

# **NHS Herts and West Essex Integrated Care Board (ICB)**

## **Deprivation of Liberty Policy**

**July 2022 V1.0**

<b>Version Number</b>	<b>V1.0</b>
<b>Approved By</b>	<b>HWE ICB</b>
<b>Date Approved</b>	<b>01 July 2022</b>
<b>Responsible Director</b>	Director of Nursing and Quality
<b>Directorate</b>	<b>Nursing &amp; Quality</b>
<b>Staff Audience</b>	All staff working within or on behalf of HWE ICB plus those contracted by HWE ICB and who are involved with people 16yrs and over who may lack capacity to make decisions for themselves.
<b>Review Date</b>	<b>2024</b>
<b>Description</b>	The Deprivation of Liberty Policy sets out the roles and responsibilities of the ICB within the terms of current legislation and case law.
<b>Superseded Documents (if applicable)</b>	

### Document Control

<b>Version</b>	<b>Page</b>	<b>Details of amendment</b>	<b>Author</b>
<b>V1.0</b>		<b>Joint policy for HWE</b>	<b>Tracey Cooper, Stephenie Evis, Zivai Muyengwa</b>

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## 1. Introduction

Deprivation of Liberty Safeguards (DoLS) were created to help protect individuals that lack mental capacity to consent to treatment that might deprive them of their liberty, where this care or treatment is in their best interests or will protect them from harm. The Mental Capacity Act 2005 (MCA) provides a legal process for this deprivation which makes sure that it is unavoidable and, in the individual's best interests.

The MCA (2005) has recently been reviewed and updated and is now the Mental Capacity Amendment Act (2019). Legislative changes to DoLS and Liberty Protection Safeguards (LPS) will require implementation pending publication of a Code of Practice and Regulations, yet to be agreed. Until this has happened this policy and procedure will remain in place.

The distinction between a deprivation of, and restriction upon liberty, is merely one of degree or intensity and not one of nature or substance.

DoLS apply to adults over the age of 18 years.

DoLS do not apply to adults who are lawfully imprisoned or are lawfully detained under the provisions of the Mental Health Act 1983.

The Acid Test is a list of conditions identified in the Cheshire West case (Cheshire West and Chester Council v P [2014] UKSC19) which, when satisfied, will identify whether or not a person is being deprived of their liberty. A person will be deprived of their liberty when they:

- Are being deprived of their liberty for more than a few days
- Are subject to continuous supervision and control
- Are not free to leave

In all cases the following are not relevant to the application of the Acid test:

- The individual's compliance or lack of objection to the care management
- The reason or purpose behind a particular placement
- The relative normality of the placement (whatever the comparison made). This means that the person should not be compared with anyone else in determining whether there is a Deprivation of Liberty.

A young person under the age of 18 can also require authorisation of a Deprivation of Liberty from the appropriate Court and advice should be sought from the Safeguarding Children's team.

A deprivation of liberty can occur in a care home, hospital, or domestic setting such as supported living or an individual's own home.

For those deprived of their liberty in a care home or hospital a DoLS is authorised by the Local Authority.

Within domestic settings, applications are made to the Court of Protection.

This policy should be read in conjunction with the Mental Capacity Act 2005 Code of practice and the Southend, Essex, and Thurrock (SET) Mental Capacity Act and Deprivation of Liberty Safeguards policy and Guidance and the Hertfordshire Policy on Mental Capacity. These can be accessed below:

[Mental Capacity Act 2005 Code of Practice](#)

[SET Mental Capacity Act and Deprivation of Liberty Safeguards Policy and Guidance](#)

<https://www.hertfordshire.gov.uk/media-library/documents/about-the-council/data-and-information/mental-capacity-act-2017.pdf>

## **2. Purpose**

This policy aims to ensure that no adult without mental capacity to consent to their care and treatment is deprived of their liberty without legal authorisation to do so, and the least restrictive method is always used. This deprivation of liberty is irrespective of where the deprivation takes place.

The policy applies to all HWEICB employees irrespective of their role within the organisation. In particular those who visit patients and their families and carers, and those who are responsible for commissioning NHS funded nursing care and NHS continuing healthcare.

HWEICB will inform other commissioners of care or treatment services about any safeguard concerns regarding non-compliance with the MCA and DoLS where services are commissioned in coordination with HWEICB.

## Relevant Legislation, Guidance and Policies

- The Mental Capacity Act: Code of Practice
- Mental Health Act 1983
- Deprivation of Liberty Safeguards (DoLS): Code of Practice
- The Mental Health Act 2007
- The Mental Capacity Amendment Act 2019
- The Human Rights Act 1998
- The European Convention on Human Rights
- The Care Standards Act 2003
- The Children Act 1989
- Hertfordshire Policy on Mental Capacity 2017
- SET Mental Capacity Act and Deprivation of Liberty Safeguards Policy and Guidance 2018
- SET Safeguarding Adults Guidance 2019
- Hertfordshire Safeguarding Adults at Risk Multi-Agency Policy, Procedure and Practice Guidance 2021
- Hertfordshire Safeguarding Children Partnership Procedures Manual
- SET Safeguarding Children Guidance
- The Care Act 2014
- HWEICB Mental Capacity Act Policy 2022
- HWEICB Safeguarding Adults Policy 2022

### 3. Definitions

MCA	Mental Capacity Act 2005
IMCA	Independent Mental Capacity Advocacy
Decision Maker	A professional who consults with others to decide on the best interest decision Code of Practice Written to support the understanding and application of the MCA
Where no one else appropriate is available to consult	The term is used when a person who lacks capacity to make specific decisions, has nobody else who is willing and able to represent them or be consulted in the process of working out their best interests
Best Interests	Under the Act many different people may be required to make decisions or act on behalf of someone who lacks capacity to make decisions for themselves. The person making the decision is referred to as the 'decision maker'. It is the decision maker's responsibility to work out what would be in the best interests of the person who lacks capacity. The Act does not define the term "best interest"; however, section 4 of the Act (supported by the Code of Practice) sets down how to decide

	what is in the best interests of a person who lacks capacity in any particular situation.
Lasting Power of Attorney (LPA)	This is a Power of Attorney created by the MCA 2005, appointing an attorney to make decisions in relation to personal welfare, including healthcare and/or deal with property and affairs

## 4. Roles and responsibilities

### 4.1 Roles and responsibilities within the organisation

The Director of Nursing and Quality is the named Executive Lead to provide board leadership of adult safeguarding and the Mental Capacity Act within HWEICB. This responsibility is reflected within their portfolio and job description and is clearly identified within the organisation and on external communications.

HWEICB will ensure that all staff are aware of their responsibilities under the Mental Capacity Act 2005 and Deprivation of Liberty Safeguards 2007 and will ensure that they will operate at all times in accordance with MCA and DoLS and the accompanying codes of practice.

HWEICB is statutorily responsible for ensuring that the organisations from which it commissions services provide a safe system which safeguards vulnerable children and adults, including adults who lack mental capacity.

HWEICB will, therefore, ensure it commissions MCA and DoLS compliant care and will ensure that providers meet their statutory responsibilities to the people who are without capacity to consent to care and treatment.

In order to carry out its responsibilities with respect to the Mental Capacity Amendment Act HWEICB will:

- Identify a named MCA lead and ensure that relevant policy, procedure, and organisational structures support their role as MCA lead.
- Ensure that all staff employed by HWEICB are aware of their responsibilities with respect to the MCA and DoLS authorisations and ensure that staff operate at all times in compliance with the act and the accompanying code of practice,
- Ensure that training with regard to the MCA and DoLS and its effective implementation is available for HWEICB staff and staff should be updated every 3 years or when there are changes to the law.
- Develop a clear line of accountability for DoLS matters, built into internal HWEICB governance arrangements
- Engage with local Safeguarding Adults Board (SAB) and board sub-groups.

- Work with local agencies to provide joint strategic leadership on DoLS and MCA in partnership with Local Authorities, provider clinical governance teams and safeguarding leads, CQC, and where applicable, the police.
- Ensure that provider contracts specify compliance with MCA and DoLS legislation and that commissioned services are supported, and contracts monitored for compliance with MCA.
- Ensure that learning from cases where DoLS has been an issue will be used to inform future commissioning and practice.
- Ensure that safeguarding and MCA leads work within the local health and social care economies to influence local thinking and practice around DoLS.
- Ensure that best practice around DoLS is promoted, implemented, and monitored both within the ICB and within commissioned provider services.

## **4.2 Responsibilities of Providers**

Provider organisations are responsible for:

- Ensuring compliance with MCA legislation (including DoLS) within and across their organisation.
- Ensuring that there is clarity as to who holds corporate responsibility for MCA and DoLS functions within the organisation, and that appropriate governance and safeguarding systems are in place to deliver best practice.
- Providing assurance to HWEICBs that responsibilities with respect to DoLS are being safely discharged.

HWEICB will oversee these responsibilities.

## **4.3 HWEICB Staff Responsibilities if they are concerned that an individual is deprived of their liberty in a hospital or care home.**

- Where an ICB employee, in performing their duties, feels a deprivation of liberty is occurring (See section on 'acid test' above) then they need to take account of the setting in which care is being delivered.
- If the care is in a hospital or care home setting, then the ICB employee should ask the Managing Authority to make an application for authorisation under Deprivation of Liberty Safeguards to the appropriate Supervisory Body. They should assure themselves that this has been done.
- Where the ICB employee feels the Managing Authority are not acting on their concerns discussion should take place with the Supervisory Body, i.e., the local authority lead.
- Where the ICB employee recognises that a potential deprivation of liberty may be occurring in a setting other than a hospital or care home then the Deprivation of Liberty Checklist should be completed (see Appendix 1).



- If it is still deemed that a Deprivation of Liberty is unavoidable then an application to the Court of Protection should be initiated – consult the CHC Clinical Lead or HWEICB MCA Lead for further advice.

#### **4.4 HWEICB Staff Responsibilities in Making an application for a Deprivation of Liberty Safeguard, to the Court of protection, when an individual is in a domestic setting.**

The coordination of this is completed by the HWEICB CHC team by following the process below:

- I. An accurate list of all individuals that lack capacity to consent to their care which will deprive them of their liberty must be kept by the CHC team.
- II. This must be reviewed monthly in order to ensure applications are completed in a timely manner
- III. Confirm that the individual is fully funded by the ICB
- IV. Liaise with the legal team and with their support and guidance:
- V. Carry out and complete a Court of Protection Mental Capacity Assessment (COP form 3)
- VI. Prepare a detailed care plan/best interest statement/transition plan (if required)
- VII. Arrange meetings with those involved in the individual's care and welfare to gather views and opinions. If there is no relevant person identified, consult with the Independent Mental Capacity Advocate (IMCA).
- VIII. Liaise with the GP and/or psychiatrist to obtain the medical evidence to support the Application
- IX. Forward all the completed paperwork to the MCA Lead for HWEICB for information.

[COP form 3 Assessment of Capacity](#)

[COP form 10 Application to authorise a Deprivation of Liberty](#)

The CHC clinical and administration staff will complete the process for applications as detailed below:

1. The administration team securely send all relevant documentation to the legal team.
2. The administration team will track the progress and details of the applications on the Deprivation of Liberty spreadsheet in the shared drive in liaison with the legal team.

3. Once the application is authorised the administrator will update the spreadsheet of the date when the process will need to be reviewed and notify the CHC team of this.
4. All copies of the authorised application will be sent to the CHC team for uploading to the individual's record.

Once the application has been authorised by the COP the CHC team will review mental capacity of the individual and deprivations of liberty in line with the terms of the order, or when there has been a change in condition.

## **5. Consultation and Communication with Stakeholders**

This policy has been reviewed in line with ICB governance processes.

HWE ICB comply with the Equality and Diversity Act (2010) and Public Sector Equality Duty (2011) and as such recognise that some individuals with protected characteristics may need additional support to understand and interpret this Policy. The ICB Safeguarding Team will respond to any direct or indirect request for support in interpreting this policy, which includes clarification and translation.

## **6. Policy Review**

The Deprivation of Liberty Policy will be reviewed 3 yearly and in accordance with the following on an "as and when required" basis:

- Legislative changes
- Good practice guidance
- Case Law
- Serious Incidents
- Safeguarding Adults reviews (where applicable)
- Changes to organisational infrastructure

## **7. Education and training**

All staff are required to undertake relevant training and safeguarding supervision commensurate with their duties and responsibilities as outlined in the Intercollegiate Document 'Adult Safeguarding: Roles and Competencies for Health Care Staff' and the ICB document 'A Learning Approach to Adult Safeguarding'.

Staff requiring support should speak to their line manager in the first instance.

## 8. References

Intercollegiate Document 'Adult Safeguarding: Roles and Competencies for Health Care Staff'

[Adult Safeguarding: Roles and Competencies for Health Care Staff](#)

Mental Capacity Act 2005 Code of Practice

[Mental Capacity Act 2005 Code of Practice](#)

Deprivation of Liberty Safeguards Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice

<https://www.cqc.org.uk/sites/default/files/Deprivation%20of%20liberty%20safeguards%20code%20of%20practice.pdf>

SET Mental Capacity Act and Deprivation of Liberty Safeguards Policy and Guidance

[SET Mental Capacity Act and Deprivation of Liberty Safeguards Policy and Guidance](#)

Hertfordshire Policy on Mental Capacity

[Hertfordshire Policy on Mental Capacity](#)

A Learning Approach to Adult Safeguarding – available on the ICB Intranet.

## Glossary of Abbreviations

COP	Court of Protection
DNACPR	Do Not Attempt Cardiopulmonary Resuscitation
DoLS	Deprivation of Liberty Safeguards
EPA	Enduring Power of Attorney
LPA	Lasting Power of Attorney
MCA	Mental Capacity Act/Mental Capacity Assessment

## 9 Appendices

### Appendix 1 Checklist

#### Introduction

Following the Supreme Court ruling in March 2014, it has been clarified that a person can be deprived of their liberty in a domestic setting where the State is responsible for imposing the arrangements. This would apply to patients living in their own home or in supported living, where the ICB is the Commissioner of their care package.

The following checklist has been developed to assist practitioners in determining if a patient is being deprived of their liberty and should be applied at the point a care package is commenced, adapted, or reviewed.

#### Section 1 – Mental Capacity

There are two questions that staff need to ask in order to assess mental capacity; also referred to as the two-stage capacity test.

- Stage 1 - is there an impairment of or disturbance in the person's mind or brain?
- Stage 2 - is the impairment or disturbance sufficient that the person lacks the mental capacity to make that particular decision at the time it needs to be made?

A person is deemed not to have capacity for a decision if they cannot meet any one or more of the following:

- Understand information given to them about the decision
- Retain that information long enough to help make that decision
- Use or weigh up that information as part of the decision-making process
- Communicate their decision. This may be by talking, using sign language or even simple muscle movements like blinking an eye or squeezing a hand.

**Does the individual have the Mental Capacity to accept, refuse or choose amongst options related to the package of care they are being offered? (Ensure the documentation is comprehensive and complete a Mental Capacity Assessment if there is a suspicion that they do not have the mental capacity to make these decisions)**

**YES**

**Section 2 - DoLS Checklist**



**YES** If the above answer is **yes** and this decision is documented then they **do not** meet the test for deprivation of liberty you do not need to proceed to Section 2.

**NO**



**NO** If the answer is **no** and this decision is documented then they **do** meet the test for deprivation of liberty and you must proceed to **Section 2**.

The purpose of this section of the assessment is to determine if a person is under continuous supervision and control AND is not free to leave.

It is irrelevant whether the person is compliant or whether there is a lack of objection. The focus is not on the person's ability to express a desire to leave, but on what those with control over their care arrangements would do if they sought to leave. The purpose of the placement is not relevant, and the person should no longer be compared only with another person who has the same level of disability. The concept of "relative normality" as expressed by the Court of Appeal in the Cheshire West case is no longer good law.

**Question 1: In your opinion is the person free to leave?**

- This does not mean that they must be trying to leave or even expressing a view about leaving, it is more a test of what staff would do if the person tried to leave.

**Yes**

**No**

**Question 2: Is the person subject to both supervision and control?**

- The Supreme Court did not give guidance on what constitutes complete supervision and control.
- It is no longer relevant whether the purpose of this is to enable them to have greater freedom, to move around more, go out or to take part in activities or if the high level of supervision and control is to meet a high level of care needs.
- It is no longer relevant whether the person would actually physically be able to get up and leave.

**Yes**

**No**

**Question 3: Is the level of supervision and control continuous?**

- A definition of continuous may include someone knowing where they are or what they are doing, either directly or through the use of assistive technology.

**Yes**

**No**

In any case where the answers are **NO, YES, YES** (in that order) then it is a possibility that the person is being deprived of liberty. In these cases, you will need to proceed to

### **Section 3 - Next Steps**

When it is determined that an individual may be being deprived of their liberty, it is not always appropriate to jump straight to making an application to the Court of Protection for this deprivation to be authorised.

The first step that should be taken would be to review the person's care/treatment plan to determine whether this can be provided in a less restrictive way.

In cases where care cannot be met in a less restrictive way and the three-stage test has established that they may be being deprived of their liberty an application will need to be made to the Court of Protection for this to be authorised.

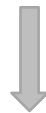
**Is it possible to meet the individual's needs in a less restrictive way?**

**YES**



If the answer is **yes** reapply the DoLS Checklist in Section 2

**NO**



Contact the ICB CHC Clinical and Administration staff and commence the process to make an application for authorisation of a Deprivation of Liberty through the Court of Protection

### **Appendix 4 Contacts**

If you require further help with applying this checklist or to understand what the next steps of the process are then please contact:

HWEICB Leads for Mental Capacity Act:

Hertfordshire: [hertsvalleysccg.safa@nhs.net](mailto:hertsvalleysccg.safa@nhs.net) Tel: 01442 898 881

West Essex: [WECCG.Safeguardingadults@nhs.net](mailto:WECCG.Safeguardingadults@nhs.net) Tel: 01992 556140

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## Appendix 5 - Equality Analysis – Full Equality Impact Assessment

This template is an adapted version of the NHS England Equality template which was published in September 2014 and is the current standard.

<b>Title of policy, service, proposal etc being assessed:</b>
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Deprivation of Liberty Policy.
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<b>What are the intended outcomes of this work?</b>
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The aim of this policy is to provide HWE ICB staff with information so that they may fulfil their statutory duty in relation to the identification and authorisation of deprivation of liberty.
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<b>How will these outcomes be achieved?</b>
---

Staff required to follow the policy direction in relation to any deprivation of liberty in circumstances that fall within the remit of this policy
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<b>Who will be affected by this work?</b>
---

All staff working in the ICB and the service users that are defined within the remit of this policy
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<b>What evidence have you considered?</b>
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As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral.
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<b>Age</b>
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This Policy relates to people over the age of 18.
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As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral
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### **Disability**

Subjects who have any difficulty with sight, reading, or interpreting critical or complex information (either verbal or written) may require additional support to interpret information

As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Gender reassignment (including transgender)**

This Policy relates to all included subjects irrespective of gender re-assignment

As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Marriage and civil partnership**

This Policy relates to all included subjects irrespective of marital/partnership status

As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Pregnancy and maternity**

This Policy relates to all included subjects irrespective of pregnancy or maternity status

As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Race**

Subjects whose first language is not English may require additional support with translation of the policy. For some people this policy may not be understandable and as such may need additional support to understand the Law and Statutory guidance that underpins this policy

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As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Religion or belief**

Subjects may require additional support with the context interpretation of the policy and as such may need additional support to understand the Law and Statutory guidance that underpins this policy

As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Sex**

This Policy relates to all included subjects irrespective of Sex

As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Sexual orientation**

This Policy relates to all included subjects irrespective of sexual orientation

As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Carers**

This Policy relates to all included subjects irrespective of carer status

As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Other identified groups**

Subjects may require additional support with the context interpretation of the policy and as such may need additional support to understand the Law and Statutory guidance that underpins this policy.

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As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Engagement and involvement**

How have you engaged stakeholders with an interest in protected characteristics in gathering evidence or testing the evidence available?

Advice from ICB Equality and Diversity Lead

How have you engaged stakeholders in testing the policy or programme proposals?

Policy approved by the ICB

For each engagement activity, please state who was involved, how and when they were engaged, and the key outputs:

### **Summary of Analysis**

Considering the evidence and engagement activity you listed above, please summarise the impact of your work.

NA

Now consider and detail below how the proposals could support the elimination of discrimination, harassment and victimisation, advance the equality of opportunity and promote good relations between groups (the General Duty of the Public Sector Equality Duty).

The ICB ensures that the Policy enables subjects to access to support from the ICB Safeguarding Team to interpret the Policy and support full understanding by any person who it relates to, where required

### **Eliminate discrimination, harassment and victimisation**

Ensure that the policy does not contain discriminatory language and re-iterates the universal provisions for this policy

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### **Advance equality of opportunity**

As stated in section 5 of the policy, the equality needs of individuals when interacting with the policy and process will be met to ensure equity of outcome, therefore, providing those needs are met, the impact is expected to be neutral

### **Promote good relations between groups**

Policy is universally applied to all subjects in relation to any allegations made against staff in circumstances that fall within the remit of this policy

### **Next Steps**

Some individuals with protected characteristics around Disability, Race, Religion or Belief and other identified groups such as individuals who are not UK citizens may require support in relation to the interpretation or translation of this policy.

This has been addressed by the policy which includes provision (In section 5) for any affected individual to be encouraged to approach the safeguarding team for support with interpretation or translation.

The completed EqIA will be published on the HWEICB website.

Having considered the proposal and sufficient evidence to reach a reasonable decision on actual and/or likely current and/or future impact I have decided that a full equality impact assessment is not required.

Paul Curry, Equality and Diversity Lead, 20 June 2022

An equality impact assessment has been completed and when considering equity and equality it is likely that decision makers will have sufficient information to be able to show Due Regard, as required by the Equality Act 2010.

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