

Deprivation of Liberty Safeguards Policy

Version number :	1.4
Consultation Groups	Mental Health Law Monitoring Group
Approved by (Sponsor Group)	Mental Health Law Monitoring Group
Ratified by:	Quality Committee
Date ratified:	23 rd June 2021
Name of originator/author:	Johanna Turner – Lead Nurse in Mental Health Law
Executive Director lead :	Paul Gilluley – Chief Medical Officer
Implementation Date :	June 2021
Last Review Date	June 2021
Next Review date:	June 2024

Services	Applicable
Trustwide	Yes
Mental Health and LD	
Community Health Services	

Version Control Summary

Version	Date	Author	Status	Comment
1.1	20th January 2016	Johanna Turner	Final	Updated following case-law and update to MHA Code of Practice
1.2	7 June 2017	Johanna Turner	Final	Amended following change in coroner reporting requirements.
1.3	8 January 2018	Johanna Turner	Final	Removed references to DoLS email address and DoLS team and replaced with current administrative arrangements Emphasised CNS role within the DoL process
1.4	16 June 2021	Johanna Turner	Final	Change of Job title, addition of DoLS team email and clarity of dols team role in process

Contents

Paragraph		Page No.
i.	Glossary	4-6
ii.	Flow Diagram – How to request a safeguard authorisation	7
1.	Introduction	8
2.	General Guiding Principles	9-10
3.	What are the Deprivation of Liberty Safeguards	10
4.	Scope & Exclusions	10-11
5.	Legislation and Guidance	11
6.	When can someone be deprived of their liberty?	11
7.	Identifying Deprivation of Liberty	12
8.	How is an Authorisation Given?	12-13
9.	Requesting Different Types of Authorisations	13
9.1	Urgent Authorisation	13-14
9.2	Standard Authorisation	15
10.	Types of Assessments	15-16
11.	Where to send the Applications	16-19
12.	Assessments where criteria is not met for authorisation	19

13.	Assessments where criteria is met for authorisation	19-20
14.	Administration	20-21
15.	Review Process	21-22
16.	Role of Person's Representative	22
17.	Deprivation outside of safeguard process	22-23
18	Death whilst under DoLS	24
19.	Deciding between the Mental Health Act 1983 and DoLS	24
20.	Monitoring	25

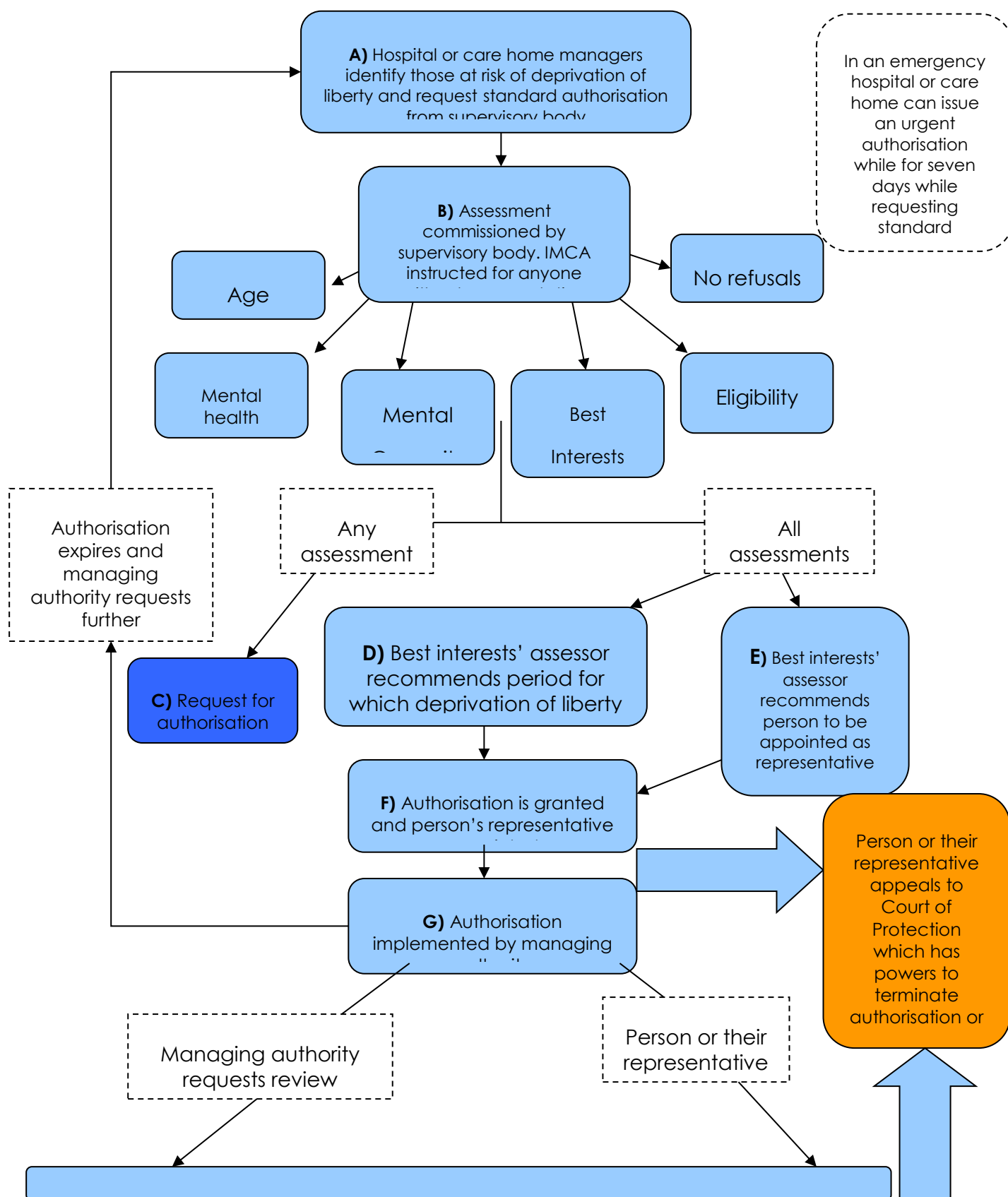
Glossary

<u>Term</u>	<u>Definition</u>
Age Assessment	An assessment, for the purpose of the deprivation of liberty safeguards, of whether the relevant person has reached 18 years of age.
Best Interests Assessment	An assessment, for the purpose of the deprivation of liberty safeguards, of whether deprivation of liberty is in a detained person's best interests, is necessary to prevent harm to the person and is a proportionate response to the likelihood and seriousness of that harm.
Capacity	Short for mental capacity. The ability to make a decision about a particular matter at the time the decision needs to be made. A legal definition is contained in section 2 of the Mental Capacity Act 2005.
Consent	Agreeing to a course of action – specifically in this document, to a care plan or treatment regime. For consent to be legally valid, the person giving it must have the capacity to make the decision, have been given sufficient information to assist them to make the decision, and not have been under any duress or inappropriate pressure.
Deprivation of Liberty	Deprivation of liberty is a term used in the European Convention on Human Rights about circumstances when a person's freedom is taken away. Its meaning in practice is defined through case law. The supreme court have defined a deprivation of liberty as a person not being able to leave a premises and they are under continuous supervision and control. If they lack capacity to consent to this, then the deprivation must be legally authorised.
Deprivation of Liberty Safeguards	The framework of safeguards under the Mental Capacity Act 2005 for people who need to be deprived of their liberty in a hospital or care home in their best interests for care or treatment and who lack the capacity to consent to the arrangements made for their care or treatment.
Deprivation of Liberty Safeguards Assessment	Any one of the six assessments that need to be undertaken as part of the standard deprivation of liberty authorisation process. Each of the assessments are organised by the supervisory body (Local Authority)
Deputy	Someone appointed by the Court of Protection with ongoing legal authority, as prescribed by the Court, to make decisions on behalf of a person who lacks capacity to make particular decisions.
Donee	Someone appointed under a Lasting Power of Attorney who has the legal right to make decisions within the scope of their

	authority on behalf of the person (the donor) who made the Lasting Power of Attorney.
Eligibility Assessment	An assessment, for the purpose of the deprivation of liberty safeguards, of whether or not a person is rendered ineligible for a standard deprivation of liberty authorisation because the authorisation would conflict with requirements that are, or could be, placed on the person under the Mental Health Act.
Independent Mental Capacity Advocate (IMCA)	Someone who provides support and representation for a person who lacks capacity to make specific decisions, where the person has no one else to support them. The IMCA service was established by the Mental Capacity Act 2005 and is not the same as an ordinary advocacy service.
Lasting Power of Attorney	A Power of Attorney created under the Mental Capacity Act 2005 appointing an attorney (donee), or attorneys, to make decisions about the donor's personal welfare, including health care, and/or deal with the donor's property and affairs.
LA	Local Authority
Managing Authority	The person or body with management responsibility for the hospital or care home in which a person is, or may become, deprived of their liberty.
Maximum Authorisation Period	The maximum period for which a supervisory body may give a standard deprivation of liberty authorisation, which must not exceed the period recommended by the best interests assessor, and which cannot be for more than 12 months.
Mental Capacity Act 2005	Legislation that governs decision-making for people who lack capacity to make decisions for themselves or who have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about this.
Mental Capacity Assessment	An assessment, for the purpose of the deprivation of liberty safeguards, of whether a person lacks capacity in relation to the question of whether or not they should be accommodated in the relevant hospital or care home for the purpose of being given care or treatment.
Mental Disorder	Any disorder or disability of the mind, apart from dependence on alcohol or drugs. This includes all learning disabilities.
Mental Health Assessment	An assessment, for the purpose of the deprivation of liberty safeguards, of whether a person has a mental disorder.
No Refusals Assessment	An assessment, for the purpose of the deprivation of liberty safeguards, of whether there is any other existing authority for decision-making for the relevant person that would prevent the giving of a standard deprivation of liberty authorisation. This might include any valid advance decision, or valid decision by

	a deputy or a donee appointed under a Lasting Power of Attorney.
Qualifying Requirement	Any one of the six qualifying requirements (age, mental health, mental capacity, best interests, eligibility and no refusals) that need to be assessed and met in order for a standard deprivation of liberty authorisation to be given.
Relevant Person	A person who is, or may become, deprived of their liberty in a hospital or care home.
Relevant Person's Representative	A person, independent of the relevant hospital or care home, appointed 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.
Restraint	The use or threat of force to help carry out an act that the person resists. Restraint may only be used where it is necessary to protect the person from harm and is proportionate to the risk of harm.
Restriction of Liberty	An act imposed on a person that is not of such a degree or intensity as to amount to a deprivation of liberty.
Standard Authorisation	An authorisation given by a supervisory body, after completion of the statutory assessment process, giving lawful authority to deprive a relevant person of their liberty in a hospital or care home.
Supervisory Body	A local authority, Welsh Ministers or a local health board that is responsible for considering a deprivation of liberty request received from a managing authority, commissioning the statutory assessments and, where all the assessments agree, authorising deprivation of liberty.
Urgent Authorisation	An authorisation given by a managing authority for a maximum of seven days, which may subsequently be extended by a maximum of a further seven days by a supervisory body, that gives the managing authority lawful authority to deprive a person of their liberty in a hospital or care home while the standard deprivation of liberty authorisation process is undertaken.

Requesting an authorisation under the Safeguards process



DEPRIVATION OF LIBERTY (DoL) POLICY

1 INTRODUCTION

- 1.1 This document has been prepared as a guide for Trust staff who may be involved in a deprivation of liberty (DoL) of a service user. Its purpose is to provide appropriate instruction to staff to ensure the necessary legal procedures are correctly applied.
- 1.2 This Policy should be read in conjunction with the Deprivation of Liberty Code of Practice¹, the Mental Capacity Act Code of Practice², the Mental Health Act Code of Practice³ and Trust Policies on Consent to Treatment, Mental Capacity Act, Advance Decisions to Refuse Medical Treatment Policy, Care Programme Approach Policy, safeguarding adult procedures and Community Treatment Order Policy.
- 1.3 It is intended that this document will prove a useful reference document for all staff involved in the process of requesting and managing DoL authorisations and/ or applications to the Court of Protection (CoP). However, if in doubt staff should seek legal advice or guidance from the Trust's Mental Health Law Department. The Lead Nurse in Mental Health Law is the Trust lead for MCA and DoL
- 1.4 The aim of this document is to promote an understanding of the required procedures, which will ensure the smooth running of authorisations and court applications, compliance with the Mental Capacity Act 2005 and compliance with Article 5, the right to liberty and security of person, of the European Convention on Human Rights (ECHR).
- 1.5 Staff must familiarise themselves with this protocol, and report any difficulties in its application to the Trust Mental Health Law Department.

¹http://elftintranet/our_organisation/deprivation_of_liberty_safeguards.asp

²http://elftintranet/our_organisation/mental_capacity_act_2005.asp

³http://elftintranet/our_organisation/mental_health_act_1983.asp

2 GENERAL GUIDING PRINCIPLES

- 2.1 All individuals, regardless of age, ability, race, gender, sexual orientation, faith or beliefs should have the greatest possible control over their lives.
- 2.2 A person aged 16 and over must be assumed to have capacity unless it is established that they lack capacity. The starting presumption must always be that a person has the capacity to make a decision, unless it can be established otherwise. A person's capacity must be assessed specifically in terms of their ability to make a particular decision at the time it needs to be made. A person may have the capacity to make one decision but not another. The Mental Capacity Act 2005 defines someone who lacks capacity as a person who is unable to make a decision for themselves because of an impairment or disturbance in the functioning of the mind or brain. It does not matter if this is a permanent or temporary disturbance. A person is deemed to be lacking capacity if the person cannot do one or more of the following due to the identified impairment/ disturbance: (a) Understand the information that is given to them relevant to the decision that they are being asked to make (b) Retain that information for long enough to make the decision (c) Use or weigh up the information as part of the decision making process (d) Communicate the decision - every effort must be made to assist the person to communicate in whatever mode they can.
- 2.3 People have a right to express their wishes and priorities and to be personally involved when plans are made for their care and treatment. Every effort should be made to enable people to make decisions and express their wishes in a way that is appropriate for them and to maximise their participation in any decision-making process irrespective of their capacity or lack thereof.
- 2.4 A person is not to be treated as unable to make a decision unless all practical steps to help him/her to do so have been taken without success.
- 2.5 A person must not be treated as unable to make a decision merely because they make an unwise decision.
- 2.6 When it has been shown that a person lacks capacity, any act done or decision made for or on behalf of that person must be done or made in their best interests.
- 2.7 Before an act is done or a decision is made on behalf of a person who has been shown to lack capacity, regard must be had to whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
- 2.8 Every effort should be made to prevent deprivation of liberty. If deprivation cannot be avoided it should be for no longer than is necessary.

- 2.9 It may be necessary, in their best interests, to override the wishes of an individual who lacks capacity to make a decision, particularly if following their wishes would cause them to come to harm.

3 WHAT ARE THE DEPRIVATION OF LIBERTY (DoL) SAFEGUARDS?

- 3.1 The Act does not define what a deprivation of liberty may be and so a decision as to whether or not the care and treatment regime amounts to deprivation of liberty will depend on each set of particular circumstances. The 'Cheshire West' judgement however has set out an 'acid' test to determine whether a person is deprived (see section 7). Ultimately, whether the steps taken by staff in relation to a person constitute a deprivation of liberty is a legal question and only Courts can ultimately determine the law.
- 3.2 The DoL Safeguards provide a legal framework and protection for those vulnerable people who are, or may become, deprived of their liberty in a hospital or care home. They will provide suitable protection in circumstances where deprivation appears to be unavoidable, in a person's best interests. A deprivation of liberty which occurs outside of these settings must be authorised by the Court of Protection for this to be lawful.

4 SCOPE & EXCLUSIONS

- The DoL Safeguards apply to anyone:
 - Aged 18 and over
 - Who suffers from a mental disorder within the meaning of the Mental Health Act (MHA) 1983. This includes learning disabilities (without the need for the identification of an additional conduct disorder required by S1.2 of the MHA to come within its scope).
 - Who lacks the capacity to give valid consent to the arrangements made for their care and/or treatment.
 - Who is or will be detained in a hospital or care home, for the purpose of being given care or treatment in circumstance that amount to a deprivation of liberty
 - It does not apply to anyone currently detained under the Mental Health Act 1983
 - It does apply to people being treated for a physical condition or injuries and who may find themselves in an acute hospital setting
 - A deprivation of liberty authorisation does not give authority to treat people. The arrangements for the care and treatment of people who lack capacity is subject to the wider provision of the Mental Capacity Act.

- This policy applies to all staff employed by East London NHS Foundation Trust. Partner agencies will have their own policies relating to the Mental Capacity Act and the Deprivation of Liberty Safeguards and Trust staff will need to familiarise themselves with these and will need to be aware of how to implement this policy when working with other agencies.

5 LEGISLATION AND GUIDANCE

- 5.1 When implementing the DoL Safeguards, staff may also need to consider other relevant legislation and guidance. This may include (not an exhaustive list):
- Mental Capacity Act 2005 and Code of Practice
 - Mental Health Act 1983 and Code of Practice
 - Deprivation of Liberty Safeguards Code of Practice
 - Human Rights Act 1998
 - Equality Act 2010
 - Care Act 2014
- 5.2 The DoL Safeguards were introduced into the Mental Capacity Act 2005 via the Mental Health Act 2007 amendments. They should be read and understood alongside the other provisions of these Acts.

6 WHEN CAN SOMEONE BE DEPRIVED OF THEIR LIBERTY?

- To deprive someone of their liberty is a serious matter and not a decision to be taken lightly.
- A person may only be deprived of their liberty:
 - If they lack capacity to give their informed consent to the arrangement
 - in their own best interests to protect them from harm; it is not applicable to the protection of other people
 - if it is a proportionate response to the likelihood and seriousness of the harm, and
 - there is no less restrictive alternative.

7 IDENTIFYING DEPRIVATION OF LIBERTY?

- Whether a care or treatment regime amounts to deprivation of liberty is a matter of law and depends on the particular circumstances of the case. As a general rule, to determine whether a care or treatment regime amounts to deprivation of liberty, it is useful to look at a whole range of factors including the type, duration, effects and manner of implementation of the measures in question.
- There have been a number of judgements in the UK Courts and the European Court of Human Rights and further legal judgements are likely. Currently the key factors, set out in the recent supreme court judgement in the 'Cheshire West' case apply an 'acid test' to be considered:-
- Is the person subject to continuous supervision and control? AND
- Is the person free to leave? (this is a theoretical question – the person may not be attempting to or requesting to leave but a decision has been made that the person would not be allowed to leave if they attempted or made arrangements with another to do so)
- If the answer to the first question is yes and the answer to the second question is no, then it is likely that the person will be deprived of their liberty and action should be taken to follow the appropriate procedures which are set out further in the policy should it be established they lack capacity to make the decision regarding the circumstances of their care and treatment.
- **Restraint.** The Mental Capacity Act provides protection under Section 6 for restraint used in order to admit or administer treatment if it is necessary to prevent harm to the person and proportionate to the likelihood of the harm occurring and the seriousness of the harm if it did occur. Proportionate restraint could amount to deprivation of liberty. This could be due to the cumulative effect of several different types of restraint or due to one type of restraint being severe. If restraint is required when admitting a person to hospital then that need for restraint may indicate objection to that admission or treatment, and could amount to a deprivation. If the person meets the criteria for the Mental Health Act, they are normally ineligible for a deprivation of liberty safeguard authorisation and the use of the Mental Health Act should be considered.

8. HOW IS AN AUTHORISATION GIVEN?

- 8.1 There may be times when depriving someone of their liberty is necessary (for example to protect them from harm) and in their best interests. In these cases, authorisation must be sought for the deprivation to be

lawful. If within a hospital, residential or nursing home, the safeguards apply. The **Managing Authority** who is defined as the person or body with management responsibility for the hospital or care home in which the person is, or may become, deprived of their liberty must apply to the **Supervisory Body** for authorisation. For the purposes of this Policy, all future references to the Managing Authority will be references to East London NHS Foundation Trust and all references to the Supervisory body will be the relevant local authority.

- 8.2 If a person is being deprived of their liberty in their own home, or in some other form of supported living, the safeguards will not apply. However there may be a duty on the local authority and/ or the CCG dependent on funding to ensure the deprivation is lawful in which case an application will need to be made to the Court of Protection.
- 8.3 In these circumstances, this matter must be raised with the Lead Nurse in Mental Health Law as soon as possible.
- 8.4 When the safeguard procedures apply, the request will be made in writing using the standard forms (available on Trust intranet⁴) and will be sent to the appropriate supervisory body (see table at paragraph 11).
- 8.5 Authorisation should be obtained in advance except where it is thought to be urgent (see below).
- 8.6 An assessment can also be triggered by anyone (e.g. a family member or friend) with a concern that a deprivation is occurring. They can apply directly to the supervisory body to trigger the assessment process, if they have previously asked the relevant care home or hospital but the authority has not responded.

9 REQUESTING DIFFERENT TYPES OF SAFEGUARD AUTHORISATIONS

- 9.1 ***Urgent Authorisation:*** In an emergency situation when it is believed that the Trust may be currently depriving a person of their liberty, the relevant clinical team must self-issue an urgent authorisation, using the appropriate form (form 1), giving the reasons for doing so in writing. A standard authorisation from the relevant local authority **MUST** be requested at the same time (also via form 1 and see 9.12).
- 9.2 Any decision to make an urgent authorisation and action taken to deprive a person of their liberty must be in the person's best interests following

⁴ http://elftintranet/our_organisation/deprivation_of_liberty_safeguards.asp

an establishment of a lack of capacity to agree to their current care arrangement.

- 9.3 In practice, if any member of a clinical team suspects that a person is currently being deprived of their liberty, this must first be raised as a matter of urgency with the multi- disciplinary team. If it is unclear, following this consultation whether the person is being deprived then this matter can be discussed further with the Lead Nurse in Mental Health Law at 020 7655 4264 or via email.
- 9.4 If established that the person meets the 'acid test' (see section 7), a senior member of the multi-disciplinary team completes an urgent authorisation alongside a standard authorisation request. **The decision to request an authorisation should be taken as a team decision and not made by any one individual.**
- 9.5 Form 1 must be completed to enable the trust to give itself the urgent authorisation. Full details must be documented on the form regarding the nature of the deprivation the current treatment regime and why the care and treatment is necessary.
- 9.6 An urgent authorisation may be for a maximum of 7 days but may be extended by the relevant local authority for up to a further 7 days in exceptional circumstances. In conjunction with the use of an urgent authorisation, the clinical team must immediately request a standard authorisation from the local authority.
- 9.7 It may well be that a request for a standard authorisation has already been made but the process is not yet complete and the need for a person to be deprived of liberty has become so urgent there is no option but to self-authorise with an urgent authorisation.
- 9.8 This means a request for an urgent authorisation can never be given without a request for a standard authorisation being made simultaneously or previously.
- 9.9 Urgent authorisations should normally be used in response to sudden unforeseen circumstances. It would not be appropriate to give an urgent authorisation simply to legitimise a short-term deprivation.
- 9.10 Where possible, family and carers should be involved in the decision to make an urgent authorisation and consulted if appropriate. Any other professionals or care staff should also be consulted for their views. This may include, for example, a physical health care team or care staff at a residential or nursing care home where the person was previously resident.
- 9.11 The clinical team must take all practical steps to ensure that the person understands the effect of the authorisation and their right to take their

case to the Court of Protection. This information must be given both orally and in writing and recorded in the patient's notes.

- 9.12 **Standard Authorisation:** this must be applied for by the Trust when it appears likely, that either presently or at some time during the next 28 days, someone is/ will be accommodated in circumstances that amount to a deprivation liberty. If any member of a clinical team suspects that a person will be deprived of their liberty, this must first be raised with the multi-disciplinary team. **Again the decision to request an authorisation should be taken as a team decision and not made by any one individual.**
- 9.13 Requests for standard authorisations must also include any relevant medical information relating to the person's health, and the individuals care plan.
- 9.14 The application should be forwarded to the relevant supervisory authority.
- 9.15 The Clinical team must notify the relevant local authority if it is satisfied there is no one i.e. family or friends appropriate to consult, other than the people engaged in providing care or treatment for the relevant person in a professional capacity or for remuneration. In these cases, the local authority will instruct an IMCA to represent and support the person during the assessment process.

10 TYPE OF ASSESSMENTS

- 10.1 When a request for an authorisation has been received, the relevant local authority obtains 6 assessments from 2 independent assessors within a period of 21 days for a standard authorisation. The assessments are:

- **Age Assessment** – the person must be aged 18 or over
- **Mental Health Assessment** – the person must be suffering from a mental disorder
- **Mental Capacity Assessment** – the person must lack capacity to consent to remain in or be admitted to the hospital or care home
- **Eligibility Assessment** – a person is not eligible for the Safeguards if they are or could be detained under the Mental Health Act 1983. People on community treatment orders or who are on leave or conditionally discharged may be required to reside in a care home for further treatment for their mental disorder in circumstances where their recall is not appropriate and which may amount to a deprivation of liberty. In those cases, the procedures for obtaining authorisation should be

followed, as deprivation of liberty safeguards may exist alongside community treatment orders or leave or conditional discharge providing there is no conflict with any conditions set by the responsible clinician. When a person is subject to guardianship under the Mental Health Act, their guardian can decide where they are to live but cannot authorise deprivation of liberty and cannot require them to live somewhere where they are deprived of their liberty unless that deprivation is authorised.

- **Best Interests Assessment** - the proposed course of action would constitute a deprivation of liberty and it is in the person's best interests to be subject to the authorisation and necessary to prevent harm to them and proportionate to the likelihood of harm occurring and the seriousness of the harm if it did occur
- **No Refusals Assessment** – the authorisation does not conflict with a valid decision by a donee of a Lasting Power of Attorney for health and welfare or a Court-appointed deputy and is not for the purpose of giving treatment that would conflict with a valid and applicable advance decision made by the person.

10.2 The assessments require at least two suitable qualified, skilled and trained assessors but these will be identified by the local authority, not by Trust staff.

11 WHERE TO SEND THE APPLICATIONS

- 11.1 If the application is being made by a Trust member of staff for a person receiving care and treatment in a Trust hospital or unit, applications will need to be sent to the relevant local authority where the person is normally resident, See below for further information.

Name of local authority	Address.	Contacts
Bedford Borough Council	Sara-Jayne Williams Safeguarding of Vulnerable Adults Team	dols@bedford.gov.uk Tel: 01234 718342 (direct)

	<p>Bedford Borough Council</p> <p>Borough Hall</p> <p>Cauldwell Street</p> <p>Bedford MK42 9AP</p>	<p>Fax: 01234 276076</p>
Central Bedfordshire Council	<p>Dan Baker</p> <p>Safeguarding Vulnerable Adults Team</p> <p>Central Bedfordshire Council</p> <p>Houghton Lodge, Houghton Close</p> <p>Amphill, Bedfordshire</p> <p>MK45 2TG</p>	<p>dols@centralbedfordshire.gov.uk</p> <p>Tel: 0300 300 8122</p>
City and Hackney	<p>Safeguarding Adults team</p> <p>Health and Community Services</p> <p>Hackney Service Centre</p> <p>1 Hillman Street, E8 1DY</p>	<p>DOLS@hackney.gov.uk</p> <p>Tel: 020 83566212</p> <p>Fax: 020 83565043</p>
Luton Borough Council	<p>Safeguarding Manager</p> <p>Luton Borough Council</p> <p>Adult Safeguarding Team</p>	<p>dols@luton.gov.uk</p> <p>Tel: 01582 547730</p> <p>Fax: 01582 547773</p>

	4 th Floor, Town Hall Extension Gordon Street Luton LU1 2BQ	
Newham	Safeguarding Adults team 4 th Floor, Unex Tower 5 Station Street, London E15 1DA	deprivationofliberty@newham.gov.uk Tel: 020 3373 8453/9731 Fax: 020 84301022
Tower Hamlets	Tower Hamlets DoLS Service Safeguarding and MCA Team Gladstone Place 1 Ewart Place, Bow London E3 5EQ	DOLS@towerhamlets.gov.uk Tel: 020 7364 2019 Fax: 020 73642277

- 11.2 Applications should be faxed/ sent electronically in the first instance to the single point of entry for each of the local authorities identified above with original application then sent by registered post to the correct addressee. Staff must comply with Trust protocols in sending patient identifiable data and ensure that emails are password protected or sent via nhs.net accounts and faxes that are 'safe haven' faxes.
- 11.3 Care should be taken to ensure the correct form has been completed and that all the relevant information has been provided to avoid unnecessary delays with incomplete forms having to be returned.
- 11.4 All applications MUST also be sent via email to the elft.dols@nhs.net email address who keep a record of all applications and outcome and

will upload a copy of the request and authorisation/ refusal onto the appropriate electronic record

12 ASSESSMENTS WHERE CRITERIA IS NOT MET FOR AUTHORISATION

- 12.1 The local authority will be unable to consider authorisation if any of the assessments do not concur that the criteria for the authorisation has been met. Reasons will be provided to the Trust, outlining why this is the case.
- 12.2 All outcomes where an authorisation is not given MUST be notified to the DoLS email address who will follow up as appropriate with the clinical team as to further options
- 12.3 If it is considered the person may already be deprived of their liberty and the authorisation has been declined, consideration must be given, if appropriate, as to whether a Mental Health Act assessment should be carried out.
- 12.4 If there is serious concern about sustaining life treatment or to prevent serious deterioration in the condition of the person, it will not be unlawful to detain the person pending a decision from the Court of Protection.⁵ This action must not be undertaken without prior consultation with the Lead Nurse in Mental Health Law unless it is an emergency.
- 12.5 If there is a question over the refusal, a decision may be sought from the Court of Protection, again it is important that prior consultation with the Lead Nurse in Mental Health Law take place before any application to the Court is made.

13 ASSESSMENTS WHERE CRITERIA IS MET FOR AUTHORISATION

- 13.1 If all assessments agree that the person meets the criteria for deprivation of liberty safeguards, the supervisory body must grant the authorisation of deprivation of liberty.
- 13.2 The time period may not be longer than recommended by the Best Interests Assessor and in any case not longer than 12 months.
- 13.3 The authorisation must be in writing and include the purpose for the deprivation, the time period, any conditions and outline the reasons the

⁵

http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf

criteria are met. All outcomes where an authorisation is given MUST be notified to the DoLS email address

- 13.4 The authorisation will be copied to the clinical team, to the person/patient concerned, any IMCA and all persons consulted by the Best Interests Assessor.
- 13.5 The clinical team must take all practical steps to ensure the person understands the following information:
- The effect of the authorisation
 - Their right to take their case to the Court of Protection
 - Their right to request a review
 - Their right to have a s39D IMCA to support them and their representative to access their rights.

This information must be presented orally and in writing using the Department of Health booklet (available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_097497.pdf) or the Trust information leaflet and must be documented in the clinical notes, along with a date for review. The person identified as responsible for providing this information will be the named nurse for the patient

- 13.6 The clinical team must ensure that any conditions attached to the authorisation are complied with, and this should form part of the care plan for the patient which must be documented in the patient's notes.
- 13.7 The clinical team must set out in the patient's care plan clear roles and responsibilities for monitoring the deprivation of liberty and this must be evaluated on a regular basis.

14 ADMINISTRATION

- 14.1 All copies of authorisation forms should be forwarded via email to the DoLS email address office with further photocopies retained and uploaded onto the appropriate document folder in the patient's electronic records; the DoLS team will check this and upload documentation if not already done by the clinical team.
- 14.2 Information regarding all authorisations will be electronically stored and managed by the mental health law team.
- 14.3 Reminder alerts relating to the current authorisations, expiries and renewal of authorisations will be sent to relevant clinical teams by the mental health law department at relevant intervals but no less than fortnightly.

- 14.4 Authorisations will be scrutinised by them, supervised by the lead nurse in mental health law and they will have the responsibility to bring any identified errors to the attention of the supervisory body if this has not already happened.
- 14.5 The lead nurse in mental health law will ensure the Trust fulfil the statutory requirement to notify the Care Quality Commission of the outcome of any applications in respect of standard authorisations made by the Trust and a copy of the statutory notification is sent to the clinical team.
- 14.6 Any proposals to make a referral to the Court of Protection regarding a person who is believed is or will be deprived of liberty must be discussed with the lead nurse in mental health law or in their absence, the Associate Director for Mental Health Law prior to the referral being made.

15 REVIEW PROCESS

- 15.1 This can be triggered at the request of the clinical team or at the request of the person or their representative.
- 15.2 There are certain statutory grounds for carrying out a review which include the person no longer meeting the age, no refusals, mental capacity, mental health or best interest's requirements. The person may no longer meet the eligibility requirement because they are now objecting to receiving treatment in hospital and may better meet the criteria for assessment under the Mental Health Act.
- 15.3 The supervisory body must conduct a review and repeat any necessary assessments that might have changed.
- 15.4 The outcome might be to terminate the authorisation, to vary the conditions or to change the given reasons.
- 15.5 All relevant parties must be informed of the outcome of a review.
- 15.6 The supervisory body must inform the Trust they are going to carry out a review. If the supervisory body inform the clinical team directly, this information must be passed onto the lead nurse in mental health law via telephone on 020 7655 4264.
- 15.7 If the clinical team, in consultation with the lead nurse in mental health law decides the deprivation of liberty is no longer necessary it must immediately apply for a formal review to the authorising local authority via completion of form 10 and if appropriate, the authorisation will be terminated.

- 15.8 It is possible to give a short term suspension of the authorisation if the person does not currently meet the eligibility requirement as long as the person would become eligible again within 28 days of the suspension. The clinical team, following consultation with the lead nurse in mental health law, need to notify the supervisory body of the suspension and notify the supervisory body when the person has become eligible again. If the person does not become eligible again within 28 days the authorisation will be terminated.

16 ROLE OF PERSON'S REPRESENTATIVE

- 16.1 The local authority will appoint a 'representative' at the point at which authorisation is granted or as soon after that as possible.
- 16.2 The Best Interests Assessor will identify as part of their assessment, who might be suitable for this role. An IMCA can assist and support the representative in their role.
- 16.3 The role of the representative is to maintain contact with the person and to represent and support them in all matters relating to the deprivation including if necessary requesting a review, using the Trust's complaints procedure on the person's behalf or making an application to the Court of Protection.
- 16.4 The Best Interests principle applies to the relevant person's representative to ensure that when acting on behalf of the person their actions are appropriate at all times and always in the best interests of that person.
- 16.5 The clinical team must provide the representative with a copy of the written information they have given the person. This must then be documented in the patient's notes.
- 16.6 It is the responsibility of the clinical team to monitor the contact the representative has with the person and inform the local authority if they feel that the person is not maintaining an appropriate level of contact with the person.

17. DEPRIVATION OF LIBERTY OUTSIDE OF HOSPITAL OR A CARE HOME

- 17.1 The Deprivation of Liberty Safeguards are the administrative procedures which authorise the deprivation of liberty of an adult who lacks the capacity to consent their care arrangements where those care arrangements are "imputable to the state" e.g. the person is deprived of their liberty in a hospital or care home setting.

- 17.2 It is important for staff to consider whether the care arrangements for adults lacking capacity who are not in hospital or a care home are, in fact, deprived of their liberty. For example, adults within domestic settings may also be deprived of their liberty if they are under continuous supervision and control and are not free to leave. If the trust is providing/overseeing services or is responsible for managing a wholly or partly funded placement, there may be a duty on the trust to ensure the deprivation is lawfully authorised.
- 17.3 Where the adult lacks the capacity to consent to these arrangements, it is the Court of Protection, not the Deprivation of Liberty Safeguards, which is the legal mechanism to authorise the deprivation of liberty.
- 17.4 The Courts are yet to clarify the meaning of “imputable to the state” (i.e. what level of involvement would be needed for the State to be then held responsible). As such, the clinical team must ensure that they contact the lead nurse in mental health law as soon as practicable to establish the suitability of an application to the Court of Protection and to clarify who the Trust believe is the most appropriate body to make such an application
- 17.5 The sections of the Mental Health Act 1983 which require a person to be detained in hospital (e.g. s.2, s.3, s.4, s.5(2), s.5(4), s.35, s.37, s.47 etc) are the only provisions which authorise a deprivation of liberty. The Mental Health Act 1983 may only be relied upon as the authority to deprive a person of their liberty where the person is subject to these specific provisions of the Act.
- 17.6 Where a person remains subject to other provisions of the Mental Health Act 1983 outside of hospital (e.g. by virtue of being subject to a community treatment order or conditional discharge) there remains scope for a person to be deprived of their liberty without legal authority e.g. in domestic settings.
- 17.7 Where a person is deprived of their liberty due the specific conditions of these arrangements, the clinical team must ensure that they contact the clinical nurse specialist in mental health law as soon as practicable to establish the most appropriate way in which to authorise the deprivation of liberty.
- 17.8 Alternatively, less restrictive care arrangements may be organised so that the person is no longer deprived of their liberty.

18. Death whilst under a DoLS Authorisation

- 18.1 The Chief coroner has directed (April 2017) that the death of a person subject to a deprivation of liberty should no longer be the subject of a coroner investigation because that person is no longer being considered to be in state detention within the meaning of the Coroners and Justice Act 2009.
- 18.2 Therefore, when a person who is subject to an authorisation dies, the death does not have to be routinely to the coroner UNLESS there is cause to believe the death is unnatural or unexpected. However, the dols team must be informed via email that the death has occurred and the local authority must also be informed. There is no current requirement to inform the CQC of a death of a person subject to a DoLS authorisation.

19 DECIDING BETWEEN THE USE OF THE SAFEGUARDS OR THE MENTAL HEALTH ACT 1983

- 19.1 In most cases, it will be apparent that either the Mental Health Act or alternatively DoLS is the most appropriate mechanism to deprive someone of their liberty within a hospital or care home environment. Decision makers should use their professional judgement and consider all the relevant circumstances in each individual case when making decision within the framework of the legislation.
- 19.2 However, there may be circumstances which arise where there are disagreements which result in an inability to take a decision as to whether the Act or DoLS should be used. If this situation arises, in the first instance consideration should be given to the guidance in Chapter 13 of the Mental Health Act Code of Practice, in any event, the matter should be escalated immediately to the relevant borough clinical director for further support and advice. The matter should also be raised with the lead nurse in mental health law where relevant with a view to seeking external legal advice where necessary.

- 20.1 The Care Quality Commission assume responsible for monitoring the application of the Safeguards. This is achieved through the statutory requirement that every managing authority must inform the CQC of when an application for a deprivation of liberty authorisation has been made and the outcome (see 14.5 above).
- 20.2 Internal procedures are set up to monitor the use of the Safeguards, to provide the necessary statistical information and to inform future training programmes.
- 20.3 These include maintenance of a database to record each application for a Safeguard/ Court of Protection authorisation and the outcome. This database will generate reports as requested for assurance purposes.
- 20.4 In addition, an electronic copy of the authorisation request, the outcome and the CQC statutory notification form is kept securely by the dols team for the duration of the authorisation.
- 20.5 A regular audit is carried out of a random sample of persons currently subject to DoLS to ensure assessments are being made within legal time frames, information is being given regarding DoLS and care plans reflect any conditions attached to an authorisation. Further aspects of the DoLS process may be audited as required or directed.
- 20.6 Training on Deprivation of Liberty Safeguards is delivered to appropriate staff via face to face or eLearning alongside the development of clinical advisors to provide a first 'port of call' for clinicians.