Department of Health

Mr Niall Fry
Social Care Quality & Safety Team
Area 313B, Richmond House
79 Whitehall, London SW1A 2NS
E-mail: niall.fry@dh.gsi.gov.uk

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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

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

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[1]. 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.

[1] 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 vitial 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.