

Deprivation of Liberty Safeguards (DoLS) Service

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Dear Managing Authority

Revised Test for Deprivation of Liberty Safeguards

This letter contains important information for you, as the Managing Authority of your care home/ hospital ward, in discharging your legal requirements under Mental Capacity Act 2005 Deprivation of Liberty Safeguards

Gloucestershire County Council Supervisory Body has the responsibility for overseeing the Deprivation of Liberty Safeguards process for people living in care homes and hospitals in Gloucestershire and for people whose care and/or treatment is funded in other parts of the country by Gloucestershire County Council and Gloucestershire Clinical Commissioning Group. I am writing to you on behalf of the Supervisory Body because there have been important changes in understanding how a person could be deprived of their liberty in a care home or hospital.

As you may know, on 19 March 2014, the Supreme Court handed down its judgment in the case of *P v Cheshire West and Chester Council* and *P & Q v Surrey County Council*. The Department of Health (see below) underlines how significant this judgment is in deciding 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.

The New Test

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.

If a person in your care home/hospital meets all parts of this test and lacks the capacity to consent to their care plan, they are deprived of their liberty, and this must be lawfully authorised under Deprivation of Liberty Safeguards.

The previous indicators of a deprivation of liberty still apply. However, it is important to note that the Supreme Court highlighted a number of factors that we used to work out if someone was deprived of their liberty; these factors are no longer relevant in determining a deprivation of liberty but they are relevant as to whether a deprivation of liberty is in a person's best interest or not:-

- how happy the person is in the home/hospital
- whether they have ever actually expressed the wish to leave or tried to leave
- the reason why they are there
- whether they have anywhere else to go
- the relative normality of their situation

I would suggest that in a timely way, you need to consider the situation of each of your residents/patients. After reviewing their capacity to consent to being in the care home/ hospital, you need to decide whether they are 'under continuous supervision and control' and whether they are 'not free to leave' (i.e. the focus is not on the person's ability to express a desire to leave, but on what staff would do if they sought to leave).

You should then look again at the circumstances of the case and check to see whether the person's care can be provided in a way that is less restrictive and doesn't require them to be deprived of their liberty. If this is not possible, the law says you must use the Deprivation of Liberty Safeguards to authorise the deprivation of liberty. If you feel that the person is not deprived of their liberty, I suggest that you record this in their file with the reasons for your decision.

It is important to note that provision of care must continue and takes priority.

In the first instance, please contact the Deprivation of Liberty Safeguards Service for advice PRIOR to making DoLS applications (telephone number as above). In order to ensure you have easy access to important additional information, I have enclosed a simple flow chart to help you work out whether someone is deprived of their liberty and a new briefing from CQC on Deprivation of Liberty Safeguards in the light of the Supreme Court judgment. You can also get more information from the following links:

Supreme Court Judgment:

http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

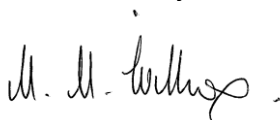
Supreme Court Judgment Press Release summarising the judgment

http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_PressSummary.pdf

House of Lords Review of Mental Capacity Act and Deprivation of Liberty Safeguards published in March 2014

<http://Publications.parliament.uk/pa/ld2014/ldselect/ldmentalcap/139/139.pdf>

Yours sincerely



Margaret Willcox
Commissioning Director: Adults & DASS