

**CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL  
DEPARTMENT OF HEALTH AND WELL BEING  
POLICY & PROCEDURES**

**THE DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS)**

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## INTRODUCTION

1. The Mental Capacity Act 2005 (MCA) provides a statutory framework for people who lack capacity to make decisions or take actions for themselves and others may have to make those decisions on their behalf. When they do this, they should not deprive the person who lacks capacity of their liberty, unless it is essential to do so in the person's best interests and for their own safety.
2. This policy is based on the Deprivation of Liberty Safeguards (DoLS) addendum to the MCA Code of Practice and adds to the guidance in the Bradford MCA Policy (MCA01)
3. It provides guidance to anyone who is working with and/or caring for adults who may lack capacity to make particular decisions, and is in a situation where the possibility that there may be deprivation of liberty arises.
4. It is important that the MCA and the main Code of Practice are adhered to whenever capacity and best interests issues, and the deprivation of liberty safeguards, are being considered. The DoLS are in addition to, and do not replace, other safeguards in the Act.
5. The categories of people that are required to have regard to the Code of Practice include anyone who is:
  - An attorney under a Lasting Power of Attorney (LPA)
  - A deputy appointed by the Court of Protection
  - Acting as an Independent Mental Capacity Advocate (IMCA)
  - Carrying out research approved in accordance with the Act
  - Acting in a professional capacity in relation to a person who lacks capacity, or
  - Being paid for acts for, or in relation to, a person who lacks capacity.

These categories cover a wide range of people that may include:

- Healthcare staff (doctors, dentists, nurses, therapists, radiologists, paramedics etc)
- Social care staff (social workers, care managers, etc), and
- Others who may occasionally be involved in the care of people who lack capacity to make the decision in question, e.g. ambulance crew, police etc.

People who are being paid for acts for or in relation to a person who lacks capacity may include:

- Care assistants in a care home
- Care workers providing domiciliary care services, and
- Others who have been contracted to provide a service to people who lack capacity to consent to that service



## GLOSSARY

<b>Abbreviation</b>	<b>Definition</b>
ATU	Assessment & Treatment Unit
BIA	Best Interests Assessor
CAMHS	Children and Adolescent Mental Health Services
CCG	Clinical Commissioning Group
Cheshire West	The judgment of the Supreme Court in P v Cheshire West and Chester Council and P & Q v Surrey County Council [2014] UKSC 19
CoP	Court of Protection
CPN	Community Psychiatric Nurse
CQC	Care Quality Commission
CTO	Community Treatment Order
DDA	Disability Discrimination Act 1995
DoLS	The deprivation of liberty safeguards regime introduced by Schedule A1 to the MCA 2005
DoLS Code	The code of practice accompanying Schedule A1 to the MCA 2005
ECHR	European Convention on Human Rights
ECtHR	The European Court of Human Rights
IMCA	Independent Mental Capacity Advocate
ICU	Intensive Care Unit
LPA	Lasting Power of Attorney
MA	Managing Authority
MCA 2005	Mental Capacity Act 2005
MHA 1983	Mental Health Act 1983
OPG	Office of the Public Guardian
RPR	Relevant Person's Representative
SB	Supervisory Body

## BACKGROUND

### Bournewood.

In October 2004, the European Court of Human Rights (ECtHR) announced its judgment in the case of *HL v the United Kingdom* (commonly referred to as the 'Bournewood' judgment).

HL was a profoundly autistic man with a learning disability, who lacked the capacity to consent to, or to refuse, admission to hospital for treatment. The ECtHR held that he was **deprived of his liberty** when he was admitted, informally, to Bournewood Hospital.

The ECtHR further held that:

- the manner in which HL was deprived of liberty was not in accordance with 'a procedure prescribed by law' and was, therefore, in breach of Article 5(1) of the European Convention on Human Rights (ECHR), and
- there had been a contravention of Article 5(4) of the ECHR because HL was not able to apply to a court quickly to see if the deprivation of liberty was lawful.

To prevent further similar breaches of the ECHR, the MCA 2005 has been amended to provide additional safeguards for people who lack mental capacity and whose care or treatment necessarily involves a deprivation of liberty within the meaning of Article 5 of the ECHR, but who either are not, or cannot be, detained under the Mental Health Act 1983.

These safeguards are referred to as '**deprivation of liberty safeguards**'.

## CROSS-REFERENCES & LEGISLATION

- Mental Capacity Act 2005
- Mental Capacity Act 2005 Code of Practice
- Mental Capacity (Deprivation of Liberty) Regulations 2008
- Deprivation of Liberty Safeguards - Code of Practice 2008
- Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008
- Mental Health Act 1983 and Mental Health Act 2007
- Care Act 2014
- [Care and Support Statutory Guidance: Section 10 \(Care and Support Planning\)](#)
- Mental Capacity Act 2005 Policy (MCA01)
- The Law Society: Identifying a Deprivation of Liberty  
<http://www.lawsociety.org.uk/Support-services/documents/Deprivation-of-liberty---a-practical-guide/>

## 1 DEFINITIONS

- 1.1 The deprivation of liberty safeguards require that a hospital, care home, support agency etc. (a 'managing authority') must seek authorisation in order to be able to deprive someone who has a mental disorder, and who lacks capacity to consent, of their liberty.
- 1.2 Authorisation is from the Supervisory Body (the Local Authority) in the case of hospitals and care homes, or from the Court of Protection in other cases, otherwise the deprivation of liberty is unlawful.
- 1.3 In order to establish whether deprivation of liberty is taking place, it is necessary to consider all the circumstances of each case. It is not possible to say that any single factor alone would always or could never amount to a deprivation of liberty.
- 1.4 An authorisation only relates to deprivation of liberty and does not, for example, give authority for any course of treatment.

## 2 HOW CAN DEPRIVATION OF LIBERTY BE IDENTIFIED?

### 2.1 Extracts from the Bournemouth judgment

*'... to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance.'*

*'the key factor in the present case [is] that the healthcare professionals treating and managing the applicant exercised complete and effective control over his care and movements'*

*'the applicant was under continuous supervision and control and was not free to leave'.*

### 2.2 Cheshire West.

In March 2014, the Supreme Court handed down its judgment in the case of "P v Cheshire West and Chester Council and another" and "P and Q v Surrey County Council".

The requirements for the Deprivation of Liberty Safeguards are unchanged and there are still 6 requirements which need to be met:

- a) 18 and over
- b) Suffering from a mental disorder
- c) Lacking capacity for the decision to be accommodated in the hospital or care home
- d) No decision previously made to refuse treatment or care, or conflict relating to this such as LPA
- e) Not ineligible for DoLS
- f) The person needs to be deprived of liberty, in their best interests.

The Supreme Court confirmed that to determine whether a person is objectively deprived of their liberty there are two key questions to ask, which they describe as the 'acid test':

- i. Is the person subject to continuous supervision and control? (all three aspects are necessary) and**
- ii. Is the person free to leave? (The person may not be saying this or acting on it but the issue is about how staff would react if the person did try to leave).**

This now means that if a person is subject both to continuous supervision and control and not free to leave they are deprived of their liberty.

2.3 The following factors are no longer relevant to this:

- i. the person's compliance or lack of objection;
- ii. the relative normality of the placement and
- iii. the reason or purpose behind a particular placement.

2.4 The judgment is significant in determining whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty.

2.5 A deprivation of liberty for such a person must be authorised in accordance with one of the following legal regimes: a deprivation of liberty authorisation under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act 2005 or Court of Protection order.

2.6 The fact that a person who lacks capacity is living in a hospital or care home does not necessarily mean that the person is deprived of liberty, even if the unit is locked or staff would not allow the person to leave unescorted for their own protection.

For example, if someone was only able to leave when accompanied by a friend, family member or Carer, or was not allowed to leave in the middle of the night, or there is a lock or electronic keypad on the door, this alone would not necessarily amount to deprivation of liberty.

2.7 All the circumstances of each and every case must be considered e.g.

- What measures are being taken?
- When are they required?
- For what period will they endure?
- What are the effects of any restraint or restrictions?
- Why are they necessary?
- What aim do they seek to meet?
- What are the views, wishes, and feelings of the person?
- What are the views of the person's family or carers?
- How are any restraints or restrictions to be applied?
- Do they go beyond restraint & restriction and become deprivation of liberty?
- Are there less restrictive options available?
- Does the cumulative effect of the restrictions amount to deprivation of liberty even though individually they would not?

Note that this is not an exhaustive list.

- 2.8 Further legal developments may occur after this guidance is issued. Health & Social care staff need to keep themselves informed of any legal developments affecting their practice.

### 3 RESTRAINT

- 3.1 A person is using restraint if they:
- Use force, or threaten to use force, to make someone do something that they are resisting, or
  - Restrict a person's freedom of movement, whether they are resisting or not.
- 3.2 Restraint is appropriate when it is used to prevent harm to the person who lacks capacity and it is a proportionate response to the likelihood and seriousness of harm.
- 3.3 Appropriate use of restraint may fall short of deprivation of liberty.
- 3.4 The duration of any restrictions is a relevant factor when considering whether a person is deprived of their liberty. If restraint or restriction is frequent, cumulative, and ongoing, then care providers should consider whether this goes beyond permissible restraint and DoLS authorisation is required.
- 3.5 Although appropriate restraint may lawfully be used under the MCA, it should be seen as an indicator that a person's wishes **may** be being over-ridden. In these circumstances the person may be being deprived of their liberty and authorisation is needed.
- 3.6 In the case of a person in hospital for mental health treatment, the need for restraint is likely to indicate that they are objecting to treatment or to being in hospital. A person who objects to mental health treatment is **ineligible** for an authorisation under the deprivation of liberty safeguards. If it is necessary to detain them, use of the Mental Health Act 1983 should be considered.

### 4 AVOIDING UNLAWFUL DEPRIVATION OF LIBERTY

- 4.1 Anyone involved in the provision of residential accommodation or other care services that might be affected by the deprivation of liberty safeguards should avoid unlawful deprivation of liberty by:
- Seeking to operate care regimes that promote a person's control over their daily living and maximise their autonomy.
  - Applying the principles of person-centred planning to all people who lack mental capacity.
  - The involvement of family, friends and carers
  - Having systems in place to:
    - Consider whether or not a person is being deprived of their liberty
    - Ensure that authorisation for deprivation of liberty is obtained when needed.
  - Keeping the question of whether the person is deprived of their liberty under review
  - Addressing the question of deprivation of liberty explicitly whenever a change is made to the care plan
  - Recording details of each review in the person's health and care records.

- 4.2 If it is identified that a person is being deprived of their liberty (or is at risk of it), then consideration should be given as to whether the person could be cared for safely with fewer restrictions on them.
- 4.3 If this is not considered feasible, then an authorisation must be sought **in advance of the restrictions being introduced**, except in an emergency when an urgent authorisation must be issued at the time the application is made
- 4.4 There are lots of ways to reduce the risk of deprivation of liberty, by minimising restrictions and ensuring that decisions are taken involving the person concerned and their family, friends and carers.  
The following list highlights elements of good practice that are likely to assist in this and to help avoid the risk of legal challenge:
- Decision should be taken in a structured way and reasons for decisions should be recorded.
  - Protocols for decision-making should include consideration of whether deprivation of liberty may arise and how it could be avoided.
  - Providers should follow good practice for care planning for any people in their care who lack capacity.
  - All elements of the plan must be documented, including the involvement of family, friends, carers (both paid and unpaid) and others interested in the welfare of a person who lacks capacity
  - There should be a proper assessment of whether the person lacks capacity to decide whether or not to accept the care proposed
  - A person should not be assumed to lack capacity to make a decision.
  - All practical and appropriate support to make the decision in question must be provided.
  - It is also important to identify if a person's condition has deteriorated and they no longer have capacity to make a decision for themselves.
  - All decisions about whether a person should be deprived of their liberty must be made within the principles of the MCA.
  - Before admitting a person to hospital or residential care consideration must always be given to identifying ways to meet the person's needs in a less restrictive way.
  - Any restrictions placed on the person while in hospital or in a care home must be kept to the minimum necessary in all the circumstances of the case.
  - The person who lacks capacity and their family, friends and carers must have access to appropriate information about their care.
  - The involvement of local advocacy services should be encouraged to support the person and their family, friends and carers.
  - Proper steps should be taken to help the person to retain contact with family, friends and carers. If, exceptionally, there are good reasons why maintaining contact is **not** in the person's best interests, then obtain legal advice on how to proceed.
  - It should be made clear how long the restrictions will be maintained and how the decision can be challenged.
  - Both the assessment of capacity and the care plan should be kept under review.

## 5 AUTHORISATION OF DEPRIVATION OF LIBERTY

- 5.1 There are some circumstances in which depriving someone who lacks capacity of their liberty is necessary to protect them from harm and would be in their best interests.



However, it is important to note that a deprivation of liberty authorisation does not, in itself, give authority to treat someone.

- 5.2 Deprivation of liberty in hospitals and care homes can be authorised by the supervisory body (local authorities).  
To obtain authorisation to deprive someone of their liberty, managing authorities (the hospital or care home in which the person will be deprived of their liberty) have to apply for an authorisation.
- 5.3 A **standard authorisation** must be obtained **before** the deprivation of liberty begins.
- 5.4 If the need for the deprivation of liberty is so urgent that it is in the best interests of the person for it to begin while the application is being considered, then the care home or hospital may issue an **urgent authorisation** for up to seven days.
- 5.5 A managing authority has responsibility for applying for authorisation of deprivation of liberty.
- 5.6 If a healthcare or social care professional considers, for example as a result of a care review or needs assessment, that an application for authorisation should be made they should inform the managing authority.
- 5.7 A supervisory body is responsible for considering requests, commissioning assessments and, where all the assessments agree, authorising deprivation of liberty.
- 5.8 There are two types of authorisation: standard and urgent.
- 5.8.1 Standard Authorisation.**  
A managing authority must request a standard authorisation when it appears likely that, either currently or at some time during the next 28 days, someone will be accommodated in their hospital or care home in circumstances that amount to a deprivation of liberty.
- 5.8.2 Urgent Authorisation.**  
Whenever possible, authorisation should be obtained in advance.  
Where this is not possible, and the managing authority believes it is necessary to deprive someone of their liberty in their best interests before the standard authorisation process can be completed, the managing authority must itself grant an urgent authorisation and then obtain standard authorisation within seven calendar days.
- 5.9 Before applying for an authorisation, the managing authority needs to consider, in consultation with the family where possible, whether the person meets the qualifying requirements. (See Flowchart: Appendix A)
- 5.10 **Approval of Signatories:**
- i. Who can be an authorising signatory is not defined within the Mental Capacity Act 2005 or the Regulations. However, while the limitations of the role are laid down in Schedule A1, case law has amplified and illuminated its importance. The authoriser represents the local authority and must not be in a position of conflict (for example, they must not manage the managing authority in addition to the DoLS service).
  - ii. Local authorities should be aware of, and pre-empt, any conflicts of interest within their authorising roles – for example, if they, as managers who may authorise care packages, also line-manage a best interests assessor who may be asked to assess an individual who is in receipt of such a care package.

*[Deprivation of Liberty Safeguard (DoLS) Putting Them into Practice: Social Care Institute of Excellence; updated September 2017]*

- iii. In Bradford the **Strategic Director** (Health and Wellbeing) has approved **The Principal Social Worker** and **The Mental Capacity Act Team Manager** as the authorised DoLS signatories.
- iv. In rare circumstances e.g. a DoLS case that is very complex or has high risk legal or financial implications, the DoLS Team Manager may consider that the case requires the involvement of the Strategic Director at the sign-off stage.

#### 5.11 **The Application Process**

When a managing authority applies for a standard authorisation, it must do so in writing to the supervisory body.

#### 5.12 The request from a managing authority for a **standard authorisation** must include:

- the person's name
- the name, address and telephone number of the care home or hospital
- details of the person's mental disorder
- the purpose of the proposed deprivation of liberty, including relevant care plans and needs assessment
- a summary of the restrictions considered to amount to deprivation of liberty (i.e. why the application is needed)
- the date from which the deprivation of liberty authorisation is sought
- whether there is anyone to consult who is not paid to provide care for the person (in order to inform the supervisory body whether an IMCA is needed), and
- whether an urgent authorisation has been issued and, if so, the date of expiry.

#### 5.13 In addition, the regulations require that the request include the following information if it is available or could reasonably be obtained without delaying the application:

- the person's current address and telephone number if relevant (for example, if the person is currently residing somewhere else)
- their age, gender and ethnic group
- other health information relevant to the deprivation of liberty
- issues relevant to carrying out the assessments, for example communications and language needs
- the names, contact addresses, telephone numbers and e-mail addresses of lead professionals involved. If the deprivation of liberty involves a change of care setting then contact details should include those for the professional responsible for the person's care in the previous care setting
- names and contact details for family, friends and day-to-day decision makers to contact for the best interests assessment
- name and contact details of any IMCA currently instructed for the person
- name and contact details of any LPA for the person
- name and contact details of any court appointed deputy
- details of any relevant advance decision to refuse treatment
- whether the person has previously been subject to a standard authorisation (in which case the date of expiry of the previous authorisation should be supplied)

- whether the person is currently detained or liable to detention under the Mental Health Act 1983 (MHA)
- 5.14 A standard form is available for this purpose
- 5.15 If the request relates to renewal of an authorisation, information that has not changed does not have to be re-supplied.
- 5.16 The managing authority must notify the supervisory body if it concludes that there is **nobody appropriate to consult** in determining the person's best interests. In such a case, the **supervisory body must instruct an IMCA** to represent and support the relevant person.
- 5.17 Upon receipt of an application for authorisation of deprivation of liberty, the supervisory body should as soon as is practical and possible:
- consider whether the request is appropriate and should be pursued, and
  - seek any further information that it requires from the managing authority to help it with the decision.
- 5.18 If the supervisory body has any doubts about proceeding with the request, it should seek to resolve them with the managing authority.
- 5.19 A standard authorisation may come into force at a specific time after it is given, e.g. when authorisation is sought as part of care planning (such as discharge planning from hospital).
- 5.20 There may be cases in which the supervisory body considers that an application for an authorisation has been made too far in advance (i.e. more than 28 days before that authorisation is required). This might mean that an assessor could not make an accurate assessment of what the person's circumstances will be by the time the authorisation comes into force. In such a case, the supervisory body may agree with the managing authority that the application should be resubmitted at a more appropriate time.
- 5.21 The Managing Authority must have reasonable grounds for believing that the person lacks the mental capacity to make decisions regarding their care arrangements. There should also be an assessment of the person's capacity to consent to sharing information regarding the DoLS application. If the person is not able to consent then a decision may be taken to share information in their best interests e.g. with the GP or other health professionals.
- 5.22 Information regarding the DoLS process should be provided to appropriate family members.

## 6 DEPRIVATION OF LIBERTY ASSESSMENTS

- 6.1 As soon as the supervisory body has confirmed that the request should be pursued, it must obtain the relevant assessments to ascertain whether the qualifying requirements are met.
- 6.2 Assessments must be completed within 21 days, or 7 days if an urgent authorisation has been granted.
- 6.3 The assessments are:
- Age assessment
  - Mental health assessment
  - Mental capacity assessment



- Best interests assessment
  - Eligibility assessment
  - No refusals assessment
- 6.4 If the supervisory body is not in the same place as the care home or hospital, they may arrange to use assessors based in the person's area.
- 6.5 If an '**equivalent assessment**' to any of these assessments has already been obtained, it may be relied upon instead of obtaining a fresh assessment.
- 6.6 An equivalent assessment is an assessment:
- That has been carried out in the preceding 12 months
  - That meets all the requirements of the deprivation of liberty assessment, and
  - Of which the supervisory body accepts and sees no reason why it should no longer be accurate.
  - Of which the supervisory body has a written copy
- 6.7 Supervisory bodies are advised to record the reasons if a decision is taken to use an equivalent assessment.
- 6.8 All assessments required for a standard authorisation **must be completed within 21 calendar days** from the date on which the supervisory body receives a request from a managing authority.
- 6.9 If an urgent authorisation is already in force, the assessments must be completed **before the expiry of that authorisation**.
- 6.10 Urgent authorisations maybe given for an initial seven-day period, and may, in exceptional circumstances, be extended by the supervisory body for up to a further seven days.
- 6.11 The six assessments do not have to be completed by six different assessors. However, each assessor must make their own decisions and to ensure that an appropriate degree of objectivity is brought to the assessment process:
- There **must** be a minimum of two assessors.
  - The mental health and best interests assessors **must** be different people.
  - The best interests assessor can be an employee of the supervisory body or managing authority but **must not** be involved in either the care of the person they are assessing or in decisions about their care.
  - A potential best interests assessor **should not** be used if they are in a line management relationship with the professional proposing the deprivation of liberty or the mental health assessor
  - None of the assessors may have a personal financial interest in the care of the person they are assessing
  - The assessor **must not** be a relative of the person being assessed nor of a person with a financial interest in the person's care. For this purpose, a 'relative' is:
    - a) a spouse, ex-spouse, civil partner or ex-civil partner
    - b) a person living with the relevant person as if they were a spouse or civil partner
    - c) a parent or child



- d) a brother or sister
- e) a child of a person falling within definitions a, b, or d
- f) a grandparent or grandchild
- g) a grandparent-in-law or grandchild-in-law
- h) an aunt or uncle
- i) a sister-in-law or brother-in-law
- j) a son-in-law or daughter-in-law
- k) a first cousin, or
- l) a half-brother or half-sister

These relationships include step-relationship

- 6.12 Other relevant factors for supervisory bodies to consider when appointing assessors include:
- The reason for the proposed deprivation of liberty
  - Whether the potential assessor has experience of working with the service user group from which the person being assessed comes
  - Whether the potential assessor has experience of working with people from the cultural background of the person being assessed.
- 6.13 Assessors act as individual professionals and are personally accountable as such for their decisions. Managing authorities and supervisory bodies must not dictate or seek to influence their decisions.
- 6.14 Nobody can or should carry out an assessment, other than an age assessment, unless they covered by indemnity in respect of any liabilities that might arise in connection with carrying out the assessment.
- 6.15 If a single body is both supervisory body and managing authority (e.g. where a local authority itself provides a residential care home) this does not prevent it from acting in both capacities. However, **the best interests assessor cannot be an employee of the supervisory body / managing authority.**  
e.g. in a case involving a local authority care home, the best interests assessor could be an NHS employee or an independent practitioner.
- 6.16 If there is **nobody appropriate to consult**, other than people engaged in providing care or treatment for the relevant person in a professional capacity, the managing authority must notify the supervisory body when it submits the application for the deprivation of liberty authorisation.  
**The supervisory body must then instruct an IMCA straight away** to represent the person.

## 7 THE ASSESSMENT PROCESS.

- 7.1 **Age Assessment:** The purpose of the age assessment is simply to confirm whether the relevant person is aged 18 or over.
- 7.2 This assessment can be undertaken by anybody whom the supervisory body thinks is suitable to undertake it. This includes a person who is conducting one or more of the other assessments.

- 7.3 **Mental Health Assessment:** The purpose of the mental health assessment is to establish whether the relevant person is suffering from a mental disorder or learning disability.
- 7.4 This is not an assessment to determine whether the person requires mental health treatment.
- 7.5 This assessment must be carried out by a doctor, and the assessing doctor either has to be approved under section 12 of the Mental Health Act 1983 or be a registered medical practitioner who has special experience in the diagnosis and treatment of mental disorder.
- 7.6 Whether or not the assessor is section 12 approved, they must have completed the appropriate MCA mental health assessor training.
- 7.7 Supervisory bodies must:
- be satisfied that the assessor has the required skills and competencies.
  - consider the suitability of the assessor appointed to the particular case, for example whether they have experience relevant to the person's condition and
  - should consider using a doctor who is eligible to carry out the assessment and who already knows the relevant person to undertake this assessment if they think it would be of benefit.
- 7.8 The mental health assessor is required to consider how the mental health of the person being assessed is likely to be affected by being deprived of their liberty, and to report their conclusions to the best interests assessor.
- 7.9 The mental health and best interests assessments cannot be carried out by the same person
- 7.10 **Mental Capacity Assessment:** The purpose of the mental capacity assessment is to establish whether the relevant person lacks capacity to consent to the arrangements proposed for their care.
- 7.11 The mental capacity assessment can be undertaken by anyone who is eligible to act as mental health or best interests assessor. In Bradford this will be undertaken by the Best Interests Assessor (BIA).
- 7.12 Supervisory bodies should consider using an eligible professional who already knows the relevant person to undertake this assessment if they think it would be of benefit.
- 7.13 **Best Interests Assessment:** The purpose of the best interests assessment is to establish firstly whether deprivation of liberty is occurring or is going to occur and, if so, whether:
- it is in the best interests of the relevant person to be deprived of liberty
  - it is necessary for them to be deprived of liberty in order to prevent harm to themselves, and
  - such deprivation of liberty is a proportionate response to the likelihood of the relevant person suffering harm and the seriousness of that harm
- 7.14 The deprivation of liberty best interests assessment must be undertaken by an approved mental health professional or a social worker, nurse, occupational therapist or psychologist with the skills and experience required by the regulations.
- 7.15 The supervisory body must also be satisfied that the assessor:
- has the required skills for the role
  - has completed specific deprivation of liberty best interests assessor training, and

- is suitable considering the circumstances of the case.
- 7.16 The MCA main Code includes a checklist of factors that need to be taken into account in determining best interests, including:
- the nature of the possible harm that may arise if the deprivation of liberty does not take place
  - the likelihood of that harm arising
  - evaluation of other care options to avoid deprivation of liberty, and
  - if deprivation of liberty is currently unavoidable, identifying what action could be taken to avoid it in future.
- 7.17 **Eligibility Assessment:** This assessment relates specifically to the relevant person's status, or potential status, under the MHA 1983 and aims to confirm whether the relevant person should be covered by that Act rather than the deprivation of liberty safeguards under the MCA.
- 7.18 For most authorisations sought by care homes, the eligibility assessment will effectively be irrelevant.
- 7.19 A person is not eligible for a deprivation of liberty authorisation if:
- They are, at the time of the authorisation, detained as a hospital in-patient under the Mental Health Act 1983, or
  - The authorisation, if granted, would be inconsistent with an obligation placed on them under the MHA, such as a requirement to live somewhere else.
- 7.20 In addition, if the proposed authorisation relates to deprivation of liberty in a hospital **wholly or partly for the purpose of treatment of mental disorder**, then the person will not be eligible if:
- They are currently on leave of absence from detention under the MHA, or subject to Supervised Community Treatment or conditional discharge in which case powers of recall under the MHA should be used, or
  - They object to being admitted to hospital, or to some or all the treatment they will receive there for mental disorder, **and** they meet the criteria for an application for admission under the MHA.
- 7.21 In many cases, a patient will be perfectly able to state such an objection. However, where the patient is unable to communicate, or can only communicate to a limited extent, assessors will need to consider the patient's behaviour, wishes, feelings, views, beliefs and values, both present and past, so far as they can be ascertained. If there is reason to think that a patient would object if able to do so, then the patient should be assumed to be objecting.
- 7.22 Assessors should always bear in mind that their job is simply to establish whether the patient objects to treatment – the reasonableness of that objection is not the issue.
- 7.23 The eligibility assessment will often be carried out by the best interests assessor but, where this is not the case, the eligibility assessor must seek and take account of the views of the best interests assessor in deciding whether the person objects to being in hospital or to treatment for mental disorder.

- 7.24 Even where a patient does not object and a deprivation of liberty authorisation is possible, it should not be assumed that such an authorisation is invariably the correct course.
- 7.25 There may be other factors that suggest that the Mental Health Act 1983 should be used (for example, where it is thought likely that the person will recover relevant capacity and will then refuse to consent to treatment, or where it is important for the hospital managers to have a formal power to retake a person who goes absent without leave).
- 7.26 See also Appendix B for further guidance.
- 7.27 **When patients are assessed as ineligible.**  
If the eligibility assessor believes that the patient is not eligible, but they nevertheless should be deprived of liberty in their best interests, the eligibility assessor should immediately take steps to arrange for appropriate action to be taken under the MHA
- 7.28 In the case of someone already subject to the MHA, the eligibility assessor should contact the clinician in overall charge of the patient's treatment or, if the person is subject to guardianship, the relevant local social services authority.
- 7.29 **The Eligibility Assessor:**
- 7.30 The regulations for England specify that anybody that the supervisory body considers to be appropriate, by virtue of possessing the necessary experience and meeting the training and skills specifications, may undertake the eligibility assessment.
- 7.31 In most cases, it should be carried out by a person conducting one or more of the other assessments.
- 7.32 Where the eligibility assessor and best interests assessor are different people, the eligibility assessor, in undertaking the assessment, must seek information from the best interests assessor about the person's attitude to the arrangements being made for their care and treatment.
- 7.33 **No Refusals Assessment:** The purpose of the no refusals assessment is to establish whether an authorisation to deprive a person who lacks capacity to consent of their liberty would conflict with other existing authority for decision-making for that person.
- 7.34 The following examples show instances of a conflict which would mean that a standard authorisation could not be given.
- If the relevant person has made an advance decision that remains valid and is applicable to some or all of the treatment that the person would receive if authorisation were granted.
  - If any part of the proposal to deprive the person of their liberty (including any element of the care plan) would be in conflict with a valid decision of a donee of a Lasting Power of Attorney or a deputy appointed by the court
  - If there is a conflict, the no refusals assessment qualifying requirement will not be met and a standard authorisation for deprivation of liberty may not be given.
- 7.35 The no refusals assessment can be undertaken by anybody that the supervisory body considers has the skills and experience to perform the role, including a person conducting one or more of the other assessments.

## 8 THE ROLE OF THE BEST INTERESTS ASSESSOR



- 8.1 The best interests assessor is the person who is responsible for assessing the best interests of a relevant person for whom a managing authority has applied for authorisation to deprive them of their liberty
- 8.2 The first task of a best interests assessor is to establish whether deprivation of liberty is occurring, or is going to occur.
- 8.3 If the best interests assessor concludes that deprivation of liberty is **not** occurring and is not likely to occur, they should inform the supervisory body that deprivation of liberty is not in the person's best interests because there is a less restrictive option available. The assessor must inform the supervisory body that the best interests requirement is not met
- 8.4 The best interests assessor must consult the managing authority of the relevant hospital or care home and examine any relevant needs assessments and care plans prepared in connection with the relevant person being accommodated in the hospital or care home.
- 8.5 The best interests assessor must consider whether the proposed care plan and the manner in which it will be implemented would constitute a deprivation of liberty. If it would not, then no deprivation of liberty authorisation would be required for that care plan.

## **9 THE BEST INTERESTS ASSESSMENT PROCESS**

- 9.1 If the best interests assessor considers that deprivation of liberty is or will be occurring, they should start a full best interests assessment. This involves seeking the views of the following about whether they believe that depriving the relevant person of their liberty is, or would be, in the person's best interests:
  - anyone engaged in caring for the person,
  - family members,
  - anyone interested in the person's welfare,
  - any IMCA who has been instructed,
  - anyone named by the relevant person who should be consulted, and
  - staff involved in the person's care.
- 9.2 The best interests assessor must state in their assessment the name and address of every interested person whom they have consulted.
- 9.3 They must also involve the person they are assessing in the assessment process as much as is possible and help them to participate in decision-making.
- 9.4 They will also need to consider the conclusions of the mental health assessor about how the person being assessed is likely to be affected by being deprived of their liberty.
- 9.5 If the proposed care would involve the person being moved, then the assessor should consider the impact of the upheaval and of the journey itself on the person.
- 9.6 If the best interests assessment supports deprivation of liberty in the care home or hospital in question, the assessor should state for how long any authorisation should be given, with a maximum period of 12 months.
- 9.7 This recommendation should be based on the information obtained during the consultation process, especially about how long any treatment will last, and any details about how likely it is that the relevant person's circumstances will change.

- 9.8 The underlying principle is that deprivation of liberty should be for the minimum period necessary so, for the maximum 12-month period to apply, the assessor will need to be confident that there is unlikely to be a change in the person's circumstances which would affect the authorisation within that timescale.

## **10 THE REPORT OF THE BEST INTERESTS ASSESSOR**

- 10.1 The best interests assessor will need to give reasons for their conclusion in the report of their assessment. If they do not support deprivation of liberty, then their report should aim to be as useful as possible in deciding on future action, e.g. recommending how deprivation of liberty could be avoided.
- 10.2 In such a case, it may also be helpful for the best interests assessor to discuss the matter with the providers of care **during the assessment process**.
- 10.3 The best interests assessor may recommend to the Supervisory Body that conditions should be attached to the authorisation.
- 10.4 Conditions may also be recommended (to the Supervisory Body) to work towards avoiding deprivation of liberty in future.
- 10.5 Conditions should not be a substitute for a properly constructed care plan.
- 10.6 The Managing Authority must implement any conditions attached to the DoLS authorisation in order for it to be valid.
- 10.7 In recommending conditions, best interests assessors should aim to impose the minimum necessary constraints, so that they do not unnecessarily prevent or inhibit the staff of the hospital or care home from responding appropriately to the person's needs, whether they remain the same or vary over time.
- 10.8 It would be good practice for the assessor to discuss any proposed conditions with the relevant personnel at the home or hospital before finalising the assessment.
- 10.9 Where possible, the best interests assessor should also recommend someone to be appointed as the **'relevant person's representative'**.
- 10.10 The appointment of the relevant person's representative cannot take place unless and until the authorisation is given, but by identifying someone to take on this role at an early stage, the best interests assessor can help to ensure that a representative is appointed as soon as possible.
- 10.11 The assessor must be confident that the proposed relevant person's representative would support the person in any challenge to the deprivation of liberty, in accordance with *AJ v A Local Authority [2015]*.

## **11 ASSESSMENTS, RECORDS, AND REPORTS**

- 11.1 Assessors may examine and take copies of records which they consider may be relevant to their assessment.

- 11.2 As soon as possible after carrying out their assessments, assessors must give copies of their assessment report(s) to the supervisory body.  
The supervisory body must give copies of these to:
- The managing authority
  - The relevant person and their representative, and
  - any IMCA
- 11.3 **Assessment conclusion**  
If all the assessments conclude that the person meets the criteria for authorisation, and the supervisory body has written copies of all the assessments, it must give a standard authorisation.
- 11.4 The supervisory body may attach or vary conditions to the authorisation, taking account of the best interests assessor's recommendations
- 11.5 When the supervisory body gives a standard authorisation, it must do so in writing and must state the following:
- the name of the relevant person
  - the name of the relevant hospital or care home
  - the period during which the authorisation is to be in force (which may not exceed the period recommended by the best interests assessor)
  - the purpose for which the authorisation is given (i.e. why the person needs to be deprived of their liberty)
  - any conditions subject to which the authorisation is given (as recommended by the best interests assessor), and
  - the reason why each qualifying requirement is met.
- 11.6 The supervisory body must give a copy of the authorisation to the managing authority, the relevant person, the relevant person's representative, any IMCA involved and every interested person consulted by the best interests assessor as soon as is possible.
- 11.7 A person should be deprived of liberty for the shortest period possible.
- 11.8 For the maximum 12-month period to apply, the assessor will need to be confident that there is unlikely to be a change in the person's circumstances which would affect the authorisation within that timescale.
- 11.9 Deprivation of liberty authorisation relates solely to the issue of deprivation of liberty. It does not give authority to treat people, nor to do anything else that would normally require their consent.
- 11.10 Any treatment can only be given to a person who has not given their consent if:
- it is established that the person lacks capacity to make the decision concerned
  - it is agreed that the treatment will be in their best interests, having taken account of the views of the person and of people close to them, and, where relevant in the case of any serious medical treatment, of any IMCA involved.
  - the treatment does not conflict with a valid and applicable advance decision to refuse treatment, and
  - the treatment does not conflict with a decision made by a donee of Lasting Power of Attorney or a deputy acting within the scope of their powers.



- 11.11 Life-sustaining treatment, or treatment to prevent a serious deterioration in the person's condition, may be provided while a decision in respect of any relevant issue is sought from the Court of Protection.
- 11.12 If a person who is subject to a standard authorisation moves to a different hospital or care home, the managing authority of the new hospital or care home must request a new standard authorisation. The application should be made **before** the move takes place.
- 11.13 If the move has to take place so urgently that this is impossible, the managing authority of the new hospital or care home will need to issue an urgent authorisation.
- 11.14 The only exception is if the care regime in the new facility will not involve deprivation of liberty.
- 11.15 If any of the assessments conclude that **one of the criteria is not met**, then the assessment process should stop immediately and **authorisation may not be given**.  
The supervisory body should:
- inform anyone still engaged in carrying out an assessment that they are not required to complete it
  - notify the managing authority, the relevant person, any IMCA involved and every interested person consulted by the best interests assessor that authorisation has not been granted, and
  - provide the managing authority, the relevant person and any IMCA involved with copies of those assessments that have been carried out.
- This should be done as soon as possible because in some cases different arrangements will need to be made for the person's care.
- 11.16 The commissioners of care are responsible for ensuring that any care package is commissioned in compliance with the deprivation of liberty safeguards.
- 11.17 The actions that both managing authorities and commissioners of care should consider if a request for an authorisation is turned down will depend on the reason why the authorisation has not been given.
- If the best interests assessor concluded that the person was not in fact being, or going to be, deprived of liberty, no action is likely to be necessary.
  - If the best interests assessor concluded that the proposed deprivation of liberty was not in the person's best interests, the managing authority will need to consider how the care plan could be changed to avoid deprivation of liberty.
  - If the mental capacity assessor concluded that the person **has** capacity to make decisions about their care, the care home or hospital will need to consider, in conjunction with the commissioner of the care, how to support the person to make such decisions.
  - If the person was identified as not eligible to be subject to a deprivation of liberty authorisation, it may be appropriate to assess whether an application should be made to detain the person under the MHA.
  - If the person does not have a mental disorder, the care plan will need to be modified to avoid a deprivation of liberty.
  - Where there is a valid refusal by an attorney or deputy or an applicable and valid advance decision, alternative care arrangements will need to be made. If there is a question about the refusal, a decision may be sought from the Court of Protection.

- 11.18 Where the best interests assessor comes to the conclusion that the best interests requirement is not met, but it appears to the assessor that the person being assessed is already being deprived of their liberty, the assessor must inform the supervisory body and explain in their report why they have reached that conclusion.
- 11.19 The supervisory body will need to liaise with the managing authority in order to ensure that an unauthorised deprivation of liberty is not permitted to continue in these circumstances. The person's care plan and the provision of care must be reviewed immediately and the changes made as soon as possible. The steps taken to end the deprivation of liberty should be recorded in the care plan. Where possible it will be important to involve family, friends and carers in deciding how to prevent the unauthorised deprivation of liberty from continuing.
- 11.20 The managing authority can itself give an **urgent authorisation** for deprivation of liberty where it:
- is required to make a request to the supervisory body for a standard authorisation, but believes that the need for a person to be deprived of liberty is so urgent that it is appropriate to begin the deprivation before the request is made, or
  - has made a request for a standard authorisation but believes that the need for a person to be deprived of liberty has now become so urgent that it is appropriate to begin the deprivation before the request is dealt with by the supervisory body.
- This means that an urgent authorisation can never be issued without a request for a standard authorisation being made.**
- 11.21 Urgent authorisations should normally only be used in response to sudden unforeseen needs but may also be used in care planning (for example, to avoid delays in transfer for rehabilitation where delay would reduce the likely benefit of the rehabilitation).
- 11.22 Any decision to issue an urgent authorisation and take action that deprives a person of liberty must be in the person's best interests.
- 11.23 The managing authority must decide the period for which the urgent authorisation is given, but this must not exceed 7 days.
- 11.24 The authorisation must be in writing and must state:
- The name of the relevant person
  - The name of the relevant hospital or care home
  - The period for which the authorisation is to be in force, and
  - The purpose for which the authorisation is given.
- 11.25 Supervisory bodies and managing authorities should have a procedure in place that identifies:
- What action should be taken when it is necessary to make use of the urgent authorisation process
  - By whom the action should be taken, and within what timescale.
- 11.26 The managing authority must keep a written record of any urgent authorisations given, and must give a copy of the authorisation to the relevant person and any IMCA involved.

- 11.27 The managing authority must also seek to ensure that, as far as possible, the relevant person understands the effect of the authorisation and the right to challenge the authorisation via the Court of Protection. Appropriate information must be given both orally and in writing.
- 11.28 The managing authority should notify the person's family, friends and carers in order to enable them to offer informed support to the person.
- 11.29 Consultation on Urgent Authorisations  
If the managing authority is considering depriving a person of liberty in an emergency and issuing an urgent authorisation, they must, as far as is appropriate,
- Take account of and record the views of anyone engaged in caring for the relevant person or interested in their welfare
  - Record the steps taken to involve family, friends and carers, and others with an interest. The views of carers are important as they are in a good position to gauge how the person will react to the deprivation of liberty, and the effect it will have on their mental state.
  - Record the reasons why it was decided to issue an urgent authorisation.
  - If appropriate, consult any staff who may have some involvement in the person's case.
- 11.30 Termination of Urgent Authorisations  
An urgent authorisation will terminate at the end of the period for which it is given (up to 7 days, which may in exceptional circumstances be extended to a maximum of 14 days by the supervisory body.)
- 11.31 It will terminate before this time if the standard authorisation applied for is granted.
- 11.32 An urgent authorisation will also terminate if a managing authority receives notice from the supervisory body that the standard authorisation will not be granted. It will not then be lawful to continue to deprive the person of their liberty.
- 11.33 Moving a Person into Care under an Urgent Authorisation  
There may be cases in which managing authorities are considering giving an urgent authorisation to enable them to move the relevant person to a new type of care e.g. admitting a person from home into hospital.
- 11.34 For some people, such a change of location would have a detrimental effect on their mental health, which might significantly distort the way they come across during any assessment process. In such a case, managing authorities should consider whether giving the urgent authorisation and admitting the person to hospital would outweigh the benefits of leaving the person in their existing location, where any assessment of their needs might be more accurate.
- 11.35 Extension of Urgent Authorisation  
If there are exceptional reasons why the request for a standard authorisation cannot be dealt with within the period of the original urgent authorisation, the managing authority may ask the supervisory body to extend the duration of the urgent authorisation for a maximum of a further seven days.
- 11.36 The supervisory body may only extend the duration of the urgent authorisation if:



- the managing authority has made a request for a standard authorisation
- there are exceptional reasons why it has not yet been possible to authorise the deprivation of liberty, and
- it is essential for the deprivation of liberty to continue while the supervisory body makes its decision.

11.37 Extensions will only be granted in exceptional circumstances. e.g. an extension may be justified where the supervisory body was satisfied that:

- it was not possible to contact a person the best interests assessor needed to contact;
- the assessment could not be relied upon without their input; and
- extension for the specified period would enable them to be contacted.

11.38 **An urgent authorisation can only be extended once.**

11.39 The supervisory body should notify the managing authority of the length of any extension granted and must vary the original urgent authorisation so that it states the extended duration.

11.40 If the supervisory body decides not to extend the urgent authorisation, it must inform the managing authority of its decision and the reasons for it. The managing authority must give a copy of the notice to the relevant person and any IMCA involved.

## **12 THE RELEVANT PERSON'S REPRESENTATIVE**

12.1 Once a standard authorisation has been granted, supervisory bodies must appoint a relevant person's representative as soon as possible to represent the person who has been deprived of their liberty.

12.2 The role of the relevant person's representative is:

- to maintain contact with the relevant person, and
- to represent and support the relevant person in all matters relating to the operation of the deprivation of liberty safeguards, including, if appropriate, triggering a review, using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection.

12.3 As soon as possible after an authorisation is issued, the managing authority must take all practical and appropriate steps to ensure that the relevant person and their representative understand:

- the effect of the authorisation
- their right to request a review
- the formal and informal complaints procedures that are available to them
- their right to make an application to the Court of Protection to seek variation or termination of the authorisation, and
- their right to request the support of an IMCA

12.4 To be eligible to be a relevant person's representative, a person must be:

- 18 years of age or over
- willing to be appointed, and
- able to keep in contact with the relevant person.

12.5 The person must not be:



- prevented by ill health from carrying out the role of representative
  - financially interested in the relevant person's managing authority
  - a close relative of a person who is financially interested in the managing authority
  - if the person is deprived of liberty in a care home, employed by, or providing services to, that care home
  - if the person is deprived of liberty in hospital, employed to work at that hospital in a role that is or could be related to the relevant person's case, or
  - employed to work in the relevant person's supervisory body
- 12.6 The appointment of a relevant person's representative is in addition to, and does not affect, any appointment of an attorney or deputy.
- 12.7 The functions of the representative are in addition to, and do not affect, the authority of any attorney, the powers of any deputy or any powers of the court.
- 12.8 There is no presumption that a relevant person's representative should be the same as the person who would be their nearest relative for the purposes of the MHA.
- 12.9 The process of identifying a representative should begin as soon as possible. Normally, this should be when the best interests assessor is appointed – even if one or more of the other assessments has not yet been completed. This is because the best interests assessor must, as part of the assessment process, identify if there is anyone they would recommend to become the relevant person's representative.
- 12.10 The best interests assessor should discuss the representative role with the people interviewed as part of the assessment.
- 12.11 The best interests assessor should firstly establish whether the person potentially being deprived of liberty has the capacity to select their own representative and, if so, invite them to do so. If the relevant person has capacity and selects an eligible person the best interests assessor must recommend that person to the supervisory body for appointment.
- 12.12 If there is an attorney or deputy with the appropriate authority, they may select the person to be recommended as the relevant person's representative where the relevant person lacks capacity to do so. If an attorney or deputy selects an eligible person then the best interests assessor must recommend that person to the supervisory body for appointment.
- 12.13 It is up to the best interests assessor to confirm whether any representative proposed by the person, an attorney or deputy is eligible. If the best interests assessor decides that a proposed representative is not eligible, they must advise the person who made the selection and invite them to make a further selection.
- 12.14 If neither the person concerned, nor an attorney or deputy, selects an eligible person, then the best interests assessor must consider whether they are able to identify someone eligible who could act as the relevant person's representative.
- 12.15 In making a recommendation, the assessor will wish to consider, and balance, factors such as:
- Does the person concerned have a preference?
  - Will the proposed representative be able to keep in contact with the person?
  - Does the person appear to trust and feel comfortable with the proposed representative?
  - Would the proposed representative be able to represent the person effectively?



- Is the proposed representative likely to represent the person's best interests?
- 12.16 In most cases, the best interests assessor will be able to check at the same time that the person is willing to be the representative
- 12.17 It should not be assumed that the representative needs to be someone who supports the deprivation of liberty
- 12.18 The best interests assessor must not select a representative where the relevant person, an attorney or a deputy objects to that selection.
- 12.19 If the best interests assessor is unable to recommend anybody to be the relevant person's representative, the assessor must notify the supervisory body accordingly.
- 12.20 The supervisory body must then itself identify an eligible person to be appointed as the representative, following the conditions set out above.
- 12.21 The supervisory body cannot select a person from among family, friends and informal carers who has not been recommended by the best interests assessor
- 12.22 The supervisory body may pay the person that they select to provide this service. The service could be commissioned through an advocacy services provider, ensuring that the service provides effective independent representation for the person deprived of liberty.
- 12.23 When selecting a suitable representative for a person, the supervisory body should pay particular attention to the communication and cultural needs of the relevant person.
- 12.24 If the person refuses, a further eligible person must be identified and invited to become the representative. This process must continue until an eligible person is appointed.
- 12.25 The appointment of a relevant person's representative must be in writing, stating the date of expiry, which must be for the period of the standard authorisation.  
Copies must be sent to:
- the appointed person
  - the relevant person
  - any attorney or deputy of the relevant person
  - any IMCA involved
  - every interested person consulted by the best interests assessor, and
  - the managing authority of the relevant hospital or care home.
- 12.26 The person appointed must confirm in writing that they are willing to take on the role.
- 12.27 The appointment of a relevant person's representative will be terminated in any of the following circumstances:
- The standard authorisation comes to an end and a new authorisation is not applied for or, if applied for, is not granted.
  - The relevant person, if they have capacity to do so, selects a different person to be their representative, and that person is eligible and willing to take on the role.
  - An attorney or deputy selects a different person to be the representative, and that person is eligible and willing to take on the role.
  - The representative informs the supervisory body in writing that they are no longer willing or eligible to continue in the role.
  - The supervisory body becomes aware that the relevant person's representative is not keeping in touch with the person.



- The supervisory body becomes aware that the relevant person's representative is no longer eligible.
- If it becomes apparent that the relevant person's representative is not acting in the person's best interests
- The relevant person's representative dies.

#### 12.28 INSTRUCTING AN IMCA TO ACT WHEN THERE IS NO RELEVANT PERSON'S REPRESENTATIVE AVAILABLE (Section 39(C))

A person who is being deprived of their liberty will be in a particularly vulnerable position during any gaps in the appointment of a relevant person's representative, since there may be nobody to represent their interests or to apply for a review on their behalf.

In these circumstances, if there is nobody who can support and represent the person (other than a person engaged in providing care and treatment for the relevant person in a professional capacity or for remuneration), the managing authority must notify the supervisory body, who must instruct an IMCA to represent the relevant person until a new representative is appointed.

The role of the IMCA during their period of appointment is essentially the same as that of the relevant person's representative. Once a relevant person's representative is appointed, this role of the IMCA ends.

However, after the representative has been appointed, the IMCA may still apply to the Court of Protection for permission to take the relevant person's case to the Court in connection with the giving of a standard authorisation but, in doing so, the IMCA must take the views of the relevant person's representative on the matter into account.

#### 12.29 INSTRUCTING AN IMCA TO ACT TO SUPPORT THE PERSON OR THEIR REPRESENTATIVE (Section 39(D))

Both a person who is deprived of liberty under a standard authorisation and their representative have the statutory right of access to an IMCA.

It is the responsibility of the supervisory body to advise the person and their representative of the right to an IMCA and to instruct an IMCA if the person or their representative agrees. The role of the IMCA is to explain the authorisation to them: what it means, why it has been granted, why it is considered that the person meets the criteria for authorisation, how long it will last and how to trigger a review or challenge in the Court of Protection.

The IMCA will have the right to make submissions to the supervisory body on the question of whether a qualifying requirement is reviewable or to give information, or make submissions to any assessor carrying out a review assessment.

An IMCA must be instructed if this is requested by the person or their representative. A request may be made more than once during the period of the authorisation.

In addition, if the supervisory body has reason to believe that the review and Court of Protection safeguards might not be used without the support of an IMCA, then they must instruct an IMCA.



## **13 IMCA RIGHTS AND RESPONSIBILITIES**

- 13.1 An IMCA instructed at the initial stage of the deprivation of liberty safeguards process has additional rights and responsibilities compared to an IMCA more generally instructed under the MCA.
- 13.2 IMCAs in this context have the right to:
- give information or make submissions to assessors, which assessors must take into account in carrying out their assessments;
  - receive from the supervisory body copies of any deprivation of liberty assessments that the supervisory body are given;
  - receive a copy of a standard authorisation;
  - be notified by the supervisory body if they are unable to give a standard authorisation because all the deprivation of liberty assessments did not come to a positive conclusion;
  - receive a copy of any urgent authorisation from the managing authority;
  - receive from the supervisory body a copy of a notice declining to extend the duration of an urgent authorisation;
  - receive from the supervisory body a copy of a notice that an urgent authorisation has ceased to be in force, and
  - apply to the Court of Protection for permission to take the relevant person's case to the Court in connection with a matter relating to the giving or refusal of a standard or urgent authorisation (in the same way as any other third party).
- 13.3 An IMCA will need to familiarise themselves with the circumstances of the person to whom the deprivation of liberty safeguards are being applied, and to consider what they may need to tell any of the assessors during the course of the assessment process. They will also need to consider whether they have any concerns about the outcome of the assessment process.
- 13.4 Differences of opinion between an IMCA and an assessor should ideally be resolved while the assessment is still in progress. Where there are significant disagreements between an IMCA and one or more of the assessors that cannot be resolved between them, the supervisory body should be informed before the assessment is finalised.
- 13.5 An IMCA will also need to consider whether they have any concerns about the giving of an urgent authorisation, and whether it would be appropriate to challenge the giving of such an authorisation via the Court of Protection.
- 13.6 Once a relevant person's representative is appointed the role of the IMCA falls away. However, the IMCA may still:
- Apply to the Court of Protection for permission to take the relevant person's case to the Court in connection with the giving of a standard authorisation
  - Be instructed during gaps in the appointment of a relevant person's representative
  - Be instructed to assist the relevant person and their representative either on their request or if a supervisory body believes that appointing an IMCA will help to ensure that the person's rights are protected.
- 13.7 The roles of the Relevant Person's Representative and of the IMCA are not mutually exclusive, and the Relevant Person's Representative is entitled to have an IMCA to provide additional advocacy support as and when needed.

## 14 REVIEWS

- 14.1 In all cases where a person is deprived of their liberty, the managing authority has a duty to monitor the case on an ongoing basis to see if the person's circumstances change – which might mean they no longer need to be deprived of their liberty.
- 14.2 The supervisory body must carry out a review if requested to do so by the person concerned, their representative or the managing authority, and may also carry out a review at any other time. There are no restrictions on when a review can be requested.
- 14.3 In general, the grounds for requesting a review are that:
- The relevant person no longer meets all of the six qualifying requirements.
  - The person is ineligible because they now object to receiving mental health treatment in hospital
  - The reason why the relevant person meets a qualifying requirement is not the reason stated in the authorisation.
  - There has been a change in the relevant person's situation and therefore it would be appropriate to vary the conditions to which the authorisation is subject.
- 14.4 An authorisation only **permits** deprivation of liberty: it does not mean that a person **has to be** deprived of liberty. If a care home or hospital decides that deprivation of liberty is no longer necessary then they must end it immediately, by adjustment of the care regime or whatever other change is appropriate.
- 14.5 When a supervisory body receives a request for a review, it must first decide which, if any, of the qualifying requirements need to be reviewed.
- If the supervisory body concludes that none of the qualifying requirements need to be reviewed, it need take no further action.
  - If one or more of the qualifying requirements appear to be reviewable, the supervisory body must arrange for a separate review assessment to be carried out in relation to each reviewable requirement.
- 14.6 The supervisory body should record the reasons for decisions.
- 14.7 Where the supervisory body decides that the best interests requirement should be reviewed solely because details of the conditions attached to the authorisation need to be changed, and the review request does not include evidence that there is a significant change in the person's case, there is no need for a full reassessment. The supervisory body can simply vary the conditions attached to the authorisation as appropriate.
- 14.8 If the review relates to any of the other requirements, or to a significant change in the person's situation under the best interests requirement, the supervisory body must obtain a new assessment.
- 14.9 If the assessment shows that the requirement is still met, then the supervisory body must consider whether the reason that it is met has changed from the reason originally stated on the authorisation and make any appropriate amendments.  
In addition, if the review relates to the best interests requirement, the supervisory body must consider whether any conditions should be varied in view of the outcome of the assessment.
- 14.10 If any of the criteria are not fulfilled, then the authorisation must be terminated immediately.

14.11 The supervisory body must give written notice of the outcome of a review of the care home or hospital, the relevant person, the representative and the IMCA, if an IMCA is involved.

**14.12 Short-term suspension of authorisation**

There are separate review arrangements in cases in which the eligibility requirement ceases to be met for a short period of time for reasons other than that the person is objecting to being a patient or to some or all of the mental health treatment they are being given. E.g. if the relevant person is detained as a hospital in-patient under the MHA, then the managing authority must notify the supervisory body, who will suspend the authorisation. Then:

- if the person becomes eligible again within 28 days, the managing authority must notify the supervisory body who will remove the suspension
- if no such notice is given, at the expiry of the 28-day period the authorisation will cease to have effect.

14.13 If the patient ceases to meet the eligibility requirement because they begin to object to being in hospital for the purposes of treatment for mental disorder, review procedures should be started immediately.

**14.14 Fluctuating Capacity**

Where a relevant person’s capacity to make decisions about their care fluctuates on a short-term basis, a balance has to be made between:

- a) The need to review and terminate authorisation if capacity returns, and
- b) Spending resources constantly reviewing, terminating, and seeking fresh authorisations.

Each case must be judged on its own merits. Managing authorities must keep all cases under review and a clinical judgment must be made by a suitably qualified person.

If there is consistent evidence of regaining capacity on a longer-term basis. Then deprivation of liberty should be lifted immediately.

Where the regained capacity is likely to be temporary, and a new authorisation required within a short period of time, then the authorisation should be left in place, but kept under review.

**15 CONCERNS THAT A PERSON IS BEING DEPRIVED OF THEIR LIBERTY WITHOUT AUTHORISATION**

15.1 Depriving someone who lacks capacity to consent of their liberty without authorisation is a serious issue. If anyone believes that a person is being deprived of their liberty without authorisation, they should raise this with the relevant authorities as described below.

15.2 If the conclusion is that the person is being deprived of their liberty unlawfully, this will normally result in a change in their care arrangements, or in an application for a deprivation of liberty authorisation being made.

15.3 If a person themselves, any relative, friend or Carer or any other third party (such as a person carrying out an inspection visit or a member of an advocacy organisation) believes that a person is being deprived of liberty without the managing authority having applied for an authorisation, they should draw this to the attention of the managing authority, asking them to apply for an authorisation. Given the seriousness of deprivation of liberty, a managing authority would normally be expected to respond within 24 hours.

- 15.4 If the concerned person has done this, but the managing authority has not applied for an authorisation within a reasonable period, the concerned person has a right to ask the supervisory body to decide whether there is an unauthorised deprivation of liberty.
- 15.5 In such circumstances, the supervisory body must select and appoint a person who would be suitable and eligible to carry out a best interests assessment to investigate whether the person is deprived of liberty.
- 15.6 The exception to this is if the supervisory body believes that:
- the concern they have received is frivolous or vexatious (for example, where the person is very obviously not deprived of their liberty)
  - the question of whether or not there is an unauthorised deprivation of liberty has already been decided, and since that decision, there has been no change of circumstances that would merit the question being decided again.
- 15.7 The supervisory body should record the reasons for their decisions.
- 15.8 The supervisory body must notify the person who raised the concern, the relevant person, the managing authority of the relevant hospital or care home and any appointed IMCA:
- that it has been asked to assess whether or not there is an unauthorised deprivation of liberty
  - whether or not it has decided to commission an assessment, and
  - where relevant, who has been appointed as assessor
- 15.9 Where an assessment of whether an unlawful deprivation of liberty is occurring is necessary, it must be carried out within seven days.
- 15.10 The person nominated to undertake the assessment must consult the managing authority and examine any relevant needs assessments and care plans to consider whether they constitute a deprivation of liberty.
- 15.11 They will also speak to the person who raised the concern about why they believe that the relevant person is being deprived of their liberty and consult, as far as is possible, with the relevant person's family and friends. If there is nobody appropriate to consult among family and friends, they should inform the supervisory body who must arrange for an IMCA to be instructed to support and represent the person.
- 15.12 There are three possible outcomes of an assessment. The assessor may conclude that:
- the person is not being deprived of their liberty
  - the person is being lawfully deprived of their liberty because authorisation exists. (This, though, is an unlikely outcome since the supervisory body should already be aware if any authorisation exists, thus rendering any assessment in response to a third party request unnecessary.)
  - the person is being deprived of their liberty unlawfully.
- 15.13 The supervisory body must notify the third party who made the request, the relevant person, the managing authority of the relevant hospital or care home and any appointed IMCA of the outcome of the assessment.
- 15.14 If the outcome of the investigation is that there is an unauthorised deprivation of liberty then the full assessment process should be completed as if a standard authorisation for deprivation of liberty had been applied for.



- 15.15 If the managing authority considers that the care regime should continue while the assessments are carried out, it will be required to issue an urgent authorisation and to obtain a standard authorisation within seven days.
- 15.16 If the concerned person does not accept the outcome of their request for assessment they can apply to the Court of Protection to hear their case.

## **16 PALLIATIVE CARE [Extract from DoH Letter (Niall Fry) of January 2015]**

- 16.1 For the purpose of this guidance, we consider palliative care to be concerned with the last few weeks of life.
- 16.2 If a person receiving palliative care has the capacity to consent to the arrangements for their care, and does consent, then there is no deprivation of liberty
- 16.3 If the person has capacity to consent to the arrangements for their care at the time of their admission or at a time before losing capacity, and does consent, then this consent is considered to cover the period until death and that hence there is no deprivation of liberty.
- 16.4 An important exception would be if the care package to which the individual consented were to change in a manner that imposed significant extra restrictions or which included care contrary to the previously expressed wishes and preferences of the individual. In such circumstances, the individual's consent is unlikely to cover the changed care and an application for a DoLS authorisation or a Court of Protection order may be required if there is or will be a deprivation of liberty.
- 16.5 Where an individual lacks capacity and there is no valid consent, there will be no deprivation of liberty unless the Supreme Court judgment "acid test" is met:
- Are they "free to leave"? Just because they are physically unable to leave of their own accord does not mean they are not free to leave for the purpose of the test – they may for example be able to leave with family assistance.
  - Are they under "continuous control and supervision"? If the individual is in a private room and checked only every few hours then they may not necessarily be under continuous control and supervision.
- 16.6 A person who lacks capacity and is receiving palliative care is entitled to the same rights under the law as every other citizen. Such individuals can indeed have a care and support package that results in a best interests deprivation of liberty. If there is no valid consent, and the acid test is met, such a deprivation of liberty must be authorised. Managing authorities and local authorities must be alert to this.

## **17 DEATH OF A PERSON WHO IS THE SUBJECT OF DEPRIVATION OF LIBERTY SAFEGUARDS**

- 17.1 The Chief Coroner's present view is that 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 Coroners and Justice Act 2009. [See extract from Chief Coroner's Guidance No. 16A]
- 17.2 When that person dies the death should therefore be treated as with any other death outside the context of state detention.
- 17.3 The need to report will be dependent upon whether the person was subject to a DoLS authorisation at the time that they died.
- a) **If they were subject to a DoLS Authorisation.**



- Mandatory inquests are no longer required and natural deaths need not be reported to the coroner. Where there is concern that the death is unnatural, violent, or the cause unknown the circumstances should be reported to the Coroner's Officer who will refer it to the coroner.
- Where there is concern about care or treatment before death or the medical cause of death is uncertain it should be reported to the Coroner's officer to enable the coroner to investigate thoroughly in the usual way.
- Where concerns have been raised by the family with respect to care or treatment before the death it should be reported to the Coroner's Officer to enable the coroner to investigate thoroughly in the usual way.

b) **If the person had been referred for DoLS assessments but these had not been completed and a DoLS had not yet been authorised.**

- The coroner still requires such cases to be referred to the Coroner's Officer to enable the Coroner to exercise discretion as to the requirements of a further investigation and inquest given issues of detention.

17.4 The local Coroner advises that in the majority of cases it will mean nothing more than a phone call from the Managing Authority to a Coroner's Officer.

17.5 There is no need to contact Police in the case of a death of a person subject to DoLS if the death is not unexpected and there are no suspicious circumstances.

## **18 APPLICATION TO THE COURT OF PROTECTION**

18.1 The relevant person, or someone acting on their behalf, may make an application to the Court of Protection **before** a decision has been reached on an application for authorisation. Such an application to the court might seek a declaration as to whether the relevant person has capacity, or whether an act done or proposed to be done in relation to that person is lawful (this may include deciding if the action is in the best interests of the person).

18.2 Once a standard authorisation has been given, the relevant person or their representative has the right to apply to the Court of Protection to determine any question relating to the following:

- whether the relevant person meets one or more of the qualifying requirements
- the period during which the standard authorisation is to be in force
- the purpose for which the standard authorisation is given
- the conditions subject to which the standard authorisation is given.

18.3 Where an urgent authorisation has been given, the relevant person or any other person acting on his or her behalf has the right to apply to the Court of Protection to determine any question relating to the following matters:

- whether the urgent authorisation should have been given
- the period during which the urgent authorisation is to be in force
- the purpose for which the urgent authorisation has been given.

18.4 Where a standard or urgent authorisation has been given, any other person may also apply to the Court of Protection for permission to take the relevant person's case to the Court to decide whether the authorisation should have been given.



- 18.5 People should not be discouraged from making an application to the Court of Protection if it proves impossible to resolve concerns satisfactorily through other routes in a timely manner.
- 18.6 The following people have an automatic right of access to the Court of Protection and do not have to seek permission from the court to make an application:
- A person who lacks, or is alleged to lack, capacity in relation to a specific decision or action
  - The donor of a Lasting Power of Attorney to whom an application relates, or their donee
  - A deputy who has been appointed by the court to act for the person concerned
  - A person named in an existing court order to which the application relates, and
  - The relevant person's representative
- 18.7 The Court may make an order:
- varying or terminating a standard or urgent authorisation
  - directing the supervisory body (in the case of a standard authorisation) or the managing authority (in the case of an urgent authorisation) to vary or terminate the authorisation

## **19 WHEN A DOLS AUTHORISATION ENDS**

- 19.1 When an authorisation ends, the managing authority cannot lawfully continue to deprive person of their liberty.
- 19.2 If the managing authority considers that a person will still need to be deprived of liberty after the authorisation ends, they need to request a further standard authorisation to begin immediately after the expiry of the existing authorisation.
- 19.3 The planned end date for all DoLS authorisations is recorded with the person's DoLS information on the case management system (SystemOne). Normally this is the date when the DoLS authorisation stated on the Standard Authorisation Granted (Form 5) has expired. However, there may be other circumstances when the DoLS may end early e.g. at a Review or other changes of circumstances.
- 19.4 Additionally, the person's details are retained on a SystemOne 'Waiting List' so the DoLS Team are aware that a new application is expected when the previous one ends. If a new application is not received, then DoLS Admin will make contact with the Managing Authority to remind them that this is due.
- 19.5 If the Managing Authority does not send in a DoLS application and the Supervisory Body is aware that deprivation of liberty continues to take place, then the Supervisory Body may take further action themselves e.g. initiating the DoLS application process or raising a safeguarding concern.
- 19.6 There is no statutory time limit on how far in advance of the expiry of one authorisation the managing authority can apply for a renewal authorisation. It will need to be far enough in advance for the renewal authorisation to be given before the existing authorisation ends, However, it should not be applied for too far in advance as this may prevent an assessor from making an accurate assessment of what the person's circumstances will be at the time the authorisation will come into force.
- 19.7 Once underway, the process for renewing a standard authorisation is the same as that for obtaining an original authorisation, and the same assessment processes must take place.

However, the need to instruct an IMCA will not usually arise because the relevant person should at this stage have a representative appointed.

19.8 When the standard authorisation ends, the supervisory body must inform in writing:

- the relevant person
- the relevant person's representative
- the managing authority, and
- every interested person named by the best interests assessor in their report as somebody they have consulted in carrying out their assessments.

## **20 DOCUMENT REVIEW**

This document will be kept under review pending the outcome of the review of DoLS presently taking place by the Law Commission. The procedure will be due for internal review on [\[DATE\]](#) or earlier if there are any significant changes in regulations or case law.

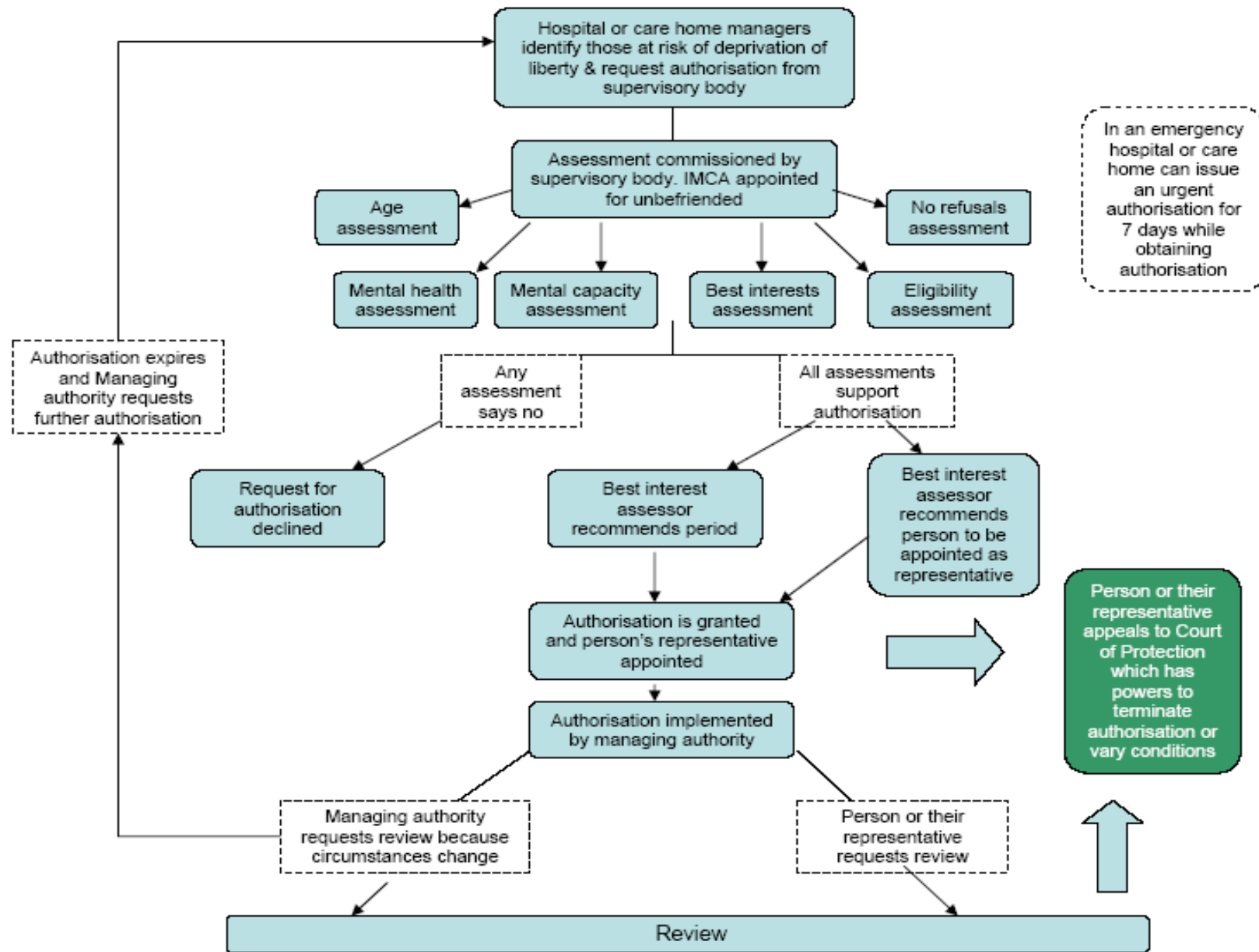
### **APPENDICES**

**A: OVERVIEW OF THE DEPRIVATION OF LIBERTY SAFEGUARDS PROCESS**

**B: ELIGIBILITY GUIDANCE**

**Appendix A**

**OVERVIEW OF THE DEPRIVATION OF LIBERTY SAFEGUARDS PROCESS**



**THE INTERFACE BETWEEN THE MHA 1983 AND THE MCA 2005****Extract from Deprivation of Liberty in the Hospital Setting (39 Essex Chambers)**

The key differences between the approaches under the MHA 1983 and the MCA 2005 can be summarised as follows.

First, the MCA 2005 relates to a person's functioning – i.e. their (in)capacity to make a particular decision – whereas the MHA 1983 relates to a person's status, as someone diagnosed as having a mental disorder within the meaning of the Act and subject to its powers.

Second, the MCA 2005 requires acts done or decisions made under the Act on behalf of persons who lack the requisite capacity to be done or made in their best interests. The MHA 1983, by contrast, contains no equivalent requirement; under its provisions, an individual can (for instance) be detained solely on the basis of the risk that they pose to others.

Third, the MCA 2005 covers all decision-making, whereas the MHA 1983 is, to a very large degree, limited to decisions about care in hospital and medical treatment for mental disorder.

Fourth, the MCA 2005 specifically excludes anyone giving a patient medical treatment for mental disorder, or consenting to a patient being given medical treatment for mental disorder, if the patient is, at the relevant time, already detained and subject to the compulsory treatment provisions of Part 4 MHA 1983.

	<b>Mental Health Act 1983</b>	<b>Mental Capacity Act 2005</b>
<b>WHO</b>	The non-compliant capacitated and non-compliant incapacitated. Inability or unwillingness of the patient who suffers from a mental disorder to consent to the relevant care and treatment.	The compliant incapacitated and the non-compliant incapacitated. Person who lacks capacity to make a relevant decision
<b>PURPOSE</b>	Compulsory care in hospital and medical treatment given to patient for mental disorder.	All decision-making
<b>TRIGGER</b>	“Necessity test”: When it is necessary to protect patient or others from harm that patient receive care and treatment for mental disorder	“Best interests test”: Acts done or decisions made under the MCA on behalf of persons who lack capacity must be done in their best interests.

The MHA Code includes a helpful ‘options grid’ summarising the availability of the MHA and the MCA to authorise deprivation of liberty in a hospital setting. (See below)

	<b>Individual objects to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for mental disorder</b>	<b>Individual does not object to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for a mental disorder</b>
<b>Individual has the capacity to consent to being accommodated in a hospital for care and/or treatment</b>	<u>The non-compliant capacitated</u> Only the MHA is available	<u>The compliant capacitated</u> The MHA is available Information admission might be appropriate Neither DOLS authorisation nor CoP order available
<b>Individual lacks the capacity to consent to being accommodated in a hospital for care/and or treatment</b>	<u>The non-compliant incapacitated</u> Only the MHA is available	<u>The compliant incapacitated</u> The MHA is available DOLs authorisation under the MCA or potentially order of CoP

Note that, even if the person is eligible to be deprived of their liberty by way of a (urgent or standard) authorisation under Schedule A1, it is still necessary for them to meet all the other criteria set down in Schedule A1. In particular, it is necessary for the best interests requirements to be met. Interestingly and importantly, this requirement does not merely encompass the considerations set down in section 4 MCA 2005, but also additional, specific, considerations, namely that:

- (1) it is necessary for the person to be deprived of their liberty in order to prevent harm to them; and
- (2) the deprivation of their liberty is a proportionate response to the likelihood of the person suffering harm, and the seriousness of that harm.

Very careful consideration must therefore be given to whether the deprivation of liberty to which they are (to be) subject is the least restrictive option, a point emphasised by Charles J in *A Local Authority v PB and P*.

It is also vital to remember that the mechanisms provided by Schedule A1 to authorise the deprivation of a person's liberty must not be used to stifle real debates about where their best interests may lie. In such a case, the proper course of action is to seek a decision from the Court of Protection: *Hillingdon London Borough Council v Neary*.