

## **AN EXPLANATION ABOUT DEPRIVATION OF LIBERTY SAFEGUARDS AND THE ROLE OF THE REPRESENTATIVE**

### **DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS)**

The DoLS are part of the Mental Capacity Act 2005 (MCA). The MCA is a piece of legislation which provides a way of making a decision for a person who is unable to make a decision for themselves. Being unable to make a particular decision about something is described as 'lacking capacity' to make that decision.

The DoLS relate to Article 5 of the European Convention of Human Rights, which requires that in order to deprive someone of their liberty, it needs to be justified legally and provide the person with the right to appeal against the deprivation.

The law says that if someone is being accommodated in order to give care and treatment and they lack the capacity to consent to this; and they are under continuous supervision and control and not free to leave, that person is being deprived of their liberty. In these circumstances the DoLS provide the legal framework to deprive someone of their liberty, in a hospital or a registered care home.

In order to decide whether a deprivation of liberty is happening and that it is the right thing for the person, they are assessed by a Best Interests Assessor and a doctor. If all of the assessments confirm that the person meets the requirements, including that the restrictions are the minimum required and in the persons best interests; the local authority (supervisory body) can grant authorisation for the person to be deprived of their liberty for up to a year.

If authorisation is granted, the supervisory body must appoint someone to act as "the Relevant Person's Representative". In this note, that person is called "the Representative". The person who is being deprived of their liberty is called "the person".

### **THE REPRESENTATIVE**

The Representative has a specific role to support the person. They need to be able to visit the person regularly. They can ask for a review of the DoLS authorisation, or if necessary, help the person complain or enable them to appeal to the Court of Protection about the decision to deprive them of their liberty. It is important that the Representative can carry out all of their expected functions.

## **Choosing a Representative**

During the DoLS assessment process the Best Interest Assessor will speak to the person being accommodated in the hospital or care home, as well as family and friends involved. This will help them make a decision about their assessment. It will also help them identify if there is someone who can be the Representative if an authorisation is made.

A Representative can be selected by the person who is being assessed, if they have the capacity to make this decision. They can also be selected by someone who holds a lasting power of attorney or has been appointed as deputy in respect of the person's health and welfare. If neither of these options are available, the Best Interest Assessor will recommend someone who could be a Representative.

If you are a family member or friend involved with a person being assessed under the DoLS, you might have already had a conversation with a Best Interests Assessor about whether you would be in a position to be the person's Representative.

If you have spoken to the Best Interests Assessor about being willing to be the person's Representative you will receive a copy of the assessments and the authorisation. If you decide you are able to take on this role, please complete the last page of form 5 to confirm this, and return it in the envelope provided. The rest of the paperwork is for your information only, to help you carry out your role and support the person.

## **Advice and Information for the Representative**

To help the Representative with their role, they will receive contact from an Independent Mental Capacity Advocate (IMCA). An IMCA is independent from the council. They are there to assist the Representative with supporting the person and ensure that the Representative is able to carry out their role and uphold the person's rights. The IMCA will provide South Gloucestershire Council with regular updates in the form of a report. If you have been identified as a Representative, you should receive a phone call from an IMCA. Both the Representative and the IMCA are there to offer an extra check in the system in order to ensure that the rights of the person are upheld.

## **Ending the Representative's role**

Because it is such an important safeguard for the person, if the Representative is unwilling, unable or for whatever reason is not carrying out their expected functions, the local authority can end the Representative's involvement and appoint another Representative. This could be a Paid Representative if required. The Representative's role might end also if the person has capacity to object to this appointment and does so, or someone who holds a lasting power of attorney or has been appointed as deputy in respect of the person's health and welfare objects to the appointment. The Representative's role will also automatically end when the DoLS authorisation comes to an end.

## **REVIEWS**

Part of the Representative's responsibility is to ask for a review of the DoLS authorisation if it is required. This is not the same as a care review. It is only concerned with the deprivation of liberty.

A review can only be requested if there has been a change to the person's circumstances, which may affect the DoLS authorisation or a condition\*. This might include a change in their mental health, their capacity to make the decision about their accommodation, or whether the DoLS is in the persons' best interests.

(\* A condition is something the hospital or care home is required to do in order for the DoLS to be authorised. Not all DoLS authorisations have conditions. If they do you will find them in form 5 Authorisation. A Representative should make themselves aware of any conditions so they can ensure they are being carried out)

### **Asking for a review**

If the Representative wishes to ask for a review, they should contact the Supervisory Body (DoLS team South Gloucestershire Council) and state what they consider needs to be reviewed. The DoLS team will arrange for an assessment of that issue if they are satisfied that the requirements for a review are met. For example if the Representative thinks the DoLS authorisation is no longer in the person's best interests, a best interests assessor could be asked to assess whether the DoLS authorisation is still in the persons Best Interests.

## **APPEALS**

The right of the person to appeal against their deprivation of liberty is extremely important. A big part of the Representative's role is to ensure that the person is able to access this right. The DoLS have the same status in law as other ways of depriving someone of their liberty, such as using the Mental Health Act or being sentenced to prison for a crime. In a similar way, if the person disagrees with the decision, they can appeal against their detention. This might sound far removed from the circumstances of a relative who is being provided care and support in a care home or hospital, where all have agreed it is in the person's best interests. However, it is an important safeguard that recognises that everyone has the right to challenge significant restrictions on their lives.

### **When to help the person appeal**

If the person is objecting to being accommodated in the care home or hospital where they are being deprived of their liberty then the Representative is required to help the person appeal. The objection can be spoken, such as 'I don't want to be here', or involve physically trying to leave or an expression in any other way. The reasonableness of the person's objection is not relevant to whether an appeal should take place. A person may wish to leave to go somewhere that no longer exists or for a reason based on confusion about present circumstances. This still constitutes an objection in law and an appeal must be made to the Court of Protection.

It is important to say that an appeal does not mean that the decision for the person to be accommodated was wrong. It is entirely possible that the court will agree with the decision. The appeal is about providing independent scrutiny from the Court of Protection to ensure all available alternatives to the DoLS have been properly explored. The Court will look at the reasons for the accommodation and why the person is objecting.

### **The Representative's view**

The Representative does not have to agree with the person's objection, in order to help them appeal. But it is recognised that some relatives or friends might find it a very difficult thing to do, particularly if the relative has been involved in the decision for them to be accommodated in a care home or hospital. If the relative feels that they are unable to help the person to appeal, then an alternative Representative would need to

be identified. If there are no other friends or family members able to take on the role, a paid Representative will be appointed. They would be an independent professional usually working within an advocacy organisation. If a paid Representative is appointed, this doesn't change the importance and involvement of other friends and family, who remain significant people in the person's life.

### **How to help the person appeal**

This is a very straightforward process for the Representative. Included with the information the Representative receives from the Supervisory Body will be a list of solicitors who are able to carry out this work. The person is entitled to legal aid to make one appeal per DoLS authorisation. Once the solicitor has received the information, they will progress with the appeal.

### **Complaints**

The Representative needs to consider whether it is appropriate to make a complaint using the Local Authority's complaints process. A complaint will not usually be suitable where the person wants to be able to leave their placement. It may be appropriate if the person is unhappy with the process that has been followed or the conduct of someone they have dealt with.

## **IMCA FOR THE PERSON OBJECTING**

If a person is considered to be objecting to their accommodation when a DoLS authorisation is made, South Gloucestershire Council will automatically ask for an Independent Mental Capacity Advocate (IMCA) to become involved. This is to provide an additional support and safeguard for this person in ensuring their rights are upheld. The IMCA will provide South Gloucestershire Council with regular updates in the form of a report.

## **BEST INTERESTS AND PRINCIPLES**

Anyone, including the Representative, who may be making a decision with a person assessed as lacking capacity to make the decision, must be acting in the person's Best Interests. This is a legal term in the MCA. This means they must encourage the person's participation and communication, involve significant others, have regard for the person's past and present wishes, not make assumptions and take all this into account before reaching a decision. When making a best interests

decision or taking any other action in relation to the MCA, anyone including the Representative must be directed by the statutory principles of the MCA. These are:

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

## **FREQUENTLY ASKED QUESTIONS FOR REPRESENTATIVES**

### **I have been sent a lot of paperwork, what do I do with it?**

You have been sent a copy of the DoLS assessments and authorisation because you have indicated that you are willing to be a Representative for a person you know well who is subject to DoLS authorisation (see explanation sheet). If you are willing to take on this role, complete the back page of form 5 and return it. Keep the rest of form 5 and the other documents, they contain useful information for carrying out your role. You don't need to do anything else with the documents other than to keep them safe, as they contain sensitive and confidential information about the person and should not be seen by a third party.

### **How does the Representative's role relate to the role of deputy or lasting power of attorney?**

The role of Representative is a separate function to a deputy or person with LPA and does not affect the role of the attorney or deputy. An attorney or deputy could also be the Representative but not necessarily. If they have health and welfare powers they are able to choose the Representative for the person.

### **This all seems very complicated, am I able to fulfil the role?**

The DoLS are recognised as a complicated process. It is not necessary to know the law in detail to be a Representative. The important thing is you know the person well, can maintain regular contact and can support and represent the person, including helping them to appeal if relevant. You can contact the DoLS team with any questions about the DoLS. An IMCA is also available to provide advice and information.

### **How long will I be the Representative?**

Usually it will be the duration of the DoLS authorisation. You can find the end date of the authorisation on form 5 in the paperwork you have been sent. Your role may end sooner if you are unable to carry out the role.

### **What happens if I am unable to continue to act as the Representative?**

Contact the DoLS team (Supervisory Body) and let them know. They will then appoint someone else. This could be a Paid Representative.

### **I don't feel able to help the person appeal, what do I do?**

This is an important part of the Representative's role. However it is recognised that this is not easy for some people. If you do not feel able to fulfil this part of the role, a different Representative will be appointed. This does not change the important part you play in the person's life, it just means the specific functions of a Representative are carried out by someone else.

### **Why has the person been provided with an advocate when they have a Representative?**

The person being deprived of their liberty has a right to an IMCA, who can help them have a voice and uphold their rights. If the DoLS team are aware that the person is objecting, they will also appoint an IMCA for the person. South Gloucestershire Council, as a supervisory body, has an overall responsibility to make sure the person has a right to appeal if they are objecting. By appointing an IMCA this is an extra safeguard to make sure that this is being monitored and action is taken where necessary.

**The person is objecting, but it is not based on reality and is inconsistent. Is this still an objection?**

It is understood that some people's thinking is affected by their condition, such as dementia for example. This can mean that they may be wanting to leave in order to go somewhere that is no longer an option, such as to their parents who have long since passed away. In law, this is still an objection and an appeal to the Court of Protection must be made. This is because it is for the court to decide, not anyone else, whether the objection should be upheld. The court will take into account all the information and how the decision to authorise a deprivation of liberty was reached.

**I am worried that an appeal will distress the person concerned, should it still go ahead?**

It is understood that it can be difficult to raise issues which are known to cause anxiety for the person. However if the person is raising a concern about their accommodation this still needs to be addressed by an appeal. But it can be approached sensitively. Involving an IMCA or gathering information from other sources as well as the person, are all options to limit the distress of repeatedly raising a distressing issue with the person.

**The accommodation is the best place for the person, why is an appeal still necessary?**

If a person is subject to a DoLS authorisation then a decision has been reached that the accommodation is in their best interests. This does not change the person's right to challenge this decision under Article 5(4) ECHR. It just means the decision is given independent scrutiny by the court.

## FURTHER INFORMATION AND CONTACT DETAILS

If you are interested in finding out more, the DoLS code of practice can be downloaded from the Department of Health website at [http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_085476](http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476) Please note that chapter 2 is out of date and what amounts to a deprivation of liberty has changed since its publication.

The MCA code of practice is also an essential guide to anyone involved with making decisions with someone who lacks the capacity to do so. You can download or order a copy from the government publications website at <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

The DoLS Team contact details:

DoLS Team  
South Gloucestershire Council  
Department for Children, Adults & Health  
PO Box 298  
Civic Centre  
High Street  
Bristol  
BS15 0DQ

Tel 01454 865824

[dolsteam@southglos.gov.uk](mailto:dolsteam@southglos.gov.uk) (please note this is not a secure connection)

If you would like to make a complaint please contact:

01454 865924 or e mail [CAHFeedback@southglos.gov.uk](mailto:CAHFeedback@southglos.gov.uk)

Or use the online feedback form at [www.southglos.gov.uk](http://www.southglos.gov.uk)

**Solicitors:**

Sheila Carrick, Mowbray Woodwards, Bath

Tel 01225 400666 Email [slc@mowbraywoodwards.co.uk](mailto:slc@mowbraywoodwards.co.uk)

Robert Agg, Mowbray Woodwards, Bath

Tel 01225 485747 Email [rja@mowbraywoodwards.co.uk](mailto:rja@mowbraywoodwards.co.uk)

Ben Grant, South West Law, Bristol

Tel 0117 3146416 Email [ben@southwestlaw.org.uk](mailto:ben@southwestlaw.org.uk)

Jess Flanagan, Clarke Willmott, Bristol

Tel 0845 2091160 Email [jess.flanagan@clarkewillmott.com](mailto:jess.flanagan@clarkewillmott.com)

Fiona McGhie, Irwin Mitchell, Bristol

Email [fiona.mcghie@irwinmitchell.com](mailto:fiona.mcghie@irwinmitchell.com)

Ronan Mulqueeny, Avon & Bristol Law Centre, Bristol

Tel 0117 9167708 Email [ronanm@ablc.org.uk](mailto:ronanm@ablc.org.uk)

Caroline Miles, Avon & Bristol Law Centre, Bristol

Email [carolinem@ablc.org.uk](mailto:carolinem@ablc.org.uk)

Polly Sweeney, Irwin Mitchell, Bristol

Email [polly.sweeney@irwinmitchell.com](mailto:polly.sweeney@irwinmitchell.com)

Fiona McGhie, Irwin Mitchell, Bristol

Email [fiona.mcghie@irwinmitchell.com](mailto:fiona.mcghie@irwinmitchell.com)

Katie Webber, Foot Anstey, Bristol

Tel 0117 9154953 Email [katie.webber@footanstey.com](mailto:katie.webber@footanstey.com)

Catrin Blake, Butler & Co, Taunton

Email [cb@butler-solicitors.co.uk](mailto:cb@butler-solicitors.co.uk)