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THE MENTAL CAPACITY ACT

# DEPRIVATION OF LIBERTY SAFEGUARDS

  

## MULTI-AGENCY GUIDANCE AND PROCEDURE



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## **INTRODUCTION**

The Deprivation of Liberty Safeguards (DoLS) were produced in response to the European Court of Human Rights judgement in the Bournemouth case (HL v UK) October 2004. This highlighted that additional safeguards were needed for people who lack capacity and who might be deprived of their liberty.

The Government committed to close this “Bournemouth gap” and amended the Mental Capacity Act 2005 to introduce the Deprivation of Liberty Safeguards (DoLS). The DoLS strengthen the rights of hospital patients and care home residents, as well as ensuring compliance with the European Convention on Human Rights (ECHR).

People who suffer from a mental disorder and who lack the mental capacity to consent to where they are accommodated in order to receive the care or treatment they need, should be cared for in the least restrictive way without depriving them of their liberty.

However in many cases, people may need to be deprived of their liberty in order to receive treatment or care which is necessary in their best interests to protect them from harm. The Deprivation of Liberty Safeguards were introduced to provide a legal process with suitable protection in those circumstances where deprivation of liberty appears to be unavoidable.

## **AIMS**

The aim of the Deprivation of Liberty Safeguards Multi-Agency Guidance is to clearly describe a Shropshire-wide approach to operational practice in relation to the implementation of the DoLS.

The safeguards aim to:

- Ensure that people can be given the care and support they need in the least restrictive environment.
- Prevent arbitrary decisions that deprive people of their liberty.
- Provide safeguards for vulnerable people who lack capacity.
- Provide people with rights of challenge against unlawful detention.

This Guidance sets the strategic framework for the ongoing application of the Deprivation of Liberty Safeguards (DoLS) across Shropshire and Telford and Wrekin.

## DEFINITIONS, ROLES AND RESPONSIBILITIES

*Adult Safeguarding Multi-Agency Policy and Procedure (West Midlands)* – the document that explains how to recognise if an adult with care and support needs may be being abused, how to report concerns and the roles and responsibilities of agencies within this process.<sup>1</sup>

*Authoriser* – the term given to describe a representative of the supervisory body who ultimately signs the standard authorisation.

*Capacity* – the ability of a person to make a decision about a particular situation at the time it needs to be made.

*Care Management* – the process of assessing the needs of individuals, identifying how those care needs should be met, commissioning the care and then the reviewing of that care when funded by a local authority.

*Continuing Healthcare Funding* – a system to establish an assessment to determine eligibility for National Health Service funding of long-term care provided outside hospitals.

*Deprivation of liberty* – this means that a person, who lacks mental capacity to decide where they are accommodated for care and/or treatment, is subject to complete or continuous supervision and control, and is not free to leave the place where they are living. An unauthorised Deprivation is unlawful.

*Health and Social Care Workforce* – for the purposes of this guidance, this is any member of care, nursing or medical staff who is involved in looking after people in a care home or hospital. This also extends to those who assess and arrange care packages for those without capacity to do this for themselves.

The responsibilities of this group are to:

- Prevent an unnecessary Deprivation of Liberty.
- Identify when an Authorisation may be needed (in a Care Home or Hospital) and inform the relevant Managing Authority.
- Identify when a Deprivation of Liberty Order may be needed from the Court of Protection
- Recognise when an unlawful Deprivation is occurring, inform the Supervisory Body and, if appropriate, raise a Safeguarding concern.
- Work in accordance with the Mental Capacity Act and Code of Practice.
- Work in accordance with Deprivation of Liberty Safeguards Code of Practice.

*Independent Mental Capacity Advocate (IMCA)* – An advocate with a specific remit to support and represent people who lack capacity to make specific decisions and who have no-one appropriate to support them.

*Managing Authority* – the person or body with management responsibility for the hospital or registered care home where the Deprivation may occur.

*Nursing and Medical Care* – this is the ongoing care and treatment received by a person with or without capacity from registered nursing and medical practitioners. It

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<sup>1</sup> For the latest version of this policy and other safeguarding issues please visit the Keeping Adults Safe in Shropshire or Telford and Wrekin Safeguarding Adult Board website  
Shropshire Multi-Agency DoLS Guidance and Procedure October 2018  
Datix Ref: 1164-49906

also includes care that is assessed, delivered and/or funded by the National Health Service.

*Relevant Person's Representative* - A Relevant Person's Representative is appointed for every person who has a Standard Authorisation agreed. They are appointed at the time the authorisation is given or as soon as practicable thereafter.

The role of the relevant person's representative, once appointed, is:

- To maintain contact with the relevant person.
- To represent and support the relevant person in all matters relating to the Deprivation of Liberty including, triggering a review, using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection. This is a very important role in ensuring the person is able to exercise their rights.

*Restriction* – an act imposed on a person that is not of such a degree or intensity as to amount to a Deprivation of Liberty.

It is acceptable to restrict a person's liberty but not to deprive them of it. This can be achieved by promoting the person's control over daily living and maximising choice and autonomy. It should also include involving family, friends and carers at every stage and helping the person to maintain contact with family, friends and carers.

*Self-Funder* – a person who has eligible care needs who can afford to purchase this care themselves as they have funds over the Local Authority's capital limit.

*Supervisory Body* – the organisation that has the responsibility to commission assessments when requested to do so, to consider requests for a Deprivation of Liberty and when all assessments are complete agree, to authorise deprivation of liberty. This will be the Local Authority where the person is ordinarily resident.

The responsibilities of the Supervisory Body are to:

- Operate a robust referral and receiving system.
- Provide advice to Managing Authorities.
- Conduct assessments within predetermined time frames.
- Have sufficient Best Interest Assessors ensuring compliance with Conflict Regulations.
- Have sufficient trained Doctors to complete Mental Health assessments.
- Maintain standards and records.
- Record and monitor assessments and authorisations.
- Conduct reviews.
- Review the Independent Mental Capacity Advocate (IMCA) involvement.
- Provide audit and governance.

## **LEGAL CONTEXT AND ETHOS**

Although the Supreme Court decision in *Cheshire West* in 2014 resulted in an “acid test”<sup>2</sup> what constitutes a deprivation of liberty is a matter of judgement in each particular

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<sup>2</sup> [https://www.39essex.com/docs/newsletters/deprivation\\_of\\_liberty\\_after\\_cheshire\\_west\\_-\\_a\\_guide\\_for\\_front-line\\_staff.pdf](https://www.39essex.com/docs/newsletters/deprivation_of_liberty_after_cheshire_west_-_a_guide_for_front-line_staff.pdf)

case. It is important to note that the distinction between deprivation of and restriction of liberty is one of degree or intensity and not one of nature or substance. This means it is how often something is done and to what extent, rather than the thing itself, that determines whether it may be a deprivation rather than a restriction.

It will be the factors in the specific situation of the person concerned which provide the 'degree' or 'intensity' that result in a deprivation of liberty. In practice, this can relate to:

- The type of care being provided.
- How long the situation lasts.
- Its effects on the person.
- The way in which the particular situation came about.

The "acid test" of a deprivation of liberty is that if the following criteria is met then the person is deprived of liberty:

"The person is not free to leave and is subject to both complete or continuous supervision and control."

Other factors are identified in Deprivation of Liberty Code of Practice; these must now be treated with caution and referred to in the light of the acid test.

[http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_085476](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476)<sup>3</sup>

The Safeguards provide a framework for approving the deprivation of liberty for people over the age of 18 who lack the capacity to consent to being accommodated in a Care Home or Hospital for the purpose of treatment or care, which can only be provided in circumstances that amount to a deprivation of liberty, but which is in their best interests.

Deprivation of liberty, without legal authorisation, is unlawful in any setting but the Safeguards described only apply to hospitals and care homes.

Deprivation of liberty in a community setting such as Supported Living, Shared Lives schemes, domestic homes will need to be authorised by the Court of Protection. These applications will be decided by a Judge and for routine cases they will be decided on the papers alone without a full hearing. **It is important to note that this route applies from the age of 16.** The form to proceed with this can be found here

<https://www.gov.uk/government/publications/form-copd011-application-to-authorise-a-deprivation-of-liberty-sections-4a3-and-162a-of-the-mental-capacity-act-2005>

Helpful information for families and carers can be found here

<https://www.adass.org.uk/media/5895/quick-guide-to-deprivation-of-liberty-orders.pdf>

## RELATIONSHIP TO THE MENTAL CAPACITY ACT

The Mental Capacity Act 2005 (MCA) defines capacity. It provides the legal framework for assessing capacity and making best interests decisions for individuals (aged 16 and over) who lack the mental capacity to make particular decisions for themselves. It establishes the legal and ethical framework to provide day to day care and treatment

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<sup>3</sup> Please note the all the websites given in this policy were correct in October 2018 please ensure you are using the latest information when undertaking such searches

for a person who lacks capacity where it is in their best interests. Although it allows proportionate restraint, it does not allow deprivation of liberty.

The deprivation of liberty safeguards were inserted into the Mental Capacity Act 2005 via the Mental Health Act 2007.

The safeguards are designed to prevent unlawful deprivations of liberty and to provide safeguards for those whose liberty is deprived in order to prevent them from coming to significant harm and to ensure all decisions made on their behalf are in their best interests.

The DoLS build on and incorporate the principles of the MCA in particular the five guiding principles

- An assumption of capacity.
- Support to make decisions.
- The right to make eccentric or unwise decisions.
- To act in the persons best interests where they lack capacity.
- To identify the least restrictive option.

The ethos of this guidance is to encourage staff to provide care or treatment in the least restrictive way in order to avoid deprivations of liberty. If a deprivation cannot be avoided it should be for no longer than is necessary.

An individual's right to make decisions for themselves must be balanced with their right to be protected from harm if they lack capacity to make decisions to protect themselves.

## **RELATIONSHIP TO THE MENTAL HEALTH ACT 2007 (MHA)**

The relationship between the MHA and the MCA/DoLS is a complex one. There are some very clear situations where only one Act can be used. There are other situations where the professional needs to consider both Acts.

The DoLS eligibility assessor must consider whether the person can be deprived of liberty by the DoLS or whether they come within the scope of the MHA. They must also consider whether the main issue is treatment of a mental illness and whether this is treatment the person would object to. In some cases, they must decide which is the less restrictive of the options.

Where the person is eligible and the MHA does not apply, DoLS provides another option for a compulsory placement in a care home or a hospital when all the criteria is met.

This interaction is a complex area and advice should be sought from the appropriate DoLS Team, in the first instance.

## **RELATIONSHIP TO SAFEGUARDING AND THE WEST MIDLANDS MULTI-AGENCY POLICY AND PROCEDURE**

The issuing of an appropriate Authorisation is in itself the protection of an adult with care and support needs from a form of abuse. The process of agreeing an Authorisation puts the person at the centre of the process, has a system for review

clearly laid out and the appointment a Relevant Person's Representative, or an IMCA when necessary, helps keep regular contact with the person.

Adults without capacity, who are deprived of their liberty inappropriately, for example without the use of the Mental Health Act 1983 (including the 2007 amendments), the DoLS or an order of the Court of Protection, are being deprived unlawfully. This is usually classed as an example of physical abuse. It could however, be classed as neglect or discriminatory abuse and a Safeguarding concern should be raised.

When a deprivation is occurring and a request for an Authorisation has been made, but the Authorisation is refused on best interest grounds, a Safeguarding concern may be needed in order to ensure the person does not continue to be unlawfully detained.

When a third party identifies a potentially unlawful deprivation of liberty, the Managing Authority should be informed using DOLS Letter 1 which should also be copied to the DOLS Team to ensure the appropriate action has been taken to protect the person.

During the course of a best interest assessment a restriction may be identified which potentially amounts to abuse, as it would not be recommended by the assessor as compatible with the principles of the MCA. If the restriction can cease immediately and the level of harm to the individual is low, with no potential implications for other service users, a referral may not be needed. It will be the best interests assessor's judgement as to whether this becomes a Safeguarding concern.

If there is any concern that the restriction may continue to be used unlawfully then an adult safeguarding concern must be raised to monitor the situation.

## **RELATIONSHIP TO CARE MANAGEMENT, SELF-FUNDERS, CONTINUING HEALTH CARE, NURSING AND MEDICAL CARE**

The DoLS process begins with the Managing Authority (the residential care establishment or hospital) were applicable working with the practitioners responsible for arranging the placement. It is anticipated that staff working in either the relevant hospital or care home will identify when a deprivation of liberty is occurring or will need to happen in order to admit a resident or patient.

The Managing Authority then has a responsibility to request a Standard Authorisation and issue an Urgent Authorisation if it is appropriate to do so. If a health or social care professional identifies that a DoLS Authorisation is likely to be needed they should alert the Managing Authority (the Local Authority were that person was ordinarily resident prior to the placement taking place). This could be when carrying out an assessment or a review or devising a care or treatment plan.

Care managers and nurses involved with residential placements must be alert to the potential need for a DoLS authorisation at the earliest opportunity in order to apply for a Standard Authorisation ahead of the placement where possible.

Alternatively, a social care or healthcare professional may discover an unauthorised deprivation of liberty during the course of their work. They should, in the first instance, mention this to the Managing Authority (who has 24 hours in which to respond) by issuing DoLS Letter 1 and send a copy to the appropriate DoLS Team who can ensure

the procedure is followed. If the Managing Authority does not apply for an Authorisation within a reasonable period then the staff member can apply directly to the Supervisory body by issuing DoLS Letter 2.

Any persistent failure, by a Managing Authority, to apply for DoLS Authorisations will be communicated to Contracts Officers within the appropriate Council, as it is a requirement of care homes' contracts that they adhere to this legislation. The Care Quality Commission will also be notified.

Where possible, requests for Standard Authorisations should identify whether the person has involvement with a care or health professional.

In any situation where the person has ongoing care and support needs it will be helpful if the relevant professional can monitor any conditions set as part of their review function. Conditions are mandatory on the managing authority and any failure or inability to comply must be notified to the appropriate DoLS Team. If any issues have been highlighted as recommendations for a care/health professional they must take immediate action to address these.

The following table explains the links between the DoLS Authorisation process, Adult Safeguarding and the sources of funding for care and care providers.

|   | <b>Authorisation Issued</b>  | <b>Authorisation refused and deprivation occurring</b>                       | <b>Authorisation Refused as grounds are not met and no deprivation</b>                                      |
|---|--|--|---|
| <b>Local Authority Funded</b>             | Information shared with those specified in the Schedule <sup>4</sup> and others if deemed appropriate for care planning. | Safeguarding concern to be made by BIA via appropriate route if appropriate. | Information shared with those specified in the Schedule and others as deemed appropriate for care planning. |
| <b>Self Funded care (care homes only)</b> | Information shared with those specified in the Schedule.   | Safeguarding concern to be made by BIA via appropriate route if appropriate. | Information shared with those specified in the Schedule.  |
| <b>Continuing Health Care Funded</b>      | Information shared with those specified in the Schedule appropriate for care   | Safeguarding concern to be made by BIA via appropriate route if              | Information shared with those specified in the Schedule and   |

<sup>4</sup> This relates to Schedule A1 of the Mental Capacity Act.  
<https://www.legislation.gov.uk/ukpga/2005/9/schedule/A1>

|                           |   |  |   |
|---------------------------|---|--|---|
|                           | planning.   | appropriate.   | others as deemed appropriate for care planning.   |
| <b>Hospital Admission</b> | Information shared with those specified in the Schedule and others as deemed appropriate for care planning. | Safeguarding concern to be made by BIA via appropriate route if appropriate. | Information shared with those specified in the Schedule and others as deemed appropriate for care planning. |

## PROCEDURE FOR THE MANAGING AUTHORITY

### *Preventing a deprivation*

When admitting any person lacking capacity to consent to admission to a care home or hospital, every effort should be made to avoid depriving them of their liberty during their stay. Staff should consider the application of the acid test and always consider the MCA and particularly less restrictive options.

### *Identifying a deprivation*

For cases where it is not possible to provide care and treatment in a less restrictive way, an application can be made in advance to deprive someone without capacity of their liberty during their stay.

The appropriate member of staff within the Managing Authority must identify whether the situation will require a Standard Authorisation to be issued.

They must then decide whether the situation is so urgent it cannot wait for 21 days. If this is the case, the person acting on behalf of the Managing Authority must issue an Urgent Authorisation as soon as the person becomes deprived of their liberty.

This will not be necessary if the situation is very short term or an emergency. For example:

- Where someone has developed a lack of mental capacity due to a physical illness and once that physical illness is treated the mental disorder will resolve.
- Where a person is in Accident and Emergency or in a care home and it is anticipated that within a few hours or a few days the person will no longer be in that environment.
- Where there is no expectation that a standard authorisation will be needed.

### *Making an application*

Forms and Guidance produced by ADASS and the Department of Health (now DHSC) are available on the following website

<https://www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance>

Completed forms must be sent immediately to the appropriate Deprivation of Liberty Safeguards Team

In Shropshire there is an online web based system for all forms to be submitted. This can be found here:

<https://www.shropshire.gov.uk/disability-information/mental-health/deprivation-of-liberty-safeguards/>

In Telford and Wrekin forms should be sent by email to [dols@telford.gov.uk](mailto:dols@telford.gov.uk)

| Supervisory Body   | Telephone No. | Email address  |
|--------------------|---------------|--|
| Shropshire Council | 01743 255850  | <a href="mailto:dols@shropshire.gov.uk">dols@shropshire.gov.uk</a> |

|                          |              |                     |
|--------------------------|--------------|---------------------|
| Telford & Wrekin Council | 01952 383054 | dols@telford.gov.uk |
|--------------------------|--------------|---------------------|

The Managing Authority must make sure it's staff have copies of the forms they will have to complete and are aware of how these are submitted to the relevant supervisory body.

The appropriate person in the Managing Authority must also be notified that an Authorisation has been issued or requested. They will be responsible for collating information related to the Deprivation of Liberty Safeguards and notifying the Care Quality Commission using the form available on the CQC website.

As soon as an Urgent Authorisation is completed or an Application for a Standard Authorisation is made the family or carers of the person in question must be informed by the hospital or care home.

*Once an authorisation decision is issued*

The Managing Authority will receive a formal document for either a Standard Authorisation Granted or a Standard Authorisation Not Granted.

If the authorisation is not granted on best interest grounds, but a deprivation is occurring, a Safeguarding concern may have been raised to oversee the changes the Managing Authority need to put in place.

If the Authorisation is granted it may be given subject to conditions. It is essential that the Managing Authority reads the conditions immediately on receipt of the paperwork.

The Managing Authority **must** comply with all conditions set.

If they are unable to comply with any conditions set they should contact the appropriate DoLS team without delay as a review of the Authorisation may be needed.

The managing authority should at all times seek to implement the least restrictive care plan possible.

A Safeguarding concern will be considered by the DoLS Lead or Team Manager for an ongoing failure to adhere to conditions set. This will be decided on a case by case basis.

*Reviews of Standard Authorisations*

The Managing Authority must request a review in any of the three following circumstances

- The person no longer meets one of the qualifying requirements or
- The reason why the person meets the qualifying requirements is different than it states on the standard authorisation or
- There has been a change in the persons case which means that conditions on the authorisation need to be varied

*Discharge planning, change of placement, or return home of a resident or patient where there is a DoLS authorisation in force*

A Standard Authorisation means the person is a detained patient or resident and that it is in their best interests to be detained in the hospital or care home. If this changes it will generate a review. If the person continues to lack capacity and there are plans for a move of any kind the following must happen before discharge:

- A best interests decision needs to be made as to where it is now in their best interests to live or be treated
- If they will be a detained resident/patient the new placement need to apply for a new authorisation prior to the move or as soon as possible thereafter.
- If they will not need to be detained in the new placement a review of the existing authorisation needs to be requested prior to the move or as soon as possible thereafter.

### *Deciding which Supervisory Body to contact*

The supervisory body is the local authority for the area in which the person ordinarily resides. If the person is of no fixed abode, then the supervisory body is the local authority for the area in which the care home is situated.

This means that a care home/ hospital's own local authority will not necessarily be the supervisory body. As a general rule, the Supervisory Body will be the local authority which is funding the care. When care is self-funded or funded by CHC or FNC, the rules of ordinary residence apply.

### *Death of a resident or patient subject to a DoLS authorisation*

There is no longer a requirement to notify the Coroner of the death of a person where there is a DoLS Authorisation in place. The death of a person whilst waiting for an authorisation is subject to local Coroners decisions. In Shropshire, Telford and Wrekin the Coroner has indicated they do not need to be informed but care homes may make their own decisions on what they feel is safest practice. This relates solely to the Deprivation of Liberty Safeguards process if there are any other circumstances surrounding the death that require notification to the Police or Coroner then this should still take place.

*Cross border issues* - where treatment and residence may cross England and Wales, the rules are more complicated and in these circumstances the Managing Authority should seek advice from the appropriate DoLS Team. However, Supervisory Bodies should not delay any application whilst the issue of responsibility is determined. Where there is no immediate agreement to the contrary, the application should be made to the authority where the hospital is located.

Where there is any doubt as to who the Supervisory Body is, the application should be sent to the DoLS Team where the care home is located and they will ensure that agreement is reached on the correct Supervisory Body.

Establishing ordinary residence in relation to Deprivation of Liberty Safeguards can be found in pages 64-68 of the Guidance on:

<https://www.gov.uk/government/collections/ordinary-residence-pages>

## PROCEDURE FOR THE SUPERVISORY BODY

The Supervisory Body is responsible for receiving and processing requests relating to deprivations of liberty.

On receipt of the Standard Authorisation requests, the DoLS Team will:

Firstly determine that they are the appropriate Supervisory Body to process the application. If not it should be passed to the correct Supervisory Body without delay.

The timescale of the request must be noted on receipt in order to achieve the deadline for signing the authorisation.

Checks will be made as to whether equivalent assessments can be used in any instance.

A best interest assessor will be appointed who has appropriate experience for the relevant service user group.

A Mental Health assessor will be appointed appropriate to the service user group. Where there is no one named to consult with on behalf of the service user an IMCA will be appointed.

Once all the assessments are completed the necessary paperwork will be produced and will be forwarded to an authoriser representing the supervisory body. The authoriser may need to speak with the Best Interests Assessor or may sometimes require further evidence. They will scrutinise all assessments and sign the authorisation. They will also confirm that the representative is eligible and appropriate and will confirm their selection.

The team will work in accordance with DoLS Code of Practice.

The Supervisory Body must make sure that relevant staff have copies of the forms and/or letters they have to complete.

### *Reviews of standard authorisations*

The Supervisory body may carry out a review at any time and must do so if they are asked to by

- The person or
- The persons representative or
- The Managing Authority

And, there are grounds for believing that

- The person no longer meets one of the qualifying requirements or
- The reason why the person meets the qualifying requirements is different than it states on the standard authorisation or
- There has been a change in the persons case which means that conditions on the authorisation need to be varied

## **PROCEDURE FOR DECISION MAKING**

Some cases will need to be discussed by a more than one member of the supervisory body because of their complexity. This will vary from case to case but the following factors would usually indicate more is needed

- Dispute or disagreement about the place of residence
- A request for the person to return home by a family member or carer which is being denied
- An authorisation which is given pending an application to the Court of Protection
- An authorisation which involves interference with the persons rights under Article 5 or 8 of the Human Rights Act

The authoriser will consider requests for Authorisations and may also consider reviews. Where all assessments agree, the authoriser must issue an Authorisation. It is for the Authoriser to decide on the length of the Authorisation but this cannot be longer than recommended by the BIA.

The authoriser must however scrutinise assessments and if they have concern that any assessment is not of an acceptable standard they must not routinely sign it off. It is expected that authorisers will discuss any concerns about assessments or request clarity if it is lacking, with the BIA and if concerns persist then contact DoLS lead

Any ongoing or repeated concerns about the quality or content of assessments presented to the authoriser must be reported to the DoLS Lead or Team Manager. The authoriser can also attach conditions to the Authorisation. The authoriser may require the BIA be available to help inform their decision making.

The Authoriser must always be mindful of the type of decisions which should more appropriately be made by the Court of Protection.

All authorisers must attend annual update training.

## **COMPLETION OF FORMS**

All supervisory body decisions will be fully recorded on the appropriate forms. The following forms are always completed by authorisers on behalf of the supervisory body

- Standard Authorisation Granted
- Standard Authorisation Not Granted

Other supervisory body forms are completed by the person delegated to do so by Shropshire and Telford and Wrekin Councils.

## **PROCEDURE FOR APPLICATIONS TO CHALLENGE ISSUES IN THE COURT OF PROTECTION**

Before considering an application to the Court of Protection, the procedure for settling disputes as described in the Multi-Agency Mental Capacity Act Guidance should be followed.

What follows is a summary of the procedure that should be followed as stated in the DoLS Code of Practice.

The person or their representative can appeal to the Court of Protection once a Standard authorisation is given on any of the following matters:

- Whether the qualifying requirements are met.
- The period.
- The purpose it was given for.
- The conditions of the authorisation.

Similarly they can appeal once an **Urgent** authorisation is given on any of the following matters

- Whether it should have been given.
- The period of it.
- The purpose it was given for.

Concerns should be resolved through the complaints procedure where possible.

The following people have an automatic right to apply and do not need to be granted permission first

- A person who lacks capacity.
- The donor or donee of a Lasting Power of Attorney.
- A court appointed Deputy.
- A person already named in a court order.
- The relevant person's representative.

The relevant person or someone acting for them can apply to the Court of Protection even before an Authorisation is given, perhaps to decide on their capacity in this matter. It is up to the Court whether to consider this request in advance.

There is an expectation that disagreements or objections should be resolved locally in the first instance rather than via the Court of Protection. However where the person, their Representative or IMCA disagrees with a decision in relation to a DoLS authorisation or expresses any kind of objection in relation to the deprivation of liberty this matter should be taken to the Court of Protection. The Supervisory Body remains accountable for any dispute, complaint or litigation that may arise in relation to the Deprivation of Liberty Safeguards.

All forms relating to applications to the Court of Protection, general information about the Court and details of fees can be downloaded from

[http://www.direct.gov.uk/en/Governmentcitizensandrights/Mentalcapacityandthelaw/Makingdecisionsforsomeoneelse/DG\\_176235](http://www.direct.gov.uk/en/Governmentcitizensandrights/Mentalcapacityandthelaw/Makingdecisionsforsomeoneelse/DG_176235)

The Court of Protection forms will be COPDLA, COPDLB, COPDLD and COPDLE.

Practitioners should be aware of the number of cases reported from the Court of Protection and the impact of these on individual practice, particularly in relation to unacceptable delays in applying to the Court.

Certain decisions are of such complexity that they should be made by the Court of Protection rather than seeking to use the DoLS process.

Welfare decisions which are complex should also be made by the Court of Protection and the MCA Code of Practice should be consulted in the first instance for advice and guidance.

A summary of all recent cases and advice on what amounts to a deprivation of liberty can be found here -<https://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/>

## **APPLICATIONS TO THE COURT OF PROTECTION TO AUTHORISE DEPRIVATION OF LIBERTY IN COMMUNITY SETTINGS**

As mentioned before, depriving someone of liberty is unlawful in any setting unless it has been probably authorised. DoLS authorisations only apply in Care Homes and Hospitals settings.

A deprivation of liberty occurring in any other setting such as a residential college, supported living or Shared Lives schemes will need to be authorised by the Court of Protection. Similarly anyone aged 16 and above in any setting who may be deprived of liberty will need to have this authorised by the Court of Protection.

The responsibility to take these matters to Court lies with whoever is funding the care/treatment, which will be either the Local Authority or the Clinical Commissioning Group. If the person is self-funding then the Local Authority should be made aware of the situation and will assess whether this needs to go to Court. The process will be carried out by assessment and will follow similar lines to the DoLS except the final decision is made by a judge. For straightforward, none contested cases this will be decided on the papers and will not need a hearing.

[http://www.direct.gov.uk/en/Governmentcitizensandrights/Mentalcapacityandthelaw/Makingdecisionsforsomeoneelse/DG\\_176235](http://www.direct.gov.uk/en/Governmentcitizensandrights/Mentalcapacityandthelaw/Makingdecisionsforsomeoneelse/DG_176235)

The Court of Protection form will be COPDOL11

## **ARRANGEMENTS FOR AUDIT AND GOVERNANCE**

Every organisation that endorses this guidance has a responsibility to ensure it is disseminated widely and that the principles are adhered to.

Each Managing Authority organisation will ensure its staff understand the links between:

- The Safeguarding Adult Multi-Agency Policy and Procedure for the West Midlands and
- The Multi-Agency Mental Capacity Act Guidance.

Each Managing Authority will establish a central system for recording the number of Standard Authorisations requested and the number of Urgent Authorisations issued.

The Managing Authority must also comply with all other reporting requirements upon them as stated in the DoLS Code of Practice and as described in this guidance in relation to CQC.

The Supervisory Body will keep a record of all relevant information relating to Deprivation of Liberty Safeguards requests. They will also be responsible for the appropriate completion and submission of statutory annual returns, as facilitated by the NHS Digital. The Care Quality Commission (CQC) will use this data collection to inform the evidence base for monitoring the operation of MCA DoLS and to report on activity as requested by the Secretary of State.

Both The Managing Authority and the Supervisory Body are responsible for identifying staff to send on the appropriate DoLS training sessions. A breakdown of staff attending training by organisation may be submitted in an annual report to the Safeguarding Adults Boards for both Shropshire and Telford and Wrekin.

Commissioning and contracting processes include an expectation of compliance with the Mental Capacity Act, including the Deprivation of Liberty Safeguards.

Audits of practice in relation to the safeguards will be conducted annually. These will focus on different elements of the process and will be carried out with the support of the MCA/DoLS Operational Group and/or the Safeguarding Adults Boards.

This document will be reviewed regularly or when prompted by legislative changes and will be amended based on practice and case examples. The evaluation of this document will aim to:

- Ensure the quality and accuracy of the information contained within it.
- Ensure the content remains current and valid in light of developing knowledge and major shifts in national or local developments and case law.
- Evaluate the extent to which the intended outcomes stated are being met.

## **TRAINING REQUIREMENTS**

There are a variety of training courses available to support people working in Shropshire. For the most up to date information about training courses, contact:

Shropshire Joint Training Team on 01743 254731. Telford and Wrekin Council have their own arrangements.

### *Best Interest Assessors (BIA)*

A BIA must be either a:

- First Level Nurse with a minimum of two years post qualifying experience or
- Chartered Psychologist with a minimum of two years post qualifying experience or
- Occupational Therapist with a minimum of two years post qualifying experience or
- Social Worker with a minimum of two years post qualifying experience.

In order to qualify, staff must successfully complete a Best Interest Assessor Course.

Additionally in the West Midlands region for ongoing approval every Best Interest Assessor must each year provide evidence of:

1. A minimum of 18 hours training per 12 month period. This must include one full day training event and the remainder can include
  - Group supervision sessions
  - Short courses
  - Research
  - Professional supervision
  - BIA forums (local arrangements may exist about attending a specific number of these)
2. Each BIA should demonstrate their learning in practice, from training events and case law by presenting and reflecting on one piece of work in the 12 month period. This can be orally, in written format, discussion at forum meetings or as a PowerPoint presentation.
3. Each BIA must have completed at least one assessment in the 12 month period.
4. On an annual basis the 18 hours training should include:
  - a. A recap of the DoLS scheme
  - b. Significant Case law developments
  - c. Local case studies
  - d. National case studies
  - e. Practice issues

It is also expected that BIA's:

Attend one event locally, regionally or nationally which involves MH Assessors in order to benefit from and contribute to shared learning.

Attend Adult Safeguarding Training at least every 3 years [Shropshire].

Make use of the Safeguarding Capability Framework tool [Telford and Wrekin]

### *Mental Health Assessors*

These assessors must be Section 12 approved and also have successfully completed a course developed by the Royal College of Psychiatrists.

They must also attend update training each year approved by the Regional Health Board to remain registered with the DoLS team.

*Authorisers* In Shropshire, those members of the supervisory body identified as Authorisers must initially attend Mental Capacity Awareness and DoLS training, and they must attend annual update training for authorisers.

Authorisers in Telford & Wrekin are expected to attend an annual update and a number of BIA Forums and Authorisers Meetings throughout the year

Deprivation of Liberty Letter 1

**Letter to managing authority concerning unauthorised deprivation of liberty**

Sender's address

Contact telephone number

Date

Name and address of managing authority

Dear Sir/Madam

Re [name of person/resident]

I am writing to you about the above-named person, who is accommodated in your hospital/care home [delete as applicable].

I am the person's [state relationship or interest in the matter, e.g. 'child', 'friend', 'representative', etc].

**It appears to me that this person lacks capacity to consent to the arrangements made for their care or treatment and is subject to an unauthorised deprivation of liberty. I am therefore writing, in accordance with the provisions of the Mental Capacity Act 2005, to ask you to give an urgent deprivation of liberty authorisation and to request a standard authorisation from the supervisory body.**

My reasons for believing that this person is subject to an unauthorised deprivation of liberty are that .... [briefly state reasons]

As I am sure you know, if you do not request a standard authorisation within a reasonable period, I may ask the supervisory body to decide whether or not there is an unauthorised deprivation of liberty.

Thank you for your consideration of this matter.

Yours faithfully

Signature

Name of sender in block capitals

**Notes**

**The use of this letter is not mandatory. However, any oral or written request should include the information in bold in the above letter.**

Deprivation of Liberty Letter 2

**Letter to supervisory body concerning unauthorised deprivation of liberty**

Sender's address

Contact telephone number

Date

Name and address of supervisory body

Dear Sir/Madam

Re [name of person/resident]

I am writing to you about the above-named person who is accommodated in [Name and address of hospital or care home].

I am the person's [state relationship or interest in the matter, e.g. 'child', 'friend', 'representative', etc]

**On [enter date], I wrote to/spoke with the managing authority of the [name of hospital or care home]. I informed them that it appeared to me that this person lacked capacity to consent to the arrangements made for their care or treatment and was subject to an unauthorised deprivation of liberty. I asked them to give an urgent deprivation of liberty authorisation and to request a standard authorisation, in accordance with the provisions of the Mental Capacity Act 2005.**

My reasons for believing that this person is subject to an unauthorised deprivation of liberty are that .... [briefly state reasons]

**I understand that the managing authority has not requested a standard authorisation.**

**I am therefore writing to make a formal request that you now decide whether or not this person is subject to an unauthorised deprivation of liberty.**

Thank you for your consideration of this matter.

Yours faithfully

Signature

Name of sender in block capitals

**Notes**

**The use of this letter is not mandatory. However, any oral or written request should include the information in bold in the above letter.**