

ADASS Advice Note November 2014

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

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

This is the third advice note issued by ADASS in response to the judgement.

ADASS have led a task force to support local Councils following the judgement and the work of the task force is now drawing to a close. ADASS continues to press for increased funding and early amendments to legislation.

Extent of the increase in applications

The DH requested voluntary data collection in order to monitor demand. This data can be found at <http://www.hscic.gov.uk/catalogue/PUB15856> and in summary shows

	Quarter One 2014	Quarter Two 2014	2013-14 full year
Number of councils responding	141	132	For the same 132 Councils
Number of applications	23,900	31,300	12,500
Number Granted	12,000	9,400	7,100
Nor granted	3,000	2,400	5,000
Not yet decided	8,900	19,400	400

These figures help to illustrate the developing picture for Councils attempting to manage the huge deluge in referrals. The total number of requests so far in 2014/15 is 55,200 which can reasonably be expected to produce a year end figure of approximately 110,000 compared to an annual figure last year of 12,500. This is approaching a tenfold increase and may exceed that. Most striking is the fact that 19,400 applications have not been processed. This means 19,400 people are potentially unlawfully deprived of liberty and not receiving the protection of the safeguards in a timely manner.

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 interests decision making.

Unintended consequence

Another area of concern to ADASS on behalf of its members is the seemingly unintended consequence of DoLS applications in Intensive care and end of life situations. With the associated need for referrals to the coroner following any death whilst subject to a DoLS authorisation. Further advice may soon be available from the Chief Coroner but in the meantime all deaths must continue to be notified to the relevant coroner.

The Intensive care society have issued guidance to assist clinicians with these decisions.

<http://journal.ics.ac.uk/pdf/1504320.pdf>

Although in one sense this guidance does not assist Councils as it highlights that intensive care patients do appear to meet the acid test, there are some useful factors which should be drawn out of this guidance, in particular the following examples of exclusions where patients are not considered to be deprived of their liberty:

- those who have the capacity to decide to be admitted to intensive care
- Those who can/do consent to the restrictions applied to them
- Those who gave consent for intensive care admission prior to losing capacity – for instance prior to surgery (though they must have had an understanding that they may be under continuous supervision and control and not free to leave at some time within their stay).

It must also be borne in mind that not every patient in an intensive care setting will have a mental disorder and the DoLS only apply where there is a mental disorder as well as a lack of mental capacity.

The use of DoLS at the end of life involves consideration of issues similar to the above. Many people in hospices will have consented with capacity to their admission. Many will be able to consent to the restrictions applied to them. Many people approach the end of their life and do not have a mental disorder therefore the DoLS do not apply to them. Fundamentally in the current climate the ADASS priority tool would not routinely give high priority to people in intensive care or at the end of life as there would not appear to be any benefit to them of the use of such safeguards. Individual cases may vary of course.

The Task Force

The task force has continued to focus its work in three areas

1. **Workforce:** A list of BIA courses available around the Country is attached. It is worth noting that a number of Universities are now able to offer Fast track courses or bespoke courses. A list of Independent BIA's is still being finalised and will be available in December.
2. **Process issues:** The review of DoLS forms is now complete up to final draft stage. Forms will be circulated to all DoLS leads week commencing 17th November and final versions are anticipated the first week in December.
ADASS reviewed its protocol for reciprocal agreements in 2013 this is to be reviewed again the light of the Supreme Court judgement, in December. In the meantime whilst acknowledging the difficulties and challenges being faced in every Council in the Country ADASS would urge co-operation and reciprocation of arrangements where possible. ADASS continues to make representations for changes in legislation to ease the burden on Councils, particularly in terms of unintended consequences such as Intensive Care and end of life situations.

3. **Finance:** The figures collected by ADASS from its members in June have proven to be very accurate in terms of numbers of applications. ADASS consider that a number of the initial assumptions in the impact assessment have proved to be unsound and better evidence is now available on which to fully assess the financial burden.

ADASS along with the LGA have made a formal approach to government for the burden to be funded. This is an unsustainable burden on Councils who are already experiencing reductions in their budgets. A joint letter was issued on [31 July](#) requesting an urgent response and follow up sent on [17 October](#) after the data release from the HSCIC. ADASS is awaiting a face to face meeting with the Minister for Care Services at the time of writing.

Legislative matters

ADASS will continue to contribute to the Law Society review of DoLS both the Safeguards and the extension to community settings. This review is expected to conclude in 2017 with a consultation document being issued in early 2015.

It remains the view of ADASS that early changes to legislation would both help to ease the burden on Councils and ensure proper application of the safeguards where they were intended to be applied. ADASS would like to see early legislative changes such as;

- Changes to ease timescales for authorisation requests,
- Changes which clarify that DoLS are generally not applicable in intensive care and end of life settings
- Changes which will ensure everyone has the same process and protection whether they are in a community setting or a care home or hospital.

An added benefit of regional DoLS leads meeting together in the Task Force has been the ability to support each other but also to identify anomalies within the scheme and areas of law requiring interpretation and clarity. ADASS is continuing to work with LGA to identify possibilities for sharing legal advice. This will both feed into the work of the Law Commission and help individual Councils act within the law. The Task Force is to make a decision on continuing meetings for Regional Leads and would see this as an ideal means by which issues of concern can be raised, regional and national trends can be identified and legal advice can be shared to ensure consistency of approach. A list of Regional Leads is attached to this guidance note.

Community DoL's (Deprivation of liberty in "domestic" settings")

The Supreme Court also held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This includes placements in supported living in the community as well as domiciliary arrangements which may amount to a deprivation of liberty. Such placements must be authorised by the Court of Protection.

The decision from the Court of Protection in *Re X* was issued in August and ADASS advised its members of the actions which would be needed in response to this.

On 17 November 2014, the Court of Protection will launch a new streamlined process for managing court-authorised deprivations of liberty. The new process implements guidelines set out by the President of the Court of Protection in two recent judgments: Re X and others (Deprivation of Liberty) [2014] EWCOP 25, and, Re X and others (Deprivation of Liberty) (Number 2) EWCOP 37.

The new Re X procedure is set out in a practice direction issued by the President, and is accompanied by new application forms, designed exclusively for applying for court-authorised deprivations of liberty. You can download a saveable pdf of the form here: [COPDL10 form](#) You will find the practice direction and a suggested draft Re X order on the [Judiciary website](#) or you can access it from the Court of Protection pages on Direct Gov: www.gov.uk/court-of-protection by clicking on the 'deprivation of liberty' link.

The Re X procedure is designed to enable the court to decide applications for a court-authorised deprivation of liberty on the papers only, without holding a hearing, provided certain safeguards are met: Those safeguards include ensuring that:

- The person who is the subject of the application and all relevant people in their life are consulted about the application and have an opportunity to express their wishes and views to the court.*
- The person who is the subject of the application has not expressed a wish to take part in the court proceedings*
- The person who is the subject of the application and all relevant people in their life do not object to the application.*
- There are no other significant factors that ought to be brought to the attention of the court that would make the application unsuitable for the streamlined procedure.*

The process has been designed after informal consultation with the judiciary and court users. The Court of Protection intends to review the process once it has been up and running for a while, and would be grateful for any feedback on how it works in practice. You can email your comments to the DoL Team. COPDOLS/S16@hmcts.gsi.gov.uk

The Court of Protection has set up a dedicated team to deal with applications made under the Re X procedure. The contact details are:

*Court of Protection
P.O. Box 70185
London
WC1A 9JA
Tel 0207 421 8665*

To help prepare for this streamlined process, Councils are advised to

- Scope the likely impact
- Identify those people in a variety of community settings who may be deprived of liberty
- Ensure all those identified have assessments of capacity and best interests in relation to their accommodation for care
- Staff will need to carry out necessary consultation with those named or interested in the persons welfare
- Staff will need to determine if the person meets the acid test requirements
- All those identified will need confirmation of a mental disorder.

Whilst the forms will guide practitioners through the process there is no reason not to be collecting evidence ahead of applications.

Implications for councils

The implications for councils continue to expand as a result of this judgement. ADASS reiterate its position that this judgement stands as law and cannot be ignored.

ADASS is very grateful to its members for complying with the voluntary data collection which is providing the much needed evidence of the extent of the financial burden.

ADASS are concerned about the personal cost arising from the judgment both to service users who do not have the protection of the safeguards when they are entitled to but also to staff who are battling the sense of futility when attempting to meet impossible time scales.

The number of applications for DoLS Authorisations both Urgent and Standard, are placing enormous pressure on council DoLS Teams and on the capacity of Best Interests Assessors. This is a national challenge and councils have responded in a variety of positive ways to mitigate against the impact on Council resources.

Recommendations

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**
- 3. Continue to support the supervisory body role by releasing social workers who are trained as BIA's to carry out assessments.**
- 4. Continue to support and advise Managing Authorities particularly in relation to delays in processing applications.**
- 5. Keep partners including; elected members, staff, Best Interests Assessors, care home staff, hospital staff, supported living and other care environments briefed with developments. These briefings should disseminate information in a measured and accurate way.**
- 6. Keep insurers and Local Authority solicitors fully briefed on potential risks**
- 7. Ensure close working relationships between care management teams and DoLS teams/BIA's in order to facilitate applications to the Court of Protection for community DoL's**

Longer Term ADASS would expect councils to

- 1. Train and recruit sufficient additional BIAs to meet the new level of demand**
- 2. Update training materials in relation to MCA and DoLS to reflect the acid test**
- 3. Update all relevant policies and procedures in line with the acid test**

Wider MCA issues

ADASS also reminds its members about the request for MCA materials to be submitted to the Social Care Institute for Excellence (SCIE) in order that they can conduct a rapid but comprehensive review of MCA guidance and associated materials for the health and care sector. The aim will be to identify those materials that best provide different MCA audiences (e.g. social workers, nurses, ambulance services) with the information and tools that they require. These materials will then be jointly endorsed by national system partners and their existence advertised. Materials can still be submitted at

<http://www.scie.org.uk/opportunities/callsforevidence/mca2005.asp>

Useful resources

Details of Supreme Court DoLS Judgment

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300106/DH_Note_re_Supreme_Court_DoLS_Judgment.pdf

Further guidance for providers from CQC

http://www.cqc.org.uk/sites/default/files/media/documents/20140404_dols_briefing_for_health_and_social_care_providers.pdf

A letter from the Department of Health to MCA-DoLS Leads in local authorities and the NHS dated 8th September 2014: www.adass.org.uk/DHletter/MCA-DoLS/Sept14/

Joint ADASS and LGA letters to government; http://www.local.gov.uk/health-wellbeing-and-adult-social-care/-/journal_content/56/10180/6415062/ARTICLE

ADASS TASK FORCE

A Screening tool to prioritise the allocation of requests to authorise a deprivation of liberty

Due to the vast increase in demand for assessments under the Deprivation of liberty safeguards the ADASS task force members have shared practice in relation to prioritisation and produced this screening tool. The aim of the tool is to assist Councils to respond in a timely manner to those requests which have the highest priority. The tool sets out the criteria most commonly applied which indicates that an urgent response may be needed so as to safeguard the individuals concerned. The use of this tool must be balanced against the legal criteria for the Deprivation of Liberty Safeguards which remains unchanged. **The criteria should be used as an indicative guide only as it will generally be based on information provided by the Managing Authority in the application and each case must be judged on its own facts.**

HIGHER	MEDIUM	LOWER
• Psychiatric or Acute Hospital	• Asking to leave but not	• Minimal evidence of

and not free to leave <ul style="list-style-type: none"> • Continuous 1:1 care during the day and / or night • Sedation/medication used frequently to control behaviour • Physical restraint used regularly – equipment or persons • Restrictions on family/friend contact (or other Article 8 issue) • Objections from relevant person (verbal or physical) • Objections from family /friends • Attempts to leave • Confinement to a particular part of the establishment for considerable period of time • New or unstable placement • Possible challenge to Court of Protection, or Complaint • Already subject to DoL about to expire 		consistently <ul style="list-style-type: none"> • Not making any active attempts to leave • Appears to be unsettled some of the time • Restraint or medication used infrequently. • Appears to meet some but not all aspects of the acid test 		control and supervision <ul style="list-style-type: none"> • No specific restraints or restrictions being used. E.g. in a care home not objecting, no additional restrictions in place. • Have been living in the care home for some time (at least a year) • Settled placement in care home/hospital placement, no evidence of objection etc. but may meet the requirements of the acid test. • End of life situations, intensive care situations which may meet the acid test but there will be no benefit to the person from the Safeguards
CASE NO:		DATE:		PRIORITISED BY :
SUMMARY OF CRITERIA				
ALLOCATED PRIORITY:				



**HM Courts
& Tribunals
Service**

Court of Protection P.O. Box No. 70185 First Avenue House 42 - 49
High Holborn

WC1A 9JA

DX 160013 Kingsway

T 020 74218763

E james.batey@hmcts.gsi.gov.uk

06 November 2014

Our ref:

Your ref:

Dear Court
User

Re Implementation of the Re X procedure

I am writing to update you on the arrangements we are putting in place to implement the streamlined process for the Court of Protection (CoP) to manage applications for a court-
authorised deprivation of liberty in the light of the Supreme Court decision in P v Cheshire West and Chester Council and P and Q v Surrey County Council [2014] UKSC 19:

On 7 August 2014 the President of the CoP handed down his first judgment in Re X and others (Deprivation of Liberty) [2014] EWCOP 25. I know that most of you are aware of the content of the judgment, but in summary it:

- Set out a broad framework for a streamlined process for handling the majority of cases on paper without holding a hearing;
- Identified trigger factors that would give rise to an oral hearing, including:
 - Where P does not consent to the DoL
 - Where P wishes to take part in the proceedings
 - Where anyone with an interest in P's welfare did not support the DoL
 - Where a previous decision made by P (eg advance directive) or on behalf of P (eg by attorney) conflicts with the proposed DoL
- Identified some issues that would need to be considered by the CoP Rules Group including: the wider question of how P should be involved in proceedings and potential changes to the rules on permission.

The MoJ and HMCTS intend to implement the new process, as set out in the judgment in 2 phases:

- Phase one: a new practice direction and forms to deal with judicial authorisations for a DoL. This will be an interim process and users will be invited to provide feedback on how it works in practice.
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- Phase two: revision of the forms, practice direction and process to take into account any further guidance set out in the President's judgment, feedback from users, and any changes that come out of the CoP rules committee.

This letter explains what we are doing to implement phase one.

We have developed a new practice direction which will replace practice direction 10AA which currently deals only with applications relating to urgent and standard authorisations in hospital and care home settings. We have also developed new forms and guidance for applications for a court-
authorised deprivation of liberty. As part of this process, we carried out an informal consultation with an ad-hoc group of users in the summer. Given

the need to roll the process out as soon as possible, we do not plan to carry out any further consultation but will instead, pilot the process and invite feedback on how it works in practice. We hope to publish the forms and practice direction in the next couple of weeks along with standard draft orders.

To ensure there is sufficient judicial resource to deal with the work, HMCTS have run an expressions of interest to nominate judges working in the Social Entitlement Chamber to deal with applications under the streamlined procedure. The first group of nominees will be trained in mid-November.

We have also set up a dedicated team within the CoP which will deal exclusively with deprivation of liberty work. The new staff are already trained to do the existing CoP work, and have been briefed on the proposed new Re X processes. The intention is to ring fence the Re X work so it does not impact on the other work of the CoP.

We will be in touch shortly when the forms, practice direction and draft orders have been signed off by the President of the CoP, and in relation to the practice direction only, when it has been agreed by the Secretary of State. We will explain how to access the new forms, etc. and provide contact details for the deprivation of liberty team.

Finally, I must thank everyone who has been in touch since March for your patience and understanding while we have been developing these new processes; and a special thank you to all who have contributed to developing the new forms, etc, both as part of the ad-hoc user group and by email.

Yours faithfully,

James Batey Court of Protection

DETAILS OF BIA TRAINING

Region/Area	University name	Length of BIA course	Cost of course	Frequency of course
West Midlands/Wolverhampton	University of Birmingham	<p>Entry requirements Must have 2 years post qualified experience.</p> <p>Preparation: Application including a statement of understanding of the 5 principles underpinning the MCA and how they apply this to their practice. For health staff, an extra statement on their understanding of the social model of disability. Shadowing of a BIA assessment</p> <p>Taught days:</p> <ul style="list-style-type: none"> • Day 1 – DOLS, MHAct, MCA, other relevant legislation such as National Assistance Act • 1 day – MCA and assessment of capacity • 1 day – Deprivation of Liberty, eligibility criteria • 1 day – BIA, risk and completing BIA paperwork • 1 day or 2x 0.5 days agency based which includes presentation on shadowing a BIA assessment – ran by DOLS leads/training officers/other BIAs • 1 final day – guest speakers e.g. Judge Baker. 	£595 for Local Authority sponsored students	1 per academic year

		<p>Assessment: Presentation on piece of work done with a BIA showing active involvement in a BIA assessment Assessment+ based on an individual who lacks capacity, write up own version of forms Assignment based on the process of assessment, feedback and reflection (2,500 words at H level, 4,000 words at M level).</p> <p>Support and guidance is offered to the agency based requirements. Agencies are also required to mark work (from other local candidates on the programme) and again support and training is provided for this).</p> <p>Closing date for applications 29th August</p>		
Wolverhampton		<p>20th October to 15th December – 9 taught days</p> <p>One taught module and one shadowing experience with portfolio submitted 5th May for June Board.</p>	<p>£567 for 20 credit module</p> <p>£283.50 for 10 credit module</p>	40 candidates max per cohort 1 per year
Birmingham	Birmingham City University (BCU)	<p>Standalone module. 20m credits at M level. Shadowing before start of course. 10 day programme, results to board the following month, 2-3 months from start to successful completion.</p> <p>Viva Voce panel examination to panel plus 1500 word assignment.</p>	£550 (normally £800)	

Chester/Warrington	7 days direct teaching.	For 2014-2015 – Includes practice element – 2 direct observations of involvement in BIA assessment. Completion of 3000 word essay and Form 10.	£450	3 cohorts September October January
North West - Manchester	The University of Manchester	10/09/2014 to 19/11/14 – One Module - Teaching always takes place on a Wednesday, dates are as follows: 10/09/14, 24/09/14, 01/10/14, 08/10/14, 15/10/14, 05/11/14 and 19/11/14. Each day runs from 9:30am to 3:30pm		<i>We are also planning on running more intense courses to satisfy demand – details TBC</i>
South West	Bournemouth	3 months. 3 taught days plus self-managed learning, based on support materials provided by Bournemouth University. Assessed work comprises a portfolio of tasks to include a professional development review, a practice analysis and third-party testimony	£850 per place	Usually 2 to 3 times a year but extra courses can be put on due to demand
South West	University of The West of England	6 MONTHS (e.g. Jan – June) INDUCTION DAY plus 5 TAUGHT DAYS (1 per 4 weeks)	£1,130 30 CREDITS at L3 or M	Annual up until now but there is two courses for 2014/15 academic year (i.e. October 2014 & January 2015)
East London	University of East London	6 Days – 30 Credits	£850	At least twice a year
Hertfordshire	University of Hertfordshire	9 Days – 30 Credits	£1 650	3 x more till end of year (April 2015)

Bournemouth/ Eastern	University of Bournemouth	3 days direct delivery and submission of a Portfolio Days - 40 Credits	£850	10 overall 2014 - 2015 5 of which were bespoke
East Midlands/ Leicester	<p>East and West Midlands BIA Training Partnership, University of Birmingham</p> <p>Davina Weston, Programme Administrator</p> <p>Ric Bowl, Director of Community Mental Health Programmes</p>	<p>Start date: 17/01/14 until 20/06/2014 (for recent cohort of BIA students).</p> <p>This may alter slightly as an additional cohort are being factored in starting at some point in September 2014 and running to end of December 2014. Dates to be finalised.</p> <p>Six taught days – one module but two elements of that, requiring a student to successfully pass an oral presentation and also submission of a 3000/4000 work assignment dependent on whether studying at undergrad or post-grad level.</p>	The course will cost £595 for Local Authority sponsored students.	<p>One programme per year – with 2 and a half central shared training days; 4 training days running in both East and West Midlands and two half days based within each individual authority. This means approximately 48 candidates in total.</p> <p>The University of Birmingham will be running a BIA course with the following (provisional) dates, we still have one date to add so there will be six teaching days overall. We have yet to set the assignment dates, however I would expect students to know there results by the end of March 2015:-</p> <p>Monday 06/10/2014 Monday 13/10/2014 Monday 03/11/2014 Monday 17/11/2014 Tuesday 25/11/2014</p>
East Midlands/ Lincolnshire	University of Lincoln	Five and a half days of teaching/assessment	£570 in 2014	Usually twice per year but subject to demand additional courses can be provided