



CHIEF CORONER

GUIDANCE No 16A

DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS) – 3rd April 2017 onwards.

Introduction

1. In December 2014 guidance was issued in relation to DoLS. That guidance was updated in January 2016. In the last twelve months there have been a number of significant developments and so fresh guidance is now required.
2. This Guidance concerns those persons who die at a time when they are deprived of their liberty under the Mental Capacity Act 2005 (MCA 2005) or who might, for the purposes of Article 5 of the European Convention on Human Rights (ECHR) (the right to liberty and security) be thought to be deprived of liberty. The Guidance takes into account the changes brought into effect by the enactment of the Policing and Crime Act 2017 and also deals with the decision of the Court of Appeal (Civil Division) in *R (on the application of Ferreira) and HM Senior Coroner for Inner London South, King's College Hospital NHS Foundation Trust, the Intensive Care Society and the Faculty of Intensive Care Medicine and Secretary of State for Health and Secretary of State for Justice* [2017] EWCA Civ 31. (*Ferreira*).

Background

3. 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 subjected to restrictions and/or detention which amount to deprivation of liberty. Steps amounting to deprivation of liberty may be permitted by authorisation under the statutory scheme. Deprivation of liberty without such authority may otherwise be unlawful. The statutory scheme, set out in Schedule A1 to the MCA 2005, provides safeguards known as Deprivation of Liberty Safeguards (DoLS).
4. The Policing and Crime Act 2017 (PCA 2017) makes a significant change to coroners' investigations into deaths in deprivation of liberty cases.
5. Before the coming into force of the PCA 2017 the questions raised for coroners to answer were:
 - Is the person in state detention for the purposes of the Coroners and Justice Act 2009 (the 2009 Act)? An inquest would be required if the person had died while in state detention, which could include persons subject to DoL authorisations.

- Should there be a jury inquest? An inquest would be required if the person had died an unnatural death, or a death of unknown cause, while in state detention.
 - Will it be an Article 2 inquest? This question would be resolved according to different considerations, based on case law concerning Article 2.
6. Between 2013 and 2015 there had been a significant increase in the number of applications for DoLS, the granting of such applications and a consequent increase in the number of coroners' investigations and inquests following the deaths of those the subject to those safeguards as they were regarded as being "in state detention". It was accepted that the vast majority of these cases were ones where the deaths would not otherwise have required a coroner's investigation and inquest. Not only was the process of concern to the families of those who died in such circumstances, it was a use of resources at a time of acute financial and manpower pressures. In the report of the Chief Coroner 2015/2016 it was recommended that these cases be removed from the category of "in state detention". Section 178 of the PCA 2017 gives effect to that recommendation.
 7. The change brought about by the PCA 2017 will take effect in relation to deaths that occur **on or after 3rd April 2017. It is important to note that the change is not tied to the notification of death to the coroner, but is dependent on the date on which death takes place.**
 8. For a period of time it is inevitable that two systems will run alongside each other, and so the existing Guidance No. 16 (with some further revisions) is still available and reference should be made to that document where the death takes place before 3rd April 2017 (subject to the corrections made below). That Guidance sets out in detail the rubric of mental capacity and applications for a DoLS situation. Some of that is also set out in this document to put the current position in context.

What are DoLS? How is deprivation of liberty authorised?

9. 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).
10. 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 and who might be subject to restrictions amounting to deprivation of liberty.

Lack of capacity

11. 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.
12. Persons who lack capacity may be subject to deprivation of liberty, but only in limited circumstances, in particular: (i) by authorisation under Schedule A1 of the MCA 2005 (section 4A); (ii) by order of the Court of Protection (section 4A); or (iii) for the purpose of urgent, life-sustaining treatment and pending an application to Court (section 4B).

Meaning of 'deprivation of liberty'

13. 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 ECHR. Article 5(1) 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.'

14. 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.

15. 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]. The context of the decision was long-term social care.

16. It did not matter that the care home residents in that case were content or compliant or voiced no objection. As Lady Hale said at [46], 'A gilded cage is still a cage.'

17. Accordingly, once there is, or is likely to be, deprivation of liberty, the detention must be authorised in one of the ways outlined above. It should be noted, however, that a person lacking capacity may be treated on a 'best interests' basis without a DoL authorisation if the treatment does not involve or require a deprivation of liberty.

Authorisation

18. An authorisation which deprives a person of his or her liberty under Schedule A1 to the MCA 2005 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. In urgent cases, the 'managing authority' may effectively self-authorise for a limited period while a request is made.

The managing authority

19. 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

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

Standard and urgent authorisations

21. There are two types of authorisation: standard authorisations and urgent authorisations.

22. 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.
23. 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
24. 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.
25. 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.
26. 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 however the extension of an urgent authorisation can only be made by the supervisory body on request by the managing authority. The urgent authorisation ceases to be in force once a decision is made on the application for a standard authorisation or its period expires, whichever comes first.. See paragraphs 74-90, Schedule A1.
27. Once the authorisation is given (standard or urgent), the hospital or care home may deprive the person of their liberty by detaining the person (subject to the terms of the authorisation) for the purpose of their being given care or treatment. See paragraph 1(2), Schedule A1.

Safeguards

28. 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.
29. Safeguards are provided by the precondition of six qualifying requirements having to be met as a condition of authorisation. These are the age, mental health, mental capacity, best interests, eligibility and no refusals requirements. See paragraph 12, Schedule A1.
30. 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.
31. 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

32. The Court of Protection may make a similar order authorising deprivation of liberty, including in a domestic setting (i.e. 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.
33. 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

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

Article 5 of the European Convention on Human Rights (ECHR) – the *Ferreira* case

35. The decision in *Ferreira* concerned a patient with severe mental impairment who died in an intensive care unit (while sedated and intubated). The hospital did not seek any authorisation at any time. There was evidence before the Court of Appeal about the potential impact on hospital resources of a need to seek authorisation for a deprivation of liberty when a patient is in intensive care: in effect that obtaining such an authorisation would divert medical staff in the ICU from caring for the patient. The key issue was whether the circumstances were such that the patient was 'in state detention' for the purposes of the 2009 Act. The particular coroner dealing with the case was satisfied there needed to be an inquest into the death (on the basis that death was unnatural on the facts of the case), but he decided that the inquest did not need to be one with a jury. His decision was on the basis that he found the person was not in 'state detention' at the time of her death. He identified a number of features of the case to support his conclusion that the person had not been deprived of liberty. These included that she had not been expressly prevented or prohibited from leaving a specified place, had not been formally deprived of her liberty by authorisation and had not been detained under mental health legislation. The judgment of the Court of Appeal makes clear that there does not need to be a 'formal' DoL authorisation in place for a person in hospital or social care to be deprived of liberty under Article 5 or 'in state detention' under the 2009 Act. Paragraph 66 of the Chief Coroner's Guidance No. 16, revised in January 2016 is wrong when it states that the DoL has to be authorised before someone can be 'in state detention'.
36. The High Court decided that the coroner's decision was not one open to judicial review. The Court of Appeal dismissed the appeal and upheld the decision of the coroner. The basis of the decision pays careful analysis. There are three main strands to the decision. Firstly, applying Strasbourg case law, the person was not deprived of her liberty at the date of death as she was being treated for a physical illness and her treatment was that which it appeared to all intents would have been administered to a person who did not have her mental impairment. She was physically restricted in her movements by her physical infirmities and by the treatment she received (which included sedation) but the root cause of any loss of liberty was her physical condition, not any restrictions imposed by the hospital. Secondly, the Court went on to state that, if wrong on that point, the Court was not satisfied on the "acid test" in *Cheshire West* that the deceased had not been 'free to leave'. Thirdly, and if wrong on that point, the Court considered that this was not a case in which Parliament required the courts to apply the jurisprudence of the

ECHR when interpreting the words 'state detention' in the 2009 Act, and that a death of a sedated patient in intensive care is not, in the absence of some special circumstance, a death in 'state detention' for the purposes of the 2009 Act.

37. The *Ferreira* decision will need to be considered alongside changes to the 2009 Act by the 2017 Act.

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

38. In order to decide whether a coroner must investigate the death of a person who was subject to a DoLS (i.e. a deprivation of liberty formally authorised under the statutory scheme of the MCA 2005), it is necessary to consider the relevant provisions of the 2009 Act. Has a person who was subject to a DoLS died in 'state detention' for the purposes of the 2009 Act?

39. 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 published at the time of the coming into effect of the 2009 Act to section 1 suggest that state detention includes persons 'held under mental health legislation': paragraph 61.

40. '**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'. With effect from 3rd April 2017 section 48 is amended by the insertion of section 48(2A). Both need to be read together. Section 48(2A) provides: 'But a person is not in state detention at any time when he or she is deprived of liberty under section 4A(3) or (5) or 4B of the Mental Capacity Act 2005'. Accordingly, for deaths to which section 48(2A) applies, there is no mandatory and automatic requirement for a coroner's investigation on "state detention" grounds if the person was subject to a deprivation of liberty authorised under the MCA 2005. Of course, there may be a requirement for an investigation on other grounds (e.g. that death was unnatural, or indeed the person was in police custody).). Furthermore, a person who dies while subject to restrictions amounting to "state detention" in a hospital or care home, but without there having been a deprivation of liberty authorised under the MCA 2005, will still have to be the subject of an investigation and inquest on "state detention" grounds.

41. 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.

Public authority

42. 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.

43. 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.

44. 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.
45. 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?

46. Even for deaths prior to the 2017 legislative changes taking effect, 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

47. 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, and for deaths resulting from suicide or other violence while the deceased was in state detention, Article 2 will be engaged. 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 and no other basis for Article 2 engagement.
48. Accordingly, in many (probably most) cases of deaths in state detention 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 may not apply. The Chief Coroner emphasises that this view on the application of Article 2 is subject to any ruling to the contrary by the High Court.
49. 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

- 50. With a death occurring on or after 3rd April 2017 any person subject to a DoL (i.e. a deprivation of liberty formally authorised under the MCA 2005) is no longer 'in state detention' for the purposes of the 2009 Act.**

51. When that person dies the death should be treated as with any other death outside the context of state detention¹: it need only be reported to the coroner where one or more of the other requisite conditions are met.

52. Of course, where there is a concern about the death, such as a concern about care or treatment before death, or where the medical cause of death is uncertain, the coroner will investigate thoroughly in the usual way. There will always be a public interest in the careful scrutiny of any death in circumstances akin to state detention. As in all cases there must be sufficiency of coroner inquiry.

53. Senior coroners should maintain close liaison with the DoLS lead in their local authority, working together to deal with this extra activity.

**HH JUDGE MARK LUCRAFT QC
CHIEF CORONER**

27th March 2017

¹ Obvious exceptions to this include where a person subject to a DoL is also in police custody. Other complicating factors may arise in individual cases and coroners should – as always - be alive to the specifics of the reported death.