



Deprivation of Liberty Safeguards (2009) Policy and Procedure

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Version Control Sheet

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1. Policy Statement

NHS Bolton Clinical Commissioning Group (CCG) 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 CCG will develop documents to fulfil all statutory, organisational and best practice requirements and support the principles of equal opportunity for all.

The purpose of the Deprivation of Liberty Safeguards (DoLS) for CCGs is in relation to commissioner's duties to ensure provider services are delivered in accordance with the DoLS 2009 legal framework underpinned by the Mental Capacity Act (MCA) 2005 and that the rights of those who use services are promoted and protected. NHS Bolton CCG has responsibility for commissioning high quality care and treatment and needs to ensure commissioners and providers understand the legal framework and it's supporting Code of Practice to ensure this is embedded through its commissioning arrangements whilst monitoring compliance through the safeguarding standards and NHS CCG's contract management.

Fundamentally NHS Bolton CCG will want to ensure;

- The DoLS underpinned by MCA 2005 is given a high profile and priority within the NHS Bolton CCG (Refer to NHS Bolton CCG MCA policy).
- Compliance and how this will be achieved is a key part of the tendering process
- Ongoing compliance is monitored in detail through performance review and quality monitoring processes will be done through the safeguarding contractual standards each year by working with NHS Bolton CCG's contract team.

2. Introduction

NHS Bolton Clinical Commissioning Group, (henceforth referred to as "the CCG"), as with all other NHS bodies has a statutory duty to ensure that it makes arrangements to safeguard and promote the welfare of young people and vulnerable adults who lack mental capacity under the MCA 2005 around their accommodation arrangements and are being Deprived of their Liberty under Article 5 (Right to Liberty and Security) of the Human Rights Act 1998 and European Convention on Human Rights. This is supported by the DoLS 2009 legal framework which applies to adults aged 18 years and over. This policy details the safeguarding arrangements that must be in place to ensure the CCG fulfils its statutory duties and responsibilities. The

DoLS 2009 provides the legal framework to put the correct safeguards in place for people who lack mental capacity around their accommodation arrangements.

This policy applies to young people aged 16-17 years old and adults 18 years and over. NHS Bolton CCG commissioners / nurse assessors need to identify young people aged 16-17 year olds (see flowchart 2) and ensure the correct process is applied to safeguard the most vulnerable.

In discharging these statutory duties/responsibilities account must be taken of:

- Mental Capacity Act 2005/ Code of Practice 2007
- The Mental Health Act 1983 / Code of Practice 2015
- Care Act 2014/ Care and Support Statutory Guidance (DH, 2014)
- Safeguarding Vulnerable People in the Reformed NHS – Accountability and Assurance Framework (NHS England, 2015)
- The policies and procedures of Bolton Safeguarding Adults Board (BSAB)

3. Aims

The policy aims to ensure that no act of commission or omission on behalf of the CCG as a commissioning organisation or by a service it commissions puts a service user at risk of being deprived of his / her liberty around their accommodation arrangements and that robust systems are in place to safeguard and promote the welfare of young people and adults at risk under the DoLS 2009 legal framework underpinned by the MCA 2005 and Human Rights Act 1998. The policy reinforces the organisational philosophy that safeguarding and mental capacity is everybody's business and that all staff should respond and act to raise safeguarding awareness and address emerging issues.

The policy details the roles and responsibilities of the CCG as a commissioning organisation and of its employees, directly or indirectly employed.

To support the implementation of this policy a set of contractual safeguarding standards have been developed by the NHS Greater Manchester Safeguarding Collaborative which includes safeguarding standards around DoLS 2009 and MCA 2005 arrangements. These standards form part of the contractual arrangements with all commissioned services and are audited at a minimum annually to ensure that all service users are protected from abuse and the risk of abuse.

4. Principles

This policy demonstrates that the CCG recognises that safeguarding young people and adults at risk is a shared responsibility with the need for effective joint working between agencies and professionals that have different roles and expertise if those vulnerable groups in society are to be protected from harm. In order to achieve effective joint working there must be constructive relationships at all levels, promoted and supported by:

- A commitment of senior managers and board members to seek continuous improvement with regards to safeguarding, DoLS 2009, MCA 2005 and Human Rights both within the work of the CCG and of services commissioned.
- Clear lines of accountability within the CCG for work on safeguarding, DoLS 2009, MCA 2005 and Human Rights.
- Clear policies setting out their commitment and approach to safeguarding including safe recruitment practices and arrangements for dealing with allegations against people who work with young people and adults as appropriate where they lack capacity to keep themselves safe from harm and exploitation.
- Service developments that take account of the need to safeguard all service users, and are informed, where appropriate, by the views of service users.
- Staff training and continuing professional development including appropriate supervision and support for staff in relation to safeguarding practice and DoLS 2009, MCA 2005 and Human Rights.
- Effective interagency working including effective information sharing.

5. Definition

Abbreviation	Acronym
Advance Decision to refuse treatment	ADRT
Best Interests Assessor	BIA
Clinical Commissioning Group	CCG
Court of Protection	CoP
Continue Health Care	CHC
Deprivation of Liberty	DoL
Deprivation of Liberty Safeguards	DoLS
Enduring Power of Attorney	EPA
General Practitioner	GP
Independent Mental Capacity Advocate	IMCA
Lasting Power of Attorney	LPA
Managing Authority (Hospital & Care Home)	MA
Mental Capacity Act	MCA
Mental Health Act	MHA
Office of the Public Guardian	OPG
Relevant Persons Representative	RPR
Supervisory Body (Local Authority)	SB

The **Mental Capacity Act 2005 (MCA)** is the statutory framework for acting and making decisions on behalf of individuals over 16 years old who lack the capacity to make particular decision for themselves or who have the capacity and want to make preparations for a time when they may lack capacity in the future.

Deprivation of Liberty Safeguards (DoLS) (Adults- over 18 years old) is an amendment to the MCA 2005. They apply in England and Wales only. The MCA framework allows restraint and restrictions to be used – but only if they are in a person’s best interests. Extra safeguards are needed if the restrictions and restraint used will deprive a person of their liberty. These are called the Deprivation of Liberty Safeguards (DoLS).The Deprivation of Liberty Safeguards can only be used if the person will be deprived of their liberty in a care home or hospital. In other settings the Court of Protection can be asked if a person can be deprived of their liberty (refer to NHS Bolton CCG MCA policy). The DoLS applies to adults aged 18 years and over.

Deprivation of Liberty Safeguards (DoLS) (Young People 16-17 years old) can be deprived of their liberty but the Court of Protection can authorisation the detention by the state not the local authority.

Human Rights: A person is being deprived of his / her liberty under Article 5 (Right to Liberty and Security) of the Human Rights Act 1998 and European Convention on

Human Rights supported by the DoLS 2009 legal framework which applies to adults aged 18 years and over and MCA 2005.

Managing Authority (MA) Under the DoLS legal framework this is a care home or a hospital setting.

Supervisory Body (SB) Under the DoLS legal framework this is known as the Local authority who can authorise a deprivation for people who are deprived of their liberty in a hospital or a care home.

Independent Mental Capacity Advocate (IMCA) This is a type of advocacy introduced by the MCA 2005. The IMCA helps vulnerable people to make important decisions about serious medical treatment and changes in accommodation and who have no family or friends that would be appropriate to consult about these decisions.

Court of Protection (CoP) Under the DoLS legal framework this applies to people who are 16-17 years old living in a residential placement or for people over the age of 18 years old living in their own home in the community.

Restraint is the use of threat or force and may be disproportionate or unlawful. This will also apply to people who are deprived of liberty (see NHS Bolton CCG's DoLS policy).

Enduring Power of Attorney (EPA) is the legal authorisation to act on someone else's behalf. This has now been replaced by the LPA but if in place before 2007 is still legally viable.

Lasting Power of Attorney (LPA) enables an individual to grant authority to one or more persons to make decisions on their behalf in relation to health, welfare, property or financial matters specified in the LPA document. These powers can include giving or refusing consent to medical examination and/or treatment as specified in the LPA.

Covert Medication involves the administration of medication in a disguised form for example in food or drink when a person is refusing treatment necessary for their physical or mental health. The patient lacks capacity in relation to the planned intervention.

Mental Health Act (MHA) was first introduced in 1983 (further amendment in 2007) and sets out how you can be treated if you have a mental disorder. It affects those over 18 years old and DoLS framework is clearly outlined in the new Mental Health Code of Practice 2015¹.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435512/MHA_Code_of_Practice.PDF

The Mental Capacity Act (2005) Code of Practice defines mental capacity as:

‘A person who lacks capacity to make a particular decision or take a particular action for themselves at a time the decision or action needs to be taken’.

The policy endeavours to ensure that NHS Bolton CCG employees who have responsibility for delivering direct patient care meet their statutory responsibilities for those who lack capacity to consent to care and treatment.

The Deprivation of Liberty Safeguards (DoLS, 2009) is an amendment to the Mental Capacity Act 2005 (Refer to NHS Bolton CCG DoLS policy).

Code of Practice

There is a code which provides practitioners with guidance in relation to decisions made under the DoLS. This is

- Deprivation of Liberty Safeguards²

6. Roles and Responsibilities of the CCG

Chief Officer

The ultimate accountability for safeguarding and the DoLS 2009 sits with the Chief Officer for the CCG. Any failure to have systems and processes in place to protect young people and adults at risk in the commissioning process, or by the providers of commissioned services would result in failure to meet statutory and non-statutory constitutional and governance requirements.

The CCG must ensure that robust arrangements are in place to demonstrate compliance with safeguarding responsibilities. This includes:

- A clear line of accountability for safeguarding reflected in governance arrangements.
- Establishing and maintaining good constitutional and governance arrangements with capacity and capability to deliver safeguarding duties and responsibilities, as well as effectively commissioning services ensuring that all service users are protected from abuse and neglect.
- Having in place clear policies setting out the commitment and approach to safeguarding including safe recruitment practices and arrangements for

² <https://www.brighton-hove.gov.uk/sites/brighton-hove.gov.uk/files/DoLS%20Code%20of%20Practice.pdf>

dealing with allegations against people who work with young people and adults as appropriate.

- Supporting improvements in the quality of safeguarding practice across primary medical care.
- Ensuring the DoLS 2009 plays an integral role in all parts of the commissioning cycle, from procurement to quality assurance.
- Seeking assurance from all commissioned services, both NHS and independent healthcare providers, throughout the year to ensure continuous improvement and to demonstrate compliance with statutory DoLS 2009 duties.
- Ensuring staff are trained in recognising and reporting DoLS 2009 issues, have access to appropriate supervision, and are competent to carry out their roles and responsibilities.
- Effective inter-agency working with the local authority, the police and third sector organisations which includes appropriate arrangements to co-operate with the local authority in the operation of Bolton Safeguarding Children Board (BSCB), Bolton Safeguarding Adult Board (SAB), and Bolton Health and Wellbeing Board.
- Having an Adult Safeguarding Lead and Mental Capacity Act Lead; supported by relevant policies and training.
- Effective systems for responding to abuse and neglect.
- Effective arrangements for information sharing.
- Working with the local authority to enable access to community resources that can reduce social and physical isolation for adults.
- Supporting the development of a positive learning culture across partners for safeguarding adults to ensure that organisations are not unduly risk adverse.

Chief Nurse / Executive Board Lead With Responsibility for Safeguarding

- Ensures that the CCG has management and accountability structures that deliver safe and effective services in accordance with statutory, national and local guidance for safeguarding young people and adults at risk under DoLS 2009.
- Ensures that service plans/specifications/contracts/invitations to tender etc. include reference to the standards expected for safeguarding young people and adults at risk under DoLS 2009.
- Ensures that safe recruitment practices are adhered to in line with national and local guidance and that safeguarding and DoLS 2009 responsibilities are reflected in all job descriptions.
- Ensures that staff in contact with children and or adults in the course of their normal duties are trained and competent to be alert to the potential indicators of abuse or neglect and know how to act on those concerns in line with local guidance.

The CCG Safeguarding Team (Designated and Professional Leads for Safeguarding and DoLS)

Designated leads will work across the local health system to support other professionals in their agencies on all aspects of safeguarding.

- To ensure the CCG meet the requirements of the DoLS 2009.
- To ensure that safeguarding young people children and adults at risk is an integral part of the CCG's clinical governance framework.
- To promote, influence and develop safeguarding training – on a single and inter-agency basis - to meet the training needs of staff.
- To provide clinical advice on the development and monitoring of the safeguarding aspects contracts/service specifications under DoLS 2009.
- To provide a health perspective into single and multi-agency learning reviews
- To fulfil the role of the Nominated Senior Officer where there is an allegation against a person who works with young people /adults at risk; including, ensuring the CCG operates within Local Safeguarding Boards policies and procedures; to provide a coordinating role in these instances, resolving any interagency issues that may arise and liaising with the Safeguarding Boards as necessary.
- To provide advanced expert knowledge and advice on safeguarding young people and adults under the DoLS 2009 to a wide range of professional groups and organisations/agencies and where necessary taking responsibility for the oversight of complex cases.
- To undertake designated safeguarding functions as outlined in the accountability and assurance framework for safeguarding adults and DoLS 2009.
- Mandatory compliance with the DoLS policy and procedure and providing routine reports to the Quality and Safety Committee.

NHS Bolton CCG DoLS Lead

- Will provide advice and support to CCG commissioners including Continue Health and Funded Care Team in accordance to the law, policy and practice guidelines.
- Will provide advice and support to nursing home sector and any other independent provider commissioned by NHS Bolton CCG in accordance to the law, policy and practice guidelines.
- Will provide advice and support to GP Practices in accordance to the law, policy and practice guidelines.
- Will provide advice to the CCG's Quality, Safety and Governance Team in accordance to the law, policy and practice guidelines.
- Will put in place arrangements for DoLS for the CCG and seek assurance from providers where Bolton CCG commission services to around their DoLS

arrangements where appropriate. This will be achieved through the commissioning cycle, service specification, and safeguarding standards.

- Give assurance to the CCG Board and Executive Team and inform them of any legislative changes and risks to the CCG.
- To work in partnership with the Local Authority DoLS Team.

Line Managers

- To understand the DoLS 2009 policy and the commitment of the CCG to ensure all staff are supported to maintain training and awareness.
- To conduct regular reviews of the standards required for each role. A full re-assessment will be required if changes are made to the duties of the role which warrant a new and different level of employment check or training requirement (e.g. if the post holder takes on new duties involving children or adults at risk of harm or abuse).

Nurse Assessors / Commissioners

NHS Bolton CCG needs to assure themselves that all patients that are eligible for NHS Funded Care or Continue Health Care need to:

- Seek assurance that the CCG are identifying people who could be deprived of his/her liberty and encourage providers to make the appropriate and necessary applications to the Supervisory Body for people over 18 years old or the Court of Protection for those who are deprived of their liberty in their own homes including 16-17 years old.

NHS Bolton CCG commissioners will need to identify whether or not a DoL has occurred or is likely to occur and 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.89³). 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.

³ [http://www.mentalhealthlaw.co.uk/HL_v_UK_45508/99_\(2004\)_ECHR_471](http://www.mentalhealthlaw.co.uk/HL_v_UK_45508/99_(2004)_ECHR_471)

Governance Arrangements / CCG Quality and Safety Committee

To ensure that safeguarding is integral to the governance arrangements of the CCG the Safeguarding Team will report quarterly to the NHS Bolton CCG Safeguarding Assurance Group (SAG) which is a sub-group to the CCG Quality and Safety Committee. The purpose of the report is to provide assurance on the effectiveness of the safeguarding, MCA and DoLS arrangements in place across the organisation and within commissioned services; to ensure that the CCG is kept informed of national and local initiatives for safeguarding, MCA and DoLS; and to brief the CCG on learning from reviews and audits that are aimed at driving improvements to safeguard young people and adults at risk.

The Quality and Safety Committee will oversee the implementation of any action plans stemming from any legislation changes to DoLS.

In addition to the reporting arrangements above an annual safeguarding report will be submitted to the governing body with exception reporting on issues of significance e.g. Serious Case Review and Safeguarding Adult Reviews reports, inspections' findings and learning lessons.

MCA and DoLS Training

The CCG is committed to have arrangements in place to ensure effective training of relevant staff. The CCG expects relevant clinical staff to be trained in MCA/DoLS at level 1 and 2. Further levels of training will be determined by the responsibilities set out in job descriptions/role functions.

Line managers will agree the level of MCA/DoLS training required for each employee depending on their role and responsibilities, in line with the CCG Safeguarding Training Framework. The framework can be found on the CCGs website under the safeguarding section.

Support, supervision and mentorship will be provided for safeguarding leads within the CCG as appropriate and identified through personal development needs and appraisal.

Young People 16-17 Years old

The CCG is committed to have arrangements in place through the commissioning and compliance processes in ensuring young people are safeguarded under the MCA 2005 and that people are safeguarded under the DoLS legislation through the Court of Protection where NHS Bolton CCG have funded the package of care.

Looked After Children, Mental Capacity and DoLS

The CCG will take into account young people aged 16 -17 years old. For people who are in Looked After Care commissioners and provider must ensure themselves that people's rights are protected under the MCA 2005 or where they lack mental capacity around their accommodation arrangements and appropriate safeguards will be put in place via the Court of Protection for approval (refer to NHS Bolton CCG Mental Capacity Act policy).

7. Roles and Responsibilities of Others within DoLS

Best Interest Assessor

- Act independently
- Need to establish if a DoL is occurring or is likely to occur. If no DoL occurring the BIA not to proceed
- Need to provide an independent and objective view of whether or not there is justification for DoL.
- Must consult with the managing authority of the hospital or care home.
- Examine any relevant needs assessments and care plans. Must consider whether the care plan and the manner in which it is being, or will be, implemented constitute a DoL. If not, no DoL authorisation is required for that care plan
- Need to explain key aspects of the care plan and its aims to the people being consulted.
- Must involve the person in the assessment process as much as is possible & practical.
- Must help the person in the decision making process.

Relevant Person's Representative (RPR)

According to the Deprivation of Liberty Safeguards: A Guide for relevant person's Representatives: OPG, 2009:7, 8, 16 the role of the RPR includes⁴:

- A friend or a relative
- Appoint a paid RPR (if no friend or relative identified)
- 18 years and over
- Regular contact with the relevant person
- Willing to be appointed

⁴ http://www.knowsley.gov.uk/pdf/DHguide_for_relevant_representatives.pdf

- Must act in the Best Interest of the relevant person wishes, feelings, beliefs etc.
- Must comply with the MCA and DoLS code of Practice
- Can challenged the MCA / DoLS assessment process
- Must not be:
- Financially interested in the managing authority where the person is being deprived
- Employed or providing services to the managing authority or Supervisory Body

Independent Mental Capacity Advocate (IMCA)

The role of the IMCA includes:

- An IMCA can be requested for a standard or an urgent application
- Supervisory or RPR can request one
- To support the RPR, review process or access to the Court of Protection
- Explain the effects of the authorisation and any conditions attached
- IMCA can challenged the authorisation with the support of the RPR or not

NHS Bolton CCG Commissioners / Nurse Assessors

1. To seek assurance that Health Providers (Care homes and hospitals) are making the appropriate and necessary applications to the Supervisory Body (Local Authority).
2. CHC/Funded Care Team Health Professionals (as commissioners) identify cases where people lack mental capacity around their accommodation arrangements and make necessary arrangements to safeguard them. In instances, where a person is living in their own home and care is provided, the same process applies but only the CoP can authorise this.
3. Ensuring that decisions are taken reviewed & recorded in a structured way.
4. Considering the least restrictive form of care.
5. Helping the person retain contact with family / friends / carers / advocacy service support.
6. Reviewing the care plan including an independent view e.g. advocacy service.

NHS Bolton CCG commissioners / nurse assessors will need to determine whether or not a DoL has occurred or is likely to occur, decision-makers must consider all of the facts (See DoLS Checklist appendix 2). The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance” and this is described in (HL v UK para.89⁵). In order to provide

⁵ [http://www.mentalhealthlaw.co.uk/HL_v_UK_45508/99_\(2004\)_ECHR_471](http://www.mentalhealthlaw.co.uk/HL_v_UK_45508/99_(2004)_ECHR_471)

a clearer definition, Lady Hale in the 'Cheshire West' case law⁶, established the 'acid test' for determining if a Deprivation of Liberty is occurring, the test is listed below;

DoLS Acid Test

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.**

In determining whether such a deprivation is in the best interests of the Relevant person, the Best Interest Assessor 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 DOL?
- Are there less restrictive options for treatment that would avoid DOL altogether?
- Does the effect of all the restrictions amount to DOL, if individually they don't?
- That practical steps can be taken to reduce the risk of DOL occurring?

Section 6(4) of the MCA states that someone is using restraint if they use force, or threaten, to make someone do something that they are resisting, or restrict a person's freedom of movement, whether they are resisting. 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 DoL safeguards or change their care provision to reduce the level of restraint.

⁶ [http://www.mentalhealthlaw.co.uk/Cheshire_West_and_Chester_Council_v_P_\(2011\)_EWCA_Civ_1257](http://www.mentalhealthlaw.co.uk/Cheshire_West_and_Chester_Council_v_P_(2011)_EWCA_Civ_1257)

8. Mental Capacity Assessment

NHS Bolton CCG commissioners (CHC nurse assessors) where appropriate and relevant will ensure when commissioning placements they identify patients who lack capacity around their accommodation arrangements and the appropriate safeguards are put in place (Refer to NHS Bolton CCG MCA policy).

9. Professionals Concerns Regarding a DoLS

Reporting Concerns of an Unauthorised DoL

If any NHS Bolton CCG commissioners/nurse assessor's 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.

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

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.

Supervisory Body Contact Details

Martin Challender, Bolton Council, Deprivation Of Liberty Safeguards, T: 01204 337715 E: DOLS@bolton.gov.uk
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Reviewing the lawfulness of a DoL

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.

Where an urgent authorisation has been given, the relevant person or certain persons acting on their behalf, such as a donee or deputy, have 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. 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 DoL,
- 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.

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.
- Any Attorney for Health and Welfare decisions.
- A deputy who has been appointed by the court 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 SB as the RPR.

The court may make an order:

- Varying or terminating a standard or urgent authorisation, or
- Directing the SB (in the case of a standard authorisation) or the MA (in the case of an urgent authorisation) to vary or terminate the authorisation.

Urgent or Emergency Application to the Court Of Protection

Under certain circumstances NHS Bolton CCG may need to make an Urgent or Emergency application to the CoP. This could be in certain circumstances, e.g. when someone's life or welfare is at risk, or a person who is lacking capacity and is about to be made homeless and a decision has to be made without delay. If the court agrees, a professional is able to make the necessary decision on behalf of the person who lacks mental capacity.

A court order will not be issued unless the court decides it's a serious matter with an unavoidable time limit. Prior to any consideration about an urgent or emergency order needs to be discussed with NHS Bolton CCG Chief Officer, Chief Nurse and MCA / DoLS Lead.

Where the care package is entirely health funded, then legal advice should be sought from the NHS Bolton CCG legal advisors as to whether an application to the Court of Protection for authorisation is necessary.

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 application on advice of the NHS Bolton CCG legal team.

A less obvious consequence of the 'Cheshire West' ruling is that the number of people detained under the Mental Health Act 1983 will also rise. This has implications for the NHS Bolton CCG in terms of the numbers of people entitled to Section 117 aftercare will raise. The impact this has on budgets should be monitored monthly.

Any unauthorised Deprivations will carry with it a potential risk of litigation. Such a risk should be included on NHS Bolton CCG Safeguarding Risk register and an action plan to address the risk reviewed on a monthly basis.

10. NHS Bolton CCG Referral Process to the CoP

NHS Bolton CCG commissioners / nurse assessors making an application to the CoP must apply the following process:

- Discuss case with the CCG's DoLS lead to establish if the case is appropriate and assess other least restrictive care pathways.
- If the CCG's DoLS lead feels a standard or urgent referral is needed to the CoP then he / she will liaise with NHS Bolton CCG Governance Team, senior manager of CHC/Funded Care.
- If the DoLS lead still believes the matter needs to be referred to the CoP then he / she will discuss with Chief Nurse.
- In absence of a Chief Nurse, the DoLS lead will discuss the matter with NHS Bolton CCG Director on call/ Chief Officer / Board Secretary.
- The DoLS lead may seek advice from solicitors approved by NHS Resolution (formally NHSLA) with Chief Officer/Chief Nurse Consent.
- NHS Bolton CCG legal team for advice and support following the agreement of the Chief Nurse / Director on Call.
- If the application is appropriate NHS Bolton CCG will liaise with the NHS Bolton CCG Financial Team and the Case Manager (i.e. CHC Nurse Assessor etc.) and ask he/ she to provide all the relevant information for the NHS Bolton CCG legal representation to make the referral to CoP.

Recording and Monitoring

Where NHS Bolton CCG is involved in an application to the Court of Protection (CoP) relating to a patient (Funded nursing care, adult safeguarding or otherwise), the Governance & Safety Team should be notified by email with the patient's information, what decision that needs to be made, Court date (or date of Court Order) and other relevant details such as the mental capacity assessment, minutes of the best interest meeting and court application.

The Governance & Safety Team will log CoP cases onto the Litigation database, record the outcome and include data /decision in routine monitoring reports to the CCG's Quality & Safety Committee. This can be done by emailing the Governance & Safety Team on the following email addresses.

Email: bolccg.incidents@nhs.net or bolccg.complaints@nhs.net

11. Re X procedure Court of Protection

NHS Bolton CCG commissioners / nurse assessors can request for the Re X procedure to be instigated. The procedure to be followed in line with case law ruling Re X and others (Deprivation of Liberty) [2014] EWCOP 25, and, Re X and others (Deprivation of Liberty)⁷.

The Re X EWCOP 25 Procedure enables the court to decide applications for a court-Authorised deprivation of liberty on the papers only, without holding a hearing, provided certain safeguards are met: Those safeguards include ensuring that:

- The person who is the subject of the application and all relevant people in their life are consulted about the application and have an opportunity to express their wishes and views to the court.
- The person who is the subject of the application has not expressed a wish to take part in the court proceedings.
- The person who is the subject of the application and all relevant people in their life do not object to the application.
- There are no other significant factors that ought to be brought to the attention of the court that would make the application unsuitable for the streamlined procedure.

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[http://www.mentalhealthlaw.co.uk/Re_X_\(Deprivation_of_Liberty\)_\(No_2\)_\(2014\)_EWCOP_37,\(2014\)_MHLO_98](http://www.mentalhealthlaw.co.uk/Re_X_(Deprivation_of_Liberty)_(No_2)_(2014)_EWCOP_37,(2014)_MHLO_98)

12. DoLS for 16 / 17 Years Old

NHS Bolton CCG have responsibility for ensuring the DoL also considers a person aged 16 or 17 year old who is placed in care and support facilities they commission and who lack capacity. These include (but are not limited to)

- The family home,
- Foster homes, adoptive homes, children's homes (secure, non-secure, and certain special schools), care homes, residential special schools, boarding schools, further education colleges with residential accommodation, and hospitals.

A deprivation of liberty will be lawful if warranted under statute, for example, under: section 25 of the Children Act 1989, which provides for the placement of looked after children in secure accommodation;

- The Mental Health Act 1983;
- The youth remand provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012; or
- The custodial sentencing provisions of the Power of Criminal Courts (Sentencing) Act 2000.

Any child can be sectioned under the Mental Health Act, but it is a very grave step to take. Clearly, other options are preferable. Local authorities are under a duty to consider whether any children in need, or looked-after children, especially those in foster care or in a residential placement, are subject to restrictions amounting to a deprivation of liberty. The Cheshire West criteria must be rigorously applied to the individual circumstances of each case.

Secure Accommodation

The local authority must first consider whether section 25 of the Children Act (secure accommodation) is applicable or appropriate in the circumstances of the individual case. Section 25 allows for the placement of a looked-after child in accommodation provided for the purpose of restricting liberty. This will require an analysis of:

- whether, under the Children (Secure Accommodation) Regulations 1991, section 25 does not apply: for example if the child has been detained under the Mental Health Act, remanded to youth detention or given a custodial sentence for certain serious offences.
- whether the intended placement is accommodation provided for the purposes of restricting liberty and, thus, secure accommodation within section 25; and whether the test set out in section 25(1)(a) or (b) is met: such orders only apply to children who, without the order, would be likely to injure themselves or others, or those who have a history of absconding, would be likely to

abscond from any other type of accommodation and, if so, would likely suffer significant harm.

- Irrespective of the means by which the court authorises the deprivation of a child's liberty, whether under section 25 or what's called the inherent jurisdiction, (a residual jurisdiction to make decisions for people who need it where there is no other framework) the local authority should cease to impose such deprivation as soon as either:
 - (1) the section 25 criteria are no longer met; or
 - (2) the reasons justifying the deprivation of liberty no longer subsist.

13. Children under 16 Without Care Order

If a child under 16 is not under a formal care order, his/her parents can authorise deprivation of liberty in the exercise of parental responsibility, for instance, in a hospital, or NHS facility or day care or with a private foster carer, regardless of the child's personal mental capacity. Logically, notwithstanding that the parents' own consent negates the subjective element – the lack of valid consent – that is an essential part of the definition of deprivation of liberty, the above proposition might need to be reconsidered in light of the SRK case⁸. This is because of the State's own positive duties to keep purely private arrangements amounting to deprivation of liberty under human rights law – and an apparently benign parent may not actually be benign; but there is no known case raising that question at the moment.

Accommodated Children

If a child under the age of 16 is accommodated under section 17 or section 20 of the Children Act, the latter explicitly requiring the non-objection of the holder of parental responsibility, then the parent's consent renders the deprivation of liberty not imputable to the State, even if the State is paying for the regime. In those circumstances, the court will not need to make any declaration as to the lawfulness of the child's care regime (even if the child is not free to leave), because the regime has not triggered article 5 'process' protection.

If a child under the age of 16 is under a care order or accommodated under section 20 as a prelude to child protection proceedings, then notwithstanding a parent's consent, the inherent jurisdiction must be used for the lawful imposition of the regime in human rights terms.

⁸ http://www.39essex.com/cop_cases/staffordshire-cc-v-srk-ors/

Lacking Mental Capacity

If a young person age of 16-17 years old, lacking capacity to consent and not under a care order is deprived of his or her liberty, the commissioners must apply to the Court of Protection for authorisation. This is because the Mental Capacity Act's coverage of 16- and 17-year-olds, even though they remain children, trumps the parents' ability to consent to that which is otherwise not authorised.

Mr Justice Keehan, in *Birmingham City Council v D* [2016], which concerned a 16-year-old confined in a residential placement, said: "I have come to the clear conclusion that however close the parents are to their child and however co-operative they are with treating clinicians, the parent of a 16 or 17 year old young person may not consent to their confinement which, absent a valid consent, would amount to a deprivation of that young person's liberty."

Care Order

Where a child (regardless of mental capacity) is the subject of an interim care order or a care order, it is extremely unlikely that a parent could validly consent to what would otherwise amount to a deprivation of liberty. In those circumstances, a local authority cannot consent, in sufficiently independent terms, to a deprivation of liberty either – albeit being the holder of parental responsibility because it is also being the commissioner of the care regime.

As mentioned, section 20 arrangements for accommodating any child with foster carers, for instance, as a prelude to care proceedings, require the parental responsibility holders' agreement. But the exercise of their parental responsibility rights would have been called into question in that context, so their consent could not be sufficient authorisation to avoid an article 5 issue based on a lack of valid consent. Use of the inherent jurisdiction is then necessary.

Section 20 Concern

Mr Justice Keehan's statement in the AB case⁹ (the forerunner to the D case) about this group of children needs to be read with real care, however. Having said that where a child is not looked after, the exercise of parental responsibility may amount to valid consent to a child's confinement, he went on to say: "Where a child is a looked-after child, different considerations may apply, regardless of whether the parents' consent to the deprivation of liberty." More thought is required here because Mr Justice Keehan, in saying that if one is under 16 and 'looked-after', the Family Court must be applied to for authorisation, has perhaps overlooked that not all

⁹ <http://www.bailii.org/ew/cases/EWHC/Fam/2015/3125.html>

children accommodated under section 20 should be seen as having parents whose exercise of parental responsibility is 'suspect'.

All such children count as 'looked-after' children, but the scope for section 20 duties does not merely cover those at risk of parental abuse or neglect – it extends to inability to provide suitable accommodation or care. It is unlikely that many ill or disabled children's residential placements are properly seen as made under section 17 of the Children Act, (that being a mere power), when a duty could be regarded as having been triggered. So child aged under 16 could be placed in a specialist setting, with the agreement of his or her parent, under section 20, and parental responsibility would not have changed or been called into question. The parent's consent to the explicit details of the care plan involving deprivation of liberty would still be valid.

Court of Protection Application

If a child between 16 and 18 is lacking in capacity to consent or refuse accommodation under section 20, his/her parental responsibility holder(s) need to consent to the section 20 arrangement for it to be lawful. She/he or they would be (logically) consenting to deprivation of liberty, as parents – although scrutiny is still required by the MCA and that would at least make it a clear case for using the streamlined Re X type of application to the Court of Protection provided for by the new rules of court for an over 16-year-old.

Inherent Jurisdiction

For an under 16-year old's deprivation of liberty that does require scrutiny from the Court – where there is an interim or full care order – the criteria for the High Court's granting a local authority leave to apply for it to exercise its inherent jurisdiction, as set out in section 100(4) of the Children Act, are likely to be met. This states that the court may only grant leave if satisfied that: (a) the result which the authority wishes to achieve could not be achieved by any other order; and (b) there is reasonable cause to believe that if the inherent jurisdiction is not exercised the child is likely to suffer significant harm. Any unlawful deprivation of liberty is likely to constitute significant harm.

If a child between 16 and 18 is not lacking in mental capacity and is objecting to accommodation under section 20, his/her parents can (logically) give consent to authorise deprivation of liberty, as parents – but whether or not they would be upheld in that decision via proceedings in the Family Division of the High Court, is a moot point.

The significance of deprivation of liberty for children's and transition services became clear in March 2014 when the Supreme Court delivered its Cheshire West judgment

(P v Cheshire West and Chester Council and P & Q v Surrey County Council [2014]). In this, one of three was aged 17 years old. The minimum age at which the Court of Protection can authorise a deprivation of liberty is 16 years.

However, the law in this area is developing (see A Local Authority v D and others [2015] EWHC 3125 (Fam), Article 5 ECHR – deprivation of liberty – inherent jurisdiction). The judgement clarifies that:

- If a care regime, which amounts to a deprivation of liberty, is not justified and/or not authorised by a legal procedure, there is a human rights violation.
- Where a child is on an interim or final care order a local authority cannot consent to a deprivation of liberty.
- Where a child is accommodated under s20 of the Children Act 1989, whether parents can consent will depend on the particular circumstances of the case.
- Where parents cannot consent to deprivation of liberty the local authority will have to seek leave from the High Court to exercise its inherent jurisdiction in order to lawfully deprive a child of their liberty.

Other considerations:

- Extent to which the care arrangements differ to those typically made for someone of the same age and relative maturity who is free from disability.
- That the young person's expressed views or wishes may not accord with those who have parental responsibility or the law.
- Frequency and duration of any periods of containment.
- Behaviour management: including what techniques are used, whether seclusion used.
- Extent to which the support provided by staff can properly be described as support or whether it may be considered supervision and control.
- Whether after the 16th birthday the approach of the MCA 2005 is more relevant to a situation than the Children Act 1989 so that an application could be made to the COP before any deprivation of liberty occurs.

Authorisation Process:

- For under 16s who are confined and unable to consent: parents can give valid consent if that is an appropriate exercise of parental responsibility.
- For those of any age under an interim or final care order who are confined and unable to consent: local authority will have to seek leave from the CoP.
- 16- and 17-year-olds who are confined and lack capacity to consent: local authority will have to seek leave from the CoP.
- Those under 18 who are able to make the relevant decision and object to their confinement: local authority will have to seek leave from the CoP.

Key Points

- An authorisation may last for a maximum period of 12 months.
- 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 for up to another 12 months. 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 liberty may be challenged by the relevant person, or by the RPR, by an application to the 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 will also need to be shared with the inspection bodies.

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 recording.
- 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 legal advice 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 NHS Bolton CCG funding for Court Applications.

14. Contacts Details

Chief Officer	Sue Long T: 01204 462028 E: su.long@nhs.net
Head of Commissioning	Melissa Laskey, Melissam.laskey@nhs.net
DoLS Lead	Kaleel Khan, T: 01204 462204 E: kaleelhan@nhs.net
Richard Leigh	Programme Manager- NHS Funded Care Team T: 01204 462296 E: Richard.leigh2@nhs.net
Caroline Gee	Modern Matron , NHS Funded Care Team T: 01204 462204 E: caroline.gee3@nhs.net
Diane Sankey	Governance, Risk & Complaints Manager T: 01204 462023 E: dianasanky@nhs.net
Governance & Safety Team	Email: bolccg.incidents@nhs.net or bolccg.complaints@nhs.net
Martin Challender	Bolton Council , Deprivation Of Liberty Safeguards, T: 01204 337715 E: DOLS@bolton.gov.uk

15. Relevant Case Law

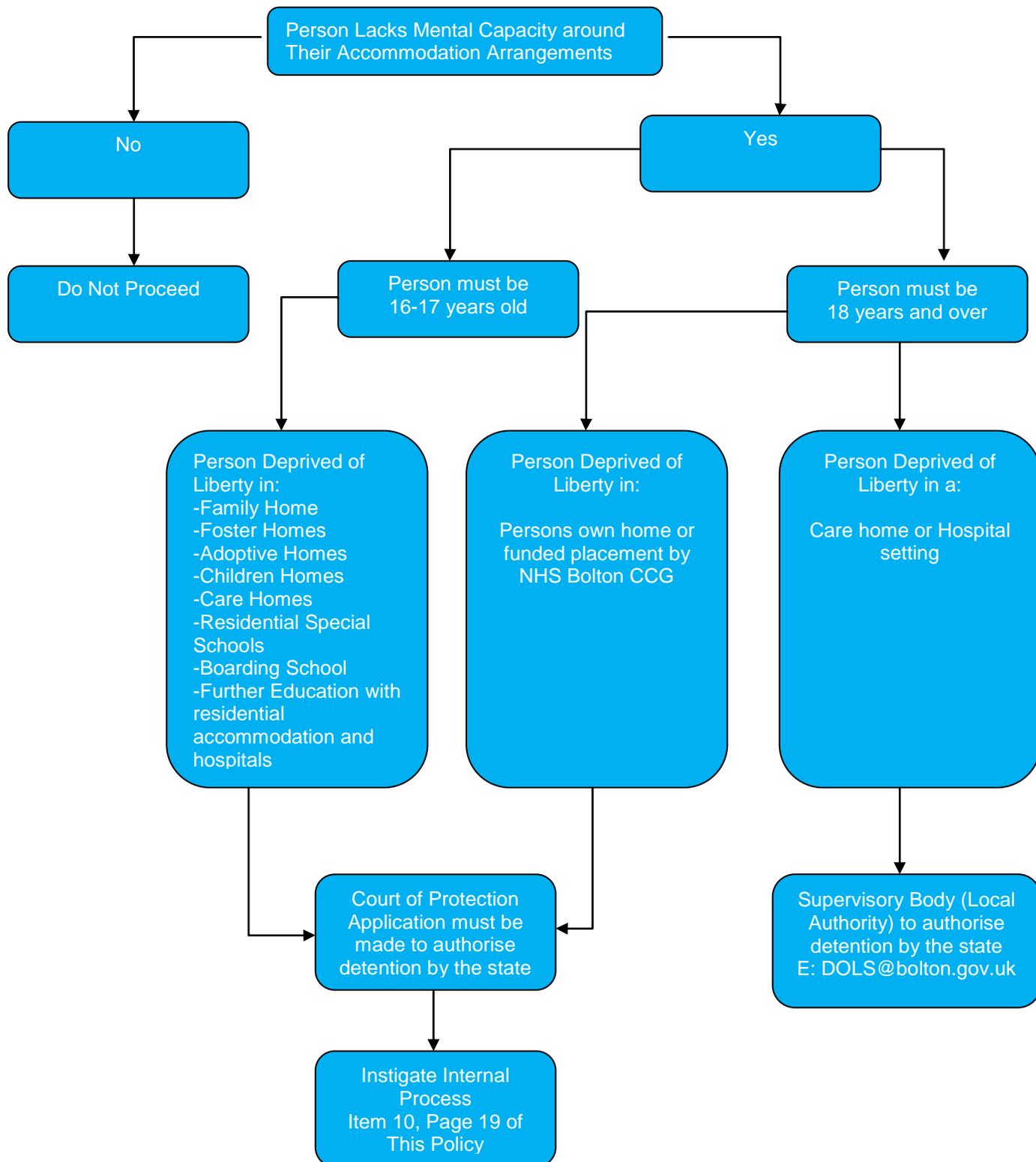
- Cheshire West and Chester Council v P (2014)
- AJ (Deprivation of Liberty Safeguards (20165) EWCOP 5 (Baker J)
- London Borough of Hillingdon v Neary [2011] EWHC 1377 (COP) (Peter Jackson J)
- Re A and Re C [2010] EWHC 978 (Fam)
- P v Surrey Council & Surrey Downs CCG [2015]
- A Local Authority v D and others [2015] EWHC 3125 (Fam), Article 5 ECHR
- Birmingham City Council v D [2016]
- Staffordshire County Council v SRK
- HL v UK 45508/99 [2004] ECHR 471
- JE v DE and Surrey County Council [2006] EWHC 3459 (Fam)
- Secretary of State for Justice v MM; Welsh Ministers v PJ [2017] EWCA Civ 194 (Court of Appeal (Sir James Munby P, Gloster LJ V-P, Sir Ernest Ryder, SP)
- The case of Birmingham City Council & D (16-17 year old)
- PJ (A Patient) v A Local Health Board and Secretary of State for Justice v MM
- A LOCAL AUTHORITY Applicant - and - D & Ors

16. References

(see foot notes)

- Mental Health Code of Practice 2015

17. Appendix 1: DoLS High Level Process



18. Appendix 2: DoLS Check List

NHS Bolton CCG Commissioners / Nurse Assessors

Name:			
DoB:		Broadcare No:	
NHS Number:			

Please consider the questions and score your answers to identify what, if any action may need to be taken. Please indicate which category your patient is being assessed under. Tick relevant box.

1. Deprivation of Liberty in a Hospital or Care Home setting (18 years and over)

Should the individual be considered to be deprived of their liberty (DoL) by reason of the restrictive measures in their care plan an application needs to be made to the Supervisory Body (Bolton Council) by the Managing Authority (Provider) for appropriate safeguards (DoLS) to be considered.

Does the person lack mental capacity around making decisions relating to his / her accommodation and care arrangements?	<input type="checkbox"/> Yes <input type="checkbox"/> No
1) Does the person meet the threshold of the acid Test?	
1.1) Acid Test 1 - Is the person free to leave?	<input type="checkbox"/> Yes <input type="checkbox"/> No
1.2) Acid Test 2 - Is the person subject to continuous supervision and control	<input type="checkbox"/> Yes <input type="checkbox"/> No
2) Further consideration – Article 8 (Right to Respect for Private and Family Life) ECHR rights	
Do the proposed care / accommodation arrangements include any interference with his / her private and family life?	<input type="checkbox"/> Yes <input type="checkbox"/> No
If yes score = 2.5	Deprivation of Liberty likely – Application for Standard authorisation made / to be made by hospital / Care home / Care Provider? <input type="checkbox"/> Yes <input type="checkbox"/> No score _____
If yes score = 2	Deprivation of Liberty likely – Application for Standard authorisation made / to be made by hospital / Care home? <input type="checkbox"/> Yes <input type="checkbox"/> No score _____
If yes score = 1.5	Possible Deprivation of Liberty / interference with human rights – Referred to XX for further assessment? <input type="checkbox"/> Yes <input type="checkbox"/> No score _____
If yes score = 1	Possible Deprivation of Liberty / interference with human rights – Referred to XX for further assessment? <input type="checkbox"/> Yes <input type="checkbox"/> No score _____
If score = 0	No action necessary
Count score: Q1.1 – Yes = 0 No = 1; Q1.2 – Yes = 1 No = 0; Q2 – Yes = 0.5 No = 0	
Total score:	
Outcome:	

2 A. Deprivation of Liberty in a community setting (18 years and over) – in a person’s own home or where a service is being commissioned by NHS Bolton CCG

Should the individual be considered to be deprived of their liberty by reason of the restrictive measures in their care plan an application to the Court of Protection for lawful authority must be considered.

2 B. Is this case jointly funded by health and the local authority? Yes No

3 A. Deprivation of Liberty (16 / 17 year olds) in a child’s / residential home / domestic setting

Should the individual be considered to be deprived of their liberty by reason of the restrictive measures in their care plan an application to the Court of Protection for lawful authority must be considered.

3 B. Is this case jointly funded by health and the local authority? Yes No

Does the person lack mental capacity around making decisions relating to his / her accommodation and care arrangements?	<input type="checkbox"/> Yes <input type="checkbox"/> No
1) Does the person meet the threshold of the acid Test?	
1.1) Acid Test 1 - Is the person free to leave?	<input type="checkbox"/> Yes <input type="checkbox"/> No
1.2) Acid Test 2 - Is the person subject to continuous supervision and control	<input type="checkbox"/> Yes <input type="checkbox"/> No
2) Further consideration – Article 8 (Right to Respect for Private and Family Life) ECHR rights	
Do the proposed care/accommodation arrangements include any interference with his/her private and family life?	<input type="checkbox"/> Yes <input type="checkbox"/> No
If score = 2.5	Deprivation of Liberty likely – Application to the Court of Protection made/to be made by CCG? <input type="checkbox"/> Yes <input type="checkbox"/> No score_____
If score = 2	Deprivation of Liberty likely – Application to the Court of Protection made/to be made by the CCG? <input type="checkbox"/> Yes <input type="checkbox"/> No score_____
If score = 1.5	Possible Deprivation of Liberty/interference with human rights – Referred to XX for further assessment? <input type="checkbox"/> Yes <input type="checkbox"/> No score_____
If score = 1	Possible Deprivation of Liberty/interference with human rights – Referred to XX for further assessment? <input type="checkbox"/> Yes <input type="checkbox"/> No score_____
If score = 0	No action necessary
Count score: Q1.1 – Yes = 0 No = 1; Q1.2 – Yes = 1 No = 0; Q2 – Yes = 0.5 No = 0	
Total score:	
Outcome:	