

**REPORT TO CABINET  
JANUARY 2016**

**REPORT OF CORPORATE  
MANAGEMENT TEAM**

**CABINET DECISION**

**1. SUMMARY**

Previous reports to Cabinet have provided details of the changes to the Mental Capacity Act Deprivation of Liberty Safeguards following the Supreme Court Judgment on the Cheshire West and Chester Council and Surrey County Council cases. The implications for the Council in relation to this were also outlined, including details of the work in progress to identify the risks and resource implications of the revised legal framework. This report provides an update on operational activity and financial projections for 2015-16.

**2. RECOMMENDATIONS**

- That Cabinet notes the content of the report, the implications of the judgment and the requirement for additional work to be carried out.
- That Cabinet agrees to receive regular updates on progress against the operational plan, with the next update planned for October 2016.
- That Cabinet notes the requirement for interim funding for 2016-2017 of £546,000 to be considered as part of the Medium Term Financial Plan. This is to enable the required improvement work to be undertaken as part of the lean work planned for adult operational services.

**3. DETAIL**

3.1 Following the Supreme Court Ruling on 19 March 2014 : P -v- Cheshire West and Chester Council and P and Q -v- Surrey County Council, there has been a radical change to the legal definition of and the test for Deprivation of Liberty (DoL), which must now be followed.

3.2 There are now two key questions that need to be considered when applying the test:

- Is the person subject to continuous supervision and control?
- Is the person free to leave?

3.3 For a person to be deprived of their liberty, they must be subject both to continuous supervision and control and not be free to leave. They must also lack the mental capacity to consent to the relevant care and support arrangements, where they have been put in place by the State. Please see Appendix 1 and Appendix 2 for more details of the judgment (a link to the full judgment is embedded in the Department of Health letter), and Appendix 3 for the Department of Health's October 2015 Update on the Mental Capacity Act and DoLS.

**The Safeguards – Legal Framework & Statutory Duties**

- 3.4 Following this judgment, and as outlined in the previous Cabinet reports, a much greater number of existing and potential clients are now considered within the scope of the Safeguards, including the current care home population and people living in supported living, both within and outside the Borough, who are Stockton residents and who are aged 16 or over. These clients require assessments for mental capacity as the first stage in the process.
- 3.5. Future planned admissions to care homes and care-planning for supported living needs to include an assessment for Deprivation of Liberty (DoL) before admissions to cared homes are made/care packages are put into place.
- 3.6. The DoLS for people in twenty four hour care settings aged 18 years and over (care homes and hospitals) consist of six assessments to establish if the DoL is in the client's best interests and that care arrangements constitute the least restrictive option to ensure the safety and well-being of the client. These assessments are carried out by Best Interests Assessors (BIAs) and doctors approved under the Mental Health Act 1983 (s.12). In complex cases, an application to the Court of Protection should be made. For clients living with support in the community and young people aged between 16 and 18 years, all deprivations need to be authorised through the Court of Protection. A Preliminary Judgment has been given by the President of the Court of Protection on the consummate cases presented in June 2014, which has clarified that all cases before the Court of Protection need to be considered by a judge and that mental capacity assessments need to be undertaken by a medical practitioner. Details of the judgment can be found at Appendix 1 and Appendix 2.
- 3.7. All people subject to Mental Health Act Guardianship, Community Treatment Orders and Conditional Discharge need to be assessed for potential Deprivation of Liberty.
- 3.8 Clients with mental health problems and/or a learning disability who are resident in, or assessed as needing care in, a hospital facility and would previously have been considered as 'informal' admissions, need to be assessed for a Deprivation of Liberty Authorisation or for detention under the Mental Health Act. This is of particular importance as there are two independent Mental Health hospitals in Stockton-on-Tees providing Mental Health services.
- 3.9. Local Authorities act as Supervisory Bodies. The Supervisory Body is responsible for considering a deprivation of liberty request received from a managing authority (care home or hospital), commissioning the statutory assessments and , where all the assessments agree, authorise a deprivation of liberty.
- 3.10. In giving authorisation, the supervisory body must specify its duration, which must not exceed 12 months and must not be longer than recommended by the Best Interests Assessor, as Deprivation of Liberty should not continue for longer than is necessary.
- 3.11. The Supervisory Body must make and keep a written record of the standard authorisations they have given. For each authorisation this includes the name of the relevant person, details of the managing authority, the period during which the authorisation is to remain in force, and any conditions attached to the authorisation.
- 3.12. The supervisory body must give notice of its decision in writing to
  - i. the eligible person;
  - ii. the person to whom the request relates (if the authorisation was not granted);
  - iii. the managing authority and
  - iv. any section 39A Independent Mental Capacity Advocate (IMCA) appointed to support the person.

- 3.13. The supervisory body must appoint a relevant person's representative (RPR) to represent the interests of every person for whom a standard authorisation of DoL is given. Where there is no family member or friend available or willing to be appointed to this role, an independent (paid) RPR will be appointed.
- 3.14. When an authorisation is in force, the relevant person, their RPR and any IMCA representing the individual have a right at any time to request that the supervisory body reviews the decision. This will involve undertaking re-assessments. They are also able to challenge the authorisation in the Court of Protection.
- 3.15. Deprivation of Liberty is within the scope of the Human Rights convention, not an addition to it. Recent case law (February 2015) has highlighted the need for local authorities and professionals to be alert to proper consideration of people's human rights in situations involving a deprivation of liberty. In re: AJ, the Court concluded that the Local Authority had infringed AJ's human rights by:
- wrongly appointing an RPR, when AJ had stated she did not wish to be there and it was clear that the RPR would not challenge the standard authorisation
  - failing to terminate the appointment of RPR
  - failing to take adequate steps to ensure that the challenge of deprivation of liberty was brought expeditiously before the court.

The claim was brought on behalf of the incapacitated person by her litigation friend the Official Solicitor, for declarations and damages under section 7 of the Human Rights Act 1998 in respect of the alleged unlawful violation of her rights under articles 5 and 8 of the Convention.

Compensation personal damages claims for unlawful deprivation of liberty have been cited as being in the region of £3, 000- £4,000 monthly per case.

- 3.16. The Chief Coroner has decided that all deaths of people subject to an authorised DoL at the time of their death will be treated as a death in state detention. It is at the discretion of the local coroner how they choose to deal with deaths of people subject to a DoL. The Tees Coroner has decided that it will be informed of each death and will decide if any examination of the client's records is necessary on a case by case basis.
- 3.17 Regional DoLS activity: At 331.1, the North East rate of DoLS applications granted for individuals per 100,000 18+ population in 2014/15 was almost 3 times the national rate of 112.1. Looking deeper, the lack of granted applications nationally is accounting for much of this difference. 77.8% of North East DoLS applications for individuals were authorised in 2014/15 as compared with just 39% nationally (45.5% of individuals nationally had a DoLS application where there had been no decision as compared with just 10.1% in the North East). However notwithstanding this, the North East rate of individuals per 100,000 with a DoLs application, regardless of the outcome, was 425.6 as opposed to 287.6 in England and all but one of the North East LAs have higher rates than the national position<sup>1</sup>.
- 3.18 The initial feedback from the LGA Review team, which carried out a Peer Review of Personalisation in December 2015, identified that the Council is compliant with respect to DoLS, with a high number of Councils in other parts of the country judged to be non-compliant. The full report of the Review is expected later in January 2016.

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<sup>1</sup> Extract from the North East Regional adult social care and health and wellbeing performance report 2014-15.

3.19. Law Commission Consultation

3.19.1 The Law Commission's Mental Capacity Act and Deprivation of Liberty consultation closed in November 2015. A final report with recommendations and a draft Bill are expected to be published in 2016.

3.19.2. The consultation paper makes a number of provisional proposals that will, if implemented, have a significant impact on working practices and resources in the longer term, so it is not expected to reduce the resource requirement identified in this update report. The proposals include:

- i. The replacement of the DoLS with a new system of safeguards in relation to care and treatment of people who lack capacity in care homes, supported living and shared lives accommodation, with additional safeguards where more restrictive or intrusive care or treatment is required. The transition to a new system will have a large-scale impact on working practices across the system. Eligibility for the safeguards would be in line with the Mental Capacity Act thresholds, meaning that more people could be considered within the safeguards than are currently.
- ii. That local authorities would have the responsibility to undertake or arrange assessments, and keep the care and treatment arrangements within the safeguards, under review.
- iii. That the role of Best Interests Assessor should become that of "Approved Mental Capacity Practitioner", with the requirement to keep under review the care and treatment of those people within the safeguards. Although workforce development plans have not been shared, it is clear that resource to meet training requirements will continue to be needed. Dedicated resource to meet the demands of the role will continue to be required, and the training and workforce development plans for social worker progression would support the workforce to deal with the pressures in the longer term.
- iv. That all people subject to the new system should be provided with an advocate to represent their views and wishes. At least the current identified advocacy resource would be necessary should this proposal be implemented, with the need for additional advocacy provision extremely likely. This is due to the greater number of people to be considered within the safeguards, and the anticipated numbers of self-funders who are expected to come forward to be part of the funding reform in April 2016.
- v. That any restrictive treatment and care decisions should be challengeable in a specialist Tribunal, rather than in a court. This could result in an increased number of challenges, creating workload pressures in respect of preparing reports and attendance at Tribunals.

The work programme and resource implications

3.20 Following an initial scoping exercise, a work programme is in progress to ensure that current clients are not unlawfully deprived of their liberty. Working practices have also been reviewed to ensure that the new test is embedded in practice and risks to vulnerable clients and the Council are mitigated as far as is reasonably practicable.

3.21. Client assessments resulting from the Supreme Court ruling are being prioritised by client group and care and support arrangements, in line with the Association of Directors of Adult Services (ADASS) priority tool. This is subject to ongoing review to ensure that priority continues to be given in accordance with those clients at greatest risk. Authorisation requests outside of this work programme, and re-assessments for those people subject to an authorisation of DoL, are being processed within the statutory timescales.

- 3.22. Stockton-on-Tees Borough Council wrote to the Care Quality Commission in April 2015 to seek clarification of the expectation on Supervisory Bodies in managing the sharp increase in applications for authorisation of DoL following the Supreme Court Judgment. The response received from the regional Head of Inspection is included at Appendix 4.
- 3.23 It has been recognised that the additional work resulting from the Supreme Court Judgment is creating workload pressures across Adult Services and the 0-25 team. Initial work to identify the number of children and young people whose care may amount to deprivation of liberty has been completed.
- 3.24. All people subject to a DoL authorisation require regular care-management reviews to ensure authorisation continues to be needed, and that it is the least-restrictive way of providing care and support. This review also highlights any issues with appointments to the RPR role and whether conditions attached to the authorisation are being implemented. Care-management review documentation has been introduced to Social Work teams to facilitate and standardise this process. The use of this documentation will be reviewed on a 3-6 monthly basis. The current arrangements are for reviews to be completed in person, on a three-monthly basis. Work is currently underway to develop a system to implement risk-assessed reviews by telephone, which would reduce the number of face-to-face contacts.
- 3.25. Additional and significant pressures on existing social work resource have been identified in relation to applications to the Court of Protection under section 21A of the Mental Capacity Act to challenge or review the standard authorisation. These “section 21A challenges” will have an impact on current resource in respect of preparation for, and attendance at Court.
- 3.26. A plan for Social Worker progression has been presented to Adult Care Management Team, and then Trade Union Liaison Group (TULG) has accepted this plan in principle. The proposal is that all qualified Social Workers at Grade L and above complete the BIA qualification in order to create and sustain capacity in the workforce.
- 3.27. An independent, paid Relevant Person’s Representative service has been commissioned effective from 1<sup>st</sup> April 2015. This is to ensure that all people subject to a DoLS authorisation have an appointed representative where there is no other person eligible, or able, to be appointed to the role.
- 3.28. A decision has been taken that, locally, short authorisations (less than 12 months’ duration) will be granted where:
- the person is objecting to the deprivation of liberty (maximum 3-month authorisation)
  - the care arrangements are not settled
  - it has not been possible for the assessors to consult with the necessary people
  - there are safeguarding concerns
  - the signatory considers that the deprivation of liberty needs to be looked at again

Where an appointed RPR has not taken steps to bring a challenge before the court, Stockton-on-Tees Borough Council will bring this on behalf of the person deprived of liberty.

3.29 Key Risk Areas

The following key risks in relation to undertaking the DoLS function have been identified:

- There is the risk of challenge to Stockton-on-Tees Borough council (even within current practice) in the existing legal framework, where we as Supervisory Body, are aware of people who currently have unauthorised Deprivation of Liberty, but those people have not been assessed. Legal challenge would be in respect of Human Rights claims

(particularly in relation to interference with Article 5 and Article 8 of the European Human Rights Convention).

- Within current practice, equitable use of the DoLS across the eligible Stockton-on-Tees population (and for those clients placed out of area) is currently not possible within current existing and additional allocated resources.
- There are increased workload pressures across the DoLS function.
- Staff retention and stability in the workforce, ensuring sufficient BIA and signatory resource within Stockton-on-Tees Borough Council.
- Financial resources to fulfil the DoLS function. The workload continues to increase, and a further upward trend is expected in response to the Supreme court judgment, and the number of existing authorisations which will require assessments for further standard authorisations (“renewals”).
- Change of government, or change of legislation (in response to the Law Commission consultation) resulting in transition from the existing to a new regime.

An Equality Impact Assessment is being undertaken in relation to the DoLS function, in order to provide a comprehensive overview.

Initial indications are that for Stockton-on-Tees:

- There are between 300 and 400 clients resident in Stockton-on-Tees Care homes who meet the requirements of the “acid test” following the Supreme Court Judgment, but who have not yet been assessed.
- The vast majority (more than 90%) of authorisation requests are granted. This translates into increased numbers of authorisations requiring a further standard authorisation as more authorisations of DoL are granted (this was around 380 as at 1.11.2015).
- As the number of completed care-management reviews has increased, so has the number of cases requiring termination of the original RPR appointment. In most cases, this results in the appointment of a paid RPR.
- The number of section 21A challenges of the DoL authorisation progressing to the Court of Protection is increasing.
- There are currently approximately 17 adult clients in supported living, and 31 young people (aged 16-18 years) identified by care managers as requiring consideration for authorisation of DoL. Work is underway to progress these cases.
- Initial scoping of clients open to the integrated services for older people’s mental health team suggests that approximately 200 clients could be living in the community and requiring authorisation of DoL.

### 3.30. Current Resources Allocated to the DoLS Function

A number of key responsibilities are currently managed within existing resources. Further additional resource has been agreed until 31<sup>st</sup> March 2016.

There are additional direct costs in relation to:

- Paid (independent) Relevant Person’s Representatives (RPRS) and Independent Mental Capacity Advocacy (IMCA)
- Additional signatory resource to support the signatory rota
- Independent (external) Best Interests Assessments
- Section 12 approved Doctors to complete DoLS Mental Health Assessments
- Court of Protection applications and the associated hearing and mental capacity assessment.

Details of the current and projected activity are included in Appendix 5.

### 3.31 Rationale for Current Resource

#### 3.31.1. DoLS Administration Team

A review of the DoLS Administration Team was undertaken in September/October 2015, and an initial analysis was subsequently presented to Adult Programme Board.

The review involved an in-depth look at the processes involved in the day-to-day administration of the DoLS function (from receipt of application for authorisation of DoL to issuing all documentation following the authorisation decision and other related processes following this). This review highlighted that:

- The number of applications for authorisation of DoL showed an overall upward trend between April and September 2015, and this activity is continuing to rise.
- The DoLS administrative processes, while prescribed, can be complex and involve a number of variations depending on other elements within the overall process.
- The time taken for completing the administrative process ranged from 1 hour 52 minutes (for each standard authorisation processed within the managed approach) to 2 hours 04 minutes (for each further standard authorisation request). Urgent authorisations which are the most frequently processed took an average of 1 hour 53 minutes per case.
- The DoLS Administrative Team are responsible for ensuring that all applications requesting authorisation of DoL are processed within the statutory timescales. However, the staff in the team carry out a wide range of tasks in addition to this including:
  - Completion of annual quarterly and annual data returns to the Health & Social Care Information Centre
  - Organising rotas for BIAs and Signatories
  - Dealing with ad hoc queries not relating to authorisations in progress
  - Checking invoices
  - Amending paperwork
  - Development and maintenance of a dedicated DoLS database to develop and maintain records for all relating to the processing of authorisations of DoL. This has been a significant and highly valuable piece of work - at no additional cost - which has addressed a number of quality assurance issues previously evident.
- The team are currently working above capacity as a result of changes to staff hours. However it was also recognised that re-alignment of tasks and more multi-processing is required in order to release some capacity in the team.
- A discrete DoLS Administration Team was identified as necessary, due to the complexity of the processes, specialist knowledge within the team and the need for dedicated work in order to work within statutory timeframes and framework.

The DoLS Administration Team is fulfilling a crucial role akin to the Mental Health Act Office within the NHS. It ensures oversight of the MCA DoLS function and compliance across the whole process by identifying and challenging errors, providing feedback and support to managing authorities and ensuring that statutory timescales are adhered to. This provides legal protection for Stockton-on-Tees Borough Council in working within the MCA DoLS framework.

An overview of current capacity and demand is shown in Table 1 below.

#### 3.31.2. Best Interests Assessors

There are currently nine trained BIAs working within the teams, and active on the DoLS rota. BIA assessments are completed in addition to main roles. There is one full-time member of staff working solely on BIA assessments, supporting the rota. A maximum of seven assessments can be picked up via the rota weekly. The remainder must be allocated to independent BIAs.

Additional staff are completing initial BIA training which will increase capacity in the rota.

Table 1

Current BIAs	September cohort (due to qualify November 2015)	Re-submissions (end November 2015)	November cohort (due to qualify February 2016)	New member of staff (qualified BIA) Jan 2016	Total (by Feb 2016)
10 (9 on rota)	1	3	7	1	22

The increase in staff on the rota will result in less reliance on independent BIAs.

Dedicated BIA resource

There are currently 2.7 WTE staff (comprising completing dedicated BIA work (this takes into account one member of staff being taken from the rota and starting dedicated work from 23.11.15)

This resource is used to:

- i. support the BIA rota for urgent authorisations with request for standard authorisation
- ii. complete assessments for further standard authorisations (“renewals”)
- iii. complete assessments for standard authorisations within the managed approach.

The demand for assessments would be unmanageable within the rota system, and it would not be possible to work within the statutory timescales.

Initial work has identified a substantive resource requirement of 6.0 WTE Best Interests Assessors in order to fully meet current demand. However, it would be unlikely that these posts could all be recruited to within the necessary timeframes. This may need a staggered or phased approach to recruitment, with regular review to assess capacity and demand. In the first instance, a minimum of 2 WTE SBC resources could be used to address the workload, with additional temporary resource being used where the need has been identified. However, this would impact on progressing assessments within the managed approach as well as the further standard authorisations.

Next Steps

- Improvement activity to document the BIA process in detail has started. This will be used to map out the process from start to finish, provide information about capacity and demand, highlight issues within the process, and opportunities for improvement.

3.31.3 Care Management Reviews for Clients Subject to a DoLS Authorisation

Care-management reviews are currently being undertaken every three months (where authorisations are in place for longer than three months, and where the authorisation relates to a care home/respite setting).

If all reviews were to be completed face to face, this would require around five WTE staff to meet the demand. However, this is likely to be difficult to recruit to, is unlikely to be sustainable, and would have a significant impact on overall resources. Work is currently underway to develop a system to implement risk-assessed reviews by telephone for some clients (risk assessed criteria to be determined), which would reduce the number of face-to-face contacts.

Improvement activity to look at the care-management review process in detail is also planned. This will be used to map out the process from start to finish, provide information about capacity and demand, highlight significant issues within the process, and opportunities for improvement. It will also include a trial telephone reviews.



### **3.31.4 Mental Health Assessors**

Mental Health Assessors are accessed via a central, national register of doctors registered under s12 of the Mental Health Act. The cost of a Mental Health Assessment is £175 plus travel costs. This fee was agreed pre- 2010.

Where a client is active to a psychiatrist (who is s12 approved), that doctor is responsible for completing the Mental Health assessment. For all applications for authorisation of Deprivation of Liberty, confirmation is sought from Tees Esk and Wear Valleys NHS Foundation Trust (TEWV) as to whether the client is open to a Psychiatrist. This cost is met by TEWV.

#### **Future Options/Next Steps**

TEWV has been approached in relation to exploring the options for provision of s12 doctors to complete Mental Health Assessments. Discussions regarding future options are underway.

### **3.31.5. Signatories**

Signatories are responsible for scrutinising the completed assessments, and making a decision as to whether the standard authorisation will be granted or not. [Case law] Signatories are undertaking this role in addition to their full-time responsibilities. This has added workload pressures, although this has been managed to date through the use of back-up support on the signatory rota.

Additional, temporary, resource of 12 hours weekly is currently being used, and this has alleviated acute pressures and has meant that current activity levels are being managed.

A reduction in the current resource would considerably compromise the capacity to address current and projected demand, and there would be a significant risk of people being deprived of their liberty unlawfully.

Improvement work has started to look in detail at the signatory process. This information will be used to map out the process, provide more detailed information on capacity/demand, highlight issues within the process and identify opportunities for improvement.

#### **4.0 DoLS Function- Next Steps**

##### *Local*

- The operational plan will continue to be implemented and monitored by the MCA DoLS steering group.
- DoLS activity will continue to be monitored through the adult services performance clinic.
- Requirements for Quality Assurance of the whole process will be monitored through the operational plan.
- The Local Executive Committee (Safeguarding Adults) will continue to be informed of progress against the action plan.
- The Local Safeguarding Children's Board will continue to receive updates on the elements of the operational plan that relate to young people aged between 16 and 18 years.
- Improvement work will be completed across the DoLS process as part of the improvement work across adult services.

#### **5.0 FINANCIAL IMPLICATIONS**

- 5.1 The requirement for interim funding for 2016-2017 of £546,000 has been identified for consideration within the Medium Term Financial Plan.

#### **6.0 LEGAL IMPLICATIONS**

- 6.1 It is a legal requirement for the Council to adopt the 'new test' for Deprivation of Liberty following the Supreme Court Judgment.
- 6.2. The outcome of the Law Commission consultation and the resulting draft Bill are awaited.

#### **7.0 RISK ASSESSMENT**

- 7.1 The Council's Risk Register has been updated.

#### **8.0 SUSTAINABLE COMMUNITY STRATEGY IMPLICATIONS**

- 8.1 Health and wellbeing: the work programme will promote the Best Interests of vulnerable Stockton residents.

#### **9.0 EQUALITIES IMPACT ASSESSMENT**

- 9.1. An Equality Impact Assessment in relation to the DoLS function is being completed.

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Education related? No

Background Paper

Ward(s) and Ward Councillors: Not ward specific

Property (<http://sbcintranet/library/64521/RES/Capital.doc?view=Display>)



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28<sup>th</sup> March 2014

Dear Colleague,

**DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS)**

**Judgment of the Supreme Court  
P v Cheshire West and Chester Council and another  
P and Q v Surrey County Council**

I am writing to draw your attention to last week's judgment in the Supreme Court to help to ensure that health and social care organisations continue to comply with the law following the revised test now supplied by the Supreme Court about the meaning of a deprivation of liberty.

**The contents of this letter are specifically addressed to all those who are**

- **involved in the assessment and/or authorisation of a deprivation of liberty**
- **involved in the care of individuals who may lack capacity**
  - **responsible for policies and procedures relating to the care of individuals who may lack capacity.**

Mental Capacity Act (MCA) and Deprivation of Liberty Safeguard (DoLS) leads should ensure this letter is cascaded to all relevant staff.

**Background**

On 19 March 2014, the Supreme Court handed down its judgment in the case of "P v Cheshire West and Chester Council and another" and "P and Q v Surrey County Council". The full judgment can be found on the Supreme Court's website at the following link:

[http://supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0068\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf)

The accompanying press release with a short description of the cases under consideration can be found at the following link:

[http://supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0068\\_PressSummary.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_PressSummary.pdf)

The judgment is significant in the determination of whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty.

A deprivation of liberty for such a person must be authorised in accordance with one of the following legal regimes: a deprivation of liberty authorisation or Court of Protection order under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act 2005, or (if applicable) under the Mental Health Act 1983.

### **Key points from the Supreme Court judgment**

#### *Revised test for deprivation of liberty*

The Supreme Court has clarified that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights in the following circumstances:

The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements.

The Supreme Court held that factors which are NOT relevant to determining whether there is a deprivation of liberty include the person's compliance or lack of objection and the reason or purpose behind a particular placement<sup>1</sup>. It was also held that the relative normality of the placement, given the person's needs, was not relevant. This means that the person should not be compared with anyone else in determining whether there is a deprivation of liberty. However, young persons aged 16 or 17 should be compared to persons of a similar age and maturity without disabilities.

#### *Deprivation of liberty in "domestic" settings*

The Supreme Court has held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This will include a placement in a supported living arrangement in the community. Hence, where there is, or is likely to be, a deprivation of liberty in such placements that must be authorised by the Court of Protection.

### **Suggested actions**

#### *Relevant staff should*

- Familiarise themselves with the provisions of the Mental Capacity Act, in particular the five principles and specifically the "least restrictive" principle.

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<sup>1</sup> NB. These factors (compliance/ objection and the reason or purpose for the placement) are of course still relevant to assessment of best interests and consideration of Article 8 rights.

- When designing and implementing new care and treatment plans for individuals lacking capacity, be alert to any restrictions and restraint which may be of a degree or intensity that mean an individual is being, or is likely to be, deprived of their liberty (following the revised test supplied by the Supreme Court)

- Take steps to review existing care and treatment plans for individuals lacking capacity to determine if there is a deprivation of liberty (following the revised test supplied by the Supreme Court)
- Where a potential deprivation of liberty is identified, a full exploration of the alternative ways of providing the care and/ or treatment should be undertaken, in order to identify any less restrictive ways of providing that care which will avoid a deprivation of liberty
- Where the care/ treatment plan for an individual lacking capacity will unavoidably result in a deprivation of liberty judged to be in that person's best interests, this MUST be authorised.

*Local authorities should in addition*

- Review their allocation of resources in light of the revised test given by the Supreme Court to ensure they meet their legal responsibilities.

Although local authorities are the supervisory body for DoLS for both care home and hospital settings, the NHS (commissioners and providers) have a vital role to play in correctly implementing DoLS (and the wider MCA). We expect that the NHS and local authorities will continue to work closely together on this.

### **Authorising a deprivation of liberty**

The DoLS process for obtaining a standard authorisation or urgent authorisation can be used where individuals lacking capacity are deprived of their liberty in a hospital or care home.

The Court of Protection can also make an order authorising a deprivation of liberty; this is the only route available for authorising deprivation of liberty in domestic settings such as supported living arrangements. This route is also available for complex cases in hospital and/ or care home settings.

Individuals may also be deprived of their liberty under the Mental Health Act if the requirements for detention under that Act are met.

### **Further information**

In the first instance professionals should contact their organisation's MCA-DoLS lead for further information.

In the meantime the Government is preparing its response to the House of Lords Select Committee report into the MCA and DoLS. We expect to issue this response by the summer.

I also enclose an annex with some additional background.

Yours faithfully,

**Niall Fry**  
**Policy Manager – Mental Capacity Act/DoLS**

**Annex – Further background and steps for consideration**

It is difficult to predict the number of individuals who lack capacity whose arrangements should be assessed in light of the Supreme Court judgment and the number of additional individuals for whom deprivation of liberty will need to be authorised.

Local authorities submit information on the number of assessments undertaken for deprivation of liberty authorisations under the Mental Capacity Act 2005 and the number of authorisations approved to the Health and Social Care Information Centre. The Department of Health and the Care Quality Commission will explore how best to monitor the evolving situation to assist in determining the practical impact of the Supreme Court's revised test.

Professionals must remember that the deprivation of liberty authorisations and Court of Protection orders under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act 2005 are rooted in the principles of that Act. DoLS exists to provide protection to individuals – to safeguard these individuals when a deprivation of liberty is an unavoidable part of a best interests care plan. Individuals who are identified as potentially deprived of their liberty must be considered on a case-by-case basis and all appropriate steps taken to remove the risk of a deprivation of liberty where possible. The emphasis should be on empowerment and enablement. Further

steps that Local Authorities could consider taking are:

- Ensuring awareness of the Supreme Court judgment among care providers
- Ensuring awareness of the need to reduce restraint and restrictions and promote liberty in care plans
- Mapping any additional requirements for Best Interest Assessors (BIAs) and working collaboratively with other Local Authorities to reduce training costs
- Reviewing information on the number of individuals in supported living arrangements to identify those individuals whose arrangements should be reviewed.



Neutral Citation Number: [2014] EWCOP 25

**COURT OF PROTECTION (In Open Court)**

Case No: 12488518 and 28 others

Royal Courts of Justice  
Strand, London, WC2A 2LL Date: 7 August 2014

**Before :**

**Sir James Munby President Of The Court Of Protection**

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**Re X and others (Deprivation of Liberty)**

**Mr Alexander Ruck Keene and Mr Benjamin Tankel** for the Official Solicitor as advocate to the court

**Ms Joanne Clement** for the Secretary of State for Health and the Lord Chancellor and Secretary of State for Justice

**Mr Stephen Cragg QC** for the Law Society of England and Wales

**Ms Alison Ball QC and Mr Andrew Bagchi** for the Association of Directors of Adult Social Services

**Mr Neil Allen** for Cheshire West and Chester Council, Surrey County Council and Northumberland County Council

**Mr Michael Dooley** for Cornwall Council

**Ms Bethan Harris** for Worcestershire County Council

**Mr Conrad Hallin** for Sunderland City Council

**Ms Natalia Perrett and Ms Emily Reed** for Barnsley Metropolitan Borough Council

**Mr Simon Burrows** for Rochdale Metropolitan Borough Council

**Mr Michael Mylonas QC** for Surrey Downs Clinical Commissioning Group **Mr Jonathan Auburn** for NHS Sheffield Clinical Commissioning Group **Mr John McKendrick** for Nottinghamshire Healthcare NHS Trust

**Mr Jonathan Butler** for KW (a patient) **Ms Katie Scott** for AS and GS (patients) **Mr Joseph O'Brien** for PMLP (a patient)

**Mr Ian Wise QC, Ms Martha Spurrier and Ms Alison Fiddy** filed written submissions on behalf of Mind

Hearing dates: 5-6 June 2014  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

This judgment was delivered in Open Court





DH Letter to  
MCA-DoLS Leads Oct

[Available to ASH Select Committee on Request]

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18 June 2015

Dear Angela

Thank you for your letter dated 28 April 2015 and received by email on 11 May 2015. You refer to previous correspondence that I am not aware of and I do apologise if this is something I have missed.

You ask for clarification of CQC's expectations of local authority supervisory bodies in managing the huge and unprecedented surge in applications for authorisation under the deprivation of liberty safeguards, following the clarification provided by the Supreme Court. We appreciate the strains on local authorities, and have worked with the Department of Health and ADASS in deciding our position, as described below. CQC supports the view taken by ADASS in its Advice Note dated November 2014:

Guidance for Local Authorities in the light of the Supreme Court decisions on deprivation of liberty safeguards.

This guidance states clearly:

ADASS remind its members that compliance with the legislation is not optional. However in recognition of the exceptional challenge facing Councils the ADASS task force has agreed that some form of prioritisation is useful in deciding those situations which have a more urgent need for speedy assessment. A tool has been developed to assist with this which is attached.

Prioritisation of applications is a temporary measure to attempt to manage demand but ADASS advise members that care homes and hospitals should not be prevented from making referrals. Care homes and hospitals are becoming increasingly concerned about their own position in relation to risk and Councils may want to consider offering them some practical tips when assessments are delayed. Remembering that underpinning the safeguards are assessments of capacity and best interest decision making.

It is not entirely clear from your letter what your 'agreed process' consists of, but it appears possible that your practice may not be in line with the ADASS guidance referred to below.

In conclusion to the above Advice Note, ADASS reminds councils to -

1. Remember it is unacceptable to refuse to accept applications for DoLS from Managing Authorities
2. Continue to risk assess and prioritise using the ADASS tool where appropriate to determine those at highest risk have the earliest protection of the safeguards

In the most recent CQC Monitoring Report on the Deprivation of Liberty Safeguards, published in January 2015, we comment, in line with the ADASS Advice Note:

Some providers have told us that local authorities have told them not to put in requests for authorisation, or even returned the applications with instructions to wait until the backlog has cleared. This is not a common action by local authorities, but even rare occurrences are unacceptable.

Not only would this refusal to accept applications mask the true nature of the increased pressures faced by local authorities, it would deny providers the opportunity to provide care lawfully, despite their best efforts to obtain authorisation. Most importantly, it would prevent independent scrutiny of the care arrangements for vulnerable people when those arrangements are thought likely to amount to a deprivation of liberty.

We recommend that hospitals and care homes continue to request authorisations when they think that people are being deprived of their liberty based on the new 'acid test'. However, they must also continue, within the provisions of the wider MCA, to seek less restrictive options to meet the needs of each person. [p.38]

CQC would expect all providers to start by identifying users of their services who might be deprived of their liberty in terms of the clarified 'acid test'. We would expect them to work within the wider MCA. This would include, for example, ensuring for those people who do lack mental capacity to consent to arrangements for their care or treatment, even after all attempts to maximise their capacity:


- every possible care is taken to reduce restriction and restraint,
- any less restrictive options to deliver necessary care or treatment are explored
- as much weight as possible is given to the individual's wishes and feelings
- relatives or close friends are consulted

This will ensure that the person's care plan can reflect their wishes as far as possible.

After that, we agree with ADASS that the provider must put in a request for authorisation, with as much relevant detail as will enable the supervisory body to triage the request for urgency in line with the ADASS triage tool.

You mention in your letter that one person for whom CQC suggested the need for an authorisation request to be made had a Lasting Power of Attorney. While, if this relates to an LPA for health and welfare, it gives the 'donee' powers to make decisions within its authority, such authority does not extend to any power to consent to deprivation of liberty.

Yours sincerely



Ros Sanderson

Head of Inspection (North East and Coast)

<b>Current and Projected DoLS Activity in Stockton-on-Tees DoLS Activity</b>	<b>2013/2014 (Full Year)</b>	<b>2014/2015 (Full Year)</b>	<b>2015/2016 (as at 31.8.15)</b>
Number of applications for authorisation of DoL received	46	742	622
Number of further standard authorisations ("renewals")	-	133	140
Number of care management reviews	-	-	1300
Number of authorisations within the standard managed process (resulting from the Supreme Court Ruling)	-	34	79

<b>Projected Estimated DoLS Activity to 31.3.2016</b>				<b>Additional Information/ Ongoing Identified Resource Requirement as at 31.8.15</b>
Urgent authorisations (to be completed within 7 days)	-	-	558	There are 9 SBC BIAs currently active on the rota who are able to complete up to 7 BIA assessments weekly. Outstanding assessments (on average, 11 weekly) must therefore be allocated to independent BIAs.
Further standard authorisations "renewals"	-	-	352	136 hours available monthly/expected monthly demand of 50 BIA assessments and an average processing time of 9 hours = 3 Whole Time Equivalent Best Interests Assessors
Standard managed process (resulting from the Supreme Court Ruling)	-	-	400 (50 of these to be completed by independent BIAs)	136 hours available monthly/estimated monthly demand of 50 BIA assessments and an average processing time of 10 hours=

**Appendix 2**

			as DoL will be authorised in SBC provision)	3 Whole Time Equivalent Best Interests Assessors
Care-management reviews	-	-	5200	136 hours available monthly/estimated monthly demand of 742 reviews and an average processing time of approx 40 minutes for reviews (comprising 2 face-to-face contacts, and 2 telephone reviews)= 3.25 Whole Time Equivalent Care Managers