Practice Guidance

# Report writing for best interests assessors

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## Learning points

- How to explain and evidence your conclusion about whether a deprivation of liberty is taking place.
- Why it's important to be aware of who will read your report when you're writing it, so that it reflects their different needs.
- How to use the balance-sheet approach.
- Tips on what makes a good best interests assessment.

# Contents

Use the links below to go straight to particular sections of this guide.



> Justice Peter Jackson in *Neary v Hillingdon [2011] EWHC 1377* (Court of Protection): "The best interests assessment is anything but a routine piece of paperwork. Properly viewed, it should be seen as a cornerstone of the protection that the DoL safeguards offer to people facing deprivation of liberty if they are to be effective as safeguards at all." (paragraph 174)

# Introduction

As best interests assessors (BIAs), trainers in the Mental Capacity Act (MCA) 2005 and Deprivation of Liberty Safeguards (DoLS), and lecturers on the qualifying course for BIAs at the University of Hertfordshire, we meet lots of health and social care professionals as well as BIAs. One of the most frequent comments we hear from BIAs is that qualifying and practising as a BIA has made them so much better at their 'day job'.

Being a BIA helps to embed into practice, and give real meaning to, concepts such as proportionality, autonomy, person-centred practice and human rights, which may sometimes seem to be 'just words' that we hear flying about.

Acting in this role certainly helped us gain a clearer and deeper understanding of the theory and practice of applying the MCA. The role of BIA requires us to stay abreast of case law and this brings with it a greater insight into how the legal system works and how to practise within the correct legal framework, not just in relation to deprivation of liberty, but in the wider context of health and social care.

As BIAs we are legally required to have annual refresher training and if we are to do our job properly we, more than others in health and social care, must remain up to date with case law. In the early days of DoLS, BIAs were urged to quote legal judgments frequently, and at length. As the body of case law increased it became obvious that this was not always helpful. It is rare now for lawyers or academics to recommend that BIAs use case law in this way.

> BIAs need to take on board principles or broad themes that emerge from case law, but must be wary of jumping to the conclusion that because some of the facts in their case are similar to those considered in a particular ruling that the same decisions should be made.

Relying on case law interpretations in this way would be unwise and unsafe as small variations in detail can greatly influence the end decision. Lord Bingham in *R (Gillan and anor) v Commissioner of Police for the Metropolis and anor*) [2006] UKHL 12 warned that it is "perilous to transpose the outcome of one case to another where the facts are different".

# The purpose of a best interests assessment

As the name suggests, the purpose of a best interests assessment is to decide whether a deprivation of liberty is in someone's best interests. To do this, the BIA must first establish whether a deprivation of liberty is occurring or is going to occur and, if so:

- Whether it is in the best interests of the relevant person to be deprived of their liberty in a care home or hospital for the purposes of being given care or treatment.
- Whether it is necessary for them to be deprived of their liberty in order to prevent harm to themselves.
- Whether deprivation of liberty is a proportionate response to the likelihood of the relevant person suffering harm and the seriousness of that harm (schedule A1, paragraph 16, Mental Capacity Act 2005; DoLS code of practice, 5.48).

The best interests assessor's report must explain and evidence how you reached your conclusion in relation to these questions. The DoLS code of practice (4.66) says: "It is essential that the best interests assessor provides an independent and objective view of whether or not there is a genuine justification for deprivation of liberty, taking account of all the relevant views and factors."

The DoLS assessment and authorisation regulations for England and Wales and code of practice provide important information on BIA responsibilities. The English regulations require that assessors have "the ability to keep appropriate records and to provide clear and reasoned reports in accordance with legal requirements and good practice" (regulation 3(3)(b)), and "the skills necessary to obtain, evaluate and analyse complex evidence and differing views and to weigh them appropriately in decision making" (regulation 5(3)(e)), a point echoed in the code of practice (4.60).

Although The College of Social Work is no longer in existence, the BIA capabilities it established remain relevant as core competencies for the role. When TCSW was considering what the capabilities should include it decided to root these in the spirit and principles of the Mental Capacity Act:

- Key capability 1: The ability to apply in practice, and maintain knowledge of, relevant legal and policy frameworks.
- Key capability 2: The ability to work in a manner congruent with the presumption of capacity. Even in cases where you are convinced that an individual lacks capacity now (and always has done) to make any health or social care decisions for themselves, the law and good practice require you to start each intervention with that person from the point of presuming they have capacity for this particular decision at this particular time. And you can only displace that presumption of capacity by assessing them and

then showing evidence that they lack capacity to make the decision using the two-stage test and four-step test of capacity set out in the MCA: that is, the person is unable to make this particular decision because, due to an impairment or disturbance in functioning of mind or brain they can't understand and/or retain and/or use and weigh information relevant to this particular decision and/or communicate their decision.

- Key capability 3: The ability to take all practicable steps to help someone make a decision.
- Key capability 4: The ability to balance a person's right to autonomy and self-determination with their right to safety, and respond proportionately.
- Key capability 5: The ability to make informed, independent best interests decisions within the context of a DoLS assessment.
- Key capability 6: The ability to effectively assess risk in complex situations, and use analysis to make proportionate decisions.

# The best interests assessment

It is crucial, first of all, to focus on the fact that you are assessing an individual. Even people who, on paper, seem similar, have had different lives, made different choices, had varying experiences of childhood, parenthood, relationships, work, loss, physical health and so on.

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To stop looking at, and looking for, an individual's experiences and wishes and just churn out a report is not good enough. It is our belief that without humanity and empathy and the ability to see people as individuals you cannot be a good professional in any area of health or social care. It is not a coincidence that the role of BIA is grounded in human rights legislation.

# The BIA report

The first, and arguably, the most important advice given to anyone writing a report is to be aware of who your audience will be. The DoLS code of practice (paragraph 5.7) and paragraph 57 of schedule A1 to the MCA says that the supervisory body must give a copy of the consequent authorisation to the managing authority (hospital or care home); the relevant person; the relevant person's representative (RPR); any independent mental capacity advocate (IMCA) involved; and every interested person named by the BIA as someone who they consulted in carrying out their assessment. And, of course, if there was a legal challenge your report might be read by lawyers or judges.

So let us consider these different people and how the BIA report can reflect their different needs.

The BIA report is always made available to the individual it is about (the person at the heart of DoLS) with an instruction to the care home or hospital that as soon as possible and practical after the authorisation is given they must ensure they take all practicable steps to ensure that the relevant person understands the effect of the authorisation and their rights around it (DoLS code of practice, paragraph 5.8/paragraph 59 of schedule A1 to the MCA).

The report is also given to the person's representative and other relatives who have been consulted, who may have already experienced suffering and loss as a result of their relative's illness and "detention". You must consider how you represent the person's situation in a way that demonstrates respect for their dignity.


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Reports should be written in plain English, avoiding unnecessary "professional speak" and in particular avoiding language that may be dehumanising or cause additional distress to the person or their family. We have come across reports that have described a person as only able to respond with "gibberish" or "gobbledygook". How much more respectful to say, for example: "Staff told me that P has difficulties expressing himself and I found his replies were not related to the questions I asked or the information I tried to give him."

Another report we saw went into unnecessary detail about a person's sexually disinhibited behaviour, despite knowing that this report would be copied to his daughter. The behaviour was likely to be the result of his frontotemporal dementia and was very relevant to the assessment as it was the cause of some of the restrictions. However, it was unnecessary to go into such excessive detail as this undermined his dignity and had the potential to distress his daughter while adding nothing to the report itself.

The report will be scrutinised by the supervisory body and the DoLS signatory, who is usually someone at senior management level in the local authority. The report must be evidence based so that the supervisory body and signatory are clear that the deprivation of liberty is both necessary and proportionate. So, for example, if you are going to state that there is a risk of falls, and this is one of the harms to be avoided, you must provide evidence to back up your opinion that this is a likely harm, with evidence of how often the person has fallen and the impact that this has had on them.

It may be useful to provide a snapshot of a fixed period such as: "Jack has fallen eight times in the last week, sustaining various injuries including an injury to his head which resulted in hospital admission on 12/01/16."

Remember to always identify the source/s of information (for example, the incident report of 12/01/16, and the dated hospital discharge summary).

Most supervisory bodies are now using the DoLS forms issued in March 2015 by the Association of Directors of Adult Social Services (Adass). Form 3 combines the age, mental capacity, no refusals and best interests assessments as well as the selection of representative. Here, we are only looking at the best interests assessment. We have followed the headings used on DoLS form 3 because although these forms are not statutory, it is the format required by most supervisory bodies and therefore likely to be the most useful.

# Background information

This is an important section because it provides key information to the reader, particularly those responsible for scrutinising the documents which support deprivation of liberty, as it gives them a sense of who the person is and the care they are receiving.

An example from one practitioner in a DoLS team illustrates why this type of information is so important. They had seen a BIA report that said, “Mrs X is a Romany gypsy and her daughter told us it had always been very important for her to feel the rain on her face and the wind in her hair.”

For various reasons Mrs X needed to remain in the care home but this statement helped explain why it was important for her to have regular access to the garden even when it wasn’t sunny and warm.

The background information section should include the following:

- Pen picture of the person (this could include an overview of who they are as an individual and as part of a family and also their current needs including brief history and current description, for example, diagnosis, sensory impairment, physical health problems, etc).
- Description of the environment the person is living in (type of institution, number of residents, etc).
- When the person was admitted and under what circumstances (including who has determined where they live).
- Whether it is a temporary or permanent arrangement.

However, what is not required is the person’s life story. The information you present must be purposeful and add to the reader’s understanding of the situation.

## Case example

Jenny is 43-years-old. She is married to Dave. They have three children, Rosie (11) Jamie (9) and Rex (4). Jenny was a photographer with her own business. Dave works in HR for

> a London-based bank. Jenny was the main carer for her children and ran her business from home. On 20/11/2015, Jenny was involved in a serious road traffic accident which resulted in a traumatic brain injury. She was in intensive care at St James Hospital for several weeks. When she regained consciousness she was transferred to Oak Park Neuro Rehabilitation Unit in Balham on 11/12/2015 to be nearer her family. Jenny's family visit her daily. She is currently unable to walk or to speak but she recognises her family and responds warmly to them.

# Views of the relevant person

The DoLS code of practice (4.61) makes it clear that when working out what is in a person's best interests under DoLS, the BIA must apply the general rules for determining what is in a person's best interests, set out in section 4 of the MCA (also known as the best interests checklist or the section 4 checklist). The checklist is covered in more detail later in this guide.

The DoLS code of practice reminds BIAs that when working with deprivation of liberty situations, it is important to remember that you are always working within the framework of the Mental Capacity Act.

Section 4(6) of the MCA requires decision makers to consider, as far as reasonably ascertainable, "the person's past and present wishes and feelings, beliefs and values must be taken into account (and, in particular, any relevant written statement made by him when he had capacity)" and "the beliefs and values that would likely influence his decision if he had capacity".

It is therefore not just good practice but an actual legal requirement to involve the relevant person in the assessment process as much as possible and practicable. The person should be given the support needed to participate, using non-verbal means of communication where needed or the support of others such as a speech and language therapist. It may also help to involve other people that the relevant person already trusts and who are used to communicating with them. It is, however, important to try to spend some time alone with the person where possible, as this gives them the opportunity to raise concerns or issues which they may feel constrained from doing in the presence of staff or family members.

# Views of others

Having found out what you can about the person's wishes and beliefs, you need to seek the views of a range of people connected to the relevant person to find out whether they believe that depriving them of their liberty is, or would be, in their best interests to protect

them from harm, or to allow the proposed care plan to be followed. The best interests assessor should, as far as is practicable and possible, seek the views of:

- Anyone the person has previously named as someone they want to be consulted.
- Anyone involved in caring for the person.
- Anyone interested in the person's welfare (for example, family carers, other close relatives, or an advocate already working with the person).
- Anyone who has been given lasting power of attorney (LPA) by the person while they had capacity or anyone appointed as a deputy by the Court of Protection (DoLS code of practice, 4.65/section 4(7), MCA).

You need to record who you consulted, the method of consultation and the date. For example, "I consulted Jenny's mother, Maria Alshott, (telephone call 28/11/2015) who described her daughter's views about conventional medical approaches. I also consulted her husband, Dave (in person on the ward on 30/11/2015)."

You are required to consider the conclusions of the mental health assessor as to how the person's mental health will be affected by being deprived of their liberty (DoLS code of practice, 4.70/paragraph 39 of schedule A1 to the MCA) and should record their views and show how you took them into account.

## Case example

As well as friends, relatives and professionals with significant involvement it is worth thinking widely about who to consult. For example, a BIA went to assess Leroy, who until recently lived at home with a significant care package. He had no close relatives. The BIA realised that his care workers had probably got to know him very well over a period of time so she contacted them to see if she could gain information, particularly about what might be causing him to be agitated and verbally aggressive at the care home, which his friend said was completely out of character.

One care worker, who had regularly cared for him four mornings a week for the last three years, told the BIA that Leroy had always liked to walk around the house in his pyjamas and dressing gown until he had eaten breakfast and had a cup of coffee. At the care home, staff were trying to support him to wash and dress as soon as he got up. As a result of the BIA assessment staff tried changing the order of what they did in the morning and found that he was much happier.

You need to document the views of everyone you consult on the person's care and any information you can obtain about the relevant person's past and present wishes, belief and values. Although you may not agree with people's views, they must be recorded. It is a good idea to take notes during all conversations you have as part of your assessment. Not all this

information will be relevant or significant to your BIA report, but it is wise to keep all notes. Like all client information these should be kept securely. Informal contemporaneous notes may serve as aide-memoires or even as crucial evidence of how you made decisions if any of your conclusions are questioned. Remember the old adage: If it isn't written down it didn't happen!

In a recent DoLS case in the Court of Protection, Judge Cushing questioned the rationale for the period of deprivation recommended by the BIA and authorised by the supervisory body. The judge asked if there were contemporaneous notes which might shed light on the grounds for choosing this period and pointedly commented in her ruling on the lack of any notes kept by either the BIA or the representative for the supervisory body (in *P v Surrey County Council and Surrey Downs CCG [2015] EWCOP 54*).

# Is the person deprived of their liberty?

The first task of a BIA is usually to establish whether deprivation of liberty is occurring, or is likely to occur, as there is no point in continuing the assessment process if this is not the case. If you conclude that the person is not, nor likely to be, deprived of liberty you should complete DoLS form 3A (best interests assessment – no deprivation). You need to give the reasons for your opinion that although the person is, or is to be, kept in the hospital or care home for the purpose of being given care or treatment, the circumstances do not amount to a deprivation of liberty.

In deciding whether someone is deprived of their liberty your starting point must be their concrete situation, and you must take account of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

The European court judgment in *Guzzardi v Italy* 7367/76 (1980) ECHR reiterated that the difference between deprivation of and restriction on liberty is "merely one of degree or intensity, and not one of nature or substance". Put simply it's not necessarily what you do, but how much you do it.

We know from the European Court ruling in *Storck v Germany 61603/00 (2005)* ECHR 406 that three elements must be present in order for a deprivation of liberty to exist within the meaning of article 5 of the European Convention on Human Rights. These are the objective and subjective elements and the requirement for the deprivation of liberty to be in some way imputed to the state.

## Objective element

This is about showing that you are talking about a person who is deprived of their liberty. The starting point is that the person is confined to a particular restricted space for a not-negligible period of time. In March 2014, the Supreme Court in Cheshire West ruled that a

deprivation of liberty occurs if a person is under 'continuous' or 'complete supervision and control' and 'not free to leave'. This has become known as the 'acid test' for DoLS.

Case law such as *Stanev v Bulgaria 36760/06 (2012) ECHR 46* or *Ashingdane v UK [1985] ECHR 8* tells us that continuous supervision and control does not necessarily mean the person is supervised one-to-one, or that staff make frequent checks on the person. The person may be allowed extended periods away from the hospital or care home, but if it is at the discretion of staff when or where or for how long the person goes out they may be deemed to be under continuous supervision and control.

Since the Cheshire West ruling the threshold for deprivation of liberty is, in practice, lower than many had thought and it is now rare for us to find a person who meets the other criteria for DoLS but yet is not deprived of their liberty. This is because if a person has a mental disorder and lacks capacity to make decisions about where they are accommodated, they are likely to need supervision and control which may amount to 'continuous or complete' and they are unlikely to be 'free to leave'.

The DoLS code of practice (2.2), quoting the European Court of Human Rights' 2004 judgment in HL v the United Kingdom, tells us that "the starting point must be the specific situation of the person concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration and effects and manner of implementation of the measures in question".

The code of practice (2.5) further identifies factors which the European Court of Human Rights and UK courts have taken into account when considering deprivation of liberty. The Adass guidance issued with the DoLS forms confirms that these are still relevant considerations "in order to establish whether they meet the acid test of continuous supervision and control and not free to leave".

In handing down the Supreme Court's ruling in the Cheshire West case, Lady Hale held:

"If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person."

In light of this the Adass guidance states: "It is helpful to imagine a non-disabled person subject to the arrangements and then identify all of the measures which bear upon the person's liberty, for example:

- locked/lockable doors/windows;
- wheelchair/lap-strap;
- degree of staff support inside and outside;
- sedative medication;

- restrictions on direct/indirect contact with family/friends;
- nature and degree of physical or verbal intervention/restraint;
- personal care arrangements;
- level of observation etc." (p9)

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It is also helpful to consider how much autonomy the person actually has. At this stage the question is not about why the restrictions are in place, or whether they are necessary or in the person's best interests; all you are trying to establish is whether or not the person is deprived of their liberty.

Each aspect of the acid test must be addressed, with clear evidence demonstrating analysis of the complex issues. The DoLS code of practice says that the BIA must consider whether the care plan and the manner in which it is being, or will be, implemented constitutes a deprivation of liberty (4.63). In order to do this, the BIA must consult the managing authority of the hospital or care home where the person is, or will be, accommodated and examine relevant needs assessments, care plans and other records. Other documents, such as medication sheets, incident reports and life story books, may also include useful, sometimes crucial, information.

All restrictive measures should be described along with the manner in which they are implemented, their duration, and the effect they have on the person. This is how you demonstrate that the person is under continuous supervision and control *and* not free to leave.

## Subjective element

This is about showing that the person has not consented to the deprivation of their liberty. For our purposes the person hasn't consented because they lack capacity to do so. This is evidenced by referring to the capacity assessment which either the BIA or the mental health assessor will have been commissioned to complete by the supervisory body.

If you have real doubts about  a mental health assessor's conclusion with respect to capacity it is important to contact the supervisory body to discuss the next steps. A disagreement is most likely to occur when there is a time gap between the mental health assessor and the BIA completing their assessments.

## The placement is imputable to the state

This is not an issue which BIAs need to address. Under the DoLS provisions of the MCA, the identity of any funding authority, or whether a person is entitled to local authority care services, is not a relevant consideration. Since the state is obliged to take steps to prevent unjustified deprivations of liberty of which it is aware, the fact that the matter is before you means any deprivation of liberty is imputed to the state.

If as BIAs you establish that the person is deprived of their liberty, and the arrangements meet the objective and subjective elements, under the DoLS legislation in schedule A1 to the MCA, three main questions arise:

- Is the deprivation necessary to prevent harm to the individual concerned?
- Is deprivation of liberty a proportionate response to the risk and likelihood of harm?
- Is deprivation of liberty in order to receive care or treatment in the person's best interests?

## Is the deprivation necessary to prevent harm to the individual concerned?

The BIA must detail the actual or likely harm (including physical, psychological, social or financial) that will be avoided by depriving the person of liberty for the purposes of receiving care or treatment.

What is the harm that may occur if they weren't here and restricted? Or if they were allowed to do what they are requesting (for example, leave)?

How likely is the harm to occur? This should include the type, severity and frequency of any actual harm. Consider history/evidence – give dates and examples where possible. For example, "without artificial feeding Sunil would suffer dehydration and malnutrition which would have an immediate detrimental effect on his physical health (Ward notes 8/12/2015 and conversation with ward registrar, Dr Slawek 12/12/2015)".

Any actual incidents or details are helpful, even if they have already been mentioned in the form or in comments; this is the place where they should be consolidated in order to justify depriving a person of liberty. For example: "If John did not have the support of two experienced members of staff when he goes out to the park or the shops, he would be at risk of immediate and serious harm from road traffic."


Photo: Pierre-Olivier/Fotolia

"Last year, John went out for a walk with one member of staff but became very frightened by an emergency vehicle siren and pulled free from the member of staff and ran into the road. Fortunately there was no traffic approaching at that time. Since then two staff always accompany John on outings as he becomes easily frightened by loud noises (incident report dated 15/06/2015, care plan amended 22/06/15 and reviewed 30/12/15)."

The care plan and risk assessments provide really useful information on what care is being provided and why. Incident reports and daily notes can also provide useful information and evidence of frequency and severity of harm: for example, if the individual has a history of falls and that evidence is in the falls risk assessment and dated, and daily records go on to show that this person has fallen another three times in the last month.

You can include potential harms, such as risk of financial exploitation (although it should be remembered that deprivation of liberty must always be necessary for the purposes of providing care or treatment), but your report must be clear about what evidence you have based your opinion on – how you have concluded that the seriousness and likelihood of harm means the deprivation is necessary.

## Is deprivation of liberty a proportionate response to the risk and likelihood of harm?

Having described the harm and the risks to the person you are required to establish whether depriving the person of their liberty is a proportionate response. The Adass guidance says (p10) that it is necessary to consider:

- what else has been tried;
- whether there are any less restrictive options;
- if an option hasn't been tried or hasn't worked, why not;

- what has been explored already;
- what could be explored.

You should consider the overall care plan in terms of proportionality but also consider individual restrictions. Is each restriction proportionate? Remember the MCA code of practice (6.47) says that a proportionate response means using the least intrusive type and minimum amount of restraint to achieve a specific outcome in the best interests of the person who lacks capacity. On occasions when the use of force may be necessary, this should be the minimum amount of force for the shortest possible time.

### Case example

Marie Flanagan lives in a small care home. She has a moderate learning disability, mental health problems and an anxiety disorder. Although Marie often goes out on her own, her care plan states that when she is in an agitated state staff will prevent her from leaving the care home.

They try to distract or dissuade her but if she insists on going out then they lock the front door to prevent her leaving. Several incident reports (including 3/6/15, 7/7/15, 9/7/15, 4/9/15 and 12/09/15) and a risk assessment (dated 12/7/15 and updated 14/9/15) show that when Marie is agitated she has a tendency to run across the road, regardless of traffic, and shout at people who she believes are “looking at her badly”; on one occasion she entered a shop and threw items off the shelves.

Preventing Marie from going out when she is upset is a proportionate response to the likelihood of serious risks of injury, retaliation and potential criminal charges. Her care plan states that restrictions on going out will only be used when she is agitated and for the shortest possible time.

## Is deprivation of liberty in order to receive care or treatment in the person’s best interests?

The original best interests assessment form (DoLS form 10) made it very clear to the BIA that the MCA section 4 checklist must be used when judging whether the proposed arrangements are in the person’s best interests. Although this guidance is not explicitly included in the revised version, form 3, it remains a central requirement of the legal framework. As well as the checklist, section 4.61 of the DoLS code of practice outlines further considerations:

- Whether any harm to the person could arise if the deprivation does not take place.
- What that harm would be.
- What other care options there are which could avoid a deprivation of liberty.

- If deprivation of liberty is currently unavoidable what action could be taken to avoid it in the future.

You can only take into account what you can reasonably be aware of at the time. As well as the person's own past and present wishes and those of significant others, where relevant to the case, your decision making on best interests should take into account:

- any advance decision, LPA, court action;
- diagnosis and prognosis;
- risk assessments;
- assessed needs – physical, emotional, psychological etc;
- the reasons for the person being admitted in the first place;
- the reasons they need to remain there/or not;
- care/support they receive;
- alternative services that are available to look after the person (you must always consider, and show you've considered less restrictive, viable alternatives).

As BIAs you need to determine, in the light of everything that has been mentioned, whether the deprivation of liberty is in the person's best interests.  It is important to explicitly refer to the points on the statutory best interests checklist but remember that it is not exhaustive. Best interests decisions should have regard to the person's emotional, social and psychological wellbeing as well as their physical wellbeing.

Many aspects of an assessment, which were previously noted in the consideration of whether the person was deprived of their liberty, are now used in the consideration of best interests, for example, a person who strongly objects to their placement may cause the assessor to consider whether they are really in the right environment (Adass guidance, p10).

# The balance-sheet approach

When making best interests decisions case law suggests it is best practice to use the balance-sheet approach (see, for example, *Re A (Medical Treatment: Male Sterilisation) [2000] 1 FLR 549* where Justice Thorpe describes this approach).

This has been common in decision making for children for some time but is increasingly used in working with adults. The balance sheet approach involves weighing up and analysing the burdens and benefits of all available options. Form 3 asks us to complete a balance sheet of the positives and negatives of all available alternatives when working out someone's best interests. Naturally this is not a consideration of every possible option in existence but only of the actual and reasonably foreseeable options available.

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When it comes to balancing risk versus benefits, 39 Essex Chambers, one of the leading barristers' chambers in mental capacity law, advises in one of its guides:

"Having identified – provisionally – each of the options that are on the table, and having taken the steps necessary to identify (for instance) P's wishes and feelings, it can be extremely helpful to draw up a balance sheet of the benefits and risks or disadvantages to P of each of those options. It is often easiest to do this in table form, or using bullet points, so that the reader can easily see the issues and can compare the various options under consideration. Don't forget to include practical implications for P as well as less tangible factors such as relationships with family members and care home staff."

Some BIAs indicate the weight given to each factor by using a different font, for example, using bold to indicate a significant benefit or burden, italics to indicate a factor which is not very weighty, and so on.

The DoLS code of practice (4.66) states "it is essential that the best interests assessor provides an independent and objective view of whether or not there is a genuine justification for deprivation of liberty, taking account of all the relevant views and factors". The BIA must be able to provide evidence to support their decision, showing what factors they took into account. It is important not to be unduly influenced by your own personal feelings or opinions or those of others.

You have to guard against becoming over-involved in care management or too caught up in clinical decisions. Where there are safeguarding concerns it is important to remember that DoLS gives no authority to breach a person's article 8 right to respect for their home, and private and family life. If there is a perceived need to prevent or restrict the person's contact with family or friends this may need to go to court rather than be dealt with in a DoLS authorisation.

## Case example

An 87-year-old man was admitted to hospital following a series of falls. He had broken his arm in two places and sustained various minor injuries. In hospital he was diagnosed with the early stages of Alzheimer's disease, as well as dehydration and iron

deficiency. A falls clinic at the hospital identified his biggest risk factor for falls was the poor state of his feet. He could no longer reach his feet in order to look after them and had long toenails with fungal growth between the toes. The skin on his heels was thick and dry with deep cracks and his feet were painful.

He was widowed and lived alone. He admitted to sometimes feeling lonely but said he wanted to return to live in his own home. His daughters and grandson had asked hospital staff and the social worker to arrange for him to go into residential care as they were worried he couldn't manage at home any more.

A balance sheet was drawn up using different fonts to reflect the different weight of factors (neutral; *light;* **heavy; very weighty**) to take into account in the decision for him to return home with a care package or move into residential care:

**RETURNING TO HIS OWN HOME**

| BENEFITS | BURDENS |
|---|---|
| He would be in a familiar environment surrounded by his own things. | *May still be a risk of falls (although less likely now infection and feet treated).* |
| **He has lived in his house for 53 years and says he loves it.** | He is sometimes lonely and will continue to spend long periods alone |
| **He is agreeing to a home care package which has not yet been tried (which may help with personal care, prompt drinking/eating, etc).** | This is not his family's preferred option and they say they are reluctant to continue offering a high level of support. |
| He can continue to have regular contact with friends and neighbours in his village. | He may not drink enough fluids or eat balanced meals. |
| **He has always been a private person who doesn't need company and dislikes groups.** | |
| **He will remain independent (this has always been important to him – he hated not being 'in charge' of his own life in the army).** | |

**GOING INTO RESIDENTIAL CARE**

| BENEFITS | BURDENS |
|---|---|

| | |
|---|---|
| He would be physically safer and will always have staff at hand. | **He may lose his independence and sense of being in charge of his own life.** |
| His meals will be provided and he will regularly be offered drinks. | A huge change from living at home with no care package to living in residential care. |
| Reduction of stress on his family. | He would have to pay for his own care because of his savings. |
| His family would visit him regularly (they say this would be quality time as it would not be spent doing chores and arguing about what he should/shouldn't be doing). | **His house may have to be sold to pay for his care (this would upset him a great deal – he is proud of being the first homeowner in his family and loves his house).** |
| *The proposed care home has a nursing unit so he would not have to move again as his dementia deteriorates.* | He may not take to group living as he has never been very sociable. |
| | **There is no care home in his village so he would have to relocate. Friends and neighbours may not be able to visit often.** |

# Recommending the authorisation period

"If the best interests assessment supports deprivation of liberty in the care home or hospital in question, the BIA must state what the maximum authorisation period should be in the case concerned. This must not exceed 12 months. The assessor should set out the reasons for selecting the period stated" (DoLS code of practice, 4.71/paragraph 42, schedule A1 to the MCA).

The decision should take into account information obtained during the consultation process – but should also reflect information from the person's care plan about how long any treatment or care will be required in circumstances that amount to a deprivation of liberty. Generally speaking the more settled the person is, the happier their friends or family are, the clearer it is that their needs are being met, the more stable the situation is, the longer a BIA would be happy to recommend the authorisation period should be. Conversely, the more unsettled the person, the more dissatisfied their family, the harder staff are finding it to meet someone's needs, the more unstable or changeable the situation, the shorter the period a BIA is likely to want to recommend.

BIAs are required to specify a maximum period of authorisation; the supervisory body can make the authorisation shorter but not longer than a BIA's recommendation (paragraph 51,

schedule A1 to the MCA).

# Conditions

The BIA can recommend conditions on the deprivation of liberty authorisation to, for example, lessen its impact on the individual (paragraph 43, schedule A1 to the MCA). The DoLS code of practice (4.75) offers BIAs specific and helpful guidance about the use of conditions: "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."

The code clarifies that 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 properly constructed care plans. The conditions should relate to the deprivation of liberty authorisation and not to general care planning issues.

The BIA may make recommendations around contact issues, for example, "Janet told me that she is discouraged from visiting her mother as care home staff feel it unsettles Mary. However, this is a lifelong and hugely important relationship for both of them. Therefore, visiting restrictions must be lifted with immediate effect."

Conditions can relate to issues relevant to a person's culture, for example: "Mr Petroski is Polish and was actively involved in his local Polish church prior to admission. Mr Petroski must be supported to attend his church at least fortnightly as this is an important aspect of his life and culture."

Conditions may also apply to 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 BIA may recommend conditions in order to work towards avoiding deprivation of liberty in future (DoLS code of practice, 4.74). For example, a person who may currently be in a care home but may be able to return home with support. A condition here, for example, could be one that supports a trial period at home with a care package.

The supervisory body must have regard to any recommended conditions but does not have to impose them (paragraph 53, schedule A1 to the MCA). It is open to a BIA to state in their

assessment report that their conclusions are based on the assumption that recommended conditions are in fact written into the supervisory body's authorisation to deprive a person of their liberty). BIAs should generally pay particular heed to ensuring that conditions are written in a clear and unambiguous way.

# Any other relevant information

There is a box on form 3 where the BIA can identify issues that would not fit the criteria as a condition of the authorisation but which may need addressing. Most commonly here an assessor will note decisions that need formalising under the MCA or recommendations to the care team or managing authority.

So, for example, a BIA may pick up poor practice in respect of how decisions are made under the MCA and may make recommendations that evidence of how decisions are reached must be included in the care plan.

Also it is useful here to include any recommendations to the care management team, for example, asking for a review of funding for additional activities, or a review of medication.

# Selecting the relevant person's representative

Often, it falls to the  BIA to recommend someone to be appointed as the relevant person's representative (RPR). But in some cases, the BIA cannot do so (see the following paragraph). As a result of the consultation process you should be able to identify whether there is anyone suitable to take on this role. The appointment of the RPR cannot take place unless and until an authorisation is given. However, by identifying someone to take on this role at an early stage, the BIA can help to ensure that a representative is appointed as soon as possible.

The person may have capacity to select their representative (and may or may not wish to do so). If they cannot, or do not wish to, then someone else may have the power to make the selection by virtue of a health and welfare lasting power of attorney (LPA) or deputyship appointment. The rules about who can select a representative are contained in the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008.

If neither of these options is possible then the BIA recommends a RPR to the supervisory body. Criteria for being a RPR include:

- Being 18 years of age or over.
- Being able to keep in contact with the relevant person.
- Being willing to be the RPR.
- Not being financially interested in the relevant person's managing authority.
- Not being related to a person who is financially interested in the managing authority.
- Not being employed by, or providing services to, the relevant person's managing authority, where the relevant person's managing authority is a care home.
- Not being 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.
- Not being 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 (DoLS code of practice, 7.6).

The BIA must be satisfied that any representative they recommend will:

- Maintain contact with the relevant person.
- Represent and support the relevant person in matters relating to or connected with the deprivation of liberty.
- Ensure that the relevant person is supported to bring a challenge to their authorisation before the Court of Protection if the person shows (whether expressly or by their actions) that they wish to do so, and whether or not the RPR thinks such a challenge is in their best interests.

In *AJ v A Local Authority [2015] EWCOP 5*, it was observed that "it is likely to be difficult for a close relative or friend who believes that it is in P's best interests to move into residential care, and has been actively involved in arranging such a move into a placement that involves a deprivation of liberty, to fulfil the functions of RPR, which involve making a challenge to any authorisation of that deprivation. BIAs and local authorities should therefore scrutinise very carefully the selection and appointment of RPRs in circumstances which are likely to give rise to this potential conflict of interest".

However, subsequently the vice president of the Court of Protection said in *Re NRA [2015] EWCOP 59* that the context to AJ had to be borne in mind in that it involved a family member who was wedded to a particular course of action (paragraph 172 of the judgment). There is no rule to the effect that relatives or friends who have previously expressed views about a course of action favoured by a public authority must be assumed to have a conflict of interest that is incompatible with their appointment as RPR.

As the role of the RPR is critical to the safeguards provided by DoLS, particularly to enable the person to exercise their article 5(4) right to challenge their detention, the BIA should also make it clear in their report whether the RPR will need the support of an independent mental capacity advocate (IMCA) in order to fully represent the person. It was always considered best practice for every RPR to automatically be provided with an IMCA. However, given the huge demand on advocacy services, it may be that there is a need to prioritise

allocation of IMCAs. For this reason, it may be helpful to make your views on the necessity of an IMCA explicit in your report. The circumstances in which an IMCA must be appointed, alongside an unpaid representative, are set out in section 39D of the MCA.

# What makes a good best interests assessment?

- Don't be frightened of using the first person. Saying 'I', 'my', 'me', can help make the assessment more direct and powerful. For example, if you say: "Mrs Brown was assessed on 23/11/15 and found to be deprived of her liberty", the reader wouldn't even be sure who assessed her! BIAs need to 'own' their reports and have confidence in their professional expertise. It is much better to say, "I assessed Mrs Brown on 23/11/15 and it is my opinion that she is deprived of her liberty because..."
- You must consider what questions to ask otherwise the answers you get may not give you information of any value. What facts are relevant to your enquiry? So if you are considering someone's capacity or their views on their care, it may be useful to have a short chat with them on arrival at the care home/hospital before reading the care records. You can then prepare questions based both on your knowledge of their ability to communicate and on information picked up from the care file or from talking to staff.

Photo: Stephan Popov/Fotolia

    - When you have gathered your evidence, identify what is fact and what is opinion. If you are assessing a person with severe learning disabilities you may see a care plan that seems to be expressing the person's views, such as: "If I become agitated I like to be left alone in my room with my music playing." In your report you should state that this is what staff believe helps or they have found this works, rather than stating it as the person's opinion.

- What evidence is relevant? If you accept or reject some evidence, on what basis have you done so? You may not give weight to some factors because there is a lack of certainty in the report; or give more weight if the person giving the evidence has great expertise in the relevant area. Or you may have a situation where you've talked to two care workers who give you very different accounts of what the person may have said if they had capacity to express a choice. If one care worker has known the individual for a longer period and been their regular care worker, you may give more weight to their account.
- Make a judgment and say why you have given more or less weight to any particular factors.

## Case example

"My assessment based on the evidence is that although Mary frequently states that she wants to go home, when I discussed with her what home meant to her, she was talking about the home where she lived with her parents when she was a young girl and not the home she lived in for 25 years before coming into the care home. This was also confirmed by Diane, Mary's keyworker (in person on 5/12/2015). Mary's daughter, Janet, told me (phone call 8/12/15) that Mary had often been very frightened while living at home and would ring her for reassurance up to 40 times a day. Janet and Diane both confirmed that Mary is much less anxious since she has been at Manor House Care Home. For this reason, I am giving less weight to Mary's own view of her wish to return home than I might otherwise have done."

- Acknowledge areas of uncertainty but reach a conclusion based on the best available evidence.

## Case example

For example: "It was clear that both of Mary's daughters were passionate about their mother's care, however, their wishes for her future care support were very different. Janet was firmly of the view that Mary is settled at Manor House and should not be moved, while Joanie strongly believes that Mary should move nearer to her where she and her grandchildren can visit regularly which she thinks will improve her quality of life. I can see advantages from both points of view and this has caused me some uncertainty in reaching a decision in Mary's best interests.

"On a narrow balance I believe it is in Mary's best interests to remain at Manor House for the following reasons: she seems to be quite settled here and although she frequently says she wants to go home she does not seem distressed when she says this. Although Joanie doesn't live very close to this care home her journey of 20 minutes by car does not seem to justify the upheaval of moving Mary again. Daily records on

> her file confirm the views of Janet and Diane (Mary's keyworker) that when she moved here Mary was very distressed and disorientated for two months before settling. It is possible that moving her again could cause a repeat of this."

You should:

- Always consider alternative, less restrictive options.
- Record sources of information and dates.
- Record and keep contemporaneous notes.
- Record the reasons for your opinion including your judgments.
- Not make assumptions.
- Ensure your reasoning is based on the law and code of practice.

Some lessons for BIA practice can be found in the judge's remarks in Hillingdon LB v Neary [2011] EWHC 1377 (COP), [2011]:

- You must establish, record and take into account the wishes and feelings of the individual and those close to them.
- You must consider, and show you have considered, whether there is a less restrictive option.
- You must follow the MCA section 4 checklist.
- Conditions are to be used to limit restrictions, not add to them.
- Your report must reflect your own work. In this particular case, the judge pointed out that in the report from the second BIA "substantial parts of her short report are cut and pasted from the previous best interests report", and added that the report "had all the hallmarks of a document completed in a hurry".

# Conclusion

Remember that a judge who is asked to decide on the best interests of a person who lacks capacity operates within the same legal framework as a BIA and will need to consider the same information. Very often in case law you can see that judges start by reminding themselves of the principles of the MCA and the best interests checklist. A good BIA report will demonstrate that you have done the same.

Be clear and concise and show that you know the law and have worked within its framework. It must be apparent from your report that you have taken into account the person's own wishes and the views of those you consulted whether you agree with them or not. You must give evidence of where you received information from and you must avoid vagueness. Your report should show that you have analysed and evaluated all the information you have gathered in order to reach conclusions that fairly balance rights with

risks. The person reading your report should never be left guessing how you reached the conclusions.

> This guide forms part of Inform Adults' knowledge and practice hub on mental capacity and deprivation of liberty.

# References

Association of Directors of Adult Social Services (2015)
*New DoLS forms*

Adass (2015)
*Deprivation of Liberty Safeguards guidance*

Department for Constitutional Affairs (2007)
*Mental Capacity Act 2005 Code of Practice*
London, TSO

Ministry of Justice (2008)
*Deprivation of liberty safeguards Code of Practice*
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The College of Social Work (2013)
*Best interests assessor capabilities*
London, TCSW (now available on Social Work Resources website)