Haringey Safeguarding Adults Board

Mental Capacity Act (MCA) & Deprivation of Liberty Safeguards (DoLS)

Staff Procedure and Guidance 2016

Document Control

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1. Introduction

The Mental Capacity Act 2005[1] (MCA) provides a statutory framework for people who lack capacity to make decisions or take actions for themselves, and others may have to make those decisions on their behalf. When they do this, they should not deprive the person who lacks capacity of their liberty, unless it is essential to do so in the person's best interests and for their own safety.

This guidance needs to be considered in conjunction with the *MCA Code of Practice*[2], the *Deprivation of Liberty Safeguards (DoLS) Code of Practice*, and the *ADASS Guidance*[3].

It is important that the MCA and the main Code of Practice are adhered to whenever capacity and best interests issues, and the DoLS are being considered. The DoLS are in addition to, and do not replace other safeguards in the Act.

This guidance is relevant to professionals who are with adults who may lack capacity to make particular decisions, and is in a situation where the possibility that there may be deprivation of liberty arises.

The guidance will describe:

- How to identify a deprivation of liberty;
- How to avoid a deprivation of liberty; and
- The DoLS assessment and authorisation procedure.

[1] Mental Capacity Act 2005: http://www.legislation.gov.uk/ukpga/2005/9/contents
[2] Mental Capacity Act Code of Practice: https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice
[3] ADASS DoLS Guidance: https://www.adass.org.uk/deprivation-of-liberty-safeguards-guidance/

2. Background

2.1 The Bournewood Judgment and the European Court of Human Rights

On 5 October 2004, the European Court of Human Rights (ECtHR) announced its judgment in the case of *HL v the United Kingdom*[4] (commonly referred to as the 'Bournewood' judgment). HL is a profoundly autistic man with a learning disability, who lacked the capacity to consent to, or to refuse, admission to hospital for treatment. The ECtHR held that he was deprived of his liberty when he was admitted, informally, to Bournewood Hospital.

The ECtHR further held that:

- The manner in which HL was deprived of liberty was not in accordance with 'a procedure prescribed by law' and was, therefore, in breach of Article 5(1) of the European Convention on Human Rights (ECHR); and
- There had been a contravention of Article 5(4) of the ECHR because HL was not able to apply to a court quickly to see if the deprivation of liberty was lawful.

To prevent further similar breaches of the ECHR, the MCA 2005 has been amended to provide additional safeguards for people who lack mental capacity and whose care or treatment necessarily involves a deprivation of liberty within the meaning of Article 5 of the ECHR, but who either are not, or cannot be, detained under the Mental Health Act 1983[5].

These safeguards are referred to as '**deprivation of liberty safeguards**'.

2.2 Cheshire West [2014] UKSC 19

There are many people in different settings who are deprived of their liberty by virtue of the type of care or treatment that they are receiving, or the level of restrictive practices that they are subject to, but they cannot consent to it because they lack the mental capacity to do so. In March 2014, the Supreme Court handed down judgment in two cases, and that judgment, commonly known as *Cheshire West*[6], has led to a considerable increase in the numbers of people in England and Wales who are considered to be "deprived" of their liberty for the purposes of receiving care and treatment.

The judgment also emphasised the importance of identifying those who are deprived of their liberty so that their circumstances can be the subject of regular independent checks to ensure that decisions being made about them are actually being made in their best interests.

39 Essex Street[7] summarises the Judgment as follows:

[4] Bournewood case http://www.mentalhealthlaw.co.uk/HL_v_UK_45508/99_(2004)_ECHR_471
[5] Mental Health Act 1983 http://www.legislation.gov.uk/ukpga/1983/20/contents
[6] Cheshire West Supreme Court Judgement: https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf
[7] Barristers' Chambers publication: http://www.mentalhealthlaw.co.uk/39_Essex_Chambers_Mental_Capacity_Law_Newsletter

1. The person objectively deprived of their liberty or is there a risk that cannot be sensibly ignored that they are objectively deprived of their liberty.

   There are two key questions to ask - the ‘acid test’:

   i. Is the person subject to continuous supervision and control?
   ii. Is the person free to leave?

   The following factors are no longer valid:

   i. The person’s compliance or lack of objection,
   ii. The relative normality of the placement, and
   iii. The reason or purpose behind the particular placement.

2. The person lacks capacity to consent to the DoLS.

3. The care arrangements giving rise to the DoLS are imputable to the state.

4. If the DoLS is occurring in an environment other than a care home or a hospital, then the DoLS needs to be considered by the Court of Protection (CoP).

Children can be deprived of their liberty just as adults but in the ordinary run of events, children cared for at home by their parents without state involvement will not be deprived of their liberty.

Seek legal advice in respect of children cared for at home where there is local authority/NHS involvement in the delivery of that care, but the actual arrangements for the delivery of care are made by the child(ren)’s parents; noting that:

a. the DoLS regime cannot be used for a child under 18;
b. a DoLS authorisation cannot be used to authorise a deprivation of liberty taking place in a children’s home; and
c. the CoP can authorise the deprivation of a person’s liberty from the age of 16.

3. Reference

3.1 Relevant legislation, guidance and procedures

- Mental Capacity Act 2005: *http://www.legislation.gov.uk/ukpga/2005/9/contents*
- Mental Health Act 1983: *http://www.legislation.gov.uk/ukpga/1983/20/contents*
- Mental Health Act 2007: http://www.legislation.gov.uk/ukpga/2007/12/contents
- Mental Capacity Act 2005 Code of Practice: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf*
- Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008: *http://www.legislation.gov.uk/ukdsi/2008/9780110814773/contents*
- Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008: *http://www.legislation.gov.uk/uksi/2008/1315/contents/made*
- ADASS Guidance on DoLS: *https://www.adass.org.uk/deprivation-of-liberty-safeguards-guidance/*

3.2 New Developments

It is important to keep up to date with case law and legal updates in relation to the MCA and DoLS. The present system is currently under consultation and review. There is an ever growing body of case law that the relevant practitioners need to keep abreast of to ensure that they are adhering to the current legal frameworks and guidance.

4. Definitions

4.1 Managing Authority

The hospital or care home that is likely to be subjecting a patient or resident to a DoLS in terms of breaching their human rights *(Human Rights Act 1988 – Article 5 Right to Liberty).*

The managing authority applies to the supervisory authority for an authorisation the DoLS that is taking place.

4.2 Supervisory authority

The London Borough of Haringey (LBH) is the supervisory authority for all LBH and Haringey Clinical Commissioning Group (CCG) funded residents. LBH can only authorise DoLS for people who are in hospitals or care homes.

4.3 Lacking Capacity

A person lacks capacity in relation to a matter if he or she is unable to make a decision for himself or herself in relation to the matter because of an impairment (permanent or temporary) of, or a disturbance in the functioning of, the mind or brain: sections 1 and 2, MCA 2005 (MCA 2005).

Persons who lack capacity may be subject to deprivation of liberty, but only by authorisation under Schedule A1 of the MCA 2005 or by order of the Court of Protection (section 4A).

4.4 Deprivation of Liberty

A DoL is likely to occur when the person involved lacks capacity in relation to the DoL and the Cheshire West 'Acid Test' is met i.e. lacks capacity and is under constant supervision, control and not free to leave.

4.5 Deprivation of Liberty – Community or Domestic Settings

The CoP may make a similar order authorising DoL in a domestic setting (outside hospitals and care homes) in relation to personal welfare. This will include a placement in a supported living arrangement.

4.6 DoLS – Best Interest Assessor (BIA)

A practitioner qualified to carry out BIA DoL assessments. The BIA completes the age assessment, best interest assessment and the no refusals assessment.

4.7 DoLS – Mental Health Assessor

A qualified Mental Health practitioner, including a section 12 doctor. The Mental Health assessor completes the mental health assessment, mental capacity assessment and the eligibility assessment.

4.8 **Independent Mental Capacity Advocate (IMCA)**

In relation to the DoLS process an IMCA is generally required at 2 stages of the process. An IMCA needs to be involved when there is on one else to consult during the Best Interest Assessment process (39A IMCA)[8] and also when there is no one appropriate to appoint as the relevant persons representative (39D IMCA)[9]

4.9 **Relevant persons Representative (RPR) and Paid RPR**

Once a DoL is authorised the relevant person's representative is responsible for monitoring the DoL that is taking place including the conditions that have been attached to the DoL authorisation. If there is no one appropriate to be appointed as the RPR, then the supervisory authority appoints an IMCA who acts as the paid RPR.

4.10 **Cheshire West – Acid Test**

To identify whether a DoL is occurring the Cheshire West ruling prescribes an 'Acid Test' namely, the person is deemed as lacking capacity, under constant supervision, control and not free to leave.

[8] Mental Capacity Act Deprivation of Liberty Safeguards: Section 39A - http://www.scie.org.uk/publications/guides/guide41/39a.asp

[9] Mental Capacity Act Deprivation of Liberty Safeguards: Section 39D http://www.scie.org.uk/publications/guides/guide41/39d.asp

5. Deprivation of Liberties Safeguards (DoLS) – Referral and Contact

5.1 Contacts and Referral Process

LBH adheres to the ADASS guidance on DoLS referrals.

5.2 The request for a standard DoLS application and urgent authorisations can be sent to:

Email:	Adult.protection@haringey.gov.uk IAT@haringey.gov.uk
Secure email:	IATTeamIncomingWork@haringey.gcsx.gov.uk
Fax:	020 8489 2323

5.3 The DoLS Coordinator

Email:	adult.protection@haringey.gov.uk
Tel:	020 8489 6931
Fax:	020 8489 2323

5.4 IMCA Services

MCA Services within LBH are provided through Voiceability.

Referral Forms are accessible from the Voiceability Website (http://www.voiceability.org/support-for-you/independent-mental-capacity-advocacy) or from ADASS endorsed forms:

(https://www.adass.org.uk/uploadedFiles/adass_content/policy_networks/mental_health_Drugs_and_Alcohol/public_content/Final%20DoLS%20Guidance%202015.pdf)

Referrals sent to:	imca@voiceability.org.uk
Tel:	0300 330 5499
Fax:	0208 330 6622

6. How can a DoL be identified.

6.1 Relevant Legislation and case Law

There is an ever growing body of guidance and case law in relation to how to identify whether a DoL is occurring. At present the Cheshire West 'Acid Test' needs to be considered.

The Law Society has issued comprehensive guidance on the law relating to the deprivation of liberty safeguards. The safeguards aim to ensure that those who lack capacity and are residing in care home, hospital and supported living environments are not subject to overly restrictive measures in their day-to-day lives.

The guidance was commissioned by the Department of Health (DH) and aims to help frontline health and social care professionals identify when a deprivation of liberty may be occurring in a number of health and care settings.

The Law Society - **Deprivation of liberty: a practical guide**
http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/

6.2 Based on existing case law, the following factors may be considered to be relevant when considering whether or not deprivation of liberty is occurring:

- Restraint is used (including sedation) to admit the person to the institution to which the person is resisting admission;
- The person is not allowed to leave the facility;
- The person has no, or very limited, choice about their life within the care home or hospital;
- The person is prevented from maintaining contact with the world outside the care home or hospital;
- The person is unable to maintain social contacts due to the restrictions placed upon them;
- The person is, or would be, prevented from leaving the facility at all, whether by distraction, locked doors or restraint, or because they are led to believe that they would be prevented from leaving if they tried;
- Family, friends or carers, who might reasonably expect to take decisions under the MCA, are prevented from moving them to another care setting or from taking them out at all;
- The person in care is not given reasonable opportunity to go outside of the home or hospital (escorted or otherwise) even though it would be possible for them to do so and it seems likely that they would enjoy it, it would reduce their distress or anxiety, or it would be beneficial in some other way;
- A decision has been taken that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate;
- A request by carers for a person to be discharged to their care has been refused.

- The person is not allowed to make any choices at all about issues such as:

- where they can be within the care home or hospital;
- what they can do; and
- who they can associate with, or when and what they can eat.

This could equally apply if choices were available but the care given to the person does not enable them to make any choices.

- Staff exercise complete and effective control over the care and movement of the person for a significant period;
- Staff exercise control over assessments, treatment, contacts, and residence;
- The person is not allowed any freedom of movement within the care home or hospital;
- The person's behaviour and movement is controlled through regular use of medication or seating from which a person cannot get up; and
- The person loses autonomy because they are under continuous supervision and control.

Restrictions are placed on who the person in the care home may contact, who may visit them or when they can use the telephone. (This does not in general apply to proportionate restrictions for the benefit of the running of the unit and other residents, e.g. restrictions on the time of visits, or on numbers of visitors at any one time).

7. Restraint

A person is using restraint if they use force, or threaten to use force, to make someone do something that they are resisting, or restrict a person's freedom of movement, whether they are resisting or not.

Restraint is appropriate when it is used to prevent harm to the person who lacks capacity and it is a proportionate response to the likelihood and seriousness of harm.

The duration of any restrictions is a relevant factor when considering whether a person is deprived of their liberty. If restraint or restriction is frequent, cumulative, and ongoing, then care providers should consider whether this goes beyond permissible restraint and DoLS authorisation is required.

Although appropriate restraint may lawfully be used under the MCA, it should be seen as an indicator that a person's wishes **may** be being over-ridden. In these circumstances the person may be being deprived of their liberty and authorisation is needed. Restrictions and restraint must be proportionate to the harm the care giver is seeking to prevent.

8. DoLS Assessment and Authorisation Process – Hospitals and Care Homes

8.1 Assessment Process

8.1.1 Request for Urgent and Standard Authorisation

- The managing authority applies for a DoL;
- The managing authority can apply for an urgent authorisation which is valid for 7 days;
- The supervisory authority can then extend an urgent authorisation for a further 7 days; and
- The supervisory authority should complete the request for standard authorisation within 21 days.

8.1.2 Screening of Urgent Authorisation and Request for Standard Authorisation

The supervisory authority screens the urgent authorisation and request for standard authorisation in line with ADASS guidance and the MCA and associated codes of practice.

If the supervisory authority feels that the managing authority has not completed the referrals in line with relevant statutory legislation and guidance, the supervisory authority can request further information from the managing authority.

8.1.3 Commissioning and Allocation of Assessments

The supervisory authority then commission or allocate 2 assessors to complete 6 assessments.

The DoLS Code of Practice requires 2 assessors to complete the required 6 assessments.

The assessors identified need to meet the requirements as prescribed in the DoLS Code of Practice, particularly in relation to independence to the process e.g. the assessors cannot be allocated to the case and they cannot be line managed by someone involved in the care management of the case.

If required the supervisory authority also refers to the relevant IMCA services. The assessments need to evidence that the DoL is not detrimental to the person, in the person's best interest and that the proposed DoLS are the least restrictive options available

8.1.4 Mental Health Assessments

The Mental Health Assessor (MHA) completes the following assessments in line with the relevant Codes of Practice:

- Mental Health Assessment – Clinical Evidence of the person's mental health;
- Mental Capacity Assessment – Capacity assessment in relation to the DoLS;

- Eligibility Assessment – That the DoLS are not in conflict with Mental Health legislation; and
- The MHA completes their reports in line with ADASS guidance and forms.

8.1.5 Best Interest Assessments

The Best Interest Assessor (BIA) completes the following assessments in line with the relevant Codes of Practice:

- Age Assessment – evidence that the person is over 18 years old;
- Best Interest Assessment - evidence that the DoLS are in the persons best interest;
- No refusals – the proposed DoLS do not conflict with any other civil legislation e.g. LPA; and
- The BIA completes their reports in line with ADASS guidance and forms.

8.1.6 Equivalent Assessments

The DoLS Code of Practise provides scope and requirements for equivalent assessments to be used.

Equivalent assessments cannot be older than 12 months.

8.1.7 IMCA Referral – 39A IMCA

If there is no relevant person's representative to consult during the Best Interest Assessment process, then the supervisory authority needs to refer for a 39A IMCA. This is done by completing the relevant referral to the IMCA Service.

8.2 **Authorisation Process**

8.2.1 Scrutiny of Assessments

The BIA and MHA complete the 6 assessments to evidence that the 6 DoL requirements have been met in line with the DoLS Code of Practise. Where a 39A IMCA has been appointed, they are required to submit their report as part of the assessment and scrutiny process. The 6 Requirements are as follows:

- Age;
- Mental Health;
- Mental Capacity;
- Eligibility;
- Best Interest; and
- No refusals.

The supervisory authority is required to scrutinise the assessments in line with ADASS guidance. In particular the supervisory authority needs to evidence the following:

- Why the authoriser agrees that a deprivation of liberty is occurring and what evidence has convinced them of this;
- What harm the person would otherwise encounter;
- Why deprivation of liberty is proportionate to that harm; and
- Why are there no less restrictive options available.

If further information is required as a result of the scrutiny process, the supervisory authority can approach the relevant assessors for further clarification.

8.2.2 Authorisation of the DoLS

If the supervisory authority can evidence that the 6 DoL requirements have been met and have provided the relevant scrutiny in relation to the assessments, then the DoL is granted.

The supervisory authority then completes the relevant form in line with ADASS guidance and grants the request for standard authorisation.

The supervisory authority will also provide copies of the authorisation and assessments to all parties involved in the assessment process, including the managing authority, the relevant person's representative and the IMCA if they have been involved in the process.

8.2.3 DoL not granted

If any of the 6 DoL requirements are not met the assessment process ends and the DoL cannot be authorised. The Supervisory authority need to adhere to the DoLS Code of Practice if a DoL is not granted including informing all relevant parties. The supervisory authority then also completes the relevant forms.

The supervisory authority will also provide copies of the authorisation and assessments to all parties involved in the assessment process, including the managing authority, the relevant person's representative and the IMCA if they have been involved in the process.

8.2.4 Duration of a DoLS Standard Authorisation

The DoL standard authorisation can only be granted for a maximum of 12 months. The BIA is responsible for prescribing how long the DoL should be valid for as well as providing reasoning for this.

8.2.5 Conditions Attached to the DoL Standard Authorisation

The BIA can attach conditions to the DoL being granted and the supervisory authority can consider including these conditions in the authorisation of the DoL.

8.2.6 Appointing the Relevant Persons Representative (RPR)

Once the DoL has been authorised, the supervisory authority has to appoint a RPR in line with the DoLS code of practise and ADASS guidance. The RPR is nominated by the BIA. The DoLS Code of Practise defines who can act as the relevant person's representative. This has been further clarified in a recent case law (AJ vs. A Local Authority)[10]:

- The RPR has to be independent to the process;
- The RPR has to maintain regular contact with the person; and
- The RPR cannot have been involved in the best interest decision making process in relation to the proposed DoL.

8.2.7 Paid Relevant Persons Representative (PRPR)– 39D IMCA

Where there is no relevant person's representative, the supervisory authority has to appoint a PRPR. This is done by making the necessary referrals to the IMCA Service.

The PRPR has the same responsibilities as the RPR.

8.3 Review

The DoLS Code of Practise prescribes when and how a review is instigated. If it is perceived by the managing authority, the RPR or PRPR that there has been a change in any of the 6 DoL requirements, then a review of the DoL can be requested. The assessment process is then reinitiated and if necessary referred to the court of protection.

8.4 DoL Standard Authorisation ends

The DoL standard authorisation is limited to a maximum of 12 months.

Once the authorisation expires, the managing authority has to reapply for a DoL and the assessment process is repeated.

[10] AJ vs. A Local Authority
http://www.mentalhealthlaw.co.uk/Re_AJ_(DOLS)_(2015)_EWCOP_5,_(2015)_MHLO_11

9. Community Based DoLS – Court of protection

Where the DoL is occurring in an environment other than a hospital or case home e.g. supported accommodation, then the DoL can only be authorised by the court of protection. Haringey Legal Department need to be involved in the process.

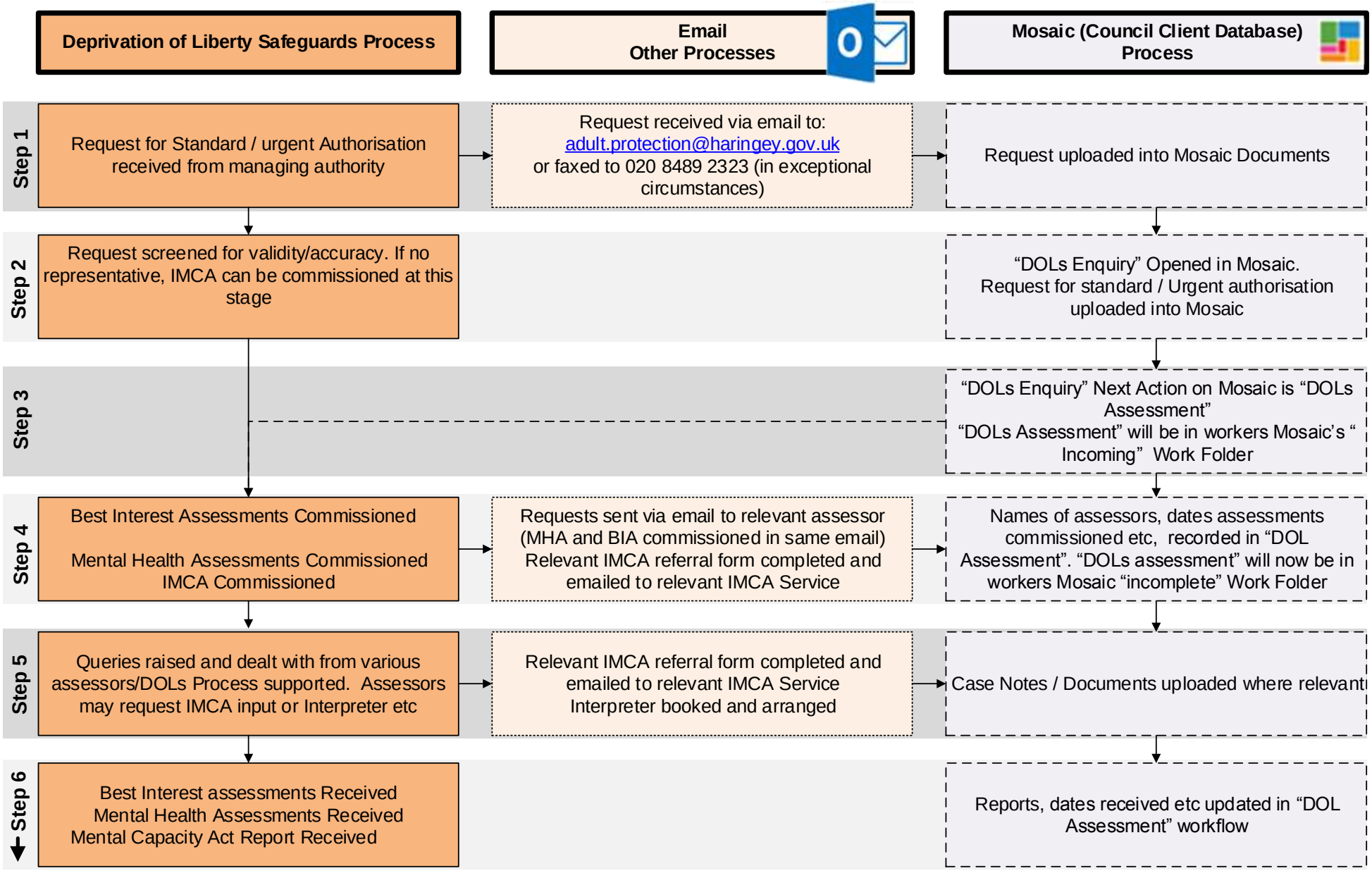
The community based DoL application to the court of protection will often include other legal decisions that need to be made including care and accommodation decisions.

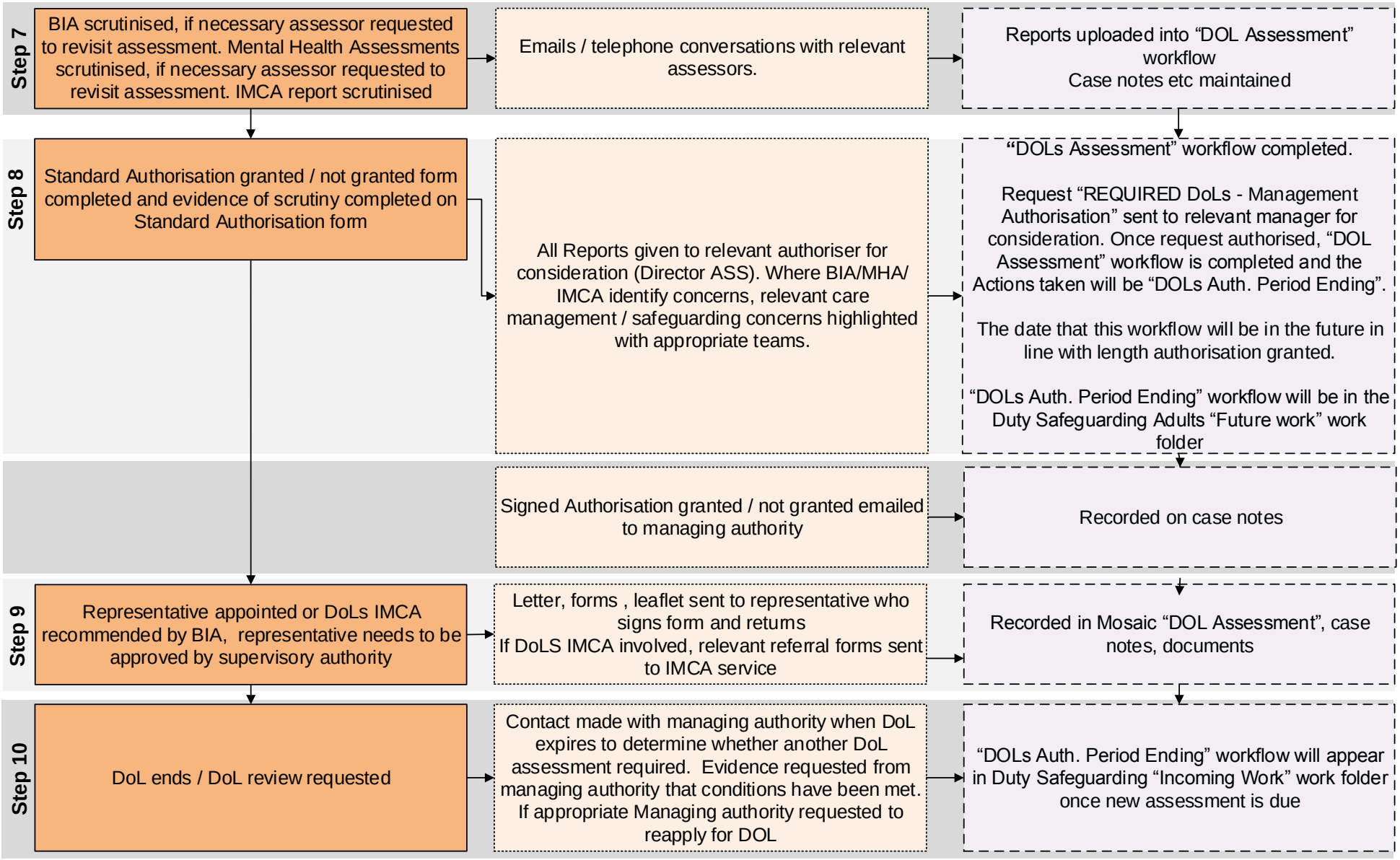
The process is as follows:

- Community based DoL identified;
- Social worker discussed with line manager;
- Relevant service manager authorises involvement from legal department;
- Social worker refers to legal in conjunction with line manager;
- Social worker completes care act compliant review to include any DoL that may be occurring;
- Social worker then provides their assessments to the DoLS coordinator who then commissions the relevant BIA and MHA assessments. The social workers review is provided to the relevant assessors;
- BIA and MHA assessments commissioned or allocated;
- Completed BIA and MHA assessments provided to allocated social worker; and
- Allocated social worker finalises court of protection application and provides all relevant paperwork and BIA and MHA to the legal department.

Workflow of DoLS Process and associated Email and other processes and mosaic processes

Appendix A




Step 7
BIA scrutinised, if necessary assessor requested to revisit assessment. Mental Health Assessments scrutinised, if necessary assessor requested to revisit assessment. IMCA report scrutinised
Emails / telephone conversations with relevant assessors.
Reports uploaded into "DOL Assessment" workflow
Case notes etc maintained
Step 8
Standard Authorisation granted / not granted form completed and evidence of scrutiny completed on Standard Authorisation form
All Reports given to relevant authoriser for consideration (Director ASS). Where BIA/MHA/ IMCA identify concerns, relevant care management / safeguarding concerns highlighted with appropriate teams.
"DOLs Assessment" workflow completed.
Request "REQUIRED DoLs - Management Authorisation" sent to relevant manager for consideration. Once request authorised, "DOL Assessment" workflow is completed and the Actions taken will be "DOLs Auth. Period Ending".
The date that this workflow will be in the future in line with length authorisation granted.
"DOLs Auth. Period Ending" workflow will be in the Duty Safeguarding Adults "Future work" work folder
Signed Authorisation granted / not granted emailed to managing authority
Recorded on case notes
Step 9
Representative appointed or DoLs IMCA recommended by BIA, representative needs to be approved by supervisory authority
Letter, forms , leaflet sent to representative who signs form and returns
If DoLS IMCA involved, relevant referral forms sent to IMCA service
Recorded in Mosaic "DOL Assessment", case notes, documents
Step 10
DoL ends / DoL review requested
Contact made with managing authority when DoL expires to determine whether another DoL assessment required. Evidence requested from managing authority that conditions have been met. If appropriate Managing authority requested to reapply for DOL
"DOLs Auth. Period Ending" workflow will appear in Duty Safeguarding "Incoming Work" work folder once new assessment is due