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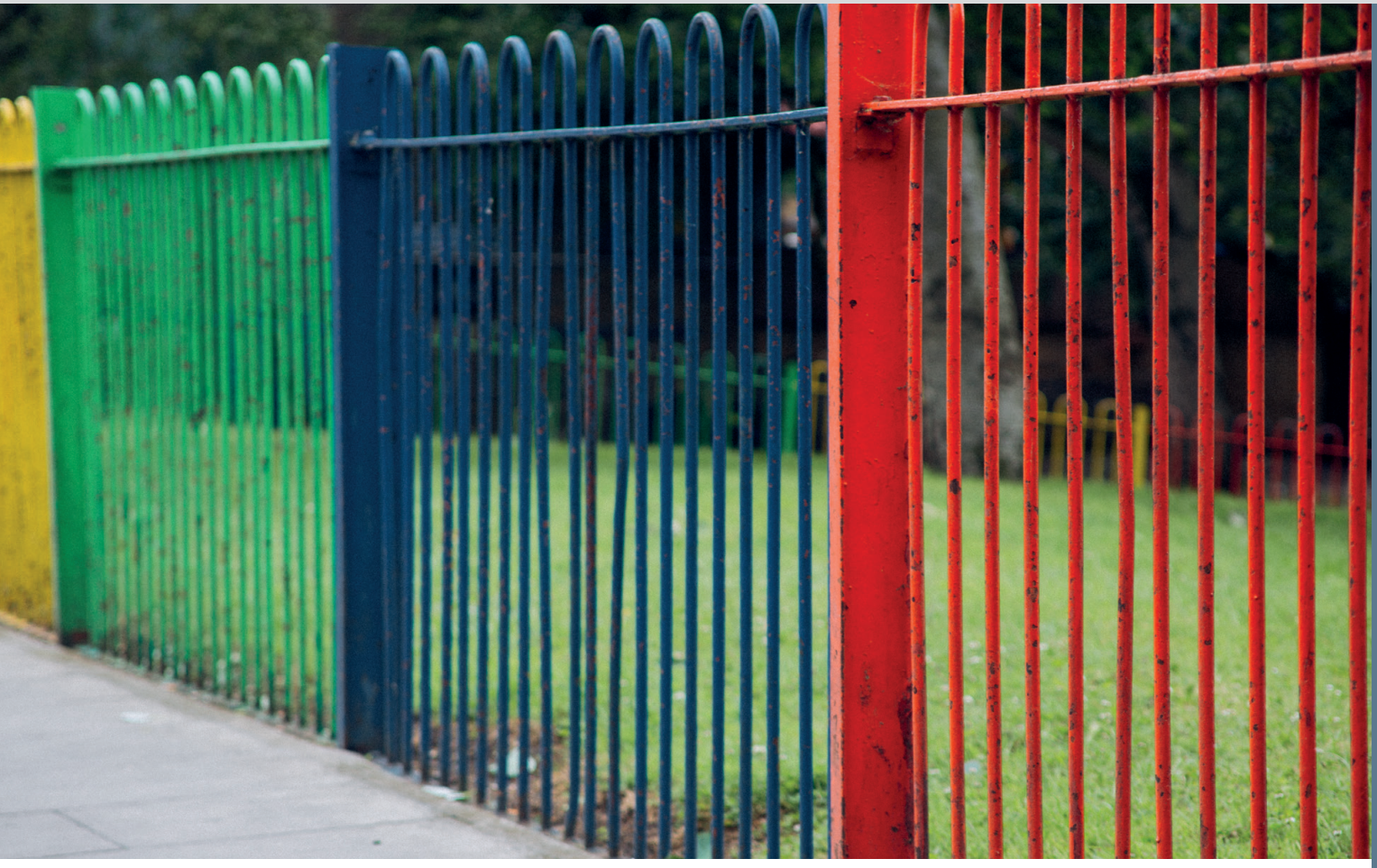
Practice Guidance



Deprivation of liberty and 16-17 year olds

Dartington

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Introduction

This resource has been created in response to recent case law that provides guidance as to when 16 and 17 year olds ('young people') are to be considered to be deprived of their liberty and, in particular, the limits of the decision-making role of people with parental responsibility. This publication does not respond directly to incoming changes in relation to the Liberty Protection Safeguards (LPS), please visit the Research in Practice website - **www.researchinpractice.org.uk** – and its legal literacy resources for more information as the LPS is developed and implemented.

The purpose of this Practice Guidance is to support health and social care practitioners and managers who work with young people to identify the circumstances in which young people may be 'deprived of their liberty', and highlight the importance of taking action to ensure that any deprivation of liberty is authorised.
It concerns the law relevant to England and Wales, and aims to support good quality decision-making about deprivation of liberty by explaining:

- what is meant by a 'deprivation of liberty' and why it is important to consider whether the care arrangements for young people might mean they are deprived of their liberty
- how to identify whether a young person is being deprived of their liberty
- what action is needed if it looks like the young person is being deprived of their liberty.

A deprivation of liberty could occur in any setting – including a hospital, a residential placement, an educational facility or the young person's own home. The general principles set out in this Practice Guidance apply across the board. In the context of educational facilities, they must be read in conjunction with relevant statutory provisions and guidance relating to restraint and discipline.

What is a 'deprivation of liberty' and why is it important?

The legal framework through which steps are taken to ensure people are not arbitrarily detained is that of 'deprivation of liberty.' The term comes from the European Convention on Human Rights (ECHR), which has been incorporated into English law under the *Human Rights Act 1998*. Article 5 of the ECHR states that everyone (of whatever age) has the right to liberty and can only be deprived of their liberty in limited circumstances and subject to strict legal procedures which allow processes of appeal. Where someone is deprived of their liberty, a periodic (at least yearly) review on whether the deprivation of liberty continues to be justified is required.

In some circumstances the provision of health and social care may mean a person is deprived of their liberty. A deprivation of liberty can arise in any setting. As set out in further detail, below, if this happens action must be taken to either revise the care arrangements (so that there is no longer a deprivation of liberty) or, if this is not possible, ensure that the legal authority for the deprivation of liberty is obtained.

Determining a deprivation of liberty

Not every action that interferes with a person's liberty amounts to a deprivation of liberty. A short period – minutes or hours – during which a person is not able to move freely will only be a restriction upon their liberty. How long this period will be considered to be only a restriction upon liberty as opposed to a deprivation of liberty depends upon the circumstances, and will be much shorter if the restrictions placed upon the person are very intense.
For a deprivation of liberty to arise three conditions must be met. In *P v Cheshire West and Chester Council; P and Q v Surrey County Council* ([2014] UKSC 19) ('Cheshire West'), the Supreme Court described these as follows:

- the objective component of confinement in a particular restricted place for a not negligible length of time
- the subjective component of lack of valid consent
- the attribution of responsibility to the state.

These are sometimes referred to as the 'Storck limbs' or 'Storck components' because they were first identified by the European Court of Human Rights in the case of *Storck v Germany* (2005).

It should be noted that this guide does not cover emergency situations where a young person requires hospital admission for *life-saving emergency medical treatment*. This is treated differently in law, as described further in the *39 Essex Chambers Guide to Deprivation of Liberty in the Hospital Setting* (see Further reading on page 14).

Is there a deprivation of liberty?

Questions to consider:

To decide whether a person's care arrangements have caused them to be deprived of their liberty, **it will be necessary to determine whether all of the Storck components are met. This requires consideration of the following questions:**

The confinement question: Is the person confined?
If no, there will be no deprivation of liberty. If yes, the second question must be considered.

The lack of consent question: Has valid consent been given for that confinement?
If valid consent has been given for the confinement there is no deprivation of liberty. To give valid consent the person needs to:

1. have sufficient information to make the decision, such as the purpose and nature of the arrangements being put in place and any alternatives to it,
2. give their consent voluntarily (without any unfair or undue pressure),
3. have the ability to make the decision (for people aged 16 and over, this is referred to as 'capacity', for under 16s this is referred to as 'competence').

If there is no consent, the person is deprived of their liberty, so the third question must be considered.

The State responsibility question: Is the State responsible for the person's confinement?
If the state is responsible for the deprivation of liberty, it will be necessary to obtain legal authority for the deprivation of liberty.

A deprivation of liberty will only arise if all three Storck components apply:

1. the person is confined
2. there is no consent to that confinement
3. the State is responsible for the confinement.

These Storck components are just as relevant to determining whether children and young people are deprived of their liberty as they are to adults. However, a question raised in the courts is if the tests for deciding whether the first condition (the confinement question) and the second condition (the lack of consent question) are met should differ for under-18s given the decision-making role of their parents.[1]

In relation to the third condition, it is important to note that there is **a low threshold** for holding that the state is responsible for a deprivation of liberty. This is because the state will be involved if any public authority (such as an NHS Trust or a local authority) is either:

> directly involved in the care arrangements by either: providing the care/funding, or arranging the care

or

> indirectly involved because they know, or ought to know of, the deprivation of liberty.

The state can be responsible where (for instance) a social worker is aware that a family member is confining a young person at home, even if there is no state-funded care being provided to that young person.

Accordingly, when health and social care practitioners are involved in a young person's care and are considering whether the care arrangements give rise to the young person's deprivation of liberty, the two key questions are likely to be the confinement question and the lack of consent question.

1 The courts have focused upon the scope of persons with parental responsibility, as opposed to carers.

1 Confinement and consent:
Adults versus under 18s

For adults the confinement question is answered by considering whether the person is under '**continuous supervision and control**' and '**not free to leave**' (Lady Hale described this as the '**acid test**' in *Cheshire West*. The lack of consent question is answered by considering whether the person is capable of consenting to the confinement and gives such consent. Where a person lacks the capacity to consent to their confinement (applying the test in the *Mental Capacity Act 2005*), no one else can consent on their behalf.

For under 18s, when considering the confinement question, the courts have highlighted the need for a different approach to the 'acid test', to take into account the restrictions that parents place on their children as part of their usual parenting responsibilities. The role of parents has also been identified as relevant to the lack of consent question, the issue being whether parents can consent to their child's confinement in cases where their child is unable to make such a decision. As explained further below, these considerations have led to a marked difference in the law's approach between young people aged 16 and 17 and children aged under 16.

2 Confinement and consent:
Young people aged 16 and 17

The Supreme Court confirmed, in Re D (A Child) ([2019] UKSC 42), that all three of the Storck components apply to under 18s. The court also clarified how these components apply to young people aged 16 and 17. In the light of this judgment the confinement question and lack of consent question are considered as follows:

- ***Confinement question:***
  Will be determined by applying the same test for 16 and 17-year-olds as applied to adults - whether the young person is under **continuous supervision and control** and **not free to leave** (the acid test).

  Although the Supreme Court considered that the key question is whether the restrictions fall within the usual parental control for a child of that age, it is clear from the judgment that a 16-year-old who is under continuous supervision and control and is not free to leave will be confined.

- ***Lack of consent question:***
  The answer to this question will depend on whether the young person is **willing and able** to consent to the confinement.

  If the young person has capacity to consent to the confinement and gives their consent, there will be no deprivation of liberty - whereas if the young person does not consent to the confinement, the young person will be deprived of their liberty.

  If the young person is unable to consent to the confinement it will **not be possible for the young person's parents to consent to the confinement** on their child's behalf. Accordingly, the young person will be deprived of their liberty.

In summary, where the care arrangements for young people mean that they are confined, those **young people will be deprived of their liberty unless they are able and willing to consent to the confinement**. The exception to this will be if the state is not responsible for the confinement.

3 Confinement and consent:
Young people aged under 16

The Supreme Court's decision in *Re D (A Child)* only concerns 16 and 17-year-olds. For under 16s the question on whether the child is confined and whether there is a valid consent to a confinement is less clear.

> ***Confinement question:***
> This is to be determined by considering whether the restrictions fall within the usual parental control for a child of that age (who does not have a disability).
>
> To date, the courts have given no firm age at which a child who is subject to constant care and supervision is likely to be confined. However, in one case the court commented that the constant supervision of a 10-year-old was unlikely to amount to a confinement whereas it may well do so for a child aged 12 (*Re A-F (Children)* [2018] EWHC 138 (Fam)).

> ***Consent question:***
> It may be possible for the child or their parents to consent to the confinement.
>
> **Children considered to have the competence to make such decisions can consent** to their confinement, in which case there will be no deprivation of liberty.
>
> Unlike 16 and 17-year-olds, it may be possible for parents to consent to their child's confinement provided that this falls within the scope of **ordinary acceptable parental restrictions.** For factors to consider, practitioners may find the guidance on the 'scope of parental responsibility' in the Mental Health Act Code of Practice (2015) helpful.
>
> Importantly, it should be noted that, where a child who is subject to a care order (whether interim or final), is confined, it will be necessary for an application to be made to a court (this is because neither the local authority nor a parent can consent to the child's confinement).

Is the young person confined?

Questions to consider

The following questions may help establish whether a young person is confined. These questions are drawn from the Law Society, *Identifying a Deprivation of Liberty: A Practical Guide* (for details see Further reading on page 14). They may be useful to consider in relation to foster care arrangements, children's homes or residential special schools. Some will be more relevant to one care setting than another. Compared to another person of the same age and relative maturity who does not have a disability giving rise to specific arrangements to meet their needs:

1. How much greater is the intensity of the supervision, support and restrictions?
2. Can the person go out of the establishment without the carer's permission?
3. Can they spend nights away?
4. To what extent is the person able to control their own finances?
5. Can the person choose what to wear and buy their own clothes?
6. To what extent do the rules and sanctions differ from non-disabled age appropriate settings?
7. Are there regular private times, where the person has no direct carer supervision?
8. What is the carer to person ratio and how different is this to what would usually be expected of someone of that age who is not disabled?
9. Is physical intervention used? If so, what type? How long for? What effect does it have on the person?
10. Is medication with a sedative effect used? If so, what type? How often? What effect does it have on the person?
11. How structured is the person's routine compared with someone of the same age and relative maturity who is not disabled?
12. To what extent is contact with the outside world restricted?

If the person is in hospital then, in addition to the questions above, a key question is whether the main reason that they are there is to assess and treat mental disorder as defined under the *Mental Health Act* (MHA, 1983):

13. If that is the main reason, then it is very likely that the young person will be confined, so the question will be whether they can consent or whether admission under the MHA is required.
14. If it is not the main reason then, even if the young person may appear to be confined, it may be that they fall within the exception for life-saving physical health treatment noted above.

Can the young person consent?

Points to consider

If it is established that the young person is confined, then it is necessary to ask whether they can consent to the confinement. If they can then, even if they are confined, so long as the young person continues to give their consent, there will be no deprivation of liberty.

It is a key principle of the *Mental Capacity Act 2005*, which applies to people aged 16 and over, that a person must be given **all practicable support to make a decision**. Where a young person is confined, and practitioners are seeking consent from the young person, it is important that they remain objective in their support to avoid any 'coercion'. This is particularly important where practitioners believe the confinement is in the interests of the young person. A crucial consideration is whether the young person has a choice about what kind of arrangements are to be put in place.

If the young person **cannot understand, retain, use and weigh the information about their confinement and communicate their decision to agree to it, then they cannot give consent** to it, and will therefore be deprived of their liberty for which it will be necessary to seek an authorisation. This will be so even if the young person appears to be compliant, acquiescent, or even actively to be content with the arrangements. **Compliance, therefore, does not constitute consent.**

If the young person **can understand, retain, use and weigh the information about their confinement, and communicate a decision to agree to it, but does not give that consent, then no one can seek to override** that refusal. The young person must therefore be seen as deprived of their liberty.

Steps to be taken where a deprivation of liberty has been identified

If there is any concern that the arrangements for a young person amount to a deprivation of liberty then the following actions should be taken:

- Consider whether the arrangements for the young person's care can be revised so that the young person is not being confined.
- Consider whether the young person might be willing and able to consent to the confinement if supported in making such a decision, being careful not to allow support to cross the line into coercion.

Provided that a deprivation of liberty is in the young person's **best interests** and is the **least restrictive response** to their needs (both these concepts being key principles of the *Mental Capacity Act* (MCA, 2005), a finding of a deprivation of liberty should not be regarded negatively - it is simply a description of the person's situation due to the level of care that is required. However, it will be essential to take steps for the deprivation of liberty to be authorised and regularly reviewed.

The need for regular review is particularly important as a young person's circumstances and ability to consent is likely to change over time. This may mean they develop the capability to consent to their treatment or that less restrictive arrangements become an option. How an authorisation might be achieved is considered below after first explaining *when* a deprivation of liberty will arise.

Seeking authorisation for a depravation of liberty

Under current law children and young people's deprivation of liberty can be authorised either by an order of the court or (in relation to psychiatric admissions) the *Mental Health Act 1983*. Another legal mechanism (the Liberty Protection Safeguards), which will apply to individuals aged 16 and over, is due to be introduced in the future.

A court

It may be necessary for practitioners and managers to seek advice from the legal department to advise on the route to take and the evidence required.

At the moment, if a child or young person is deprived of their liberty, in most cases it will then be necessary to make an application to a court for that deprivation of liberty to be authorised. Which court is to be applied to will depend on the young person's circumstances. For example, in relation to young people aged 16 and 17, the appropriate court is likely to be the Court of Protection.

The Court of Protection can make declarations and decisions in relation to those aged 16 and above who lack capacity to take specific decisions. It has the power to authorise deprivation of liberty. How such an application should be made is set out in the 39 Essex Chambers *Guidance Note: Judicial Authorisation of Deprivation of Liberty* (see Further reading on page 14).

There may be some limited circumstances in which the right court will be the High Court exercising powers under its inherent jurisdiction, i.e. its power to make such orders as are required to protect young people which it cannot make under a statute. The most obvious situation in which the right court will be the High Court will be if the young person appears to have the capacity to consent to their confinement but does not give it.

If an application is made to court, then it will be necessary to explain the basis upon which it is said that the child or young person is deprived of their liberty, including why they cannot consent.

The Mental Health Act 1983

The only time when it will not be necessary to go to court will be where the young person requires admission to hospital for mental health care, in which case the young person can be admitted to hospital under the *Mental Health Act 1983* (if the criteria for admission under that Act are met).

The future

In due course, the Liberty Protection Safeguards will create an administrative scheme for the authorisation of a deprivation of liberty which arises from the person's care arrangements, where the person lacks capacity to consent to such arrangements. These safeguards will apply to people aged 16 and over. Governmental guidance on these provisions will be developed ahead of their introduction (which is anticipated to be in the latter part of 2020).

Reflective questions

The law in this area has changed significantly in recent years, placing a crucial emphasis upon

1. the arrangements for the young person; and
2. the young person's ability to agree to those arrangements if they amount to a confinement.

Reflective questions for practitioners

1. Are you confident you can identify when a young person may be confined?

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2. In cases where a young person is confined, do you know how to ascertain whether the young person can consent to the confinement?

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3. Do you know what you should do within your organisation if you have identified that a young person may be deprived of their liberty?

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4. Do you know where you can look to develop your knowledge of key concepts such as deprivation of liberty and mental capacity?

.....

.....

.....

Examples of situations amounting to a deprivation of liberty

To assist practitioners in translating the guidance into their own practice, the following are two examples of a situation when a young person would be deprived of their liberty:[2]

- David is **16 years old** and has Smith Magenis syndrome. He **lives at home with his parents**. His condition is characterised by **self-injurious behaviour**, aggression, hyperactivity and severe sleep disturbances, including frequent and prolonged night waking. There are incidents where he destroys furniture, eats copious amounts of, sometimes uncooked, food. In accordance with assessments and a care plan prepared by the local authority in conjunction with his parents, his **parents lock him in his bedroom** from 7pm until 7am every night **to keep David safe**. Doors and windows around the house are also kept locked at all times with keys hidden. During the day he receives **intensive support** from his parents **with all aspects of daily living**, and at least one of them is **with him at all times**.

- Joanna, **aged 16**, has **autism, ADHD, a learning disability and epilepsy**. There are incidents where Joanna is aggressive and engages in **self-harming behaviours**. With the agreement of her parents (recorded under s.20 *Children Act 1989*) and funded by the local authority, she resides in a **children's home** from Monday to Friday, which her parents can visit at any time, and spends the weekends at her parents' home. During term time she attends school. At school and in the children's home she is **supervised most of the daytime** to prevent her harming herself or others. She **compliantly takes her prescribed medicines**. She is **not physically restrained other than on a few occasions to protect the safety of others**. Her behaviour has led to **minor sanctions** being imposed on a few occasions, such as not allowing her to eat a takeaway meal or stopping her listening to music when in a car. The front door to the **children's home is not locked but, were she to run out of it, she would be brought back**.

Reflective questions for practitioners

1. Do you understand *why* it is said that David and Joanna are deprived of their liberty?

   .....

   .....

2. What would you do in your own organisation if you encountered people such as David or Joanna?

   .....

   .....

2 These are drawn from guidance published by the Law Society, Identifying a Deprivation of Liberty: A Practical Guide, but have been updated to reflect the Supreme Court decision in Re D.

Further reading

39 Essex Chambers case summaries:
Cheshire West
www.39essex.com/cop_cases/1-p-v-cheshire-west-and-chester-council-and-another-2-p-and-q-v-surrey-county-council

Re D:
www.39essex.com/cop_cases/in-the-matter-of-d-a-child-2

Mental Capacity Act Code of Practice (under review at the time of writing)

39 Essex Chambers - *Deprivation of Liberty in the Hospital Setting:*
www.39essex.com/mental-capacity-guidance-note-deprivation-liberty-hospital-setting

39 Essex Chambers - *Judicial Authorisation of Deprivation of Liberty:*
www.39essex.com/judicial-deprivation-of-liberty-authorisations-updated-november-2017

39 Essex Chambers - *A Brief Guide to Carrying out Capacity Assessments:*
www.39essex.com/mental-capacity-guidance-note-brief-guide-carrying-capacity-assessments

NICE Guideline NG108 - Decision-making and mental capacity:
www.nice.org.uk/guidance/NG108

British Institute of Human Rights - *Know Your Human Rights*:
www.knowyourhumanrights.co.uk

Law Society - *Identifying a Deprivation of Liberty: A Practical Guide* (note, though, that this was written before the decision in *Re D*, so the chapter on under-18s must be read with caution):
www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty-safeguards-practical-guide

Disabled Children: A Legal Handbook (Third Edition, 2019) (see in particular Chapter 7, *Decision-making: the legal framework)*

Notes

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