



CHIEF CORONER

CHIEF CORONER'S GUIDANCE No. 16 DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS)

Introduction

1. This guidance concerns persons who die at a time when they are deprived of their liberty under the Mental Capacity Act 2005 (MCA 2005). Under the MCA 2005 a person who lacks capacity and is in a hospital or care home for the purpose of being given care or treatment may be detained in circumstances which amount to deprivation of liberty.
2. No detention amounting to deprivation of liberty may be permitted without authorisation under the statutory scheme. It would amount otherwise to false imprisonment. The scheme, set out in Schedule A1 to the MCA 2005, provides safeguards known as Deprivation of Liberty Safeguards (DoLS).
3. The questions which are raised for coroners and must be answered are:
 - Are these persons in state detention for the purposes of the Coroners and Justice Act 2009 (the 2009 Act)?
 - Should an inquest be held into their death?
 - If so, must there be an inquest in all cases, even when they die of natural causes?
 - Should there be a jury inquest?
 - Will it be an Article 2 inquest?
4. These questions arise urgently since the use of DoLS in hospitals and care homes is now widespread and increasing. The Department of Health (DH) and Care Quality Commission (CQC) expect applications for DoLS to rise from 13,000 a year to over 100,000. Most cases concern vulnerable people with dementia. Others may have a severe learning disability or acquired brain injury.
5. For the future the Law Commission has commenced a fundamental review of DoLS provisions in the MCA 2005. It will report in 2017 with recommendations for reform and a draft Bill.
6. But for now the purpose of this guidance is to give coroners a steer on the application of DoLS in the context of coroner work. It will of course be a matter for

coroners in the exercise of their independent judgment, and subject to any subsequent ruling of the High Court, to decide each case for themselves.

7. For the purpose of simplicity, the statutory authorisation for deprivation of liberty of a person in a hospital or care home will be referred to in this guidance as a DoL.

What are DoLS? How is deprivation of liberty authorised?

8. Following the decision in *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458 and its reconsideration at Strasbourg in *HL v UK* (2004) 40 EHRR 761, it became necessary for the UK to introduce machinery for the protection of the thousands of mentally incapacitated people who were regularly deprived of their liberty in hospitals and care homes (and elsewhere).
9. Accordingly the MCA 2005 was amended by the Mental Health Act 2007 so as to provide a new statutory scheme for persons in hospitals or care homes who were proved on a balance of probabilities to lack capacity.

Lack of capacity

10. Under the MCA 2005 lack of capacity is expressed in this way. A person lacks capacity in relation to a matter if he or she is unable to make a decision for himself or herself in relation to the matter because of an impairment (permanent or temporary) of, or a disturbance in the functioning of, the mind or brain: sections 1 and 2, MCA 2005.
11. Persons who lack capacity may be subject to deprivation of liberty, but only by authorisation under Schedule A1 of the MCA 2005 or by order of the Court of Protection (section 4A).

Meaning of 'deprivation of liberty'

12. Section 64(5) of the MCA 2005, the interpretation section, provides that references in the Act to deprivation of a person's liberty have the same meaning as in Article 5(1) of the European Convention on Human Rights. Article 5(1) of the Convention provides:

'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:.....e) **the lawful detention** of persons for the prevention of the spreading of infectious diseases, **of persons of unsound mind**, alcoholics or drug addicts, or vagrants.'

13. In *P v Cheshire West and Cheshire Council; P and Q v Surrey County Council* [2014] UKSC 19 (a DoLS case but not a coroner case) the Supreme Court stated that the purpose of Article 5 was to ensure that people were not deprived of their liberty without proper safeguards.
14. The Supreme Court decided (by a majority), citing *HL v UK* (above), that deprivation of liberty arose when the person concerned 'was under continuous supervision control and was not free to leave' [49], [63] and [87]. This should be determined 'primarily on an objective basis' [76] – [87].

15. It did not matter that the patient in hospital or the resident of a care home was content or compliant or voiced no objection. As Lady Hale said at [46], 'A gilded cage is still a cage.'
16. Accordingly, once there is, or is likely to be, deprivation of liberty, the detention must be authorised under the DoLS scheme in the MCA 2005.

Authorisation

17. An authorisation which deprives a person of his or her liberty is obtained in the following way. The 'managing authority' of the hospital or care home (public or private) may request authorisation from the 'supervisory body'. There must be a request **and** an authorisation before a person is lawfully deprived of his or her liberty.

The managing authority

18. The managing authority of an NHS hospital is the health trust, board or special health authority. For independent (private) hospitals the managing authority is the person registered or required to be registered by statute. For care homes the managing authority is the person registered or required to be registered by statute. See paragraphs 175-178, Schedule A1.

The supervisory body

19. Since 2009 the supervisory body for all hospitals and care homes, both public and private, is the local authority.

Standard and urgent authorisations

20. There are two types of authorisation: standard authorisations and urgent authorisations.
21. The DH has issued forms and guidance: see <https://www.gov.uk/government/collections/dh-mental-capacity-act-2005-deprivation-of-liberty-safeguards> . Form No.1 is for urgent authorisations, Form No.12 for standard authorisations.
22. The *DoLS Code of Practice* issued by the DH can be found at http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf
23. Standard authorisations are made by the local authority. They must state in writing (amongst other things) the name of the person to be detained, the hospital or care home at which deprivation of liberty is authorised, the duration of the authorisation, the purpose for which it was given, the reason why each qualifying requirement (see below) was met, and 'any conditions' subject to which the authorisation is given. It may be renewed. See paragraphs 21-73, Schedule A1.

24. There is a statutory duty upon the managing authority of a hospital or care home to apply for authorisation where the qualifying requirements are likely to be met within the following 28 days. See paragraphs 24-26, Schedule A1.
25. Urgent authorisations are made by the managing authority of the hospital or care home in urgent cases only, for a period of seven days, pending a request for a standard authorisation. They do not involve recourse to the supervisory body. See paragraphs 74-90, Schedule A1.
26. Once the authorisation is given (standard or urgent), the hospital or care home may deprive the person of their liberty by detaining the person for the purpose of their being given care or treatment. See paragraph 1(2), Schedule A1.

Safeguards

27. Safeguards (as in the phrase Deprivation of Liberty Safeguards) are provided by Schedule A1 of the MCA 2005. They involve a rigorous procedure of assessment and authorisation, independent of the hospital or home.
28. Safeguards are provided by the precondition of six qualifying requirements having to be met. These are the age, mental health, mental capacity, best interests, eligibility and no refusals requirements. See paragraph 12, Schedule A1.
29. Following a request the supervisory body must carry out assessments of all qualifying requirements before granting an authorisation: paragraph 33, Schedule A1. The six assessments must be completed by a minimum of two assessors, usually including a social worker or care worker, sometimes a psychiatrist or other medical person (see *DoLS Code of Practice* 4.13-4.57). If all assessments are in writing and 'positive', ie all qualifying requirements are met, the supervisory body must give a standard authorisation: paragraph 50, Schedule A1. This authorisation may be 'reviewed' by the supervisory body later.
30. As one would expect, where the liberty of the subject is at stake, the provisions are detailed and extensive. There are 188 paragraphs in Schedule A1. It is not the purpose of this guidance to detail all the requirements and conditions.

Court of Protection

31. The Court of Protection may make a similar order authorising deprivation of liberty in a domestic setting (outside hospitals and care homes) in relation to personal welfare: see sections 4A and 16 of the MCA 2005. This will include a placement in a supported living arrangement.
32. The authorisation of any DoL may be challenged in the Court of Protection: section 21A, MCA 2005. See, for example, *RB (by his Litigation Friend, the Official Solicitor) v Brighton and Hove City Council* [2014] EWCA Civ 561 (unsuccessful application to terminate a standard authorisation).

No challenge to validity of DoLS before coroner

33. Where an authorisation to deprive a person of liberty has been given, its validity cannot be challenged by or before a coroner.

The Coroners and Justice Act 2009: 'in state detention'

34. In order to decide whether a coroner must investigate the death of a person who was subject to a DoL, it is necessary to consider the relevant provisions of the 2009 Act. Has a person who was subject to a DoL died in state detention for the purposes of the 2009 Act?
35. A coroner must commence an investigation into a person's death under the relevant wording of section 1 of the 2009 Act where the coroner has reason to suspect that 'the deceased died while in custody **or otherwise in state detention**': section 1(2)(c). The Explanatory Notes to section 1 suggest that state detention includes persons 'held under mental health legislation': paragraph 61.
36. '**State detention**' is defined in section 48(2). 'A person is in state detention if he or she is compulsorily detained by a public authority within the meaning of section 6 of the Human Rights Act 1998.' Section 6 is headed 'Acts of public authorities'.
37. If a duty to investigate arises under section 1, the investigation may not be discontinued if the coroner has reason to suspect that the deceased 'died while in custody **or otherwise in state detention**': section 4(2)(b). In those circumstances the coroner must therefore hold an inquest: section 6.

Two opposing views

38. Two alternative views have been expressed about DoLS and whether they are included within the phrase 'in state detention'.
39. The first view is that the deprivation of liberty of DoLS extends more widely than cases of ordinary physical detention, for example to cases of persons living in relative normality, not seeking to leave or complaining about being restrained, but would be restrained if they sought to leave. See *Jervis on Coroners* 13th Edn. (2014) at paragraph 5-85.
40. In addition *Jervis* suggests that the restraint, such as it is, is outside the scope of the definition of state detention in section 48(2) (above) when it is not by a 'public authority' for the purposes of the Human Rights Act 1998, as for example in the case of a private care home.
41. On this view the death of a person in hospital or a care home who was subject to a DoL would not automatically require a coroner's investigation. Indeed in most cases there would be no need for an investigation, although the coroner would have to decide on a case by case basis whether one was necessary.
42. The second and opposing view is that a person subject to a DoL falls squarely within the 2009 Act's definition of 'in state detention'. However quiet and comfortable the person may be in, say, a care home, the reality of their position is that they have been deprived of their liberty by the authority of the state and are being held in detention under that authority - as in 'the gilded cage' referred to by Lady Hale.
43. On this view, whether intended by Parliament or not, all persons who die subject to a DoL must be the subject of a coroner investigation, whether the death was

from natural causes or not. For the purposes of the 2009 Act they were 'in state detention', therefore section 1 is triggered.

44. These two competing views are not easily reconciled. They may ultimately be a matter for decision of the High Court. The former view, for example, may require coroners to consider every DoLS death on a case by case basis to see if an investigation is required. Some coroners say that the burden of doing so would be immense. The latter view, for example, may cause local authorities great concern over additional and unexpected expenditure by the coroner service as a result of many extra inquests.

The Chief Coroner's view

45. The Chief Coroner favours the second view. It is his opinion that, on the law as it now stands, the death of a person subject to a DoL should be the subject of a coroner investigation because that person was in state detention within the meaning of the Coroners and Justice Act 2009.

46. The Chief Coroner, who sits in the High Court on coroner cases, is not providing a judgment or ruling. This guidance is no more than the expression of an opinion, subject to the ruling of the High Court. Coroners, who are of course entitled to make their own independent judicial decisions, will do as they see fit in any particular case. But they are invited to take this guidance into account.

47. The Chief Coroner's view is the view which was expressed in the Chief Coroners Guide to the Coroners and Justice Act 2009 Act at paragraph 54:

'This [the definition of 'state detention' in section 48(2)], in effect, extends the definition of state detention to institutions such as immigration detention and secure mental health hospitals. It would also appear to extend to deprivation of liberty orders (Schedule A1, Mental Capacity Act 2005).'

48. The Ministry of Justice collaborated with the Chief Coroner on the Guide and approved this wording.

49. The Department of Health also shares this view.

50. It was also the view of the Government in 2009 as expressed during the passage of the Coroners and Justice Bill. In response to questions from the Joint Parliamentary Committee on Human Rights, the then Government acknowledged that 'in state detention' would include the following circumstances:

- (a) detention by a constable or other public authority pursuant to statutory or common law powers;
- (b) **detention or deprivation of liberty pursuant to the requirements of mental health legislation, including the Mental Health Act 1983 and the Mental Capacity Act 2005, as amended by the Mental Health Act 2007;**
- (c) the placement of a child in secure accommodation;
- (d) detention pursuant to immigration and asylum legislation; and
- (e) the detention of any person in custody or otherwise detained while he or she is being transported from one place to another."

51. In accepting that the examples in the above list would come under the definition of state detention, the then Government considered that listing them in the Bill

was unnecessary. On this basis it could be said that the wording of the 2009 Act, which makes no reference to DoLS, was clearly intended by the drafters of the 2009 Act to include DoLS in the meaning of 'in state detention'.

52. This view appears to accord with the Explanatory Notes to section 1 of the 2009 Act (see paragraph 35 above).
53. It should of course be noted that the High Court may be less willing to resort to some of these extra-statutory materials in interpreting relevant provisions of the 2009 Act.
54. This view may be further supported by the language used in Schedule A1 of the MCA 2005 which refers to a person 'detained in a hospital or care home' and 'place of detention'. In short once the relevant conditions are satisfied, the person is detained by operation of law. This appears to be consistent with 'compulsorily detained' in section 48(2) of the 2009 Act.
55. This view suggests that those subject to DoLS are subject in plain language to the restrictions of state detention. They are detained compulsorily under the statutory framework of the state. There should therefore be a coroner's investigation (including inquest: section 6) in all cases.

Public authority

56. On the 'public authority' point, it is certainly arguable that all hospitals and care homes are public authorities for the purposes of the Human Rights Act (see section 48(2) above). Those in public ownership clearly are. Those in private ownership will be if they are carrying out 'functions of a public nature', so as to fall within the meaning of 'public authority' in section 6(3)(b) of the Human Rights Act 1998.
57. On this point see, for example, *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610, in which a private provider of mental health care was held to be a functional public authority, performing public functions within the meaning of section 6(3)(b) of the Act. By contrast the decision in *YL v Birmingham City Council* [2008] 1 AC 95 decided on its particular facts that the private care home was not a public body, but was providing a service for which it charged the local authority a fee for some of its residents but not all. However, the decision in *YL* has been reversed since by statute. Section 145 of the Health and Social Care Act 2008 states that where accommodation, together with nursing or personal care, is provided by a private care home and the local authority are paying for it, the care home is deemed to be a 'public authority' for the purposes of section 6(3)(b) of the Human Rights Act.
58. There is also an argument that the local authority, which as the supervisory body authorises a person to be deprived of their liberty by a DoL, is the relevant public authority. On the other hand section 64(6) of the MCA 2005 provides that for the purposes of references to deprivation of a person's liberty 'it does not matter whether a person is deprived of his liberty by a public authority or not'. That suggests that the detention is the act of the managing authority, not the supervisory body.

59. The ultimate question might therefore be: Is the detention by the managing authority in the case of a private care home a public function? The answer to that question may well be Yes. The detention is a public function because of the detailed statutory scheme which permits it. The exercise of powers of compulsory detention could therefore be considered a public function for the purposes of section 6 of the Human Rights Act.

Inquest with jury?

60. In many cases there will be no need for a jury inquest. The mandatory requirement for an inquest to be held with a jury where 'the deceased died in custody or otherwise in state detention' does not apply to deaths from natural causes. It only applies where the death is a violent or unnatural one or the cause of death is unknown: section 7(2)(a) of the 2009 Act.

Article 2

61. The mere fact that the inquest will be concerned with a death 'in state detention' does not mean that it will necessarily be an Article 2 inquest. In some cases it may be. But in many cases, particularly those where the death is from natural causes, there will be no arguable breach of the state's general duty to protect life. Nor will there be any arguable breach of the *Osman* test that the state knew or ought to have known of a real or immediate risk to the life of the deceased and failed to take measures within the scope of their powers: *Osman v UK* [1998] 29 EHRR 245.

62. Accordingly, in most cases the procedural duty to hold a *Middleton* inquest and ascertain under section 5(2) of the 2009 Act 'in what circumstances' the deceased came by his or her death will not apply.

63. The Article 2 procedural duty may, however, arguably arise where the death is not from natural causes and/or the fact of detention under DoLS may be a relevant factor in the cause of death.

Conclusions

64. The Chief Coroner's present view, subject to a decision of the High Court, is that any person subject to a DoL is 'in state detention' for the purposes of the 2009 Act.

65. When that person dies the death should therefore be reported to the coroner and the coroner should commence an investigation under section 1.

66. The person is not 'in state detention' for these purposes until the DoL is authorised.

67. Where the authorisation relates to a care home and the person is removed to a hospital and dies there (or in transit), coroners should err on the side of caution in deciding that the DoL may extend from the care home to the hospital in cases of medical necessity and therefore an investigation must be commenced. Even if the DoL is strictly place-specific (see paragraphs 25-26, Schedule A1), the law of necessity may allow the hospital to 'detain' the person, therefore an inquest would be necessary.

68. The investigation cannot be discontinued: section 4(2)(b). There must be an inquest.
69. There is no requirement for a jury where the death was from natural causes: section 7(2)(a).
70. In many cases the inquest will not be an Article 2 inquest.
71. In many cases of this kind which are uncontroversial the inquest may be a 'paper' inquest, decided in open court but on the papers without witnesses having to attend. Intelligent analysis of relevant information (without the need for a post-mortem examination) may be the best approach. Bereaved families should have all of this explained to them in advance.
72. Nevertheless, there will always be a public interest in the careful scrutiny of any death in state detention. As in all cases there must be sufficiency of coroner inquiry.
73. Senior coroners should maintain close liaison with the DoLS lead in their local authority, working together to deal with this extra activity.

**HH JUDGE PETER THORNTON QC
CHIEF CORONER**

5 December 2014