

# **Herefordshire Safeguarding Adults Board**

## **DEPRIVATION OF LIBERTY SAFEGUARDS**

### **(DoLS)**

**POLICY, PROCEDURE AND GUIDANCE**

**DATE: January 2018**

**Version 2**

It is suggested that this policy is read in conjunction with Herefordshire Safeguarding Adults Board's Mental Capacity Act 2005 policy and with the Mental Capacity Act 2005 Code of Practice and Deprivation of Liberty Safeguards Code of Practice. These Codes of Practice can be downloaded from:

MCA 2005 Code of Practice: <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

DoLS Code of Practice: <https://www.gov.uk/government/publications/mental-capacity-act-deprivation-of-liberty-safeguards>

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## 1. INTRODUCTION

1.1 This Policy, Procedures and Guidance has been developed on behalf of Herefordshire Safeguarding Adults Board for adherence and implementation within all organisations working across Herefordshire.

1.2 The overall aim of the policy and guidance is to ensure good practice and a coherent approach across organisations within Herefordshire.

1.3 The Deprivation of Liberty Safeguards (DoLS) came into force in April 2009 and were introduced into the MCA due to a 2004 European Convention of Human Rights ruling referred to as the Bournemouth judgement case (HL v UK). HL had been admitted to hospital under common law in his “best interests”. His carers were unhappy with the decision and pursued the issue through the domestic courts to the European Court of Human Rights. The judgement of the European court noted that:

- HL had been deprived of his liberty without a procedure prescribed by law (Article 5.1)
- HL had no means of applying to a court to see if the deprivation of liberty was lawful (Article 5.4)

1.4 The UK made amendments to provide a legal process for depriving a person, under very specific circumstances, of their liberty. This means that where the qualifying criteria are met, people can receive the care and support they need whilst protecting their rights to appeal and representation.

1.5 Key Message of the Deprivation of Liberty Safeguards 2007 (DoLS), introduced in April 2009 as an amendment to the Mental Capacity Act 2005 (MCA):

- The Deprivation of Liberty Safeguards extends the powers of “restriction” provided by the MCA (section 5), to allow for the lawful “deprivation of liberty” of people living in a registered care home or hospital who lack capacity to consent to highly restrictive care plans that are proportionate and necessary in order to protect the person from harm.
- The safeguards provide the right of appeal and provision of representation for the relevant person.

1.6 In March 2014, the Supreme Court handed down judgement in two cases, P v Cheshire West and Chester Council and P & Q v Surrey County Council (2014). That judgement, commonly known as Cheshire West has led to a significant increase in the number of people in England and Wales who are considered to be ‘deprived of their liberty’ for the purposes of receiving care and treatment. The Supreme Court decided that when an individual lacking capacity was under continuous or complete supervision

and control, and was not free to leave, they were being deprived of their liberty. This is commonly known as the 'acid test'.

## **2. PURPOSE**

2.1 The Deprivation of Liberty Safeguards (DoLS) provide a legal framework to protect those who may lack the capacity to consent to the arrangements for their treatment or care, in a care home, hospital or hospice, and where levels of restriction or restraint used in delivering that care are so extensive as to be depriving the person of their liberty. Whilst staff need to consider emerging case law, the Code of Practice should remain the main point of reference for staff working with deprivation of liberty issues.

2.2 These safeguards provide a robust and transparent framework, preventing arbitrary decisions which deprive a person of their liberty and providing opportunity to challenge deprivation of liberty authorisations. The safeguards therefore protect the rights of vulnerable individuals.

2.3 This document provides a framework for the management of the Deprivation of Liberty Safeguards across Herefordshire and aims to set out the processes and procedures that must be followed by those that have a duty of care towards a person who is, or may become deprived of their liberty. This includes both Managing Authorities and the Supervisory Bodies.

2.4 The policy covers the processes involved with requesting, assessing, granting and reviewing standard authorisations for deprivation of liberty from the perspective of both the Managing Authorities applying for the authorisation, and the Supervisory Body who assess and grant the authorisation in Herefordshire.

2.5 The Supervisory Body will deliver the duties required by the Deprivation of Liberty Safeguards. The Supervisory Body for Herefordshire residents is Herefordshire Council.

## **3. SCOPE**

3.1 The policy applies to all staff working across Herefordshire.

3.2 The Deprivation of Liberty Safeguards and the processes contained within this policy apply to all persons that meet all of the following criteria:

- Aged over 18
- Lack the capacity to consent to the arrangements for their care or treatment

- Are receiving care or treatment within a hospital or registered care home
- Are receiving care or treatment in circumstances that amount to a deprivation of liberty in order to protect them from harm and it appears to be in their best interests
- Have a mental disorder but their detention is not already authorised under the Mental Health Act or inconsistent with an obligation placed on them under the Mental Health Act 1983.

3.3 A large number of these people will be those with significant learning disabilities, or older people who have dementia, but they can also include those who have certain other neurological conditions (for example as a result of a brain injury).

3.4 All services must comply with the Herefordshire Safeguarding Adults Board's positive approaches to behaviour that challenges (including restrictive physical interventions) guidance.

3.5 This policy does not cover procedures for Managing Authorities to identify a deprivation of liberty or any procedures prior to the submission of a request for a standard authorisation. These procedures will need to be produced internally for each care home or hospital unit. However, key responsibilities for Managing Authorities are identified in Section 8 of this policy and the Law Society has issued comprehensive guidance to help solicitors and frontline health and social care professionals identify when a deprivation of liberty may be occurring in a number of health and care settings. This is available from :

[www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty](http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty)

## **4. POLICY STATEMENT**

4.1 It is the intention of Herefordshire Safeguarding Adults Board to empower and protect the rights and liberties of Herefordshire's most vulnerable citizens.

## **5. DEFINITIONS**

### **Best Interest Assessor (BIA)**

The assessor responsible for conducting a range of assessments to ascertain whether an authorisation for deprivation of liberty will be granted (see Section 8.5 below for the different assessments that can be conducted by the BIA). A professional (who is trained as a BIA) is appointed to this role only for the duration of the assessment / reporting process by the Supervisory Body.

NB: A BIA is not required to complete the best interest decision making process other than under the Deprivation of Liberty Safeguards.

### **Deprivation of Liberty (DoL)**

Deprivation of Liberty is a term used in the European Convention on Human Rights about circumstances when a person's freedom is taken away. Case law is defining its meaning in practice. There is no simple definition of deprivation of liberty, however, authoritative guidance as to the broad approach to adopt has now been given by the Supreme Court in *P v Cheshire West and Chester Council; P & Q v Surrey County Council* [2014] UKSC 19, commonly known as 'Cheshire West.' The court decided that a person lacking the relevant capacity met the 'acid test' of being deprived of their liberty in any setting where they were under continuous (or complete) supervision and control and not free to leave.

See Chapter 2 of the DoLS (Deprivation of Liberty Safeguarding) Code of Practice for a more detailed understanding in conjunction with the Law Society guidance 2015 [www.lawsociety.org.uk](http://www.lawsociety.org.uk).

### **Hospital**

This includes both private and publicly funded hospitals and hospices. In the case of NHS hospitals, the NHS Trust or authority that manages the hospital is the Managing Authority. In the case of independent hospitals and hospices, the Managing Authority is the person registered under The Health and Social Care Act 2008 in respect of the hospital.

### **Independent Mental Capacity Advocate (IMCA)**

This is a trained person who provides support and representation to a person, who lacks capacity to make specific decisions, about where they live and their health care and treatment, where the person has no one else to support them. IMCAs appointed under DoLS are required to have additional DoLS specific training. See DoLS Code of Practice 7.34 – 7.41 for details on the role of the DoLS IMCA.

### **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.

### **Mental Capacity**

Mental capacity is always referred to as issue, time and situation specific and describes a person's ability to make a decision about a particular matter at the time it needs to be made.

Where the term 'lack of capacity' is used throughout this document it refers specifically to the ability to decide whether or not to consent to care or treatment that involves circumstances that amount to deprivation of liberty at the time at which that decision needs to be made. A legal definition is contained in Section 2 of the Mental Capacity Act 2005. Details on how to undertake a mental capacity assessment can be found in The Mental Capacity Act Code of Practice Chapter 4.

### **Registered Care Home or Service Provider providing Regulated Activities**

Service providers are required to register with the CARE Quality Commission when carrying out regulated activities as defined in The Care Act.

### **The Mental Health Assessor (MHAs)**

The Mental Health Assessor must be a doctor who is either approved under section 12 of the Mental Health Act 1983 or is a registered medical practitioner with at least 3 years post-registration experience in the diagnosis or treatment of mental disorder. The MHA is appointed by the Supervisory Body and is a separate assessor to the BIA. They are responsible for undertaking assessments that relate to the mental health of the relevant person and are usually responsible for the eligibility assessment. They may be appointed to also undertake the mental capacity assessment.

### **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, including supporting an appeal to the Court of Protection.

### **Restraint**

The use or threat of force to undertake an act which the person resists, or the restriction of the person's liberty of movement, whether or not they resist. Restraint may only be used where it is necessary to protect the person from harm and is proportionate to the risk of harm. Restraint can include physical restraint e.g. moving the person or blocking their movement to stop them leaving, mechanical restraint involving the use of equipment such as using a belt to stop the person getting out of their chair or bedrails to stop the person from getting out of bed, chemical restraint e.g. using medication to restrain and psychological restraint e.g. telling a person not to do something or depriving a person of lifestyle choices by telling them what time to go to bed or get up.

## **Standard Authorisation**

This is the lawful authority to deprive a relevant person of their liberty in the relevant hospital or care home, given by the Supervisory Body, after completion of the statutory assessment process.

## **Supervisory Body**

A local authority that is responsible for considering a deprivation of liberty request, commissioning the assessments and, where all the assessments agree, authorising deprivation of liberty. Within Herefordshire the Supervisory Body is Herefordshire Council.

## **Urgent Authorisation**

This is an authorisation granted by a Managing Authority for a maximum of seven days. It 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. Under exceptional circumstances, it may subsequently be extended by a maximum of a further seven days by the Supervisory Body.

## **6. LEGAL CONTEXT AND CARE QUALITY COMMISSION (CQC)**

6.1 Some of the most relevant Legislation, Codes of Practice and Statutory Instruments are as follows:

- Care Act 2014
- Mental Health Act 2007
- Human Rights Act 1998
- The European Convention on Human Rights and its five principles
- Disability Discrimination Act 1998
- Data Protection Act 2017
- Care Standards Act 2000
- Human Tissue Act 2004
- Mental Capacity Act 2005
- Mental Capacity Act Code of Practice 2007
- Mental Health Act Code of Practice 2015
- Deprivation of Liberty Safeguards (DoLS) 2007
- Deprivation of Liberty Safeguards Code of Practice 2008

6.2 The Care Quality Commission (CQC) has developed Essential Standards of Quality and Safety which health and social care organisations, dentists and GPs must reach to



be compliant with the MCA 2005 and to avoid sanctions. Further details are available at: <http://www.cqc.org.uk/content/essential-standards>. There is also guidance for providers which can be downloaded from: <http://www.cqc.org.uk/organisations-we-regulate/registered-services/guidance-about-compliance/how-mental-capacity-act-2005>

6.3 CQC has a duty to monitor the operation of DoLS in England and to report on the operation of DoLS to the Secretary of Health. The Commission may cancel a registration in respect of a care setting in England where DoLS legislation has not been carried out in accordance with requirements of the enactment.

6.4 Managing Authorities have a duty to complete a statutory notification to CQC when applying to deprive a person of their liberty and of the outcome of the application. The notification form and guidance are available at <http://www.cqc.org.uk/organisations-we-regulate/registered-services/notifications/notifications-non-nhs-trust-providers>.

## **7. GOVERNING PRINCIPLES**

7.1 The following principles will be adhered to by all those with a duty of care towards an individual who is, or may be deprived of their liberty. This includes the Managing Authority and Supervisory Body: Staff will adhere to the five statutory principles which underpin the Mental Capacity Act 2005:

- **A person must be assumed to have capacity unless it is established that they lack capacity;**
- **A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success;**
- **A person is not to be treated as unable to make a decision merely because he makes an unwise decision;**
- **An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests; and**
- **Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.**

- Staff will refer to the Codes of Practice whenever issues of capacity, best interest decision making and deprivation of liberty occur.
- Staff will carry out their duty to ensure optimum care for individuals that meets their needs and upholds their Human Rights.
- Staff at all levels will work collaboratively with colleagues across organisations, to ensure efficient and consistent working practices, to ensure timely and effective communication and information sharing and to maximise efficiency of resources.
- Every effort will be made by those who are supporting and caring for an individual to prevent deprivation of liberty. This includes both commissioners and providers of care.
- The dignity and wellbeing of the relevant person will be paramount at all times. A personalised approach will be taken that maximises freedom, minimises control and supports and encourages contacts with family, carers and friends.
- Staff will work in accordance with the principles of the Data Protection Act 2017 and will share and record only that data which is necessary.
- Staff will consider safeguarding within every aspect of their responsibilities. If any act or omission constitutes abuse of an adult with care and support needs, as defined by Adult Safeguarding: Multi-agency policy & procedures for the protection of adults with care & support needs in the West Midlands, they must report this in accordance with the policy and procedure.
- Staff will seek to engage with those involved in caring for the person, anyone named by them as a person to consult and those with an interest in the person's welfare and ensure they are consulted in decision-making.
- Every effort should be made to resolve disputes surrounding a decision to deprive a person of their liberty locally and informally. Both the Managing Authority and Supervisory Body should be willing to engage in constructive discussion.
- Staff of both the Supervisory Body and Managing Authority will maintain succinct, systematic and accurate records, which demonstrate both good, safe practice within the law.

- All organisations and services involved with deprivation of liberty should seek to develop good practice by monitoring and reviewing their processes as part of the organisation's governance structure.

## **8. PROCEDURES AND GUIDANCE**

### **8.1 Managing Authorities – Requesting an Authorisation**

The Managing Authority, the hospital or care home, must seek authorisation from the Supervisory Body in order to be able to lawfully deprive somebody of their liberty. The Supervisory Body is defined on the basis of ordinary residence guidance. The Supervisory Body for Herefordshire residents is Herefordshire Council. The Herefordshire DoLS Service will provide support and guidance to managing authorities. The DoLS Service for Herefordshire Council can be contacted on 01432 383645, [DoLS@herefordshire.gov.uk](mailto:DoLS@herefordshire.gov.uk).

Annex 1 of the DoLS Code of Practice sets out an overview of the DoLS process – See Appendix 1.

8.2 Referrals by the Managing Authority should be made by completing Form 1 to apply for a standard authorisation and grant an urgent authorisation if required. This form is available from the Herefordshire DoLS service.

8.3 Managing authorities will need to ensure they have procedures in place to identify whether authorisation for deprivation of liberty is required, and if a deprivation of liberty is already occurring to grant an urgent authorisation. Procedures should clearly identify who is responsible for decision making and for taking action at this stage including signing applications:

- In the case of an NHS hospital, the managing authority is the NHS body responsible for the running of the hospital in which the relevant person is, or is to be, resident.
- In the case of a care home or a private hospital, the managing authority will be the person registered or required to be registered.
- Failure to identify a deprivation of liberty and/or to follow the procedures set out under Herefordshire DoLS Service is an act or omission that constitutes abuse which will be dealt with under safeguarding procedures.

8.4 Managing Authorities will need to ensure every effort has been made to avoid a deprivation of liberty occurring. Advice and information is available from the Supervisory Body, but it is the Managing Authority's responsibility to make an application when they suspect a deprivation of liberty is occurring. If the Managing Authority fails to put in a referral, the Supervisory Body may decide to instigate an assessment, if it believes one is

required. Appendix 2 sets out what managing authorities should consider before applying for authorisation of a deprivation of liberty.

8.5 The Managing Authority needs to decide whether a deprivation of liberty is already happening or is likely to occur within the next 28 days. The Herefordshire DoLS Service can provide advice and guidance. The Managing Authority needs to complete Form 1 to apply for a standard request and urgent authorisation if the deprivation of liberty is already occurring. The urgent authorisation makes the deprivation of liberty lawful for a period of up to 7 days (starting with the date it is granted). The Form 1 requires the Managing Authority to provide information necessary for the process. It is important that the Managing Authority clearly states the purpose of the authorisation, setting out details of the care and/or treatment that is, or is to be, provided.

8.6 Should the Managing Authority believe that a deprivation of liberty is not yet occurring but that it is likely it will be within the next 28 days, they do not give themselves an urgent authorisation, but just request a standard authorisation. If at any time, before the assessments have been completed and the Supervisory Body has given its decision, the situation changes and there is belief that a deprivation of liberty is occurring then an urgent authorisation must be granted by the Managing Authority and sent to the Supervisory Body.

8.7 The Managing Authority must state whether there is anybody that it is appropriate to consult as part of the assessment process. If there is no-one appropriate to consult, other than the 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 request on Form 1. The Supervisory Body must then instruct an IMCA using Form 30 to represent the person.

8.8 The Managing Authority should, if judged appropriate and practicable, inform the relevant person, their family, friends and carers and any IMCA already involved in the relevant person's case, of this process and the reasoning for their actions. A copy of the Form 1 needs to be kept in the person's confidential care records.

8.9 The Managing Authority should contact the Herefordshire DoLS Service on 01432 383645 or [DoLS@herefordshire.gov.uk](mailto:DoLS@herefordshire.gov.uk) and agree how the request and supporting documents should be sent to ensure data protection compliance.

### **8.10 The Standard Authorisation Process**

The Supervisory Body is responsible for considering requests for authorisations, commissioning the required assessments and where all the assessments agree, authorising the deprivation of liberty. Appendix 3 describes the Standard Authorisation process.

8.11 Upon receipt of an application for a standard authorisation, the Herefordshire DoLS Service will acknowledge receipt, decide whether it is appropriate to proceed with the request, check the form, and request any information that is missing from the application. If the Herefordshire DoLS Service considers that the application has been made too far in advance, this should be resolved with the Managing Authority and the application process should be stopped and a new application should be made at a more appropriate time. If the forms have been submitted to the wrong Supervisory Body they should be passed to the correct authority as soon as possible.

8.12 If an urgent authorisation has been granted, the Supervisory Body has 7 days in which to complete the required assessments and respond to the Managing Authority's request. If a request for a standard authorisation has been received without an urgent authorisation, the Supervisory Body has 21 days in which to complete all assessments and respond to the Managing Authority's request.

8.13 The Herefordshire DoLS Service will appoint the Best Interest Assessor and Mental Health Assessor.

8.14 Best Interests Assessors (BIA) – Professionals who have successfully completed their Best Interest Assessor training and maintained their required continual professional training will be appointed to undertake assessments, either as part of their substantive role, or commissioned independently. The choice of Assessor will be governed by:

- ensuring compliance with regulations;
- knowledge of the relevant person;
- skills and specialist knowledge for the relevant person's needs;
- expedience of resources;

8.15 Mental Health Assessors – doctor approved under S12 of the Mental Health Act 1983, who has completed the standard DoLS training for mental health assessors and required annual update training.

- See DoLS Code of Practice 4.13 and the regulations at <http://www.legislation.gov.uk/uksi/2008/1858/contents/made> for details on how assessors should be selected, and information regarding eligibility and conflict of interest.

8.16 If the relevant person has no-one appropriate to consult other than those engaged in providing care and /or treatment in a professional capacity, then, without delay, the supervisory body must appoint an Independent Mental Capacity Advocate (IMCA). IMCA's can be appointed to provide advocacy input for the relevant person and/or their

representative at various stages in the DoLS process under certain circumstances. They will inform the BIA's decision making and may also provide paid representation when required. They can bring challenge to the authorisation by approach to the Court of Protection. Further information on the role and function of the IMCA see Sec 3.22 – 3.28 of the DoLS Code of Practice. The Supervisory Body will instruct the IMCA and the IMCA will provide their report. Our current provider of IMCA services is Onside Advocacy Telephone 01905 27525, email: [imca@onside-advocacy.org.uk](mailto:imca@onside-advocacy.org.uk)

8.17 Where the Supervisory Body and the Managing Authority are the same organisation, it can act in both capacities. However, in such a situation, the BIA cannot be an employee of the Supervisory Body/Managing Authority, or provide services to it.

8.18 There are six assessments which need to be completed before a Supervisory Body can give an authorisation:

#### **8.18.1 Age Assessment.**

This assessment is to establish if the relevant person is aged 18 or over. This is completed by the BIA and recorded within the best interest's assessment on Form 3. If this assessment does not meet the requirements for authorisation because the relevant person is under the age of 18, the Managing Authority will need to refer the case to Herefordshire Council's children's services for consideration of use of the Children Act 1989, the Mental Health Act 1983 or referral to the Court of Protection.

#### **8.18.2 Mental Health Assessment.**

This assessment must be conducted by a Mental Health Assessor. The purpose is to establish whether the relevant person is suffering from a mental disorder within the meaning of S1(2) of the Mental Health Act 1983 and the assessors view on the impact of the deprivation on any mental disorder. It is recorded on Form 4. If this assessment does not meet the requirement for authorisation because the relevant person does not have a mental disorder as defined by the Mental Health Act 1983, the Managing Authority cannot legally detain the relevant person without their permission. The responsible worker/team/commissioner will be notified in order that they can support the Managing Authority to work with the relevant person to plan their on-going care and/or treatment without the use of DoLS.

#### **8.18.3 Mental Capacity Assessment.**

This establishes whether the relevant person lacks the capacity to consent to the arrangements for their care and/or treatment in the hospital or care home. This assessment can be conducted by either the BIA or the Mental Health Assessor and can be undertaken by an assessor with previous knowledge of the relevant person if this

would be beneficial. Specialist advice may be sought for clients with specific communication needs. This is recorded on Form 3 or 4 dependent upon whether the BIA or Mental Health Assessor are undertaking the assessment. If it is found that the person does have the mental capacity to make decisions about their care and/or treatment in the hospital or care home, it is unlawful to deprive them of their liberty. The responsible worker / team / commissioner will be notified in order that they can support the Managing Authority to work with the relevant person to plan their on-going care and/or treatment without the use of DoLS.

#### **8.18.4 No Refusals Assessment.**

This establishes whether an authorisation for deprivation of liberty would conflict with other existing authority for decision making for that person, such as a valid and applicable Advance Decision to Refuse Treatment or a decision by a Lasting Power of Attorney or Deputy for Health and Welfare. This is recorded by the BIA on Form 3. Where this assessment does not meet the requirement for authorisation because there is a valid refusal from a donee or deputy or where an applicable and valid Advance Decision to Refuse Treatment (ADRT) is in place, alternative arrangements for care or treatment will need to be made in conjunction with the person with the authority to make the decision.

#### **8.18.5 Eligibility Assessment.**

This establishes whether the relevant person is subject to a requirement under the Mental Health Act 1983 that may conflict with an authorisation under DoLS or whether an application under the Mental Health Act 1983 should be made. The eligibility assessment is usually completed by the Mental Health Assessor, but can be completed by a BIA who is also an Approved Mental Health Professional (AMHP). This is recorded on Form 3 or 4. If the outcome of the assessment is that consideration should be given to the use of the Mental Health Act 1983 instead of the Deprivation of Liberty Safeguards, an assessment will need to be made under the Mental Health Act 1983, the Mental Health Assessor will contact Herefordshire AMHP service via the ART Team on Tel 01432 260900 Details of arrangements made should be recorded on the Form 4 and returned to the Herefordshire DoLS Services.

#### **8.18.6 Best Interest Assessment.**

This assessment establishes whether the deprivation of liberty is occurring, whether the proposed deprivation of liberty is in the relevant person's best interests, is necessary to prevent harm to themselves and that the deprivation of liberty is proportionate to the likelihood and seriousness of the harm identified. This assessment must be conducted by the BIA and recorded on Form 3 if there is a deprivation of liberty or 3A if no deprivation of liberty has been identified. Where this assessment does not meet the

requirement for authorisation because deprivation of liberty is deemed not to be in the relevant person's best interests, the care plan will need to be amended to avoid unlawful deprivation of liberty. The responsible worker/team/commissioner will be notified in order that they can support the Managing Authority to work with the relevant person to plan their on-going care and/or treatment without the use of DoLS.

8.19 An equivalent assessment is an assessment that has been carried out in the last 12 months, which the Supervisory Body is satisfied, remains valid and applicable to the purpose under DoLS. The Act states that where an equivalent assessment to any of the above six assessments has already been obtained, it may be relied upon instead of obtaining a fresh assessment. Usual practice is that the use of equivalent assessments is considered where there are consecutive periods of authorisation and the situation is stable. It is good practice to ensure that the best interests' assessment and mental capacity assessment are completed prior to each period of authorisation.

### **8.20 Extension to Urgent Authorisations**

If the Managing Authority needs to request an extension to an urgent authorisation, Form 1 should be submitted to the Supervisory Body whom will complete the rest of the form 1 and return to the Managing Authority. In practice this need for an extension to the urgent authorisation will be discussed with the Managing Authority by the Supervisory Body. An extension should only be granted in exceptional circumstances, for example, where further assessment or consultation is required by the BIA. It is not good practice for an extension to an urgent authorisation to be granted in order to manage holiday periods or staffing difficulties. The Managing Authority is responsible for informing the relevant person and any IMCA instructed of the extension, both orally and in writing and informing them of their rights and assisting their understanding.

### **8.21 Third Party Requests**

8.21.1 If anyone believes that they or another person may be being deprived of their liberty without authorisation, they need to alert the Managing Authority and suggest they apply for an authorisation. This alert can be made verbally or in writing. The Managing Authority must normally respond to this request within 24 hours. Refer to Chapter 9 of the DoLS Code of Practice for further details on Third Party requests.

8.21.2 Where the Managing Authority has been unable to resolve the Third party request, i.e. where they have not been able to satisfy the third party that no deprivation of liberty is occurring, they must submit a request for an authorisation to the Herefordshire DoLS Service.

8.21.3 The Third Party can raise their concerns directly with the Herefordshire DoLS Service, who will consider the issue with the Managing Authority and decide whether to



pursue the request further, appointing a BIA to assess whether there is an unauthorised deprivation of liberty. If a BIA is instructed they should complete an unauthorised DoLS assessment within seven days.

8.21.4 The Supervisory Body records its decision using Form 18. The Herefordshire DoLS Service will give copies of this decision to the third party, the relevant person, the Managing Authority and any IMCA involved.

## **8.22 Access to Records**

8.22.1 The Managing Authority must provide the BIA conducting assessments with any relevant assessments or care plans and enable access to and copies of any records held that assessors or IMCA may consider relevant.

## **8.23 Assessment**

8.23.1 The BIA should maintain contact with the IMCA throughout the assessment stage and identify and attempt to resolve any potential disagreements that may emerge with the IMCA. The BIA must take into account and reference the IMCA's views within the assessment.

8.23.2 The BIA should attempt, wherever possible, to discuss with the Managing Authority any possible recommendations they intend to make in their report to ensure early remedial action in the event of an authorisation not being granted.

8.23.3 Should Assessors have concerns that deprivation of liberty is affecting a number of people within a home or a hospital ward, they need to advise the managing authority of this and request they complete an urgent authorisation and put in applications to the DoLS Team. Then if the Managing Authority does not comply with this, a referral to Adult Safeguarding will need to be made.

8.23.4 Should either assessor be aware that they are going to be unable to complete the assessments within the statutory timescales they need to inform the Herefordshire DoLS Service. If there are exceptional circumstances, an extension to the urgent authorisation may be granted.

## **8.24 The Decision on Authorisation**

8.24.1 If any of the assessments conclude that one of the requirements is NOT met, then the assessment process should stop immediately and authorisation may not be given. Form 6 should be completed by the Herefordshire DoLS Service and signed by the authorised signatory from the Supervisory Body. A copy of the form and an explanatory letter will be sent to the Managing Authority who will be asked to discuss the outcome with the relevant person and their family members. Adjustments may need

to be made to the care plan. If appropriate adjustments are not possible and the person is unlawfully deprived of their liberty, then a safeguarding alert should be made and a referral made to the Court of Protection.

8.24.2 If the outcome of the assessments is that the qualifying requirements are met, the Supervisory Body grants the authorisation. The Supervisory Body will scrutinise the assessments to ensure the relevant legal criteria and guidance from the Code of Practice have been considered. Any issues will be discussed with the assessor during this process. Form 5 should be completed by the Herefordshire DoLS Service. The Form 5 will then be signed by the authorised signatory of the Supervisory Body. Further scrutiny and discussion may take place. The signatory must determine the period of authorisation (which cannot not be longer than the period recommended by the BIA) and set conditions for the Managing Authority (being mindful of the recommendations made by the BIA).

8.24.3 The Herefordshire DoLS Service will phone the Managing Authority to advise them of the outcome and conditions as soon as a decision has been made. A copy of the decision form plus an explanatory letter and the assessment reports are sent to the Managing Authority, the Relevant Person's Representative and the 39A IMCA (if required). Copies of the form and explanatory letter can also be sent to anybody that the BIA has listed that they have consulted during the assessment. Copies are also sent to the responsible worker / team / commissioner. The information and legal status is also recorded on Frameworki. The Managing Authority must place the copies on the person's care records.

## **8.25 Relevant Person's Representative**

8.25.1 The BIA needs to initiate identifying a Relevant Person's Representative in the early stages of the assessment, although this person will not actually be appointed until an authorisation is granted. The role of the Relevant Person's Representative is to maintain contact with the relevant person and to provide independent representation and support to the relevant person in all matters relating to the deprivation of liberty safeguards, including triggering a review and making approach to the Court of Protection as necessary. Chapter 7 of The Code of Practice provides eligibility criteria for who can be the relevant person's representative. The BIA needs to give their recommendation on the Form 3 or if the relevant person does not have anyone who could act as their representative, the BIA should inform the Supervisory Body and they will need to appoint a paid representative, usually an IMCA from the advocacy service.

8.25.2 When authorisation is granted, a Relevant Person's Representative should be appointed based on the BIA's recommendations and their appointment should be confirmed in writing by completing Form 5 which should be signed by the

representative. A copy needs to be sent to the following; the Managing Authority; the relevant person; the relevant person's representative; any IMCA involved; any donee or deputy; and interested persons listed as consulted by the BIA. The representative must be given information and support to assist them in their role and be provided with the means to contact an IMCA. The Supervisory Body needs to decide whether it would be beneficial for the relevant person's representative and/or the relevant person to have the support of a 39D IMCA and to appoint them if they believe it would be in the person's best interests. This would usually be based on a recommendation made by the BIA.

8.25.3 If there is any delay in appointing a representative, or there is a period between the termination of one representative and the appointment of another, the Supervisory Body should appoint a 39C IMCA to support the relevant person until a representative has been appointed.

8.25.4 The Managing Authority must accommodate visits by the Relevant Person's Representative and details of visits are to be recorded in the relevant person's records. The Managing Authority must inform the Supervisory Body if the representative is not maintaining appropriate contact.

8.25.5 The Supervisory Body can terminate the appointment of the Relevant Person's Representative.

## **8.26 CQC Statutory Notifications**

8.26.1 The Managing Authority must inform CQC that request for a standard authorisation has been made and of outcome of the request. For further information for hospital trusts and hospices:

<http://www.cqc.org.uk/organisations-we-regulate/registered-services/notifications/notifications-nhs-trusts>

For further information for care homes:

<http://www.cqc.org.uk/organisations-we-regulate/registered-services/notifications/notifications-non-nhs-trust-providers>

## **8.27 Complaints**

8.27.1 The Managing Authority should raise any concerns about the assessment process via the complaints procedures of the Supervisory Body.

## **8.28 Reviews**

8.28.1 A standard authorisation can be reviewed at any time during the authorisation –

see Chapter 9 of the Code of Practice. Reviews will be conducted where any of the statutory grounds for review are met or where the Managing Authority, the relevant person or their representative requests a review. The Supervisory Body can also decide to carry out a review. The process is now captured on one form shared between the Managing Authority and the Supervisory Body – Form 10. The Managing Authority can request a review by completing Form 10. The relevant person or their representative can request a review by making a written or verbal request.

8.28.2 The Herefordshire DoLS Service must carry out a review if the statutory grounds are met. They must also conduct a review where it has been requested by the Managing Authority, the relevant person or the relevant person's representative.

8.28.3 Deprivation of Liberty can end before a formal review. An authorisation only permits deprivation of liberty; it does not mean that the person must be deprived where a change of circumstance no longer necessitates it.

8.28.4 During the period of authorisation, the Managing Authority must inform the Herefordshire DoLS Service of any of the following events:

- Where the deprivation of liberty is no longer occurring and the authorisation will be need to be ended.
- Where any circumstances have changed that may require a review.
- Where any circumstances have changed that may require review of the eligibility assessment and short term suspension of the authorisation (such as admission to hospital under the Mental Health Act 1983). Under these circumstances the Supervisory Body can suspend the Authorisation for up to 28 days. Form 7 should be used to inform the Supervisory Body that an authorisation needs to be suspended.
- After 28 days the Managing Authority should inform the Supervisory Body whether the person has returned within the time period and so the Authorisation is once again in force. If the person has not returned within this time period, the Authorisation will cease to be in force at the end of the 28 day period
- Where the Managing Authority identifies that the relevant person has regained capacity on a long-term basis and the authorisation will need to be terminated.

8.28.5 Once a request for a review has been received, the Herefordshire DoLS Service should acknowledge it and make plans for conducting the review within 24 hours of the request being received. Form 10 should be used to inform the relevant person, their representative and the Managing Authority of the intention to conduct a review.

8.28.6 The Herefordshire DoLS Service will need to determine which of the requirements needs to be reviewed and whether any further action is required.

8.28.7 In general, the reviews should follow the same process as the standard authorisation for each of the qualifying requirements that need to be reviewed. A Best Interest Assessor and / or a Mental Health Assessor will need to be appointed, as required, and they need to ensure reports are completed and sent back to the Herefordshire DoLS Service in a timely manner as the outcome of the review has to be achieved and communicated within 21 days.

8.28.8 Form 5 needs to be completed, and then signed an authorised signatory of the Supervisory Body, detailing the outcome of the review (and any necessary actions) such as:

- The review has determined that the requirements continue to be met and the authorisation remains in their individual's best interest.
- The conditions need to be varied as a result of the review
- The authorisation terminates if the review establishes that a deprivation of liberty is no longer occurring or if any requirement is no longer met. Forms 8 and 9 need to be completed to terminate the authorisation and the appointment of the relevant person's representative

8.28.9 A copy of the Form 10 and all re-assessed reports will need to be sent to the Managing Authority, the relevant person, their representative, any IMCA instructed and any other persons consulted during the review.

8.28.10 Where the deprivation of liberty may need to continue after expiry of the authorisation the Managing Authority needs to apply for a new standard authorisation using Form 1 before the current authorisation expires, ensuring there is good time allowed for comprehensive assessments to be completed.

8.28.11 On receipt of the Form 1, the Herefordshire DoLS Service will need to re-institute the assessment process as outlined above.

8.28.12 The Herefordshire DoLS Service will contact the Managing Authority towards the end of the period of authorisation. If the Managing Authority advises that they will not be requesting a further period of authorisation, a review will be arranged to ensure that the qualifying requirements are no longer met.

## **9. OUT OF AREA ASSESSMENTS & ORDINARY RESIDENCE WITH REGARD TO CARE HOMES**

9.1 When deciding which Local Authority is responsible for assessing an individual in a care home or hospital the rules of ordinary residence apply.

9.2 Where a person needs to be deprived of their liberty in a care home, the Supervisory Body is always the local authority in which the person is ordinarily resident. This remains the case regardless of whether the person has been placed in the home by a local authority or CCG.

9.3 If a person is self-funding their care under private arrangements, they may acquire an ordinary residence in the area in which their care home is located if they had capacity to choose to move to that area when they originally moved.

9.4 Where a person is not ordinarily resident in any local authority (for example a person of no settled residence), it is the local authority in which the care home is situated that becomes the Supervisory Body.

9.5 Where a person is placed in a care home in another local authority area becomes in need of a deprivation of liberty authorisation, they remain ordinarily resident in their placing local authority. Therefore, the placing authority would be the Supervisory Body.

9.6 Where a person is deprived of liberty in hospital, they remain ordinarily resident in the area in which they were ordinarily resident immediately before they were admitted to hospital. If that person needs to be deprived of liberty in a care home upon their discharge from hospital, and the care home applies for the standard authorisation in advance, whilst the person is still in hospital (as would be good practice in this situation), it is the local authority in which the person was ordinarily resident before their admission to hospital which is responsible for undertaking the role of Supervisory Body. This remains the case even where it is planned that the person will be discharged from hospital to a care home located in another local authority area.

9.7 If the person does not require the local authority to make arrangements on their behalf and enters that home as a self-funder (usually a deputy would enter into a contract with the care home on their behalf), they would generally acquire an ordinary residence in the area in which their care home is located. However, if the person has not entered the care home at the point when the DoLS application is made, they cannot be ordinarily resident in that local authority, despite any imminent plans to move there. Whilst the person remains in hospital, they are ordinarily resident in their previous local authority until they are discharged from hospital. It is likely that the self-funder would become ordinarily resident in the local authority in which their care home is located as soon as their move takes place but their supervisory body under DoLS would be their previous local authority.

9.8 This applies to all NHS accommodation and not just hospitals. This means that where a person is placed in a care home “out of area” by a CCG under NHS CHC arrangements they remain ordinarily resident in the area in which they were ordinarily resident before being provided with NHS CHC. Therefore, if the person in receipt of

NHS CHC subsequently needs to be deprived of their liberty, it is the local authority in which they were ordinarily resident immediately before being provided with NHS CHC that is responsible for performing the supervisory body role.

9.9 Managing Authorities will need to know which Local Authority is responsible for commissioning the care of their residents. If managing authorities are in doubt, they should discuss with the Herefordshire DoLS Service.

9.10 When there is a dispute about where the relevant person is ordinarily resident, the Supervisory Body will be the Local Authority for the area in which the care home is situated, until the matter is resolved. Herefordshire Council will co-operate with other Supervisory Bodies to ensure the best interests of any potential relevant person are met.

## **10. APPEALS AND COURT OF PROTECTION**

10.1 Once an authorisation has been granted or refused by the Supervisory Body, the Managing Authority itself cannot appeal against the decision. However, the Managing Authority can appeal against the assessment process if it believes there was a fault in the assessment process or negligence on the part of the assessor, or whether a change in the condition of the person requires a re-assessment. The dispute will need to be investigated through the relevant Supervisory Body's complaints procedures.

10.2 The Court of Protection, established by the Mental Capacity Act 2005 (see Chapter 8 of the Mental Capacity Act Code of Practice), allows anybody deprived of their liberty the right to speedy access to a review of the lawfulness of their deprivation of liberty. It is the responsibility of the Managing Authority to ensure that the relevant person and their representative is aware of their rights to apply to the court both before the authorisation is granted and afterwards and that they have the information required in order to make a referral to the Court. The relevant person and their representative should be made aware of the types of questions/issues they can take to the Court as stated in the Code of Practice Chapter 10.

10.3 The Supervisory Body should appoint a supporting IMCA for the representative and / or their representative if they believe this will be of benefit to them.

10.4 The Managing Authority and the Supervisory Body should endeavour to resolve any concerns through mediation, or their own complaints procedures before the relevant person or their representative refer the matter to the Court.

10.5 The Managing Authority and Supervisory Body are required to comply with any conditions imposed by the Court.

10.6 Where the direction of the Court is required on a matter relating to an authorisation, for example where there is on-going restriction on contact with family, proceedings should be initiated by the Supervisory Body.

## **11. REPORTING THE DEATH OF A PERSON WHO IS SUBJECT TO DEPRIVATION OF LIBERTY SAFEGUARDS**

11.1 Should a person die whilst being the subject of a Deprivation of Liberty Safeguards authorisation, the Managing Authority should inform the coroner of this using Form 12.

## **12. COMPLAINTS**

12.1 Complaints should be dealt with through the relevant Managing Authority or Supervisory Body complaints procedure. Wherever possible, concerns about the deprivation of liberty should be resolved informally.

## **13. TRAINING**

13.1 Herefordshire Safeguarding Adult Board has implemented a multi-agency training strategy which includes MCA and DoLS to support training and development of staff within Herefordshire's statutory, independent and third sector Health and Social Care workforce. The aim is to provide knowledge and understanding to enable staff to carry out their duties and responsibilities under the MCA. Within this strategy partner organisations will have their own training strategies to meet the specialist needs of individual organisations teams and service.

13.2 Organisational specific training and implementation needs will be addressed within individual agencies within the context of the overall strategy. All training should be linked to the MCA Competencies detailed in the safeguarding training strategy.

## **14. INFORMATION GOVERNANCE**

14.1 There is a need to transfer confidential, sensitive information between managing authorities, Supervisory Bodies, Best Interest Assessors, Mental Health Assessors, health and social care professionals, Independent Mental Capacity Advocates, the relevant person, their Carers, family members and representatives through the assessment and authorisation procedures with regard to the Deprivation of Liberty



Safeguards. Information governance must be considered by all organisations involved in this process. Managing Authorities should contact the Herefordshire DoLS Service to discuss the safe transfer of information.

14.2 Sometimes, third parties may request information about someone who lacks capacity. Chapter 16 of the MCA Code of Practice offers general guidance. Practitioners must have regard to the Data Protection Act and relevant organisational policy.

14.3 The following is a summary of key points:

- It should always be considered first whether the person who lacks capacity in relation to a specific decision may nevertheless have the capacity to agree to that information being disclosed. If so, the person's consent to disclose the information should be sought;
- It should always be considered whether the person making the request for confidential information has lawful authority to ask for it;
- Staff must be satisfied that the person making the request for information is acting in the Best Interests of the person who lacks capacity and needs the information to act properly;
- Staff must also be satisfied that the person making the request will respect confidentiality and will keep the information for no longer than is necessary;
- If staff decide, based upon the Best Interests and needs of the person who lacks capacity, that information should not be revealed to the person's Carer, Chapter 15 of the MCA Code of Practice provides options to consider;
- If staff reveal confidential information lawfully, they should ask the recipient to confirm that they will keep that information safe, confidential and for no longer than is reasonably necessary for the purpose requested;
- Staff should ensure they record all incidents of information sharing and their justification for sharing at that point in time.

14.4 Individuals or their relatives may make requests to see their records, and the proper processes for such "subject access requests" must be followed within the organisation receiving the request to ensure that it is answered lawfully. Other data protection rights such as the right to correct inaccurate data must also be respected and the correct organisational procedures followed when these rights are invoked."

14.5 A privacy notice will be in place to inform individuals how their personal data will be processed, and that a data sharing agreement will document the process for sharing information

## **15. RELATED POLICIES, PROCEDURES AND FORMS**

HSAB Mental Capacity Act Policy

Adult Safeguarding: Multi-agency policy & procedures for the protection of adults with care & support needs in the West Midlands.

HSAB Guidance on Positive Approaches to Behaviour that Challenges  
Guidance on Ordinary Residence

Complaints Procedure

Recording Policy

Consent Policy

Medicines Policy

End of Life Policy

Risk Management

Information Sharing

## **16. MONITORING AND REVIEW**

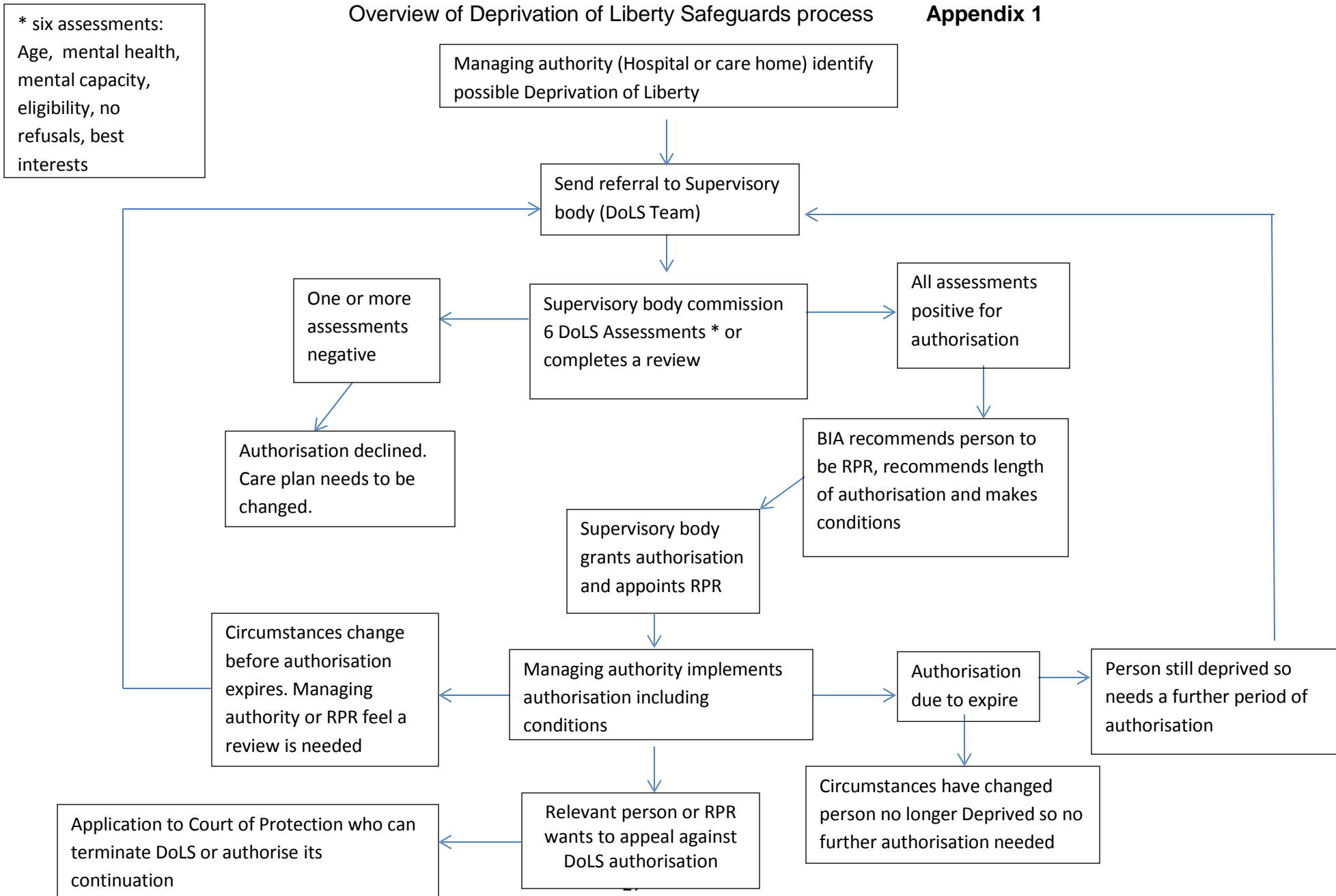
16.1 This policy will be monitored on an annual basis and reviewed in 3 years

## **17. IMPLEMENTATION**

17.1 Partner agencies existing related policies and procedures will need to be reviewed to ensure consistency with this updated DoLS policy, procedure and guidelines.

# Overview of Deprivation of Liberty Safeguards process

## Appendix 1



## APPENDIX 2

### What should a managing authority consider before making an application for Deprivation of Liberty Safeguards

