

## **A practical guide to proceeding with DoLS referrals after the Supreme Court judgement 2/6/2026**

**This document is a working draft as it is subject to further guidance becoming available from DHSC. It s correct as of the footnote date and will be updated after further guidance is issued.**

### **Referrals**

A Form 1 is needed if

- It appears to the managing authority that the person is or will be a detained resident
- This means that the person is likely to meet a multi factorial test and not be able to give valid consent. We are looking for information and evidence about the following
  - Type, duration, effects and manner of implementation of the measures
  - Whether the person is compliant or objecting, expressing a wish to leave, trying to leave
  - Whether the persons current or prior wishes suggest that they would want to leave
  - Whether coercion is present or the use sedative medication
  - Whether the measures in place go beyond what you would expect in that setting
  - Information about the relative normality of the placement
  - Information about the purpose of the measure/s
  - Information as to whether the arrangements accord with persons wishes and feelings
  - Information about whether the person can physically leave or whether a wish to leave would be facilitated
- It must also be likely that the person will meet all of the qualifying requirements
  - Age
  - Mental Capacity
  - Mental Health

- Eligibility
- No refusals
- Best interests

## Allocations

Whilst it is recommended that DoLS teams carry on with business as usual, it will be necessary to scrutinise Forms 1s to make sure they meet the criteria above and reflect the changes following the Supreme Court judgment known as AGNI.

Prioritise incoming requests and continue allocating for assessment. Some of the factors on the existing ADASS priority tool are good indicators of priority still, particularly those around objection, wishing to leave or trying to leave. The assessment will need to apply the AGNI test not the ACID test.

BIAs who practised before Cheshire West in 2014 should take a lead on assessments and should upskill BIAs who trained after 2014.

Form 1s should not be used to screen out requests for DoLS at this stage. If further information is required it should be requested but a Form 1 requires an assessment. (See MCA Sch A1 para 33: (1) This paragraph applies if the supervisory body are requested to give a standard authorisation. (2) The supervisory body **must** secure that all of these assessments are carried out...)

## Interim priority tool

West Midlands Priority Tool			
	Indicators of high priority	High Priority	Not priority
1. Screen new Form 1s	<ul style="list-style-type: none"> <li>• On the face of it, it will meet a multifactorial test</li> <li>• The person is objecting</li> <li>• The person is expressing a wish to leave or trying to leave</li> <li>• The persons current or prior wishes</li> </ul>	allocate for Form 3 assessment	Add to waiting list/ / Low priority allocate for 3A
2. Screen Form 2		allocate for Six equivalents or 3B	Add to waiting list/ / Low priority allocate for 3A
3. Existing cases		Leave in force no action	Allocate for 3A review and cease

4. Waiting list	<p>suggest that they would want to leave</p> <ul style="list-style-type: none"> <li>• Coercion is present or the use of sedative medication</li> <li>• The measures in place go beyond what you would expect in that setting</li> </ul>	Prioritise allocate for a Form 3	Likelihood of not meeting new criteria Allocate for 3A assessment
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## Renewals

Renewals should be treated with caution currently; it may not be wise to use six equivalent assessments before ensuring it is appropriate to rely on them. It would be useful to screen them first to ensure they are likely to meet the AGNI test and then proceed. Those which are deemed not to meet the AGNI test can be allowed to lapse unless the managing authority submits a Form 2. We might encourage this in the first few months. If a Form 2 has been received then a Form 3A and a 6 should be issued. However, the Form 3A can be completed without a face-to-face assessment based on the BIAs knowledge of the person, or by a telephone. When issuing a Form 3A/6 some kind of explanation in simple terms should accompany it to explain to the person and their representative why their situation previously required safeguards and now doesn't. An easy read is provided in the West Midlands.

## Reviews

As time and resources allow it will be necessary to start screening the backlog for any cases which will clearly not meet the AGNI test. There may be some acute hospital referrals which easily fall into this category. Others will need to be subject to a short and simple assessment using a new version 3A form.

DoLS teams will no doubt be asked to carry out Part 8 reviews of existing cases, the advice currently is to prioritise this against urgent incoming new referrals and process whichever is higher priority.

Care homes can be reminded that a DoLS authorisation is permissive not mandatory.

If there is workforce capacity then reviews should be prioritised and carried out using the new 3A form and prioritised as shown below.

**What does an assessment look like now?**

- Use a multifactorial test i.e. the AGNI test NOT the acid test
- Consider: Type, duration, effects and manner of implementation of the measures
- Be practical and realistic
- Is the person compliant or objecting, expressing a wish to leave, trying to leave
- Do their prior wishes suggest that they would want to leave
- Is coercion present or the use of sedative medication
- Do the measures in place go beyond what you would expect in that setting
- What is the relative normality of the placement, is this pretty much the only way the person could receive care
- What is the purpose of the measure/s
- Do the arrangements accord with persons wishes and feelings

BIAs should trust their judgement; this is a period of learning and exploring a new test.

The multifactorial assessment begins, as before, with the objective element and consideration of objection. The absence of objection will therefore prompt consideration of valid consent. NB: It is important to note that valid consent is only expected to apply to a relatively small cohort. The majority of situations which no longer need a standard authorisation will be because they fail the AGNI test.

**Comparison**

ACID test	AGNI test
Wide but superficial	Narrow but deep
Complete supervision and control	Type, duration, effects and manner of implementation of the measures
All gilded cages are in	Paradigm of a prisoner in a cell
Persons objections are not relevant	Objection is relevant
Liberty means the same for everyone	Some people cannot exercise liberty
Lack of capacity meets the subjective test	Subjective test is autonomous and there can be valid consent

## Guide to a new assessment

The AGNI test can be described as three Cs – Concrete situation, Context, Consent.

If BIAs follow this order it will help to build a picture of whether the person is objectively deprived of liberty.

**Considering deprivation of liberty after AGNI**  
— THIS IS NOW A MULTIFACTORIAL TEST (3 Cs) —

- 1** What are the **concrete** circumstances
  - What are the type, duration, effects and manner of implementation of the measures
  - Is the person compliant or objecting, expressing a wish to leave, trying to leave
  - What are the persons current or prior wishes and do these suggest that they would want to leave
- 2** What is the **context**
  - Is coercion present or the use of sedative medication
  - Do the measures in place go beyond what you would expect in that setting
  - What is the purpose of the measure/s
  - Could the person physically leave or would a wish to leave be facilitated
- 3** Can the person give valid **consent**
  - Do the arrangements accord with the persons wishes and feelings
  - Can they/do they give positive assent to the measures in place which amount to confinement

*All three elements (concrete, context and consent) must be carefully considered together in order to determine whether there is a deprivation of liberty.*

The persons wishes and feelings are relevant to the objective element but also to the subjective element.

Having considered the concrete situation of the person, the BIA then needs to look in more detail at how the arrangements impact the person and what the context for them is. A useful measure at this stage is to look at the degree and intensity of the measures.

Finally, if there is an objective deprivation of liberty the BIA needs to consider if the person can give valid consent to it despite the fact that they lack mental capacity for the decision to be accommodated for the purpose of care/treatment.

## Valid consent

In considering the persons wishes and feelings in relation to the arrangements, the following may be useful to consider:

- Any statements about their wishes and feelings in relation to the arrangements in place
- Any statements they have made about their residence in care,
- What is their general emotional state,
- What is the frequency with which they objects to the placement or ask to leave,
- What is the consistency of their express wishes or emotional state;

- Are there any potential alternative reasons for their express wishes or emotional state.

In considering whether the person's behaviour constitutes an objection consider:

- the possible reasons for their behaviour,
- whether they are being medicated for depression or being sedated,
- whether they actively try to leave the care home,
- whether they take preparatory steps to leave, e.g. packing bags,
- What is their demeanour and relationship with staff,
- Are there any records of challenging behaviour and the triggers for such behaviour.
- whether their behaviour is a response to particular aspects of the care arrangements or to the entirety of those arrangements.

*(Based on RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAs) [2016] EWCOP 49.)*

People should be given all support necessary to enable communication of their wishes and feelings. Assessment will require scrutiny of care and/or medical notes and speaking to family and staff. It may require multiple visits.

All practitioners assessing wishes and feelings should be alert to circumstances that may impact someone's ability to express their wishes and feelings, for example:

- sedating medication
- fear of consequences
- perceived pressure
- feeling that they do not want to be a burden

If the BIA finds a person can give valid consent to the confinement, then there is no deprivation of liberty and no need to continue with any further assessments. It is likely that this will be recorded on a Form 3 where a capacity assessment will have been completed as usual but additional factors considered in relation to valid consent. However, it is important to begin an assessment with the objective element, if this is not met then there does not need to be consideration of any other factors.

## **Data**

West Midlands will be monitoring data to observe how referrals decrease and at what rate, how many authorisations are granted, how many 3As are utilised and whether and when backlogs show signs of reducing. For this reason (along with other reasons) we do not advise screening people out of DoLS based on a Form1.

## **Forms**

A new Form 3A has been uploaded for use along with the slightly revised Form 3s. These Forms reflect the AGNI test and will operate in the interim and possibly longer term. The other materials and guidance on the WMADASS website have all been marked as in need of review.

## **Sedative medication**

The use of sedative/psychoactive medication can be an indicator of concern. However, a BIA should look at the reason it's prescribed, does it have a sedative effect on the person, is it used PRN for behavioural reasons and so on. The presence of a potentially sedative medication is not automatically a deprivation of liberty (See MEG who was prescribed Risperidone to manage anxiety and was found not to be deprived of liberty by the Supreme Court)