

## CHILDREN AND DEPRIVATION OF LIBERTY: FREQUENTLY ASKED QUESTIONS

### What is deprivation of liberty?

Deprivation of liberty is an interference with a person's human right to liberty and security. This right is guaranteed by Article 5 of the European Convention on Human Rights. It applies to children as well as adults.

The UK Supreme Court has decided<sup>1</sup> that there are three elements to deprivation of liberty:

1. The person is not free to leave where he/she is living and go and live somewhere else;
2. The person is subject to continuous supervision and control;
3. The person has not consented to these arrangements.

This is known as the 'acid test'.

Deprivation of liberty must meet the following criteria:

- It must be for a **legitimate purpose** – either the 'detention of a minor ... for educational supervision' or 'persons of unsound mind' (according to the European Convention);
- The deprivation must be **necessary** – i.e. the person would be harmed if he/she was not detained;
- The deprivation must be **proportionate** – it must be the least restrictive option, achieving a positive balance of benefits and harms, taking into account any harms caused by the deprivation itself.

### What are the kinds of situations in which a child might be deprived of his/her liberty?

What counts as a deprivation of liberty depends on the child's age. When a child is born, he or she is subject to practically continuous restriction for his/her protection. As the child ages and matures, he/she is usually able to do more things for himself/herself and the level of restriction can be reduced. A child aged 14 months will be subject to a much higher level of restriction than a child aged 14 years.

The High Court has decided<sup>2</sup> that deprivation of liberty will usually not be an issue for children younger than 10 years old because of the level of restriction that will usually be required in their care. It is more likely to be relevant for older children, and more relevant as the child gets older.

Children of high school age will usually be starting to spend more time on their own without the direct supervision of adults. If a child of high school age is being supervised by adults most or all of the time then this could be a deprivation of his/her liberty.

For young people aged 16 – 17 the Law Society has produced guidance on the actions that taken together could amount to a deprivation of liberty.

(See Appendix A below.)

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<sup>1</sup> [P \(by his litigation friend the Official Solicitor\) \(Appellant\) v Cheshire West and Chester Council and another \(Respondents\), P and Q \(by their litigation friend, the Official Solicitor\) \(Appellants\) v Surrey County Council \(Respondent\) \(supremecourt.uk\)](#)

<sup>2</sup> [A-F \(Children\) \[2018\] EWHC 138 \(Fam\) \(31 January 2018\) \(bailii.org\)](#)

**These situations apply to lots of children and young people. How can it make sense to say that they're being deprived of their liberty?**

The child must be compared to a child of the same age who has no disabilities, health issues, special needs etc. This is because human rights are universal and apply to all people equally, irrespective of age, illness or disability.

If all children of a particular age and maturity would normally be subject to a certain restriction, then applying the restriction will not result in deprivation of liberty. If the restrictions go beyond what would usually apply to a child of that age, then the child may be deprived of his/her liberty and further assessment is needed. (See above for guidance on the age at which this is likely to become relevant.)

In some cases it will be obvious that the restrictions go beyond what would be 'usual' for a child of the same age, e.g. if physical restraint is being used regularly. In other cases it may be less clear-cut. There are also differences between diverse groups in society over what level of supervision is appropriate for children of different ages.

You need to be able to identify when deprivation of liberty may be an issue and ensure that you are discussing it with the right people.

**Who can make decisions about whether a child can be deprived of his/her liberty?**

If the child is aged 0 – 16, the deprivation of liberty can be authorised by any person who holds parental responsibility for the child, unless parental responsibility is being shared with the local authority via a court order.

Parents should be given information on the restrictions that will apply. It is not good practice to ask parents to give 'blanket' approval for any restrictions that are considered necessary.

If the child is competent under the *Fraser* guidelines to make the relevant decisions for himself/herself, then this can provide authorisation for what would otherwise be a deprivation of liberty. But this could lead to situations in which the child's views are in conflict with those of his/her parent(s). If you think this is the case you should seek advice as soon as possible.

If no person has parental responsibility for the child, or PR is shared with the local authority via a court order, the deprivation of liberty can only be authorised by the High Court under its inherent jurisdiction.

For a young person aged 16 – 17, in most cases it will only be possible to authorise the deprivation of liberty if the young person lacks capacity under the Mental Capacity Act. The authorisation can only be given by the Court of Protection. Parental responsibility cannot be used to deprive a 16-17 year old of his/her liberty.

There may be some young people aged 16-17 who have capacity under the Mental Capacity Act but where there are concerns that some level of restriction may be needed. You should inform social services immediately if you are working with any young people to whom this may apply.

### **What should I do if I think I need to deprive a child of his/her liberty?**

- Communicate with the child/young person to find out his/her wishes as best as you can;
- Identify the restrictions that may be needed, using the Law Society list as a guide;
- For each restriction, consider whether it is necessary and proportionate;
- Obtain authorisation from the appropriate person/body and make a record of when the decision was taken;
- Keep all restrictions under constant review and reduce/remove them whenever possible.

### **I think that I'm already depriving a child/young person of his/her liberty, what should I do?**

Any restrictions should be considered and authorised before they are implemented.

But if the child is in imminent danger of suffering significant harm, take action to protect the child using restraint if necessary and proportionate. You will then need to review the actions that you've taken with the involvement of all those who are supporting the child.

If the situation is not an emergency, but restrictions are currently in place, consider whether there is anything that you can do right away to reduce or remove the restrictions.

If you think that the restrictions need to remain in place, you will need to arrange a review as soon as possible with the relevant decision-maker and all those supporting the child.

**Are there any changes coming that I need to know about?** The law is due to change for 16-17 year olds. It will be possible for the local authority to authorise deprivation of liberty using the Liberty Protection Safeguards (LPS). You will still need to follow 'what do I need to do?' section of this guidance and involve the LPS assessor from the local authority.

## **APPENDIX A: LAW SOCIETY GUIDANCE ON ACTIONS THAT COULD AMOUNT TO DEPRIVATION OF LIBERTY FOR 16-17 YEAR-OLDS**

- Decision on where to reside being taken by others
- Decision on contact with others not being taken by the individual
- Restrictions on developing sexual relations
- Doors of the property locked, and/or chained, and/or bolted for security reasons or to prevent the children or young persons leaving
- A member or members of staff accompanying the person to access the community to support and meet their care needs
- Access to the community being limited by staff availability
- Mechanical restraint, such as wheelchairs with a lapstrap or specialist harness
- Varying levels of staffing and frequency of observation by staff
- Provision of “safe spaces” or “chill out” rooms or spaces during the day or night from which the person cannot leave of their own free will (eg padded tent to sleep in)
- Restricted access to personal allowances
- Searching of the person and/or their belongings
- Restricted access to personal belongings to prevent harm
- Medication with a sedative or tranquilising effect
- Physical restraint/intervention, such as with personal care tasks, breakaway or block techniques, distraction methods, staff withdrawing, physical touches or holds (e.g. “TeamTeach” methods)
- Restricted access to modes of social communication, such as internet, landline or mobile telephone or correspondence
- Positive behavioural reward systems to reward “good” behaviour which might thereby involve restrictions on favoured activities or aspects of the curriculum to improve behaviour
- Disciplinary penalties for poor behaviour
- Restricting excessive pursuance of activities
- Lack of flexibility, in terms of having activities timetabled, set meal times, expected sleep times
- Managing food intake and access to it
- Police called to return the person if they go missing
- Restricted access to parts of the property, such as the kitchen or certain cupboards therein, to minimise health and safety risks

Source:

[Deprivation of liberty safeguards: a practical guide | The Law Society](#) (chapter 9)