

IMCA and paid relevant person's representative roles in the Mental Capacity Act Deprivation of Liberty Safeguards



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Written by David Thompson

This report is available online
www.scie.org.uk

Social Care Institute for Excellence

Goldings House

2 Hay's Lane

London SE1 2H

tel 020 7089 6840

fax 020 7089 6841

textphone 020 7089 6893

www.scie.org.uk

Contents

Endorsement by the Association of Directors of Adult Social Services	1
Introduction	1
Overview of the IMCA roles in the DOLS	2
Who can take the IMCA roles?	2
Section 39A IMCAs	3
Section 39C IMCAs	5
Section 39D IMCAs	6
Instruction by the supervisory body	8
DOLS IMCA roles and other IMCA roles	10
Assessors working with IMCAs	12
Records and reports	16
IMCAs and assessments	17
IMCA role if authorisation not granted	25
Paid relevant person's representatives	27
The role of the paid representative and 39C IMCA	31
Reviews of the authorisation	33
Taking formal action	34
Applications for further authorisations	39
When an authorisation ends	40
Appendices	41

Endorsement by the Association of Directors of Adult Social Services

The Association of Directors of Adult Social Services (ADASS) is the national organisation in England and Northern Ireland representing directors of social care in local social services authorities. (Directors of local social services authorities in Wales and Scotland have separate arrangements.) ADASS members are responsible for providing or commissioning, through the activities of their departments, the wellbeing, protection and care of hundreds of thousands of people, as well as for the promotion of their wellbeing and protection wherever it is needed. Close formal and informal links are maintained with the NHS and with national government in helping to shape and implement policy and social care legislation.

Within ADASS the work on supporting the implementation of the Mental Capacity Act 2005, including the additional Deprivation of Liberty Safeguards, is located within our Mental Health Drugs and Alcohol Network. Greg Slay (West Sussex County Council) has been our lead officer in this work since 2005, recently and ably assisted by Lindsay Smith (Halton Council) and Richard Smith (Telford and Wrekin Council).

ADASS members continue to work in partnership with the Social Care Institute for Excellence, the Department of Health, the Office of the Public Guardian, the Care Quality Commission and many other organisations in improving practitioner awareness of the Mental Capacity Act 2005.

The important role played by the introduction of the Mental Capacity Act's Deprivation of Liberty Safeguards in 2009 has been clearly understood and embraced by local social services authorities in England. This new guidance, published by the Social Care Institute for Excellence, complements earlier practice guidance documents on both the commissioning and operation of statutory independent mental capacity advocacy services. This guidance will help managing authorities and supervisory bodies to better understand the complexities associated with supporting those individuals who need to be, and are, subject to these specific safeguards.

We wholeheartedly endorse and recommend this guide to you.

Richard Webb (Sheffield Council) and Jonathan Phillips (Calderdale Council)
Co-chairs, ADASS Mental Health Drugs and Alcohol Network

April 2011

Introduction

This practice guidance describes the role of Independent Mental Capacity Advocates (IMCAs) and paid representatives in the Mental Capacity Act Deprivation of Liberty Safeguards (MCA DOLS). It is published by the Social Care Institute for Excellence (SCIE), and the Association of Directors of Adult Social Services (ADASS). It was developed by SCIE with contributions from the Department of Health, ADASS and IMCA providers. It brings together the experience of the first two years of the Mental Capacity Act 2005: Deprivation of Liberty Safeguards.

The document sets out:

- the requirements of the Mental Capacity Act 2005 (MCA)
- what should happen to comply with both the MCA Code of Practice, and the DOLS Code of Practice
- what is a consensus on good practice.

The language used throughout this document identifies which of the above applies. References are given to the relevant sections of the MCA and Codes of Practice.

This document has been produced for:

- supervisory bodies
- managing authorities
- independent mental capacity advocates (IMCAs)
- paid relevant person's representatives (paid representatives)
- best interests assessors
- mental health assessors.

This practice guidance will be helpful for anyone who is involved with people who may be subject to the Deprivation of Liberty Safeguards, and who therefore need to know when and how IMCAs and paid representatives should and could be involved. Other people who would find this document useful include the person subject to the DOLS, family members acting as the person's representative, and staff working in services where someone may be deprived of their liberty.

The guidance covers the legislation in both England and Wales.

Examples are given to show what IMCAs and paid representatives may do in practice. They are based on real situations but have been changed to protect the confidentiality of the people involved. Their aim is only to illustrate these roles and so contain limited information about why an authorisation was sought. They should not necessarily be seen as appropriate uses of the Deprivation of Liberty Safeguards

Overview of the IMCA roles in the DOLS

There are a number of different IMCA roles involved in supporting and representing people who may be subject to the Deprivation of Liberty Safeguards. These are set out in Section 39 of the **amended Mental Capacity Act 2005 (MCA)**. It is important to be clear which role an IMCA is taking, as they are instructed for different reasons and have different rights and responsibilities.

Briefly the roles are:

- Section 39A IMCAs are instructed when there is an assessment in response to a request for a standard authorisation, or a concern about a potentially unauthorised deprivation of liberty.
- Section 39C IMCAs cover the role of the relevant person's representative when there is a gap between appointments.
- Section 39D IMCAs support the person, or their relevant person's representative, when a standard authorisation is in place.

In this publication these IMCA roles are shortened to 39A IMCAs, 39C IMCAs and 39D IMCAs.

Supervisory bodies are responsible for making all these instructions. When they use **standard form 30** (the IMCA referral form) they have to indicate which type of IMCA instruction it is (boxes B1–B8).

Who can take the IMCA roles?

In England local authorities are responsible for commissioning IMCA services: in Wales it is local health boards. The commissioners can set the training and qualification requirements for IMCAs. The Department of Health supported the development of national qualifications in independent advocacy. This is provided through City & Guilds. In addition to the IMCA module of the qualification (Unit 305) there is a specific unit on the DOLS IMCA roles (Unit 310).

It is good practice for IMCAs who undertake the DOLS roles to have met the following criteria:

- undertaken other IMCA roles
- successfully completed Unit 305
- had specific training on the DOLS IMCA roles
- be working towards or have successfully completed Unit 310
- show evidence of continued professional development.

See SCIE **Guide 31: Good practice guidance for the commissioning and monitoring of Independent Mental Capacity Advocate (IMCA) services.**

Advocates must present case work in order to complete units of the City & Guilds advocacy qualification, so it is not possible for IMCAs to complete Unit 310 before undertaking DOLS cases. The good practice commissioning guidance suggests that those IMCAs who have not completed assessments should be supervised by IMCAs who have.

Section 39A IMCAs

Introduction

Section 39A IMCAs may only be instructed when a standard authorisation is not in place. There are two possibilities:

- A request has been made for a standard authorisation.
- A best interests assessor has been appointed by the supervisory body to check whether a person is being unlawfully deprived of their liberty.

The 39A IMCA's role is to represent the person in the assessments which will be carried out. In both cases the person should have no one appropriate to consult. This means having:

'no person, other than engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests' (MCA section 39A).

The MCA Code of Practice provides guidance about when a person who has contact with family or friends may still need an IMCA (MCA Code of Practice, Paragraphs 10.74–10.80).

In this document the two 39A IMCA roles will be referred to as:

- 39A IMCA (request for standard authorisation)
- 39A IMCA (assessment for a potentially unlawful deprivation of liberty).

On **standard form 30** used by supervisory bodies to instruct IMCAs these are boxes B1 and B2 respectively.

How the supervisory body knows the person requires a 39A IMCA

When requesting a standard authorisation the managing authority (i.e. the care home or hospital) is required to tell the supervisory body if the person has no one appropriate to consult. This should be done by marking box B10A on the **standard form for a request for a standard authorisation (form 4)**.

Other people could and should make the supervisory body aware of the need for a 39A IMCA. For example, a best interests assessor may become aware of the requirement for 39A IMCA representation before they complete their assessment.

The need for a 39A IMCA for a potentially unauthorised deprivation of liberty may be less clear. Good practice is for supervisory bodies to check when arranging this assessment whether the person has anyone appropriate to consult

The need for prompt instruction

The supervisory body should instruct 39A IMCAs as soon as it is aware that this is required. Any delay could mean that the person is not provided with the representation required under the Deprivation of Liberty Safeguards. This could affect the lawfulness of any deprivation of liberty.

Best interests and mental health assessors should be alerted to the involvement of IMCAs by the supervisory body – on their standard referral forms (part C of forms **28** and **29**). Details must be provided of 39A IMCAs, and also any 39C IMCA or 39D IMCA. This is because all of these have a statutory role in the assessments and must have an opportunity to make representations before the assessments are completed.

In some cases the supervisory body will need to instruct a 39A IMCA before details of the assessor(s) can be included in part D of the **standard IMCA referral form**. As soon as details of the assessor(s) are known they should be forwarded to the IMCA provider.

When a 39A IMCA is not required

There is no requirement to instruct a 39A IMCA if the request for the standard authorisation is made when a standard authorisation is already in place. This is because the person would be represented in the assessments for the new authorisation by their relevant person's representative (MCA Sections 39A (1) and (6)). There is an exception if the new authorisation would not start before or immediately after the existing authorisation ends (MCA Section 39B (7)). This is because the relevant person's representative does not have a role when an authorisation is not in place

Records for 39A IMCAs if an urgent authorisation is in place

Where a 39A IMCA is instructed and there is an urgent authorisation in place, the managing authority is required to provide the 39A IMCA as soon as practical with a copy of:

- the urgent authorisation (MCA paragraph 82(3)(a)), (**Standard form 1**)
- a revised urgent authorisation if it has been extended by the supervisory body (MCA section 85(6)), (**Standard form 1** part H)

- the reasons why a request for an extension of an urgent authorisation is declined by the supervisory body (MCA section 86(3)), (**Standard form 3**).

It is good practice for the supervisory body to provide these documents directly to 39A IMCAs to avoid any delay. They can be attached to the IMCA referral form (**standard form 30**).

When the 39A IMCA role ends

If a standard authorisation is granted the 39A IMCA role ends when the person's representative is appointed. After that the 39A IMCA may only stay involved if they are making an application to the Court of Protection to challenge the authorisation (see MCA, Schedule A1, Section 161). This includes the 39A IMCA seeking permission to make an application to the Court of Protection as well as supporting the person to make an application on their own behalf, for example as litigation friend. Before deciding to take this action the 39A IMCA must discuss this with the person's representative. When a standard authorisation is not granted the 39A IMCA may decide when to withdraw and close their case

Section 39C IMCAs

When 39C IMCAs must be instructed

The 39C IMCA role can be understood as covering gaps (but not all gaps) in the appointments of relevant person's representatives. The role ends when another relevant person's representative is appointed.

39C IMCAs must be instructed when a standard authorisation is in place if:

- the appointment of a relevant person ends, and
- there is no one appropriate to consult who could represent the person's best interests.

39C IMCAs have the powers of the relevant person's representative to demand a review and non-means tested access to the Court of Protection. Instructing a 39C IMCA allows people who are deprived of their liberty under the safeguards to always have someone independent to represent their interests.

A 39C IMCA may be required, for example, in the following situations:

- If a sister appointed as a relevant person's representative dies and there is no other family member or friend who can represent the person.
- If a paid relevant person's representative changes jobs or moves to another part of the country so is unable to continue in their role.

Where there are good commissioning arrangements in place so that supervisory bodies can appoint paid representatives promptly, the need for the 39C IMCA role will be rare

39C IMCAs can't cover all gaps

The legislation does not allow for 39C IMCA instruction for all gaps. For example, any gap before the appointment of the first relevant person's representative. This is because the condition of the appointment of a relevant person ending will not have been met. In many of these situations the person will still have the involvement of a 39A IMCA because their role does not end until the appointment of the relevant person's representative. However, once an authorisation is granted the 39A role is limited to deciding whether to challenge the authorisation. They do not have the relevant person's representative's powers to demand a review or to have non-means tested access to the Court of Protection.

If a family member is available to take over the relevant person's representative role from another family member the second condition: that there is no one appropriate to consult, would also not be met

When the 39C IMCA role ends

The 39C IMCA role ends with the appointment of a relevant person's representative. After this point they no longer have the powers shared with all IMCA roles or those specific to the 39C role.

If an authorisation ends before a representative had been appointed, the ongoing 39C role depends on whether a further standard authorisation is granted. If one is granted the 39C role continues without a new instruction being required. If a further standard authorisation is not applied for, or is not granted, the 39C IMCA role ends at this point. As an advocate they may still have significant concerns when an authorisation is no longer in place: for example, if they believe the person is, or should still be, deprived of their liberty. They may need to follow these up personally or by referring to another advocate. If they follow these concerns up themselves they do not have the powers held by IMCAs. (See section on [When an authorisation ends](#)).

Section 39D IMCAs

When 39D IMCAs must be instructed

39D IMCAs are only available when a standard authorisation is in place and the person has an unpaid relevant person's representative. (Paid representatives are expected to understand their role and to provide the person with appropriate support.)

Where a person has an unpaid representative, a 39D IMCA must be instructed if:

- The person asks the supervisory body for the support of a 39D IMCA.
- Their representative asks the supervisory body for the support of a 39D IMCA.
- The supervisory body believes that the person or their representative would benefit from the support of a 39D IMCA.

On the **standard form 30** the reasons for 39D instruction are broken down into:

- B4. A person deprived of their liberty who has an unpaid relevant person's representative has requested the support of an advocate.
- B5. An unpaid relevant person's representative of a person deprived of their liberty has requested the support of an advocate.
- B6. The supervisory body believes that the person deprived of their liberty will benefit from the support of an advocate.
- B7. The supervisory body believes that the unpaid relevant person's representative will benefit from the support of an advocate.
- B8. The supervisory body believes that the person deprived of their liberty and their unpaid relevant person's representative will both benefit from the support of an advocate.

It is the responsibility of the managing authority to explain the option of the support of a 39D IMCA to both the person and their representative at the start of an authorisation. The managing authority will only be in a good position to do this if they are themselves clear about the role of the 39D IMCA.

Good practice is for supervisory bodies to instruct 39D IMCAs at the start of all standard authorisations where a person has a family member or friend appointed as their representative. This gives the person and their representative the opportunity to meet a 39D IMCA and so that they are in a better position to decide if they need the support of one at that point, or sometime in the future.

Example of 39D IMCA support

A standard authorisation for two weeks was granted to enable Pete who had learning disabilities to receive treatment which he was resisting in hospital. Pete had consumed dangerous levels of alcohol and his life was seriously at risk. His mother was appointed as his relevant person's representative. When the supervisory body granted the authorisation they instructed a 39D IMCA to meet Pete's mother who was very confused and distressed about what was happening to her son. The IMCA took time to explain what the authorisation meant and what powers the mother had as Pete's representative. This reassured her that what was happening was in Pete's best interests. The treatment resulted in Pete regaining his capacity to make decisions about his continued treatment. He accepted he needed help and referred himself for ongoing support when he returned home.

(Example provided by East Lancashire Advocacy Service)

When the 39D IMCA role ends

It is not expected that, once instructed, 39D IMCAs will stay involved until the person is no longer deprived of their liberty under a standard authorisation. 39D IMCAs should consider when to end their involvement while an authorisation is still in place. In making this decision the IMCA will want to consider whether:

- the person and/or their representative understands the authorisation as well as their rights of access to reviews, the Court of Protection and 39D IMCAs
- the person and/or their representative need support while accessing their rights to a review or access to the Court of Protection
- the IMCA is seeking a review or is making an application to the Court of Protection.

It is good practice for 39D IMCAs to end their involvement if no formal action is being taken. In addition to reviews and access to the Court of Protection, formal action would include complaints, safeguarding adults' procedures, or a further application for a standard authorisation. 39D IMCAs should avoid keeping cases open just in case there will be formal action or until the standard authorisation ends.

When informing the supervisory body that they have closed the case it is good practice for the IMCA to advise when further 39D instructions may be required, e.g. to support the person and/or their representative during a request for any further standard authorisations.

39D IMCAs may wish to give the person and/or their representative their contact details so they can be contacted directly to provide further IMCA support. If this happens the IMCA provider must ensure that the supervisory body makes a further 39D IMCA instruction. Such an arrangement should be agreed with the supervisory body in advance, for example through an engagement protocol, or set out in the IMCA service contract.

Like the 39C IMCA role, once a person is no longer subject to a standard authorisation, the 39D IMCA role ends. If the advocate still has significant concerns they may need to follow these up personally (without IMCA powers) or by referring to another advocate. (See section on [When an authorisation ends.](#))

Instruction by the supervisory body

Records to be provided by the supervisory body

The IMCA referral form ([standard form 30](#)) provides a checklist for supervisory bodies of documents which either must or should be provided to IMCAs when they are instructed. These include:

- a copy of any current urgent authorisation ([standard form 1](#))
- a copy of any current standard authorisation ([standard form 12](#))

- copies of any assessments completed (**standard forms 5-10**).

Where there is a request for a standard authorisation supervisory bodies should provide any 39A, 39C or 39D IMCA involved with:

- a copy of the request for the standard authorisation (**standard form 4**)
- copies of the care plans and assessments which the managing authority attached to the request for the standard authorisation (**standard form 4** part B3).

Deciding which IMCA provider should be instructed

The MCA Code of Practice says the IMCA service to be instructed is the one which „works wherever the person is at the time that the person needs support and representation’ (MCA Code of Practice, Paragraph 10.12). It is not dependent on the location of the supervisory body.

For all the IMCA DOLS roles the IMCA provider instructed will be the one which covers the area where the person is staying. For the 39A IMCA role this may not be where the proposed deprivation of liberty will take place if the plan is to move the person. For the 39C and 39D IMCA roles it will be where the person is being deprived of their liberty.

Where a 39D IMCA is instructed to support a relevant person’s representative who lives in a different area to where the person is deprived of their liberty, supervisory bodies may wish to instruct the IMCA service which covers the area where the representative lives.

However, it is good practice to instruct the IMCA service where the person is being deprived of their liberty because:

- Even if instructed to support the representative the 39D IMCA must still meet the person where 'practical and appropriate' (**IMCA regulations**). This is because the role of the 39D IMCA (as set out in section 39D of the **amended MCA**) is the same regardless of the reason for the instruction.
- The representative has to have regular contact with the person. The IMCA could arrange meetings with the representative to fit in with this contact.
- It will probably be easier for the IMCA to provide support to the representative over the phone; it may not be easy to contact the person by phone.

See „Which local authority is responsible for commissioning?’ in **ADASS/SCIE Guide 31: Good practice guidance for the commissioning and monitoring of Independent Mental Capacity Advocate (IMCA) services**

DOLS IMCA roles and other IMCA roles

Introduction

The deprivation of liberty safeguards extended the IMCA roles. The original roles relate to decisions about accommodation, serious medical treatment, care reviews and safeguarding adults. IMCAs must be instructed to undertake each role by someone who is authorised to do so by the relevant local authority or NHS body. Where an IMCA is undertaking more than one role with an individual, they must be specifically instructed to do each of these by the appropriate body/bodies.

Example of the need for specific instruction

An IMCA has been instructed by a local authority for an accommodation decision. It becomes apparent that the person could be deprived of their liberty in the home that it is proposed they move to. This IMCA cannot take on the 39A IMCA role if a standard authorisation is requested unless they have been instructed to do so by the supervisory body.

Accommodation decisions

Standard authorisations are in part a decision about where someone should live. There may be some overlap with IMCA instructions for accommodation decisions for those people with no one appropriate to consult. The MCA was amended to remove the requirement for an IMCA instruction for an accommodation decision in the following situations.

- If a proposed move is subject to a request for a standard authorisation under the Deprivation of Liberty Safeguards, there is no need to instruct an IMCA specifically for the accommodation decision. This is because the person is entitled to a 39A IMCA if there is no one appropriate to consult (amended MCA, Sections 38(2)A, 39(3)A).
- After a standard authorisation is in place, any further accommodation changes where the person will also be subject to a standard authorisation will not require an IMCA to be instructed. This is because the person should be represented by their relevant person's representative (MCA, Section 39A(6)). (This includes when this role is being covered by a 39C IMCA).

An IMCA is unlikely to be required for decisions about where a person should stay immediately after an authorisation for a deprivation of liberty ends. This is because the relevant person's representative (whether paid or otherwise) is not considered as providing care or treatment in a professional capacity (MCA, Sections 38(10), 39(7)). They are expected to provide independent representation for this accommodation decision. If a decision about where the person should stay happens some time after the authorisation ends, an IMCA may need to be instructed because the representative's role will have ended with the authorisation.

Serious medical treatment decisions

Having a paid relevant person's representative, 39A, 39C or 39D IMCA does not change a person's eligibility for an IMCA to be instructed for any serious medical treatment decisions.

Example of when SMT instruction needed

If a person, who has a paid relevant person's representative and is currently under a standard authorisation, needs inpatient treatment for cancer, an IMCA must be instructed if they lack capacity to make the decision themselves and they have no family or friends who it is appropriate to consult. The IMCA for the serious medical treatment decision must be instructed regardless of whether the person may also need to be deprived of their liberty while in hospital.

Care review and safeguarding adults' instructions

The option to instruct an IMCA for care reviews and safeguarding adults applies regardless of the availability of a person's representative, 39A, 39C or 39D IMCA.

It is good practice for local authorities and NHS bodies to involve the relevant person's representative in care reviews that happen while the person is subject to a standard authorisation: it is unlikely that instructing an IMCA for a care review would benefit the person.

The safeguarding manager making a decision about the benefit of instructing an IMCA where there is a relevant person's representative (whether paid or not) should consider:

- The opportunity for the representative to be fully involved in the safeguarding adult process,
- Whether there may be a conflict of interests for the person's representative.

In cases where there is concern about the representative's ability to represent the person's views and wishes, it may be desirable to instruct an IMCA.

Where a 39A, 39C or 39D IMCA is involved and safeguarding adults' procedures are being followed, it should not be assumed that this IMCA will support and represent the person for the safeguarding procedures, even when the IMCA has raised the alert. If the safeguarding manager believes that involving an IMCA will benefit the person it is good practice to instruct an IMCA specifically for the safeguarding adult's process. In most cases it would be best if the same IMCA undertakes this role.

See **SCIE Guide 32: Practice guidance on the involvement of Independent Mental Capacity Advocates (IMCAs) in safeguarding adults.**

IMCAs and multiple advocacy roles

The MCA Code of Practice supports advocates taking more than one role with an individual (MCA Code of Practice, Paragraph 10.80). This may benefit the person because they don't have to deal with different advocates for different issues. Examples include:

- A paid relevant person's representative who meets the appointment criteria for an IMCA is instructed for a serious medical treatment decision.
- An IMCA instructed for a safeguarding adult issue may also represent the person as a 39A IMCA if one outcome of the process is to request a standard authorisation.
- An advocate is appointed as a paid relevant person's representative after undertaking the 39A IMCA role.

IMCA providers should seek the views of the person when making such decisions. To protect the independence of advocacy services, supervisory bodies and other instructing bodies should not try to influence who is appointed as the person's IMCA. See 'Supporting the independence of the IMCA service' in [SCIE Guide 31: Good practice guidance for the commissioning and monitoring of Independent Mental Capacity Advocate \(IMCA\) services](#).

Assessors working with IMCAs

How assessors know an IMCA is or should be involved

Best interests and mental health assessors should be made aware of the involvement of any 39A, 39 C or 39D IMCA by the supervisory body, on their standard referral forms (Part C of forms [28](#) and [29](#)). In some cases the supervisory body may appoint assessors before having information about any IMCA involved. If this happens the supervisory body should pass the IMCA's details to the assessors as soon as they are available.

Responsibility of assessors to identify the need for an IMCA

Assessors with their specialist knowledge of the Deprivation of Liberty Safeguards have a professional responsibility to be alert to situations when IMCAs must or could be instructed. In such cases they should inform the supervisory body. Failing to instruct an IMCA could mean a deprivation of liberty is unlawful because the person will have been denied one of their legal safeguards. Assessors should not complete any assessment without considering whether there should be IMCA input.

39A and 39C IMCAs

There is a particular responsibility for the best interests assessor carrying out the best interests assessment to identify whether an IMCA should be instructed. This is because

if they are deciding whether depriving the person of their liberty is in their best interests they have a duty: 'if it is practical and appropriate to consult.... anyone engaged in caring for the person or interested in their welfare' (MCA, Section 4).

The best interests assessor at this stage should be very aware if there 'is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests' (MCA, Sections 39A(1)b & 39C(1)c).

This could lead to the instruction of a 39A IMCA if there is no standard authorisation in place. A 39C IMCA instruction is possible if there is a gap in the appointments of representatives. Neither of these is required if there is a relevant person's representative

39D IMCAs

Where assessments are carried out as part of a review, or for a subsequent standard authorisation, assessors should be aware of the option of 39D IMCA instruction. This is only possible if the person has an unpaid representative. An assessor may believe that either the person or their representative would benefit from the support of an IMCA during the review. It would be good practice for an assessor to:

- remind the person or their representative of their right to request a 39D IMCA
- contact the supervisory body to recommend they use their discretion to instruct a 39D IMCA.

The assessor may choose to delay completing the person's assessment until 39D IMCA support has been provided.

Representations from IMCAs and paid representatives to assessors

Best interests assessors or mental health assessors are required to take into account any information given or submissions made by IMCAs and paid representatives (Section 132 of the **amended MCA**). This could include:

- meetings or phone conversations with the assessor
- emails to the assessor
- a written report.

IMCAs or paid representatives are not required to provide written reports to assessors. However it is good practice for a written report to be given to the best interests assessor before they complete the best interests assessment.

Assessors may work with IMCAs or paid representatives in three situations.

1. When assessments are undertaken in relation to a request for a standard authorisation.

This could be because:

- a 39A IMCA is instructed for a first standard authorisation (i.e. when a standard authorisation is not currently in place)
- a 39C or 39D IMCA have been instructed for an existing authorisation
- a paid representative is appointed for a current authorisation.

2. When assessments are undertaken as part of a review of a standard authorisation. This could be either a 39C or 39D IMCA. For example, a 39D IMCA may have supported the relevant person's representative to ask for a review.

3. When a best interests assessor is appointed to investigate whether someone is being deprived of their liberty without authorisation.

This would be a 39A IMCA instructed where the person has no one appropriate to consult.

Agreeing timescales

For each assessment it is good practice for the assessors, IMCAs and paid representatives to be clear as soon as possible about:

- whether the IMCA or paid representative plans to make representations. (For some assessments this may not be required),
- the deadline for the IMCA's or paid representative's representations.

This is to make sure they have the opportunity to provide input before the assessment is completed.

Particularly where there is an urgent authorisation in place, there will be pressure on assessors and IMCAs to undertake their statutory role within the time allowed. All parties should respect their colleagues' time constraints when negotiating when representations need to be submitted.

Resolving concerns

It is good practice to have open discussions between IMCAs, paid representatives and assessors during the assessment process. The assessor is responsible for the assessment but IMCAs and paid representatives may make representations which may inform or question the potential outcome of an assessment.

For example, in a mental capacity assessment an IMCA may provide information which suggests that the person does or does not have capacity. Similarly, the IMCA may present facts to the best interests assessment which they believe should be considered when deciding whether the deprivation of liberty would be in the person's best interests.

If the representations made by the IMCA or paid representative do not support the potential outcome of the assessment, the assessor should try to address these before completing the assessment. The supervisory body cannot change the outcome of an assessment once it is completed.

The DOLS Code of Practice gives the following guidance:

'Differences of opinion between an IMCA and an assessor should ideally be resolved while the assessment is still in progress. Where there are significant disagreements between an IMCA and one or more of the assessors that cannot be resolved between them, the supervisory body should be informed before the assessment is finalised. The supervisory body should then consider what action might be appropriate, including perhaps convening a meeting to discuss the matter. Wherever possible, differences of opinion should be resolved informally in order to minimise the need for an IMCA to make an application to the Court of Protection. However, an IMCA should not be discouraged from making an application to the Court of Protection should they consider it necessary.' (DOLS Code of Practice, Paragraph 3.25).

An alternative to pursuing action in the Court of Protection is for IMCAs or paid representatives to make a formal complaint. This may be appropriate if their concerns are about the assessment process rather than the outcome. Formal challenges are likely to be either:

- the assessor did not give due regard to the representations made, or
- the assessor did not give the IMCA or paid representative reasonable opportunity to contribute to the assessment.

Where it is not possible for the assessor to resolve the concerns of an IMCA they should put in writing how they have considered the views of the IMCA (MCA Code of Practice, Paragraph 10.14). This can be included in the 'reason for opinion' sections in the standard forms that the assessors complete. It is good practice to address the unresolved concerns of paid representatives in the same way.

For example, an IMCA may say that in their view the restrictions imposed suggest the person is being deprived of their liberty with reference to previous case law. If the best interests assessor concludes that the person isn't being deprived of their liberty they should explain why they have taken a different view in relation to the restrictions. This would show the IMCA that they have taken their representations into account and could avoid the need for a formal challenge.

The most likely areas of disagreement between assessors and IMCAs or paid representatives are:

- whether or not restrictions do represent a deprivation of liberty
- whether the deprivation of liberty will be in the person's best interests

- whether the person has capacity to make a decision about where they should be accommodated to receive the appropriate treatment and care.

Records and reports

Access to records for IMCAs and assessors

IMCAs and assessors have similar rights of access to records in undertaking their roles.

They can:

'at all reasonable times, examine and take copies of:

- (i) any health record,
- (ii) any record of, or held by, a local authority and compiled in connection with a social services function, and
- (iii) any record held by a person registered under Part 2 of the Care Standards Act 2000 or Chapter 2 of Part 1 of the Health and Social Care Act 2008

...which are relevant to their investigations'(MCA, Sections 35(6) and 131, amended by Section 17 of the Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010).

A critical difference is that with IMCAs it is the holder of the record who decides what is relevant, whereas assessors can decide for themselves what is relevant.

When sharing records between IMCAs and assessors care must be taken to clarify the basis on which they are shared. For example, where an assessor is carrying out their function as an employee of a local authority, the IMCA may use their right to request relevant records from the assessor. Similarly, an assessor could take copies of relevant health or local authority records that the IMCA has on file.

Records may also be shared with the consent of the person, or in their best interests where they lack capacity to make this decision. For example, if an IMCA copied a document which was relevant to an assessment from a person's file from where they lived, they could share this on a best interests basis with an assessor – if the person lacked the capacity to make a decision about sharing the information.

Access to records for paid representatives

Relevant person's representatives (whether paid or not) do not have similar rights of access to relevant records. They can however ask for, and receive, copies of any record on a best interests basis if the person lacks the capacity to make this decision.

Assessment reports

The supervisory body is required to provide any paid representative, 39A IMCA or 39C IMCA involved with copies of any assessments completed. This includes assessments undertaken:

- to identify a potential unlawful deprivation of liberty
- as part of the assessment process for a standard authorisation
- as part of a review.

Whilst there is no statutory requirement for 39D IMCAs to receive copies of assessments, it is good practice for supervisory bodies to provide them on request. Assessors may provide copies of their completed assessments directly to an IMCA or a relevant person's representative.

IMCA reports

For all DOLS instructions IMCAs are required to provide a report to the supervisory body. If an assessor or anyone else wishes to see this report it is good practice to request this from the supervisory body rather than directly from the IMCA. It is also good practice for IMCAs to provide a written report for the best interests assessor before they complete the best interests assessment. On occasion a written report may be required for another assessment. If anyone other than the relevant assessor wishes to access these reports they may be shared on a best interests basis.

IMCAs and assessments

Introduction

IMCAs will have a different level of involvement in the six different assessments. Sometimes there will be no involvement other than to tell the assessor that they will not be making representations. It will also vary depending on the person they are representing. For example, they may have little to offer to the mental capacity assessment if there are no disputes about the person's capacity on issues relating to the deprivation of liberty. However, they may wish to provide a written report if there are disputes, such as the person they are representing challenging the suggestion that they can't make their own decisions.

Assessors and IMCAs should not assume there is a common understanding about whether and when the IMCA will make representations for any assessment. It is good practice is to make contact early in the process to clarify these things. Some IMCA providers use a standard letter to the assessors to do this (see [Appendix A](#)).

Good practice for IMCA involvement and making representations for each type of assessment is described below. This is also good practice for paid representatives.

Age assessment

This assessment is made by a best interests assessor. The only time IMCAs may want to contribute to this assessment is when it has not been possible to establish a date of birth with formal records and the person may be under 18.

It is good practice for the assessor to tell the IMCA if they are having to decide whether the person is under or over 18 based on their appearance and life history. Otherwise they may complete their assessment without any input from any IMCA involved.

Mental health assessment

This assessment is made by a mental health assessor. It is a medical diagnosis to see whether the person has a mental disorder. Without medical training it is unlikely that IMCAs will be able to contribute anything to this assessment. The assessor may complete the assessment without any input from any IMCA involved.

The mental health assessor must consider how the mental health of the person being assessed is likely to be affected if deprived of their liberty, and report their conclusions to the best interests assessor. This is the only time when one of the six assessments may influence another assessment. IMCAs will need this information to support their representations in the best interests assessment, and may want to discuss it with the mental health assessor.

Eligibility assessment

This assessment can be made by a best interests assessor if they are an approved mental health professional, or by a mental health assessor if they are a Section 12 doctor.

There are two parts to this assessment. The first is to see if the authorisation would conflict with an existing requirement of the Mental Health Act 1983. The second part checks whether there should be an application for detention under the Mental Health Act 1983 rather than depriving the person of their liberty using a standard authorisation. This is especially relevant for people receiving treatment for their mental disorder in hospital.

IMCAs will have little need to make representations to the first part of the eligibility assessment because any conflict with an existing requirement of the Mental Health Act 1983 should be obvious to an assessor who has expertise in this area.

The IMCA may wish to make representations for the second part, but only if the managing authority is a hospital. These are likely to be in relation to whether the person is objecting to treatment, or whether the person will be receiving any treatment for mental disorder.

In cases where there may be an objection to treatment for mental disorder in hospital it is good practice for the eligibility assessor to give the IMCA the opportunity to make their representations, prior to concluding their assessment.

No refusals assessment

This assessment is undertaken by a best interests assessor. It looks at whether the authorisation would conflict with an advance decision to refuse treatment or a decision made by an attorney or deputy.

Where treatment is proposed the IMCA may help the assessor to find out whether an advance decision to refuse treatment has been made. They may do this by talking to the person, or other people involved. The IMCA might also find an advance decision to refuse treatment when they examine records.

The ability of a person to make an advance decision to refuse treatment should be considered. For example, some people with severe learning disabilities may never have had the capacity to make an advance decision to refuse treatment.

Where an advance decision to refuse treatment has been found the IMCA may wish to make representations about whether this is valid or relevant to the treatment which is proposed.

The IMCA will not usually need to be involved with deciding whether an authorisation would conflict with a decision of an attorney or deputy. This is because where an attorney or deputy has decision-making power over any aspect of the deprivation of liberty, the person is unlikely to be eligible for the support of either a 39A or 39C IMCA (See amended MCA, Section 40(1)). In such a case the best interests assessor will probably talk directly to the attorney or deputy.

In the case of a no refusals assessment where treatment is involved, it is good practice for the assessor to allow time for both themselves and the IMCA to find out whether the person has made an advance decision to refuse treatment. Where an advance decision is found the assessor should give the IMCA an opportunity to make representations with regard to its validity or applicability

Best interests assessment

IMCAs will always want to contribute to best interests assessments. Before concluding the assessment the best interests assessor should check whether the IMCA wishes to make any final representations. It is also good practice for the IMCA to submit a written report to the assessor before the assessment is finished.

In their report to the supervisory body best interests assessors must include details of everyone they have consulted in carrying out the assessment. The best interests assessor should take care to include details of any 39D IMCA they have consulted. This

is because the supervisory body will then be statutorily required to provide the 39D IMCA with details of the outcome of the assessment process, including a copy of the standard authorisation if granted. These must always be provided to any 39A or 39C IMCA involved (MCA, Sections 57(2) and 58(2)).

Particularly where there is an urgent authorisation in place there will be significant time pressures on both the assessor and the IMCA. There is also a risk that both the IMCA and the assessor will be asking the same people similar questions, putting an undesirable burden on the person being assessed and also on staff (see DOLS Code of Practice, Paragraph 4.17). Good practice is for the assessor and IMCA to consider sharing tasks: interviewing people together, for example, or deciding who will interview who.

This best interests assessment can be considered in five distinct parts:

1. Is there a deprivation of liberty?

IMCAs may wish to make representations as to whether restrictions amount to a deprivation of liberty. This includes 39A IMCAs instructed for a potential unlawful deprivation of liberty.

Good practice is for IMCAs to make reference to the factors identified in the DOLS Code of Practice (Paragraph 2.5) or case law, when making representations. For example, saying that the person needing always to go out with staff suggests they are 'under continuous supervision and control'.

Both the assessor and IMCA should be alert to a potentially inappropriate use of the Deprivation of Liberty Safeguards. This includes cases where the restrictions are primarily to prevent contact with a named individual where there is a risk of harm (see MCA Code of Practice, Paragraph 8.28, and [DH briefing on DOLS 2010](#)).

2. Are the restrictions in the person's best interests?

The DOLS Code of Practice (Paragraph 4.61) identifies the following factors to be addressed in this part of the assessment:

- Whether any harm to the person could arise if the deprivation of liberty does not take place?
- What that harm would be?
- How likely that harm is to arise (i.e. is the level of risk sufficient to justify a step as serious as depriving a person of liberty)?
- What other care options there are which could avoid deprivation of liberty?
- If deprivation of liberty is currently unavoidable, what action could be taken to avoid it in future?

Both the assessor and the IMCA will need to consider the mental health assessor's views about how the person being assessed is likely to be affected by being deprived of their liberty. If the proposed care would involve the person being moved, then both should consider the impact of the upheaval and of the journey itself on the person.

Where the assessor concludes that the person is, or would be deprived of their liberty but this does not represent their best interests, they are expected to provide written information to commissioners and care providers, to help them decide on future action. It is also recommended that they discuss possible alternatives with care providers during the assessment process (DOLS Code of Practice, Paragraph 4.23). IMCAs will probably want to be involved in any such discussions. (See [The person's treatment or care does not reflect their best interests.](#))

3. Conditions

The best interests assessor may recommend that conditions should be attached to the authorisation. IMCAs may suggest conditions which will benefit the person, rather than just respond to any proposed by the assessor.

The assessor and IMCA should both be aware of the guidance in the DOLS Code of Practice on the setting of conditions (Paragraphs 4.74 and 4.75):

'... they may make recommendations around contact issues, issues relevant to the person's culture or other major issues related to the deprivation of liberty, which – if not dealt with – would mean that the deprivation of liberty would cease to be in the person's best interests. The best interests assessor may also recommend conditions in order to work towards avoiding deprivation of liberty in future. But it is not the best interests assessor's role to specify conditions that do not directly relate to the issue of deprivation of liberty.

Conditions should not be a substitute for a properly constructed care plan. In recommending conditions, best interests assessors should aim to impose the minimum necessary constraints, so that they do not unnecessarily prevent or inhibit the staff of the hospital or care home from responding appropriately to the person's needs, whether they remain the same or vary over time.'

The Code of Practice also says that it is good practice for the best interests assessor to discuss any proposed conditions with the relevant personnel at the home or hospital before finalising the assessment (Paragraph 4.75). This would help to clarify whether the conditions recommended could be met by the managing authority – which may also be a concern for the IMCA.

The best interests assessor may conclude that the deprivation of liberty would only be in a person's best interests if the supervisory body sets specific conditions when granting the standard authorisation. An IMCA may have a similar view. If this is the case the IMCA should put this in writing: both to the assessor before they complete their report and the supervisory body before they make their decision about conditions.

4. Duration

The best interests assessor must suggest the duration of a standard authorisation if this is to be granted (up to a maximum of one year). IMCAs may make recommendations about the length of an authorisation: this could be longer or shorter than the time being considered by the assessor.

Once the assessment is complete, the IMCA may decide to make representations on the duration of authorisation directly to the supervisory body. However, they should remember that the supervisory body cannot grant an authorisation for a period longer than that recommended by the best interests assessor.

5. Person's representative

Where possible, the best interests assessor should recommend someone to be appointed as the relevant person's representative in an unpaid capacity (i.e. a family member or friend).

Because 39A IMCAs are involved when the person has 'no one appropriate to consult' they will rarely be in a position to comment on the suitability of a family member or friend to take on the person's representative role. They should still try and find someone who could undertake this role in either a paid or unpaid capacity. For example, an IMCA may identify an ex staff member who has maintained an interest in the person's welfare. IMCAs may wish to share their views on the choice of a paid representative with both the best interests assessor, and the supervisory body. This could include the skills the representative should have such as speaking the person's first language, for example. The IMCA could suggest someone already known to the person who could undertake the role if contracted to do so. For example, a non-statutory advocate who already has a good rapport with the person.

Best interests assessors and IMCAs should be aware of the recent [Department of Health advice](#) on the choice of the person's representative:

'10. Paragraph 7.17 of the Deprivation of Liberty Safeguards supplement to the Mental Capacity Act 2005 Code of Practice states:

"It should not be assumed that the representative needs to be someone who supports the deprivation of liberty."

11. The Department is aware of a number of cases where family members have not been selected to be the RPR where they have not been supportive of the deprivation of liberty. That alone is not grounds for not selecting them for the role. Best interests assessors need to assure themselves that the individuals in question are inappropriate for other reasons, which may include that they simply do not wish to take on the role.

12. Both the person "P" now deprived of his or her liberty and his or her RPR have an automatic non-means tested right of appeal to the Court of Protection. Where a family member is not selected to be the RPR and they wish to challenge the authorisation they can only apply to the Court, for a best interests determination and incur the costs of such an application.

13. Sometimes the MCA DOLS authorisation is the culmination of a lengthy dispute between the family and an NHS Trust or local authority about where the person should live. Paragraph 8.28 of the Mental Capacity Act 2005 Code of Practice states that a "court decision might be appropriate" where "there is a major disagreement regarding a serious decision (for example, about where a person who lacks capacity to decide for themselves should live)"

14. Such disputes, which cannot be otherwise resolved, will require the "last resort" determination of the Court rather than being resolved via the Safeguards.'

See [When a paid representative should not have been appointed](#) for the action paid representatives or 39C IMCAs should take if they are concerned that a suitable family member or friend has not been given the representative role.

Mental capacity assessment

The mental capacity assessment can be undertaken by a best interests assessor, or a mental health assessor. The assessment is to establish whether the person has capacity:

'to decide whether or not they should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment'. (MCA, Schedule A1, Section 15).'

Even if a person has the capacity to make this decision, it could still be a difficult decision for them to make. Where there is doubt about a person's capacity the time allowed for the assessment must allow for this. For example, if the person changes their mind this should not be seen as proof of a lack of capacity.

The IMCA should ensure that the person is given every possible support to enable them to make their own decision (MCA, Code of Practice, Paragraph 10.20).

The IMCA is unlikely to be able to decide whether they need to make representations for a mental capacity assessment until they have met the person. It is good practice for assessors to ensure that the IMCA has the opportunity to meet the person before the assessment is completed. Where there is uncertainty about the person's capacity it would be good practice (where practicable and appropriate) for the assessor to invite the IMCA to be present during the assessment. This would provide an opportunity for a useful and informed discussion before the assessment is finished. It could also be easier for the person who otherwise is likely to be asked similar questions at different times by the IMCA and assessor.

The mental capacity assessment is one of the most common areas of disagreement between assessors and IMCAs. Efforts should be made to resolve these disagreements before the assessment is completed (see '[Resolving concerns](#)' in this document).

If the IMCA has concerns about the potential outcome of the mental capacity assessment it is good practice to put these in writing. It should not be assumed that IMCAs will be more likely than the assessor to view the person as having capacity.

Example of 39A IMCA involvement in the assessment process

An application for a standard authorisation was made for Sheila who at the time was an informal patient on a mental health ward. Restrictions were thought necessary after a number of assaults on staff. Sheila had been assessed as being ineligible for detention under the Mental Health Act 1983.

The 39A IMCA met with Sheila after a risk assessment. They were surprised by how articulate Sheila was and how well she was able to talk about why restrictions were being suggested. After the meeting they spoke to the assessor doing the mental capacity assessment. The assessor had by this time also met Sheila but had formed a view that she lacked capacity regarding the restrictions. The assessor explained that in their meeting Sheila had shown little awareness of having a mental disorder and was unable to retain information relating to why the restrictions were being suggested.

The IMCA asked for the opportunity to meet Sheila again before the assessor concluded their assessment. During this second meeting the IMCA found that the assessor had good reason to question Sheila's capacity. They wrote a report for this assessor setting out the things that Sheila had said which both supported and challenged an assessment that she lacked capacity. The IMCA also told the assessor that they would not challenge a conclusion that Sheila lacked capacity.

An authorisation was granted when all assessments were returned positive. This was set for three weeks by which time it was expected that Sheila would have moved into a care home. A request was made for a standard authorisation in advance by the care home.

(Example provided by East Lancashire Advocacy Service)

IMCA role if authorisation not granted

Introduction

If a request for a standard authorisation is not granted the supervisory body is required to advise the 39A IMCA that this is the case (**form 13**), and to provide copies of any assessments completed.

Good practice is for 39A IMCAs to continue to support and represent the person if they have the following concerns:

- The person's treatment or care does not reflect their best interests.
- The person is being deprived of their liberty.
- The person may have been wrongly assessed as having capacity to make decisions about their treatment or care.
- The assessment process for the standard authorisation.
- Other issues not directly related to the application.

If none of these concerns arise the 39A IMCA will, in most cases, close the case at this point.

Paid representatives, 39C and 39D IMCAs may also have these concerns when an authorisation has ended: including when a request for a further authorisation has been declined. If 39C or 39D IMCAs wish to take action about any of these concerns after an authorisation has ended they need to recognise that they no longer have a statutory IMCA role with statutory powers. This is because these end with the authorisation. This does not prevent 39C and 39D IMCAs or paid representatives taking action as non-statutory advocates. It is different with 39A IMCAs for whom such action can be part of their IMCA role. Practically this means that 39A IMCAs can still use their powers to meet the person and to access records.

For each of the concerns listed above the following suggestions for good practice are made:

The person's treatment or care does not reflect their best interests

Where the authorisation was declined when the person was deprived of their liberty but the best interests assessor did not recommend the proposed care arrangements as being in the person's best interests, the DOLS Code of Practice makes the following recommendations (Paragraphs 4.72 and 4.73):

- the best interests assessor to work with the managing authority to consider alternative approaches to providing treatment and care
- the report of the best interests assessor to be kept on the person's file.

Where the person is found to be currently deprived of their liberty, the Department of Health has suggested that managing authorities and supervisory bodies should have processes to ensure this is resolved as soon as possible ([DH, 2010, section 16](#)).

IMCAs may wish to be involved in discussions with the best interests assessor and the managing authority to try to resolve concerns regarding the person's best interests. Where these concerns cannot be resolved informally the IMCA may instigate the following actions:

- a formal complaint against the managing authority and/or the local authority or funding PCT for failing to act in the person's best interests
- an alert to the local safeguarding adult team
- encouraging, supporting or making an application to the Court of Protection
- the MCA Code of Practice says that serious disputes about best interests should be resolved in this way (Paragraph 8.28).

In each case it is recommended that the IMCA provides a written report about why they think that decisions about the person's treatment or care may not be in their best interests.

The person is being deprived of their liberty

An IMCA may be concerned that the person is being (or will be) deprived of their liberty even if the best interests assessor has reached a different conclusion. Different opinions should be expected because there is no simple definition of a deprivation of liberty.

If the IMCA has been unable to resolve their concerns before the best interests assessment is completed they should consider the following actions:

- Ask the supervisory body if they can appoint a different best interests assessor to look specifically at the issue as to whether the person is being deprived of their liberty. This is possible under MCA schedule A1 69(1).
- Encourage, support or make an application to the Court of Protection

The person's mental capacity

An IMCA may be concerned that the person has been wrongly assessed as having capacity to make decisions about their treatment or care. This isn't unusual because in many cases it is difficult to be confident about the person's mental capacity, and different assessors could reach different conclusions.

If the IMCA has been unable to resolve their concerns before the mental capacity assessment is completed they should consider the following actions:

- Ask the supervisory body to arrange for another professional to assess the person's mental capacity. This would not be a formal assessment as part of the DOLS process. It would be the same process as may

happen in any situation where there are doubts about a person's capacity (MCA, Code of Practice, Paragraph 4.65).

- Encourage, support or make an application to the Court of Protection. The IMCA does not need to be challenging the assessment of capacity to take such action. Because of the significance of the outcome of the assessment it may be appropriate for the Court of Protection to make the decision (see MCA, Code of Practice, Paragraph 8.16).

The assessment process for the standard authorisation

The IMCA may have concerns about the way the request for the standard authorisation was managed. This can happen regardless of the outcome of the assessment process. Concerns could include:

- The 39A IMCA was instructed late in the process so there was little opportunity to represent the person.
- An assessor completed their assessment without giving the IMCA an opportunity to make representations.

Concerns about a failure to comply strictly with the requirements of the Deprivation of Liberty Safeguards are very serious. Such failures can make authorisations, where granted, unlawful. In many cases it will be appropriate for IMCAs to make a formal complaint if they believe the process has not been followed as set out in the legislation and code of practice.

Other issues not directly related to the application

The IMCA's work may have identified other concerns about the person's support which are not directly related to the request for the standard authorisation. For example, a request to authorise deprivation of liberty in another setting may have been rejected but there are concerns in the current setting. If these cannot be resolved informally the following actions may be considered:

- Make arrangements for the person to have access to another advocate who can follow up the concerns.
- Make a formal complaint about either the care provider or the funder of the service.

Paid relevant person's representatives

Introduction

When an authorisation is granted the best interests assessor will be able, in most cases, to recommend somebody to be the relevant person's representative (i.e. a family member or friend).

If the best interests assessor is unable to recommend anyone, the supervisory body must appoint someone to perform this role in a professional capacity. Here this is called a paid representative.

The supervisory body must be satisfied that paid representatives have appropriate skills and experience, including a good understanding of the Deprivation of Liberty Safeguards. Paid representatives should be appointed using [form 25](#).

The DOLS Code of Practice suggests that paid person's representatives could be provided by advocacy services (Paragraph 7.20). If a supervisory body has commissioning arrangements with an advocacy service, they still need to appoint a named individual from that service to undertake the role. This is different to the IMCA roles where the practice is for the IMCA provider to be instructed. The IMCA provider then has flexibility about which IMCA is involved – including the option of more than one IMCA being involved to ensure that important meetings are covered, for example.

[Appendix D](#) gives a template service specification for paid representatives.

If the supervisory body is concerned that a paid representative is not undertaking their role satisfactorily they may give them notice that their role will end ([form 26](#)). If this happens a new paid representative will need to be appointed.

Example of paid representative role

A standard authorisation was granted for Gladys, a 75 year old woman with dementia living in a care home. The restrictions were concerned with not allowing her husband to take Gladys out alone because of an incident two years ago when he had hit her. He acknowledged that this had happened saying that the stress of his wife having dementia and money worries had overwhelmed him at the time. Before the authorisation was granted he was spending several hours a day with his wife at the home and wanted to take her back to visit their home. This request had been refused as part of adult safeguarding and had led to the application.

A paid representative was appointed because the best interests assessor did not consider that Gladys' husband could take this role. After reading the standard authorisation and care plan, the paid representative met Gladys and talked to staff in the home. The paid representative urgently contacted the supervisory body saying that standard authorisations should not be used if the main purpose is to restriction contact. They quoted the Department of Health's briefing on DOLS from April 2010. They also said that by not selecting the husband as the representative had wrongly limited his opportunity to challenge the deprivation of Gladys' liberty.

The supervisory body reviewed the authorisation and appointed a different best interests assessor to do the best interests assessment. This assessor agreed with the view of the paid representative leading to the authorisation ending. A safeguarding meeting was also arranged to review the risks of the husband taking Gladys out. The

paid representative was involved in this meeting and supported the decision that there should be no further restrictions on contact.

(Example provided by East Lancashire Advocacy Service)

When a paid representative should not have been appointed

The Department of Health has reminded best interests assessors that supporting the deprivation of liberty is not a requirement for the selection of relevant person's representatives ([DH, 2010, section 10](#)).

If a paid representative (or 39C IMCA) is concerned that an appropriate family member or friend has not been appointed they should advise the supervisory body of the concerns.

- The supervisory body may then instruct a best interests assessor to look at possible appointments of family or friends as the relevant person's representative.
- Under statutory instrument SI 2008 no.1315 Regulation 4, the best interests assessor must first decide whether the person has capacity to select their own representative. If the person lacks capacity to make this decision the assessor may recommend an appointment to the supervisory body in the usual way. This can be included on [standard form 24](#)
- This is not a review of the authorisation, and the best interests assessor is not required to undertake a full best interests assessment.
- If the best interests assessor is able to recommend someone the supervisory body should appoint them using [form 25](#).
- If a paid representative has already been appointed, they will need to advise the supervisory body that they are no longer willing to carry out their role before a new representative can be appointed. The supervisory body should confirm the ending of the paid representative role using [form 26](#), marking B6, and should notify relevant people using [form 27](#).
- If contacting the supervisory body does not resolve the concerns, the paid representative (or 39C IMCA) should make use of their right to apply to the Court of Protection to challenge the lawfulness of the authorisation, on the grounds that the relevant person representative requirements have not been met.

Restrictions on who can act as a paid representative

The Department of Health has clarified the requirement in regulations for person's representatives not to be employed by, or providing services to, the managing authority, where the relevant person's managing authority is a care home (DOLS Code of Practice 7.19).

If an advocate is appointed as a person's representative it does not prevent this advocate, or others in their organisation, undertaking other advocacy roles with the

person, or with other people in the care home. The restriction is relevant if the managing authority directly contracts services from the organisation employing the advocate: for example, if the care home paid the advocacy organisation to support a self advocacy group. In such situations the person's representative could not be involved in providing the contracted services.

IMCAs acting as the relevant person's representative

IMCAs are well placed to undertake the person's representative role because of their knowledge of the MCA and their experience of working with people who lack capacity to make important decisions. Many will also have a strong understanding of the deprivation of liberty safeguards.

However, IMCAs may not be the best choice for the paid representative role with an individual if:

- The person has views about who they would want as a paid representative.
- The person already has an advocate and there is a good relationship between them.
- The person has cultural needs which can be met by a particular choice of a representative.
- The person has particular communication needs (e.g. signing or their first language is not English).

Where IMCAs are appointed to act as a person's representative they need to be clear that their role and functions are that of the person's representative, and not of an IMCA. The main difference is that as a paid representative they do not have the IMCA's rights of access to relevant records. Access to records for paid representatives is looked at below

IMCA instructions where a person has a paid representative or 39C IMCA

Where a person has a paid representative (including when this role is taken by a 39C IMCA) neither they nor their representative are eligible for the support of a 39D IMCA. The paid representative should be able to provide the person with the necessary support.

Having a paid person's representative removes the requirement for some other IMCA instructions. This is set out in detail in the section [DOLS IMCA roles and other IMCA roles](#).

If a person is subject to a standard authorisation and has a paid representative there is no requirement to instruct:

- a 39A IMCA for a further standard authorisation request
- an accommodation IMCA for the decision about where a person should live immediately after the authorisation ends.

It is assumed that the person will be supported by their paid representative for these matters. If there is a gap at the end of the authorisation before these decisions are made, the person may be eligible for the support of an IMCA. This is because the paid representative's role ends with the authorisation.

The need to instruct an IMCA for serious medical treatment decisions, or the power to instruct an IMCA for care reviews or safeguarding adults, is unaffected by having a paid representative.

The role of the paid representative and 39C IMCA

Introduction

The role of the person's representative is set out in Paragraph 140 of Schedule A1 of the amended MCA, and described in the DOLS Code of Practice (Paragraph 7.2) as:

- '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 procedures on the person's behalf or making an application to the Court of Protection.'

Frequency of contact

The DOLS Code of Practice does not provide guidance about the frequency of contact expected. The level of contact (including the frequency and duration of visits) will depend on the following factors:

- Does the paid representative already know the person? This may influence the time needed to establish rapport, and also how much time is needed to explain the authorisation and paid representative role.
- Is the person able to express their views and wishes? The communication needs of some people may require longer or more frequent visits to make sure that any views they have about the authorisation are identified. Regular contact with people less able to express their views is important because of the need to monitor how they may be affected by the authorisation.
- Is a formal process taking place? If there is a review, a request for another standard authorisation or an application to the Court of Protection the paid representative may need to have a greater level of contact. This may also be true if the person is subject to safeguarding adult proceedings. The additional contact would allow the person to be told about any developments and to be kept informed about progress.

If the paid representative has no concerns about the authorisation and there is no formal process underway it is suggested that they should have contact with the person at least once a month.

When meeting the person the paid representative should do a risk assessment.

Example of paid representative role

A standard authorisation was granted for Tina, a woman with learning disabilities living in a self contained flat based within a larger residential service. Restrictions included 2–1 staffing whenever Tina went out of her flat extending to the possible use of restraint if it was judged to be in her best interests to return home. The use of CCTV was also authorised as an alternative to constantly having to share her space with staff.

Paula was appointed as a paid representative as there was no one who had regular contact with Tina outside of services. The supervisory body specifically sought a woman with experience of working with people with severe learning disabilities. Staff who supported Tina did not think that she would tolerate a new person coming into her life. After studying information about Tina and undertaking a risk assessment, Paula started trying to get to know Tina by staying some distance away from her when she went for walks with staff. Over time this developed into accepting closer proximity including in her flat, maintaining eye contact, and communication using signs.

Paula was able to provide independent monitoring to ensure the restrictions continued to be in Tina's best interests. She had also demonstrated that Tina was more able to cope with new situations that had been expected. This led to Tina being supported to other activities outside of her flat. Paula was also to make suggestions about how to increase Tina's opportunity to make some decisions using communications aids. Paula was consulted about and supported the decision to grant a further authorisation when the first one ended.

(Provided by North Wales Advocacy and Advice Association)

Access to records for paid representatives and 39C IMCAs

Supervisory bodies are required to provide paid representatives and 39C IMCAs with copies of the following information/records:

- the assessments undertaken by the best interests and mental health assessors (**standard forms 5-10**)
- the standard authorisation (**standard form 12**)
- notice that a review is being undertaken (unless the review has been requested by the paid representative) (**standard form 20**)
- the outcome of any review (**standard form 22**).

It is good practice for the supervisory body to provide paid representatives and 39C IMCAs with:

- a copy of the original request for the standard authorisation and any subsequent requests (**standard form 4**)
- copies of the care plans and assessments which the managing authority attached to their request for a standard authorisation (**standard form 4** part B3).

Paid representatives do not have special powers to access other information such as other records held by the managing authority. However, they can request access to any record concerning the person – on a best interests basis. Under the Data Protection Act 1998 records may be shared if the record holder believes the person lacks capacity to make a decision about this, and it is in the person's best interests to share these with the paid representative.

Similarly 39C IMCAs may request information on a best interests basis. They also have the rights shared by all IMCAs of access to relevant records (MCA, Section 35(6)).

Paid representatives will often want to see records kept by the managing authority. This includes records which may show whether the requirements of the authorisation are being met.

Reviews of the authorisation

The paid representative and 39C IMCA have the same powers as the person to require the supervisory body to review an authorisation. Managing authorities also have this power (using **form 19**). Reviews can also take place if the supervisory body feels it is appropriate. This could happen if requested to do so by any other person which could include a 39D IMCA.

When the supervisory body is arranging a review they are required to tell the person, their representative and the managing authority about the review (**form 20**).

Any paid representative, 39A, 39C or 39D involved when there is a review may:

- suggest which review assessments (if any) should be undertaken
- make representations to the supervisory body about whether a full best interests reassessment is necessary, or whether concerns can be dealt with by changing the conditions
- make representations to assessors undertaking a review assessment. Assessors must pay attention to these representations
- make representations to the supervisory body about possible changes to the conditions.

Where a review is undertaken it is good practice for any IMCA or paid representative involved to provide written reports to:

- the best interests assessor if they undertake a best interests assessment

- the supervisory body before the review is completed.

The supervisory body is required to inform the person, their representative, the managing authority, and any 39D IMCA involved about the outcome of the review ([form 22](#)).

Taking formal action

Introduction

The options for formal action for are:

- complaints – possibly against the managing authority or supervisory body
- a safeguarding adult alert – about the person or another vulnerable adult
- a review for those people subject to a standard authorisation
- an application to the Court of Protection whether or not a person is subject to a standard authorisation.

Complaints and safeguarding adult alerts can be made by anyone at any time. IMCAs and paid representatives have the same opportunity as other people to take these actions.

Paid representatives and 39C IMCAs can require a review of the authorisation, as stated above. 39D IMCAs can request a review, or they can support the person or their representative to demand one. It is also possible for 39A IMCAs to request a review prior to a relevant person's representative being appointed.

The options for assessing the Court of Protection vary depending on who is representing the person and whether or not a standard authorisation is in place. This is set out in the table below. The table also includes the relevant person's rights in these areas.

Powers of access to the Court of Protection

	Before an authorisation is granted, including if an authorisation is not granted	Whilst a standard authorisation is in place	After a standard authorisation has ended and no further authorisation has been granted
Person	Right of access to the Court of Protection. This could be supported by a 39A IMCA.	Right of access to the Court of Protection (non means tested). This could be supported by a 39A or 39D IMCA, for example, acting as litigation friend.	Right of access to the Court of Protection. This could be supported by, for example, a 39D IMCA or paid representative who believed the person was still being, or should be, deprived of their liberty
39A IMCA	Can make an application to the Court of Protection on behalf of the person at any time.	The role ends with the appointment of the person's representative. Up to that point the IMCA can make an application to the Court of Protection. Afterwards they can only stay involved if they are making an application to the Court of Protection in connection with the standard authorisation being granted. (See 'When the 39A role ends')	Extremely unlikely to have a role at this point.
Paid representative or 39C IMCA	Roles cannot exist until an authorisation is granted.	Right of non means tested access to the Court of Protection. The 39C IMCA role and powers ends with the appointment of a representative.	These roles and their right of access to the Court of Protection end with the authorisation. They could still apply to the Court of Protection on behalf of the person if, for example, they believed the person was still being, or should be, deprived of their liberty.
39D IMCA	Cannot be instructed if an authorisation is not in place.	Can make an application to the Court of Protection on behalf of the person, or support the person or their	Could make an application to the Court of Protection on behalf of the person if, for example,

		representative's rights to access the Court of Protection.	they believed the person was still being, or should be, deprived of their liberty.
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Choosing a review or application to the Court of Protection

Where IMCAs or paid representatives have concerns about the deprivation of liberty, they may need to decide whether to exercise the rights for review or access to the Court of Protection. They may also need to advise or support the person or their unpaid representative to instigate either of these formal actions.

It is good practice to try to resolve concerns informally, before deciding to take formal action. An example would be if an IMCA found that a managing authority was not meeting the requirements of the authorisation (including any conditions set). This might make the authorisation unlawful. Paid representatives and IMCAs would be failing in their roles as one of the deprivation of liberty safeguards if they did not take action to address this. This would be the case even if taking action went against the wishes of the person, their representative, or their own views about what was in the person's best interests.

A first step would be to advise the managing authority that this could make the authorisation unlawful. The managing authority would probably respond by either meeting the requirements of the authorisation, or by requesting a review if they believed any conditions needed to be changed. If this doesn't happen the IMCA or paid representative should take, or support the person or their representative to take, formal action.

The following factors should help decide whether a review or application to the Court of Protection is appropriate. It is offered as good practice guidance only and should not deter the person or their representative exercising their rights to access the Court of Protection at any time, for any reason. Article 5 of the European Convention of Human Rights requires speedy access to a legal authority where the deprivation of liberty can be challenged. The Court of Protection is the legal authority for DOLS. The review process is not a legal authority.

The wishes of the person or their representative

39D IMCAs are required to help the person or their representative exercise their rights of review and application to the Court of Protection if 'it appears to the advocate' that the person or their representative wishes to exercise these rights (MCA, Section 39D(8)). The 39D IMCA's has no choice where the person or their representative asks specifically for one of these rights (even if this means going against the wishes of the other person).

What is more difficult is when a person 'appears' to want to exercise a right by protesting in some way about the deprivation of liberty, but is unable to state a preference about which right they wish to exercise. For example, they may be able to verbally communicate that they want to go home, or they are pushing against a locked door. It could be argued that everyone deprived of their liberty under the safeguards at some point is protesting about this – otherwise they would not require restrictions to receive care or treatment.

Good practice is for 39D IMCAs to take formal action if:

- On more than one occasion the person tells the IMCA verbally that they are unhappy with any restrictions. Examples include saying they want to go home or to go out but the staff won't let them. They do not need to be consistent.
- The person appears to be very unhappy or distressed. Examples include looking upset, self injuring, or not eating.

In these situations 39D IMCAs would still need to make a decision about which right to exercise.

There are no similar requirements for paid representatives or 39C IMCAs to require a review or apply to the Court of Protection if it 'appears' that the person would want to exercise one of these rights. This does not of course prevent them from taking such action.

Whether concerns may be resolved by looking at the conditions of an authorisation

If there is a possibility that any concerns of the person, their representative or an IMCA can be resolved by looking at the conditions, a review should be sought. Examples include situations where conditions are not being met, or a change in conditions could be in the person's best interests.

In these situations the supervisory body can choose whether to arrange a further best interests assessment or to vary the conditions without it. The supervisory body should seek the views of the person, their representative or any IMCA involved when making this decision (DOLS Code of Practice, Paragraph 8.14).

If a person in hospital is possibly objecting to treatment for mental disorder

If an IMCA or paid representative believes that a person in hospital is objecting to treatment for mental disorder they should seek a review. It is not good practice to avoid doing this in order to prevent the person being detained under the Mental Health Act 1983.

Concerns about whether the authorisation is in the person's best interests

If the paid representative or an IMCA believes that the deprivation of liberty is not in the person's best interests, they should try to resolve this through the review process. 39D IMCAs should also take this action if the person is disputing what is in their best interests. This may lead to a further best interests assessment.

Concerns that the person should be making their own decisions about any restrictions

The paid representative or an IMCA may be concerned about whether the person is able to make their own decisions about their care and treatment. The first step should be to try to resolve this through a review which may lead to a further assessment of capacity. 39D IMCAs should take this action if the person is disputing their capacity to make decisions. However, a review may not be required if the person has fluctuating capacity, particularly if when they have capacity they do not object to the restrictions (see DOLS Code of Practice, Paragraphs 8.22 – 8.24).

Concerns that decisions should have been taken to the Court of Protection

There may be concerns that a DOLS authorisation has been used inappropriately – where there is a dispute, or to restrict the person's contact with someone who may cause them harm (see [DH briefing on the DOLS, 2010](#)). The view may be that the Court of Protection should have been involved in making such decisions. An IMCA or representative may be concerned even if they are not challenging the decisions made about the person's care and support.

First they should draw the supervisory body's attention to their concerns and suggest that they make an application to the Court of Protection – this is the expectation of the MCA Code of Practice (Paragraph 8.28). If this does not happen the paid representative or 39C IMCA should exercise their right to make the application to the Court of Protection. A 39D IMCA will need to decide whether to seek permission to make an application or support the person to make the application. The application should ask the court to decide whether an authorisation has been used inappropriately to make decisions which should have been referred to the court, and for the court to make decisions on these matters ([COP 1](#), Questions 5.1 and 5.2).

If a review doesn't resolve concerns

If the review process does not resolve the concerns of the person, their representative or an IMCA, the paid representative and IMCA have the following choices:

- take no further action
- request a further review

- make an application to the Court of Protection.

Unless the paid representative or IMCA has new information that wasn't available at the initial review, seeking a further review would be inappropriate in most cases.

If the paid representative or an IMCA has significant unresolved concerns they should make an application to the Court of Protection. In situations where the concerns are those of the person and are not shared by the paid representative or the IMCA, different responses may be required depending on the role. 39D IMCAs should make an application to the Court of Protection on the basis that the person would „appear' to want to exercise that right. There is no such requirement for paid representatives and 39C IMCAs.

Applications for further authorisations

Authorisation is granted

If the authorisation is granted the supervisory body must provide any representative 39A or 39C IMCA with:

- a copy of any current standard authorisation (**standard form 12**)
- copies of any assessments completed (**standard forms 5-10**).

These should also be provided to any 39D IMCA involved if requested.

Where a further authorisation is granted the paid representative must be reappointed if they are to continue in their role for the new authorisation (**form 25**). Similarly it is good practice for a 39C IMCA to be reinstructed in the unlikely situation that it is not possible to appoint a paid representative.

Authorisation not granted

If the authorisation is not granted the supervisory body should notify any IMCA or paid representative involved (**form 13**). The supervisory body should also advise any representative that their role is ending in relation to the original authorisation (**form 26**).

IMCAs and paid representatives may have the following concerns:

- The person's treatment or care does not reflect their best interests.
- The person is still being deprived of their liberty.
- The person may have been wrongly assessed as having capacity to make decisions about their treatment or care.
- The assessment process was not followed as required.

There are significant concerns about other aspects of the person's treatment or care. The section on '**IMCA role if authorisation not granted**' sets out specific formal action which could be taken in these circumstances. Where the original authorisation has not

yet ended paid representatives or 39C IMCAs could use their rights to make an application to the Court of Protection to formally raise any significant concerns.

Example of 39D IMCA support

Amir had been subject to a standard authorisation in a care home for three months. He had both mental health needs and learning disabilities and the restrictions were in place to address the risk of self-harm both inside the home and outside. This included locked doors and windows as well as the PRN (as needed) use of medication.

Three weeks before the end of the first standard authorisation an application was made for a further standard authorisation. The supervisory body instructed a 39D to support Amir and his sister (who was his relevant person's representative) during the assessment process.

After a risk assessment the 39D IMCA met Amir and spoke to his sister. Amir's sister was accepting of the restrictions but was glad of the IMCA's help to explain why a further request had been made and how she could be involved. The IMCA also learnt from Amir's sister that previously he had enjoyed fishing and gardening. The IMCA also examined the care plan and daily records. This showed that Amir made daily attempts to go outside but he was only supported to do so for about an hour a week.

The IMCA discussed their concerns with the best interests assessor about how rarely Amir's had the opportunity to go outside, and how his care plan could better reflect his interests. They also put their concerns in a report to this assessor which they copied to the supervisory body and the care home manager.

The authorisation was granted for a further six months. The care home reviewed the care plan to schedule support to be available for Amir to go out at least two hours a day including giving him the opportunity to do activities which he was known to enjoy. (Example provided by East Lancashire Advocacy Service)

When an authorisation ends

Early end to an authorisation

Deprivation of liberty can be ended at any time before the end date set in the authorisation. This should happen if the care home or hospital believes the deprivation of liberty is no longer necessary. In that case the managing authority should apply to the supervisory body to review the authorisation (**form 19**). The requirements for this review are the same as other reviews (see **IMCAs' and paid representatives' roles in reviews of the authorisation**). This includes the requirements for alerting paid representatives and IMCAs and listening to their views.

Concerns when an authorisation ends

An IMCA or paid representative may have concerns about the person's treatment and care when an authorisation ends. These may be:

- the person is still being deprived of their liberty
- the person's treatment and care does not reflect their best interests.

Both IMCAs and paid representatives will want to address such concerns. It is possible for paid representatives and 39C IMCAs to use their right of access to the Court of Protection if they apply before the original authorisation ends.

Once the authorisation has ended all the powers of 39C and 39D IMCAs end. A paid representative, 39C or 39D IMCA who wishes to take action has the options that are available to non-statutory advocates. They could, for example, support an application to the Court of Protection, or refer the concerns to another advocate.

The section on **IMCA role if authorisation not granted** describes the formal action which any advocate can take in these circumstances.

Appendices

Appendix A: Template letter to assessors to set out contact with IMCAs or paid representatives

This letter could be sent to each assessor immediately an IMCA or paid representative is alerted to the need to represent a person in assessments. This includes:

- 39A, 39C, or 39D IMCAs for assessments undertaken a part of a request for a standard authorisation
- 39C or 39D IMCAs for assessments undertaken as part of a review.

It is designed so that it can be sent before the IMCA starts their work of supporting and representing the person. This is to ensure that the assessors are alerted as early as possible to the involvement of an IMCA. It can also help make sure that assessments are not completed without the IMCA having an opportunity to provide input.

This letter could be sent by an administrator when the initial IMCA instruction arrives.

Paid representatives involved in reviews or requests for further standard authorisations may also wish to use such a letter to identify how they wish to be involved in assessments.

Template letter

To the assessor

This is to advise you in your role of assessor that (name of organisation) has been instructed to act as a 39A / 39C / 39D* IMCA for (name of client).

* delete as appropriate.

They also have the following advocacy roles in relation to this client (e.g. SMT IMCA/ adult protection IMCA / non statutory advocacy role

The IMCA undertaking the role(s) is

Contact details

They will support and represent the person during the assessments process. The aim of this letter is to make the IMCA's expectations clear at the outset, so that the assessments are completed efficiently and in compliance with the duties imposed on both assessors and IMCAs under the MCA.

You are required to take account of this letter under schedule A1, Section 132.

If for any assessment you would like to make different arrangements, please contact the IMCA at the earliest opportunity so that these can be discussed and alternatives agreed.

All assessments

If either the assessor or the IMCA wishes to change the times agreed for the IMCA to make representation before the assessment is concluded, this should be done by mutual agreement.

If you are meeting the person or other contacts please consider involving the IMCA in these meetings to reduce the burden of the assessment process on those consulted.

Please share at the earliest opportunity information which may be important to the IMCA's role. The IMCA will similarly undertake to share with the assessor any significant information or views.

Please alert the IMCA as soon as possible if an individual assessment is negative.

Age assessment

You are requested to tell the IMCA if it has not been possible to verify with certainty that the person is over 18. In that case the IMCA may wish to make representations before the assessment is completed. Otherwise the IMCA will not make representations for this assessment.

No refusals assessment

If part of the purpose of the DOL is for the person to receive treatment, the IMCA may want to make representations. Otherwise the IMCA will not make representations for this assessment.

Where treatment is involved please liaise with the IMCA to set a date when representations will need to be made by. This should allow adequate time for both the IMCA and assessor to establish if there are any valid advance decisions to refuse treatment.

If an advance decision to refuse treatment is identified the IMCA may wish to make representations if there are questions about its validity or applicability.

Mental capacity assessment

The IMCA may want to make representations for this assessment. Please liaise with the IMCA to agree when representations will need to be made by. This will need to be after both the assessor and the IMCA have had the opportunity to meet the person and to speak to each other about this.

If the IMCA has any concerns about the assessment of capacity you will be told at the earliest opportunity. The IMCA may put significant concerns in writing before the agreed time.

Mental health assessment

The IMCA will not make representations with regard to this assessment.

Please tell the IMCA at the same time as the best interests assessor how the person's mental health may be affected by being deprived of their liberty. The IMCA may wish to discuss this with the assessor to inform their representations for the best interests assessment.

Eligibility assessment

The IMCA may make representations if the managing authority is a hospital. If this is not the case the IMCA will not make any representations for this assessment.

If the managing authority is a hospital please liaise with the IMCA to agree when representations will need to be made by.

Best interests assessment

The IMCA will want to submit an IMCA assessment report. This should be considered by the assessor before completing their assessment. Please liaise with the IMCA about when this report must be submitted.

If an authorisation is to be granted and the supervisory body is considering changing the conditions proposed in the best interests assessment, please tell the IMCA that this is the case and make sure that they have the opportunity to make representations.

Appendix B: Template report for the best interests assessment

This guidance says that it is good practice for IMCAs and paid representatives to provide reports to the best interests assessor, before the assessor completes the best interests assessment. The assessment may be undertaken as part of the application

process for a standard authorisation, for a review, or in the case of a potential unlawful deprivation of liberty. As such not all parts below will be relevant.

This report (or an amended version) could be submitted to the supervisory body where a standard authorisation is to be granted.

1. Person's details.

2. Reason for best interests assessment: request for standard authorisation, review, potential unlawful deprivation of liberty.

3. Role of person completing this report: 39A IMCA/ 39C IMCA / 39D IMCA, paid representative.

4. Other advocate roles currently performed in relation to this client

Item 4 may include other IMCA roles, Independent Mental Health Advocate or non-statutory advocacy.

5. Main actions undertaken to inform this report.

Item 5 should include any contact with the person, visits to services, contact with others and records accessed.

6. Regarding whether the proposed restrictions amount to a deprivation of liberty.

7. Regarding whether the restrictions are in the person's best interests

Item 7 may cover:

- whether this is necessary in order to prevent harm to the person
- whether this is a proportionate response given the likelihood that the person will otherwise suffer harm and the seriousness of that harm
- consideration of other options.

8. Regarding conditions.

9. Regarding the choice of the person's representative.

10 Regarding the duration of the authorisation.

11. Consideration should also be made to the following:

Signed and dated

The assessor is required to take this report into account in accordance with Schedule A1, Section 132 of the amended MCA, 2005.

Appendix C: Template report for a 39D IMCA closing a case

39D IMCAs are required to provide a report to the supervisory body. This is a suggested template for a report where, after the IMCA has had contact with both the person and their representative:

- neither the person or their representative wishes to exercise their rights for appeal or access to the Court of Protection
- the 39D IMCA is not seeking a review or making an application to the Court of Protection.

Notification to the supervisory body of 39D IMCA case closure

Name of relevant person:

Date of 39D IMCA instruction:

Reason for 39D IMCA instruction (as identified on **form 30**):

B4. A person deprived of their liberty who has an unpaid relevant person's representative has requested the support of an advocate.

B5. An unpaid relevant person's representative of a person deprived of their liberty has requested the support of an advocate.

B6. The supervisory body believes that the person deprived of their liberty will benefit from the support of an advocate.

B7. The supervisory body believes that the unpaid relevant person's representative will benefit from the support of an advocate.

B8. The supervisory body believes that the person deprived of their liberty and their unpaid relevant person's representative will both benefit from the support of an advocate.

IMCA's contact with the relevant person:

Relevant person's understanding of the authorisation and their rights:

IMCA's contact with the relevant person's representative:

Relevant person's representative's understanding of the authorisation and their rights:

Conclusion:

The IMCA found that neither the person or their representative appeared to wish to exercise their rights for appeal or access to the Court of Protection.

The IMCA is not seeking a review or making an application to the Court of Protection.

The IMCA recommends that the supervisory body makes a further 39D instruction in the following situations:

The IMCA would like to draw the supervisory body's attention to the following issues regarding the person's treatment or care:

Signed

Dated

Appendix D: Service specification for paid representatives

Below are suggestions for what could be included in a service specification for paid representatives. This may be helpful for the appointment of a single representative or contracting an organisation to supply the paid representative service as required.

The suggestions are not limited to the minimum statutory requirements of the paid representative role. They include what may be good practice for this developing role. Sections marked in [square brackets] may vary according to local factors.

Timing

The service will commence from [1 April 2011] and will be of [five] years duration. Subject to satisfactory performance it may be extended by agreement of both parties for a further period of [two] years.

Purpose of the service

The purpose is to provide a paid relevant person's representative service for people deprived of their liberty subject to standard authorisations under the Mental Capacity Act 2005.

Appointment of paid representatives

The organisation (providing the paid representative service) will be available to provide paid representatives to all service users who may be eligible. This includes people with learning disabilities, dementia, mental health needs and acquired brain injury.

When contacted by a representative of the supervisory body to provide this service for an individual, the organisation will provide the name of the person to be appointed no later than the end of the next working day.

The supervisory body will send **standard form 25** to the organisation. The paid representative to be appointed will sign part F of this form and return this to the supervisory body. At this point the relevant person's representative role will begin.

The organisation will, where possible, identify paid representatives who have attributes identified by the supervisory body which could benefit the person. For example, gender, ethnicity, spoken or sign language skills.

The organisation will ensure that the paid representative is:

- Aged 18 or over
- Able to keep in contact with the relevant person
- Willing to be the relevant person's representative
- Not financially interested in the relevant person's managing authority
- Not a relative (see notes at end of form) of a person who is financially interested in the managing authority
- Not employed by, or providing services to, the relevant person's managing authority (where the relevant person's managing authority is a care home)
- Not employed to work in the relevant person's managing authority in a role that is, or could be, related to the relevant person's case (where the relevant person's managing authority is a hospital); and
- Not employed to work in the supervisory body that is appointing the representative in a role that is, or could be, related to the relevant person's case.

If the organisation is commissioned by the managing authority to provide advocacy services the organisation must alert the supervisory body of this potential conflict of interests before the paid representative is confirmed.

For the avoidance of doubt the paid representative may also undertake independent advocacy roles with the relevant person. For example, to be instructed to act as an IMCA for a serious medical treatment decision provided the paid representative meets the IMCA training and qualification requirements.

Paid representatives must be employed by, or contracted to work for the organisation. Contracts must specify that if a paid representative leaves the organisation they must withdraw from all paid representative roles. The organisation must alert the supervisory body where this is the case so they can give notice of the end of the appointment using **standard form 27** before a new representative is appointed.

The training, qualification and supervision of paid representatives

The organisation will ensure the following:

- Before undertaking the paid representative role, all paid representatives have undertaken training on the Deprivation of Liberty Safeguards
- Paid representatives must undertake at least eight hours of continued professional development each year relevant to the Deprivation of Liberty Safeguards

- The paid representative is supervised a minimum of once every [four] weeks by a supervisor who had a good understanding of the Deprivation of Liberty Safeguards

Functions of the paid representative

Paid representative must in all cases:

- Undertake a risk assessment before meeting the person
- Meet the person unless the risk is unacceptable
- Provide all possible support to help the person understand their rights to review and access to the Court of Protection
- Check whether the requirements of the authorisation are being met
- Request relevant records on a best interests basis if the person lacks capacity to decide on access
- Consider whether they need to exercise their rights to review or access to the Court of Protection
- Participate in any care reviews which take place, preferably by attending in person.
- Represent the person in any assessments which are undertaken as part of a review or request for a further authorisation
- Represent the person in any adult safeguarding proceedings
- Represent the person in any accommodation decisions which need to be made immediately after the person is no longer subject to a standard authorisation

Level of contact

Paid representatives must determine the level of direct contact with the person and other time required to perform their role. A higher level of contact is likely to be required at the start of the appointment, where there is a review, application for a further authorisation, or application to the Court of Protection.

Paid representatives will minimally have visual contact with the person whilst visiting the relevant care home or hospital once every [four] weeks.

Access to the Court of Protection

If the paid representative is considering using their right to access the Court of Protection, they will put their reasons for doing so in writing to the supervisory body, and give the supervisory body an opportunity to respond before making an application.

This does not however prevent the paid representative making urgent applications to the Court of Protection if this is felt necessary. In such cases the paid representative will provide the supervisory body a copy of the application when it is submitted.

Reporting requirements

This is made up of two elements. Reporting to the supervisory body in relation to individual cases and [6] monthly monitoring information for the commissioning team.

Reporting to the supervisory body for individual cases

The paid representative / organisation will provide the following to the supervisory body:

- A copy of reports which must be prepared by the paid representative if the best interests assessment is undertaken as part of a review or application for a further authorisation.
- A copy of a risk assessment if the organisation has assessed that it is not safe for the paid representative to meet the person.
- Advance information about any planned absences of the paid representative greater than one week (e.g. holiday) and what cover will be provided. In some case the supervisory body may wish to change the appointment.
- Information about any unplanned absence lasting over a week (e.g. sickness) and what cover is being provided.
- Notice if a paid representative is due to leave the organisation before the end of any current authorisations.
- Notice if a paid representative has been suspended from their duties or dismissed.

Monitoring information for the commissioning team

The organisation will provide on a [6] monthly basis

For each relevant person who was provided the paid representative service during this period

- Names of paid representatives during this period together with dates they were appointed and, if applicable, when the role ended
- How many times the right to access a review or court of protection was used
- Number of care reviews attended (excluding any reviews of the authorisation)
- Number of care reviews which took place which were not attended by the paid representative
- Hours spent undertaking the role separating out time spent travelling
- Any key outcomes achieved for the person.

For each paid representative active during this period

- Details of relevant training and qualifications. This could include completion of unit 310 or the complete diploma in independent advocacy if an advocacy service has been commissioned

- Details of continued professional development during the period including number of hours
- Whether the minimum requirement of supervision every [four] weeks was met
- Details of any absences while in role for a period greater than two weeks (e.g. holiday or sickness) together with information about the cover which was provided

Appendix E: Department of Health briefing on DOLS (April 2010)

The Mental Capacity Act 2005: Deprivation of Liberty Safeguards – the early picture
Introduction

1. The Mental Capacity Act Deprivation of Liberty Safeguards (MCA DOLS) was introduced, as part of the Mental Health Act 2007, by the Department of Health in April 2009. The MCA DOLS are new statutory safeguards.
2. The MCA DOLS were introduced to prevent deprivations of liberty without proper safeguards including independent consideration and authorisation. Deprivations of liberty in hospitals or care homes, other than under the Mental Health Act, should now follow the MCA DOLS process and all affected patients and residents should benefit from the new safeguards. The NHS and Social Care Information Centre published [activity data for MCA DOLS](#), for the first time, in March 2010.

Number of people benefiting from DOLS safeguards

What do the numbers show?

3. Firstly, some five and a half thousand people have benefited from the new MCA DOLS safeguards, in the first nine months. This means some five and a half thousand people have had their deprivation of liberty independently assessed and considered by best interests assessors. The Department is expecting the figure, by the end of the first year, to be about seven thousand.
4. Secondly, the published data refers only to completed cases, so is a slight underestimate of the activity. However, activity levels are at about a third of the level estimated prior to the introduction of the new safeguards. Fewer people than thought are receiving care or treatment which involves them being deprived of their liberty, but there are probably a number of deprivations not recognised and not authorised.
5. Thirdly, approximately half of the assessments are resulting in authorisations rather than the quarter predicted.

6. There appears to be a better understanding of the complexities of the case law in relation to the circumstances that may constitute a deprivation of liberty than was anticipated at this, still, early stage in the implementation of the Safeguards.

7. Fourthly, there are significant variations in activity levels in different areas and, notwithstanding the success of the training and awareness raising, it is likely that activity levels continue to be lower than could be reasonably expected in some areas. DH regional implementation leads continue to work closely with all areas to ensure the legislation is properly applied.

Case law developments

8. There have been three significant case law judgments that managing authorities (hospitals and care homes) and supervisory bodies (primary care trusts and local authorities) and supervisory bodies (hospitals and care homes) and best interests and eligibility assessors should be aware of. The Department has produced [guidance on these judgments](#).

Emerging practice issues

9. Five practice issues, in particular, have arisen in the Department's implementation team's ongoing work with organisations and individuals:

i) The choice of the relevant person's representative (RPR)

10. Paragraph 7.17 of the Deprivation of Liberty Safeguards supplement to the Mental Capacity Act 2005 Code of Practice states "It should not be assumed that the representative needs to be someone who supports the deprivation of liberty."

11. The Department is aware of a number of cases where family members have not been selected to be the RPR where they have not been supportive of the deprivation of liberty. That alone is not grounds for not selecting them for the role. Best interests assessors need to assure themselves that the individuals in question are inappropriate for other reasons, which may include that they simply do not wish to take on the role.

12. Both the person "P" now deprived of his or her liberty and his or her RPR have an automatic non-means tested right of appeal to the Court of Protection. Where a family member is not selected to be the RPR and they wish to challenge the authorisation they can only apply to the Court, for a best interests determination and incur the costs of such an application.

13. Sometimes the MCA DOLS authorisation is the culmination of a lengthy dispute between the family and an NHS Trust or local authority about where the person should live. Paragraph 8.28 of the Mental Capacity Act 2005 Code of Practice states that a "court decision might be appropriate" where "there is a major disagreement regarding a

serious decision (for example, about where a person who lacks capacity to decide for themselves should live)”

14. Such disputes, which cannot be otherwise resolved, will require the “last resort” determination of the Court rather than being resolved via the Safeguards. If the best interests assessor does not support deprivation of liberty, it would be good practice for their report to be included in the relevant person’s care plan or case notes, to ensure that any views about how deprivation of liberty can be avoided are made clear to the providers of care and all relevant staff on an ongoing basis.

ii) Where a DOL is not authorised

15. In the first nine months there were 125 recorded instances of cases where a person had been found to be deprived of their liberty but a best interests assessor had not recommended an authorisation as in their view it would not be in that individual’s best interests, because a less restrictive option is or could be available.

16. Paragraphs 4.72 and 4.73 of the Deprivation of Liberty Safeguards supplement to the Mental Capacity Act 2005 Code of Practice state:

The best interests assessor must provide a report that explains their conclusion and their reasons for it. If they do not support deprivation of liberty, then their report should aim to be as useful as possible to the commissioners and providers of care in deciding on future action (for example, recommending an alternative approach to treatment or care in which deprivation of liberty could be avoided). It may be helpful for the best interests assessor to discuss the possibility of any such alternatives with the providers of care during the assessment process.

If the best interests assessor does not support deprivation of liberty, it would be good practice for their report to be included in the relevant person’s care plan or case notes, to ensure that any views about how deprivation of liberty can be avoided are made clear to the providers of care and all relevant staff on an ongoing basis.

It is not known whether this occurred in each of the 125 recorded cases but the Code advises that it should have been done. A number of local authorities have “alerts” in their policies and procedures to ensure that action is taken swiftly to end what is otherwise now an unlawful deprivation of liberty as swiftly as possible. It is recommended that all managing authorities and supervisory bodies have a mechanism that permits the swiftest possible response to these circumstances.

iii) Setting conditions and effective care planning

17. There is evidence that the Code’s guidance in relation to the setting of conditions is not being adhered to. Paragraphs 4.74 and 4.75 of the Deprivation of Liberty Safeguards supplement to the Mental Capacity Act 2005 Code of Practice state:

The best interests assessor may recommend that conditions should be attached to the authorisation. For example, they may make recommendations around contact issues, issues relevant to the person's culture or other major issues related to the deprivation of liberty, which – if not dealt with – would mean that the deprivation of liberty would cease to be in the person's best interests. The best interests assessor may also recommend conditions in order to work towards avoiding deprivation of liberty in future. But it is not the best interests assessor's role to specify conditions that do not directly relate to the issue of deprivation of liberty

Conditions should not be a substitute for a properly constructed care plan. In recommending conditions, best interests assessors should aim to impose the minimum necessary constraints, so that they do not unnecessarily prevent or inhibit the staff of the hospital or care home from responding appropriately to the person's needs, whether they remain the same or vary over time. It would be good practice for the best interests assessor to discuss any proposed conditions with the relevant personnel at the home or hospital before finalising the assessment, and to make clear in their report whether the rejection or variation of recommended conditions by the supervisory body would significantly affect the other conclusions they have reached.

18. Best interests assessors need to recommend and supervisory bodies to set conditions that reflect the advice in the supplement to the Code and not, as has been reported to the Department, recommend and set conditions that otherwise could have been achieved by effective care plans.

iv) The involvement of the Court of Protection in proposals of „no contact' with named individuals

19. Safeguarding teams will be required, at times, to consider matters of contact between a person lacking capacity and somebody that they may be at risk of harm or abuse from. Paragraph 4.74 of the Deprivation of Liberty Safeguards supplement to the Mental Capacity Act 2005 Code of Practice recognises contact might be an issue in the setting of conditions, "The best interests assessor may recommend that conditions should be attached to the authorisation. For example, they may make recommendations around contact issues". This could include conditions that allow or encourage contact as well as conditions that limit or supervise contact.

20. There may be a short-term need to rely on the conditions of an authorisation to manage no contact in such cases but paragraph 8.28 of the Mental Capacity Act 2005 Code of Practice states "a court decision might be appropriate" where "someone suspects that a person who lacks capacity to make decisions to protect themselves is at risk of harm or abuse from a named individual (the court could stop that individual contacting the person who lacks capacity)."

21. This suggests that the Court should be the arbiter for matters of no contact and that an authorisation under MCA DOLS, other than as a very short-term measure, should not be relied upon to manage no contact cases. Local authorities and PCTs seeking

JUNE 2011

authority to prevent contact are advised by the Code that “a court decision might be appropriate” in such circumstances,

22. Case law judgements, to date, indicate that preventing contact with somebody who presents a risk of harm or abuse to a person lacking capacity does not on its own amount to a deprivation of their liberty. An authorisation should not therefore be recommended nor granted on these grounds alone.

v) Where an authorisation fails to resolve a dispute

23. Where an authorisation and/or any of its conditions fails to stop the continuing or new opposition of a family member, then a dispute cannot be considered to have been resolved.

24. Cases which are subject to dispute and cannot be otherwise resolved will require the last resort determination of the Court of Protection, and should not be viewed as having been resolved via the MCA DOLS process.

[View this briefing on the Department of Health's website](#)

Social Care Institute for Excellence

Goldings House
2 Hay's Lane
London SE1 2HB
tel 020 7089 6840
fax 020 7089 6841
textphone 020 7089 6893
www.scie.org.uk