Bedfordshire, Luton and Milton Keynes Integrated Care Board

Deprivation of Liberty Safeguards Policy

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Document Owner:	Chief Nursing Director
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Version Control			
Version	**Date**	**Reviewer(s)**	**Revision Description**
v1.0	01-07-2022		The Board of the Integrated Care Board adopted approved policy

Implementation Plan

Development and Consultation:	The following individuals were consulted and involved in the development of this document: ▪ Mental Capacity Act and Liberty Protection Safeguards Lead ▪ Safeguarding Adults Leads ▪ Continuing Health Care Development Practitioners
Dissemination:	Staff can access this document via the website and will be notified of new / revised versions via the staff briefing. This document will be included in the organisation's Publication Scheme in compliance with the Freedom of Information Act 2000.
Training:	The following training will be provided to make sure compliance with this document is understood: ▪ Mental Capacity Act: An Overview ▪ Assessing Mental Capacity: Talk through of a Mental Capacity Assessment ▪ Deprivation of Liberty Safeguards ▪ Court of Protection Deprivation of Liberty (COPDOL) Processes and Procedures **Please Note: In order to understand Deprivation of Liberty (in all its forms) – you must first fully understand the foundations of the Mental Capacity Act and how to apply it in working practice.**
Monitoring:	Monitoring and compliance of this document will be carried out via: ▪ Verification of COPDOL Applications ▪ Auditing of Mental Capacity documentation ▪ Checking its accuracy in applying it in working practice ▪ Listening to feedback from staff who use the Policy
Review:	The Document Owner will ensure this document is reviewed in accordance with the review date on page 2.
Equality, Diversity and Privacy:	Appendix 1 - Equality Impact Assessment Appendix 2 - Data Protection Impact Assessment
Associated Documents:	The following documents must be read in conjunction with this document: **Safeguarding Policy**

References:	The following articles were accessed and used to inform the development of this document: ▪ https://www.mentalcapacitylawandpolicy.org.uk/mca-codes-of-practice-update/ ▪ https://www.mentalcapacitylawandpolicy.org.uk/ ▪ https://capacityguide.org.uk/ ▪ The Mental Capacity Act 2005 http://www.legislation.gov.uk/ukpga/2005/9/contents ▪ Social Care Institute for Excellence (SCIE). This site provides information on the basics in terms of introductory knowledge and key messages, and builds up through stages, with links to guidance targeted at specific audiences, such as health and social care professionals and independent mental capacity advocates (IMCA's). https://www.scie.org.uk/mca ▪ Assistance in completion of MCA assessments for practitioners and patients: www.assessright.co.uk ▪ MCA law cases: http://www.39essex.com/cop_cases/ ▪ Deprivation of Liberty: A Practical Guide. (April 2015) The Law Society https://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/ ▪ https://www.gov.uk/government/publications/liberty-protection-safeguards-factsheets/liberty-protection-safeguards-what-they-are

Mental Capacity Act and Deprivation of Liberty – Holding Statement for Policies to be updated.
February 2022.

The Mental Capacity Act Policy and the Deprivation of Liberty Safeguards Policy are both due for renewal, however we are postponing reviewing these until we have a date for implementation, in anticipation of the Mental Capacity (Amendment) Act 2019 coming into force which has now been delayed twice. Whilst we are awaiting the new code of practice to be published for consultation, the statutory law and guidance should be followed in conjunction with the information on case law which can be found on the link below.

There are currently two separate Codes of Practice to the Mental Capacity Act 2005, one for the main body of the Act, and one for the Deprivation of Liberty Safeguards. They are statutory Codes: they have been approved by Parliament, and the MCA 2005 requires certain people to have regard to them. Those people include anyone acting in a professional capacity.

Neither Code of Practice has ever been updated since they were published, the main Code in 2007, and the DoLS Code in 2009. They are both out of date in significant ways.

As part of the coming into force of the Mental Capacity (Amendment) Act 2019, it was anticipated that there would be a new Code published which would (in one place) update the main MCA Code and give guidance as to the operation of the Liberty Protection Safeguards. (LPS) However, the LPS have been delayed and, whilst we anticipate that there will be a consultation on the draft Code in 2022 (hopefully relatively early in 2022), it appears likely that professionals will be operating using two out of date Codes for some time.

Alex Ruck Keene (a specialist barrister at 39 Essex Chambers in The Mental Capacity Act (2005) and Deprivation of Liberty Safeguards (2009) has created a guidance note with his colleagues in Chambers which indicates where the current Code of Practice is out of date.

Whilst professionals must have regard to the Codes, they should depart from them where they have been superseded by case-law which makes clear what is in the Act itself, the source of the law.

Alex Ruck Keene et al has prepared this guide to those parts of the two Codes which are most out of date.

See link below.
https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2022/02/Mental-Capacity-Guidance-Note-Codes-of-Practice-Update-February-2022.pdf

We would expect that all professionals adhere to the Act, it's code, guidance and any caselaw that supersedes and amend any working practice to ensure compliance with the law.

The MCA & DoLS Policies will be reviewed once the Code of Practice is finalised and published and will at that time be amalgamated into one Policy.

Table of Contents

1.0 Introduction

1.1 NHS Bedfordshire, Luton and Milton Keynes Integrated Care Board (the ICB) aims to ensure robust governance through its formal written procedural documents, such as this document, which communicate standard organisational ways of working. These documents help clarify operational requirements and consistency within day-to-day practice. They can improve the quality of work, increase the successful achievement of objectives and support patient safety, quality and experience. The ICB aims to ensure its procedural documents are user friendly, up-to-date and easily accessible.

1.2 The ICB must design and implement procedural documents that meet the diverse needs of our service and workforce, ensuring that none is placed at a disadvantage over others, in accordance with the Equality Act 2010. The Equality Impact Assessment initial screening, which was used to determine the potential impact this policy might have with respect to the individual protected characteristics is incorporated at Appendix 1.

1.3 A Data Protection Impact Assessment is a process which helps assess privacy risks to individuals in the collection, use and disclosure of personal information. The Data Protection Impact Assessment initial screening, which was used to determine the potential impact this policy might have with respect to an individual's privacy is incorporated at Appendix 2.

2.0 Scope

2.1 This policy applies to all ICB staff members, including Ordinary Members of the Board of the ICB, involved in policy-making processes, whether permanent, temporary or contracted-in under a contract for service (either as an individual or through a third-party supplier).

3.0 Definitions

3.1 Whilst a Deprivation of Liberty may occur in any care setting, the Deprivation of Liberty Safeguards (DoLS) provide legal protection for people who may be at risk, over the age of 18, who are or may become, deprived of their liberty in a hospital or care home environment, whether placed under public or private arrangements. Those affected by the Deprivation of Liberty Safeguards will include people with a "mental disorder", as defined within the Mental Health Act 2007, (MHA 1983 amended) who lack the capacity to make informed decisions about their care or treatment; a risk that the person may be deprived of their liberty must be identified at the earliest opportunity.

3.2 The Deprivation of Liberty Safeguards is the procedure prescribed in law when it is necessary to deprive of their liberty a patient who lacks capacity to consent to their care and treatment arrangements in order to keep them safe from harm.

3.3 The Deprivation of Liberty Safeguards clarifies that a person may be deprived of their liberty:

- If they lack the mental capacity to consent to their accommodation and care plans, and;
- It is in their own best interests to protect them from harm, and;
- If it is a necessary and proportionate response to the likelihood and seriousness of the harm, and;
- It is the least restrictive way of meeting their needs safely.

3.4 On 19th March 2014, the Supreme Court published its judgment in the P v Cheshire West and Chester Council and P & Q v Surrey County Council cases.

3.5 This judgement clarified the definition of what constitutes a deprivation of liberty by establishing an 'Acid Test'. In doing so, they have reduced the threshold and broadened the scope of who may now be affected by DoLS; to cover Independent Living Schemes, Adult Placements, Children's homes and Foster Placements and also people at home receiving CHC fully funded packages of care.

3.6 Where a Deprivation of Liberty is identified, either the care plan must be significantly altered to remove restrictions and end the deprivation or an authorisation obtained via a prescribed legal process. Such authorisation should be obtained via the Mental Health Act 1983 (MHA amended in 2007), The Deprivation of Liberty Safeguards 2009 (DoLS) or via an application to the Court of Protection (COP). The ICB should be able to seek assurance from providers that they are compliant with the DoLS framework.

3.7 The following terms are used in this document:

Abbreviation	**Reference**
ADRT	Advance Decision to Refuse Treatment
BIA	Best Interests Assessor (Nurse, or Social Worker, or Occupational Therapist, or Chartered Psychologist with a minimum of 2 years post qualifying experience and has completed the Secretary of States approved Deprivation of Liberty Safeguards training)
CoP	Court of Protection
DoLS	Deprivation of Liberty Safeguards
EPA	Enduring Power of Attorney
ECHR	European Convention on Human Rights
GP	General Practitioner (Doctor)
IMCA	Independent Mental Capacity Advocate
LPA	Lasting Power of Attorney
MA	Managing Authority (Care Home, Nursing Home or Hospital)
MCA	Mental Capacity Act
MHA	Mental Health Act
OPG	Office of the Public Guardian
PR	Paid Representative
RPR	Relevant Persons Representative

SB	Supervisory Body (Local Authority department for DoLS)
SMT	Serious Medical Treatment (Can be anything considered invasive to the body) See MCA Policy for full definition

3.8 **What is Deprivation of Liberty?**

3.8.1 Article 5 of the Human Rights Act states that 'everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law'. The Deprivation of Liberty Safeguards is the procedure prescribed in law when it is necessary to deprive of their liberty a resident or patient who lacks capacity to consent to their care and treatment in order to keep them safe from harm.

3.8.2 The Deprivation of Liberty Safeguards are an amendment to the Mental Capacity Act 2005. The Mental Capacity Act allows restraint and restrictions to be used – but only if they are proportionate and in a person's best interests.The Deprivation of Liberty Safeguards are used when any restrictions or restraints mean that a person is being deprived of their liberty.

3.8.3 A Deprivation of Liberty can only be authorised in two ways:

- The local authority (Supervisory Body); if the person will be deprived of their liberty in a care home or hospital. (The Deprivation of Liberty Safeguards (DoLS))
- In other settings, such as supported living arrangements or sheltered housing schemes, an application to the Court of Protection can authorise such a Deprivation of Liberty (DOL).

3.8.4 There are many people in different settings who are deprived of their liberty by virtue of the type of care or treatment they are receiving, or the level of restrictive practices they are subject to, but they cannot consent to it because they lack the mental capacity to do so. In March 2014, the Supreme Court handed down judgment in two cases: P v Cheshire West and Chester Council and P & Q v Surrey County Council [2014] UKSC 19. That judgment, also known as Cheshire West, has led to a considerable increase in the numbers of people in England and Wales who are considered to be “deprived” of their liberty for the purposes of receiving care and treatment. The judgment also emphasised the importance of identifying those who are deprived of their liberty so that their circumstances can be the subject of regular independent checks and scrutiny to ensure that decisions being made about them are actually being made in their best interests.

4.0 Policy Statement

4.1 The ICB aspires to the highest standards of corporate behaviour and clinical competence, to ensure that safe, fair and equitable procedures are applied to all organisational transactions, including relationships with patients their carers, public, staff, stakeholders and the use of public resources. In order to provide clear and consistent guidance, the ICB will develop documents to fulfil all statutory,

organisational and best practice requirements and support the principles of equal opportunity for all.

4.2 BLMK ICB has a statutory duty to ensure that it makes arrangements to safeguard and promote the welfare of children and young people and to protect adults at risk from abuse or neglect in accordance with the Children's Act (2004) and the Care Act (2014).

4.3 The purpose of this policy is to outline the responsibilities of the ICB in applying the Mental Capacity Act Deprivation of Liberty Safeguards 2009 legislation. The Deprivation of Liberty Safeguards set out a legal and procedural framework for authorising the care arrangements that deprive a mentally incapacitated person of their liberty where that care is determined as being in the person's best interests.

4.4 The Deprivation of Liberty Safeguards (DoLS) aims to ensure that people in care homes, hospitals and other environments are looked after in a way that does not inappropriately restrict their freedom. The safeguards should ensure that a care home, nursing home, hospital or other environment only deprives someone of their liberty in a safe and correct way, it is necessary and proportionate to the risk, and that this is only done when it is in the best interests of the person and there is no other less restrictive way to look after them.

4.5 BLMK ICB has a vision:

4.5.1 Our vision is to work with our population to optimise health and wellbeing, advance equality in our communities and make the best use of our resources.

4.5.2 'We will work in partnership with patients, their carers, providers and other partners to deliver a high quality and cost effective NHS to the people of BLMK, empowering them to lead healthy and independent lives. This will be underpinned by our values'

4.5.3 Protecting the vulnerable is a key part of the ICB's approach to commissioning and, together with a focus on quality and patient experience, is integral to its working arrangements. BLMKICB continually strives to build on its pledge to learn from the best and inspire the health economy in BLMK in order to fulfil its statutory safeguarding responsibilities.

4.5.4 BLMKICB recognises that there is a need for effective joint working between agencies and professionals who have differing roles and expertise if vulnerable groups are to be protected from abuse. BLMK ICB is working closely with the Safeguarding Boards, statutory agencies and its provider organisations to ensure the effectiveness of multiagency arrangements to safeguard and promote the wellbeing of children and adults at risk from abuse or neglect.

4.5.5 BLMK ICB, in recognising its duty to make improvements in the quality of primary care, has appointed Lead GPs for Safeguarding Children and Adults and a Named GP to provide the necessary local leadership and support and to work closely with NHS England as commissioners of these services.

4.5.6 The Safeguarding Strategy should be read in conjunction with the ICB Safeguarding Policies, Including the Mental Capacity Act and Deprivation of Liberty Safeguards Policies, Workforce Strategy, Safeguarding Annual Reports and Business Plans.

5.0 Roles and Responsibilities

5.1 The following have specific responsibilities in relation to this policy:

Accountable Officer	The accountable officer has overall responsibility for the strategic direction and operational management, including ensuring that ICB process documents comply with all legal, statutory and good practice guidance requirements.
Mental Capacity Act and Deprivation of Liberty Safeguards Manager	The Mental Capacity Act and Deprivation of Liberty Safeguards Manager is responsible for: ▪ Maintaining and reviewing this policy document ▪ Updating this policy when required ▪ Monitoring the implementation of this policy ▪ Training Staff and raising awareness in relation to this policy
Quality and Safety Teams, Contracts and Commissioning Teams	Monitoring of Providers adherence to the Deprivation of Liberty Safeguards.
Nurse Assessors/ Case Managers	Adhering to the Deprivation of Liberty Safeguards in the Community via completing Court of Protection applications for adults and potentially some children. Using the Streamlined Re X Procedure in appendix 7 and submitting evidence to the Court of Protection.
All Staff	All staff, including temporary and agency staff, are responsible for: ▪ Compliance with relevant process documents. Failure to comply may result in disciplinary action being taken. ▪ Co-operating with the development and implementation of policies and procedures and as part of their normal duties and responsibilities. ▪ Identifying the need for a change in policy or procedure as a result of becoming aware of new Case Law that will effect changes in practice, changes to statutory requirements, revised professional or clinical standards and local/national directives, and advising their line manager accordingly. ▪ Identifying training needs in respect of policies and procedures and bringing them to the attention of their line manager. ▪ Attending training/awareness sessions when provided.

6.0 Processes and Procedures

6.1 Implication of the 'Cheshire West' ruling for the ICB

6.1.1 The Supreme Court ruling in the P 'v' Cheshire West and Chester Council and P & Q v Surrey County Council cases has far reaching implications for the ICB. Although ICBs are no longer Supervisory Bodies, the lowering of the threshold has meant there are significant responsibilities for the ICB to ensure any deprivation occurring outside of a hospital or care home is properly reviewed and where necessary the appropriate actions are taken to negate the deprivation or to authorise it.

6.1.2 Where an ICB employee, in performing their duties, feels a Deprivation of Liberty is occurring (See section on 'acid test'), they need to take account of the setting in which care is being delivered.

6.1.3 If the care is in a hospital or care home setting then the ICB employee should ask the Managing Authority if an authorisation is in place and if not, to request that the Managing Authority make an application for an authorisation under Deprivation of Liberty Safeguards to the appropriate Supervisory Body.

6.1.4 Where the ICB employee feels the Managing Authority are not acting on their concerns they should contact the Supervisory Body to ask them to consider a 'third party' application.

6.1.5 Where the ICB employee recognises that a potential Deprivation of Liberty may be occurring in a community setting; such as an Independent living scheme, a person's own home, an adult placement or foster placement, then the following process should be followed:

6.1.6 Review the care package to see if any restrictions could be removed to negate a deprivation.

6.1.7 ICB staff, such as those responsible for commissioning or reviewing the care package, must make and record an assessment of the person's mental capacity (if they doubt the person's ability to consent to their care (See ICB Mental Capacity Act Policy). If the person has the capacity to make that decision at that time, they should sign a consent form agreeing to their care/treatment and/or accommodation arrangements.

6.1.8 Where an individual lacks the mental capacity to consent, then the assessor should apply the 'Acid Test' (See section on 'acid test'), i.e., is the person subject to continuous supervision and control and not free to leave and live elsewhere?

6.1.9 Is the person's care 'Imputable to the state', i.e., is it arranged and/or funded by a government body such as the ICB or Local Authority. Where packages are joint funded, then discussion should be held with the relevant Local Authority about whether an application to the Court of Protection is needed to authorise the Deprivation of Liberty. When joint funded, it is anticipated that the Local Authority may take the lead in taking

the case to the Court of Protection if required. This would need to be considered and negotiated on a case by case basis. It is vital that any such negotiations should not unduly delay an appropriate application being made and, where disagreements exist between funding bodies, it is advisable that senior management within the respective organisations are made aware.

6.1.10 Under DoLS (for those detained in hospitals or care homes) where the care package is entirely health funded and an application to The Court of Protection is required (e.g. S21a Appeal), the Local Authority Supervisory Body should liaise with the most appropriate lead at the ICB, ensuring senior management oversight as to whether they will be joint applicants or named respondents. In Deprivation of Liberty applications in the community, advice should be sought from the ICB's senior management as to whether an application to the Court of Protection for authorisation is necessary.

6.1.11 Where it is decided that an application needs to be made, the responsible Assessing Officer or Case Manager needs to compile evidence for the Court of Protection application on the advice of their Line Manager and the Mental Capacity Act and Deprivation of Liberty Safeguards Lead. (See Appendix 6 for Court of Protection Guidance).

6.1.12 Where a person is subject to a Deprivation of Liberty Authorisation dies, the case manager or reviewing officer or assessing officer must notify the Supervisory Body or authorising Court.

6.1.13 Any unauthorised Deprivations will carry with it a potential risk of litigation and financial risk to the organisation. Such a risk should be included on the Risk Register and an action plan to address the risk reviewed on a regular basis.

6.2 Documentation/References/Case Law

6.2.1 Other related policy documents.

- Mental Capacity Act Policy
- Safeguarding Adults Policy
- Administering of Covert Medication Policy

6.2.2 Legislation/statutory requirements/guidance documents

- Cabinet Office (1983) Mental Health Act 1983. London. HMSO
- Cabinet Office (1998) Human Rights Act 1998. London. HMSO.
- Cabinet Office (2000) Freedom of Information Act 2000. London. HMSO.
- Cabinet Office (2005) Mental Capacity Act 2005. London. HMSO.
- Cabinet Office (2006) Equality Act 2006. London. HMSO.
- Cabinet Office (2007) Mental Health Act 2007. London. HMSO
- Department of Health (2007) Mental Capacity Act 2005: Deprivation of Liberty Safeguards - Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice. London. DH.

- Department of Health (2009) The Mental Capacity Act Deprivation of Liberty Safeguards. London. DH.
- Griffiths, Rachel and Leighton, John (November 2012) Adults' Service SCIE Report 62. Managing the transfer of responsibilities under the Deprivation of Liberty Safeguards: a resource for local authorities and healthcare Commissioners. London: Social Care Institute for Excellence.
- Health and Safety Executive (1974) Health and Safety at Work etc. Act 1974. London. HMSO.
- House of Lords (March 2014) Select Committee on the Mental Capacity Act 2005: Post-legislative scrutiny. London: The Stationery Office
- P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents) P and Q (by their litigation friend, the Official Solicitor) (appellants) v Surrey County Council (Respondents) [2014] UKSC 19 on appeal from: [2011] EWCA Civ 1257; [2011] EWCA Civ 190

6.2.3 Best practice recommendations

- Department of Health. (2006) Records Management: NHS Code of Practice. London: DH.
- NHS Litigation Authority. (2008) Risk Management Standard for Primary Care Trusts. London: NHSLA.
- HM Government (June 2014) Valuing Every Voice, respecting every right: Making the Case for the Mental Capacity Act. The Government's response to the House of Lords Select Committee report on the Mental Capacity Act 2005.
- Law Society: Identifying a deprivation of liberty: A Practical Guide. https://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/
- Lord Chancellor and Secretary of State for Justice and Secretary of State for Health
- Independent Safeguarding Authority (http://www.isa-gov.org.uk/)
- Ruck Keene, Alex and Dobson, Catherine (April 2014) Mental Capacity Law: Guidance Note. Deprivation of Liberty in the Hospital Setting. London: 39 Essex Street
- Social Care, Local Government and Care partnership (2014). Positive and Proactive Care: Reducing the need for restrictive interventions. London: Department of Health
- Social Care Institute for Excellence (August 2014) Adult Services: Report 66. Deprivation of Liberty Safeguards: putting them into practice. London: www.scie.org.uk

6.2.4 Relevant case law

http://www.bailii.org/ew/cases/EWCOP/2018/11.html The Patient had been in PVS since suffering a cardiac arrest in 2015. The ICB, with the support of P's family, was applying for Clinically Assisted Nutrition and Hydration (CANH) to be withdrawn with the inevitable consequence that she would die within 7-14 days. Even though the case of Re Y [2017] EWHC 2866 (QB) ruled that there is no rule of principle or binding authority for the proposition that there is a legal obligation that all cases concerning the

withdrawal of Clinically Assisted Nutrition and Hydration from a person who lacks capacity must be sanctioned by the court, that case has been appealed to the Supreme Court (judgment now handed down) at the time the CCG had therefore taken the precaution of applying to the court but invited the court to deal with the application on the papers and without a hearing.

The court made the declarations and order sought and concluded that CANH should be discontinued and replaced by palliative care.

Cases in dispute now only need to be taken to the Court of Protection provided the relevant guidance is followed in each individual case.

http://www.bailii.org/uk/cases/UKSC/2017/22.html The Supreme Court has now pronounced definitively upon what the Court of Protection should do where is a dispute between the providers or funders of health or social services for a person lacking the capacity to make the decision for himself as to what services should be provided to him either between the person's family or, by analogy, by those acting on behalf of the person.

http://www.bailii.org/ew/cases/EWCA/Civ/2017/194.html This case law is about Community Treatment Orders (CTO's) and DoLS. A CTO can authorise a deprivation of liberty in the community without the need for a DoLS authorisation or (DoLS Court Order). CTO is *"…a power to provide for a lesser restriction of movement than detention in hospital which may nevertheless be an objective deprivation of liberty provided it is used for the specific purposes set out in the CTO scheme."* A DOLS authorisation is no longer required for those on CTOs following this case law.

http://www.bailii.org/ew/cases/EWCOP/2016/60.html: An application by a medical trust seeking a declaration that it would be in a patient's best interests not to undergo treatment but rather to be provided with palliative care only.

http://www.bailii.org/ew/cases/EWCOP/2016/37.html: This application came before District Judge Bellamy concerned the legality of providing covert medication to patients subject to DOLS authorisations and being attributable to the State. The use of medication without consent or prescribed covertly must always call for close scrutiny.

http://www.bailii.org/ew/cases/EWCOP/2016/5.html: This case involved two linked appeals from an order of District Judge Glentworth dated 13 July 2015, (judgment reported as North Yorkshire County Council v MAG, GC and A Clinical Commissioning Group [2015] EWCOP 64). They were brought by North Yorkshire County Council ("NYCC") and A Clinical Commissioning Group ("AICB") against the refusal of an application brought by NYCC for authorisation for the deprivation of liberty of a man ("MAG") at the home where he has lived since 2006.

http://www.bailii.org/uk/cases/UKUT/AAC/2015/644.html: This case first came before Mr. Justice Charles in Secretary of State for Justice v KC and C Partnership NHS Foundation Trust [2015] UKUT 376 (AAC), in which a restricted patient lacked the

capacity to consent to the conditions of his conditional discharge, his care package and any deprivation of his liberty that would arise.

http://www.bailii.org/ew/cases/EWCA/Civ/2015/599.html: This case concerns an appeal against the decisions made by the President of the Court of Protection, in the case of X v Ors (Deprivation of Liberty) [2014] EWCOP 25, 7th August 2014, and X v Ors (Deprivation of Liberty) (Number 2) [2014] EWCOP 37, 16th October 2014.

http://www.bailii.org/uk/cases/UKUT/AAC/2015/376.html Conditions (Care Plan) for a person on a conditional discharge can lead to a deprivation of liberty. A conditional discharge itself does not provide authority to deprive a person of their liberty. Conditional Discharge and DoLS (or DoLS Court Order) can run together. If the restrictions of a proposed conditional discharge create a deprivation of liberty the person cannot consent to them in order to avoid the deprivation of liberty (freely given consent is not available in this context) A Mental Health Tribunal does not have the power to order a conditional discharge where the conditions mean the person will be deprived of their liberty. See also MM and PJ (Deprivation of Liberty) [2017] EWCA Civ 194.

6.3 Monitoring, Review and Archiving

6.3.1 Monitoring: The MCA and DoLS Lead will agree a method for monitoring the dissemination and implementation of this policy.

6.3.2 Staff who becomes aware of any change which may affect a policy should advise their line manager as soon as possible. The author will then consider the need to review the policy or procedure outside of the agreed timescale for revision.

6.3.3 For ease of reference for reviewers or approval bodies, changes should be noted in the 'document history' table on the front page of this document.

6.3.4 NB: If the review consists of a change to an appendix or procedure document, approval may be given by the sponsor director and a revised document may be issued. Review to the main body of the policy must always follow the original approval process.

6.4 Revision of The Deprivation of Liberty Safeguards 2009

6.4.1 It is anticipated that the law commission's recommendations for the revision of The Deprivation of Liberty Safeguards 2009 to the proposed "*Liberty Protection Safeguards*" if adopted by the government, will impact on the ICB. The ICB will become a *"Responsible Body"* and will be responsible for all health care packages that result in a deprivation of liberty and will be required to record all aspects and take cases to the Court of Protection. The final report and draft Bill were published on 13 March 2017.

6.4.2 See Law Commissions Proposals Summary document: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/03/Mental_Capacity_Report_Summary.pdf

6.4.3 The Government have responded and agree to many of the proposals, but have stated that the points where the MCA interfaces with the Mental Health Act will not be agreed. It is anticipated that these points will be reviewed when the Mental Health Act is reviewed.

6.4.4 On the 14th March 2018 the final Governments Response to the Law Commission's review of Deprivation of Liberty Safeguards and Mental Capacity was published. http://qna.files.parliament.uk/ws-attachments/861932/original/180314%20Response%20to%20Law%20Commission%20on%20DoLS%20-%20final.pdf

6.4.5 The government is committed to bringing the Liberty Protection Safeguards (LPS) into force to replace the Deprivation of Liberty Safeguards (DoLS). The Mental Capacity (Amendment) Act 2019 will incorporate the Liberty Protection Safeguards and will provide protection for people aged 16+. The new MCA Code of Practice and its Regulations are currently out to consultation and the government will consider all submissions and make the required changes, then decide when the new legislation will come fully into force.

6.5 Training Implications

6.5.1 The training required to comply with this policy are:

- Policy awareness sessions
- Mandatory training programme
- E-learning
- Bespoke training provided by BLMKICB to include new case law, and Court of Protection documentation and evidence required.

NHS
Bedfordshire, Luton and Milton Keynes
Integrated Care Board

Appendix 1 - Equality Impact Assessment Initial Screening

Please answer the questions against each of the protected characteristic and inclusion health groups. If there are significant impacts and issues identified a full Equality / Quality Impact Assessment (EQIA) must be undertaken. It is against the law to discriminate against someone because of these protected characteristics. For support and advice on undertaking EQIAs please contact: agcsu.equalities@nhs.net

Name of Policy:	Mental Capacity Act and Deprivation of Liberty Safeguarding Policies
Date of assessment:	08/06/2022
Screening undertaken by:	Mental Capacity Act and Liberty Protection Safeguards Lead

Protected characteristic and inclusion health groups. Find out more about the Equality Act 2010, which provides the legal framework to tackle disadvantage and discrimination: https://www.equalityhumanrights.com/en/equality-act/protected-characteristics	Could the policy create a disadvantage for some groups in application or access? **There is reference to all of the protected characteristics however no disadvantage, application or access to any.**	If Yes - are there any mechanisms already in place to mitigate the potential adverse impacts identified? If not, please detail additional actions that could help. If this is not possible, please explain why
Age A person belonging to a particular age (for example 32 year olds) or range of ages (for example 18 to 30 year olds).	The Policy will positively impact on vulnerable adults age 16+. It sets out the procedures which staff are required to adhere to empower and support individuals to make their own decisions.	
Disability A person has a disability if she or he has a physical or mental impairment which has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.	The Mental Capacity Act is in place to uphold individual's rights and freedoms and linked to The Human Rights Act 1998. This policy sets out to address any discrimination relating to disability in line with legislation. The policy allows for scrutiny of care packages where restrictions may be in place that may amount to a deprivation. If so, an authorisation to make lawful that care package will be put in place and will further protect the individual.	
Gender reassignment The process of transitioning from one gender to another.	The policy sets out to address any discrimination relating to Gender reassignment in line with current legislation.	
Marriage and civil partnership Marriage is a union between a man and a woman or between a same-sex couple. Same-sex couples can also have their	This policy sets out to address any discrimination relating to marriage and civil partnership in line with current legislation.	

relationships legally recognised as 'civil partnerships'.		
Pregnancy and maternity Pregnancy is the condition of being pregnant or expecting a baby. Maternity refers to the period after the birth and is linked to maternity leave in the employment context. In the non-work context, protection against maternity discrimination is for 26 weeks after giving birth, and this includes treating a woman unfavourably because she is breastfeeding.	This policy sets out to address any discrimination relating to Pregnancy and Maternity in line with current legislation	
Race Refers to the protected characteristic of race. It refers to a group of people defined by their race, colour and nationality (including citizenship) ethnic or national origins.	This policy sets out to address any discrimination relating to race in line with current legislation.	
Religion or belief Religion refers to any religion, including a lack of religion. Belief refers to any religious or philosophical belief and includes a lack of belief. Generally, a belief should affect your life choices or the way you live for it to be included in the definition.	This policy sets out to address any discrimination relating to Religion or belief in line with current legislation.	
Sex A man or a woman.	This policy sets out to address any discrimination relating to sex in line with current legislation.	
Sexual orientation Whether a person's sexual attraction is towards their own sex, the opposite sex, to both sexes or none.	This policy sets out to address any discrimination relating to sexual orientation in line with current legislation.	
Carers Individuals within the ICB which may have carer responsibilities.	This policy does not impact on any working arrangements. Carers are consulted as part of any mental capacity process, to establish the views of the actual individual concerned. (Not the views of the carer)	
Please summarise the improvements which this policy offers compared to the previous version or position.		
Rebranding required and updates to new Advocacy Providers across Bedfordshire, Luton & Milton Keynes and incorporated new case law and resources for contacting local authority colleagues.		
Has potential disadvantage for some groups been identified which require mitigation?		
No – The Mental Capacity Act 2005 and The Mental Capacity (Amendment) Act 2019 is in place to empower individuals and uphold their rights and freedoms. The Government have their own EQIA		

completed for the legislation also. The overall aim is to ensure individuals are supported to make informed decisions where possible and if unable to, evidence is documented, and decisions made in the persons best interests using a checklist that evidences that the persons wishes and feelings are given primacy and where their wishes are not followed full justification in the documentation is essential.

Appendix 2 - Data Protection Impact Assessment Initial Screening

Data protection is the fair and proper use of information about people. Before completing this form, please refer to the Data Protection Impact Assessment (DPIA) Guidance in the Information Governance (IG) section on the staff Intranet or contact the Data Protection Officer for support via blmkicb.ig@nhs.net

A DPIA is a process to help you identify and minimise the data protection risks. You must do a DPIA for processing that is likely to result in a high risk to individuals. You can use our screening checklist below to help you decide when to do one. If you have answered 'Yes' to any of the 10 screening questions, you must then carry out a full DPIA using the Stage 2 form, which is also available on the Intranet in the IG section.

Name of Policy:	Mental Capacity Act Policy and Deprivation of Liberty Policy
Date of assessment:	08/6/2022
Screening undertaken by:	Karen McCulloch: Mental Capacity Act and Liberty Protection Safeguards Lead

Stage 1 – DPIA form	**please answer 'Yes' or 'No'**
1. Will the policy result in the processing of personal identifiable information / data? This includes information about living or deceased individuals, including their name, address postcode, email address, telephone number, payroll number etc.	Yes
2. Will the policy result in the processing of sensitive information / data? This includes for living or deceased individuals, including their physical health, mental health, sexuality, sexual orientation, religious belief, National Insurance No., political interest etc.	Yes
3. Will the policy involve the sharing of identifiers which are unique to an individual or household? e.g., Hospital Number, NHS Number, National Insurance Number, Payroll Number etc.	Yes
4. Will the policy result in the processing of pseudonymised information by organisations who have the key / ability to reidentify the information? **Pseudonymised data -** where all identifiers have been removed and replaced with alternative identifiers that do not identify any individual. Re-identification can only be achieved with knowledge of the re-identification key. **Anonymised data -** data where all identifiers have been removed and data left does not identify any patients. Re-identification is remotely possible, but very unlikely.	No
5. Will the policy result in organisations or people having access to information they do not currently have access to?	No
6. Will the policy result in an organisation using information it already holds or has access to, but for a different purpose?	No
7. Does the policy result in the use of technology which might be perceived as being privacy intruding? e.g., biometrics, facial recognition, CCTV, audio recording etc.	No
8. Will the policy result in decisions being made or action being taken against individuals in ways which could have a significant impact on them? Including profiling and automated decision making. (This is automated processing of personal data to evaluate certain things about an individual i.e., diagnosis and then making a decision solely by automated means - without any human involvement)	No
9. Will the policy result in the collection of additional information about individuals in addition to what is already collected / held?	No
10. Will the policy require individuals to be contacted in ways which they may not be aware of and may find intrusive? e.g., personal email, text message etc.	No

Appendix 3 - Summary of Key Points

Managing Authorities – (Care Homes, Nursing Homes & Hospitals)

- Need to adapt their care planning processes to incorporate consideration of whether a person has capacity to consent to the services which are to be provided and whether their actions are likely to result in a deprivation of liberty.
- Must not, except in an urgent situation, deprive a person of their liberty unless a standard authorisation has been given by the Supervisory Body.
- Request a standard authorisation and implement the outcomes.
- Must ensure that they comply and adhere to any conditions attached to the authorisation.
- Should monitor whether the RPR maintains regular contact with the person.
- Should only request standard authorisation if it is genuinely necessary for a person to be deprived of liberty in their best interests in order to keep them safe.

Supervisory Bodies – (Local Authorities):

- Will receive applications from Managing Authorities for standard authorisations.
- Must have obtained written assessments of the relevant person in order to ensure that they meet the qualifying requirements.
- Need to ensure that sufficient skilled assessors are available.
- May not give authorisation unless all the qualifying requirements are met.
- Must specify an authorisation's duration, which may not exceed 12 months.
- May attach conditions to the authorisation if it considers it appropriate to do so.
- Must give notice of its decision in writing to specified people, and notify others.
- Must appoint a Relevant Person's Representative to represent the interests of every person for whom they give a standard authorisation for DoLS.

In addition, both the Managing Authority and Supervisory Body should be aware of the following key points:

- An authorisation may last for a maximum period of 12 months. The Best Interests Assessor sets the timescale, the Supervisory can reduce that time given but they cannot extend it.
- Anyone engaged in caring for the person, anyone named by them as a person to consult, and anyone with an interest in the person's welfare must be consulted in decision-making.
- Before the current authorisation expires, the Managing Authority may seek a fresh authorisation by sending in a new standard application 28 days before the previous one expires, provided the requirements continue to be met.
- The authorisation should be reviewed, and if appropriate revoked, before it expires if there has been a significant change in the person's circumstances.
- When an authorisation is in force, the relevant person, the RPR and any IMCA representing the individual have a right at any time to request that the Supervisory Body reviews the authorisation.
- A decision to deprive a person of their liberty may be challenged by the relevant person, or by the RPR, by an application to the Court of Protection (CoP). However, Managing Authorities and Supervisory Bodies should always be prepared to try to resolve disputes locally and informally.
- If the court is asked to decide on a case where there is a question about whether DoL is lawful or should continue to be authorised, the Managing Authority can

continue with its current care regime where it is necessary: – for the purpose of giving the person life-sustaining treatment, or – to prevent a serious deterioration in their condition while the court makes its decision.

- Management information should be recorded and retained, and used to measure the effectiveness of the DoL processes. This information may also need to be shared with the inspection bodies.

Appendix 4 - Considerations for the ICB

Where deprivation occurs outside of the DoL Safeguards

- Where possible gain consent for care packages from the relevant person
- Where there is doubt, assess mental capacity and make a formal record on mental capacity assessment form
- Review the package to see if it can be made less restrictive without compromising the safety of the relevant person.
- Hold a Best Interest Meeting to determine if the overall package meets the 'Acid Test' then seek advice from the MCA/DoLS Manager regarding an application to the Court of Protection or whether there are other legal remedies, i.e. Mental Health Act 1983 if treatment is for a mental disorder and patient is objecting.
- Funding for joint packages for any legal processes should be agreed with the Local Authority
- Fully funded packages of care will require ICB funding for Court Applications and then ongoing funding for each authorisation per year. Orders are usually 12 months in duration and cannot be longer under the current legislation.

The ICB should seek assurance from providers via Contract Monitoring of the following:

- There is a free standing section covering DoLS in Providers' MCA policy or a separate DoLS policy linked to their MCA policy.
- There is DoLS Training provided.
- Care plans highlight areas of restriction and restraint and show consideration of the DoLS criteria and process.
- Ensure provider staff have access to DoLS forms and are trained in completing them and are aware of how to process them.
- DoLS are reflected in audit and internal review programmes.
- Evidence the provider has developed clear links with the local Supervisory Body DoLS service.
- Providers are aware of their responsibilities to notify CQC of DoLS authorisations.
- DoLS is considered in reports regarding the care and treatment of patients such as those with learning disabilities, dementia, mental illness, stroke and traumatic brain injury.
- Ensure provider staff have access to MCA and DoLS Codes of Practice and are kept up to date with significant case law by their own legal advisors/training department.

Appendix 5 - Application Process: (for hospitals, nursing homes and care homes) The Deprivation of Liberty Safeguards (DoLS) 2009

1.1 A 'Managing Authority' i.e. the relevant hospital, nursing home or care home must seek authorisation from the Supervisory Body (Local Authority) in order to be able to lawfully deprive someone of their liberty. Where a deprivation of liberty is occurring in a setting outside of a hospital or care home, consideration must be given to the need for authorisation via an application to the Court of Protection.

1.2 The Deprivation of Liberty Safeguards applies to people where DoL is or is likely to be necessary to protect them from harm and appears to be in their best interests. The DoL Safeguards cover those with a permanent disturbance of the mind or brain such as a learning disability, a mental health condition, a dementia, a traumatic brain injury, or a temporary disturbance caused by delirium, drugs and alcohol, or confusion caused by treatment.

1.3 In order to come within the scope of a DoL authorisation, a person must be detained in a hospital or care home, for the purpose of being given care or treatment in circumstances that amount to a deprivation of their liberty. The authorisation must detail the person and the restrictions imposed and the hospital/care/nursing home in which they are detained.

1.4 Whilst the DoL may be for the purpose of providing treatment, an authorisation does not itself authorise treatment. Treatment that is proposed may only be given with the person's consent (if they have capacity to make the decision) or in accordance with the Mental Capacity Act 2005, by completing a mental capacity assessment (only if you doubt that person's ability to make that decision for themselves) and best interests decision if the person is deemed as lacking the capacity to make that decision at that time.

1.5 The Managing Authority must apply to the Supervisory Body where the person lives, for example, a ward at the Luton and Dunstable hospital with a patient from Dunstable would apply to Central Bedfordshire Supervisory Body. A person who lives in Luton the application will be sent to Luton Supervisory Body and a person who normally resides in Bedford the application will be sent to Bedford Borough Supervisory Body, all based within the Local Authority and sit within the Safeguarding Teams.

1.6 The responsibilities of Supervisory Bodies are to:

- Receive applications from Managing Authorities for standard authorisations.
- Obtain written assessments of the relevant person in order to ensure that they meet the qualifying requirements.
- Ensure that sufficient skilled assessors are available.
- Decline authorisation unless all the qualifying requirements are met.
- Specify an authorisation's duration, which may not exceed 12 months or exceed the Best Interest Assessor's (BIA's) recommended duration.
- Attach conditions to the authorisation if it considers it appropriate to do so.
- Give notice of its decision in writing to the Managing Authority and all those consulted in the process.
- Appoint a Relevant Person's Representative (RPR) to represent the interests of the Relevant Person for whom they give a standard authorisation for DoL.
- Appoint a Paid Representative (If the person has no family or friends), to represent the interests of the Relevant Person for whom they give a standard authorisation for DoL.

- Consider appointing an Independent Mental Capacity Advocate (IMCA) to support the relevant person and their representative in ensuring the person's rights are upheld. (This is called a 39D IMCA in the Act)

1.7 Where the ICB commissions care packages outside a care home or hospital, i.e. via Continuing Health Care, or on a spot purchase contract on behalf of the ICB, the ICB will aim to reduce the risk of DoL to include minimising the restrictions imposed and ensuring decisions are taken with the involvement of all relevant people.

The processes for staff to follow are:

- Ensuring that decisions are taken, reviewed & recorded in a structured way, involving the relevant person throughout.
- Assessing whether the person lacks capacity to see whether or not to accept the care
- Considering the least restrictive form of care.
- Helping the person retain contact with family/friends/carers/advocacy service support.
- Reviewing the care plan including an independent view e.g. advocacy service involvement to represent and uphold the relevant person's rights.

1.8 In determining whether a deprivation of liberty has occurred or is likely to occur, decision-makers must consider all of the facts. The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance" (HL v UK para.89). In order to provide a clearer definition, Lady Hale in the 'Cheshire West' case, established the 'acid test' for determining if a Deprivation of Liberty is occurring, the test is listed below:

The person lacks the mental capacity to consent to their accommodation and care AND

They are under continuous supervision and control AND

They are not free to leave and live elsewhere AND

Their deprivation is imputable to the state.

1.9 In determining whether such a deprivation is in the best interests of the relevant person, the Best Interest Assessor (BIA) must consider the 'Best Interest Checklist' (Section 4 MCA) and the guidance in Paragraph 4.61 of the Code of Practice, including:

- All of the circumstances in each and every case & the measures taken.
- When they are required & what period do they endure?
- The effects of any restraints/restrictions on the individual? Are they necessary?
- What aim do the restrictions seek to meet?
- What are the views of the relevant person, family or carers? Do any of them object?
- How are any restraints or restrictions implemented?
- Do the constraints go beyond 'restraint'/'restriction' to the extent they constitute a deprivation of liberty?
- Are there less restrictive options for treatment that would avoid deprivation of liberty altogether?
- Does the effect of all the restrictions amount to a deprivation of liberty, if individually they don't?
- That any practical steps are taken to reduce the risk of deprivation of liberty occurring?

1.10 Section 6 (4) of the Mental Capacity Act states that someone is using restraint if they use force, or threaten to use force, to make someone do something that they are resisting, or restrict a person's freedom of movement, regardless of whether they are resisting, or not. However, where the restriction or restraint is frequent, cumulative and on-going, or if there are other factors present, then care providers should consider whether this has gone beyond permissible restraint. The care providers should then consider:

An application for authorisation under The Deprivation of Liberty Safeguards or change their care provision to reduce the level of restraint.

The flowchart at Appendix 9 outlines the process for hospital and care/nursing homes. The Priority tool as shown in Appendix 10 is to be used by ICB staff for prioritising cases where deprivation of liberty may be occurring for complex care packages in the community.

1.11 If any ICB employee is concerned, after raising the issue with the Managing Authority that it has not applied for an authorisation, they can ask the Supervisory Body to decide if there is an unauthorised DoL by making a 'third party' request.

1.12 The Supervisory Body does not need to arrange an assessment where it appears the request is frivolous or vexatious.

1.13 An assessment of whether an unlawful DoL is occurring must be arranged and carried out by the Supervisory Body within seven calendar days of being notified.

1.14 Reviewing the lawfulness of a DoL. The Mental Capacity Act 2005 Deprivation of Liberty Safeguards (DoLS) contains a mechanism whereby a detention under the DoLS can be reviewed by the Supervisory Body (SB) who has authorised the detention.

A review process which complies with Article 5(4) of the European Convention on Human Rights (ECHR), which says that:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The case which brought the DoLS into existence, HL v UK (the 'Bournewood Case'), and the absence of any (accessible and appropriate) procedure for reviewing the lawfulness of HL's detention was one of the ways in which his human rights had been violated.

1.15 The relevant person, or someone acting on their behalf, may make an application to the Court of Protection before a decision has been reached on an application for authorisation to deprive a person of their liberty. This might be to ask the Court to declare whether the relevant person has capacity, or whether an act done or proposed to be done in relation to that person is lawful. It is up to the Court of Protection to decide whether or not to consider such an application in advance of the decision on authorisation.

1.16 Where an urgent authorisation has been given, the relevant person or certain persons acting on their behalf, such as a Lasting Power of Attorney or Deputy, has the right to apply to the Court of Protection to determine any question relating to the following matters:

- Whether the urgent authorisation should have been given,
- The period for which the urgent authorisation is to be in force, or
- The purpose for which the urgent authorisation has been given.

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

- Whether the relevant person meets one or more of the qualifying requirements for Deprivation of Liberty,
- The period for which the standard authorisation is to be in force,
- The purpose for which the standard authorisation is given, or
- The conditions subject to which the standard authorisation is given.

1.18 The following people have an automatic right of access to the Court of Protection and do not have to obtain permission from the court to make an application:

- A person who lacks, or is alleged to lack, capacity in relation to a specific decision or action. There will usually be a fee for applications to the court.
- Any Lasting Power of Attorney for Health and Welfare decisions.
- A Deputy who has been appointed by the Court of Protection to act for the person concerned.
- A person named in an existing Court order to which the application relates, and
- The person appointed by the Supervisory Body (SB) as the Relevant Person's Representative (RPR).

1.19 The Court of Protection may make an order:

- Varying or terminating a Standard or Urgent Authorisation, or
- Directing the Supervisory Body (in the case of a Standard Authorisation) or the Managing Authority (MA) (in the case of an Urgent Authorisation) to vary or terminate the authorisation.

Appendix 6 - The Court of Protection Process

Authorising a Deprivation of Liberty taking place within a domestic setting.

Taken from: The Court of Protection - Application to Authorise a Deprivation of Liberty

Re: X Procedure; **Streamlined Procedure**

APPLICATIONS UNDER SECTION 16(2) (a) FOR AN ORDER AUTHORISING DEPRIVATION OF LIBERTY UNDER SECTION 4A (3) AND (4) PURSUANT TO A STREAMLINED PROCEDURE

1. This Part sets out the procedure to be followed in applications to the court under section 16(2) (a) to authorise deprivation of liberty under section 4A (3) of the Act pursuant to a streamlined procedure and applies only to such applications. Reference should be made generally to the decision of the
2. Supreme Court in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and another; P and Q (by their litigation friend the Official Solicitor) v Surrey County Council [2014] UKSC 19*, and in relation to the procedure in these cases, to the judgments of the President of the Court of Protection in *Re X and others (Deprivation of Liberty) [2014] EWCOP 25* and in *Re X and others (Deprivation of Liberty) (Number 2) [2014] EWCOP 37*.

Making the application

3. To bring proceedings, the applicant must file an application using form COPDOL 10, verified by a statement of truth and accompanied by all attachments and evidence required by that form and its annexes.
4. The application form and accompanying annexes and attachments are specifically designed to ensure that the applicant provides the court with essential information and evidence as to the proposed measures, on the basis of which the court may adjudicate as to the appropriateness of authorising a deprivation of liberty, and in particular to identify whether a case is suitable for consideration without an oral hearing. The use of the form and its annexes is mandatory and they must be provided fully completed and verified by the required statements of truth.
5. The applicant must ensure that the evidence in the application form, accompanying annexes and attachments is succinct and focussed.
6. A separate application must be made for every individual for whom the applicant requests an authorisation of deprivation of liberty. However, where there are matters in relation to which the facts are identical for a number of individuals, such as common care arrangements, the applicant may, in addition to addressing the specific issues relating to each individual, attach a generic statement dealing with the common care arrangements or other matters common to those individuals.

Deponent

7. The applicant must consider carefully who should complete the form and each annex with regard to the nature of the evidence required by each. There is no requirement that the same individual should complete and verify by statement of truth the form and each annex and indeed it might be inappropriate for this to be the case, where different people are best placed to provide evidence on different matters.

Applicant's duty of full and frank disclosure

8. The applicant has a duty of full and frank disclosure to the court of all facts and matters that may have an impact on the Court's decision whether to authorise the deprivation of liberty. The applicant should therefore scrutinise the circumstances of the case and clearly identify in the evidence in support (in Annex A to form COPDOL 10) factors—
    (a) Needing particular judicial scrutiny;
    (b) Suggesting that the arrangements in relation to which authorisation is sought may not in fact be in the best interests of the person the application is about, or the least restrictive option; or
    (c) Otherwise tending to indicate that the order should not be made.
9. Pursuant to this duty, the applicant should also identify those persons, not consulted by the applicant, who are in the same category under paragraph 15 as persons with whom the applicant has consulted. Those persons must be listed in Annex B on form COPDOL 10 together with an explanation in that Annex of why they have not been consulted.

Draft order

10. The application must be accompanied by a draft of the order which the applicant seeks, including the duration of the authorisation sought, appropriate directions for review, and liberty to apply for its reconsideration**.**

Consultation with the person the application is about

11. Consultation with the person the application is about must take place before the application form is lodged with the court. The applicant must arrange for that person to be informed of the following matters—
    (a) That the applicant is making an application to court;
    (b) That the application is to consider whether the person lacks capacity to make decisions in relation to his or her residence and care, and whether to authorise a deprivation of their liberty in connection with the arrangements set out in the care plan;
    (c) What the proposed arrangements under the order sought are;
    (d) That the person is entitled to express his or her views, wishes and feelings in relation to the proposed arrangements and the application, and that the person undertaking the consultation will ensure that these are communicated to the court;
    (e) That the person is entitled to seek to take part in the proceedings by being joined as a party or otherwise, what that means, and that the person undertaking the consultation will ensure that any such request is communicated to the court;
    (f) That the person undertaking the consultation can help him or her to obtain advice and assistance if he or she does not agree with the proposed arrangements in the application.

12. The person undertaking the consultation must complete Annex C to form COPDOL 10.

13. The applicant must confirm that the person the application is about has been supported and assisted to express his or her views, wishes and feelings in relation to the application and the arrangements proposed in it, and encouraged to take part in the proceedings to the extent that he or she wishes, in accordance with section 4(4) of the Act.

Consultation with other persons regarding the making of the application

14. The consultation required by paragraph 15 below must take place before the application is lodged with the court.
15. The applicant must ensure that the following people are consulted about the intention to make the application—
    (a) Any donee of a lasting power of attorney granted by the person;
    (b) Any deputy appointed for the person by the court; together with, if possible, at least three people in the following categories—
    (c) Anyone named by the person the application is about as someone to be consulted on the matters raised by the application; and
    (d) Anyone engaged in caring for the person or interested in his or her welfare.

16. When consulting such people, the applicant must inform them of the following matters—
    (a) That the applicant is making an application to court;
    (b) That the application is to consider whether the person the application is about lacks capacity to make decisions in relation to his or her residence and care and whether he or she should be deprived of liberty in connection with the arrangements set out in the care plan;
    (c) What the proposed arrangements under the order are; and
    (d) That the applicant is under an obligation to inform the person the application is about of the matters listed in paragraph 11 above, unless in the circumstances it is inappropriate for the applicant to give that person such information.

Dispensing with notification or service of the application form

17. Provided that the court is satisfied as to the adequacy of consultation with the person the application is about in accordance with paragraphs 11 to 13, and with other persons with whom consultation should take place in accordance with paragraphs 14 to 16, the court may dispense with notification of the issue of the application under rules 42, 69 and 70.

Court fees

18. An application fee is payable for all applications, and if the court decides to hold a hearing before making a decision, a hearing fee will be payable.
19. If an application is received without a fee it will be treated as incomplete and returned.

Applications suitable for the streamlined procedure

20. As soon as practicable after receipt the court officers will consider the suitability of the application to be the subject of paper determination, or to be considered at an oral hearing.
21. All applications considered suitable for the streamlined procedure will be referred to a judge for consideration without an oral hearing, as soon as practicable after receipt.

Applications not suitable for the streamlined procedure

22. If the judge considers that the application is not suitable for the streamlined process, case management directions shall be given.

Applicant to supply a copy of the order to each person consulted

23. The applicant must provide all persons consulted, including the person the application is about, with a copy of the order made pursuant to the streamlined procedure granting or refusing the authorisation of the deprivation of liberty.

Review of the authorisation

24. An application for a review of the authorisation of the deprivation of liberty must be made in accordance with the terms of the order.

Checklist for information required:

Every question on all of the forms should be completed, or stated that information is not available. Failure to provide the information required by the court could lead to unnecessary delays to proceedings.

A separate application must be made for each individual for whom an authorisation of a deprivation of liberty is sought.

Please ensure that the following forms have been completed:

1. **COPDOL11** Application under section 4A(3) and 16(2)(a) of the Mental Capacity Act 2005 to authorise a deprivation of liberty
2. **Annex A** Evidence in support of an application under section 4A(3) and 16(2)(a) of the Mental Capacity Act 2005 to authorise a deprivation of liberty
3. **Annex B** Consultation with people with an interest in an application under section 4A(3) and 16(2)(a) of the Mental Capacity Act 2005 to authorise a deprivation of liberty
4. **Annex C** Consultation with the person the application is about for an application under section 4A (3) and 16(2) (a) of the Mental Capacity Act 2005 to authorise a deprivation of liberty.

You must also supply:

5. COP3 Evidence of Capacity
6. Mental Health Assessment
7. A copy of any Advance Decision
8. A copy of any Lasting Power of Attorney (LPA)
9. Any relevant Court orders
10. Care Plan
11. Best Interest Assessment
12. COP24: Witness Statement
13. The application fee

Link to the COPDOL11 form: Application to the Court:

https://www.gov.uk/government/publications/form-copdol11-application-to-authorise-a-deprivation-of-liberty-sections-4a3-and-162a-of-the-mental-capacity-act-2005

Link to the COP3 form: Assessment of Capacity:

https://www.gov.uk/government/publications/make-a-report-on-someones-capacity-to-make-decisions-form-cop3

Link to the COP24 form: Witness Statement:

https://www.gov.uk/government/publications/give-a-witness-statement-about-a-person-who-lacks-capacity-form-cop24

Appendix 7 - MODEL RE X ORDER

UPON the Court having read the application dated [*insert date*] and accompanying evidence as listed in the schedule attached hereto and including in particular the care plan dated [*insert date*] ("the Care Plan"), which has been signed and dated by the judge and kept on the Court file

AND UPON the Court being satisfied on the basis of the evidence filed by the Applicant (which is the only evidence before it) that:

1. [*P*] has been consulted about this application and given the support necessary to express views about the application, including whether or not *s*/he wishes to participate in proceedings by being joined as a party or otherwise;

2. [*P*] has not expressed a wish to be joined as a party and his/her joinder is not necessary or appropriate because [*insert reasons*];

3. Appropriate steps have been taken to consult [*insert names of those consulted*], being other relevant people in [*P's*] life, of this application and to canvass their wishes, feelings and views as to what is in [*P's*] best interests;

4. [*Recite any other matter which is relevant to the decision*] ;

5. The purpose for which this order is needed cannot be as effectively achieved in a way that is less restrictive of the rights and freedoms of [P];

6. It is appropriate for the application to be determined on the papers pursuant to the streamlined procedure described in *Re X and Others (Deprivation of Liberty) Number 1 [2014] EWCOP 25* and *Number 2* [2014] EWCOP 37.

IT IS OREDERED THAT:

7. Permission: The Applicant is granted permission to bring these proceedings.

8. Confidentiality: Until further order, these proceedings shall be heard in private and no person shall publish or disclose any information which enables the identification of [P] or any other party to these proceedings, save for the purpose of caring for [P] or for the purpose of communicating with a person exercising a relevant function authorised by statute or for the purpose of complying with an order of any court of competent jurisdiction.

9. Any requirement to comply with Rules 54 (filing of a permission form), 42, 69 and 70 (notification) of the Court of Protection Rules 2007 is dispensed with.

IT IS OREDERED THAT:

10. [P] Lacks capacity to decide where *s/*he should live and what care and treatment *s/*he needs.

FURTHER, PURSUANT TO SECTIONS 4 AND 16 OF THE MENTAL CAPACITY ACT 2005 IT IS ORDERED THAT:

Placement and authorisation of deprivation of liberty

11. For the review period as defined below, [P] is to reside and receive care at [*insert address*] ("the placement") pursuant to arrangements made by [*the Applicant*] and set out in the Care Plan; and to the extent that the restrictions in place pursuant to the Care Plan are a deprivation of [P]'s liberty, such deprivation of [P's] liberty is hereby authorised.

Review

12. If a change or changes to the Care Plan that render it more restrictive have as a matter of urgent necessity been implemented [*the Applicant*] must apply to the Court for an urgent review of this order on the first available date after the implementation of any such changes.

13. If a change or changes to the Care Plan that render it more restrictive are proposed (but are not required as a matter of urgent necessity) [*the Applicant*] must apply to the Court for review of this order before any such changes are made.

14. In any event, [*the Applicant*] must make an application to the Court no less than one month before the expiry of the review period as defined below for a review of this order if at that time the Care Plan still applies to [P]. Such application shall be made in accordance with any Rules and Practice Directions in effect at the date of the application being filed or, if not otherwise specified, on form COPDOL11.

15. Any review hearing shall be conducted as a consideration of the papers unless any party requests an oral hearing or the Court decides that an oral hearing is required.

16. "The review period" shall mean [*insert – usually 12 months; may be less, not more*] from the date on which this order was made or, if an application for review has been filed at Court before that date, until determination of such review application.

17. This order shall cease to have effect on the death of [P]

Costs

18. No order as to costs.

Reconsideration

19. [P], any party to the proceedings, any person who is affected by this order and any person who is properly interested in [P's] welfare may apply to the Court at any time for its reconsideration, variation or discharge by any judge of the court including the judge who made this order.

20. Such application should be made without notice by filing an application in form COP9 and the court will make such order or give such directions as it thinks fit, including, where appropriate, who should be consulted about or notified of that application.

Appendix 8 - Sample Witness Statement

CASE NO:

IN THE COURT OF PROTECTION

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

IN THE MATTER OF [Insert patient name]

BLMK ICB Applicant

(BLMK health and care partnership)

WITNESS STATEMENT OF [INSERT

NAME OF PERSON GIVING THE STATEMENT]

I, [insert name], [insert job title] for [insert name and address of ICB], **WILL STATE AS FOLLOWS**

I am a [role].

My qualifications are [insert]

I am the Case Manager for [patient name].

Except where I say otherwise, the facts or matters referred to in this witness statement are derived from my own knowledge or from documents in my possession and I believe them to be true.

I am making this statement to explain the background to this matter and in support of the application being made by the ICB.

Background

A brief summary of the patient, their needs, how these needs are met and how they came to be at their current placement.

Does [insert patient's name] suffer from a mental disorder?

[Insert patient's name] has a diagnosis of [insert diagnosis]. [He/she] is, therefore, of unsound mind for the purposes of Article 5.

Capacity

[Set out the detail in the COP3 and conclude that the patient lacks capacity in respect of residence and care].

Deprivation of liberty

[Set out the level of supervision, most notably, is the person under continuous supervision and control].

[insert the patient's name] is not free to live where [he/she] chooses as [his/her] placement is chosen by the ICB and the ICB would seek to intervene if [he/she] were to attempt to move elsewhere.

In accordance with the Supreme Court's ruling in *Cheshire West* [insert the patient's name] is deprived of [his/her] liberty because [he/she] is under continuous supervision and control and is not free to leave.

Best interests/least restrictive

[Set out why the deprivation is in the patient's best interests, focusing on the harm that would occur if they were not deprived of their liberty. Also address whether less restrictive alternatives have been considered. If you are not including a best interests assessment or the minutes of a best interests meeting this section will need a lot of detail]

Is [insert the patient's name] ineligible to be deprived of [his/her] liberty?

[Insert the patient's name] is not subject to the Mental Health Act 1983 ('the Act') and does not meet the criteria for detention under the Act. [Insert the patient's name] is, therefore, not ineligible to be deprived of [his/her] liberty under the Mental Capacity Act 2005.

Is the state responsible for the deprivation of liberty?

[Insert the patient's name]'s care package is designed and commissioned by [insert the ICB's name] which is a state body. This means that the deprivation of liberty is carried out by the state.

Is [insert the patient's name] aware of the application?

Details of the attempt to engage [insert the patient's name] are contained in Annex C of the COPDOL11.

Should [insert the patient's name] be a party to proceedings?

[Set out details of the family members who have been consulted and who can speak for the patient. If they are unanimous in their support of the placement set this out. If the patient has very limited communication skills this should also be specified.]

It may be that [insert the patient's name]'s best interests can be properly and satisfactorily expressed without [his/her] needing to be party to these proceedings.

Litigation friend or representative

[Set out details of any family member who is prepared to act as Litigation Friend or Representative.]

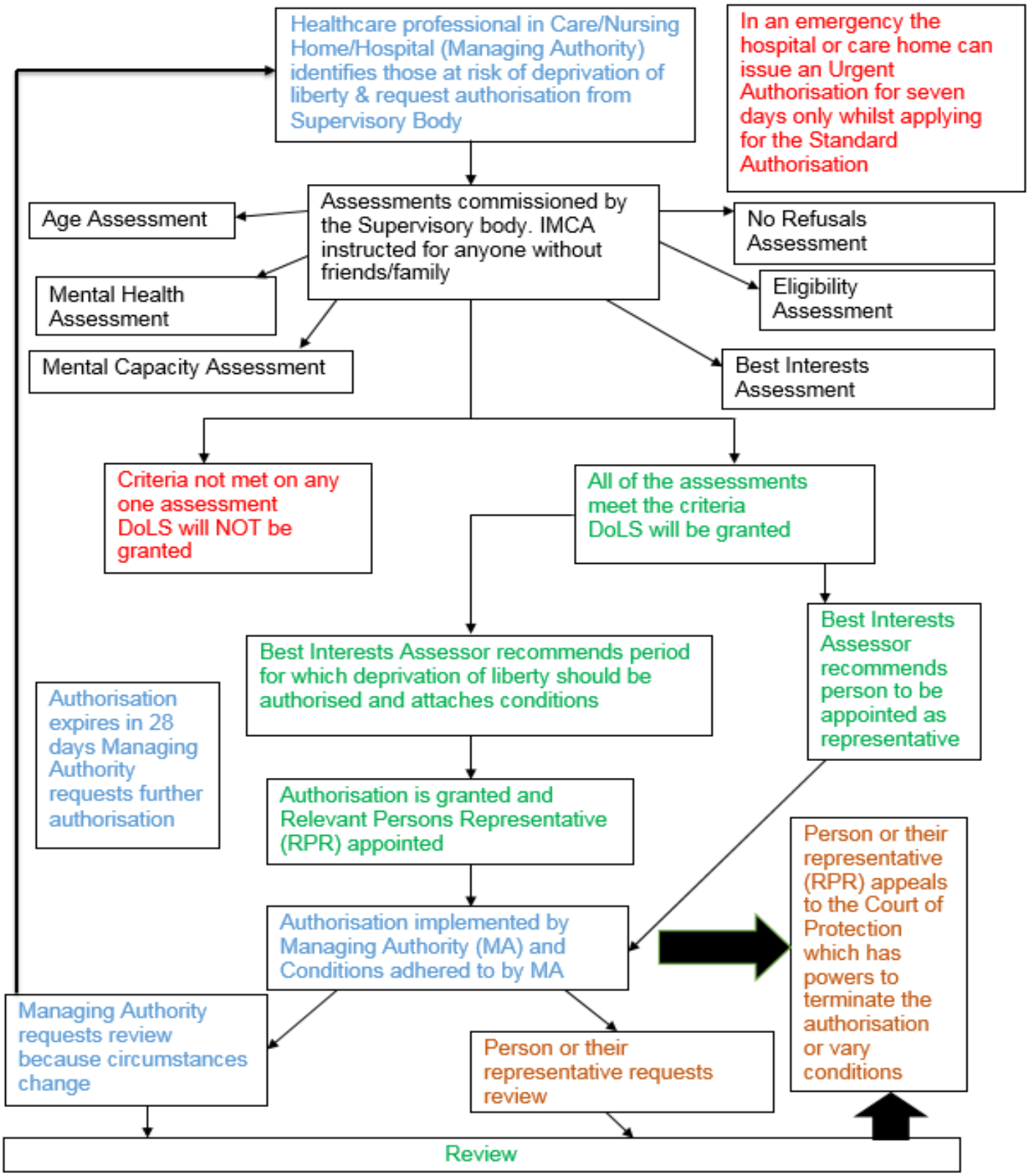
Proposed Order

The ICB invites the Court to order that the deprivation of liberty is in [insert the patient's name]'s best interests. A proposed order is attached to this application.

I believe that the facts stated in this witness statement are true and correct to the best of my knowledge and belief.

Signed:	
Dated:	

Appendix 9 - Flow Chart: The Deprivation of Liberty Safeguards (In Hospitals and Care Homes)



Appendix 10 - Prioritisation Tool – Identifying a Deprivation of Liberty in the Community

Following the Supreme Court ruling on 19 March 2014, BLMKICB needs to prioritise the allocation of assessments. It would be helpful if you would consider the following guide when preparing for a DOLS Court of Protection Application.

These applications will be for those individuals who have had their mental capacity assessed and have been deemed unable to consent to their care package/regime and are not free to leave and are under continuous supervision and control.

Priority 1 (P1) - Features of P1 might include:

- Continuous 1:1 care during the day and night
- Restraint used regularly – equipment or persons
- Medication is **prescribed** covertly
- Objections from family/friends
- Objections from relevant person (verbal or physical); expressing unhappiness through language or behaviour
- Attempts to leave
- Confinement to a particular part of the establishment for any period of time
- Concerns from care staff about person's well being
- Concerns from professionals or safeguarding issues
- Renewals – DOLS authorisation in place and coming to an end

Priority 2 (P2) - Features of P2 might include:

- Some moderate restrictions are in place
- Some periods of observations / monitoring
- Where general concerns have been raised by Adult Protection
- Infrequent restraint used in response to risk
- Some 1:1 during the day or night

Priority 3 (P3) - Features of P3 might include:

- Person in own home (not a placement)
- Appear happy and settled
- No specific restraints or restrictions being used