

OPG609



Office of the
Public Guardian



Deprivation of Liberty Safeguards

A guide for relevant person's representatives

Mental Capacity Act 2005

DH INFORMATION READER BOX

Policy	Estates
HR/Workforce Management	Commissioning
Planning/Performance	IM & T
Clinical	Finance
	Social Care/Partnership Working

Document purpose Policy

Gateway reference 11227

Title Deprivation of liberty safeguards: A guide for relevant person's representatives

Author DH

Publication date 01 Feb 2009

Target audience PCT CEs, NHS Trust CEs, SHA CEs, Care Trust CEs, Foundation Trust CEs, Local Authority CEs, Directors of Adult SSs, PCT Chairs, NHS Trust Board Chairs, Directors of Finance, Allied Health Professionals, GPs, Communications Leads

Circulation list PCT CEs, NHS Trust CEs, SHA CEs, Care Trust CEs, Foundation Trust CEs, Local Authority CEs, Directors of Adult SSs

Description This booklet is designed to help relevant person's representatives understand and fulfil their statutory role under the MCA DOLS legislation

Cross reference Deprivation of liberty safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice

Superseded documents N/A

Action required Distribution by hospitals, care homes, local authorities and care homes to the relevant person's representative

Timing **By 01 Apr 2009**

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For recipient's use

Deprivation of Liberty Safeguards
A guide for relevant person's
representatives

Mental Capacity Act 2005

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1. About this booklet

This booklet is designed to help you understand and fulfil your role as a relevant person's representative (RPR). As an RPR, you have been appointed to support a person who is deprived of their liberty under the Mental Capacity Act 2005 Deprivation of Liberty Safeguards (MCA DOLS).

When a person lacks the mental capacity to make decisions about the care or treatment they need, and may be at risk if that care is not provided, it is sometimes in their best interests to deprive them of their liberty. The aim of this is to prevent them from coming to harm. The MCA DOLS exist to ensure that no one is deprived of their liberty without good reason, and that if someone needs to be deprived of their liberty in these circumstances, that person still has specific rights.

One of these rights is that every person deprived of their liberty under the terms of the MCA DOLS must have an RPR like you to protect their interests throughout the process.

This booklet contains all the information you need to understand your role and responsibilities as a person's RPR. It will enable you to represent the interests of the person being deprived of liberty in the best possible way.

Your role as the RPR is:

- to maintain contact with the person being deprived of their liberty
- to represent and support that person in all matters relating to the MCA DOLS, including, if appropriate, requesting a review, using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection
- to provide support that is independent of the relevant person's commissioners and service providers.

Key terms used in the MCA DOLS legislation include:

- **supervisory body:** this refers to PCTs and local authorities
- **managing authority:** this is the person or body with management responsibility for the hospital or care home in which a person is being, or may be, deprived of liberty
- **standard authorisation:** this permits lawful deprivation of liberty and is issued by a supervisory body (see page 16)
- **urgent authorisation:** this permits lawful deprivation of liberty and is issued by a managing authority (see page 15)
- **relevant person:** this is the person who needs to be deprived of liberty
- **relevant person's representative:** this is the person who represents the relevant person (see page 7)
- **best interests assessor:** this is the person who assesses whether or not deprivation of liberty is in the person's best interests, is necessary to prevent harm to the person and is a proportionate response to the likelihood and seriousness of that harm (see page 15)
- **advance decision:** this is a decision to refuse specified treatment made in advance by a person who has capacity to do so. The decision will then apply at a future time when that person lacks capacity to consent to, or refuse, the specified treatment. Specific rules apply to advance decisions to refuse life sustaining treatment (see page 13)
- **donee of lasting power of attorney:** this is the person appointed under a lasting power of attorney who has the legal right to make decisions within the scope of their authority on behalf of the person (the donor) who made the lasting power of attorney (see page 9)

- **Independent Mental Capacity Advocate (IMCA):** this is a person who provides support and representation for a person who lacks capacity to make specific decisions in certain defined circumstances. The IMCA was established by the Mental Capacity Act and is not the same as an ordinary advocacy service (see page 16).

An overview of the MCA DOLS process can be found in the Appendix on page 27.

2. Your responsibilities as the RPR

Who can be an RPR?

In general, a relevant person's representative is a friend or family member who will ensure that the rights of a person being deprived of their liberty are protected. There are certain rules guiding who can be an RPR which are set out below.

In cases where no friend or family member is willing or eligible, a paid representative will be appointed.

To be eligible for the role of the relevant person's representative, you must be:

- 18 years of age or over
- able to keep in contact with the relevant person
- willing to be appointed.

You must not be:

- financially interested in the hospital or care home where the relevant person is being deprived of their liberty, or be a relative of a person who has a financial interest
- employed by, or providing services to, the care home in which the relevant person is residing

- employed by the hospital in which the relevant person is residing in a role that is, or could be, related to their treatment or care
- employed to work in the relevant person's supervisory body in a role that is, or could be, related to the relevant person's case.

If you think that you may not be eligible to act as the RPR for any reason, you must contact the supervisory body immediately.

Acting in the best interests of the person you represent

According to the 'best interests' principle of the Mental Capacity Act 2005 (MCA), anything done to, or on behalf of, someone who lacks the capacity to make their own decisions must be **in their best interests**. As the RPR, you will need to make decisions and act on behalf of a person who lacks capacity, so you must follow this principle.

The MCA gives a non-exhaustive list of what you need to think about when working out what is in a person's best interests, for instance:

- as far as possible, the person must be involved in any decision made on their behalf
- if there is a chance that the person may regain capacity and be able to make the decision, could the decision be delayed to allow this?
- the wishes and feelings of the person, including any views they have expressed in the past, should be used to understand what their wishes and feelings might be in this situation. This might include things they have written down or said to other people, or examples of how they have behaved in similar circumstances in the past
- any beliefs or values a person holds may influence their decision-making process. These might include religious beliefs, cultural background or moral views

- if the decision is about life-sustaining treatment, the decision must not be motivated by a desire to bring about the person's death
- if there any other factors that the person would be likely to consider if they were able to do so, these should be considered too.

In your role as the RPR, you should consult with carers and anyone who has an interest in the relevant person's welfare to ensure that all decisions are made in their best interests. People providing care for the relevant person are obliged to consult with you, as well as with any donee of lasting power of attorney (attorney) or deputy appointed for the person by the Court of Protection (deputy) involved in the case, before key decisions are made.

Maintaining regular contact

RPRs must have regular, face-to-face contact with the person being deprived of their liberty, to ensure that their interests are being safeguarded. This means that the hospital or care home where the person is (the managing authority) should allow you to visit them at reasonable times. As the RPR, your name should be recorded in the person's health and social care records.

If you have insufficient contact with the relevant person for whatever reason, they may not have full opportunities to have their case reviewed or to appeal against their deprivation of liberty to the Court of Protection.

Complying with the Mental Capacity Act Code of Practice

As an RPR, you have a legal duty to comply with the Mental Capacity Act Code of Practice. Information to help you do this is available at: www.opsi.gov.uk/ACTS/acts2005/related/ukpgacop_20050009_en.pdf

In addition, all RPRs must comply with the Deprivation of Liberty Safeguards supplement. For details of how to do this, visit:

www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

Both publications can be purchased from The Stationery Office which you can contact on 0870 600 5522 or by sending an email to:

esupport@tso.co.uk

Further information is available at:

www.tsoshop.co.uk/bookstore.asp?DI=586105&trackid=002156

and at:

www.tsoshop.co.uk/bookstore.asp?FO=1161149&DI=602634&trackid=002289

3. Understanding the MCA DOLS: an overview for RPRs

What are the MCA DOLS?

The MCA DOLS provide protection for vulnerable people who are accommodated in hospitals or care homes in circumstances that amount to a deprivation of their liberty, and who lack the capacity to consent to the care or treatment they need. In such cases, MCA DOLS provide a lawful way to deprive someone of their liberty, provided that this is in their own best interests or is necessary to keep them from harm.

Why were the MCA DOLS introduced?

The MCA DOLS were introduced to prevent breaches of the European Convention on Human Rights (ECHR) following the legal judgment given by the European Court of Human Rights (ECtHR) in the case of *HL v United Kingdom** (commonly referred to as the *Bournewood* judgment).

This case concerned an autistic man (HL) with a learning disability who lacked the capacity to decide whether he should be admitted to hospital for treatment. He was admitted to hospital on an informal basis under common law but was prevented from leaving the hospital with his carers. This decision was challenged by HL's carers and the ECtHR found there had been a breach of HL's rights under the ECHR. The reasons given for the verdict were that:

- HL had been deprived of his liberty and the deprivation of liberty had not been in accordance with 'a procedure prescribed by law' and was, therefore, in breach of Article 5(1) of the ECHR
- there had been a contravention of Article 5(4) of the ECHR because HL had no means of applying quickly to a court to see if the deprivation of liberty was lawful.

* (2004) Application No: 00045508/99

The MCA DOLS were introduced to prevent further breaches of the ECHR and to provide legal protection for vulnerable people who may be deprived of their liberty within the meaning of Article 5 of the ECHR in a hospital (other than under the Mental Health Act 1983) or care home, whether placed there under public or private arrangements.

Who can be lawfully deprived of their liberty under the MCA DOLS?

The MCA DOLS state that deprivation of liberty should be avoided whenever possible, and should only be authorised in cases where it is in the relevant person's best interests and is the only way to keep them safe. It should be for as short a time as possible and only for a particular treatment plan or course of action.

In order to be deprived of their liberty, a person must be staying in a hospital or care home, and must meet six qualifying requirements:

- the age requirement
- the no refusals requirement
- the mental capacity requirement
- the mental health requirement
- the eligibility requirement
- the best interests requirement.

Primary care trusts (PCTs) and local authorities are known under the MCA as supervisory bodies, and they have a statutory duty for arranging assessments, when requested by a care home or hospital, to see if these requirements are met. If they are, they must authorise a deprivation of liberty and appoint an RPR.

As the RPR, you should:

- be sure that the person you represent is eligible to be deprived of liberty under the terms of the MCA DOLS. If you have any doubt, you can request a review of their MCA DOLS authorisation at any time
- ensure that the MCA DOLS are never used as a form of punishment for the relevant person, or for the convenience of professionals, carers or anyone else.

The Department of Health anticipates that the majority of people who will require the protection of the MCA DOLS are those people with more severe learning disabilities, older people with any of the range of dementias or people with neurological conditions such as brain injuries.

How does the assessment process work?

As the RPR of someone who is being, or will be, deprived of their liberty, you should have a good understanding of the assessment process. If you think the person you represent does not meet (or has ceased to meet) any one of the assessment criteria, you should ask for their MCA DOLS assessment to be reviewed.

Before issuing an MCA DOLS authorisation, the supervisory body must conduct the six assessments listed below:

- **age assessment:** to assess whether the person being deprived of liberty is aged 18 or over
- **no refusals assessment:** to ensure that the authorisation being requested does not conflict with a valid decision already made by an attorney or deputy, and is not for the purpose of giving any treatment that would conflict with a valid and applicable advance decision made by the relevant person

- **mental capacity assessment:** to assess whether the person being deprived of liberty lacks capacity to decide whether to be admitted to, or remain in, the hospital or care home in which they are being, or will be, deprived of liberty
- **mental health assessment:** to assess whether the person being deprived of liberty is suffering from a mental disorder within the meaning of the Mental Health Act 1983, but disregarding any exclusion for people with learning disabilities
- **eligibility assessment:** to assess whether the person is eligible to be deprived of liberty under the MCA DOLS. Broadly, a person is eligible unless they:
 - are detained under the Mental Health Act 1983
 - are subject to a requirement under the Mental Health Act 1983 that conflicts with the authorisation being requested (such as a guardianship order requiring them to live somewhere else)
 - object to being in hospital for the purpose of treatment of a mental disorder, or to being given some or all of the treatment in question, and they meet the criteria for detention under the Mental Health Act 1983
- **best interests assessment:** to establish whether there is a deprivation of liberty and, if there is, whether it is:
 - in the best interests of the person to be subject to the authorisation
 - necessary in order to prevent them coming to harm
 - a proportionate response to the likelihood of them suffering harm and the seriousness of that harm.

What happens once an MCA DOLS authorisation is granted?

If the relevant person complies with all six assessment criteria, an MCA DOLS authorisation will be granted and, as the RPR, you will be informed in writing. Supervisory bodies will set the duration for the authorisation, which should be as short as possible (and no longer than 12 months, or the time period suggested by the best interests assessor). The law requires supervisory bodies to issue you with a standard deprivation of liberty authorisation in writing, including details such as the purpose of the deprivation of liberty and the period for which it is to be in place.

Standard and urgent authorisations

To properly defend the rights of the relevant person, RPRs must understand the terms of their MCA DOLS authorisation. There are two types of authorisation: urgent and standard. The terms of these authorisations are described below to help you ensure that the rights of the person you are supporting are protected.

Urgent authorisations

Urgent authorisations are valid for a maximum of seven calendar days, and can be given by managing authorities (hospitals or care homes). They should only be given if it is clear that there is a need to deprive someone of their liberty immediately in their own best interests in order to protect them from harm.

When giving an urgent authorisation, managing authorities must, if they have not already done so, apply simultaneously to their supervisory body for a standard authorisation to be issued before the urgent authorisation expires. Where an urgent authorisation has been given, the assessments must be carried out within seven calendar days. If there are exceptional reasons for doing so, a supervisory body may extend the duration of an urgent authorisation by up to seven calendar days.

Standard authorisations

Standard authorisations should be the most common type of authorisation. An application for this kind of authorisation should be made before a person is deprived of liberty and only when it is clear that less restrictive measures will not meet the person's needs.

Once issued, a standard authorisation can last for a maximum of 12 months, but every effort should be made to ensure that it is in place for as short a time as possible.

When a supervisory body receives an application for a standard deprivation of liberty authorisation from a hospital or care home, and no urgent authorisation has been given, it has 21 calendar days in which to complete the assessment process.

It is essential that the person in respect of whom the application is being made (the relevant person) has someone to support them during the assessment process.

If a managing authority believes that deprivation of liberty needs to continue beyond the initial authorisation period, it should apply for a new authorisation. A new set of assessments will then indicate whether continued deprivation of liberty remains in the person's best interests.

Every effort should be made to prevent deprivation of liberty from occurring. If deprivation of liberty cannot be avoided, it should be for no longer than is necessary.

Can an authorisation be challenged?

You can challenge authorisations on behalf of the person you represent in the Court of Protection, although you should consider whether it is possible to resolve any concerns informally with the managing authority and/or supervisory body first. All unpaid RPRs and people being deprived of their liberty have a statutory right to be supported by a specialist Independent Mental Capacity

Advocate (IMCA) when making an application to the Court of Protection (see section 4, ‘Your rights as an RPR’, pages 19–22).

If you wish to challenge any MCA DOLS authorisation through the Court of Protection, you should contact:

The Court of Protection Customer Services

Archway Tower

2 Junction Road

London N19 5SZ

Telephone: 0845 330 2900

(Phone lines are open from 9am–5pm)

Fax: 020 7664 7551

Email: customerservices@publicguardian.gsi.gov.uk

When should authorisations be reviewed?

Supervisory bodies are legally required to carry out a review if you request one in your capacity as RPR. A standard letter is available for this purpose at the end of this document (Appendix A).

Supervisory bodies are also legally required to review an authorisation if:

- the person no longer meets the age, no refusals, mental capacity, mental health or best interests requirements
- the person no longer meets the eligibility requirement because they object to receiving mental health treatment in hospital and they meet the criteria for an application for admission under section 2 or 3 of the Mental Health Act 1983
- there has been a change in the person’s situation and, because of that change, it would be appropriate to amend or delete an existing condition of the authorisation or add a new condition
- the reasons why the person now meets the qualifying requirements are different from the reasons recorded at the time the authorisation was given.

If you request a review, the supervisory body must assess which, if any, of the qualifying requirements should be reviewed and record its decision. The supervisory body should then commission the relevant assessments and inform you as the RPR.

If the person no longer meets the qualifying requirements for being deprived of their liberty, the authorisation must be terminated. If the assessments illustrate that deprivation of liberty is still necessary, the supervisory body must consider whether the conditions attached to the authorisation should be amended. In either case, you should be informed in writing.

What happens when an authorisation comes to an end?

If an authorisation is terminated for any reason, the supervisory body should inform you in writing. The person should cease to be deprived of their liberty immediately. This also applies if an authorisation is suspended, which is possible for a maximum of 28 calendar days.

4. Your rights as an RPR

Support from managing authorities

Managing authorities and supervisory bodies should keep you informed about sources of support and information available to help you in your role, including how to access the support of an Independent Mental Capacity Advocate (IMCA).

As soon as possible after a standard deprivation of liberty authorisation is given, the managing authority must make sure that both you and the relevant person understand:

- the effect of the authorisation
- the formal and informal complaints procedures that are available to both of you
- your right to request a review
- your right to make an application to the Court of Protection to seek variation or termination of the authorisation
- your right, where the relevant person does not have a paid ‘professional’ representative, to request the support of an IMCA.

Legal representation: the right to an IMCA

Both the person who is deprived of liberty under a standard authorisation and you as their RPR have a statutory right of access to an IMCA. It is the responsibility of the supervisory body to instruct an IMCA if you, or the person deprived of their liberty, requests one.

The IMCA will give you extra support if you need it, and will help you to make the best possible use of the review process and the Court of Protection. You only have access to an IMCA if you are an unpaid RPR.

The IMCA can also help you and the relevant person understand:

- why the person meets the criteria for authorisation
- how long the authorisation will last
- any conditions to which the authorisation is subject.

The IMCA will have the right to make submissions to the supervisory body to provide relevant information for assessors. In addition, they can request reviews of qualifying requirements.

As the RPR, you can request support from an IMCA more than once during the period of the authorisation. For example, you might choose to ask for help at the start of the authorisation and then again later in order to request a review.

Your rights in brief

The following table provides an overview of your rights as an RPR. The Mental Capacity Act 2005: New Schedule A1 can be accessed at: www.opsi.gov.uk/acts/acts2007/ukpga_20070012_en_16#sch7 and the regulations at: www.opsi.gov.uk/si/si2008/uksi_20082368_en_1 and at: www.opsi.gov.uk/si/si2008/uksi_20081315_en_1

Right to receive information	Relevant paragraph of New Schedule A1 to the MCA, or regulation number
Copy of a standard authorisation from the supervisory body	Paragraph 57(2)(a)
The managing authority to give an RPR any written information given to the relevant person about the effect of a standard authorisation, etc, as soon as practicable after it is given to the relevant person	Paragraph 59(5) and (6)
Notice from the supervisory body that a standard authorisation has ceased to be in force	Paragraph 65(3)(c)
Notice from the supervisory body that a standard authorisation has been suspended	Paragraph 93(3)(b)
Notice from the supervisory body that a standard authorisation has ceased to be suspended	Paragraph 95(3)(b)
Notice from the supervisory body that it is to conduct a review	Paragraph 108(1)(b)
Notice from the supervisory body of the outcome of a review	Paragraph 120(1)(c)
Copies of MCA DOLS assessments from the supervisory body	Paragraph 135(2)(d)
To receive a written copy of their appointment from the supervisory body	Regulation 12(4)(a) of the RPR regulations
To be notified by the supervisory body when their appointment as an RPR is to terminate	Regulation 14(1) of the RPR regulations

Other rights	Relevant section of the MCA or paragraph of Schedule A1 or New Schedule A1 of the MCA
Right to request support from an Independent Mental Capacity Advocate (IMCA).	Section 39D(4)
Right to make application to the Court of Protection without requiring permission	Section 50(1A)
Right to make a submission to the supervisory body about the use of an existing assessment as an 'equivalent' best interests assessment	Paragraph 49(6)(a)
Right to request a review of a standard authorisation	Paragraph 102(3)(b)
Right to give information, or make a submission, to an assessor	Paragraph 132(a)
Right to be consulted by a section 39A IMCA before the IMCA exercises any power of challenge to the Court of Protection	Paragraph 161(6)

5. Finishing your work as an RPR

Your work as an RPR will usually finish when the relevant person's authorisation comes to an end. However, there may be special circumstances in which your time as an RPR may end prematurely. For example, this could happen if you decide that you no longer wish to continue in the role, or if the supervisory body is concerned that you are no longer maintaining regular contact with the relevant person or acting in their best interests.

In every case where an RPR's role is terminated, the supervisory body should inform the RPR of the date when their role will come to an end and clearly state the reasons for their decision.

Your appointment as an RPR will be terminated if:

- the standard authorisation comes to an end and a new authorisation is not granted
- the relevant person objects to you continuing in your role as the RPR and selects a different person to be their representative (providing that they have the capacity required to make this decision)
- an attorney or deputy objects to you continuing in the role of RPR (if they have the authority to do so)
- the supervisory body believes that you are no longer willing or eligible to continue in the role of RPR
- the supervisory body becomes aware that you are not keeping in touch with the relevant person or that you are not acting in their best interests
- you die while the MCA DOLS authorisation is still in place.

If the supervisory body believes that you are not keeping in touch with the relevant person, no longer acting in the person's best interests or no longer eligible to be an RPR, it should contact you to clarify the position before deciding whether to terminate your appointment.

If you are no longer eligible to be a person's RPR, the supervisory body may seek your advice on who would be an appropriate replacement.

6. What happens when there is no RPR available?

A person who is being deprived of their liberty will be in a particularly vulnerable position during any delays in the appointment of an RPR since there will be nobody to represent their interests or to apply for a review on their behalf. If there is nobody who can support and represent the person (other than someone who is engaged in providing care or treatment for the person in a professional capacity or for remuneration), the managing authority must notify the supervisory body, who must instruct an Independent Mental Capacity Advocate (IMCA) to represent the person until a new representative is appointed.

The role of an IMCA instructed in these circumstances is essentially the same as that of an RPR. The IMCA's appointment ends when the new RPR is appointed.

Appendix A: Standard letter

Deprivation of Liberty Letter 4

Letter to the supervisory body requesting a review of a standard authorisation from relevant person's representative

[Sender's address]

[Telephone number]

[Date]

[Name and address of supervisory body]

Dear Sir/Madam

Re [Name of person/resident]

I am writing to you about the above-named person who is deprived of their liberty at [enter name of hospital/care home].

I am the relevant person's representative.

I am writing to request that you conduct a review under Part 8 of Schedule A1 to the Mental Capacity Act 2005 of the standard authorisation that permits their deprivation of liberty.

My reasons for believing that this person does not meet the qualifying requirements for being deprived of their liberty under a standard authorisation are as follows:

[Briefly state your reasons]

[Optional additional paragraph]

Should this not eventually be accepted, in my view the conditions attached to the standard authorisation should be relaxed.

[Briefly state how, and give your reasons]

Thank you for your consideration of this matter.

Yours faithfully

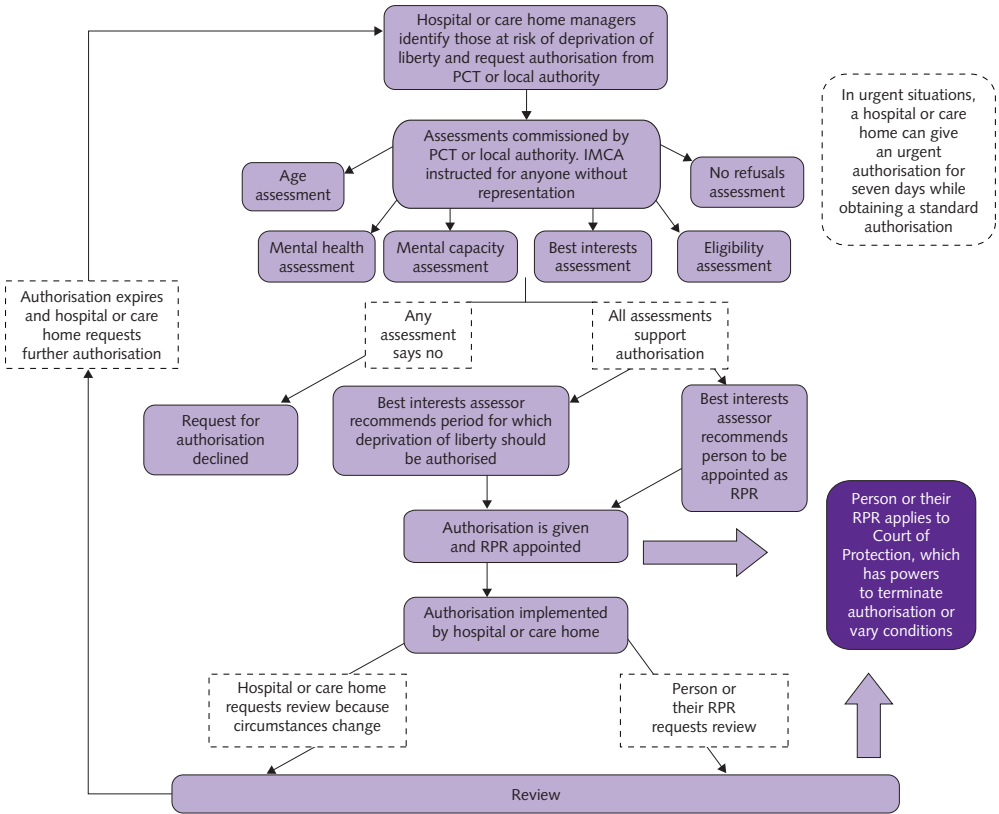
[Signature]

[Name of sender in block capitals]

Notes

The use of this letter is not mandatory. If you wish, you can choose to make a request orally, by using a different letter, or in any other way that you deem appropriate.

Appendix B: An overview of the MCA DOLS process



Other booklets in this series include:

- OPG601** Making decisions... about your health, welfare or finances. Who decides when you can't?
- OPG602** Making decisions: A guide for family, friends and other unpaid carers
- OPG603** Making decisions: A guide for people who work in health and social care
- OPG604** Making decisions: A guide for advice workers
- OPG605** Making decisions: An Easyread guide
- OPG606** Making decisions: The Independent Mental Capacity Advocate (IMCA) service
- OPG607** Deprivation of Liberty Safeguards: A guide for primary care trusts and local authorities
- OPG608** Deprivation of Liberty Safeguards: A guide for hospitals and care homes

Making decisions booklets are available to download at:
www.publicguardian.gov.uk

If you want to find out more about what the Deprivation of Liberty Safeguards (DOLS) mean for you or your organisation, the DOLS Code of Practice, which explains in detail how the DOLS' processes and procedures work, can be downloaded at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

Or you can visit the website at:
www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm

Making decisions booklets are available in English, Welsh and Braille formats. There is also an Easyread booklet and Easyread Audio version. Contact the Office of the Public Guardian for more information.

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292785/OPG609 1p 500k Feb09 (HOW)