

POLICY TITLE:	Deprivation of Liberty
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Policy Owner:	Kim Forrester, Head of Mental Health Act and Mental Capacity Act Operations
Ratified by:	Dr Adrian Cree, Executive Medical Director
Responsible Signatory:	Colin Quick, Chief Quality Officer
Outcome:	<p>This policy:</p> <ul style="list-style-type: none"> • Is intended to assist colleagues to identify when a legal framework is necessary to authorise a deprivation of liberty • Understand our role in protecting service users who lack capacity to consent to care or treatment in circumstances that may be considered a deprivation of liberty. • Supports staff in identifying and applying the least restrictive option and reducing deprivation of liberty for individuals
Cross Reference:	<p>OP03 Complaints OP05 Mental Capacity OP05.1 Gillick Competency to Consent in a Healthcare Setting OP05.2 Mental Capacity Act: Deprivation of Liberty Safeguards (England and Wales) OP05.3 Adults with Incapacity (Scotland) OP05.4 Mental Capacity Act (Northern Ireland) 2016 and Deprivation of Liberty Safeguards</p>

EQUALITY AND DIVERSITY STATEMENT

Priory is committed to the fair treatment of all in line with the [Equality Act 2010](#). An equality impact assessment has been completed on this policy to ensure that it can be implemented consistently regardless of any protected characteristics (age, disability, gender identity and expression, marriage or civil partnership, pregnancy or maternity, race, religion or beliefs, sex, sexual orientation), and all will be treated with dignity and respect.

In order to ensure that this policy is relevant and up to date, comments and suggestions for additions or amendments are sought from users of this document. To contribute towards the process of review, email LegalandComplianceHelpdesk@priorigroup.com

DEPRIVATION OF LIBERTY

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1 SCOPE

- 1.1 This policy applies to all sites and services (in both Adult Care and Healthcare) across England, Scotland, Northern Ireland and Wales. Where there are differences between nations, this will be clearly highlighted.
- 1.2 The processes to reduce or identify a deprivation of liberty contained within this policy document apply to all service users that meet the following criteria:
- They have been assessed as lacking the capacity to consent to arrangements for their care or treatment
 - They are receiving care or treatment within a hospital, care home or supported living situation
 - They are, or may be in future, receiving care or treatment in circumstances that amount to a deprivation of liberty
 - They have a mental disorder but their detention is not (or cannot be) authorised under the Mental Health Act 1983.
- 1.3 The policy applies to all employees and workers across Priory, including temporary (bank) workers, agency and locum colleagues. It is essential that all colleagues working in Priory services protect people's liberty and proactively work with our service users and others to minimise restrictions.
- 1.4 Responsible managers and clinicians must seek legal authorisation for any actual or potential deprivation of liberty and this applies to people of any age, including children. The right to liberty is one of our most fundamental rights and must be protected through legal frameworks.

2 INTRODUCTION

- 2.1 This policy sets out the statutory requirements and principles that apply to children, young people and adults who are, or may be, deprived of their liberty. Priory colleagues have a duty to reduce, minimise and avoid restrictions that may lead to a deprivation of liberty for everyone in our care. In this document we will refer to 'individual' or 'service user'
- 2.2 There are different approaches across the UK to assessing and authorising a deprivation of liberty. The laws offer legal protection for vulnerable people who are, or may become, deprived of their liberty within the meaning of Article 5 of the European Convention of Human Rights (ECHR). This policy identifies the common aims and principles in law, with minimum expectations set for our practice and procedures in supporting our service users.
- 2.2 Priory is committed to maintaining and further developing therapeutic environments where restrictive interventions are only used as a last resort. This means any deprivation of liberty

must only be applied if it is necessary, proportionate and we believe it is in the best interests of the individual (within the meaning of Section 4 of the Mental Capacity Act).

- 2.3 Colleagues must also refer to Priory and Divisional policies and procedures on care planning, Positive Behaviour Support, restrictive practices and Mental Capacity and use them in conjunction with this document.

3 IDENTIFYING A DEPRIVATION OF LIBERTY

- 3.1 There is no single definition of 'deprivation of liberty', however it should be noted that a deprivation exists when a person's **physical** liberty and freedom are restricted. Other restrictions on rights and freedoms would not alone amount to a deprivation e.g. access to mobile phones or internet although must still be kept under review as part of a care plan and meet the least restriction principle.

- 3.2 Court cases have provided an 'acid test' which must be used to consider if an individual's care plan or arrangements needed to support them may be at risk of their liberty being deprived as:

- (a) They are under continuous supervision and control **and**
- (b) They are not free to leave (i.e. they would be prevented if they tried to leave) **and**
- (c) They lack capacity to consent to these arrangements

Factors that are **not** relevant to establishing if deprivation of liberty exists are;

- (a) Their person's compliance or their lack of objection (however this will determine the legal authority that can be used e.g. in hospitals in England, non-compliance and objection would mean Mental Health Act is the most appropriate legal framework, rather than Mental Capacity Act)
- (b) The reason or purpose for their admission or placement
- (c) Whether their situation is 'relatively normal' e.g. they live in a homely environment, are free to leave for short periods and able to continue a 'normal' life

- 3.3 Court judgements have additionally provided the following factors as relevant to identifying deprivation of liberty:

- (a) Restraint is used, including sedation, to admit a service user to an institution where that service user is resisting admission
- (b) Colleagues exercise complete and effective control over the care and movement of a service user
- (c) A decision has been taken by the institution that the service user will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate
- (d) A request by carers for a service user to be discharged to their care is (or would be) refused
- (e) The service user is unable to maintain social contacts because of restrictions placed on their access to other people, including situations where a service user may be allowed access to other people and/or the community, but only at times when escorted by colleagues
- (f) The service user loses autonomy because they are under continuous supervision and control.

- 3.4 The fact that restraint or restrictions may be justified in the service user's best interests, because they are necessary for the service user's safety, does not prevent them from possibly leading to a deprivation of liberty. If amount of restraint or restrictions lead to deprivation of liberty, a formal authorisation must be applied for. It is otherwise unlawful to deprive a service user of their liberty.

3.5 The overriding principle is that if a deprivation of liberty MAY occur then authorisation MUST be sought.

4 ACTION TO BE TAKEN WHEN A DEPRIVATION OF LIBERTY IS IDENTIFIED

4.1 The individual circumstances and legal frameworks (see below) will vary but any deprivation of liberty within Priory services must be supported by records in the persons health or care notes by;

- Capacity assessments relating to the decisions and arrangements that amount to a deprivation of liberty. This must include the person's views, their understanding of each aspect of their care and arrangements
- Best interest's decision records that involve the decision-maker (typically the manager of the service or the lead clinician) and relevant consultees. This must consider the question of necessity and proportionality of the deprivation e.g. balance between the risk and how the deprivation is needed to protect the person
- A care plan that includes consideration of why the deprivation cannot be avoided, how the person is to be supported and review dates that assess the least restrictive care and treatment options to reduce the risk or actual deprivation. There should also be support for maintaining and increasing the persons freedoms and rights while deprived e.g. access to families and others, social activities, ability to make as many choices and express their wishes to ensure we are applying the least restrictive approach available
- The consideration and actions taken to seek legal authority for the deprivation of liberty (see below)
- The support offered to the individual, family, carers and supporters in understanding the purpose, reasons and route to challenge the deprivation or any restrictions in place

4.2 This must be completed in all cases as, while there may be other agencies and individuals involved in the authorisation of the deprivation of liberty e.g. local authorities in England, the burden of proof will always be with the Priory service providing care to the individual. This means we must be able to demonstrate that we have taken all necessary steps to avoid harm and the deprivation of liberty is necessary and proportionate for the individual.

5 AUTHORISATION OF A DEPRIVATION OF LIBERTY

5.1 Once the deprivation of liberty has been identified and alternative options to avoid this have been unsuccessful, then we must ensure we have legal authority for this to continue. This is to ensure;

- There is legal basis for the deprivation and it is only applied in accordance with a procedure prescribed by law
- There is an independent assessment of the person's capacity and that they have a mental impairment that affects the decisions relating to the deprivation of liberty
- Measures in place are kept to a minimum and are proportionate in response to the situation and risk that justifies the deprivation or detention
- There is an independent view of whether the service they are receiving care or treatment is appropriate for their needs
- The individual and/or their family, carers and supporters can challenge the deprivation of liberty
- There are regular reviews of the deprivation (within the statutory timescales set in law or by order of a court)

5.2 Across Priory services in the UK, legal authority will be provided by the following legal frameworks;

	Priory Healthcare	Priory Adult Care
England and Wales		
Aged under 16	<ul style="list-style-type: none"> • Parental consent (Gillick test applies) • Mental Health Act • Children’s Act • High Court 	<ul style="list-style-type: none"> • Not applicable
Aged 16 & 17	<ul style="list-style-type: none"> • Mental Health Act • Court of Protection • High Court 	<ul style="list-style-type: none"> • Court of Protection • High Court
Aged 18 and over	<ul style="list-style-type: none"> • Mental Health Act • Deprivation of Liberty Safeguards • Court of Protection 	<ul style="list-style-type: none"> • Deprivation of Liberty Safeguards • Court of Protection
Scotland		
Aged under 16	<ul style="list-style-type: none"> • Mental Health (Care and Treatment) Act 	
Aged 16 and over	<ul style="list-style-type: none"> • Mental Health (Care and Treatment) Act • Adults with Incapacity (Scotland) Act 2000 	<ul style="list-style-type: none"> • Adults with Incapacity (Scotland) Act 2000
Northern Ireland		
Aged 16 and over	<ul style="list-style-type: none"> • Not applicable 	<ul style="list-style-type: none"> • Mental Capacity Act Deprivation of Liberty

6 COMMON LAW AND DOCTRINE OF NECESSITY

- 6.1 Common law (legal precedent that has been, or would need to be, developed by courts on the basis of individual cases) only exists where there is a gap in legal frameworks for the situation, risk and immediately necessary actions taken to save a person’s life or in response to a threat or risk of harm.
- 6.2 There are very limited scenarios where common law would ever be necessary or appropriate to rely upon in our health and care settings. The general authorities provided by capacity law and mental health law, mean that most interventions – even when urgently needed – will be protected by the legislative frameworks for mental health and mental capacity.
- 6.3 Common law must never be stated as a legal authority for any planned care and treatment that amounts to a deprivation of liberty. There is no legal definition of time but in all Priory services, we should consider the most appropriate legal authority where the unplanned deprivation of liberty is expected to last longer than 1 hour (in response to an emergency situation).

7 DELAYS IN AUTHORISATIONS

7.1 In circumstances where there may be a delay to receiving the legal authority for deprivation of liberty, we must take the following actions;

- Record the delay and the reasons for the delay in the individual’s records
- Explain this to the person and their family, carer or supporters
- Record the delay in the services risk register
- Identify the frequency, lead and method of reviewing the ongoing deprivation of liberty and chasing any external agency for updates on the delay
- Report the delay and gap in legal authority using Datix

7.2 The above may also apply if we have asked for a review or identified a gap in the legal authority provided and the persons care plan. For any period where the care plan continues while reviews are taking place, there should be a clear review and monitoring approach to ensure the gap in legal authority is recognised and information shared with all impacted.

8 REFERENCES

- 8.1 European Convention on Human Rights
 Mental Capacity Act (England and Wales)
 Mental Health Act (England and Wales)
 Mental Capacity Act Deprivation of Liberty (Northern Ireland)
 Mental Health Order (Northern Ireland)
 Mental Health (Care and Treatment) (Scotland) Act
 Adults with Incapacity (Scotland)
 Children’s Act (England and Wales)

9 EQUALITY IMPACT ASSESSMENT

9.1 **How is the policy likely to affect the promotion of equality and the elimination of discrimination in each of the groups?**

Protected Characteristic (Equality Act 2010)	Impact Positive/ Negative/ None	Reason/ Evidence of Impact	Actions Taken (if impact assessed as Negative)
Age	None		
Disability	Positive	Service users with a mental impairment that impacts decision making will benefit from application of this policy	
Gender identity and expression	None		
Marriage or civil partnership	None		
Pregnancy or maternity	None		
Race	None		
Religion or beliefs	None		
Sex	None		
Sexual orientation	None		
Other, please state:			
EIA completed by:			
Name:	Kim Forrester		
Role/ Job Title:	Head of MHA/MCA Operations		
Date completed:	9 June 2023		