Deprivation of Liberty Safeguards

Policy

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1.0 FLOW DIAGRAM – Identifying when a Deprivation of Liberty Safeguards Authorisation is required (use alongside the guidance in Appendix A)

Does the patient lack the capacity (due to a Mental Disorder) to consent to being in hospital in order to receive care or treatment that is necessary to prevent harm to them?

Yes

An application is not possible

No

Is the patient under continuous supervision and control? And is this for a non-negligible period of time?

Yes to both

An application is not required

No to either

Is the patient free to leave?

Yes

An application is not required

No

Is the patient 18 years of age or older?

Yes

The Deprivation of Liberty Safeguards do not apply (see appendix A)

No

Does the patient have a valid refusal of the proposed treatment? (Through an Advance Decision or a decision from the holder of a valid Power of Attorney)

Yes

It is not possible to make an application for treatment that has been declined

No

Could this be better managed under the Mental Health Act?

Yes

The Mental Health Act should be used

No

Is the person subject to any powers of the Mental Health Act in a way that would mean that they are ineligible for DoLS?

Yes

The Mental Health Act should be used

No

Is their admission for life sustaining treatment, without which they would die immediately or within a short period of time, or they are so unwell that they are likely to die anywhere other than in hospital?

Yes

An application is not required unless restrictions are being used that would not be used for someone else with the same condition

No

A Deprivation of Liberty Safeguards Authorisation/Application should be completed

Access the County Council DoLS application form

https://secure1.somerset.gov.uk/forms/ShowForm.asp?fm_formalias=dols

This is also available on the Trust Intranet site
2.0  INTRODUCTION

2.1  The Mental Capacity Act 2005 Deprivation of Liberty Safeguards (DoLS) were introduced in April 2009. These legal safeguards are designed to protect vulnerable adults who lack capacity to make certain decisions regarding their care, treatment or residence and are, or may become, deprived of their liberty within a hospital or care home. A DoLS authorisation is designed to provide a legal framework and protection when a deprivation of liberty is considered to be unavoidable and in a person’s best interests.

2.2  The Cheshire West case, which went to the Supreme Court in 2014, introduced an acid test, that is to be used when deciding if someone is being deprived of their liberty. There are two questions to ask:

- Is the person subject to continuous supervision and control?
- Is the person free to leave?

2.3  A DoLS Authorisation is designed to avoid breaches of the Human Rights Act and provides protection for people:

- Who lack the mental capacity specifically to consent to treatment and care in either a hospital or care home

And

- The care can only be provided in circumstances that amount to a deprivation of liberty and;
- The care is in their best interests to protect them from harm; and
- Detention under the Mental Health Act 1983 is not available for the person at the time.

2.4  The DoLS are underpinned by the five statutory principles of the Mental Capacity Act:

- 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, 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 (This means that once an assessment has concluded that the patient lacks capacity, what is then done must be in the patients best interests)
- Before the act is done, or the decision 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 (This means we must always consider the least restrictive option when considering a patients best interests).

3.0  DEFINITIONS

3.1  **Advance Decision:** This refers to a decision to refuse specific treatment in advance that is made by someone with capacity. This will then apply when the person lacks capacity. These are commonly known as Advance Directives or Living Wills.

3.2  **Age Assessment:** An assessment carried out by the Supervisory Body, of whether the relevant person has reached 18.
3.3 **Best Interest Assessment**: An assessment carried out by the Supervisory Body, of whether depriving the person of their liberty is in the patient's best interests, is necessary to prevent harm to the person and is a proportionate response to the likelihood and seriousness of that harm.

3.4 **Best Interests Assessor (BIA)**: One of two assessors commissioned by the supervisory body to carry out the assessments required before a standard authorisation may be granted. The best interest's assessor can be an employee of the supervisory body or managing authority, but must not be involved in the care or treatment of the person they are assessing nor in decisions about their care. BIAs are often social workers or nurses, but could be from other professional backgrounds.

3.5 **Capacity**: “The ability to make a decision about a particular matter at the time the decision needs to be made” Mental Capacity Act 2005 Code of Practice.

3.6 **Court of Protection**: This is a specialist Court that deals with all legal decisions related to a lack of capacity.

3.7 **Deprivation of Liberty Safeguards (DoLS)**: A legal framework that allows a managing authority to deprive someone of their liberty who lacks mental capacity to make decisions about aspects of their care and treatment in a hospital or care home.

3.8 **Deprivation of Liberty**: A deprivation of liberty occurs when a person is subject to continuous supervision and control, is not free to leave and either does not consent to this arrangement or lacks the capacity to do so. Deprivations of liberty may occur in any setting, but the DoLS may only be applied within hospitals or care homes.

3.9 **Eligibility Assessment**: An assessment carried out by the Supervisory Body, of whether or not the person is rendered ineligible for a standard DoLS authorisation, because the authorisation would conflict with requirements that are, or could be, placed on the person under the Mental Health Act 1983.

3.10 **Deputy**: A person appointed by the Court of Protection with ongoing legal responsibility to make some decisions on behalf of a person who lacks capacity to make particular decisions.

3.11 **Human Rights Act (1998)**: The Human Rights Act has eighteen articles covering people’s human rights. This includes Article 5; Right to Liberty and Security. The DoLS were created to comply with the Human Rights Article 5.

3.12 **Independent Mental Capacity Advocate (IMCA)**: An advocate who has a statutory role within the Mental Capacity Act. Within the DoLS process a relevant person’s representative (RPR) is entitled to be supported by an IMCA, and the managing authority and supervisory body should provide details of how to access this support. In some cases, the IMCA will be appointed as the RPR, or they may act as a temporary RPR at times when none has been appointed.

3.13 **Lasting Power of Attorney**: Is an attorney appointed by the patient under the Mental Capacity Act, which can give authority to make decisions about property and financial issues and/or personal welfare (including healthcare) issues.

3.14 **Managing Authority**: 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, an inpatient. This means that both Somerset Partnership NHS Foundation Trust and Taunton and Somerset NHS Foundation Trusts are managing authorities.

3.15 **Mental Capacity**: Mental Capacity is the ability of an individual to make decisions about specific issues when these decisions need to be made.
3.16 **Mental Capacity Act (2005):** This Act provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. For more information on the Mental Capacity Act please refer to the Trust Using the Mental Capacity Act policy.

3.17 **Mental Health Assessment:** An assessment carried out by the supervisory body, of whether the person has a mental disorder.

3.18 **Mental Health Assessor (also known as the medical assessor):** One of the two assessors commissioned by the supervisory body to carry out the assessments required before a standard authorisation may be granted. This will be an appropriately qualified and experienced doctor.

3.19 **No Refusals Assessment:** An assessment carried out by the supervisory body, of whether there is an existing authority for decision-making that would prevent the giving of a standard DoLS authorisation. It is not possible to deliver treatment under the DoLS if this treatment has been declined through a valid and applicable advance decision, or a valid decision made by a deputy or holder of a Lasting Power of Attorney with the appropriate authority.

3.20 **Parental Responsibility:** Is defined by the Children Act 1989 as “In this Act “parental responsibility” means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property. Parental responsibility will automatically be given to:

- Mothers
- All fathers married to the mother of the child
- All fathers registered on the birth certificate of the child (after the 1st of December 2003)

It can be possible for fathers and others who don’t automatically get parental responsibility to acquire it.

3.21 **Relevant Person:** A person who is, or may become, deprived of their liberty in accordance with the DoLS.

3.22 **Relevant Person’s Representative:** The supervisory body must appoint a relevant person’s representative for every person to whom they give a standard authorisation for deprivation of liberty. The representative is appointed at the time the authorisation is given or as soon as possible and practical. The role of the relevant person’s representative, once appointed, is:

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

3.23 **Restraint:** To use force, or threaten to use force, to make someone do something that they are resisting, or restrict a person’s freedom of movement, whether they are resisting or not.

The Use of Force Act 2018, which is soon to be implemented in Mental Health Units, has some definitions as part of this primary legislation.

- ‘Use of Force’
  - (a) the use of physical, mechanical or chemical restraint on a patient, or
  - (b) the isolation of a patient.
- ‘Physical restraint’ means the use of physical contact which is intended to prevent, restrict or subdue movement of any part of the patient’s body;
• ‘Mechanical restraint’ means the use of a device which –
  • (a) is intended to prevent, restrict or subdue movement of any part of the patient’s body, and
  • (b) is for the primary purpose of behavioural control;
• ‘Chemical restraint’ means the use of medication which is intended to prevent, restrict or subdue movement of any part of the patient’s body;
• ‘Isolation’ means any seclusion or segregation that is imposed on a patient.

3.24 **Standard Authorisation:** An authorisation granted by a supervisory body to a managing authority, which provides authority for the managing authority to deprive the relevant person of liberty. Standard authorisations are granted following assessments by a medical assessor and a best interest’s assessor (BIA). The BIA decides on the duration of the authorisation. This can be up to 12 months, but is often much shorter, particularly when the patient’s circumstances are likely to change.

3.25 **Supervisory Body:** The Local Authority that covers the area within which the relevant person is ordinarily resident. Ordinary residence is defined in the Care Act. In some situations, the supervisory body may not be Somerset County Council if the person’s normal residence is outside of Somerset. In these circumstances, it will be the Local Authority where the person is ordinarily resident. The supervisory body is responsible for considering a DoLS request, arranging the required assessments and agreeing or denying a DoLS authorisation.

3.26 **Urgent Authorisation:** An authorisation granted by a managing authority to itself when it unavoidably has to deprive a relevant person of their liberty in their best interests. An urgent authorisation lasts for up to 7 days. Whenever an urgent authorisation is granted, an application for a standard authorisation needs to be sent to the supervisory body. During the 7 days of the urgent authority, the supervisory body should complete assessments to determine whether they will grant a standard authorisation. An extension to an urgent authorisation can be requested from the supervisory body, which can extend the urgent authorisation for up to an additional 7 days.

4.0 **ROLES and RESPONSIBILITIES**

4.1 **Chief Executive:** To ensure that the Trust complies with relevant legal and statutory requirements related to the DoLS.

4.2 **MCA, DoLS and Consent Lead:** Will ensure that guidance will be issued when staff need to understand new developments or to change practice as case law develops. Will complete notifications to the CQC when an authorisation has been granted or not granted.

4.3 **All managers of clinical teams responsible for the care of people in hospital, or for admitting people to hospital:** Should have a working knowledge of this policy, the Mental Capacity Act and the Deprivation of Liberty Safeguards and are responsible for ensuring that their teams complete the relevant assessments and documentation. They will also provide guidance within their teams.

4.4 **Ward Managers in mental health units and Matrons/Ward Sisters in community and acute hospital settings:** Are responsible for ensuring that an urgent authorisation is completed and that an application for a standard authorisation is sent to the County Council DoLS team, for any patient in their care who meets the criteria for the DoLS. If they are unavailable, this responsibility falls to the person in charge of the ward at the time the authorisation is needed.
4.5 **The Learning and Development Department:** Will facilitate regular face-to-face training sessions on the Deprivation of Liberty Safeguards within the mandatory MCA, DoLS and Consent levels of training.

4.6 **Individual members of staff:** Must ensure that they follow this policy.

5.0 **DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS) PROCESS**

**Applying for a DoLS Authorisation**

5.1 Decide whether the current situation may amount to a deprivation of liberty. See section 1.0 and appendix A.

5.2 If a patient is admitted from a care home or another hospital and they already have a DoLS authorisation in place, it is very likely that the Trust will need to apply for a DoLS authorisation. For elective cases this should be applied for in advance of the planned admission date and it is the admitting clinician’s responsibility to ensure that this is completed.

5.3 A DoLS authorisation cannot be transferred between different organisations. See section 5.35 and 5.36 for considerations when moving patients between wards or hospitals.

5.4 A DoLS application is made using an electronic referral form.

[https://secure1.somerset.gov.uk/forms/ShowForm.asp?fm_formalias=dols](https://secure1.somerset.gov.uk/forms/ShowForm.asp?fm_formalias=dols)

Once the form is completed and is submitted, it will be forwarded to the DoLS Team at the County Council.

5.5 The electronic referral form allows two e-mail addresses to be identified. These are the addresses where all correspondence related to the application will be sent. For Acute Hospital Staff the second e-mail address should be for the ward Matron. For staff outside of the acute hospital it should be an appropriate senior member of staff or a central administrative e-mail address.

5.6 Within the electronic form there is a box to check, which indicates that the person is a patient within the Trust. It is important to check this box, as this allows the MCA, DoLS and Consent Lead to be copied in to all correspondence.

**Making an Urgent Authorisation**

5.7 The electronic referral form includes a section where an Urgent Authorisation can be made. This allows staff to authorise a deprivation of liberty for a period of up to 7 days. Once this is completed, the patient has a legal authorisation depriving them of their liberty. This authorisation should be completed when:

- The care and treatment that a patient is receiving amounts to a deprivation of liberty and there is no less restrictive alternative available
- The patient requires care or treatment to start immediately that would amount to a deprivation of liberty.

5.8 Whenever an Urgent Authorisation is completed, the section of the form applying for a Standard Authorisation should be completed.
Applying for a Standard Authorisation

5.9 The electronic form includes a section where you can apply for a standard authorisation. This should be completed:

- When an urgent authorisation has been completed
- When there is a plan to deliver care or treatment that does not need to start straight away, when this will amount to a deprivation of liberty.

Applying for an Extension to an Urgent Authorisation

5.10 The electronic form includes a section where you can apply for the Urgent Authorisation to be extended. Due to the current difficulties being experienced by the County Council in satisfying the assessment requirements of the Act, an extension should be requested in all cases (except when it is clear that the deprivation of liberty will not last longer than 7 days).

When do the DoLS not apply?

5.11 Situations where the DoLS cannot be used:

- The person is “within the scope” of the Mental Health Act (see appendix A and B)
- The person is under 18 years of age
- The use of the safeguards would conflict with a decision of the person’s attorney or Court of Protection Deputy or with any requirements imposed upon them as part of a Guardianship order under the Mental Health Act
- Outside of a hospital or care home.

Who completes the DoLS form?

5.12 It is the responsibility of the hospital where the person is (or will be) being deprived of their liberty to apply for a DoLS authorisation. The electronic application form should be completed by:

- Ward managers, matrons, or the person in charge of the ward at the time when the authorisation is required.

5.13 When community staff are planning an admission, and it is known that a DoLS authorisation will be required, the care co-ordinator (or whoever is leading the plans for admission) must discuss the need for an authorisation with the ward manager (or deputy). The manager (or deputy) will then need to complete the DoLS application with the support of the care co-ordinator.

What happens to the forms once completed?

5.14 Once the form has been submitted, it will go to the County Council DoLS team. A copy of the form will then be sent to all of those e-mail addresses that have been included on the electronic application, as well as the Trust MCA, DoLS and Consent Lead.

5.15 The County Council DoLS team will also look at the level of restriction in place for the patient and will decide what level of priority to give the application. The more significant the restrictions in place the more likely it is that the DoLS team will come in within the required timeframe to undertake their assessments.

5.16 If the Urgent Authorisation part of the form has been completed an urgent authorisation will be in place for the patient.

What else needs to be done when an application is made?

5.17 A copy of the application should be:
- Saved in the patient’s clinical record
- Given to the relevant person (patient)

5.18 Efforts must be made to explain the DoLS to the patient. It may not be appropriate to do this at the time of the application, but must be done as soon as possible. Staff should document when this has been done.

5.19 The patient’s next of kin should be informed that an application has been made. Staff should explain to the next of kin what the purpose of the DoLS is and how the process works. Staff should also inform other family, friends and carers and any IMCA already involved with the patient.

5.20 For staff who use RiO: A record of the patient’s DoLS status must be documented on the DoLS reporting screen in RiO. This screen allows for the recording of urgent authorisations, requests for standard authorisations and the outcome of standard authorisation assessments. It also allows a record to be made when a DoLS authorisation ends. This screen must be kept up to date.

5.21 For staff who don’t use RiO, they should document in the clinical record:
- The date an Urgent Authorisation was made
- The date the Urgent Authorisation ends
- Whether an extension to the Urgent Authorisation was requested and the date that this ends.
- When the patient has been given a copy of the application
- When the DoLS process has been explained to the patient
- When the patient’s Next of Kin has been informed of the application
- When the DoLS process has been explained to the next of kin.

**Supervisory Body Assessments**

5.22 The Supervisory Body should make arrangements for the required assessments to be undertaken. Clinical staff should support this assessment process but do not undertake the assessments themselves. The assessors will require access to the medical records.

5.23 The assessment will be undertaken by a best interest’s assessor and a Mental Health (or medical) assessor.

5.24 On completion of the assessment process, the Supervisory Body will either grant or deny the DoLS authorisation. The DoLS office will send the outcome of the report to the e-mail contacts identified on the initial application form. Staff who use RiO should update the RiO reporting screen for DoLS. For other areas, a copy of the outcome should be added to the patient’s clinical record.

**What if the Urgent Authorisation expires before the Supervisory Body have completed their assessments for a Standard Authorisation?**

5.25 To satisfy the requirements of the DoLS the County Council is required to undertake their assessments for a standard authorisation within 7 days of receiving our application. This means that the assessments should be completed prior to the expiry of our Urgent Authorisation. However, difficulties with resourcing the requirements of the legislation, mean that they will often be unable to satisfy this requirement. This will mean that our care will amount to a deprivation of liberty, but we will have no legal authority authorising this. If this situation exists, staff should:
Inform the County Council DoLS team via dolsinformation@somerset.gov.uk that the Urgent Authorisation has expired
Inform the County Council DoLS team that the required care will be delivered in the patients best interests under the Mental Capacity Act
Update the County Council of any changes in circumstances, such as:
- The patient regains capacity
- The patient is discharged
- The patient is sectioned under the Mental Health Act
- Any changes in the restrictions being placed upon the patient.

When a Standard DoLS Authorisation is granted

5.26 The MCA, DoLS and Consent Lead will complete the CQC notification form “Statutory notification – Notification about an application to deprive a person of their liberty”.

5.27 The care plan should include ongoing review of the treatment plan and the need for a continuing DoLS authorisation.

5.28 A person (“the relevant person”) held under the DoLS may be kept in hospital for as long as this has been authorised. A DoLS authorisation is “permissive” rather than "prescriptive" which means it allows the relevant person to be deprived of their liberty only when necessary. The relevant person may not need to be deprived of their liberty constantly, but just at certain times or in certain circumstances.

5.29 A DoLS authorisation only applies to the place indicated in the authorisation. A move to another hospital or care home would require a new authorisation to be granted, should the person continue to be deprived of liberty in the new location.

5.30 The Supervisory Body will appoint a Relevant Persons Representative. This person must keep in contact with the patient, support them and if necessary challenge any aspect of the DoLS that they are concerned about.

5.31 The Supervisory Body may appoint an Independent Mental Capacity Advocate (IMCA) to support the patient and the relevant person’s representative.

5.32 The DoLS only apply in Hospitals and Care homes, this means that if a patient is able to leave the hospital and their grounds, the DoLS authorisation no longer applies and the authorisation cannot be used to bring the patient back to the hospital. In these circumstances, if there is a risk of harm to the patient, it may be necessary to inform the police. The police may be able to transport the patient to a place of safety using the Mental Health Act.

When does an Authorisation end?

5.33 A DoLS Authorisation will end when:
- The relevant person no longer needs to remain in hospital
- Arrangements have been made for on-going care to continue in another location, such as a care home or another hospital
- The DoLS authorisation is judged no longer to be required.
- The DoLS authorisation expires. If continuing treatment and care is required and this would mean that the person continues to be deprived of their liberty then an extension to the Standard Authorisation will be required

Or
• The person’s mental capacity returns and they are able to make their own decision about continuing with treatment and care. In this circumstance, the DoLS is no longer valid, even if the person decides to leave hospital or refuses to comply with treatment and care against medical advice.

5.34 Any changes in the patient’s circumstances, which may mean that the DoLS authorisation has ended, should be shared with the County Council DoLS team.

Moving between wards or hospitals

5.35 A DoLS authorisation is specific to the hospital named in the authorisation. The legislation describes a managing authority as a “hospital” and not a “ward”. Therefore, if the relevant person transfers to another ward in the same hospital and DoLS authorisation goes with them, unless the conditions of their care arrangements are so different that the DoLS authorisation, or any conditions attached to them, should be reviewed.

5.36 If a move to another hospital is indicated, then a new DoLS authorisation would be required at the new hospital. This should be discussed with the new hospital and they should make a DoLS application.

When a Standard DoLS Authorisation is not granted

5.37 The MCA, DoLS and Consent Lead completes the CQC notification form “Statutory notification – Notification about an application to deprive a person of their liberty”.

5.38 One potential outcome of the assessment by the medical assessor and the best interest’s assessor is that no deprivation of liberty is occurring. In these circumstances, the care and treatment should continue in the person’s best interests if the person continues to lack capacity to consent to it, or their wishes should be respected where they have the capacity to make decisions for themselves.

5.39 If the authorisation is refused or cannot be granted because the qualifying criteria have not been met, then the treatment and care plan should be reviewed again to see if less restrictive alternatives could be put in place. Alternatively consideration could be given to whether a different treatment option or care location can be arranged which would be acceptable to the patient.

5.40 However, if there are major concerns about the person’s safety should they leave hospital and fail to comply with what is deemed essential treatment and care, senior clinical and legal advice should be sought. In some cases, it may be possible to apply the Mental Health Act, or in others, an application to the Court of Protection may be required.

Unauthorised Deprivations of Liberty

5.41 If staff are concerned that an unauthorised deprivation of liberty has occurred or is likely to occur within the Trust then a senior clinician should review the situation as a matter of urgency and steps taken to avoid any further, or prevent a potential future, deprivation of liberty.

5.42 Any unauthorised deprivation of liberty must be reported via the Trust incident reporting process.

5.43 If a member of staff has concerns that a deprivation of liberty may be occurring in non-Trust accommodation, then staff should discuss the concern with their line manager as soon as possible and the Managing Authority of the care home or hospital. The Supervisory Body should be notified if the Managing Authority’s response is not deemed sufficient to resolve the issue.
DoLS or the Mental Health Act?

5.44 Sometimes, it is necessary to make a decision about whether to use DoLS or the Mental Health Act to deprive someone of their liberty. Please refer to appendix A and B for guidance on what needs to be considered when making these decisions.

The Court of Protection

5.45 The relevant person’s representative has the right to lodge an appeal with the Court of Protection asking the Court to review the lawfulness of the deprivation of liberty.

5.46 In the event of the Court, or the solicitor representing the relevant person, requesting (or ordering) access to various parts of the patient record, any such requests should be forwarded immediately to the Information Governance Manager. These requests usually need to be completed within seven days.

Advice and Support

5.47 Advice for issues concerning the DoLS can be sought from the MCA, DoLS and Consent Lead. This is either via the Safeguarding Single point of Contact: 0300 323 0035, or via mcadolsandconsent@sompar.nhs.uk

6.0 TRAINING/COMPETENCE REQUIREMENTS

6.1 All clinical staff working with patients should have a basic understanding of DoLS.

6.2 All Trust staff who may be required to be involved in the DoLS authorisation process must undertake role specific training as set out in the Mental Capacity Act training programme.
## 7.0 MONITORING

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<td>All</td>
<td>Review of training figures in line with staff mapping of requirements</td>
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<td>Reporting to the Safeguarding Committee as a regular update at each meeting</td>
<td>Create actions to address any shortfall in training numbers and add the action to the Mental Capacity Act, Deprivation of Liberty Safeguards and consent work plan</td>
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| DoLS Application                 | Section 5 | Complete audit of applications. To include:  
  - Clinical Area  
  - Name  
  - Date of Application  
  - Whether an extension has been applied for  
  - Whether family object  
  - Whether the patient is trying to leave  
  - Whether the patient is saying they want to leave  
  - The outcome of the application  
  - Whether a Notification has been sent to the CQC | MCA, DoLS and Consent Lead | Reporting to the Safeguarding Committee on completion of the audit | Create actions to address any concerns identified through audit |
| Targeted aspects of the policy   | Targeted aspects of the policy | To be added to the annual Mental Capacity Act audit, in response to concerns raised |          | Reporting to the Safeguarding Committee on completion of the audit | Create actions to address any concerns identified through audit |

### 8.0 REFERENCES

8.1 Mental Capacity Act 2005; TSO; London
8.2 Mental Health Act 1983; TSO; London
8.3 Mental Capacity Act 2005 Code of Practice; TSO; London
8.4 Mental Capacity Act 2005 Deprivation of Liberty Safeguards Code of Practice 2008; TSO; London
8.5 Mental Health Act 1983 Code of Practice; TSO; London
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<th><strong>Document Author</strong></th>
<th>Duncan Marrow</th>
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<tbody>
<tr>
<td><strong>Lead Owner</strong></td>
<td>Hayley Peters</td>
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<td><strong>This Version</strong></td>
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<td><strong>Replaces</strong></td>
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<td>Final</td>
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<td><strong>Approval Date</strong></td>
<td>31 May 2019</td>
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<td>9 August 2019</td>
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<td><strong>Review date</strong></td>
<td>August 2022</td>
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</table>

**Applies to:**
All Clinical staff and managers responsible for the care of people in hospital or admitting people to hospital

**Exclusions**
10.0 APPENDIX A - Guidance Note on Flow Chart

1. Does the patient lack the capacity (due to a mental disorder) to consent to being in hospital in order to receive care or treatment that is necessary to prevent harm to them?

- The Deprivation of Liberty Safeguards can only be applied to people who lack the capacity (due to a mental disorder) to decide about their accommodation, care and treatment in hospital.

Mental Disorder

“Although a person must have an impairment or disturbance of the functioning of the mind or brain in order to lack capacity, it does not follow that they automatically have a mental disorder within the meaning of the Mental Health Act 1983” Mental Capacity Act 2005 Deprivation of Liberty Safeguards Code of Practice (2008).

“Mental disorder is defined for the purposes of the Act as ‘any disorder or disability of the mind’. Relevant professionals should determine whether a patient has a disorder or disability of the mind in accordance with good clinical practice and accepted standards of what constitutes such a disorder or disability” Mental Health Act 1983 Code of Practice (2015).

Conditions that could fall within the definition of mental disorder:
- Affective disorders, such as depression and bipolar disorder
- Schizophrenia and delusional disorders
- Neurotic, stress-related and somatoform disorders, such as anxiety, phobic disorders, obsessive compulsive disorders, post-traumatic stress disorder and hypochondrial disorders
- Organic mental disorders such as dementia and delirium (however caused), including personality and behavioural changes due to brain injury and damage
- Personality disorders
- Mental and behavioural disorders caused by psychoactive substance use
- Eating disorder, non-organic sleep disorders and non-organic sexual disorders
- Learning disabilities
- Autistic spectrum disorders (including Asperger’s syndrome)
- Behavioural and emotional disorders of children and young people

This is not an exhaustive list and other conditions may apply.

2. Is the patient under continuous supervision and control?

“Continuous supervision and control” is one aspect of the Supreme Courts’ acid test that was set out in case law in 2014 in a case known as the Cheshire West case. This test provides a way to determine if someone is being deprived of their liberty.

There is no legal definition of what “continuous supervision and control” means, this has led to some differences in interpretations.
- The Law Society say that most people who lack capacity and are in hospital can be managed under the Mental Capacity Act without the need for the Deprivation of Liberty Safeguards
- The opposing view is that just being in hospital and not being free to leave, patients are likely to need a DoLS authorisation.

If in doubt about whether “continuous supervision and control” exists, the safest pathway is to assume that it does.
3. **And is this for a non-negligible period of time?**

The terms non-negligible and significant period of time are used to highlight that a deprivation of liberty is something that is effected by the duration of the patient's admission, care or treatment. It is possible that care and treatment given will not amount to a deprivation of liberty straight away, but over a period of time the threshold for deprivation of liberty may be met. There is no definition of how long a non-negligible/significant period of time is, but when care is restrictive this can be met straight away or very soon. For care that is not restrictive, it may take longer.

Care and treatment that is clearly restrictive may meet this threshold straight away, or very soon. This could include:

- Administration of medication to affect behaviour
- Being prevented from leaving
- Use of covert medication
- Use of physical restriction or restraint
- A request by family members or carers for discharge is declined
- Restrictions being placed on the person's contacts
- Close supervision
- Staff exercise control over assessments, care or treatment
- Use of mittens

In other circumstances, someone's care or treatment may not be restrictive in nature, but this does not mean that the DoLS do not apply to them. In these circumstances, it will take longer for a non-negligible/significant period of time to have occurred. Although there is no defined duration required to meet this timeframe, it is thought that non-restrictive care is likely to amount to a deprivation of liberty if it continues for a number of days (if all of the other criteria are met).

If we are not being restrictive in a way that will immediately deprive someone of their liberty, we need to consider:

- Will the patient regain capacity during this period?
- Will the patient be discharged during this period?

If the answer to either of these questions is ‘yes’, then it may be reasonable not to make an application. If in doubt, the safest pathway will be to assume the timeframe has been met and make an application.

4. **Is the patient free to leave?**

“Free to leave” is one aspect of the Supreme Court's acid test that was set out in case law in 2014 in a case known as the Cheshire West case. This test provides a way to determine if someone is being deprived of their liberty.

There is no definition of what free to leave means, but in general, a patient will not be free to leave unless the patient is free to remove themselves permanently from the hospital. The patient does not have to say that they want to leave for this to apply. This will also still be the case for patients who are unable to remove themselves without assistance.

5. **Is the patient 18 years of age or older?**

The DoLS only apply to those of 18 years and older. Although people under 18 don’t fall under the DoLS legislation, they can become deprived of their liberty. If this is the case, it may be necessary to get this authorised by the Court. If you have a concern about a deprivation of liberty for someone under 18 contact the MCA, DoLS and Consent Lead for advice.
6. **Does the patient have a valid refusal of the proposed treatment? (Through an Advance Decision or a decision from the holder of a valid Power of Attorney)**

It is not possible to provide a patient with treatment that has had a valid refusal. This refusal could be by a valid and applicable advance decision, or it could be through a refusal by a power of attorney, or Court appointed Deputy when they have the authority to make this decision. If it is not possible to provide a treatment, it will not be possible to deprive the person of their liberty in order to provide that treatment.

7. **Could this be better managed under the Mental Health Act?**

See the MHA, MCA, DoLS flowchart in appendix B for circumstances where the Mental Health Act may apply and where DoLS may not apply.

In circumstances where either the Mental Health Act of DoLS could apply, staff should consider:

- The choice of legal regimen should not be based on a preference for one piece of legislation over another, or because one is more familiar than the other
- The choice should not be based on a belief that one regimen is generally less restrictive than the other. However, in an individual case it may be reasonable to choose a regimen if it is likely to prove less restrictive, this should be balanced against potential benefits associated with the other regimen
- The choice should not be based on a belief that one regimen generally offers greater safeguards. However, the safeguards are different, so professional judgment will need to be used when considering which regimen will be best in protecting the patient in the particular circumstances of an individual case

8. **Is the person subject to any powers of the Mental Health Act in a way that would mean that they are ineligible for DoLS?**

A patient will be ineligible for DoLS if:

- The person is detained under a section of the Mental health Act (Section 2, 3, 4, 35-38, 44, 45A, 47, 48 or 51)
- The person is liable to be detained under a section of the Mental Health Act, and:
  - The proposed care or treatment would conflict with a requirement imposed as part of a liable detention using the Mental health Act, or
  - The relevant care and treatment consists in whole or part of treatment for mental disorder in hospital.
- The person is on a Community Treatment Order (CTO), and:
  - The proposed care or treatment would conflict with a condition of their CTO, or
  - The care and treatment is in whole or in part for treatment for mental disorder in hospital
- The person is subject to guardianship under the Mental Health Act, and:
  - The proposed care or treatment would conflict with a requirement of the guardianship regimen, or
  - It is proposed that the patient will be detained in hospital for treatment for mental disorder and they object, or are likely to object (and the persons attorney or deputy has not consented)
- Those people who would meet the criteria for being detained under section 2 or 3 of the Mental Health Act, but is not liable to be detained under sections 4, 35-38, 44, 45A, 47, 48, or 51, or subject to a CTO or guardianship, and
  - It is proposed that the person will be detained in hospital for treatment of mental disorder, and
• The person objects to being accommodated in hospital for that treatment, or to being given some or all of that treatment (and the person’s attorney or deputy has not consented where the person objects).

9. **Is their admission for life sustaining treatment, without which they would die immediately or within a short period of time, or they are so unwell that they are likely to die anywhere other than in hospital?**

   In the Ferreira case, the Court set out circumstances where the DoLS will not apply in the hospital setting:
   - When the patient needs life sustaining treatment (without which they would die immediately or within a short space of time), or
   - They are so unwell that they are at risk of dying anywhere other than in hospital

   This will only apply if the treatment is materially identical to that given to a patient with capacity. This will mean that if restrictions are being placed on the patient that would not be placed on others with the same condition the DoLS may still apply.

10. **A Deprivation of Liberty Safeguards Authorisation/Application should be completed**

    See below.

11. **Access the County Council DoLS application form**

    [https://secure1.somerset.gov.uk/forms/ShowForm.asp?fm_formalias=dols](https://secure1.somerset.gov.uk/forms/ShowForm.asp?fm_formalias=dols)

    This is also available on the Trust Intranet site

    The form should be completed and submitted to the County Council DoLS team. If you require any advice, contact the MCA, DoLS and Consent Lead:
    - Tel: Safeguarding Single Point of Contact: 0300 323 0035, or
    - E-mail: mcadolsandconsent@sompar.nhs.uk
### Appendix B: Adult - MHA / MCA / DoLS Options Grid

<table>
<thead>
<tr>
<th>Individual has the capacity to consent to being accommodated in a hospital for care and/or treatment</th>
<th>Individual lacks the Capacity (due to a mental disorder) to consent to being in hospital for care and/or treatment</th>
<th>Individual lacks the Capacity (not due to a mental disorder) to consent to being in hospital for care and/or treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Only the MHA is available</td>
<td>The MHA is available</td>
<td>The MHA is available</td>
</tr>
<tr>
<td>The MHA is available</td>
<td>The MCA and DoLS authorisation are available</td>
<td>The MCA is available</td>
</tr>
<tr>
<td>Informal admission might be appropriate</td>
<td>Court of Protection order potentially available</td>
<td>Court of Protection order potentially available</td>
</tr>
<tr>
<td>DoLS is not available</td>
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</tbody>
</table>

**Individual objects to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for mental disorder:**

**Individual does not object to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for mental disorder:**

**Individual objects to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for mental disorder:**

**Individual does not object to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for physical health:**

**Individual objects to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for their physical health:**

**Individual has the capacity to consent to being accommodated in a hospital for care and/or treatment:**

**Admission and treatment are possible with the patients consent:**

**Admission and treatment are not possible without the patients consent:**

**Only the MHA is available:**

**The MHA is available:**

**The MCA and DoLS are available:**

**Court of Protection order potentially available:**
### Appendix C: Young Person (16-17 year old) - MHA / MCA / DoL / Parental Responsibility Options Grid

<table>
<thead>
<tr>
<th>Young Person (16-17 year old) - MHA / MCA / DoL / Parental Responsibility Options Grid</th>
<th>Individual objects to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for mental disorder</th>
<th>Individual does not object to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for mental disorder</th>
<th>Individual objects to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for physical health</th>
<th>Individual does not object to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for their physical health</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Individual has the capacity to consent to being accommodated in a hospital for care and/or treatment</strong></td>
<td>The MHA is available</td>
<td>The MHA is available</td>
<td>Parental Responsibility (if within scope of PR – but not advisable)</td>
<td>Admission and treatment are possible with the patients consent</td>
</tr>
<tr>
<td></td>
<td>Court order under Inherent Jurisdiction</td>
<td>Informal admission might be appropriate</td>
<td>Court order under Inherent Jurisdiction</td>
<td></td>
</tr>
<tr>
<td><strong>Individual lacks the Capacity (due to a mental disorder) to consent to being in hospital for care and/or treatment</strong></td>
<td>The MHA is available</td>
<td>The MHA is available</td>
<td>The MHA is not available unless the treatment is part of, or ancillary to, treatment for mental disorder (e.g. treating wounds self-inflicted as a result of mental disorder)</td>
<td>The MHA is not available unless the treatment is part of, or ancillary to, treatment for mental disorder (e.g. treating wounds self-inflicted as a result of mental disorder)</td>
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<td></td>
<td>Parental Responsibility (if within scope of PR)</td>
<td>Parental Responsibility (if within scope of PR)</td>
<td>Parental Responsibility (if within scope of PR)</td>
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<tr>
<td></td>
<td>Court order potentially available</td>
<td>Care / treatment that amounts to a Deprivation of Liberty that falls outside of the scope of Parental Responsibility or the MHA must be authorised by the Court</td>
<td>Care / treatment that amounts to a Deprivation of Liberty that falls outside of the scope of Parental Responsibility or the MHA must be authorised by the Court</td>
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<td>Court order potentially available</td>
<td>Court order potentially available</td>
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<tr>
<td><strong>Individual has the capacity to consent to being accommodated in a hospital for care and/or treatment</strong></td>
<td>The MHA is available</td>
<td>The MCA is available</td>
<td>Parental Responsibility (if within scope of PR)</td>
<td>The MCA is available</td>
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<td></td>
<td>Parental Responsibility (if within scope of PR)</td>
<td>Court order potentially available</td>
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<tr>
<td><strong>Individual lacks the Capacity (due to a mental disorder) to consent to being in hospital for care and/or treatment</strong></td>
<td>The MHA is available</td>
<td>The MCA is available</td>
<td>The MCA is available</td>
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<td>Parental Responsibility (if within scope of PR)</td>
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<td>Court order potentially available</td>
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<tr>
<td><strong>Individual lacks the Capacity (due to a mental disorder) to consent to being in hospital for care and/or treatment</strong></td>
<td>The MHA is available</td>
<td>The MCA is available</td>
<td>Parental Responsibility (if within scope of PR)</td>
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<tr>
<td><strong>Individual lacks the Capacity (due to a mental disorder) to consent to being in hospital for care and/or treatment</strong></td>
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<td><strong>Individual lacks the Capacity (due to a mental disorder) to consent to being in hospital for care and/or treatment</strong></td>
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<tr>
<td><strong>Individual lacks the Capacity (due to a mental disorder) to consent to being in hospital for care and/or treatment</strong></td>
<td>The MHA is available</td>
<td>The MCA is available</td>
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<tr>
<td>Individual <strong>lacks the Capacity (not due to a mental disorder)</strong> to consent to being in hospital for care and/or treatment</td>
<td>must be authorised by the Court</td>
<td>The MHA is available</td>
<td>The MCA is available</td>
<td>The MHA is not available</td>
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<td>Parental Responsibility (if within scope of PR)</td>
<td>Parental Responsibility (if within scope of PR)</td>
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<tr>
<td>Court order potentially available</td>
<td>Court order potentially available</td>
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<td>Court order potentially available</td>
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</tr>
<tr>
<td>Individual <strong>objects</strong> to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for <strong>mental disorder</strong></td>
<td>Individual <strong>does not object</strong> to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for <strong>mental disorder</strong></td>
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<tr>
<td><strong>Individual has the Gillick Competence</strong> to consent to being accommodated in a hospital for care and/or treatment</td>
<td>The MHA is available</td>
<td>Parental Responsibility (if within scope of PR – but not advisable)</td>
<td>Court order potentially available</td>
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<tr>
<td>Parental Responsibility (if within scope of PR)</td>
<td>Informal admission might be appropriate</td>
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<td>The MHA is available</td>
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<td>Parental Responsibility (if within scope of PR)</td>
<td>Care / treatment that amounts to a Deprivation of Liberty, that falls outside of the scope of Parental Responsibility or the MHA, must be authorised by the Court</td>
<td>Court order potentially available</td>
<td>Parental Responsibility (if within scope of PR)</td>
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<td>Care / treatment that amounts to a Deprivation of Liberty, that falls outside of the scope of Parental Responsibility or the MHA, must be authorised by the Court</td>
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<td><strong>Individual lacks the Gillick Competence</strong> to consent to being in hospital for care and/or treatment</td>
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<td>Parental Responsibility (if within scope of PR)</td>
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<td>Parental Responsibility (if within scope of PR)</td>
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<td>And does not have a Mental Disorder</td>
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