

# DISCUSSION PAPER FOR PSAB APRIL 2015

## Mental Capacity Act and Deprivation of Liberty Safeguards



The Mental Capacity Act (MCA) was introduced in 2007 and is designed to protect the rights of people to make their own decisions. It also sets out a framework for health and social care staff to determine whether a person is able to give consent and make decisions on the person's behalf where they lack capacity to give consent. It also covers guidance surrounding lasting power of attorney and advance decisions. Further information about the Mental Capacity Act can be found at:

<http://www.scie.org.uk/key-topics/mental-capacity>

The Deprivation of Liberty Safeguards (DoLS) were introduced into the Mental Capacity Act by the Mental Health Act 2007. Implemented in 2009, they provide a legal framework by which individuals may be lawfully deprived of their liberty in care homes or hospitals in certain circumstances. They apply only if the person lacks capacity to consent to their care, it is in their best interest to be detained/confined and there are no other less restrictive options to keep them safe. The safeguards give statutory responsibilities to Local Authorities, hospitals and care homes. They aim to uphold article 5 right to liberty including the right to appeal to a court to challenge unlawful detention. Further information about the deprivation of liberty safeguards can be found at:

<http://www.scie.org.uk/mca-directory/dols.asp>

In March 2014, the Supreme Court issued a judgement in *P v Cheshire West and Chester Council and another* and *P and Q v Surrey County Council*. This clarified what constitutes a deprivation of liberty and when legal processes need to be followed. The judgment led to a significant increase in DoLS applications to local authorities for people in care homes and hospitals. It also led to an increased awareness of the need for health and social care organisations to follow a legal process when people are deprived of their liberty in supported living and other community settings. Applications to the court are necessary when deprivation is attributable to the state. This is an essential safeguard to the people's article 5 rights. Further information about the implications of this judgment is available from:

[http://www.39essex.com/docs/newsletters/deprivation\\_of\\_liberty\\_after\\_cheshire\\_west\\_-\\_a\\_guide\\_for\\_front-line\\_staff.pdf](http://www.39essex.com/docs/newsletters/deprivation_of_liberty_after_cheshire_west_-_a_guide_for_front-line_staff.pdf)

In June 2014, the government issued its response to the House of Lords Scrutiny Committee report on the implementation of the Mental Capacity Act. This led to a number of actions and recommendations for a variety of agencies for on-going implementation of the Act. The response document is available from: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/318730/cm8884-valuing-every-voice.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/318730/cm8884-valuing-every-voice.pdf) Some of the actions taken in response to the report include:

- A national MCA Steering group has been formed to progress the recommendations.
- The Law Commission is consulting on a possible new legislative framework that would allow for the authorisation of deprivation of liberty in supported living and considering any improvements that might be made to the DOLS process (to report in 2017)
- Government has commissioned up to date guidance on what constitutes a deprivation:  
[http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/?utm\\_source=Newsletters&utm\\_campaign=b0077ba691-MCL+MARCH+2015&utm\\_medium=email&utm\\_term=0\\_0dd23690b2-b0077ba691-95930285](http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/?utm_source=Newsletters&utm_campaign=b0077ba691-MCL+MARCH+2015&utm_medium=email&utm_term=0_0dd23690b2-b0077ba691-95930285)

Improved compliance with MCA and DOLS is a key requirement of most, if not all, member organisations of PSAB. Nationally, SABs are taking a leadership role in coordinating and quality assuring compliance in their area through advisory sub-groups. MCA is directly linked with Care Act requirements such as legal literacy and making safeguarding personal, as well as wider safeguarding agendas such as the response to the Francis Inquiry, Winterbourne View and rights-based approaches.