Torbay and South Devon NHS
NHS Foundation Trust

Practice Guidance to support Practitioners and Managers when making applications to the Court of Protection for people deprived of their liberty within a domestic setting in Torbay

Directorate: Professional Practice
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Document Control Information

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	Yes	*No*
Does this document have training implications? *If yes please state:* *A bespoke training session will be required to inform Practitioners and Managers.*	☒	☐
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Document Amendment History

Date	**Version no.**	**Amendment summary**	**Ratified by:**
11 May 2016	1	New	Care and Clinical Policies Group Torbay Legal Services

Contents

1. Purpose

1.1 This document has been produced to support Practitioners and Senior Managers where an application to the Court of Protection will be required for people who are deprived of their liberty and living in domestic settings, who lack the mental capacity to consent to their care arrangements and where the state is imputable for that care**.**

2. Introduction

2.1 On March 19th 2014 the Supreme Court passed a ruling in P v Cheshire West and Chester Council and P and Q v Surrey County Council{2014}UKSC 19 **,** within which it clarified the threshold for identifying what constitutes a 'deprivation of a person's liberty.

Lady Hale (Supreme Court March 2014) said:

'What is means to be deprived of liberty must be the same for everyone, whether or not that they have physical or mental disabilities. If it were to be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. **A gilded cage is still a cage** The Local Authorities have in no doubt done the best they can to make their lives as happy and fulfilled as they possibly could but **in the end it is the constraints that matter'**.

2.2 The definition of a deprivation of liberty has been identified as:

The person is subject to

Continuous supervision and control

and

Not free to leave'

Both aspects of the 'Acid Test' must be met for a deprivation of liberty to be occurring.

2.3 The Supreme Court also ruled that the threshold included not only people residing within care homes and hospitals, but also all those who:

- Are aged 16 and over
- Reside in domestic settings such as supported living environments, educational facilities and within their own homes.
- Who are subject to care arrangements that have the effect of depriving them of their liberty within the meaning of Article 5 of the Human Rights Act 1998 (the right to liberty and security)
- Where the state is imputable for the care arrangements i.e. the confinement must be the responsibility of the state.

- Where the person lacks the mental capacity to consent to the care arrangements

2.4 A separate application must be made for every individual for whom the applicant requests an authorisation of deprivation of liberty. However, where there are matters in relation to which the facts are identical for a number of individuals, such as common care arrangements, it is possible to attach to each individual application a generic statement dealing with the common care arrangements or other matters common to those individuals.

3. Roles and Responsibilities

3.1 In situations where the NHS or Local Authority are imputable for care arrangements that have the effect of depriving a person of their liberty, there is a duty placed upon them to ensure that any deprivation of liberty is in place in accordance with a process prescribed by law. Without doing so, will leave the responsible organisation at risk of implementing arrangements that amount to an unlawful deprivation**.**

3.2 The Deprivation of Liberty Safeguards only applies to people who are resident within a hospital or care home environment. In such cases the Local Authority (acting as a Supervisory Body) has a duty to assess, authorise the deprivation within a Standard Authorisation (where appropriate) monitor and where necessary undertake a review of the authorisation.

However, where it has been identified that a person is deprived of their liberty within a domestic setting, the lawful process of depriving that person of their liberty is different and can only be sanctioned by approaching the Court of Protection to seek a Court Order.

3.4 Torbay and South Devon NHS Foundation Trust has a legal duty to ensure it has defined processes in place to enable applications to be made to the Court of Protection where necessary, and in doing so avoid any breaches of a person's Article 5 rights.

3.5 In situations where the NHS is responsible for the care arrangements, which have the effect of depriving a person of their liberty, legal advice should be sought via the Clinical Commissioning Group Lead for Safeguarding Adults/Mental Capacity and Deprivation of Liberty Safeguards.

3.6 In situations where the Local Authority is responsible for the care arrangements which have the effect of depriving a person of their liberty, the Local Authority provide legal advice and support via their own legal department.
The Local Authority Legal Team can be contacted on Contact number: 01803 207956

3.7 Within the Trust, Managers, (who have a responsibility for managing and supervising staff), will need to ensure that operationally, there are systems in place to demonstrate compliance with the Mental Capacity Act 2005

Practitioners will be expected to have completed Mental Capacity Act 2005 and Deprivation of Liberty Safeguards training up to Level 3 within the Organisations training strategy.

3.8 The Deprivation of Liberty Safeguards Team will be responsible to

- Act as point of contact within the Trust to receive all completed 'Operational Initial Assessments to identify a Domestic DoL

- Triage all completed initial assessments received and keep a record of the outcome.
- Provide Professional Practice guidance to the Operational staff in support of their assessment and Court preparation work
- Keep a record of all Court of Protection 'Granted Authorisations' specific to people accommodated within domestic settings, the date of the authorisation commencing , the expiry date and keep operational teams informed of the need to prepare for any necessary new application, in a timely manner.
- Act as a point of information for all stakeholders within Torbay.

3.9 Torbay and South Devon NHS Foundation Trust have a responsibility to ensure staff within the Organisation have access to a robust Mental Capacity Act 2005 and Deprivation of Liberty Safeguards training strategy that will equip them with the necessary skills and competence. The training strategy can be accessed on ICON: https://icon.torbayandsouthdevon.nhs.uk/areas/mental-capacity-act/Pages/default.aspx

4. Restriction and Restraint of an incapacitated person using the MCA 2005:-

4.1 Section 5 of the MCA 2005 allows for actions to be taken to protect an incapacitated person from harm. However, section 6 of the Act imposes important limitations on acts which can be carried out with protection from liability under section 5

4.2 The key areas where acts might not be protected from liability are the following:-

- Where there is inappropriate use of restraint
- Where a person who lacks capacity is deprived of their liberty.

4.3 Section 6 (4) of the Act states that someone is using restraint if they:-

- Use force or threaten to use force to make someone do something that they are resisting.
- Restrict a person's freedom of movement, whether they are resisting or not.

4.4 It is important that staff recognise that any action intended to retrain a person who lacks capacity will not attract protection from liability unless the following 2 conditions are met:

- The person taking the action must reasonably believe that restraint is necessary to prevent harm to the person who lacks capacity

- The amount and type of restraint used and the time it lasts must be a proportionate response to the like hood and seriousness of the harm.

4.5 The MCA 2005 Code of practice provides comprehensive guidance entitled *'What protection does the Act offer for people providing care or treatment'* within Chapter 6. It is strongly recommended that staff read this chapter.

4.6 **In short:-**

When employing restrictive measures, under the Act, Family members and all staff must be able to clearly demonstrate the following factors:

- The person lacks the mental capacity to consent to the intervention
- The intervention is a proportionate response to the risk of harm, and the seriousness of that harm
- A reasonable belief that the intervention is absolutely necessary
- The intervention must be the least restrictive option available
- The intervention must be in place for the shortest possible time
- The intervention must be in the patient's Best Interest

5. The Care Planning Process

5.1 In circumstance where a staff member employed within Torbay and South Devon NHS Foundation Trust is involved in a 'Best Interest decision' (for a person residing within a domestic setting), to be subject to a Care Plan that may on occasions require the use of restraint or restriction to prevent harm to them, **it is really important** that the staff member takes responsibility to ensure the following information is clearly recorded within the care plan:

- The assessed risk, seriousness of harm and the probability of it occurring
- Reference to the completed mental capacity assessment, such as date completed by whom and the outcome.
- Any known/observed triggers leading to the person requiring an intervention with a restrictive nature.
- Any known/observed steps that can be taken to de-escalate support and reassure the person, whilst maintaining their dignity throughout.
- References to the MCA 2005, why it is deemed to be a proportionate response, to protect the person from harm, the other options considered, why it is deemed to be in Best Interest only after having considered other less restrictive options.
- Who may act as the Decision Maker and implement the restrictive measure.
- How often the care plan must be reviewed and by whom, inclusive of who should be consulted, to ensure it is still relevant and necessary.

5.2 The care plan must be kept within the Person's care plan file and accessible to the Person and other people who hold legal authority to access information such as the staff responsible for the care of the Person, A registered Lasting Power of Attorney specific to Health and Welfare, A Court Appointed Deputy specific to Health and Welfare, Independent Mental Capacity Advocate and Health and Social Care staff undertaking assessments that will require such information to inform the process.

6. Care Planning, use of restraint and the limitations of the Mental Capacity Act 2005

6.1 Section 5 of the MCA 2005, allows action to be taken to ensure a person who lacks capacity to consent receives necessary care and or/treatment. The Act provides protection for people who are able to demonstrate that they have worked within the framework of the Act.

6.2 Although Section 5 of the MCA 2005 permits the use of restriction and restraint of an incapacitated person, Section 6 (5) confirms that there is no protection under the Act for actions that result in someone being deprived of their liberty as defined by Article 5 (1) of the European Convention on Human Rights.

6.3 This applies not only to public authorities, but also everyone who might otherwise get protection under section 5 of the Act. It also applies to Attorney's and Deputies, they cannot give permission for an action that takes away a person's liberty.

6.4 Therefore staff involved in the planning of care, where restraint may be necessary must consider whether such arrangements have the effect of depriving the person of their liberty.

6.5 Any care arrangement that has the effect of depriving a person of their liberty that has not been authorised by the Court of Protection will constitute an lawful deprivation.

6.6 Staff who fail to undertake the appropriate steps to ensure the person is not being unlawfully deprived of their liberty may be at risk of becoming complicit with unlawful practice.

7. What is a Deprivation of Liberty?

7.1 The test for considering whether to engage the DoLS process and go to the Court of Protection is never whether the professional is **certain** that there is a deprivation of liberty, but rather there is a **risk** of a deprivation of liberty. If there is such a risk, that should trigger further assessment;

7.2 The phrase 'Deprivation of Liberty' originates from Article 5 of the European Convention of Human Rights, which protects everyone's right not to be deprived.

7.3 There are 3 elements to a deprivation of liberty:

- An 'objective element' of a person's confinement, to a certain limited place for a non-negligible length of time, .i.e. the concrete situation. Account must be taken of a range of criteria such as the type, duration, effects and manner of implementation of the restrictive measure in question.

- The 'subjective element' a lack of valid consent, i.e. the person lacks capacity to consent to the measures, care or arrangements in place. If the person has capacity and consents, there is no deprivation.

- The confinement must be the responsibility of the state. This is referred to as 'imputable to the state'. This means that a public body (in this case the Trust) has some level of responsibility in respect of the arrangements in place that have the effect of depriving the person of their liberty, for example, funding the care package.

  The ECtHR has held that this can arise in one of three ways, two of which are relevant, these being:

  -Direct involvement of public authorities in the individual's detention

  -By violating the state's positive obligation under Article 5(1) to protect individuals against deprivation of their liberty being carried out. (see section 20 of this document)

7.4 The State is under an obligation to make sure that where deprivation of liberty is delivered by Social Care or Health Care Professionals, who are in law treated as "State agents," that there is lawful authority for that deprivation.

Such authority is required to comply with Article 5(1) of the European Convention on Human Rights ('ECHR'), made part of English law by s.6 Human Rights Act 1998, which places strict limits upon the circumstances under which individuals can be deprived of their liberty.

7.5 The most relevant parts of Article 5 ECHR are:

- *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

- *The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*

7.6 Article 5 also carries with it an express procedural protection, set out in Article 5(4) which provides that:

- *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

7.7 Professionals should always remember that authority to deprive someone of their

liberty does not, itself, provide authority to provide care and treatment to them. If a person does not have capacity to consent to take decisions in this regard, then it will always be necessary to consider the basis upon which those decisions are being taken by others and their authority for doing so which, will, in general terms, be:

- On the basis of the provisions of ss.5-6 MCA 200513, in terms of the delivery of 'routine care and treatment;
- On the basis of a court order, where the care and treatment goes beyond the 'routine;' In some circumstances, on the basis of the provisions of Part IV of the Mental Health Act 1983 (but only ever in relation to the provision of medical treatment related to the individual's mental disorder).

7.8 In other words, no one should assume that just because the deprivation of liberty is authorised that this is the end of the story for that individual.

7.9 In almost every case, there will be a continuum from:

- *'Routine' decisions or interventions in an individual's life to provide them with care and treatment*. These will be taken on the basis of a reasonable belief that the individual lacks capacity to take the material decision and that the professional is acting in the individual's best interests: these can be carried out under s.5 MCA 2005;

Moving through to*:*

- *Interventions that constitute restraint*. Restraint does not merely mean the use of force, but can include the threat of the use of force or restriction of the individual's liberty, whether or not they resist. By operation of s.6 MCA 2005, a professional restraining an individual will be protected from liability provided the restraint is proportionate to the risk of and likelihood of harm and is only used where the professional reasonably believes it to be necessary to prevent harm to the person.

Moving through to:

- *Interventions that go beyond 'mere' restraint to a deprivation of liberty*. The professional at that point cannot rely upon the provisions of ss.5-6 MCA 2005, but
  authority will be required from the Court of Protection.

7.10 In March 2014 the Supreme Court handed down a judgement in the '*Cheshire West* case and set out what is now described as the "acid test" for deprivation of liberty.

The acid test

The acid test consists of three components, which must be met, to determine whether the person is deprived of their liberty.

The acid test is therefore defined as:-

- Where the person lacks capacity to consent to the arrangements / care plan in question

And

- The person is ***"under continuous supervision and control and not free to leave"***

7.11 The person must be both under continuous supervision and control and not free to leave.

7.12 If the arrangements are such that the person is under continuous supervision and control but is free to leave, it is not a deprivation of liberty.

7.13 Likewise, if a person is not under continuous supervision and control but is not free to leave, it is not a deprivation of liberty.

7.14 However, where there is a risk that a person is deprived of liberty, this alone should trigger an assessment and detailed consideration of whether the person is deprived of liberty and if so, how lawful authorisation should be sought should be taken.

7.15 You should err on the side of caution if in doubt, as an assessment could afford the person important safeguards.

8. What does 'Continuous Supervision and Control and Not free to leave' mean?

8.1 Although the Supreme Court has provided a definition of what constitutes a deprivation of a person's liberty, it may be difficult for Practitioners to interpret the meaning of 'Continuous Supervision and Control and Not free to leave. It may be helpful to refer to the following 3 areas**.**

8.2 **Continuous Supervision**

- Are there people around 24 hours a day 7 days a week who have a duty to ensure they know where the person is, what they are doing and how they are presenting?
- Is the person subject to any closer levels of supervision, during the day? If so what is the nature of it, how frequently does it happen, and for how long?
- Is the person subject to any level of observation during the night, if so what is the nature of it, how frequently does it happen, and for how long?
- Is the person observed or supervised when accessing the wider community? If so, how is this implemented, how frequently and for how long?

- Are there any other aspects of supervision or observation in place, if so what is the nature of them, how often do they occur, and how long does it last?
- What is the impact of observation/supervision on the person?

8.3 **'Continuous Control'**

- Is the person subject to care plans to support the essential activities of daily living? If so were they involved in the development of the care arrangements? Were family/Carers/advocates consulted as part of the care planning process? Does anyone hold total and effective control over the person's movements and contacts?
- Is the person able to manage their finances? If not who does this and how is it done?
- Is the person able to decide what to eat/drink and when to eat/drink? If not who decides this?
- Is the person able to manage their medication? If not who is responsible for the ordering/storing/administration and monitoring? If medication is required do any of them have a sedative effect? If so why is it necessary, how often are they administered, and what is their effect?
- Is the person able to freely communicate with whom they choose and at a time of their choice? If they require support what is the nature of the support and how frequently does it take place?
- Are there pharmaceuticals in place which have the effect of causing a restriction of movement or sedation? If so what is the nature of the pharmaceutical? why is it necessary, how is it applied, how frequently, for how long and what is the impact?
- Is the person mobile and able to freely move about? If not how is the person supported with their mobility and does this impact on their ability to engage with others and socialise?
- Is physical restraint ever required? If so what is the nature of the restraint, why is it necessary, how is it applied, how frequently, for how long and what is the impact?
- Are mechanical restrictions required, for example bed rails/lap straps etc? If so what is the nature of the restriction, why are they necessary, how frequently is it used and for how long?
- Are there any environmental restrictions, for example locked doors, window restrictors, gates etc. If so what is the nature if the restriction, why are they necessary, how frequently is it used and for how long?
- Are there technological restrictions in place, for example sensor mats, door alarms, GPS tracking, CCTV? If so, what is the nature of the restriction, why is it necessary, how frequently is it used and for how long?

- Is it necessary to restrict access to any personal effects, for example clothes/ photo's music/ books/cigarettes/ etc. if so what and why?
- Are any restrictions placed on social contacts? If so what is the nature of the restriction, why is it necessary, how frequently does it take place and what is the impact?

- Are there any restrictions placed on the person's personal effects? If so what is the nature of the restriction, why is it necessary, how frequently does it take place and what is the impact?
- Are there any other control measures in place? If so what is the nature of them, why are they necessary, how frequently do they occur and for how long?

8.4 **'Not free to leave'**

It is important not to conflate *"freedom to leave"* with *"ability to leave"* or *"attempts to leave."* Doing so would lead to the reduction in the universality of the right to liberty upon which the Supreme Court placed such emphasis. The focus should be upon the actions (or potential actions) of those around the individual, rather than the individual themselves. In other words, the question may well be a hypothetical one – if the person manifested a desire to leave (or a family member properly interested in their care sought to assist them to leave), what would happen?

Therefore

8.5 The question is not whether the person is free to leave temporarily for e.g., social activities, outings, etc. only to return afterwards, but whether they are free to leave on a permanent basis and live elsewhere.

8.6 The fact that the person is not physically able to leave due to a health condition, whether because of a physical or mental disability is not relevant. What are important are the actions that would be taken to stop a person from leaving.

8.7 If you would seek to bring the person back or stop them from leaving it is likely that the person 'is not free to leave'

- Is the person at liberty to leave their home independently, of their own free will, move away without seeking permission and live somewhere else?

- If the person where to request to leave their home what action would be taken? Would they be stopped and prevented from leaving? If so what would be the reason for this? e.g. would it be to protect them from harm? If so what harm?

  Is preventing the person from leaving a proportionate response to the identified harm and the seriousness of that harm?

9. What is not relevant to whether the person is deprived of their liberty?

9.1 Equally important is what you should not take into account when assessing whether a person is deprived of their liberty, including:

- That the person is compliant or not objecting to the placement or arrangements in place;
- The "relative normality" of the placement or arrangements in place;
- The reason or purpose of the placement or arrangements in place.

9.2 The crux of the Cheshire West case was that people with disabilities have the same human rights as everyone else – human rights have a "universal character".

Therefore, if a person is unable to express any dissatisfaction as to the placement / measures in place, or appears to be "happy" or "compliant", this is not relevant to whether or not there is a deprivation of liberty.

9.3 Likewise if the person is in the same, or similar placement to other people with similar disabilities, and so given the nature of those disabilities, it is '*relatively normal'* for them, this is irrelevant to whether or not there is a deprivation of liberty.

9.4 Also the purpose of the placement, i.e. to keep the person safe and secure, is irrelevant to whether or not there is a deprivation.

9.5 All of the above may be relevant to whether or not the placement and deprivation of liberty is in the person's Best Interest, but they are not relevant to whether or not there is actually a deprivation.

9.6 Practitioners must consider what is in the care plan for the person. What is important is the measures taken and whether they are such that the person is under '**Continuous Supervision and Control and Not Free to Leave.**

10. How can Deprivation of Liberty be identified within a domestic setting where the care arrangements are the imputable to the state?

Please note

10.1 It is not necessary to be a qualified Best Interest Assessor to undertake this initial assessment for a DoL

10.2 There are two stages to identifying a potential Deprivation of liberty, these are:

- **Stage one**: Practitioners involved in the setting up of, or review of, care arrangements in a Person's' Best 'Interest can request the Provider to complete an initial screening tool 'entitled **'Identifying a Deprivation of Liberty in Domestic Settings -Providers'** and once completed return it immediately to you as the Practitioner

This tool is attached as Appendix 1 and can be accessed electronically via ICON:

The completed tool will indicate to you the following:

Either

- That there is no deprivation of liberty occurring in which case it will be necessary to save the tool on PARIS as evidence that consideration has been given to the legislative framework.

- That there is a deprivation of liberty occurring.

- **Stage two**: If a deprivation of liberty is indicated the Practitioner involved should make arrangements to visit the client as soon as possible and complete an initial professional assessment entitled '**Initial Assessment for a DoL' Operations'**
  This tool is attached as Appendix 2 and can be accessed electronically via ICON

10.3 As part of the initial assessment it is essential that the type of restrictive measures in place and the frequency and duration of implementation are identified. It is also essential that a discussion is held with the Provider to try and identify any other possible options to deliver the necessary care in a safe and less restrictive way.

10.4 It may be the case that following this discussion it is not possible to identify a less restrictive arrangement. This information will be an essential aspect of the Court application.

10.5 Once completed, the initial assessment will identify those persons who:

- Cannot be placed in a less restrictive environment
- Who will continue to be deprived of their liberty
- Whose deprivation must be authorised by an application to the Court of Protection.

Please Note

10.6 At this point the Practitioner should consider whether the person would benefit from an Advocate. The person would be ineligible for an Independent Mental Capacity Advocate in respect of the deprivation of liberty, therefore it may be necessary for the Practitioner to consider instruction of an Advocate under the provisions of the Care Act 2015 via the Devon Advocacy Consortium.

Information about the Devon Advocacy Consortium can be accessed via:
http://www.directory.devon.gov.uk/kb5/devon/directory/organisation.page?id=1fjqatyY5tE

10.7 The completed assessment should be provided to the following:

- The Person who is now identified to be deprived of their liberty
- The Care Provider
- Any IMCA or Advocate
- Anyone consulted
- Line Manager and Zone Manger

DoLs Team via secure email: tsdft.domesticdols@nhs.net

11. What steps must be taken when a person is identified as deprived of their liberty and the care arrangement is deemed imputable to the state?

11.1 On receipt of the completed 'Operations Initial Assessment for a DoL' the DoLS Team will:

- Securely store the assessment.
- Triage the assessment against a DoL Triage tool and securely store the triage outcome
- For those cases achieving a 'High' Triage outcome, the DoLS Team will make contact with the Practitioner named in the assessment, to arrange a meeting within which to provide guidance regarding the court preparation process.

Please Note

11.2 If there is a high volume of assessments received, the 'Associate Directors Adult Social Services' (ADASS), recommend that those at highest risk have the earliest protection form the safeguards.

The 'DoL Triage Tool' is attached as Appendix 3 and also accessible electronically via ICON:

11.3 The DoLS Team will provide relevant guidance to operational staff in support of Court preparation work; however, the ultimate responsibility for preparing the necessary information to enable an application to the Court of Protection will remain with the Operational team who are responsible for commissioning the care.

11.4 The Line Manager will maintain overall responsibility to support the staff member in the preparation all of the necessary assessments, information and paperwork

11.5 The Line Manager will also be responsible for informing the Zone/Team Manager that it will be necessary to instruct the legal team to make an application to the Court of Protection.

Please note

11.6 The costs of the application will fall upon the Zone Budget

An application fee is payable for all applications, and if the Court decides to hold a hearing before making the decision, a hearing fee will also be payable. If an application is received without a fee it will be treated as incomplete and retuned.

12. What Information must the Practitioner make available to their Line Manager/Zone Manager prior to requesting a legal planning meeting?

12.1 It will be the responsibility of the Practitioner to ensure all relevant information has been collated (as set below) and a draft report has been prepared in readiness to present to their Line Manager.

12.2 A 'Court Report Template' that enables the Practitioner to capture all the relevant points required is attached as Appendix 4 and accessible electronically via ICON:

https://icon.torbayandsouthdevon.nhs.uk/areas/mental-capacity-act/Pages/default.aspx

12.3 The responsibility for instructing the Solicitor will lie with the Zone/Team Manager once the relevant assessment and information gathering process is complete.

12.4 The responsibility for making the application to the Court will lie with the Solicitor once all relevant information and clear instruction has been made by the Zone/ Team Manager.

12.5 **Information required.**

- Proof that the person is aged16 years or over. This can take the form of their date of birth and if possible a copy of their birth certificate.

- Information to inform on what basis it is said the person suffers from unsoundness of mind and upon which it is said that the person lacks the capacity to consent to their care arrangements (together with the relevant medical evidence).

12.6 Professional medical opinion is necessary to establish '*unsoundness of mind'*, but where factors are clear, this need not involve an expert psychiatric opinion as there will be cases where a General Practitioner's evidence will suffice.

12.7 The Mental Health Act defines the term **'**mental disorder**'** as 'any disorder or disability of mind**'.**

12.8 It will be the responsibility of the Practitioner / Report Author to contact the person's GP and formally request a statement to evidence 'unsoundness of mind'. In situations where the Practitioner may be in some doubt as to whether it will be necessary to commission a Psychiatrist report or to request a report from the person's General Practitioner they should first discuss and agree with the Zone/Team Manager

12.9 In either case the Practitioner should request:

- A written statement to inform on basis it is said the person is suffering from 'unsoundness of mind' as determined by the Mental Health Act 1983

- Written on headed Paper
- Signed and dated

12.10 If the Practitioner experiences difficulties in obtaining this evidence either from a GP or a Psychiatrist they should inform their Line Manager as soon possible and if necessary the situation escalated to the Clinical Commissioning Group (CCG) Lead for Safeguarding Adults /MCA/DoLS for resolution.

The CCG lead contact details are:
Safeguarding Adult/MCA/DoLS Lead
South Devon and Torbay Clinical Commissioning Group
Pomona House
Oak View Close
Torquay
TQ2 7FF
Tel: 01803 652599

- The reason upon which it is said the person lacks the mental capacity to consent to be accommodated and to the arrangements in place for their care and or treatment i.e. the provision of an up to date, decision specific, signed, dated and completed mental capacity assessment that evidences a lack of capacity.

12.11 To ensure that all the requirements of the capacity assessment are satisfied the Practitioner should refer to the Mental Capacity Act 2005 Code of Practice chapter 4 and record their assessment upon the FACE Mental Capacity Assessment Tool which is attached as Appendix 5.
Both the Code and the assessment tool can be accessed on ICON
https://icon.torbayandsouthdevon.nhs.uk/areas/mental-capacity-act/Pages/default.aspx

- The nature of the person's care arrangements (together with a copy of the person's care/treatment plan), and why it is said that they do or may amount to a deprivation of liberty, i.e. evidence of the concrete situation indicating the person is subject to Continuous Supervision and Control and Not Free to leave.
- How the placement was chosen and how it is working, if P already lives there
- Any recent change or planned change in the care package (with reasons)
- The tenancy agreement (if there is one) and who has the authority or needs to apply for the authority to sign it on P's behalf
- The participation of family and friends in the past
- How the family or friends have provided and will provide balanced support for P in his or her best interests
- Why family and friends support the care package which is proposed
- How the family and friends have been included in the process
- That they are keeping the package of care under review

- The nature of any known risk, the seriousness of that risk and the probability of it occurring, i.e. the provision of up to date, relevant, signed and dated risk assessments held by both the Trust and the Provider.
- The basis upon which it is said that the arrangements are necessary in the person's Best Interest, i.e. the provision of a documented Best Interest process inclusive of the alternative packages of care that have been considered and why they have been rejected.

Please note

12.12 One of the key safeguards to administrative detention is the fact that the person assessing 'Best Interest' is Independent. Although this is not a legal requirement the Practitioner should seek to discuss with the Zone/Team Manager and potentially the Legal Team, and identify the most appropriate person (with the appropriate skills and competence) to undertake the assessment, for example, a person other than the allocated Practitioner , so as to ensure maximum degree of independence. This may also minimise the need for calling upon independent expert evidence in the case of the proceedings.

12.13 The Trust recognises that this may not always be possible due to other competing statutory demands placed upon Operational teams; therefore the ultimate decision as to who should undertake the assessment will lie with the Team/Zone Manager.

12.14 As part of the Best Interest process the Practitioner should include an options appraisal of considered less restrictive options, inclusive of a benefits and burdens analysis.

12.15 To ensure that all the requirements of the Best Interest process are satisfied and clearly recorded the Practitioner should refer to the Mental Capacity Act 2005 Code of Practice chapter 5 and the Best Interest Checklist attached as Appendix 6.

12.16 It may not always be necessary to undertake a Best Interest Meeting, however if the situation is complex or there is any element of dispute between parties, the Practitioner should consider convening one.

12.17 To ensure that all the requirements of the Best Interest Meeting process are satisfied and clearly recorded the Practitioner should refer to the 'Managing and Chairing Best Interest Meetings Guidance'.

The Code, Best Interest Checklist and meeting guidance are all accessible electronically on ICON: https://icon.torbayandsouthdevon.nhs.uk/areas/mental-capacity-act/Pages/default.aspx

- The steps that have been taken to notify the person and all other relevant people (who should also be identified) of the application and to canvas their wishes feelings and views. (statutory requirement of best interest)
- Any relevant wishes and feelings expressed by the person (statutory requirement of best interest)

12.18 This is very important and must be included within the report. If the person is unable to express their views or refuses to engage, the Practitioner must make reference to this and provide evidence such as:

(Please Note this list is also provided as Appendix 7)

- Does the person present with any non -verbal communication that may indicate their view (it will be helpful to reference consultation with people who know the person well and are best placed to interpret any expressed non- verbal communication.)

- Has the person expressed their views in the past?
- Is there any significant life aspect that may indicate a preference or view, such as being married for many years or always living in a certain geographical area or close to family, close relationships with family members etc.

- Details of any valid and applicable Advance Decisions made by the person and any relevant decisions under a Lasting Power of Attorney or by the person's Deputy (who should also be identified).

- The Person's eligibility for public funding.

- Any reasons for particular urgency in determining the application.

- Any factors that that ought to be bought specifically to the Courts attention (the applicant having a duty to make a full and frank disclosure to the Court of all the facts).

- Whether the person wishes to take part in the proceedings and what type of support will be required to enable this.

13. Consultation with the person the application is about

13.1 It is essential that full and frank discussion is held with the relevant person before the application is lodged with the Court.

13.2 The Practitioner will be required to discuss the communication strategy with their line Manager prior to speaking directly to the relevant person to ensure and confirm that an instruction is going to be placed with the legal service.

13.3 The Practitioner must arrange for that person to be informed of the following matters:

- That the application is being made to the court.
- That the application is to consider whether they lack the capacity to make decisions in relation to their residence and care, and whether to authorise a deprivation of their liberty in connection with the arrangements set out in their care plan.

- What the proposed arrangements under the order sought are:
- That the person is entitled to express their views, wishes and feelings in relation to the proposed arrangements and the application, and that these will be communicated to the Court.
- That the person is entitled to take part in the proceedings and to receive support to do this.
- That the person will receive help to obtain advice and support if they do not agree with the proposed arrangements within the application.

14. Consultation with other people regarding the making if the application

14.1 It is also a requirement for the Practitioner to ensure that the following people are consulted about the intention to make the application. It is best practice do this verbally and to follow up with a supporting letter:

- Any Donee of a lasting power of attorney granted by the person.
- Any Deputy appointed by the Court, together with at least 3 people in the following categories.
- Anyone named by the person as someone to be consulted on the matters raised within the application.
- Anyone engaged in caring for the person or interested in their welfare.

14.2 When consulting with such people the following information must be provided

- That the application is being made to the Court.
- That the application is to consider whether the person lacks the capacity to make decisions in relation to their residence and care and whether they should be deprived of their liberty in connection with the arrangements set out in their care plan.
- What the proposed arrangements under the order are.
- That the person will also be informed of the application to the Court unless in the circumstances it is inappropriate to give the person such information.

15. Emergency applications to the Court of Protection

15.1 There may be times when an urgent application to the Court is required; however this must be seen as the last possible option and deemed a proportionate response necessary to protect a person from harm.

15.2 The practitioner must strive to collate as much information as possible, as described above, to enable the application to take place.

15.3 During working hours the Practitioner and their Line Manger will be required to contact the appropriate legal service as described above, and follow the same process as much as time will allow.

15.4 During out of hours the Trust is able to provide legal advice and support over a 24hour period. To access legal support the Line Manager must contact the 'On Call' Duty Senior Manager to inform and to request legal support, and will be expected to also provide as much information as possible.

16. Court Fees and Legal Planning

16.1 When seeking to make an application to the Court of Protection the Practitioner must first discuss and seek permission directly from their Zone/Team Manager prior to any contact with the legal service, as there will be a financial implication attached to the application.

The initial Court fees are set out below, however it must be noted that Court processes can, on occasions attract escalating costs over and above those detailed below.

- **Application fee** - £400: payable on making an application to start court proceedings or on making an application for permission to start proceedings.
- **Appeal fee** - £400: payable on filing an appellant's notice appealing a court decision or seeking permission to appeal a court decision.
- **Hearing fee** - £500: payable where the court has held a hearing to decide the application and has made a final order, declaration or decision.
- **Copy of document fee** £5: payable on requesting a copy of a document filed during court proceedings.

Further information can be found at: -
http://hmctsformfinder.justice.gov.uk/courtfinder/forms/cop044-eng.pdf

16.2 In addition, it must also be noted that significant costs may also be incurred by Barrister fees, for example these will be in the region of £800-£1000 per hearing of up to ½ a day. These costs will vary depending on the complexity, preparation and time spent on the case.

16.3 It will not be the responsibility of the Practitioner to complete the Court application forms, as this will lie with the Legal Team, however Court forms can be found at:
https://www.gov.uk/

16.4 The Court Practice Direction for the Solicitor can be found at:
http://www.judiciary.gov.uk/wp-content/uploads/2014/05/PRACTICE-DIRECTION-10AA-consolidated-FINAL.pdf

16.5 At the point the Practitioner has received consent from the Zone/Team Manager it will be necessary to contact the Legal Service to request the opportunity to discuss the case with them. The Legal Team will inform the Practitioner if a Legal Planning Meeting will be required. There may be times where advice can be given on the paperwork (required detailed within 17.5) provided to the Legal Team.

16.6 Where the arrangements are funded by Social Care a Legal advice can be sought via Torbay Council Legal Team.

Tel No: 01803 207956

16.7 Where the arrangements are funded by the NHS/ Health such as Continuing Health Care it will be necessary to contact the CCG lead for Safeguarding Adults to discuss the application to Court and appropriate legal support.

16.8 Where the arrangements are joint funded the Practitioner should notify the following people who will hold responsibility to determine the most appropriate legal service to instruct.

- Associate Director of Adult Social Care Tel: 01803 210500
- CCG Lead for Safeguarding Adults/MCA/DoLS Tel: 01803 652599.

Important
It is important that Practitioners remain mindful that the cost of an application to the Court of Protection will fall to the responsible Zone budgets, It is therefore imperative that there is continuous communication between Practitioner and Zone Manager

17. The Legal Planning Meeting-(If required, if advice is not given on the papers)

17.1 The Practitioner must ensure that a Legal Planning Meeting is convened as soon as all the relevant information has been gathered. To delay the process will mean the person remains subject to an unlawful derivation of their liberty. It will also place the Trust at increased risk of litigation.

17.2 The Practitioner must ensure a copy of the report is sent to the Legal Team via secure email prior to the Legal Planning meeting taking place. There must be sufficient time allowed for the Solicitor to read the report contents.

17.3 The meeting should be clearly minuted and include the following:

- A member of Legal Team
- The Practitioner responsible for the case.
- The Line Manager
- Minute Taker
- Any other Health and Social Staff member who has a significant role in the case.

17.4 The minutes must be securely stored on PARIS

17.5 The Practitioner must be able to provide the following information, regardless of whether there is to be a Legal Planning Meeting or advice will be given on the papers. :

- Letter of statement from the GP regarding unsoundness of mind
- Completed MCA assessment specific to being accommodated for the purpose of receiving care
- Completed Best Interest Process, inclusive of any meeting minutes etc
- Completed Risk assessments which indicate why the restrictive measures are necessary and proportionate
- All Care Plans from the Trust and the Provider which clearly evidence how the restrictive measures required will be implemented, by whom, for how long, and who will have responsibility for reviewing them.
- A completed, signed and dated Court report written on the template provided as Appendix 4

17.6 The Legal Team will review all information and advice as necessary.

18. What happens once the Authorisation to deprive a person of liberty has been granted?

18.1 Once the Court Order has been passed down by the Court, the Operational Team and Legal Team should ensure that the DoLS team have been given a copy of the order by secure email to enable it to be securely stored.

18.2 The Court authorisation will specifically detail the length of time the authorisation will be in place. This will not exceed 12 months.

18.3 It will be the responsibility of the DoLS team to keep the following information about the Court Authorisation.

- The date the authorisation starts
- The date the authorisation expires
- A copy of the authorisation
- The name of the responsible allocated worker

18.4 Prior to the authorisation expiring, it will be the responsibility of the DoLS Team to inform the Operational Team of the expiry date.

18.5 Once this has been received by the Operational Team a full review of the restrictive care arrangements must be undertaken.

18.6 Where it is identified that the care arrangements continue to have the effect of depriving the person of their liberty, it will be necessary to commence the preparation of the Court application again.as set out above.

19. The effect of the Authorisation

19.1 It is important to understand that the grant of authority to deprive an individual of their liberty under the MCA 2005 by way of an order of the Court of Protection does not require the individual to be deprived of their liberty. In other words, it is not an order that the person must be detained. Rather, it means that a person or body can rely upon that authority to deprive the individual of their liberty secure in the knowledge that they are acting lawfully.

20. What if a deprivation of liberty may be occurring and the arrangements are not imputable to the state?

20.1 Where the State knows that a vulnerable adult is subject to restrictions on their liberty by a private individual that arguably give rise to a deprivation of liberty, then its positive obligations under Article 5 will be triggered.

20.2 These will include the duty to investigate, so as to determine whether there is, in fact, a deprivation of liberty. In this context the local authority will need to consider all the factors relevant to the objective and subjective elements of the test for deprivation of liberty.

20.3 If, having carried out its investigation, the local authority is satisfied that the objective element is not present, so there is no deprivation of liberty, the local authority will have discharged its immediate obligations. However, its positive obligations may in an appropriate case require the local authority to continue to monitor the situation in the event that circumstances should change.

20.4 If, however, the local authority concludes that the measures imposed do or may constitute a deprivation of liberty, then it will be under a positive obligation, under Article 5 alone to take reasonable and proportionate measures to bring that state of affairs to an end.

20.5 What is reasonable and proportionate in the circumstances will depend upon the context, but it might require the local authority to exercise its statutory powers and duties so as to provide support services for the carers that will enable inappropriate restrictions to be ended, or at least minimised.

20.6 If, however, there are no reasonable measures that the local authority can take to bring the deprivation of liberty to an end, or if the measures it proposes are objected to by the individual or his family, then it may be necessary for the local authority to seek the assistance of the

Court of Protection in determining whether there is, in fact, a deprivation of liberty and if there is a need to obtain authorisation for its continuance."

20.7 In situations where a Practitioner may believe that a person is deprived of their liberty, however the person is not receiving services (therefore the confinement is not imputable to the state), they must discuss their concern with their Line Manager as soon as possible and raise a Safeguarding Alert to the Single Point of Contact for Safeguarding Adults

Contact details:
Email: safeguarding.alertstct@nhs.net
Tel: 01803 219888

20.8 It should be noted that, depending upon the circumstances, a private individual depriving an incapacitated individual in a purely private setting may be guilty of an offence under s.44 MCA 2005 if the conditions under which the individual was kept amount to ill-treatment or wilful neglect by the person doing the detaining if they had care of them, or were an Attorney under a Lasting or Enduring Power of Attorney or a Court Appointed Deputy.

21. Training and Supervision

21.1 Torbay and South Devon NHS Foundation Trust will ensure a robust Mental Capacity Act 2005 and Deprivation of Liberty Safeguards training strategy is in place that sets out the level of training required for staff which is commensurate with their role within the Organisation. The Training strategy can be accessed via:
https://icon.torbayandsouthdevon.nhs.uk/areas/mental-capacity-act/Pages/default.aspx

21.2 All senior staff will have a duty to ensure that each staff member has attained and maintained the level of training required. This will be identified within Supervision and annual Appraisal processes.

21.3 Senior Managers will be responsible for ensuring all cases involving a person subject to a Court of Protection Authorisation are discussed and reviewed within each Supervision session, and that this is clearly recorded upon the Trust Supervision template.

21.4 The allocated Practitioner will be responsible for ensuring that the deprivation of liberty remains necessary and in the person's best to protect them from harm.

22. References

- Care Act 2015
- Deprivation of Liberty Safeguards Code of Practice
- Human Rights Act 1998
- Mental Capacity Act 2005
- Mental Capacity Act 2005 Code of Practice
- Mental Health Act 1983.
- P v Cheshire West and Chester Council and P and Q v Surrey County Council{2014}UKSC 19

23. Appendices

- **Appendix 1:** Identifying a deprivation of liberty in a domestic setting (Provider)
- **Appendix 2:** Initial assessment for a deprivation of liberty (Operational)
- **Appendix 3:** Domestic Deprivation of Liberty triage tool
- **Appendix 4:** Court Report Template
- **Appendix 5:** FACE Mental Capacity Act assessment tool.
- **Appendix 6:** Statutory Best Interest Checklist

Appendix 1:

Identifying a Deprivation of Liberty in Domestic Settings (Provider)

For use within Supported accommodation/shared lives/adult placement

Use this tool if you are a providing care and accommodation to a person, to assist you to determine if the **scale of restriction or restraints applied** to the person' indicate they may be deprived of their liberty.

What is deprivation of liberty?
The DOLS Code of Practice lists the 7 factors which may indicate a deprivation of liberty:

The Supreme Court has now confirmed that there are two key questions to ask ('the acid test'):

- **Is the person subject to continuous supervision and control?**
  The oversight must be continuous (though does not have to be 'in line of sight'); it must amount to supervision, and have a clear element of control.

And

- **Is the person not free to leave?**

  The question is not whether the person is free to leave temporarily for e.g., social activities, outings, etc. only to return afterwards, but whether they are free to leave on a permanent basis and live elsewhere

  The fact that the person is not physically able to leave due to a health condition, whether because of a physical or mental disability is not relevant. What are important are the actions that would be taken to stop a person from leaving. If you would seek to bring the person back or stop them from leaving it is likely that the person 'is not free to leave' The issue is about how carers would react if the person did try to leave or if relatives/friends asked to remove them, not whether the person is asking to leave or showing by their actions that they wish to leave

  If both factors are present, the person is deprived of their liberty.

Step 1: Mental Capacity Assessment

Relevant Person's Name		Accommodation type	
Date of uptake of residence or admission		Date of current assessment or review	

Mental Capacity Assessment: Have regard to the 5 Statutory Principles of the MCA 2005

Test of Capacity (refer to Mental Capacity Act Section 2 & 3, and the Code of Practice Chapter 4)

Part One - Does the person have an impairment of, or a disturbance in, the functioning of mind or brain? **If no**, the person is deemed to have capacity by law. Stop the assessment at this point and seek advice from the care coordinator or a manager**. If yes**, proceed to part two.			Yes / No
Part Two - Does this impairment prevent the person from deciding to remain resident for the purpose of receiving care or treatment? Note: **This may require decision specific capacity assessments in relation to specific aspects of the care regime** and what this involves for the person. The 4 elements of the functional capacity test must be addressed below - does the person:			
1) Understand the information relevant to the decision?	Yes / No	2) Retain the information long enough to come to a decision?	Yes / No
3) Weigh the information in order to come to a decision?	Yes / No	4) Communicate their decision?	Yes / No
Outcome of part two of the assessment: Does the relevant person have the capacity to consent to remain at the home / be admitted to the accommodation?	**YES:** <u>the person **has capacity**</u> If the answer to **all** of the questions in part 2 above is "Yes" the person has the capacity to decide to remain at the accommodation. No further action required. **No:** <u>the relevant person **lacks capacity**</u> If the answer to **any** of the questions in part 2 is "No" the person lacks the capacity to decide to remain at the accommodation. Please continue with the Individual Scale Tool below.		

Step 2: Individual Scale Tool

If the relevant person **lacks the capacity to consent** to be accommodated please proceed to complete the Matrix below.

To determine whether an individual has been deprived of their liberty, specific factors need to be considered such as the type, duration, effects and manner of implementation of the measures in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity; it is useful to envisage a scale which moves from 'restraint' or 'restriction' to 'deprivation of liberty'.

Please note:
A score of 1 indicates 'never happens'
A score of 2 indicates 'happens on very rare occasions'
A score of 3 indicates 'happens occasionally'
A score of 4 indicates 'happens frequently'
A score of 5 indicates 'happens all of the time'

The person loses autonomy because they are under **continuous supervision and control** and **is not free to leave (The 'acid test' of the Supreme Court)**	Yes – score: 1-5 No (circle)	Total
Carers exercise complete and effective control over the care and movement of the person for a significant period	Yes – score: 1-5 No (circle)	Total
Carers exercise control over assessments, treatment, contacts and residence	Yes – score: 1-5 No (circle)	Total
Restraint is used	Yes – score: 1-5 No (circle)	Total
The person is unable to maintain social contacts because of restrictions placed on their access to other people	Yes – score: 1-5 No (circle)	Total
A decision has been taken that the person will not be released into the care of others, or permitted to live elsewhere, unless the carers consider it appropriate	Yes – score: 1-5 No (circle)	Total
A request by family, friends or carers for a person to be discharged to their care is refused	Yes – score: 1-5 No (circle)	Total
Total score: Note a score of 3+ in any category , or accumulated, may indicate a deprivation of liberty	0 – 35 =	Total

Step 3: Impact score

This matrix below enables you to gauge the impact on an individual; using points based within 2 main areas: **likelihood** of the measures arising, and the **impact** on the individual.

Using the matrix below please identify the likelihood and the impact of the restrictions.

Likelihood of Restriction factors - Consider the type, nature / substance, manner of implementation and their regularity of occurrence	**Impact**: Degree or intensity of restriction of liberty. Consider the Duration and Effects				
	Insignificant	Minor	Moderate	Major	Fundamental
Certain					**5+**
Likely				4	
Possible			3		
Unlikely		2			
Rare	1				

Add together the scores identified within stage 2 and stage 3 Total Score =

Providers should err on the side of caution when deciding what constitutes a deprivation of liberty. Any score of 3 or more in any category might give sufficient cause to believe the person is being deprived of their liberty. On completion, submit this form to the funder / placing authority to consider need for an assessment.

Signed:	Date:
Position / Job role:	Location (where assessment taken has taken place):

To the Assessor:

Please indicate who you have forwarded a copy of this assessment, in the box below.

Please place a copy of this assessment in the care plan file for record.

Health or Social Care Key Worker

- Name:
- Contact details:

Within Provider Organisation

- Name:
- Contact Details:

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Appendix 2:

Initial Assessment for Domestic DoL (Operations)

This report is undertaken where an unauthorised deprivation of liberty of a person is identified in a 'domestic setting', e.g.: supported accommodation/shared lives/adult placement, or otherwise where the state has a responsibility (i.e.: the health or social care services placing/funding the person).

For these purposes there is an unauthorised deprivation of liberty if:

a) A person is kept in circumstances that amount to depriving them of their liberty, in that they are under continuous **supervision and control, and they are not free to leave**

and

(b) Their deprivation of liberty has not been authorised by a declaration of the Court of Protection, and nor is relevant declaration presently being sought from the court.

(c) **The person lacks mental capacity for the decision to be accommodated in the care circumstances described below**

PART A – BASIC INFORMATION

Details of person completing the report: Note this form will be completed by the relevant person's allocated or reviewing: - Social Worker - Care Coordinator - Case Manager Or allocated professional from the appropriate placing/funding authority	Name	
	Address	
	Profession	
Full name of the person being assessed	Name	
PARIS Number		NHS Number
Their date of birth (or estimated age if unknown)	DOB	d d m m y y y y
	Est. age	Years
Name or description of the relevant person's accommodation, e.g.: - Supported Accommodation - Shared Lives/ Adult Placement - Other	Name	
	Address	
Name and address of provider/	Name	

organisation responsible for commissioning the care to the relevant person, e.g.: - Local Authority - NHS	Address	
Person to contact at the above provider/ organisation,	Name	
	Telephone	
	Email	

PART B – RECORD OF THE ASSESSMENT

I have initially assessed whether or not the person is being cared for in circumstances that amount to a deprivation of their liberty.

A person is kept in a care circumstances that amount to depriving them of their liberty, if they are under **continuous supervision and control, and they are not free to leave.**

Place a cross in EITHER box B1 OR box B2

B1	I have concluded that the person **IS NOT** being cared for in circumstances that amount to a deprivation of their liberty. *Save this assessment tool on PARIS*	☐
B2	I have concluded that the person **IS NOT** being cared for in circumstances that amount to a deprivation of their liberty, as the care plan where required CAN be, and has NOW BEEN, adjusted to be delivered in a less restrictive manner.	☐
B3	I have concluded that the person **IS** being cared for in circumstances that amount to a deprivation of their liberty, and the care plan **CANNOT** be delivered in a less restrictive manner and / or care environment whilst still meeting the person's best interests. *Proceed to question 1 – 4 below:*	☐

My reasons for concluding that the person is, or is not, being kept in the accommodation in circumstances that amount to a deprivation of their liberty that are detailed in 1-4 as follows:

Question 1. The reasons for my opinion concerning whether or not the arrangements for the person's care circumstances amount to depriving them of their liberty in this accommodation, are:

The relevant person <u>is / is not</u> under continuous supervision and control, and they are not free to leave.

Where the relevant person is noted to be deprived of their liberty, the following sections 2-4 are also required to be assessed.

Question 2. If the arrangements amount to depriving the person of their liberty, the reasons for my opinion that they are, or are not, in the person's best interests, are:

You can include a balance sheet.

Question 3. If the arrangements amount to depriving the person of their liberty, the reasons for my opinion that they are, or are not, necessary in order to prevent harm to the person, are:

Include the particulars of the harm that will be avoided by depriving the person of their liberty.

Question 4. If the arrangements amount to depriving the person of their liberty, the reasons for my opinion that they are, or are not, a proportionate response to the likelihood of the person otherwise suffering harm and the seriousness of that harm, are:

Include why the risk of harm, and the seriousness of harm, justifies the deprivation of liberty.

PART C — INFORMATION AS TO WHETHER ANY DETENTION IS AUTHORISED

Only complete Part C of the form if you concluded that the person IS being kept in this accommodation in circumstances that amount to a deprivation of their liberty.

C1	I am satisfied that a Court of Protection order, is in force in relation to the person's deprivation of liberty, or that a relevant order is presently being sought from that particular court ☐
C2	It appears to me that the deprivation of liberty of the person is not authorised by the Court of Protection nor is a relevant order presently being sought from that particular Court. ☐

C3	I am unable to say whether or not the person's deprivation of liberty is authorised by the Court of Protection or whether any relevant order is presently being sought. ☐

PART D – PERSONS WHO HAVE BEEN CONSULTED

D1	In undertaking this assessment, I have consulted the following person stated below:	
	Name and relationship to the person	**Address**
1		
2		
3		
4		
5		

WHAT TO DO NOW

PART E – PROVIDING COPIES OF THIS ASSESSMENT
AND
Evidence that the person lacks mental capacity for the decision to be accommodated in the care circumstances described.

Copies of this assessment and the Mental Capacity Assessment (referred to above) should be provided to the following:

- The person who was the subject of the request to decide whether or not there was an unauthorised deprivation of liberty.
- The care provider named in Part A above.
- Any IMCA or advocate.
- Anyone consulted about what is in this person's best interests who is neither a professional nor is being paid to provide care, whom it is appropriate to provide representation for the persons best interests – Namely, those engaged in caring for the person or who are interested in their welfare.
- The Line Manager of the person completing this assessment.
- The responsible Commissioner or funding body
- The DoLS Team in Torbay
  3rd Floor Union House
  Union Street
  Torquay
  Devon
  TQ1 3YA
  Email: dolstorbay@nhs.net
  Tel: 01803 219832

Torbay and South Devon NHS
NHS Foundation Trust

Appendix 3:

Domestic DoL Triage Tool

Date of DoLs Triage: **Triage Practitioner signature**	**Name of client:** **DOB:** **Application Number:**	**Name of Provider** **Name of Operational Practitioner** **IMCA details (if involved)**
Column 1. Type of restriction / restraint / control / supervision / article 5/8	**Column 2** Place tick if column 1 is evident within application	**Column 3 - Comments** Type/Frequency/Duration/Impact
Physical / pharmacological / Mechanical / Environmental Restraint / Restriction		
Attempts to leave (High outcome)		
High level of intensive observation (High outcome)		
Family requesting discharge or Objection from RP / Family / IMCA / LPA / Deputy / other (High outcome)		
Restrictions placed on social contacts (High outcome) Article 8 seek further information ASAP		
Palliative Care and objection (High outcome)		

Use of Physical restraint (High Outcome)		
Requesting to leave but not making active attempts to leave (Medium outcome)		
Safeguarding Adult concern (High outcome) Discuss with S/A Ops manager or Safeguarding Facilitator ASAP If no notification open alert SPOC ASAP		
Accumulation of restrictions with no objection / no evidence of distress (Medium Outcome)		
Acid test met but none of the above identified (Low Outcome)		

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Name: …… DOB: ……

Triage Outcome (please circle)

High Medium Low

Provide Clear Rationale for Triage outcome decision below

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Practitioner Signature: - …… **Date:-**……

Evidence of follow up discussions and actions taken:-

Detail date operation practitioner contacted and date of initial meeting arranged

Any other significant information such as requesting additional information to support triage decision making

Date: **Signature:**

Appendix 4:

Report template in respect of an application to the Court of Protection for direction under Section 16 of The Mental Capacity Act 2005

1. Author of report and status:-

- Detail your full name
- Detail your professional Status: Include this statement and add information as appropriate:

'I am a qualified …….. …….and am employed by ……..

'In preparing this statement I have spoken to and taken into consideration the views and opinions expressed by the following people: (List all people consulted and their tile/job title).

'I have gathered the relevant information for this application from the following sources: (list all information accessed such as care plans both corporate and independent provider /risk assessments/capacity assessments/best interest meetings etc.

I am based at (Provide full work address)

2. Relevant Persons details:-

- Detail the full name of the person for whom the application is being made.
- Detail the person's DOB:
- Detail the person's current address and how long they have been resident there
- Detail any transition plan if appropriate, including details about review and P's
- reaction to his or her new placement
- Detail how the placement was chosen and how it is working.
- Detail any recent change or planned change in the care package (with reasons)
- Detail the tenancy agreement (if there is one) and who has the authority or needs to apply for the authority to sign it on P's behalf
- Provide the details of the Commissioners of the care.
- Provide the details of the Providers of Care (inclusive of the details of any management companies).
- Provide the details of any person/s with legal status such as Power of Attorney/Court appointed Deputies and any restrictions or conditions set within it, by the Donor or the Court of Protection.
- Detail other frameworks in place such as the Mental Health Act, and provide the details of any appointed Guardian.
- Detail how long you have known the person and worked /supported them, and provide a very brief background history.

3. Details of the issue(s) that the Court is being asked to consider:

- The person has been assessed as lacking the mental capacity to make decisions in relation to their residence and care, and the care arrangements appear to have the effect of depriving them of their liberty, (under continuous supervision, control and not free to leave) therefore infringing their Article 5 of the ECHR to liberty.
- The Court is asked to consider the arrangements in place, which have the effect of depriving ……. of their liberty, and to make provision for them to be lawfully implemented.
- Details to inform whether this is a new application to the Court.
- Details to inform if the application is seeking to renew an existing Court Authorisation.
- If seeking to renew an existing Court Authorisation on what date will the existing order expire.

4. Details of Capacity assessment:-

- Ensure the capacity assessments are decision specific and relevant i.e. in relation to capacity to consent to reside at x for the purpose of receiving care and or treatment.
- Detail the name, profession and skill of the assessor.
- Detail the name and contact details of the medic who undertook the 'unsoundness of mind' aspect of the capacity assessment.
- Detail what relevant information was provided to the person, within the assessment.
- Detail how relevant information was presented for e.g. What communication aids/methods were implemented to support communication and understanding?
- Other steps taken to help/maximise the person make decision themselves.

5. What are the risks to the person and what significant harm will be prevented?

- Reference to all relevant and robust risk assessments and provide the date and details of the assessors.
- Detail any sedation or restraint which is, or may be used
- Detail why the care arrangements are a proportionate response to the risk.
- What harm is being avoided/prevented or reduced as much as possible by implementing such restrictive measures within the care arrangements.
- Detail consideration of positive risk taking and how this will be supported safely.

6. What options have been considered?

- Detail the benefits and burdens of each.
- What options have been considered /tried.
- Detail why various options have failed.

7. What are the views /opinion expressed by the person past or present?

- Detail what is most important to the person regarding the decision.
- Detail how this information has been gathered and what additional support may have been necessary, such as communication aids to support the person in expressing their views.

8. What are the views and opinions of Family, Representatives/LPA/Court appointed Deputy?

- Detail views/opinions expressed by each individual person consulted.
- Detail how this information was sought.
- The participation of family and friends in the past
- How the family or friends have provided and will provide balanced support for P in his or her best interests
- Why family and friends support the care package which is propose
- How the family and friends have been included in the process

9. What are the views and opinions of health and social care staff, c, or is expressing a view that conflicts with the views expressed by others, carers /IMCA's?

- Detail name and professional views expressed by each person consulted and reference any reports they have produced.
- Ensure that you have access to all professional reports to submit alongside the court application, if required.

10. Are there any conflicts or objections?

- Detail anyone who has objected to the care arrangements
- If the person themselves is objecting to the care arrangements , detail how long their objection has been evident, how the person is expressing their objection, how intense any expressions of objection are and the impact this has on the person.
- Detail the nature of the objection.
- Detail all steps taken to resolve any objection or dispute.
- Provide clear detail of any outstanding conflict/objection.

11. Why are the proposed care plans in the person's best interest?

- Reference consideration of section 4 of the MCA
- Provide full consideration of the best interest checklist
- Detail all Less restrictive options

- Can the decision be delayed? and will the person be in a position to make the decision themselves in the future? If it is not possible to wait provide details to inform why not.

- **MOST IMPORTANT …THE VIEWS AND OPINIONS OF THE PERSON BOTH PAST AND PRESENT. THIS IS ESSENTIAL**
- Provide your professional view/rational and analysis (ESSENTIAL) and clearly state your profession position.

12. Details of person(s) to be notified of the proceedings:-

- Provide a full and comprehensive list of all people who have been notified that an application is being made to the Court.
- Detail anyone with legal authority such as lasting power of attorney/court appointed deputy.
- Detail the type of authority the above have and any restrictions or conditions specified by the Donor or the Court.

13. Finishing the report:-

Add the statement 'I believe this report to be a true and faithful record'. It I has been compiled from case files and contemporaneous notes.

- Ensure you date the report
- Ensure you sign the report
- Provide a list of Appendices

Appendix 5:

Name:	Main ID:	Completed by:

FACE Mental Capacity Assessment

What prompted this assessment? *(i.e. summary of relevant history)*

Details:

What is the specific decision to be taken? *(If this is a review, detail previous decision about capacity)*

Details:

Key roles	Closest person	Lasting Power of Attorney (LPA) – health and welfare	Enduring Power of Attorney (EPA)/ LPA – financial	Court of Protection Deputy (CPD)	Other
Name					
Tel. No.					
Role					

Determination of capacity *(This is a specific, not general determination. Note any documentation referenced)*

Is there an impairment of or disturbance in the functioning of the person's mind or brain?	*Permanent impairment* ☐	*Fluctuating impairment* ☐	*Temporary impairment* ☐	*No* ☐

Details:

Is the person able to understand information related to the decision?	*Yes* ☐	*No* ☐

Details:

Are they able to retain information related to the decision?	*Yes* ☐	*No* ☐

Details:

Are they able to use or weigh the information whilst considering the decision?	*Yes* ☐	*No* ☐

Details:

Are they able to communicate their decision by any means?	*Yes* ☐	*No* ☐

Details:

A 'No' answer in any of the 4 domains above constitutes incapacity. If all 'Yes' go to Assessment Summary.

Were all reasonable steps taken to maximise the person's capacity to make the decision?	*Yes* ☐	*No* ☐

Details:

Can the decision be delayed because the person is likely to regain capacity in the near future?	*Yes* ☐	*Not likely to regain capacity* ☐	*Not appropriate to delay* ☐

Details:

Who was consulted about the determination? *(Give names and roles. If case conference held detail attendees)*

Details:

Name:		Main ID:		Completed by:	

Advance decisions to refuse treatment *(Note any documentation referenced)*

Is there an advance decision relevant to the decision?	*No* ☐	*Yes* ☐	*If yes select option and give details*	*Similar treatment* ☐	*Similar circumstances* ☐

Details of similar treatment or circumstances:

Advance decision type	*Written* ☐	*Verbal* ☐	Date of advance decision	

What was the decision? *(Give details. If advance decision was verbal, detail to whom, in what circumstances)*

Details:

Is this decision still applicable?	*Yes* ☐	*No* ☐	*If 'No' select option below and give reasons (check guidance)*

Withdrawn ☐	*Unanticipated circumstances* ☐	*LPA/EPA granted regarding decision* ☐	*Inconsistent behaviour* ☐	*Detained under Mental Health Act 1983* ☐	*Other* ☐

Details:

Determination of best interest *(Note any documentation referenced)*

IMCA required?	*No* ☐	*Yes* ☐	Name		Tel. No.	

What is most important to the person as regards this decision? *(Current and past views, e.g. written statement)*

Details:

Views of interested others *(E.g. family, friends, carers, LPA, IMCA, CPD, etc. Give names and roles. If no-one justify)*

Details:

Views of professionals involved

Details:

Describe any possible conflicts of interest with regard to this decision

Details:

Assessment summary *(Remember any judgment about mental capacity is specific to this decision)*

Decision requires arbitration?	*No* ☐	*Independent mediation* ☐	*Court of Protection* ☐

Considering all the factors what final decision has been reached? *(If arbitration required detail)*

Details:

I confirm that this decision is the least restrictive option or intervention possible. Special considerations for life-sustaining treatment have been considered or are not applicable. This decision has not been biased by age, appearance, condition, gender or race. Every effort has been made to communicate with the person concerned.

Decision-maker		Role	
Organisation		Telephone no.	
Signature		Electronic ☐	Decision date

FACE Mental Capacity Assessment Version 2 Page 2 of 2

Appendix 6:

Best Interest Checklist

It is recognised that most significant decisions regarding someone who lacks capacity will be made in the context of a multidisciplinary discussion.
However, the 'decision maker' is the person who is proposing to take action so in the case of medical treatment it is the doctor, if nursing care the nurse, if social care then social worker and so on.

Section 4 of the Mental Capacity Act sets out a checklist of factors to be considered by the decision maker whilst considering the best interests of the person. A brief summary is given below but reference should be made to the Mental Capacity Act Code of Practice.

Factors to be considered

- No decision is made solely on the basis of a person's age, appearance or other aspect of behaviour that might lead others to make unjustified assumptions.
- All relevant circumstances
- Likelihood of regaining capacity – could the decision be delayed?
- As far as possible encourage the person to participate.
- If life-sustaining treatment then the decision must not be motivated by a desire to bring about their death.
- Is it possible to ascertain the persons past and present wishes and feelings?
- Is it possible to ascertain their beliefs and values?
- The views of other people in particular anyone formerly named by the person to be consulted, those involved in caring for the person, those interested in their welfare, donees of a lasting power of attorney or any court deputy. Consultation with Independent Mental Capacity Advocate if one is required.

Decisions must be clearly recorded in the case notes.

Appendix 7:

1. Consultation checklist

It is a requirement that the person for whom the application is about is provided with the following information:

- That the application is being made to the court.
- That the application is to consider whether they lack the capacity to make decisions in relation to their residence and care, and whether to authorise a deprivation of their liberty in connection with the arrangements set out in their care plan.
- What the proposed arrangements under the order sought are:
- That the person is entitled to express their views, wishes and feelings in relation to the proposed arrangements and the application, and that these will be communicated to the Court.
- That the person is entitled to take part in the proceedings and to receive support to do this.
- That the person will receive help to obtain advice and support if they do not agree with the proposed arrangements within the application.

2. Consultation with other persons regarding the making of the application

It is also a requirement for the Practitioner to ensure that the following people are consulted about the intention to make the application. It is best practice do this verbally and to follow up with a supporting letter:

- Any Donee of a lasting power of attorney granted by the person.
- Any Deputy appointed by the Court, together with at least 3 people in the following categories.
- Anyone named by the person as someone to be consulted on the matters raised within the application.
- Anyone engaged in caring for the person or interested in their welfare.

When consulting with such people the following information must be provided

- That the application is being made to the Court.
- That the application is to consider whether the person lacks the capacity to make decisions in relation to their residence and care and whether they should be deprived of their liberty in connection with the arrangements set out in their care plan.
- What the proposed arrangements under the order are.
- That the person will also be informed of the application to the Court unless in the circumstances it is inappropriate to give the person such information

.

The Mental Capacity Act 2005

The Mental Capacity Act provides a statutory framework for people who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a time when they lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about this. It covers a wide range of decision making from health and welfare decisions to finance and property decisions

Enshrined in the Mental Capacity Act is the principle that people must be assumed to have capacity unless it is established that they do not. This is an important aspect of law that all health and social care practitioners must implement when proposing to undertake any act in connection with care and treatment that requires consent. In circumstances where there is an element of doubt about a person's ability to make a decision due to 'an impairment of or disturbance in the functioning of the mind or brain' the practitioner must implement the Mental Capacity Act.

The legal framework provided by the Mental Capacity Act 2005 is supported by a Code of Practice, which provides guidance and information about how the Act works in practice. The Code of Practice has statutory force which means that health and social care practitioners have a legal duty to have regard to it when working with or caring for adults who may lack capacity to make decisions for themselves.

"The Act is intended to assist and support people who may lack capacity and to discourage anyone who is involved in caring for someone who lacks capacity from being overly restrictive or controlling. It aims to balance an individual's right to make decisions for themselves with their right to be protected from harm if they lack the capacity to make decisions to protect themselves". (3)

All Trust workers can access the Code of Practice, Mental Capacity Act 2005 Policy, Mental Capacity Act 2005 Practice Guidance, information booklets and all assessment, checklists and Independent Mental Capacity Advocate referral forms on iCare

http://icare/Operations/mental_capacity_act/Pages/default.aspx

Infection Control

All staff will have access to Infection Control Policies and comply with the standards within them in the work place. All staff will attend Infection Control Training annually as part of their mandatory training programme.

Torbay and South Devon NHS
NHS Foundation Trust

NHS South Devon and Torbay Clinical Commissioning Group

NHS South Devon Healthcare NHS Foundation Trust & Torbay and Southern Devon Health and Care NHS Trust

Rapid Equality Impact Assessment *(for use when writing policies and procedures)*

Policy Title (and number)	Practice Guidance to support Practitioners and Managers when making applications to the Court of Protection for people deprived of their liberty within a domestic setting in Torbay				
Policy Author	Nicola Griffin				
Version and Date (of EIA)	Version 1 Date 31/03/2016				
Associated documents (if applicable)					
RELEVANCE: Does the aim/purpose of the policy relate to each of the aims of the Public Sector Equality Duty?					
· Eliminate unlawful discrimination or other conduct prohibited by the Equality Act 2010					Yes ☒ No☐
· Advance equality of opportunity between people from different groups					Yes ☒ No☐
· Foster good relations between people from different groups					Yes ☒ No☐
SIGNIFICANCE AND IMPACT: Consider the nature and extent of the impact, not the number of people affected.					
Does the policy affect service users, employees or the wider community? (if no, proceed to sign off)					Yes ☒ No☐
Does the policy affect service delivery or business processes?					Yes ☒ No☐
Does the policy relate to an area with known inequalities (deprivation/unemployed/homeless)?					Yes ☒ No☐
EQUALITY ANALYSIS: How well do people from protected groups fare in relation to the general population? ***PLEASE NOTE: Any 'Yes' answers may trigger a full EIA and must be referred to the equality leads below***					
Is it likely that the policy/procedure could treat people from protected groups less favorably than the general population? (see below)					
Age	Yes ☐ No☒	Disability	Yes ☐ No☒	Sexual Orientation	Yes ☐ No☒
Race	Yes ☐ No☒	Gender	Yes ☐ No☒	Religion/Belief (non)	Yes ☐ No☒
Gender Reassignment	Yes ☐ No☒	Pregnancy/ Maternity	Yes ☐ No☒	Marriage/ Civil Partnership	Yes ☐ No☒
Is it likely that the policy/procedure could affect particular 'Inclusion Health' groups less favorably than the general population? (substance misuse; teenage mums; carers; travellers; homeless; convictions; social isolation; refugees)					Yes ☐ No☒
Please provide details for each protected group where you have indicated 'Yes'.					
What if any, is the potential for interference with individual human rights? (consider the FREDA principles of Fairness/ Respect/ Equality/ Dignity/ Autonomy)					
This document links directly with the protection of Article 5 of the Human Rights Act 1998.					
RESEARCH AND CONSULTATION					
What is the reason for writing this policy? (What evidence/ legislation is there?)					
Landmark Supreme Court Ruling 13TH March 2014					
Who was consulted when drafting this policy/procedure? What were the recommendations/suggestions?					
ACTION PLAN: Please list all actions identified to address any impacts					
Action			**Person responsible**		**Completion date**
1. Report to the Community Health & Social Care Divisional Board			**Nicky Griffin / Joanna Williams**		**Awaiting a date**
2. Development and launch of implementation Communication strategy			**Nicky Griffin/Joanna Williams**		**April 2016**
3. Develop and launch training and awareness for Organisational staff and providers within Torbay			**Nicky Griffin**		**April 2016**
AUTHORISATION					

Name of person completing the form		**Signature**	
Validated by (line manager)		**Signature**	

Please contact the Equalities team for guidance:
For South Devon & Torbay CCG, please call 01803 652476 or email marisa.cockfield@nhs.net
For Torbay and South Devon NHS Trusts, please call 01803 656676 or email pfd.sdhct@nhs.net

This form should be published with the policy and a signed copy sent to your relevant organisation