

Guidance for Managing Authorities following the Supreme Court judgement:

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

The requirement for the Deprivation of Liberty Safeguards are unchanged.

There are still 6 requirements which need to be met in order for a Deprivation of liberty to be authorised:

1. 18 and over
2. Suffering from a mental disorder
3. Lacking capacity for the decision to be accommodated in the hospital or care home
4. No decision previously made to refuse treatment or care, or conflict relating to this such as LPA
5. Not ineligible for DOLS (The safeguards do not apply when someone is detained sectioned under the Mental Health Act 1983)
6. The person needs to be deprived of liberty, in their best interests.

The Deprivation of Liberty Safeguards apply to:

The Supreme Court has now confirmed that to determine whether a person is objectively deprived of their liberty there are two key questions to ask, which they describe as the ‘acid test’.

- (1) Is the person subject to continuous **supervision** and **control**?

AND

- (2) Is the person **free to leave**? (all three aspects are necessary)

This now means that if a person is subject both to continuous supervision and control and not free to leave they are deprived of their liberty.

The following factors are no longer relevant to this:

- (1) the person’s compliance or lack of objection;
- (2) the relative normality of the placement and
- (3) the reason or purpose behind a particular placement.

The judgment is significant in determining 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.

What should Managing Authorities do?

You should familiarise yourselves with this judgment and consider the implications on your own practice. If considered appropriate you should seek independent legal advice.

Under the provisions of the Mental Capacity Act (MCA) it can be lawful to restrict or restrain a person where it has been assessed to be necessary in their best interests, in order to prevent harm to that person, as long as :

- a) The least restrictive method is used for the shortest period of time that is necessary to achieve the outcome and
- b) The restriction **does not** amount to a deprivation of the person's liberty.

It is important that Managing Authorities do not make speculative applications for DOLS as a result of this judgment, and residents / patients are not subjected to unnecessary or avoidable assessments, which can be unsettling for them and their families. Applications for DOLS must only be made as a result of an MCA compliant and properly recorded, best interest decision for that person. Managing Authorities are reminded of their responsibilities and the guidance outlined in the DOLS Code of Practice click [here](#)

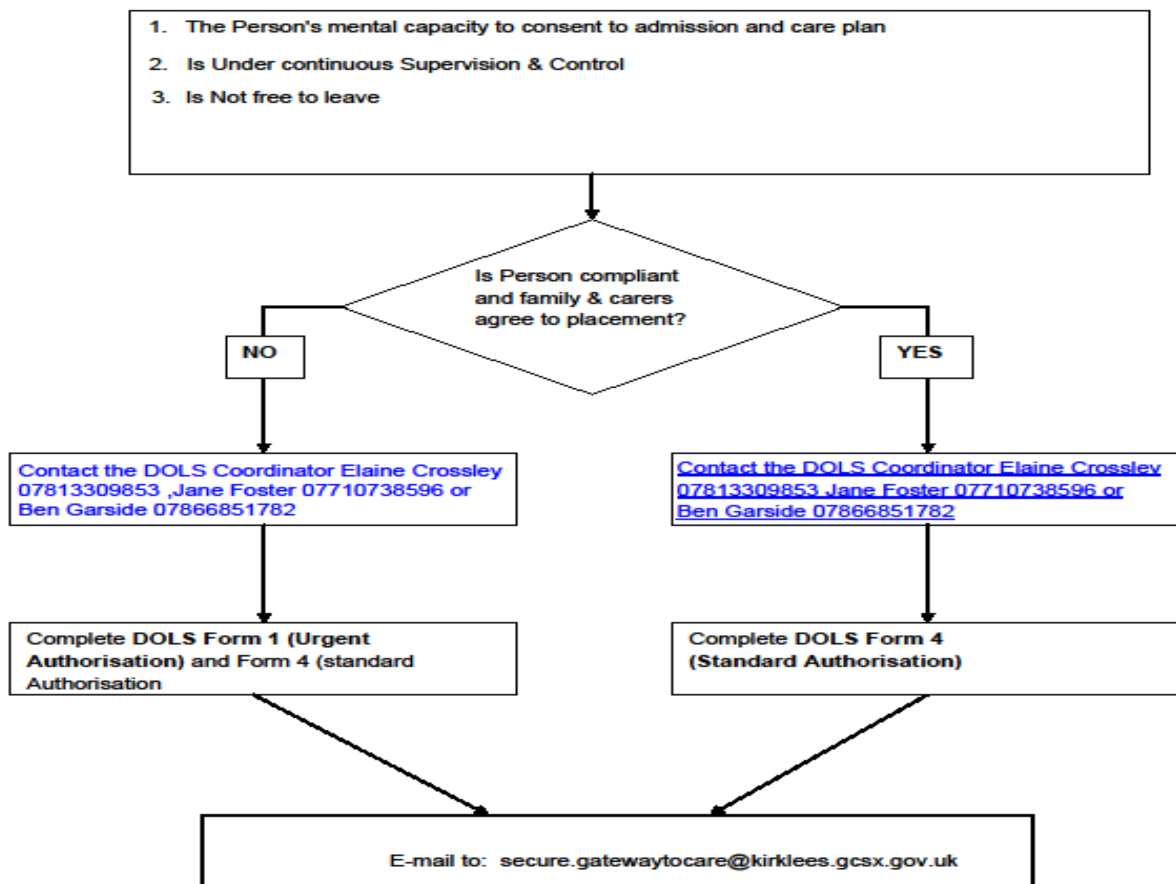
The Law Society has issued comprehensive guidance on the law relating to the deprivation of liberty safeguards click [here](#)

Before making an application for Authorisation, Managing Authorities (care homes and hospitals and hospices) need to ensure:

- you have checked the DOL criteria as laid out in the flow chart in Annex 2 of the Code of Practice.
- all 6 requirements need to be met for the safeguards to be used.
- you have completed any supporting documentation, such as **mental capacity assessments, risk assessments and best interest`s decisions.**
- Where the lack of capacity is confirmed and formally assessed by the managing authority, the managing authorities need to screen the case using the 'acid test' and if making a DOLS application provide evidence how the person meets this criteria.
- If a potential DOLS 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. This includes reviewing of care plans.

- When the above action have been completed any you think you may be depriving a person of their liberty please contact Jane Foster or Elaine Crossley.

If a DOLS request is made solely because of the factors referred to in the Supreme Court Judgment (i.e. the person is not subject to new or additional restrictions) and the steps above have been taken. Managing Authorities should make a Standard Authorisation request, unless the criteria for an Urgent Authorisation are met for example the person is non compliant with the care plan and family & carers disagree to placement?



All the contact details for making a DOLS Application as well as the forms required can be found by clicking [here](#)

DOLS and Respite Care in a Care Home

A DOLS authorisation request can be made if a person has regular respite care at the same registered care home each time. The usual process for applying to the Supervisory Body applies again using the same principles as above. The authorisation can be made for up to a year and does not need to be made each time the person has respite.

Supported Living

It may be that a supported living provider considers that a person who lacks capacity about the accommodation they are residing. Whilst MCA compliant decisions must be made regarding that person, the DOLS provisions do not apply and the deprivation can only be authorised by the court of protection.

If DOLS is identified advice should be sought from the commissioner of the care / support that is being provided (e.g. local authority or NHS) as well as the social work team if they are involved. If the person is 'self-funding' or being supported by an attorney or court appointed deputy, either the commissioner or provider should seek independent legal advice.

Further info can be found in the law society guidance click [here](#)

Deprivation of liberty in “domestic” settings

The Supreme Court also held that a deprivation of liberty can occur in domestic settings e.g in Foster Care or Family placement, where the State (Local Authority) is responsible for imposing such arrangements. Where there is, or is likely to be, a deprivation of liberty in such placements it must be authorised by the Court of Protection.

Further info can be found in the law society guidance click [here](#)

Other useful links:

CQC

<http://www.cqc.org.uk/service-providers/registered-services/guidance-meeting-standards/how-mental-capacity-act-2005-affect>

SCIE

<http://www.scie.org.uk/publications/ataglace/ataglace43.asp>

Law Society Guidance

<http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/>