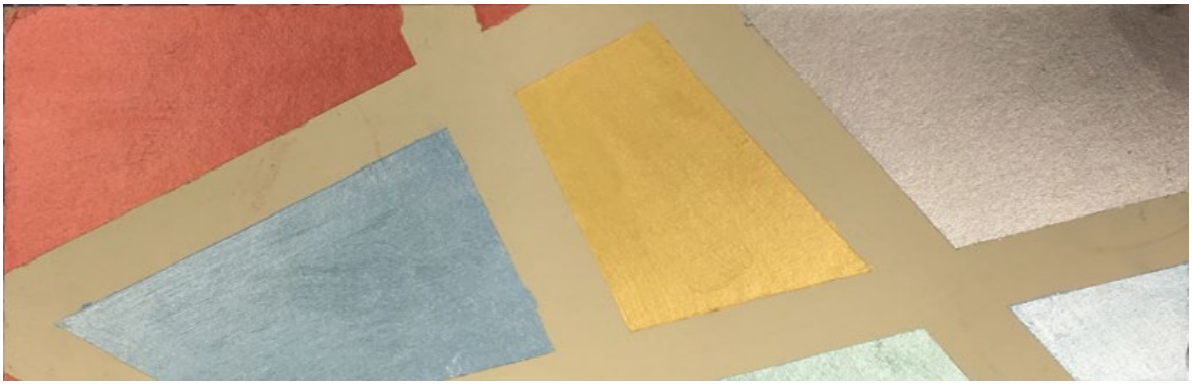

A: Introduction

1. This purpose of this document is to provide supervisory bodies and DoLS assessors with some guidance on the equivalent assessment process which has been available ever since DoLS was brought into force in 2009. The process has assumed greater importance since *Cheshire West*, owing to the ever-increasing demand for these safeguards in a context where over 123,500 people are deprived of liberty without any.

2. To streamline the process and avoid unnecessary duplication, Sch A1 MCA 2005 includes a provision for using equivalent assessments – essentially relying upon existing assessments – instead of reassessing a situation which would in all likelihood only serve to confirm what the supervisory body already knows.

3. At its outer limit, typically where P is settled in a care home, with no objections or concerns arising or material changes having taken place, this equivalisation process would mean that a set of assessments resulting in a 12-month authorisation could be relied upon for a further 12-month authorisation. So P would get the benefit of 2-years' worth of safeguards from one set of assessments. This document cannot take the place of legal advice. In any case of doubt as to the principles or procedures to apply, it is always necessary to consult your legal department. Indeed, we recommend supervisory bodies have a policy which considers when and under what circumstances it is appropriate to use equivalent assessments.

Editors
Neil Allen
Alex Ruck Keene KC (Hon)

The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

A: Legal Framework

Statutory provisions

4. Paragraph 49 of Sch A1 MCA 2005 sets out the rules for equivalising existing assessments for a new DoLS authorisation:

> *MCA 2005 Sch A1 para 49: Equivalent assessment already carried out*
> *(1) The supervisory body are not required by paragraph 33 to secure that a particular kind of assessment ("the required assessment") is carried out in relation to the relevant person if the following conditions are met.*
> *(2) The first condition is that the supervisory body have a written copy of an assessment of the relevant person ("the existing assessment") that has already been carried out.*
> *(3) The second condition is that the existing assessment complies with all requirements under this Schedule with which the required assessment would have to comply (if it were carried out).*
> *(4) The third condition is that the existing assessment was carried out within the previous 12 months; but this condition need not be met if the required assessment is an age assessment.*
> *(5) The fourth condition is that the supervisory body are satisfied that there is no reason why the existing assessment may no longer be accurate.*
> *(6) If the required assessment is a best interests assessment, in satisfying themselves as mentioned in sub-paragraph (5), the supervisory body must take into account any information given, or submissions made, by—*
> *(a) the relevant person's representative,*
> *(b) any section 39C IMCA, or*
> *(c) any section 39D IMCA.*
> *(7) It does not matter whether the existing assessment was carried out in connection with a request for a standard authorisation or for some other purpose.*
> *(8) If, because of this paragraph, the supervisory body are not required by paragraph 33 to secure that the required assessment is carried out, the existing assessment is to be treated for the purposes of this Schedule—*
> *(a) as an assessment of the same kind as the required assessment, and*
> *(b) as having been carried out under paragraph 33 in connection with the request for the standard authorisation.*

5. Note, therefore, that any of the existing assessments can be "equivalised," other than the age assessment which need not be as sadly none of us are getting any younger. Moreover, as long as the 12-month currency and accuracy requirements are satisfied, an existing assessment can be equivalised as many times as necessary. Even though paragraph 49 does not require it, we suggest that consultation with the managing authority should always take place. The same is true, we suggest, in relation to the RPR/IMCA, even though paragraph 49 only refers to the best interests assessment. If there is a health and welfare LPA/deputy, although the no refusals assessment can be equivalised, as best practice they should also be consulted with (if they are not the RPR). In terms of granting a standard authorisation, the key provisions are the same as when equivalent assessments are not used:

51(1) If the supervisory body are required to give a standard authorisation, they must decide the period during which the authorisation is to be in force.
(2) That period must not exceed the maximum authorisation period stated in the best interests assessment.
52 A standard authorisation may provide for the authorisation to come into force at a time after it is given.
53(1) A standard authorisation may be given subject to conditions.
(2) Before deciding whether to give the authorisation subject to conditions, the supervisory body must have regard to any recommendations in the best interests assessment about such conditions.
(3) The managing authority of the relevant hospital or care home must ensure that any conditions are complied with.

Code of Practice guidance

6. Limited guidance is given in the DoLS Code:

4.4 The Act states that where an 'equivalent assessment' to any of these assessments has already been obtained, it may be relied upon instead of obtaining a fresh assessment.
4.5 An equivalent assessment is an assessment:
(a) that has been carried out in the last 12 months, not necessarily for the purpose of a deprivation of liberty authorisation (where the required assessment is an age assessment, there is no time limit on the use of an equivalent assessment)
(b) that meets all the requirements of the deprivation of liberty assessment,
(c) of which the supervisory body is satisfied that there is no reason to believe that it is no longer accurate, and
(d) of which the supervisory body has a written copy.
An example would be a recent assessment carried out for the purposes of the Mental Health Act 1983, which could serve as an equivalent to a mental health assessment.
4.6 Great care should be taken in deciding to use an equivalent assessment and this should not be done routinely. The older the assessment is, even if it took place within the last 12 months, the less likely it is to represent a valid equivalent assessment (unless it is an age assessment). For example, only a very recent mental capacity assessment would be appropriate where capacity is known to fluctuate, since one of the principles of the Act is that a person must be assumed to have capacity unless it is established that they lack capacity.
4.7 If an equivalent best interests assessment is used, the supervisory body must also take into account any information given, or submissions made, by the relevant person's representative or an Independent Mental Capacity Advocate (IMCA) instructed under the deprivation of liberty safeguards.
4.8 Supervisory bodies should record the reasons why they have used any equivalent assessment. A standard form is available for this purpose.

Case law

7. There is no reported case yet that has analysed the law regarding equivalent assessments. But *London Borough of Hillingdon v Neary* [2011] EWHC 1377 emphasises that the supervisory body must examine the assessments with an independent mind and appropriate care, given the gravity of depriving someone of liberty. If an assessment (new or equivalent) is outdated, superficial or inadequate, simply "rubber-stamping" it can render the resulting authorisation unlawful. Although

a supervisory body must grant an authorisation if the six qualifying requirements are met,

> *"This obligation must be read in the light of the overall scheme of the schedule, which cannot be to require the supervisory body to grant an authorisation where it is not or should not be satisfied that the best interests assessment is a thorough piece of work that adequately analyses the four necessary conditions. … where a supervisory body knows or ought to know that a best interests assessment is inadequate, it is not obliged to follow the recommendation. On the contrary it is obliged to take all necessary steps to remedy the inadequacy, and if necessary bring the deprivation of liberty to an end, including by conducting a review under Part 8 or by applying to the court. … A standard authorisation has the same effect as a court order and there is no reason why it should receive lesser scrutiny." (London Borough of Hillingdon v Neary* [2011] EWHC 1377*)*

8. We suggest that, by analogy, the COPDOL11 triggers are helpful in determining the appropriateness of using existing as equivalent assessments. In other words, a supervisory body should be especially cautious and will likely require a re-assessment (whether a form 3/3B or 4/4B) if there is:

   (a) Any objection by P or by anyone else to the qualifying requirements;

   (b) Any consultation concerns;

   (c) Any concerns arising out of P's wishes and feelings, the RPR appointment, or any matter requiring particular scrutiny or suggesting the arrangements may not in fact be in P's best interests;

   (d) Any potential conflict with any decision taken by an LPA or deputy within the scope of their legal authority;

   (e) Any other reason the supervisory body/others think that a full re-assessment is necessary or appropriate.

B: Equivalising existing assessments

No refusals assessment

4. Although paragraph 49 does not require it, we would always recommend the supervisory body arranges for any health and welfare LPA/deputy to be consulted with to confirm they still agree that the person should be accommodated in the relevant hospital or care home.

Mental capacity assessment

5. If there is any prospect of P regaining capacity to make the decision, an existing assessment should not be equivalised. Equivalent capacity assessments are really for situations where this will not happen or where it might in due course but there is a very recent capacity assessment since which nothing has changed.

6. We would suggest that the existing assessment cannot be equivalised if the place of detention has

changed so a reassessment would be required. This is because P meets the mental capacity requirement if s/he lacks capacity to decide whether or not to be accommodated in "the relevant hospital or care home" for the purpose of being given the relevant care or treatment. So if that has changed, the decision has changed it now relates to a different hospital or care home. The same is true if "the relevant" care or treatment has materially changed (eg moving from residential to nursing settings within the same care home).

Mental health assessment

7. If the person's mental disorder is unchanging (eg learning disability, dementia), the existing assessment could be equivalised. We suggest this could also be the case if the setting has changed, but some caution is required. The person meets this requirement if s/he is suffering from a mental disorder (within the meaning of the MHA 1983 disregarding any exclusion for persons with learning disability) which may not have changed. However, when carrying out a mental health assessment, the assessor must also - (a) consider how (if at all) the person's mental health is likely to be affected by being a detained resident, and (b) notify the BIA of their conclusions. Although it says "being a detained resident", and a change of placement means they remain "a detained resident", the arrangements in the new setting may be very different and have a bearing on the person's mental health. So, out of an abundance of caution, we suggest a new mental health assessment (either form 4/4B) should be undertaken for changes of accommodation in case the impact of the new arrangements is different on P's mental health.

Best interests assessment

8. Equivalising an existing best interests assessment probably causes the most concern amongst practitioners, for understandable reasons. But the law allows for it (provided the consultation is undertaken) although caution is required. The intensity of the arrangements might increase; P's wishes and feelings may have changed; new options may now be in the pipeline. In these scenarios, it is extremely unlikely that an existing assessment would be equivalised for obvious reasons, particularly so in hospital cases.

9. We suggest that the typical scenario where a best interests assessment would be equivalised is where P is in a settled care home placement under an existing 12-month authorisation. The previous BIA's maximum suggests that there is unlikely to be a material change of circumstance, otherwise they would have recommended a shorter period.

Eligibility assessment

10. If the person is in the same care home or hospital, there is significant scope for equivalising the existing assessment. The main scenario where it would be wrong to do so is if P is detained in hospital and the circumstances indicate that the MHA 1983 is now applicable. Such a situation should already have triggered a Part 8 review.

C: The authorisation process

11. Accordingly, an existing assessment carried out within the last 12 months can be re-used as an 'equivalent assessment' if there is no reason for the supervisory body to think that it may no longer

be accurate. If P had dementia last time, the chances are P still has it. If this was a care home last time, we do not need another mental health assessor to confirm that this is still the same care home. Indeed, there is no need to reassess any of the six DoLS criteria (so-called 'qualifying requirements') if there are the existing assessments within the last 12 months which remain accurate.

12. Equivalising all six existing assessments is often overlooked but provides an opportunity to (a) reduce the burden on people who are deprived of liberty and their families; and (b) make better use of scarce resources so as to provide safeguards to more people. Existing assessments for both care homes and hospitals cases can be equivalised. However, given the more dynamic situation in hospitals, where certain assessments might be appropriately equivalised, the full equivalent process for all six is probably more appropriate in long-term stable care home scenarios. Here are some examples illustrating how the process can work:

    Hospital scenario:
    15 May: P satisfies all qualifying requirements (advanced dementia, lacks capacity to decide the matter, no refusals, in best interests, eligible because confined in hospital for physical health treatment). Maximum 1-month standard authorisation granted (as per BIA recommendation).
    13 June: existing mental health, capacity, no refusals and eligibility assessments equivalised. Fresh BIA assessment requested as existing one may no longer be accurate.
    15 June: second standard authorisation granted for 2 months (as per BIA's new maximum recommendation).

    Care home scenario:
    15 May 202X: P satisfies all qualifying requirements (advanced dementia, lacks capacity to decide the matter, no refusals, in best interests, eligible because confined in care home). Maximum 12-month standard authorisation granted (as per BIA recommendation).
    20 April 202Y: supervisory body consults with managing authority and RPR/IMCA. No reason to think existing assessments no longer accurate.
    22 April 202Y: all existing assessments equivalised; second standard authorisation granted for 12-months to come into force on 15 May, expiring 14 May 202Z.

13. The hospital case equivalised all but the best interests assessment because of concerns that things may have changed. The length of each standard authorisation is limited to the maximum period set by the BIA; this was initially 1-month and then the fresh assessment said 2-months. In the care home scenario, 2-years' worth of safeguards were available on the basis of one set of assessments in a stable, long-term placement with no concerns or triggers arising from the consultation with the managing authority and RPR/IMCA. Further assessments would be required for the following year, and the assessors would determine whether this should be using form 3/3B or 4/4B. Note, therefore, that forms 3B/4B are fresh assessments, just documented and carried out in a different manner.

(i) Within the previous 12 months?

14. It is likely that the following task can be completed by administrative staff as it involves merely factual issues, not requiring any MCA 2005 expertise or experience. Upon receiving a standard authorisation request, the supervisory body should check the date of the existing forms 3/3B and

4/4B. If they were completed within the last 12 months, they satisfy the statutory recency criterion. It is also important, we suggest, that the renewal process is concluded before the expiry of the existing authorisation. Managing authorities can request a renewal up to 28 days before the existing authorisation is due to expire, and supervisory bodies 'may provide for the authorisation to come into force at a time after it is given'. If coordinated in this way, supervisory bodies would have a 28-day window to undertake the equivalization process in a timely manner.

15. For "stale" assessments, paragraph 49(4) of Sch A1 MCA means you have to reassess if the existing assessment is more than 12 months old (except the age assessment). But it does not say that the 'reassessment' has to be a full reassessment, as opposed to a light touch but express assessment. This is particularly relevant for the mental health, eligibility and no refusals requirements, and potentially relevant to the capacity requirement where P has a profound and enduring mental impairment. It is also potentially relevant to the best interests requirement in renewal situations.

16. Such 'light touch' or 'proportionate' assessments describe the process by which the reassessment is undertaken, rather than the type of assessment itself. Documenting assessments in forms 3B and 4B legally involve a new assessment and are not equivalent assessments. In other words, the following determination by an assessor reflects a new, rather than equivalent, reassessment:

> *"I have considered the original assessment of capacity dated [XX]. I am aware that I cannot rely upon this as an equivalent assessment as it does not meet the criteria under paragraph 49(4) of Schedule A1 MCA 2005. However, having considered the assessment and the circumstances of X, I am of the view that they still meet (e.g.) the capacity requirement, because there has been no material change in their capacity since the assessment dated [XX]".*

(ii) No reason why the existing assessment may no longer be accurate?

17. This view of the supervisory body should, we suggest, be reached by a suitably MCA-qualified person (most likely a best interests assessor although there may be regional variations) who is asked to review the existing evidence and undertake consultation. They will need to speak with managing authority and RPR/IMCA to check whether anything has happened that would call into question the accuracy of the existing assessments. Examples might be:

    - any increase in the restrictions arising from the care/support plan;
    - any objection by P or by anyone else to the qualifying requirements;
    - any safeguarding concerns;
    - any matter requiring particular scrutiny or suggesting the arrangements may no longer in fact be in P's best interests.

18. If there had been a significant change in circumstances during the existing authorisation, this should already have triggered a Part 8 review, but this consultation provides another opportunity to check the position.

The authorisation

19. If the supervisory body is satisfied as to recency and accuracy, the existing assessments can be equivalised. It is important to note that no new assessment forms are completed: it is the previous forms 3/3B and 4/4B which are being relied upon to renew the authorisation. But it is critical to record clearly that this is being done and the rationale for it. The DoLS Code of Practice advises that supervisory bodies *"should record the reasons why they have used any equivalent assessment"*. The DoLS forms have changed since the Code was written, so there is no longer a standard form to record this. So we suggest the Form 5 authorisation could have a recording along the following lines -

    "Six existing assessments are being used as equivalent assessments for this authorisation. The managing authority, RPR and any IMCA have been consulted with and the supervisory body is satisfied that (i) the existing assessments were completed within the previous 12 months and (ii) there is no reason why the existing assessments may no longer be accurate."

20. We would also suggest that a short summary of the BIA's consultation should be provided within the form (perhaps in the evidence of scrutiny) as this provides the evidence upon which the supervisory body's decision is based. The current version of form 5 already provides the dates of the existing assessments relied upon.

21. As a belts and braces measure, the supervisory body could add a condition which resembles the Court of Protection streamlined *Re X* orders:

    "If a change or changes to the Care Plan that render it more restrictive have as a matter of urgent necessity been implemented, the managing authority must request a Part 8 review after the implementation of any such changes.

    If a change or changes to the Care Plan that render it more restrictive are proposed (but are not required as a matter of urgent necessity), the managing authority must request a Part 8 review before any such changes are made."

22. It is important to reiterate that an authorisation based upon equivalised assessments cannot be granted for longer than the maximum set in the original best interests assessment. If the arrangements are so settled that a longer period is called for, a fresh form 3/3B will be needed.

D: Useful resources

23. Useful free websites include:

- www.39essex.com/resources-and-training/mental-capacity-law – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing marketing@39essex.com.
- www.mclap.org.uk – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better.

- www.capacityguide.org.uk – a website which draws upon both this guidance and research conducted by the Mental Health and Justice project to give further assistance to those thinking about capacity, especially in more difficult situations.
- www.lpslaw.co.uk – a website set up by Neil which includes videos, papers and other materials (most of them free) relating both to the Liberty Protection Safeguards and the MCA 2005 more widely.
- www.mentalhealthlawonline.co.uk – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.
- https://www.scie.org.uk/mca/directory/ - the Social Care Institute of Excellence database of materials relating to the MCA.
- www.nice.org.uk/NG108: - the NICE guideline on decision-making and mental capacity
- www.gmc-uk.org/learningdisabilities/ - extremely useful resource designed in the first instance for doctors, but of much wider application, with particularly useful practical guidance upon communication techniques.

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