

# **BEDFORDSHIRE AND LUTON MENTAL CAPACITY ACT LOCAL IMPLEMENTATION NETWORK**

## **MULTI AGENCY PROTOCOL FOR THE DEPRIVATION OF LIBERTY SAFEGUARDS**

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# PROTOCOL FOR THE DEPRIVATION OF LIBERTY SAFEGUARDS

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## **PART ONE INTRODUCTION AND FORWARD**

### **1 INTRODUCTION**

- 1.1 This protocol has been developed as an interagency agreement to support the implementation of the Deprivation of Liberty Safeguards from 1<sup>st</sup> April 2009. The protocol is an agreement produced by the multi – agency Mental Capacity Act Local Implementation Network for (LIN) Bedfordshire and Luton. From 1<sup>st</sup> April the protocol will apply to the new authorities of Bedford Borough and Central Bedfordshire together with Luton Borough Council.
- 1.2 The purpose of the protocol is to ensure a consistent and coordinated approach to operation of the safeguards by all agencies involved for the benefit of the service user.
- 1.3 Along with the protocol is further guidance for use by all professionals involved in the process. This guidance will be subject to review and change at an early stage based on experience of operating the Safeguards and the development of case law.
- 1.4 The protocol is largely based on the Code of Practice (2008) for Deprivation of Liberty and is within the wider framework of the Code of Practice for the Mental Capacity Act 2005. The Codes of Practice should be referred to when complex issues of practice arise together with the Mental Capacity Act.
- 1.5 The Deprivation of Liberty Safeguards will be linked to the Safeguarding Vulnerable Adults Protocol for Bedfordshire and Luton through joint procedures as part of an overall framework to ensure the safety of those at risk, and to minimise such risks while ensuring the independence, choice, dignity and the human rights of the vulnerable person are upheld.
- 1.6 In addition to this guidance care planning for people affected by the Safeguards will be informed by the general guidance for their service group specifically to ensure that they have a personalised care plan.

### **1.7 BACKGROUND**

- 1.8 The purpose of the Safeguards are to provide a proper legal process for people lacking capacity specifically to consent to restrictive treatment or care in either a hospital or a care home, and who are detained in their best interest (best interest is defined more fully in Chapter 5 of the Mental Capacity Act Code of Practice, and Section 7 of the Bedfordshire and Luton Mental Capacity Act Policy). The Safeguards protect the rights of these people, within the wider principles, guidance and processes in the Mental Capacity Act Code of Practice, and Policy.
- 1.9 The principles of the Deprivation of Liberty Safeguards are based on the European Convention of Human Rights and the ruling of the European Court of Human Rights. The Safeguards (originally included in the Mental Capacity Act Code of practice (6:49)) were strengthened following a legal challenge in the European Court of Human Rights (HL v United Kingdom, also known as the Bournemouth Judgement).

The court held that the United Kingdom had not addressed the issue of unlawful detention within its Mental Capacity legislation. The ruling (October 2004) stated that “Everyone has the right to liberty and security of person. No persons of an unsound mind shall be deprived of their liberty without a procedure prescribed by law.”

To address unlawful detention, the Mental Capacity Act 2005 has been amended using the updated Mental Health Act 2007 as the vehicle to do so. From April 2009 the Deprivation of Liberty Safeguards will be an additional statutory requirement of the Mental Capacity Act.

## 1.10 The Partnership

Health and Social Care services in Bedfordshire and Luton recognise that vulnerable people receiving their services will benefit from a consistent approach and good liaison from all partner agencies. The Local Implementation Network has developed this protocol in partnership to ensure as much consistency in approach as possible. Differences in procedures due to local circumstances, will be clearly identified to allow both service users/patients and member agencies to access services in their locality.

- 1.11 This multi agency protocol represents an agreement between these organisations as to how they will work together to achieve these aims. The final structure of the Safeguards service will be negotiated between the member organisations.
- 1.12 The guidance in this protocol will also help staff in statutory, voluntary and Independent agencies identify when treatment and care may deprive vulnerable people of their liberty and to explain the safeguards that have been put in place to ensure that any deprivation that may be needed is lawful.
- 1.13 All Health and Social Care professionals engaged in implementing the Safeguards must have regard to the Protocol, and the guidance outlined in the Deprivation of Liberty Code of Practice, and refers directly to it when reaching decisions concerning a vulnerable adult.

## 1.14 Joint Statement of Principles of Deprivation of Liberty Safeguards

- Bedfordshire and Luton are committed to work together through the framework of this protocol to provide a network of services that Safeguard and support vulnerable people
- Each partner will prioritise, promote and publicise the Deprivation of Liberty Safeguards protocol through inclusion in their internal networks, using information leaflets and internal web sites.
- Member agencies will work to the statutory principles and processes of Deprivation of Liberty Safeguards Code of Practice, the Mental Capacity Act Code of Practice, and this protocol.
- Staff of member agencies will be adequately trained and understand as far as possible the implications of the Deprivation of Liberty Safeguards.
- Authorisation of the Deprivation of Liberty Safeguards is only to be used when it is in the best interest of the individual concerned and less restrictive arrangements have been found not to meet the needs of the relevant person. Authorisations should be made for the shortest period of time necessary.
- Any person who is or is likely to be deprived of their liberty will be a priority in for assessment and provision of services
- Agencies will work in the Best Interest of adults who lack capacity within the principles of the Mental Capacity Act.
- The views and wishes of people lacking capacity, and their carers will be obtained by all agencies and become central to the assessment process.
- The Safeguards apply to both publically and privately arranged placements.
- Additional or alternative care commissioned due to refusal of an authorisation will be prioritised to ensure a person is not unlawfully deprived of liberty

- In their wider work member agencies will work with managing authorities to provide good quality care to minimise the need for deprivation of liberty

### 1.15 Outcomes from the Protocol

We will seek to promote the principles of the Deprivation of Liberty Safeguards in the following ways:

- No vulnerable adult will be deprived of their liberty without a thorough assessment and clear reasons for this decision
- The needs of people where deprivation may be considered will be assessed and advice provided about their care.
- Unless there are clear reasons to the contrary an application for deprivation will be a planned, carefully considered process
- The restriction of people who need deprivation of liberty will have this carried out in a way that is in their best interest. These restrictions will be managed and reviewed to ensure that they are benefiting the person
- All people affected by deprivation of liberty will have personalised care plans that give them the least restrictive care needed for their safety and welfare
- All people who's liberty is restricted will be represented and the views of their representatives will be considered in planning their care
- Service users/patients, carers and any other relevant people will have the information required to ensure that they how understand how Deprivation of Liberty Safeguards operate within Bedfordshire and Luton.
- Staff who are involved in the process will have the knowledge and skills to carry out their role

## **PART TWO DEPRIVATION OF LIBERTY SAFEGUARDS- SUMMARY**

### 2.1 SUMMARY – PROCESS OVERVIEW

The following table identifies the key stages of the process from the time that an existing or a need for deprivation is identified to the review and termination of the order. Each stage of the process has a specified time period and documentation to be used in all cases. Information on these will be provided together with examples on the forms in the Guidance

## Deprivation of Liberty Safeguards – Process Overview

Stage	Objectives	Timescale		Completed by
		Standard	Urgent	
Identification of possible Deprivation of Liberty	<ul style="list-style-type: none"> <li>• Determine whether the Care/Treatment of a person may be Deprivation of Liberty.</li> <li>• Consult with relevant person and complete standard form</li> </ul>	28 Days	Within 28 Days	Managing Authority  Supervisory Body
Application for Authorisation	<ul style="list-style-type: none"> <li>• To ensure that the application is valid and complete.</li> </ul>	28 Days	Within 28 Days	Managing Authority
Assessment Process	<ul style="list-style-type: none"> <li>• Commission Assessors</li> <li>• Instruct Assessors</li> <li>• Instruct an IMCA where needed</li> <li>• Produce written copies of all assessments</li> </ul>	21 Days	7 Days 14 Days	Supervisory Body
Decision on Authorisation	<ul style="list-style-type: none"> <li>• Agree conditions and review date</li> <li>• Record and communicate the decision</li> <li>• Appoint a relevant persons representative/IMCA</li> </ul>	Within 21 days	Within 7 days  Within 14 days	Supervisory Body
Monitoring the Order	<ul style="list-style-type: none"> <li>• Visiting by the Relevant persons representative/IMCA</li> <li>• Any changes to the Deprivation of liberty order?</li> <li>• Termination of Person's Representative contract</li> </ul>	Maximum One Year	Maximum One Year	Managing Authority  Supervisory Body
Review of Authorisation	<ul style="list-style-type: none"> <li>• Plan the review</li> <li>• Appoint a best interest assessor</li> </ul>	No National Timescales Consider Local Policy	No National Timescales Consider Local	Managing Authority  Supervisory Body

		•Notify all parties		Policy		
	Extending an Urgent Authorisation		28 days before the end of an authorisation	Within 28 Days	Managing Authority  Supervisory Body	

## 2.2 IDENTIFICATION OF DEPRIVATION OF LIBERTY

2.2.1 It is the primary responsibility of Hospital or Care Home managers as Managing Authorities to identify individuals at risk of deprivation of liberty and request an authorisation from the Supervisory Body. Managers are able to discuss the details of the particular situation with the Supervisory body, but ultimately they are responsible for determining when to make an authorisation request. **Guidance for Managing Authorities can be found in Annex 2 of the Deprivation of Liberty Safeguards Code of Practice.**

2.2.2 Staff and managers of health and social care agencies have a responsibility to assess the care of all those for whom they provide or commission care and ensure that:

- All service users should have a personalised care plan with sufficient detailed information to ensure all staff can meet the person's specific needs. All personalised care plans need to be up to date and genuinely accessible to the service user. The plans also need to state clearly what information is private and needs to be shared on a need to know basis. More detail on this can be found in the Appendices.
- Any elements of this plan that may require deprivation of liberty will be subject to a Best Interest Assessment and authorised under the Safeguards

2.2.3 The Managing Authority must make an application for standard authorisation where a person is detained in a care home or hospital, or likely to be detained within 28 days, and likely to meet the qualifying requirements for Deprivation of Liberty within 28 days"

- The Managing Authority must also request a Standard Authorisation where an existing authorisation is in force but the relevant person is to be moved to a new care home or hospital; and where a court order authorising Deprivation of Liberty is shortly to expire; and where an existing standard authorisation is shortly to expire.
- The Managing Authority may request a new authorisation where an existing one is shortly to expire.
- Managing Authorities must grant urgent authorisation, for up to a maximum of 7 days, where they believe the need for a relevant person to be a detained resident is so urgent that the detention must begin before an application for standard authorisation can be made or be disposed of.
- The Managing Authority can only grant one Urgent Authorisation but may ask the Supervising Body to extend it once. The Supervising Body may extend if the Managing Authority has applied for a Standard Authorisation, there are exceptional reasons why it hasn't been disposed of, and it is essential that the deprivation should continue until it is disposed of.

Third parties can request that the Managing Authority request a Deprivation of Liberty Authorisation by sending a Letter 1 to the Managing Authority. These letters will need to be kept in a place where access to them is possible.

## ASSESSMENT

The Best Interest Assessor (BIA) must be satisfied that:

- The person is, or going to be detained in a care home or hospital. This requires the BIA to establish if the person's care and treatment is, or will amount to a deprivation of liberty
- It would be in the person's best interest to be a detained resident
- It is necessary for the person to be a detained resident to prevent harm to him/ herself

And

- Deprivation of liberty is a proportionate response to the likelihood of the person suffering harm and the seriousness of that harm
- In addition the best interest checklist set out in Section 4 of the Mental Capacity Act, Best Interest Assessors must also consider the additional factors outlined in E Para 4.61 of the code
- Whether any harm to the person could arise if the deprivation could arise if the deprivation of liberty does not take place
- What that harm would be
- What other care options there are which could avoid a deprivation of liberty
- If deprivation of liberty is currently unavoidable what action could be taken to avoid it in the future

### 2.3 Authorisation

2.3.1 If all assessments agree, on the recommendations of the Best Interest Assessor, the Supervisory Body sets the length of time for an authorisation.

Before giving an authorisation to deprive someone of their liberty the Supervisory Body must:

- Be satisfied that the person has a mental disorder and lacks capacity to decide about their residence or treatment.
- Have received written copies of all the assessments.
- Have considered recommendations made by the Best Interest Assessor. Where the Supervisory Body does not attach conditions as recommended by the best interest assessor, it should discuss the matter with the best interest assessor in case the rejection or variation of the conditions would significantly affect the other conclusions the best interest assessor reached in their report.
- Have considered any conditions attached to the order.

2.3.2 If the Supervisory Body is satisfied on all the above points, it must

- Give a standard authorisation to enable the Managing Authority to lawfully deprive the relevant person of their liberty in that hospital or care home.
- Set the period of the authorisation, which must not be longer than that recommendation made by the Best Interest Assessor.
- Issue the standard authorisation, in writing outlining the length of authorisation, and any conditions on it.



- Have the Authorisation signed off by Senior Management (not related to the care of the relevant person) within the Primary Care Trust/Local Authority.

### 2.3.3 The Supervisory Body

Must give a copy of this authorisation to:

- The Managing Authority
- The Relevant Person
- The Relevant Person's Representative
- Any Independent Mental Capacity Advocate (IMCA) involved, and
- Every interested person named by the best interest assessor in their report as somebody they have consulted in carrying out their assessment.

The Supervisory Body must also keep a written record of any standard authorisation that it gives, and appoint a Relevant Person's Representative on the recommendation of the Best Interest Assessor.

### 2.3.4 The Managing Authority

Once the Managing Authority has received their copy of the Authorisation, they should ensure that they understand it. The Authorisation may contain conditions recommended by the Best Interest Assessor; these conditions are an essential part of the Authorisation, and if neglected could significantly affect the other conclusions that have been reached. Therefore it is a requirement that the Managing Authority understands these conditions and decides how they are going to apply them to the treatment and care of the relevant person. Any conditions will need to be included in the Social Service care plans for the person, both the Social Services Care Plan and the internal care plans for the Care home/hospital.

If the conditions are not understood, it is the responsibility of the Managing Authority to seek clarity with the Supervisory Body.

### 2.3.5 Refusal of an Authorisation

If any of the assessments conclude that one of the requirements is not met, The Supervisory Body must be informed, the assessment process must stop immediately and the Supervisory Body cannot give a standard authorisation.

Under these circumstances the Supervisory Body should:

- Inform anyone still engaged in carrying out an assessment that they are not required to complete it
- Notify the Managing Authority, the relevant person, any IMCA involved and every interested person consulted by the best interests assessor that authorisation has not been given.
- Provide the Managing Authority, the relevant person and any IMCA involved with copies of those assessments that have been carried out. This must be done as soon as possible, because in some cases different arrangements will need to be made for the person's care

Where a Deprivation of Liberty Authorisation is refused, it is illegal to keep people under the conditions which the Managing Authority identified as meeting the requirements of Deprivation of liberty if the current placement cannot provide it.

The Social Care/Health Care Professionals involved should prioritise this case, and urgently re-assess the needs, considering ways for the relevant person's care needs to be met

The re-commissioning of less restrictive care will need to be a priority, to avoid illegal Deprivation of Liberty.

The Care Plan will need to be adjusted to specify changes in care plan and how the issues of Deprivation have been addressed.

### 2.3.6 Failure to Implement

Any failure to implement less restrictive care could be subject to Safeguarding procedures and may require an application to the Court of Protection.

Appointment of a Relevant Person's Representative (Will need to refer to the arrangements reached in Luton and Bedfordshire)

The role of Relevant Person is described in Chapter 7 of the Deprivation of Liberty Safeguards Code of Practice. This is a crucial role providing the relevant person with representation and support that is independent of the commissioners and providers of the services that they are receiving. For further information please see the Relevant Person's Representative in the Appendices.

## PART THREE REVIEW

- 3.1 Managing Authorities should keep all deprivation of liberty cases under review. Also Health and Social Care Workers will need to consider whether to keep cases where Deprivation is occurring open, to ensure that any necessary changes can be implemented quickly.
- 3.2 A standard authorisation can be reviewed at any time. The review is carried out by the Supervisory Body. A review can be requested by the relevant person, their representative or the Managing Authority if:
  - The relevant person no longer meets the age, no refusals, mental capacity, mental health, eligibility (because they are objecting to receiving mental health treatment in hospital) or best interests requirements.
  - There has been a change in the relevant person's situation and because of that change, it would be appropriate to amend an existing condition to which the authorisation is subject.
  - The reason that the person now meets the qualifying requirements is different from the reasons given at the time the standard authorisation was given.
  - It appears to it that one or more of the qualifying requirements are no longer met, or may no longer be met.
- 3.3 The Supervisory Body must inform the relevant person, their representative and the Managing Authority if they are going to carry out a review. This should happen either before the review begins or as soon as possible and practical after it has begun.
- 3.4 The relevant person's records must include information about any formal reviews that have been requested, when they were considered, and the outcome. These records must be retained by the Supervisory Body.
- 3.5 Deprivation can be ended before a formal review. An authorisation only permits deprivation it does not mean that a person must be deprived of liberty where circumstances no longer necessitate it. If a care home/hospital decide that deprivation is no longer necessary then it must end immediately, by whatever other changes are necessary. The Managing Authority should then apply to the Supervisory Body to review and, if appropriate, formally terminate the authorisation.

- 3.6 On receipt of the request for a review, the Supervisory Body must decide which if any of the qualifying requirements need reviewing.
- If the Supervisory Body feel that none of the qualifying requirements need reviewing, no further action is necessary.
  - If it appears that one or more of the qualifying requirements should be reviewed, the Supervisory Body must arrange for a separate review assessment to be carried out for each of these requirements.
- 3.7 The Supervisory Body must:
- Record when a review is requested, what action it decides on, and the reasons for the decision.
  - Conduct the assessments outlined above for each of the qualifying requirements that need to be reviewed.
  - Give written notice of the outcome of a review and any changes that have been made to the deprivation of liberty authorisation to the Managing Authority (care home/hospital, the relevant person, the Relevant Person's Representative, and any Independent Mental Capacity Advocate (IMCA) involved.
- 3.8 Wherever possible, the person, family, friends, and carers should be involved in deciding how to prevent the unauthorised deprivation of liberty from continuing. If the Supervisory Body has any doubts about whether the matter is being satisfactorily resolved within an appropriately urgent timescale, it should alert the inspection body.
- 3.9 There will need to be a priority on the funding and any additional support of the relevant person, to ensure that the relevant person no longer meets the criteria for Deprivation.

#### **PART FOUR ROLE OF PCT**

- 4.1 Primary Care Trusts have responsibilities as Supervisory Bodies for applications for authorisation from Hospitals. The Primary Care trust will write into their contract and commission the Bedford and Luton Primary Care Trust to conduct their assessments.

#### **PART FIVE IMPLEMENTATION**

- 5.1 Implementation of the protocol will be coordinated through the Local Implementation Network and monitored through reports to the Local Safeguarding Boards of the member authorities and to partner agencies.
- 5.2 The guidance will be continually monitored and updated by a sub-group of the Local Implementation Network and changes will be reported to the main network on a regular basis. Further operational procedures will be developed according to need and will be placed in the guidance.
- 5.3 Information concerning the safeguards will be circulated widely through the leaflet to staff and an easy read guide for service users
- 5.4 Performance Indicators are to be developed based on the level of activity and the achievements of outcomes in the protocol.
- 5.5 Activity measures will include the number of assessments, authorisations and the numbers of representatives appointed.
- 5.6 Outcomes will be measured through qualitative measures including the views of carers, services users and partner agencies

- 5.7 A training programme will continue to support and develop the skills of best interest Assessors, staff employed by the supervisory bodies, managing authorises and all partner agencies.
- 5.8 This protocol will be continually monitored and formally reviewed by the Local Implementation Network in February 2010

The following agencies and groups have contributed to the development of the protocol and guidance and are committed to working within them include:

**Bedfordshire County Council**

**Luton Borough Council**

**Bedfordshire and Luton Partnership Mental Health Trust**

**NHS Bedfordshire**

**NHS Luton**

**Bedford Hospital NHS Trust**

**Luton & Dunstable Hospital Foundation Trust**

**POhWER Advocacy**

**The Bedfordshire Care Group**

**Advocacy Alliance**

**The Bedfordshire Older Persons Advocacy for Older People**

**Rethink Advocacy**