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# Mental Health Legislation

## An Overview

- Mental Capacity Act 2005
- Deprivation of Liberty Safeguards

# Mental Capacity Act 2005

# When was it implemented?

- Royal Assent – April 2005
- IMCA service in England; criminal offence; Code of Practice – April 2007
- Main Body of The Act – Came into force on 1<sup>st</sup> October 2007

# Who Is Affected?

- Mental capacity could affect anybody
- Over 2 million people in England and Wales lack mental capacity to make some decisions for themselves.
- Up to 6 million family carers, carers, health and social care staff

# Principles of the Act (Section 1)

- Assume a person has capacity unless proved otherwise
- Do not treat people as incapable of making a decision unless you have tried all you can to help them
- Do not treat someone as incapable of making a decision because their decision may seem unwise

# Principles of the Act

- Do things or, take decisions for people without capacity in their best interests
- Before doing something to someone or making a decision on their behalf, consider whether you could achieve the outcome in a less restrictive way

# Who may lack capacity? (Section 2)

- For the purposes of this Act, a person lacks capacity in relation to a matter he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain – diagnostic test.
- Can be permanent or temporary.

# What Does That Mean?

Can not make a decision because of an impairment of, or a disturbance in the functioning of, the mind or brain – Some examples of this would be:

- May have dementia, be unconscious, have a profound learning disability, suffering from a stroke or have an acute infection
- Can be **permanent or temporary.**

The lack of capacity may be temporary or permanent and will include people with dementia, with brain injury, with learning disability and mental health needs, and those who are unconscious or barely conscious whether due to an accident, being under anaesthetic or as a result of other conditions

# Assumption of Capacity and Supported Decision Making

- Must give information in a clear and easy way to understand
- Must help the person who lacks capacity to communicate. An inability to communicate does not equate to a lack of capacity.

# Ability to make decisions – Functional Test

Act says in 3(1)....a person is unable to make a decision for himself if he is unable:

- to understand the information relevant to the decision
- to retain that information
- to use or weigh that information as part of the process of making that decision, or
- to communicate his decision (whether by talking, using sign language or any other means).

# Best Interests (Section 4)

- All decisions must be made in the best interests of the person who lacks capacity
- It is the key principle that governs all decisions made for people who lack capacity
- Same as the current common law

# Best Interests

Must consider all relevant circumstances

Act doesn't define best interests but does give a checklist:

- Must involve the person who lacks capacity
- Have regard for past and present wishes and feelings
- Consult with others who are involved in the care of the person
- There can be no discrimination

# Section 5

Section 5(1) sets out the circumstances in which protection from liability or acts done to or for people who lack capacity may be available

- Reasonable steps to establish lack of capacity
- Reasonable belief that “P” lacks capacity
- Act will be in “P’s” best interests

# Section 6

- If the act is intended to restrain P protection is limited unless two further conditions are met:
  - reasonable belief that it is necessary to prevent harm
  - proportionate
- Cannot deprive P of his liberty and this will be the case from October 2007
- Cannot conflict with LPA or deputy

# A quick review

1. Is the decision relating to health or welfare
2. Does the person meet the criteria
  - Diagnostic Test
  - Functional Test
3. Have the principles been adopted
4. Is the decision taken in the persons best interest

# Diagnostic Test

- For the purposes of this Act, a person lacks capacity in relation to a matter he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain – diagnostic test.
- Can be permanent or temporary.

# Functional Test

Act says in 3(1)....a person is unable to make a decision for himself if he is unable:

- a) to understand the information relevant to the decision
- b) to retain that information
- c) to use or weigh that information as part of the process of making that decision, or
- d) to communicate his decision (whether by talking, using sign language or any other means).

# Principles

- Assume a person has capacity unless proved otherwise
- Do not treat people as incapable of making a decision unless you have tried all you can to help them
- Do not treat someone as incapable of making a decision because their decision may seem unwise
- Do things or, take decisions for people without capacity in their best interests
- Before doing something to someone or making a decision on their behalf, consider whether you could achieve the outcome in a less restrictive way

# Planning Ahead

## What can we do?

# Planning Ahead for a Time When You Think You Might Lack Capacity

The act provides new and clearer defined ways of planning ahead:

1. Appoint a Lasting Power of Attorney (LPA)
2. Make an advance decision to refuse treatment
3. Make your wishes and feelings known

# Lasting Powers of Attorney

Appointing someone to take decisions for you should you lose capacity.

- Choice of appointment made when you have capacity
- Not necessary for you to see a Solicitor to arrange

# Types of LPA

- Health and Welfare
- Financial

# Advanced Decisions

Advanced decisions can only be made about your right to refuse medical treatment under carefully described situations.

If they relate to the refusal of life sustaining treatment they have to be in writing and witnessed.

# Making Your Wishes And Feelings Known

The Act acknowledges that decision makers must take your past and present wishes and feeling into consideration when taking decisions on your behalf.

In preparation for the day you may loose capacity, write them down and get them on your records.

# Application to the Court of Protection

(A) orders of the court - applications can be made to the court of protection for complex or difficult welfare decisions or simple one-off financial decisions

(B) court appointed deputies - could be used when a series of decisions are needed and a single court order is insufficient

# How Is the New Legal Framework Being Supported?

1. Code of practice
2. New Office of the Public Guardian
3. New Court of Protection
4. Criminal offence – Neglect of person who lacks capacity

# The Independent Mental Capacity Advocate (IMCA)

Who? - Extra safeguard for particularly  
vulnerable people in specific  
situations

Who? - People with no-one to consult (other  
than paid carers)

When? – serious medical treatment; longer  
term accommodation moves

# IMCA – Serious Medical Treatment

- 4 (2) Serious medical treatment is treatment which involves providing, withdrawing or withholding treatment in circumstances where:
- (a) in a case where a single treatment is being proposed, there is a fine balance between its benefits to the patient and the burdens and risks it is likely to entail for him,
  - (b) in a case where there is a choice of treatments, a decision as to which one to use is finely balanced, or
  - (c) what is proposed would be likely to involve serious consequences for the patient.

# IMCA role

- Needs to be instructed by a decision maker
- To represent the person
- To find out about the persons feelings and wishes as much as possible
- To find out about different courses of actions
- To challenge the decision maker if necessary, including in extremis going to the Court of Protection

# Questions and Comments



# Deprivation of Liberty Safeguards (DoLS)

# Deprivation of Liberties Safeguards

- Is part of the Mental Capacity Act 2005.
- Comes into force April 2009.
- When either a care home or hospital identifies that a person lacking capacity is being or risks being deprived of their liberty they must seek Authorisation to their **Supervisory body** for Authorisation to deprive someone of their liberty.
- **FAILURE TO DO SO IS ILLEGAL.**

# How Does DoLS Relate to the Rest of the Mental Capacity Act 2005?

- **Any action under DoLS must be in line with the principles of the Mental Capacity Act.**

# Why has law been created?

- IN 2004 the UK was judged to be in breach of the Human Rights Convention Article 5, by the European Court. In that a patient HL had been deprived of his liberty unlawfully because of a lack of legal procedure that offered sufficient safeguards against arbitrary detention and speedy access to court.(The Bournewood case).
- DoLS ensures compliance with the European Convention of Human Rights(ECHR).

# Who is covered by the Safeguards?

- Apply to 18+.
- Covers patients from care homes or hospitals who:
  - Suffer from a disorder of the mind.
  - Lack capacity to give consent to the arrangements for their care or treatment.
  - For whom such care amounts to a deprivation of liberty.

## People covered by Dols:

- Elderly.
- Learning Disabilities.
- Some physical injury. Trauma ,Stroke etc.

# Deprivation of Liberties is not:

- A new system for determining whether a person lacking capacity should receive treatment.
- Nor is it a power to take or convey people to hospitals or care homes.
- It is about the environment of care and treatment not an authorisation for it.
- It is solely about ensuring there are appropriate safeguards in place when it is deemed that a person lacking capacity to decide, needs to receive treatment or care in their best interest in a care home or hospital in circumstances that deprive them of their liberty.

# WHEN CAN SOMEONE BE DEPRIVED OF THEIR LIBERTY

- Depriving someone who lacks capacity to make decisions of their liberty is a serious matter and should not be taken lightly.
- One must only be deprived of ones liberty if:
  - It is in the individuals own best interests.
  - When there is no less restrictive alternative.
- This means that DoLS must not be used as a form of punishment.

# HOW CAN WE IDENTIFY DEPRIVATION OF LIBERTY

- Deprivation of liberty in European Court of Human Rights Terms, may only result from restrictions placed on a person by actions or omissions of the staff providing care and treatment.
- When assessing whether a person is or may be deprived of their liberty it is necessary to consider the combined impact of all restrictions placed upon the individual.

# Deprivation V Restriction???

- Legal judgement from European Court of Human Rights.
- No definition as such.
- ECtHR said in its October 2004 judgment:
- “To determine whether there has been a deprivation of liberty, the starting point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type ,duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of and restriction upon, liberty is merely one of degree or intensity and not of nature or substance”.

- **Deprivation:**
- Can be viewed as total control which is ongoing.
  - *(Professionals caring for and managing the patient exercise complete and effective control over persons care and movements ,also person is under continuous supervision and not free to leave).*
- **Restriction:**
- Can be viewed as a one of something which occurs sometimes.

# **The fact that restrictions may be justified because they are necessary for the persons safety does not prevent them from leading to a Deprivation of Liberty.**

If a person is not allowed any freedom of movement within hospital or care home i.e.

They **are not allowed** to leave their room for long periods of time, they are probably deprived of their liberty.

Similarly ,**controlling** a persons behaviour and movement through regular use of medication or seating from which a person can't get up ,may constitute deprivation of liberty.

Deprivation of liberty **may only result from restrictions** placed on a person by actions or omissions of the staff providing care and treatment.

The physical or psychological effects of illness or disability alone would not in themselves mean that a person is deprived of liberty.

# Proportionate Restrictions

## Restrictions:

- That are unavoidable in a group situation, and apply to all residents, would be unlikely in themselves to constitute a deprivation of liberty i.e.
  - They are proportionate restrictions for the benefit of running the unit or home and the other patients/residents, such as general restrictions on early morning or late evening visits or upon numbers of visitors at any one time .
  - They would however depend upon the context and the extent of other restrictions imposed on the person concerned.

# 2 New Responsibilities

- Care Homes and Hospitals – **Managing Authorities**
- PCT's and Local Authorities – **Supervisory Bodies**

# SUPERVISORY BODIES

- Care Homes- **Local Authority**
- Hospitals- **PCTs**
  
- Care Homes/Hospital Units become **Managing Authorities**
- Hospitals not Trusts become **Managing Authorities**

# Authorisation Process

## Care Home/ Hospital (Managing Authority).

- If a person is at risk of deprivation of liberty ,consider less restrictive alternatives.
- Authorisation requested by Care Home / Hospital in which the person is or will be resident to the appropriate Supervisory Body.
- Authorisations should be obtained in advance (maximum 28 days) except in circumstances where need is considered urgent.
- Urgent Authorisations last maximum 7 days. In exceptional circumstances may be extended by Supervisory Body for further 7 days.
- In an emergency situation, the managing authority( Care Home/Hospital) may issue an Urgent Authorisation, giving reasons in writing and a Standard Authorisation must be obtained before the expiry of the Urgent Authorisation.

# Urgent Authorisations (emergency situations)

Where a managing authority becomes aware of someone who lacks capacity to provide agreement.

1. Either they are currently caring for them in a manner that amounts to a deprivation of liberty.
2. Or they have been asked to admit/care for someone and they know that in doing so, they are likely to be depriving them of their liberty.

They must seek authorisation for the deprivation from the appropriate Supervisory Body. If the situation is so urgent that they need to care for someone immediately, the Managing Authority can provide themselves with an emergency authorisation.

# Standard Authorisations

Anyone with a concern can trigger an assessment e.g. family member.

2. They may have asked the home or hospital ward to apply for an authorisation but it has not been done.
- If the finding is that the person may be being deprived of their liberty. This would lead on to the full assessment process.
  - On receipt of request for Authorisation the Supervisory body must commission 6 assessments to be completed within 21 days of request being sought.

# Standard Authorisations

## Person meets criteria:

Supervisory Body must grant authorisation for Deprivation of Liberty.

Time period no longer than 12 months.

Authorisation will be in writing. The time period, and any conditions attached .

Copy given to care home/hospital.

The person concerned.

Any Imca instructed.

All interested persons consulted by Best Interests Assessor.

A Persons Representative will be appointed to keep in touch with the person. Supporting them and to request a review or make an application to the court of protection if thought appropriate.

# Standard Authorisations

## Assessments:

1. Age.
2. Mental Capacity Assessment.
3. Eligibility Assessment.
4. No Refusals Assessment.
5. Best Interests Assessment.
6. Mental Health Assessment.

If any assessments conclude person **does not meet criteria** for an authorisation the supervisory body **must turn down** the request for authorisation.

# Care Home Managers /Hospital Responsibilities

Duty to:

- ▶ Take all practical steps to ensure person concerned and representative understand what the authorisation means.
- ▶ Ensure any conditions are met. Monitor individuals circumstances ,as any change, may require them to request a review of authorisation.
- ▶ Home/hospital can apply for further authorisation when authorisation expires in which case original process would begin again.

# Review Process

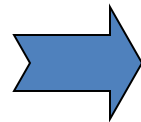
A review may be carried out because:

- The person or persons representative requests a review.
- Care home/ hospital requests one due to change in circumstances.
- The Supervisory Body must conduct a review if asked to do so by the above.
- The person, their representative or an attorney or deputy can at any time request a review by the supervisory body.
- They have also the right to challenge a decision to authorise Dols at any time to the Court of Protection.

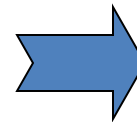
# When should it be used and what does it look like?

Used when a resident or patient needs to go in to or remain in the registered care home or hospital in order to receive the care or treatment that is necessary to prevent harm to themselves.

**Managing Authority**  
Hospital/Care Home



**Supervisory Body**  
PCT/LA

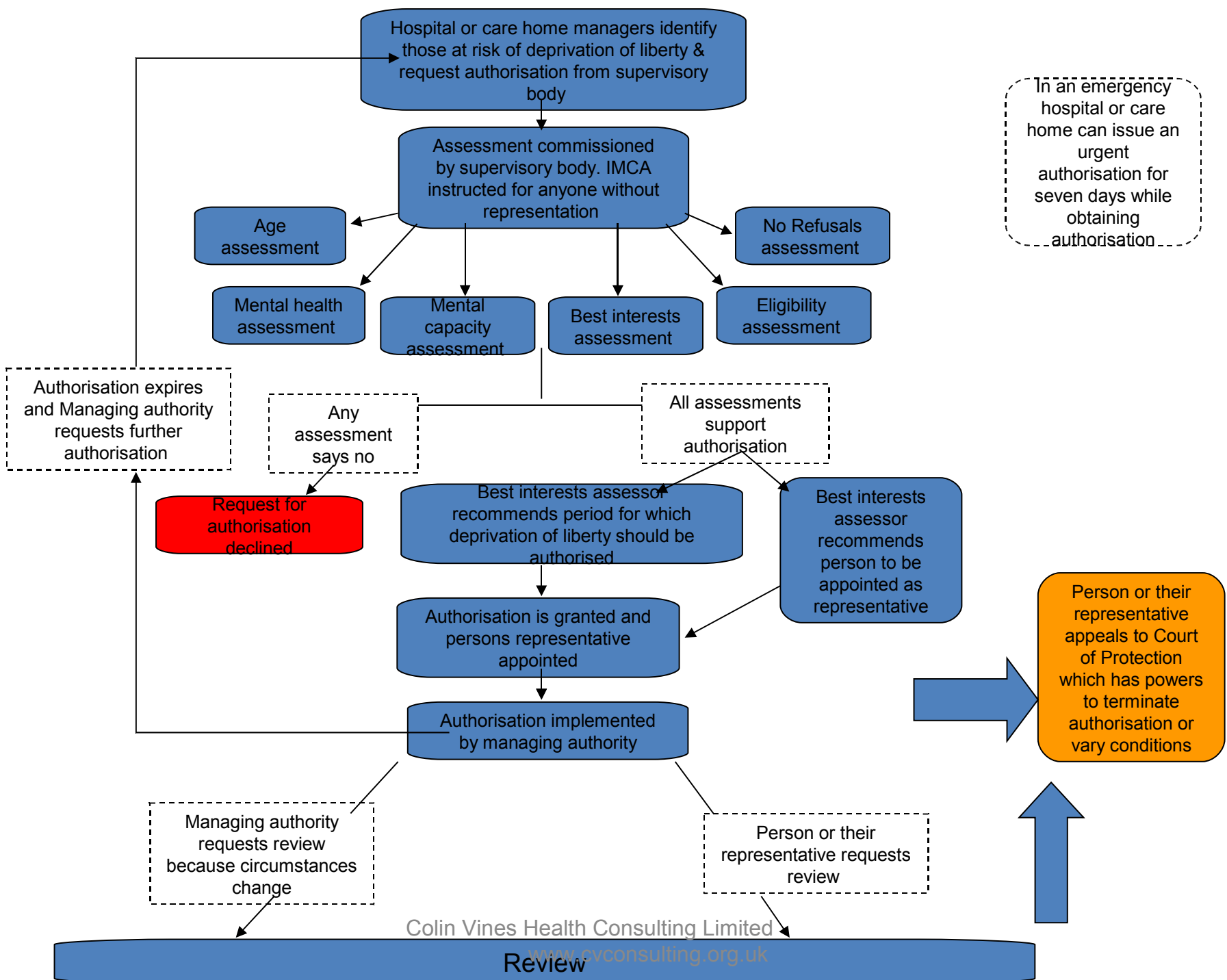


**Managing Authority**  
**Supervisory Body**

Decide if it is necessary to apply for authorisation from Supervisory Body to deprive someone of their liberty in their best interests

Assess each individual case and provide or refuse authorisation for DOL as appropriate

Review cases to determine if DOL is still necessary and remove where no longer appropriate



## Some key points

- The deprivation of liberty safeguards are in addition to and do not replace other safeguards in the MCA
- Deprivation of liberty is for the purpose of providing treatment or care under MCA it does not authorise it
- Essential that hospital and care home managers and assessors understand the distinction between deprivation and restriction of liberty
- Every effort should be made to avoid instituting deprivation of liberty care regimes wherever possible
- Local authorities, PCTs, Hospitals, Care Homes and other key stakeholder organisations need to work in partnership to deliver DoL safeguards and reduce the numbers referred unnecessarily for assessment

# How do DOLS relate to the rest of the MCA?

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

# Responsibilities in Deprivation of Liberty

## Supervisory Body

PCT or LA

Responsible for assessing the need for and authorising deprivation of liberty



## Managing Authority

Hospital or Care Home

Responsible for care and requesting an assessment of deprivation of liberty



## Relevant Person

Person being deprived of liberty



## Assessors

Carry out assessments



## Family/Friends/Carers

Consulted, involved and provided with all information



## Representative

Providing independent support



## IMCA

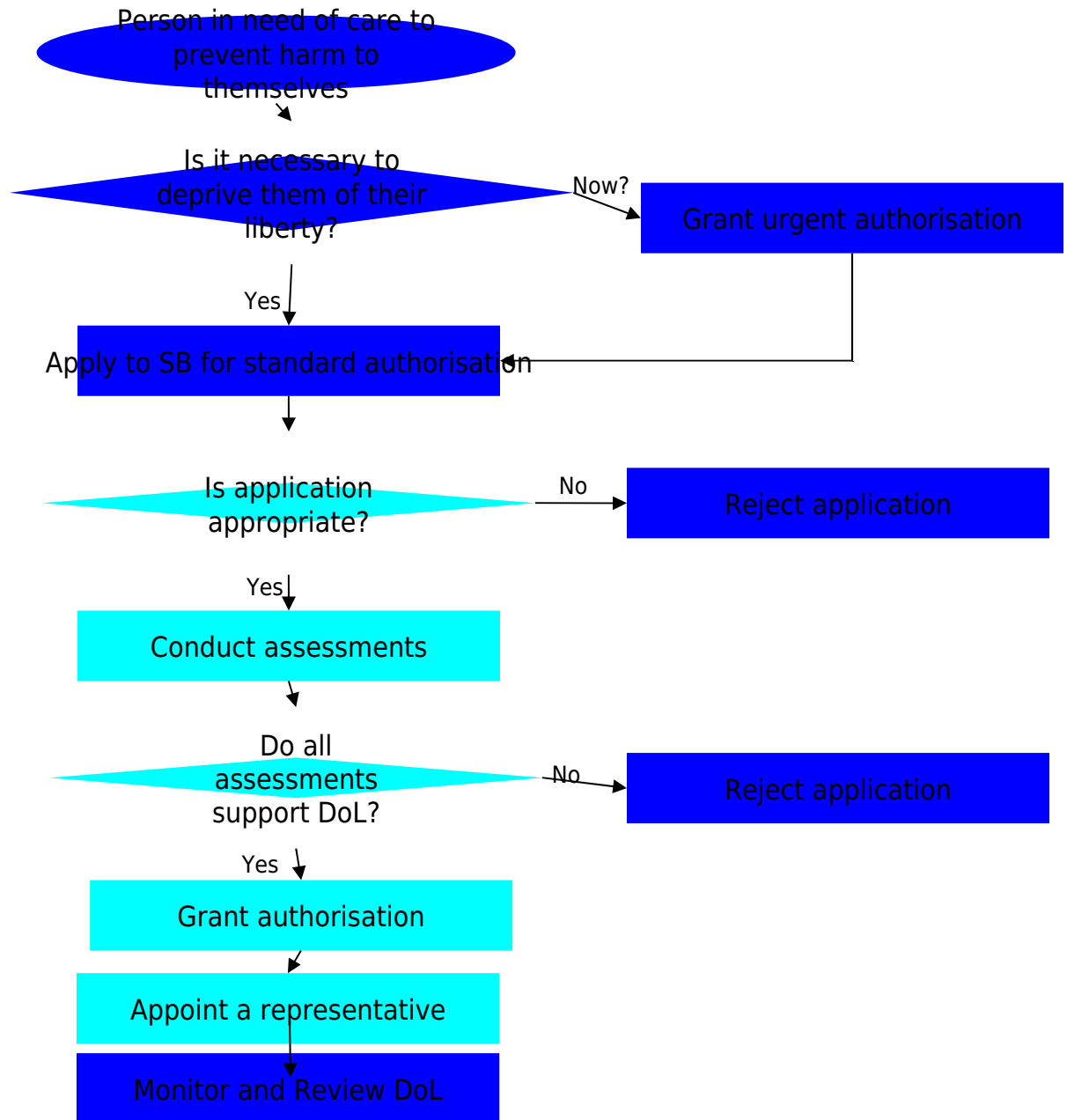


## Court of Protection



## DoL Process

Purpose: To prevent unlawful deprivation of liberty



# Initial Questions for the Managing Authority

No

Yes

**Do they lack capacity to consent?**

No application can be made

Application may be required

**Are they at risk of DoL within 28 days**

Reconsider when reviewing care

Application may be required

**Can they receive care through less restrictive but still effective alternative?**

Application may be required

Application cannot be made

**Is the person 18 years of age or older (or going to turn 18 within 28 days)?**

No application can be made – Consider Children Act/MHA

Application may be required

**Is the person subject to powers of the MHA which would mean they are ineligible for DoL?**

Application may be required

Application cannot be made

**Has the person made an advance decision to refuse the treatment?**

Application may be required

Application cannot be made

**Is proposed DoL for mental health treatment in hospital and does the person object?**

Application may be required

Application cannot be made

**Has the person's attorney/deputy indicated they will refuse on their behalf?**

Application is required

Application cannot be made

**Should DoL begin immediately?**

Apply for standard  
authorisation

Grant urgent authorisation

# Assessments

- Assessments have to ensure that all the requirements are met in relation to deprivation of liberty.
- They must ensure that the relevant person
  - Is old enough
  - Lacks capacity to make a decision at that time
  - Has not previously refused treatment
  - That their attorney / deputy is not refusing / objecting
  - That they are not currently subject to or should be subject to the Mental Health Act
  - That deprivation of liberty is in their best interests

# Age Assessment

- To establish if the relevant person is 18 or over



Anyone deemed to be appropriate

# Mental Capacity Assessment

- Purpose – To establish whether the relevant person lacks capacity to consent to the arrangements proposed for their care or treatment



Anyone eligible to act as a Mental Health Assessor or Best Interests Assessor

# No Refusals Assessment

- Purpose – To establish whether an authorisation for DoLS would conflict with other existing authority for decision making for that person



Anybody that the Supervisory Body considers has the skills and experience to perform the role

# Eligibility Assessment

- Purpose – to establish whether the relevant person should be covered by the MHA 1983 or DoLS under MCA 2005



Best Interests Assessor

Someone familiar with the Mental Health Act 1983

# Mental Health Assessment

- Purpose – Is the relevant person suffering from a mental disorder within the meaning of the MHA 1983



Doctor

Approved under Section 12 of MHA 1983 or Registered medical practitioner who has special experience in diagnosis and treatment of mental disorder

Completed appropriate MCA 2005 mental health assessor training

Doctors cannot be Best Interests Assessors

# Best Interests Assessment

- Purpose – to establish firstly whether DoL is occurring or is going to occur and if so whether it is in their best interests, it necessary to prevent harm to themselves and the DoL is proportionate to the likelihood and seriousness of the harm



AMHP; Social Worker, Nurse, Occupational Therapist, Psychologist:

With skills and experience required by the regulations

Has the required skills for the role

Has completed specific DoL Best Interests Assessor training

Suitability considering the circumstances of the case

# Best Interests Assessment

Evaluate the care plan

Determine if DoL is occurring / going to occur

Seek the views of anyone involved in caring for the person or interested in their welfare

Involve the relevant person and support them to participate in decision making

Consider views of mental health assessor

Decide whether it is in person's best interests to deprive them of their liberty

State how long the authorisation should last

State any necessary conditions associated with DoL

Recommend someone to be appointed as relevant person's representative

Produce report, stating reasons for conclusions submit to supervisory body

# Assessors

- Individual professionals personally accountable for their decisions
- Nobody can or should carry out an assessment, other than age, unless covered by indemnity in respect of any liabilities that might arise in connection with carrying out the assessment

# IMCAs

- Instructed as with MCA when no family / friends appropriate to represent during the application / assessment stage
- Once deprived of liberty the person or their representative has right to an IMCA
- A paid / professional representative or the person that has one has no right to an IMCA

# Representatives

- Once anybody is deprived of liberty the SB has to appoint a representative from amongst those recommended by the BI assessor
- A paid / professional representative has to be appointed where no family or friends – that person can not be an employee of the SB

# Questions & Comments

# The End