Deprivation of Liberty Safeguards Policy

Inmind Reference:	CNL10
Category:	Clinical Policy
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Reviewed on:	March 2019
Next review date:	March 2020
Lead Officer:	Director of Nursing
Equality Impact Assessment completed:	Yes

Applicable Legislation/Regulations:
The Deprivation of Liberty Safeguards 2009 The Mental Capacity Act 2005 The Care Act 2014
Codes of Practice:
Mental Health Act 1983 Mental Capacity Act
Purpose:
To ensure that all staff working within In Mind Healthcare are aware of and able to carry out their responsibilities under the Deprivation of Liberty Safeguards and the Mental Capacity Act, and that all service users are protected under this legislation.

Version Control Table		
Date Ratified	**Version Number**	**Status**
March 2019	V2.0	Live

Date	**Key Revision**
February 2018	Overall revision of Capacity Policy to provide more detail regarding staff responsibilities under the Deprivation of Liberty Safeguards and Mental Capacity Act.
March 2019	Reviewed – No change

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1.0 The Policy

a) Inmind Health care has robust procedures in place to ensure that it operates within the safeguards against unlawful deprivation of liberty as set out in legislation.

b) The **Deprivation of Liberty Safeguards** (DOLS) came into force on 1st April 2009. The Safeguards provide for the lawful deprivation of liberty of people who lack capacity to consent to arrangements for their care or treatment in either hospitals or care homes, but who need to be deprived of liberty in their best interests, to protect them from harm. The Safeguards apply to people in England and Wales who are 18 years or older. A large number of such individuals will be those suffering significant learning disabilities, or people with dementias, but may also include people with neurological conditions, for example, as the result of a brain injury, and where the criteria for detention under the Mental Health Act 1983 are not met at the time the care and treatment is proposed.

c) DoLS were introduced in response to the 2004 'Bournewood judgment' in the European Court of Human Rights (HL v UK (Application No: 45508/99)). This case was brought by carers of an autistic man who was kept at Bournewood Hospital against their wishes. The Court found that the circumstances by which HL was admitted to and kept in hospital breached the human right to liberty (Article 5(1) European Convention of Human Rights Deprivation of liberty) and of Article 5(4), the right to have the lawfulness of detention reviewed by a court.

d) Use of the DoLS Authorisation can avoid similar breaches of human rights 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 appropriate for the person at that time.

e) **DoLS are underpinned by the five key principles of the Mental Capacity Act:**

1. A presumption of capacity - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
2. The right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
3. That individuals must retain the right to make what might be seen as eccentric or unwise decisions;
4. Best interests – anything done for or on behalf of people without capacity must be in their best interests; and
5. Least restrictive intervention – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms

1.1 Scope

a) All clinical staff within Inmind will come into contact with vulnerable people who may lack capacity to consent to care or treatment where it may be necessary to deprive that person of their liberty in their best interests, in order to protect them from harm. All clinical staff within Inmind will receive an appropriate level of training for their role in relation to these safeguards and the application of the Mental Capacity Act 2005.

b) DOLS authorisations can only be granted for persons aged 18 years and over.

1.2 Definitions

a) **Deprivation of Liberty Safeguard** – a legal authorisation that allows a managing authority to deprive someone who lacks mental capacity of their liberty.

Mental capacity - Mental capacity is the ability of an individual to make decisions about specific aspects of their life.

Mental Incapacity - an inability to make a particular decision at a particular time due to "an impairment or disturbance in the functioning of their mind or brain".

A person may be assessed as lacking capacity if they have any impairment of the brain or mind, and are unable to do one or more of the following four things:

- Understand information given to them
- Retain that information long enough to be able to make the decision
- Weigh up the information available to make the decision
- Communicate their decision

Managing Authority - the organisation responsible for the care home or hospital applying for the DoLS authorisation i.e. Portsmouth Hospitals NHS Trust

Supervisory Body / Authority – the Local Authority which covers the persons normal place of residence. Local Authorities are responsible for considering a DoLS request, arranging the required assessments and agreeing or denying a DoLS authorisation.

Due to the nature and location of services provided by In Mind Waterloo Manor, Leeds City Council and NHS Leeds, are the 'Supervisory Bodies' under the legislation, as referred to within Section 2 of this policy.

For the purpose of this policy, Inmind is 'the Managing Authority'.

2.0 The Procedure

2.1 Applying for a DoLS Authorisation

a) Decide if the current situation may equate to a deprivation of liberty.

b) A DoLS authorisation cannot be used in order to force treatment or care on a person who has the mental capacity to a make a decision about the proposed treatment, care and the manner and location in which it is to be provided.

c) DoLS only apply to people who lack the mental capacity to decide whether to remain in a hospital or care home for treatment and care. Whether a particular situation amounts to a deprivation of liberty and therefore needs to be authorised under the DoLS provisions is a legal question and is decided on the facts of the individual case. There is no one particular restriction of circumstance that is the defining factor and case law is constantly reviewing this.

d) The law draws a distinction between a 'restriction of movement' and a 'deprivation of liberty'. Restriction of movement does not need to be authorised under the DoLS provisions. However the principles of the Mental Capacity Act 20005 apply to any restriction of movement. In particular, if it should be deemed necessary to do so in the person's best interest, it must be a proportionate response to the assessed risks and for as short a period as necessary. If the limitations or restrictions placed upon the person may be considered mild or moderate in nature then continuing to accommodate the person in hospital, in their best interests can be lawful under the MCA.

e) When considering if a situation amounts to a deprivation of liberty the type, duration, proportionality, effects and manner of implementation of the measure in question needs to be considered. Professionals need to consider the guidance in this policy and the Codes of Practice.

f) Factors to consider include:

- Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.
- The patient would be prevented from leaving hospital or care home if they attempted to do so.
- Professionals exercise complete control over the care and movements of a person for a significant period
- A request by carers to discharge a patient to their care is refused by a hospital or care home.
- Professionals exercising control over assessments, treatment, contacts and residence
- The person is unable to maintain social contacts because of restrictions placed on visitors or movements by the hospital or care home.
- The person loses autonomy because they are under continuous supervision and control.

g) Professionals should particularly take into account the wider context of these factors, the effect on the person in question and their views; the views of family and carers and the benefit that any restrictions are aimed to give

2.2 Does the Mental Health Act 1983 apply?

a) When a person lacking mental capacity is in a hospital or care home, receiving treatment for a mental disorder and is or is likely to have their liberty deprived consideration should be given as to whether to use the provisions of the Mental Health Act rather than DoLS. If the person fits the criteria for a mental health section to be applied then that should be the chosen route.

b) A mental health section does not normally allow treatment of a physical problem or illness that is unrelated to their mental health condition. In these circumstances a DoLS may be required, but the law is complex so senior clinical and legal advice should be sought.

c) Factors that may indicate use of the Mental Health Act rather than DoLS include:

- The patient's lack of capacity to consent to treatment and care is fluctuating or temporary and the patient is not expected to consent when they regain capacity. This may be particularly relevant to patients having acute psychotic, manic or depressive episodes;
- A degree of restraint needs to be used which is justified by the risk to other people but which is not permissible under the MCA because, exceptionally, it cannot be said to be proportionate to the risk to the patient personally; and

There is some other specific identifiable risk that the person or others might potentially suffer harm as a result. For example, if there is a risk that the person may need to be returned to the hospital or care home at some point in a manner that would not be authorised under DoLS.

2.3 When else can't a DoLS be used?

- The person is under 18 years of age;
- The person has made a valid and applicable Advance Decision refusing a necessary element of treatment for which they were admitted to hospital
- The use of the safeguards would conflict with a decision of the persons attorney or Deputy of the Court of Protection;
- The patient lacks capacity to make decisions on some elements of the care and treatment they need, but has capacity to decide about a vital element and has already refused it or is likely to do so.

2.4 The Mental Capacity Act 2005 and DOLS

a) Before any decisions can be made about deprivation of liberty, it must first be established whether the individual has capacity, as set out within the Mental Capacity Act 2005.

b) Where doubt exists about the person's ability to make a **specific decision**, a formal capacity assessment should be undertaken. If there is more than one decision to be made then a capacity assessment should be undertaken for each decision (see Appendix 4).

c) Where a decision is to be made in the best interest of an individual, this should be undertaken following the five statutory principles:

1 A person must be assumed to have capacity unless it is established that they lack capacity.

2 A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.

3 A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.

4 An act done or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests.

5 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

2.5 Recognising and acting upon a potential deprivation of liberty

a) It is the responsibility of the Nurse in Charge (NiC) to recognise any potential deprivation of liberty in the care they prescribe and deliver (see Appendix 1 for further guidance).

b) If the NiC recognises that there is, or will be likely within the next 28 days, a potential deprivation of liberty, they should email the Registered Manager as a matter of priority, outlining within the email:

- Why the deprivation may occur
- The nature of the deprivation
- The least restrictive actions that have already been explored
- What is stated in the individual's current care plan
- The individual's capacity in relation to the specific issue

c) The Registered Manager must then complete the appropriate DOLS application as below (and Appendix 2):

- **Standard** – if a deprivation is expected to occur within the next 28 days
- **Standard** *and* **Urgent** – if the deprivation is immediate

d) The application forms can be found online at:

- Urgent application https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223393/dh_124864.pdf

Standardapplication – https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223395/dh_095871.pdf

f) When the Registered Manager has approved the form, a nominated deputy can then fax the form to the Contact Centre (acting on behalf of the local Supervisory Body) of the area responsible for the individual service user.

2.6 The authorisation process

a) Once an application has been submitted to the relevant Supervisory Body, the Supervisory Body will arrange for an independent assessment of the application to take place and will contact the Registered Manager to arrange this. **See Appendix 3** for a flow chart containing further detail of the process.

b) The assessments will be undertaken by a Best Interest Assessor and will normally be within the 7-day period of the Urgent Authorisation. If for any reason the assessment process will take longer, then the Supervisory Body will advise if an Urgent Extension will be required. The clinical team caring for the service user/patient will be given the required form and responsible for applying for any extension. (Whilst this process will normally take place within a statutory seven day period, there may be occasions when the Supervisory Body may be unable to facilitate this within time-frame.) Always remain in contact and record if any delays occur.

c) In such circumstances, it is the responsibility of the Registered Manager to ensure that they apply for an extension of any urgent DOLS application, no later than the day of expiry of the current application.

2.7 Clinical Documentation

a) Any service user subject to a deprivation of liberty should have in place a detailed care plan to reflect this. It is the responsibility of the Nurse in Charge to ensure that care plans and risk assessments for the individual service are formulated and/or updated in accordance with any DOLS applications/authorisations, and that all relevant parties are kept informed.

2.8 Other notifications in relation to DOLS

a) In the event that a service user subject to a DOLS is admitted to hospital, the Registered Manager should complete the following form: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223397/dh_095872.pdf

b) In the event that a service user dies whilst subject to a DOLS, the Registered

Manager should complete the relevant form supplied by Leeds City Council/NHS Leeds.

Equality Impact Assessment for this policy

Protected Characteristic (domain)	Area of conflict	Resolution
Age	Nil	N/A
Disability	Nil	N/A
Gender Reassignment	Nil	N/A
Pregnancy & Maternity	Nil	N/A
Race	Nil	N/A
Religion or Belief	Nil	N/A
Sex	Nil	N/A
Sexual Orientation	Nil	N/A
Marriage and Civil Partnership	Nil	N/A

All relevant persons are required to comply with this policy and must demonstrate sensitivity and competence in relation to diversity in race, faith, age, gender, disability and sexual orientation. If you feel you are disadvantaged by this policy, please contact the Registered Manager and the service will actively respond to the enquiry.

Appendix 1 Deprivation of Liberty Safeguards: Deciding if an authorisation may be needed

The person
- Is over 18 years
- Has a mental disorder (e.g. mental illness, acquired brain injury, learning disability)
- Lacks capacity to consent to the admission
- Is not subject to any powers of the Mental Health Act that would conflict with a DoLS authorisation
- Does not have any other valid decision-making authorities (advance decision, Lasting Power of Attorney, Court Appointed Deputy) that would conflict with a DoLS authorisation

AND

Measures are in place to restrict the person's freedom of movement, for example.
- Close observation and supervision, 1:1 nursing
- Sedative medication
- Distraction/persuasion to control behaviour and freedom of movement
- Preventing them from leaving the unit of bringing them back if they try to leave
- Equipment intended to restrict freedom of movement, e.g. bed rails, chairs (tip-back, deep-seated, with fixed tables), lap straps, gloves, splints, bandaging, helmets
- Locked doors, coded keypads, 'baffle' handles
- Electronics devices – pressure mats, tagging devices
- Physical intervention techniques
- Refusing requests for discharge
- Restrictions on social activities or contacts with other people
- Restrictions on movement within the unit
- Restrictions on outings from the unit

AND

Severity and impact of the restrictions is significant, for example:
- Restrictions are used for frequently and/or for prolonged periods of time
- Restrictions are severe/intense – impact significantly on the person's freedom of movement
- Restrictions have a significant psychological impact on the person, e.g. objecting, distressed
- Relatives/carers object or are concerned that the individual is severely restricted

AND

The restrictions are considered to be in the person's best interests because:
- They are necessary to protect the person from harm
- They are a proportionate response to the likelihood and severity of the potential harm
- Consideration has been given to reducing or eliminating the restrictions

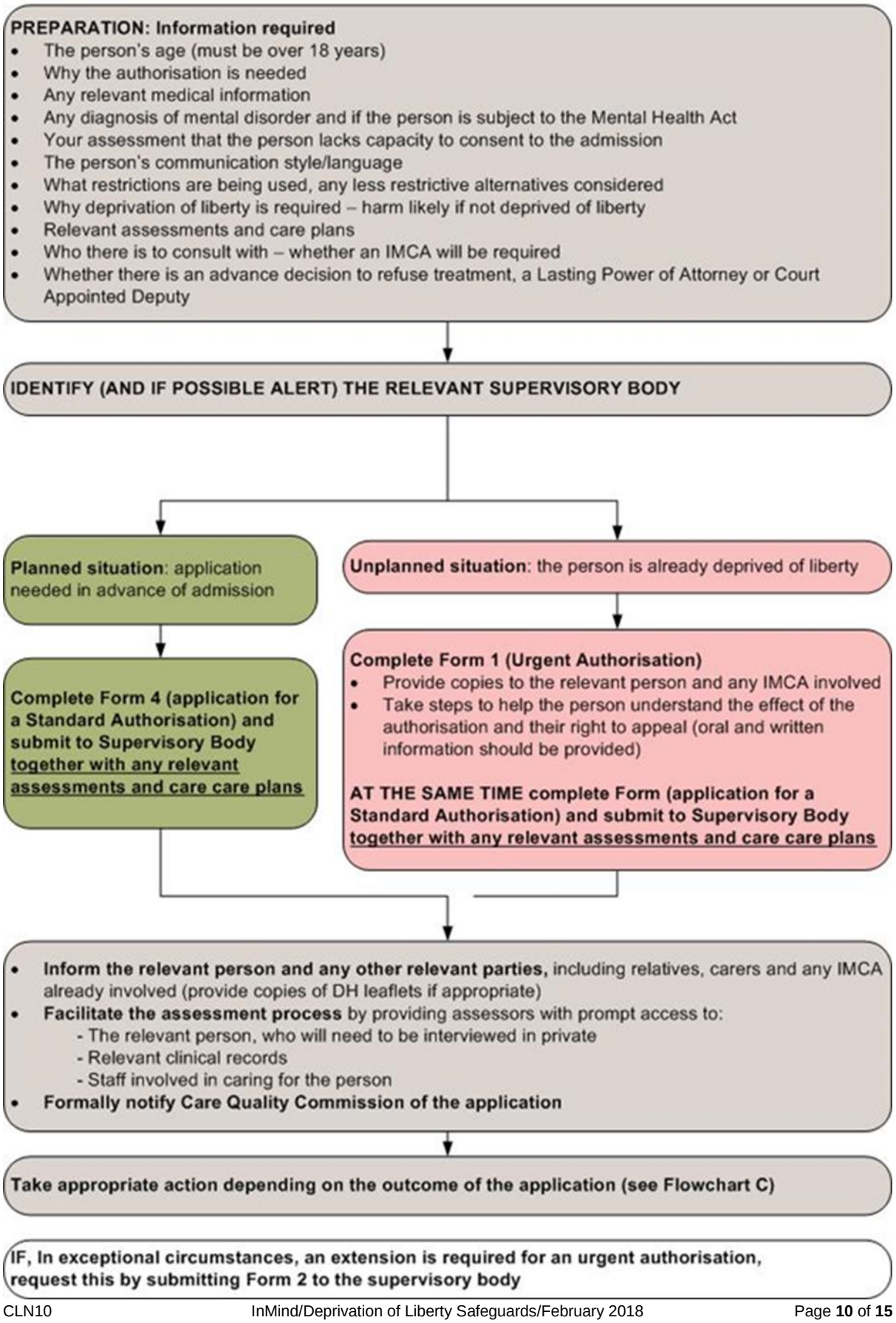
It is possible to minimise the restrictions to a level at which the person will not be deprived of their liberty

- **Immediately take any necessary action to reduce the restrictions so that the person is not deprived of their liberty**
- **Ensure that any remaining restrictions are monitored closely and kept under review**

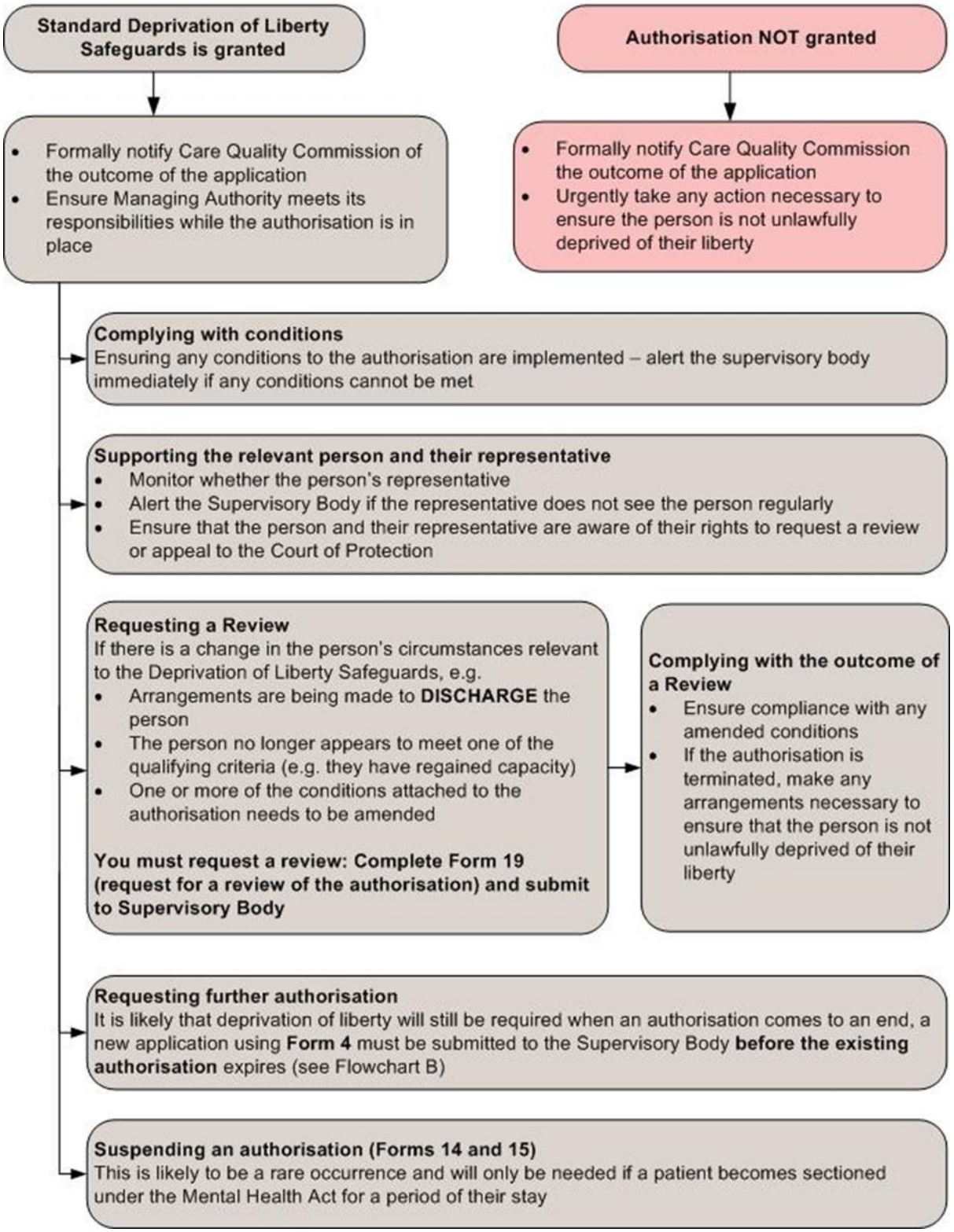
- The person does appear to be deprived of their liberty **AND**
- It is not considered to be in their best interests to reduce the restrictions further

An application for DoLS authorisation MUST be made (see Flowchart B)

Appendix 2 Deprivation of Liberty Safeguards: The Application Process



Appendix 3 **Deprivation of Liberty Safeguards: Managing Authority's Responsibilities Following an Application**



Appendix 4

ASSESSMENT OF MENTAL CAPACITY

This capacity assessment tool should be used by individuals and multidisciplinary teams when assessing the mental capacity of a person aged 16 years or over to make a decision or take a particular course of action, and if a best interests decision has to be made. The assessor/s should follow the principles and guidance outlined in the Mental Capacity Act 2005 (MCA) and the MCA Code of Practice when undertaking the assessment.

Name of Service User:	
Date of Birth	----------
NHS Nº:	----------
Address:	----------

Postcode:	----------
Person/s assessing:	----------
Job Title/s:	----------
Date/s of assessment:	----------
Location of assessment:	----------
	----------

1. **Does the person understand information about the decision to**	**Please provide evidence supporting the outcome, including person's responses and quotations where appropriate.**	**Outcome**

be made and why they need to make it? This includes why they have to make the decision, options available, consequences of deciding one way or another or making no decision at all?		**Yes**	☐
		No	☐

2. **Is the person able to hold the information in their mind long enough to use it to make an effective decision?**	**Please provide evidence supporting the outcome, including person's responses and quotations where appropriate.**	**Outcome**	
		Yes	☐
		No	☐

3. **Is the person able to weigh up the information and use it to arrive at a decision?**	**Please provide evidence supporting the outcome, including person's responses and quotations where appropriate.**	**Outcome**	
		Yes	☐
		No	☐

4. **Can the person communicate his / her decision (e.g. talking, sign**	**Please provide evidence supporting the outcome, including person's responses and quotations where appropriate.**	**Outcome**

language, other form of communication)?		**Yes**	☐
		No	☐

Take into account additional factors beyond the skills of the individual

Are there additional factors beyond the cognitive and communication skills of the individual which you believe is affecting the person's ability to make a free and balanced decision? This may include external influences such as coercion or threats from others.

Please provide details	**Has this resulted in your opinion in impairment in the person's capacity to make this decision?**	
	Yes	☐
	No	☐

STEP 6: Conclusion*

☐ **Having taken 'reasonable' steps to establish capacity, I consider on the balance of probabilities, that the person DOES have capacity to make this decision**

☐ **Having taken 'reasonable' steps to establish capacity, I consider on the balance of probabilities, that the person DOES NOT have capacity to make this decision**

☐ **I consider that this person has temporary/fluctuating capacity and that the decision can be reasonably and safely DELAYED until such time that capacity can be re-assessed.**

* The MCA 2005 Code of Practice (s 4.10) refers to the level of proof required for claiming that a person lacks capacity. An assessor must be able to show, "on the balance of probabilities, that the individual lacks capacity to make a particular decision, at the time it needs to be made (section 2(4)). This means being able to show that it is more likely than not that the person lacks capacity to make the decision in question."

Signature of person/s assessing: .....

Post Title of person/s assessing: .....

Date: .....