



# Mental Capacity Act

(Northern Ireland) 2016

## Deprivation of Liberty (DoL)

The 2004 European Court of Human Rights case, *Bournewood*, ruled that deprivation of liberty cases needed procedural safeguards so as to ensure a person is not being deprived of their liberty unnecessarily.

In 2014, the Supreme Court ruled in *Cheshire West* that a person was deprived of their liberty if they were under continuous control and supervision.

Therefore, if a person believed to lack capacity is unable to leave and under continuous control and supervision, their confinement must be authorised.

The Mental Capacity Act contains the procedural mechanisms by which a DoL is authorised and provides protection from liability for those depriving a person of their liberty.

## Mental Capacity Act

The Act does not create a power to detain. It provides protection from liability to staff, carers and senior clinicians and managers who are depriving a person of their liberty where that person lacks capacity to consent to their detention.

This is known as the **Deprivation of Liberty Safeguards**.

## Deprivation of Liberty Safeguards

The Act gives staff, carers, senior clinicians and managers protection from liability as long as they:

- Have a reasonable belief that the person lacks capacity to make a particular decision;
- Have a reasonable belief that the decision is in the person's best interests;
- Believe that failure to detain the person would create a risk of serious harm to that person or someone else; and
- Have in place the additional safeguards required for lawful deprivation of liberty (see above).

## Offences

Section 269 of the Act provides that it is an offence to unlawfully detain a person. From 31 May 2021, this is a new statutory offence under the Act. However, **it has always been an offence in common law to falsely imprison someone**. A similar offence is also currently in force under the Mental Health Order (NI) 1986. Therefore, the Act does not create a new criminal offence.

The staff member / carer unlawfully detaining the person will be guilty of the offence. Senior managers will also be guilty of the offence if it was done with their consent, if they connived with it or if it can be attributed to neglect on their part.

## Additional Safeguards

A number of additional safeguards are required. For protection from liability when depriving someone, believed to lack capacity, of their liberty, there must be:

- A formal assessment of capacity;
- Consultation with a nominated person; and
- Authorisation which is obtained through an application to the Trust MCA Panel.

## Emergencies

Where waiting until all the required safeguards are met would create an unacceptable risk of harm to the person believed to lack capacity, the emergency provisions in the Act can be relied on.

In order for a situation to be an emergency, two conditions must be met:

- That a person depriving another of their liberty knows that an additional safeguard is not met or that the person does not know whether the safeguard is met; and
- Waiting either until the safeguard is met, or to establish whether it is met, would create an unacceptable risk of harm to the person believed to lack capacity.

However, even in an emergency, there must still be:

- A reasonable belief of lack of capacity and the care arrangements being in the person's best interests; and
- A belief that detaining the person would prevent serious harm.

## Workforce

Trusts have reported they are actively recruiting and considering other means in which to ensure adequate staffing to carry out statutory duties.