

Mental Capacity Act 2005
Deprivation of Liberty Safeguards
Standard forms for best interests assessors

Introduction

This guidance booklet is intended for people undertaking best interests assessments for the purpose of the Mental Capacity Act 2005 Deprivation of Liberty Safeguards (the MCA DOLS).

The MCA DOLS apply to people in hospitals and care homes who lack the capacity to consent to the arrangements made for their care or treatment and who need to be deprived of their liberty, within the meaning of Article 5 of the European Convention on Human Rights, in their own best interests and to protect them from harm.

The main legislation relating to the MCA DOLS is sections 4A and 4B of, and Schedules A1 and 1A to, the MCA. It is important to bear in mind though that the MCA DOLS are in addition to other safeguards in the MCA, so any action taken under the MCA DOLS must be in line with the other provisions of the MCA. Section 4 of the MCA is particularly relevant when determining what is in a person's best interests.

Regulations¹ set out the eligibility criteria for MCA DOLS assessors. Assessors will be appointed by a "supervisory body", which will be the relevant Primary Care Trust or local authority. A standard referral form (Form 30) has been produced for supervisory bodies to use to appoint a best interests assessor. A copy of the form is included in the annex to this booklet.

This booklet is not intended to be a comprehensive stand-alone guide for best interests assessors. Consequently, it does not replicate information available from other sources. It does, however, cross-refer to other sources of information that a best interests assessor may need to consider when undertaking their assessment.

All MCA DOLS assessors should have an applied knowledge of the main MCA Code of Practice² (the main Code). The MCA DOLS supplement to the main Code³ (the MCA DOLS Code) is also an important source of information for assessors.

The role of the best interests assessor

¹ The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008, accessible via:
http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/DH_084948

² The main Mental Capacity Act 2005 Code of Practice is accessible via:
<http://www.dca.gov.uk/menincap/legis.htm#codeofpractice>

³ The MCA DOLS supplement to the main Code is accessible via:
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

What follows is a brief description of a best interests assessor's role. More detailed information about the role of the best interests assessor is contained in paragraphs 4.58 to 4.76 of the MCA DOLS Code. Chapter 5 of the main Code gives more general guidance on assessing best interests for the purposes of the MCA.

The MCA DOLS best interests assessment is a particularly important one, and is likely to be the most time-consuming of the MCA DOLS assessments due to the need to consult relevant interested parties.

The best interests assessor needs to decide whether DOL is occurring, or is likely to occur, and, if so, whether the DOL is in the best interests of the person being assessed. Chapter 2 of the MCA DOLS Code contains guidance on factors that need to be considered in deciding whether DOL is occurring.

In undertaking their assessment, the best interests assessor is required to take into account the views of anyone named by the person as someone to be consulted, anyone engaged in caring for the person, anyone interested in the person's welfare, or anyone who has Lasting Power of Attorney for the person or has been appointed as a deputy for the person by the court. Any Independent Mental Capacity Advocate instructed in respect of the person should also be consulted.

There is a requirement on a mental health assessor to consider what effect being deprived of liberty will have on a person's mental health, and to notify the best interests assessor accordingly so that the best interests assessor can take the information into account in compiling their assessment (paragraph 4.70 of the MCA DOLS Code). There is also a requirement, where the best interests assessor and the eligibility assessor are not the same person, for the best interests assessor to provide any relevant eligibility information that the eligibility assessor requests from the best interests assessor (paragraph 4.54 of the MCA DOLS Code).

In deciding that DOL will be in the best interests of the person being assessed, the best interests assessor must state what the maximum period for the standard MCA DOL authorisation should be. The maximum permitted period is 12 months but this should not be regarded as a norm (paragraph 4.71 of the MCA DOLS Code).

The best interests assessor should consider whether any conditions should be attached to a standard MCA DOL authorisation, for example regarding steps to be taken to keep contact with family or to ensure cultural or faith-based needs are met (paragraphs 4.74 and 4.75 of the MCA DOLS Code).

The best interests assessor should also consider whether there is anybody suitable to be appointed as a "relevant person's representative". Regulations⁴

⁴ The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008 accessible via: http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/DH_084948

set out the requirements relating to the selection and appointment of relevant person's representatives, and paragraph 4.76, and Chapter 7, of the MCA DOLS Code give guidance on the matter.

In addition to completing assessments as part of the standard MCA DOL authorisation process, best interests assessors may be asked to undertake assessments in the context of an MCA DOLS review (Chapter 8 of the MCA DOLS Code) or where there is a need to decide whether a person is being deprived of liberty without authorisation (Chapter 9 of the MCA DOLS Code).

Rights of MCA DOLS assessors to examine and copy records

All MCA DOLS assessors have a statutory right (paragraph 131 of Schedule A1 to the MCA) to, at all reasonable times, examine and take copies of:-

- any health record,
- any record of, or held by, a local authority and compiled in accordance with a social services function,
- any record held by a person registered under Part 2 of the Care Standards Act 2000,

which the assessor considers may be relevant to the assessment that is being carried out.

Standard forms for assessors

Standard forms have been prepared for completion by MCA DOLS assessors to record the outcome of their assessments. The standard forms are available on the DH website⁵. These are not statutory forms, so there is no absolute requirement to use them. However, their use is recommended since they lead assessors through the assessment process in a way that will enable them to ensure that they properly comply with the requirements of the MCA DOLS legislation, and they will promote a consistent approach to record-keeping.

Standard form 10 is the main form for completion by a best interests assessor to record the outcome of their assessment, either as part of the standard MCA DOL authorisation process or in the context of an MCA DOLS review.

Standard form 24, relating to the selection of a relevant person's representative, is also for completion by a best interests assessor as part of the standard MCA DOL authorisation process.

⁵ Forms and record-keeping guides for supervisory bodies and managing authorities are accessible via:
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089772. The guide for supervisory bodies includes a full set of the MCA DOLS standard forms.

Standard form 17 is for use where an assessor is asked to decide whether a person is being deprived of liberty without authorisation.

A supervisory body might ask a best interests assessor to undertake up to four other MCA DOLS assessments. The other four potential assessments, the related standard forms, and the paragraphs of the MCA DOLS Code that contain guidance on the relevant assessment are as follows:-

- Age assessment: standard form 5 (although the assessment can, alternatively, be recorded at Part H of standard form 10), paragraphs 4.23 and 4.24 of the MCA DOLS Code.
- No refusals assessment: standard form 8, paragraphs 4.25 to 4.28 of the MCA DOLS Code.
- Mental capacity assessment: standard form 7, paragraphs 4.29 to 4.32 of the MCA DOLS Code.
- Eligibility assessment: standard form 9, paragraphs 4.40 to 4.57 of the MCA DOLS Code. (Only best interests assessors who are also approved mental health professionals are eligible to complete this assessment.)

Copies of all the standard MCA DOLS forms that a best interests assessor might potentially be asked to complete are attached in the annex to this booklet.

The outcome of the assessment process

Although it is for a supervisory body to either give or refuse a standard MCA DOL authorisation, it has to do so on the basis of the outcome of the assessment process. If every assessment comes to the conclusion that the person being assessed meets the DOLS qualifying requirement to which the assessment relates, the supervisory body must give a standard MCA DOL authorisation. If any assessment comes to the conclusion that the person does not meet the relevant DOLS qualifying requirement, the supervisory body may not give a standard MCA DOL authorisation.

If a supervisory body is informed by a DOLS assessor that any qualifying requirement is not met, the supervisory body should inform any assessor still engaged in carrying out an assessment that they are not required to complete it.

It is important that a best interests assessor should give a copy of their best interests assessment report to the supervisory body that has requested it as soon as possible after the completion of the assessment. Similarly, they should give the supervisory body copies of any other of the MCA DOLS assessments that they have been asked to undertake as soon as possible.

Where the conclusion of the best interests assessment is that the proposed DOL is not in the best interests of the person being assessed, it will be most helpful if the best interests assessor includes in their assessment report recommendations about how deprivation of liberty could be avoided (paragraph 4.72 of the MCA DOLS Code).

Best interests assessors will need to use forms 5, 7, 8, 9, 10, 17, 24 and need to be aware of form 28.

Form 5: Age assessment form

Form 7: Mental capacity assessment form

Form 8: No refusals assessment form

Form 9: Eligibility assessment form

Form 10: Best interests assessment form

Form 17: Unauthorised deprivation of liberty assessment form

Form 24: Form by which a best interests assessor records their action in respect of the selection of a relevant person's representative

Form 28: Form by which a supervisory body appoints a best interests assessor

A continuation sheet has been developed as required for forms 5, 7, 8, 10 and 17.