

## Deprivation of Liberty Safeguards Guidance

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**This guidance may evoke concerns addressing the following policies/guidance:**

- **Safeguarding Adults**
- **Mental Capacity Act**
- **Therapeutic Restriction**

Please refer to the relevant guidance or contact the Trust  
Safeguarding Adults team for advice

The Mental Capacity Act 2005 provides a statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves. From 1 April 2009, the Act contains procedures for authorising the Deprivation of Liberty (DOL) in hospitals and care homes for some people who lack capacity to consent to being there.

Guidance on the operation of the procedures is contained in the Deprivation of Liberty Safeguards Code of Practice, which is a supplement to the main Mental Capacity Act 2005 Code of Practice.

The DOL Safeguards apply to people residing in a hospital or care home, aged 18 and over, who have a mental disorder and lack capacity to consent to the arrangements made for their care or treatment, but for whom receiving care or treatment in circumstances that amount to a DOL may be necessary to protect them from harm, and appears to be in their best interests. **The procedures do not apply to people detained under the Mental Health Act or individuals under the age of 18.**

On the 19<sup>th</sup> March, the Supreme Court handed down its judgement in the case of “P v Cheshire West”.

The judgement is significant in the determination of whether arrangements made for care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty.

A deprivation of liberty for such an individual must be authorised in accordance with one of the following legal regimes:

- a deprivation of liberty authorisation or Court of Protection order under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act 2005,
- Or (if applicable) under the Mental Health Act 1983.

## **Key Points/changes from the Supreme Court judgement**

There is now a revised test for deprivation of liberty

The Supreme Court has clarified that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights in the following circumstances:

- The person is under continuous supervision **and** control

**And**

- is not free to leave,

**And**

- The person lacks capacity to consent to these arrangements.

The above is known as “the acid test.”

The Supreme Court held that factors which are NOT relevant to determining whether there is a deprivation of liberty include

- The person’s compliance or lack of objection
- The reason or purpose behind a particular placement.
- It was also held that the relative normality of the placement, given the person’s needs, was not relevant. This means that the person should not be compared with anyone else in determining whether there is a deprivation of liberty.

## **Definitions**

### **Deprivation of Liberty (DOL)**

The term used in the European Convention on Human Rights about circumstances when a person's freedom is taken away. Its meaning in practice is being defined through case law.

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

An IMCA is someone who provides support and representation for a person who lacks capacity to make specific decisions, where the person has no-one else to support them.

### **Managing Authority**

The person or body with management responsibility for the hospital in which the person is, or may become, deprived of their liberty. York Teaching Hospital NHS Foundation Trust is the Managing Authority.

### **Relevant Person**

A person who is, or may become, deprived of their liberty in the hospital

### **Relevant Persons Representative**

A person, independent of the relevant hospital, appointed to maintain contact with the relevant person, and to represent and support the relevant person in all matters relating to the operation of the deprivation of liberty safeguards.

### **Restriction of Liberty**

An act that is imposed on a person that is not of such a degree of intensity as to amount to a deprivation of liberty.

### **Standard Authorisation**

An authorisation given by a supervisory body, after completion of the statutory assessment process, giving lawful authority to deprive a relevant person of their liberty in the relevant hospital.

### **Supervisory Body**

A primary care trust or local authority that is responsible for considering a deprivation of liberty request received from a managing authority, commissioning the statutory assessments and, where all the assessments agree, authorising deprivation of liberty.

## Urgent Authorisation

**An authorisation given by a managing authority for a maximum of 7 days, which may be subsequently extended by a maximum of a further 7 days by a supervisory body, that gives the managing authority lawful authority to deprive a person of their liberty in a hospital while the standard deprivation of liberty authorisation process is undertaken**

This guidance is to ensure the Trust, as a Managing Authority, meets its responsibilities under the Mental Capacity Act Deprivation of Liberty Safeguards. The guidance should be read in conjunction with the Mental Capacity Act Guidance (available on Staff Room) and the Mental Capacity Act (2005) Deprivation of Liberty Safeguards Code of Practice.

The guidance describes the legal framework at (Appendix A) and provides guidance on the identification of a possible deprivation of liberty (Appendix B).

In addition to the Codes of Practice the local guidance explains the procedures and the local process to request authorisation for a deprivation of liberty, if care is being managed in a way that constitutes, or is believed to constitute a deprivation of liberty. A flow chart summarising this is attached at Appendix C. Information relating to Standard Authorisation requests is attached at Appendix D and the Urgent Authorisation Process is attached at Appendix E.

This guidance identifies accountability and responsibilities for the Deprivation of Liberty Safeguards.

This guidance does not describe the process for the management of patients once they are subject to an authorised Deprivation of Liberty as this process is overseen by the Safeguarding Adults Team and individual departments will be supported by the Safeguarding Team to ensure ongoing compliance.

## **Accountability and Responsibilities**

### **Managing Authority**

York Teaching Hospital NHS Foundation Trust (in this context the Trust is the Managing Authority) will ensure the deprivation of liberty safeguards are implemented effectively by providing systems which support the safeguards.

### **Safeguarding Adults Governance Group**

The Safeguarding Adults Working Group is responsible for ensuring deprivation of liberty safeguard procedures and processes are in place and operating effectively across the organisation.

In Governance terms this is the Committee responsible for monitoring compliance with the Deprivation of Liberty Safeguards.

### **Safeguarding Adults Team**

The Trusts Safeguarding Adults Team will;

- Ensure authorisations for deprivation of liberty are sought from the local authority (supervisory body) in all instances where a person is considered to be deprived of their liberty:
- Ensure the Care Quality Commissions reporting requirements are adhered to
- Ensure appropriate records are kept
- Inform all relevant parties regarding the details and outcomes of the deprivation of liberty safeguards process
- Support all departments who have an authorised DOL in relation to ongoing process and compliance requirements

**The Safeguarding Adults Team can be contacted for advice in relation to this guidance during working hours, out of hours the Bed/Duty Management Team should be contacted via switchboard.**

### **The multidisciplinary team will;**

- Be responsible for ensuring that potential deprivations of liberty are identified
- Consider less restrictive care planning options
- Agree on when a deprivation of liberty authorisation should be sought

### **Ward Managers and their deputies will;**

- Take all steps to minimise the restrictions imposed on a person
- Apply for the authorisation of a deprivation of liberty for any person who may come within the scope of the deprivation of liberty safeguards and comes under their area of responsibility
- Grant an urgent authorisation where a deprivation of liberty is apparent and cannot be reduced to a restriction
- Ensure the deprivation of liberty authorisation is reviewed, remains current where necessary and is ended when appropriate
- Ensure appropriate advocacy and representation is provided wherever necessary
- Maintain contact with the nominated Relevant Persons Representative (RPR), See Appendix F

All employees of the Trust have a contractual responsibility to adhere to the policies and procedures of the Trust and should therefore;

- Be aware of the Mental Capacity Act Deprivation of Liberty Safeguards and understand how these may effect their clinical practice and care planning provision
- Ensure they are trained to the appropriate level as their role requires and to seek the relevant training (as identified in the training needs analysis and their individual mandatory training profiles)

## **Assurance**

As a minimum the Clinical Commissioning Group and Safeguarding Adults Boards expect the following;

- Availability of copies of Mental Capacity Act and Deprivation of Liberty Safeguards Codes of Practice in all relevant wards/units within the organisation (via Staff Room) and links are provided on the Trust's Safeguarding Adults Intranet Resource page.
- Processes in place to record if a person has an advance decision on receiving medical treatment or record if people have a LPA (Lasting Power of Attorney, IMCA (Independent Mental Capacity Advocate) or RPR (Relevant Person's Representative)
- For an authorised DOL, a system for recording details and monitoring how often the Relevant Persons Representative keeps in touch with the Relevant Person and whether they are acting in the person's best interests
- That staff are trained and understand when and how to use the Mental Capacity Act and the Deprivation of Liberty Safeguards; including induction training where this is relevant to their role.

## **Appendices**

<b>Appendix A</b>	<b>The Legal Framework</b>
<b>Appendix B</b>	<b>Identifying a DoLS</b>
<b>Appendix C</b>	<b>Flowchart</b>
<b>Appendix D</b>	<b>Standard Authorisation</b>
<b>Appendix E</b>	<b>Urgent Authorisation</b>
<b>Appendix F</b>	<b>Relevant Persons</b>
<b>Representative (RPR)</b>	

### The Legal Framework

In general terms, the legal framework:

- Provides that a person may not be deprived of their liberty in a hospital or care home unless a standard authorisation or an urgent authorisation is in force.
- Applies to local authority, NHS, independent and voluntary sector hospitals and care homes, and to anybody being treated or cared for in those environments irrespective of whether they are publicly or privately funded.
- Requires that managing authorities must request a standard authorisation when one is necessary. Wherever possible, this should be in advance of a deprivation of liberty commencing. They must also ensure that any conditions attached to a standard authorisation are complied with.
- Provides for a standard authorisation to be given by the supervisory body. The supervisory body must also appoint a “relevant person’s representative” to support and represent the person deprived of their liberty.
- Specifies that the supervisory body for hospitals is the relevant local authority.
- Specifies that, if it is necessary to deprive a person of their liberty before a standard authorisation can be given, the managing authority must grant itself an urgent authorisation. This may last for a maximum of seven days only, by which time a standard authorisation must be in place. A supervisory body may, however, extend an urgent authorisation for a maximum of a further seven days if, in exceptional circumstances, it has not been possible to complete the standard authorisation process within the timescale of the original urgent authorisation.
- States that, for the purposes of the Mental Capacity Act 2005, references to deprivation of a person’s liberty have the same meaning as in Article 5(1) of the European Convention on Human Rights.

- Provides for two main exceptions to this scheme. Firstly, the Court of Protection may authorise the deprivation of a person's liberty in a hospital or care home. Secondly, some hospitals are registered to detain people under the Mental Health Act 1983. Sometimes that Act may be used instead.

It is important to bear in mind that, whilst the deprivation of liberty will be for the purpose of providing a person with care or treatment, neither a standard nor urgent deprivation of liberty authorisation authorises such care or treatment. The arrangements for providing care or treatment to a person in respect of whom a deprivation of liberty authorisation is given are subject to the wider provisions of the Mental Capacity Act 2005.

### Identifying a Possible Deprivation of Liberty

The difference between deprivation of liberty and restriction upon liberty is one of degree or intensity. It may therefore be helpful to envisage a scale, which moves from 'restraint' or 'restriction' to 'deprivation of liberty'. Where an individual is on the scale will depend on the concrete circumstances of the individual and may change over time, each individual case must be assessed on its own circumstances. No two cases are likely to be identical, so it is important to be aware of previous court judgments and the factors that the courts have identified as important.

The Supreme Court has clarified that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights in the following circumstances:

- The person is under continuous supervision **and** control

**And**

- is not free to leave,

**And**

- The person lacks capacity to consent to these arrangements.

The above is known as "the acid test."

The Supreme Court held that factors which are NOT relevant to determining whether there is a deprivation of liberty include

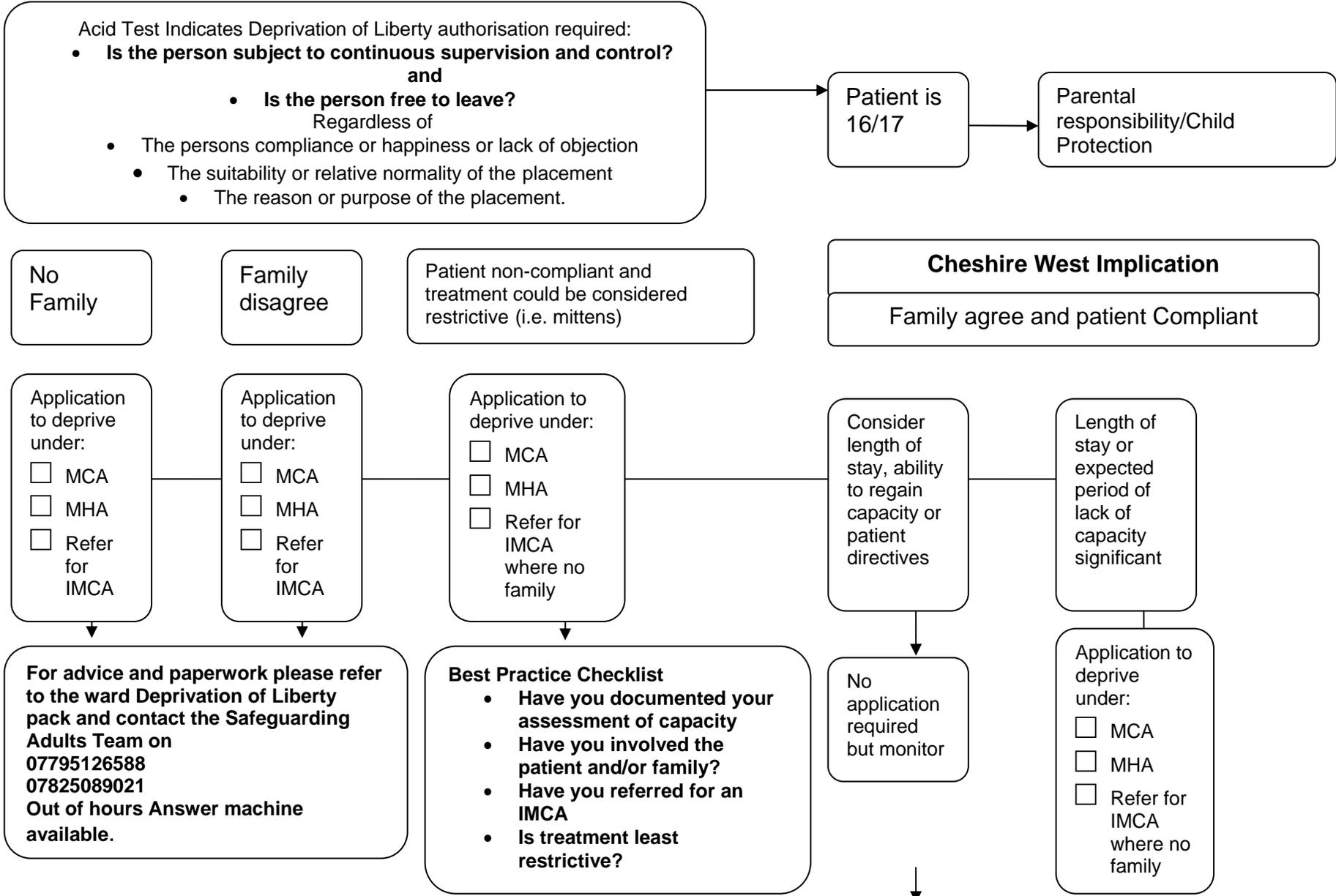
- The person's compliance or lack of objection
- The reason or purpose behind a particular placement.
- It was also held that the relative normality of the placement, given the person's needs, was not relevant. This means that the person should not be compared with anyone else in determining whether there is a deprivation of liberty.

Previously the ECtHR and UK courts have determined a number of cases about deprivation of liberty. Their judgments indicate that the following factors can be relevant to identifying whether steps taken involve more than restraint and amount to a deprivation of liberty

- Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission
- Medication is given forcibly, against a patients will
- Staff exercise complete and effective control over the care and movement of a person for a significant period
- Staff exercise control over assessments, treatment, contacts and residence
- A decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate
- A request by carers for a person to be discharged to their care is refused
- The person is unable to maintain social contacts because of restrictions placed on their access to other people
- The person loses autonomy because they are under continuous supervision and control

In determining whether deprivation of liberty has occurred, or is likely to occur, decision-makers need to consider all the facts in a particular case. There is unlikely to be any simple definition that can be applied in every case, and it is probable that no single factor will, in itself, determine whether the overall set of steps being taken in relation to the relevant person amount to a deprivation of liberty. In general, the decision-maker should always consider the following;

- All the circumstances of each and every case
- What measures are being taken in relation to the individual? When are they required? For what period do they endure? What are the effects of any restraints or restrictions on the individual? Why are they necessary? What aim do they seek to meet?
- What are the views of the relevant person, their family or carers? Do any of them object to the measures?
- How are any restraints or restrictions implemented? Do any of the constraints on the individual's personal freedom go beyond 'restraint' or 'restriction' to the extent that they constitute a deprivation of liberty?
- Are there any less restrictive options for delivering care or treatment that avoid deprivation of liberty altogether?
- Does the cumulative effect of all the restrictions imposed on the person amount to a deprivation of liberty, even if individually they would not.



# Does the care plan amount to a Deprivation of Liberty?

## 1. Does or will the care plan subject the patient to continuous supervision?

Patients are likely to be considered to be under continuous supervision if for example any of the following apply:

- They need constant or frequent supervision
- They would not be left on their own for more than a short period, even if they asked to be.
- It is necessary for carers to decide on many aspects of their daily lives
- They need support with all or many everyday tasks and would be stopped from trying to do these if there were no carer to help
- The care plan imposes severe restrictions on contact with family

## 2. Is the patient free to leave?

The focus is not on the person's ability to express a desire to leave, but on what those with control over the care arrangements would do if they sought to leave.

It doesn't matter that:

- The person is compliant or not objecting.
- The care provided is relatively normal in the circumstances, or;
- The reason or purpose behind the care package

Does the person have capacity to consent to that deprivation of liberty?

*(that is the actual regime that is, or will be, put in place).*

**No one** has authority other than the patient to consent to care that results in the patient's deprivation of liberty. e.g. attorneys under Lasting Power of Attorney (LPA) cannot consent to such a package of care .

**Adult in Care Home or Hospital**

**DoLS = Deprivation of Liberty Safeguards**

An application for approval should be made by the care home or hospital to the appropriate local authority (Supervisory Body)

**Contact the Safeguarding Adults Team on**

**07795 126588  
07795 126677  
07825 089021**

### Procedure for Standard Authorisation

Standard authorisations of a deprivation of liberty are issued by the supervisory body and mean the managing authority may lawfully deprive the relevant person of their liberty in the hospital or care home named in the authorisation for a named period of time. In the vast majority of cases it should be possible to plan in advance so that a standard authorisation can be obtained before the deprivation of liberty begins.

The decision to apply for authorisation for a deprivation of liberty will be a multidisciplinary one. All reasonable steps will have been taken to reduce the likelihood of the deprivation to a restriction before an application is made. A professionally qualified member of the care team (at Band 6 or above) will be nominated by the multidisciplinary team to complete the application using Form 4.

#### **Forms can be accessed via the staff room and also below:**

<http://www.dh.gov.uk/en/Publicationsandstatistics/PublicationsGuidanceAndGuidance/DH>

The application will be sent to the Managing Authority and Safeguarding Adults Team.

The Safeguarding Team will be responsible for informing the CQC and for working with the relevant managing authority and they will support departments with the ongoing process.

If the person is considered to be deprived of their liberty while waiting for the standard authorisation an urgent authorisation should be granted by the Trust (see appendix E).

### **Procedure for Urgent Authorisation**

Urgent authorisation for a deprivation of liberty can be made by a managing authority itself where deprivation of liberty unavoidably needs to commence before a standard authorisation can be obtained and will last for only a short time. Urgent authorisation cannot be made without a request for a standard authorisation being made simultaneously. Advice should be sought from the Safeguarding Adults Team via switchboard or the numbers shown above during working hours or out of hours via the bed/duty switchboard.

When granting an urgent authorisation the views of the relevant person's family, friends, carers, other staff who have involvement in the person's case should be sought and considered at an early stage and outcome recorded in the person's records.

A professionally qualified member of the care team (at pay Band 6 or above) will be nominated by the MDT team to provide the authorisation and complete the process using Form 1. The decision to provide an urgent authorisation should be discussed by the multi-disciplinary team whenever possible.

### **Forms can be accessed via Staffroom and the Department of Health website using the following link**

<http://www.dh.gov.uk/en/Publicationsandstatistics/PublicationsGuidanceAndGuidance/DH>

The maximum period for which a managing authority can give itself an urgent authorisation is seven days. Once an urgent authorisation is given, the law provides that all of the assessments required for a standard authorisation must be completed before the urgent authorisation expires

The application will be sent to the Managing Authority and Safeguarding Adults Team.

The Safeguarding Team will be responsible for informing the CQC and for working with the relevant managing authority and they will support departments with the ongoing process.

### The Relevant Persons Representative

The supervisory body must appoint a relevant person's representative for every person to whom they give a standard authorisation for deprivation of liberty. It is important that the representative is appointed at the time the authorisation is given or as soon as possible and practical thereafter.

The role of the relevant person's representative, once appointed, is:

- To maintain contact with the relevant person, and
- To represent and support the relevant person in all matters relating to the deprivation of liberty safeguards, including, if appropriate, triggering a review, using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection.

This is a crucial role in the deprivation of liberty process, providing the relevant person with representation and support that is independent of the commissioners and providers of the services they are receiving.

As soon as possible and practical after a standard deprivation of liberty authorisation is given, the managing authority must seek to ensure that the relevant person and their representative understand:

- The effect of the authorisation
- Their right to request a review
- The formal and informal complaints procedures that are available to them
- Their right to make an application to the Court of Protection to seek variation or termination of the authorisation, and
- Their right, where the relevant person does not have a paid professional' representative, to request the support of an Independent Mental Capacity Advocate (IMCA).