



Deprivations of Liberty

RELATED GUIDANCE

[Mental Capacity Act Code of Practice](#)

[Practice Direction 11A – Deprivation of Liberty Applications](#) – parts 2 and 3 apply to deprivation of liberty applications in relation to children.

[Law Society Guidance Identifying a Deprivation of Liberty: a Practical Guide](#). This provides guidance on identifying a deprivation of liberty in various settings. It contains several examples of factors pointing to a potential deprivation of liberty and those which are unlikely to amount to a deprivation of liberty across a range of settings.

[Deprivation of Liberty Safeguards Forms and Guidance](#) - for use by local authorities in their role as supervisory body for the Mental Capacity Act Deprivation of Liberty Safeguards (DoLS).

[Court of Protection Forms online](#)

AMENDMENT

This chapter was reviewed in June 2020, with a new Appendix A – Deprivation of Liberty Resource which is kept up-to-date in line with policy developments.

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Appendix 1 – Deprivation of Liberty Resource

1. Introduction

This procedure should be used by practitioners working with children and young people under the age of 18, where a deprivation of liberty may be occurring.

It applies to *all* social care practitioners carrying out *any* social care function with children who are receiving care or treatment in *any* setting.

2. Understanding What a Deprivation of Liberty is

Article 5 of the Human Rights Act states that 'everyone has the right to liberty and security of person and no one shall be deprived of his or her liberty unless in accordance with a procedure prescribed in law'.

A deprivation of liberty occurs when there has been a breach of a child or young persons' article 5 rights.

Deprivations of liberty requiring authorisation by a Court of Law that have not been authorised are:

- Unlawful; and
- A breach of a child or young person's basic human rights.

Need to Know

Deprivation of liberty is *not* the same as the Deprivation of Liberty Safeguards (DoLS). DoLS is the framework used to authorise deprivations of liberty when:

- The person being deprived is 18 or over; and
- They live in a care home or hospital.

The Deprivation of Liberty Safeguards framework does *not* apply to anyone under the age of 18.

3. Identifying Deprivations of Liberty (under 16)

3.1 Children under 16 years of age

This section of the procedure applies to *all* social care practitioners carrying out *any* social care function with young people under 16 years old, who are receiving care or treatment in *any* setting.

As a social care practitioner you need to know:

- What a deprivation of liberty is;
- How to identify a possible deprivation; and
- What action to take if you believe a deprivation is occurring.

3.2 Places where a deprivation of liberty may occur

Deprivations of liberty occur all the time, particularly with young children when they are properly cared for. The Council is responsible for a Deprivation of Liberty when the Council requires or arranges for a child to be cared for in a way that deprives them of their liberty (also known as being a deprivation of liberty imputable to the state). Deprivations of liberty can occur in any setting, including:

- The family home;
- A foster placement;
- A school or college;
- A care home;
- The roadside;
- A hospital; and
- A day centre or other place where the child receives care or treatment away from their home.

3.3 Identifying a possible deprivation of liberty

If the following things *all* apply then it is likely that a deprivation of liberty is occurring:

- The child is under the age of 16;
- The child is not consenting to their deprivation of liberty either because they object or because they are not 'Gillick competent' to consent to their care or treatment;

- The child is under continuous supervision or control;
- The child is not free to leave the place where they are receiving care or treatment;
- Care or treatment being received is imputable to the state; and
- The level of deprivation is not comparable to the level of restriction normally placed on child or young person of that age, or in all circumstances the child is over 12.

3.4 Continuous supervision and control

Whenever care or treatment is provided there will probably be some element of supervision or control. For example:

- The child may require monitoring when taking their medication; or
- They may have the nature of their food choices restricted due to a risk of choking.

Supervision and control is only deemed to be 'continuous' in nature if the overall impact on the child's life is significant.

The following are examples of situations when supervision and control is likely to be continuous:

- The child needs frequent or constant supervision for their safety;
- The child is only ever left on their own for short periods of time;
- Most aspects of life are decided by others (e.g. what to wear, what to eat, when to get up or go to bed, how to spend their time);
- The child is not permitted to carry out everyday tasks (such as bathing) without the support of others;
- The use of restraint or medication to routinely manage behaviour.

3.5 Not free to leave

A child is not free to leave if they:

- Are required to be there to receive the care or treatment; and □

Would be prevented from leaving if they attempted to do so.

An important thing to remember about being 'free to leave' is that it **does not** matter whether the child is asking or attempting to leave; what matters is the response that they would receive if they were to do so.

3.6 Imputable to the state

The detention must be "imputable to the State". Care and treatment is imputable to the state if:

- It has been arranged or provided by the Local Authority; or
- It has been arranged or provided by the NHS; or
- A child's family has made their own arrangements for care, but if they didn't have the means to continue to do so the Local Authority would have (or be likely to have) a duty to meet their needs.

3.7 Not comparable deprivation

The child is likely to be deprived of their liberty when the level of deprivation is greater than the level of restriction normally placed on a child of that age. The relevant comparison depends upon the circumstances of the particular case and upon the attributes of the relevant comparator. The comparison is not with a "typical" child of the same age who is subject to a care order. A child has to be considered having regard to the actual circumstances of the child and comparing them with the notional circumstances of the typical child of the same "age", "station", "familial background" and "relative maturity" who is "free from disability". Little more than "rule of thumb" suggests:

- (a) A child aged 10, even if under pretty constant supervision, is unlikely to be "confined";
- (b) A child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion;
- (c) Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.

The situation of the young or very young does not involve a "confinement" for the purposes of component (a), meaning that such a child living with foster carers in their home is not deprived of his or her liberty.

When care is being provided by the child's family in the family home, this judgement should be made in the context of that particular family, having regard to:

- Their beliefs and values; and

- The level of restriction placed on non-disabled siblings of a similar age; *unless*
- The level of restriction being placed on non-disabled siblings is not deemed appropriate.

3.8 The difference between a deprivation of liberty and 'restrictive physical interventions'

There are 4 broad categories of restrictive physical intervention:

- Restraint;
- Holding;
- Positive touching; and □ Presence.

The 'Restrictive Physical Intervention' procedure provides information about each category, and the circumstances when it is appropriate to use restrictive physical intervention (see [Physical Intervention: Practice Guidance for Social Workers Procedure](#)).

The use of a physical intervention does not surmount to a deprivation of liberty when:

- The person providing care or treatment is using the restrictive physical intervention appropriately; *and*
- The restrictive physical intervention is not used routinely as a method to manage behaviour.

If the restrictive physical intervention is being used routinely as a way to manage the child's behaviour it is likely that this surmounts to continuous supervision and control, which would then indicate that a deprivation of liberty may be occurring.

3.9 If a deprivation is occurring

If you believe that a deprivation is occurring you need to make a decision about whether or not it is the *least* restrictive way to:

- Provide the care or treatment required; *and*
- Reduce the likely significant harm to the child.

See [Section 5, Least Restrictive \(under 16\)](#) for guidance about determining whether a deprivation is least restrictive.

4. Identifying Deprivations of Liberty (ages 16 and 17)

4.1 Children aged 16 and 17

This section of the procedure applies to *all* social care practitioners carrying out *any* social care function with young people aged 16 and 17 years old, who are receiving care or treatment in *any* setting.

As a social care practitioner you need to know:

- What a deprivation of liberty is;
- How to identify a possible deprivation; and
- What action to take if you believe a deprivation is occurring?

4.2 Places where a deprivation of liberty may occur

Deprivations of liberty can occur in a range of settings, including:

- The family home;
- A foster placement;
- A care home;
- A hospital;
- A shared lives scheme;
- A school or college; and
- A day centre or other place where the young person receives care or treatment away from their home.

4.3 Identifying a possible deprivation of liberty

If the following things *all* apply then it is likely that a deprivation of liberty is occurring:

- The young person is aged 16 or 17;
- The young person lacks capacity to consent to their care or treatment;
- The young person is under continuous supervision or control;
- The young person is not free to leave the place where they are receiving care or treatment;
- The care or treatment being received is imputable to the state; and

- The level of deprivation is not comparable to the level of restriction normally placed on a young person of that age.

Need to Know

In order to lack capacity any young person from the age of 16 must have been deemed so through a proportionate mental capacity assessment that has applied the statutory principles of the Mental Capacity Act 2005.

4.4 Continuous supervision and control

Whenever care or treatment is provided there will probably be some element of supervision or control. For example:

- The young person may require monitoring when taking their medication; or
- They may have the nature of their food choices restricted due to a risk of choking.

Supervision and control is only deemed to be 'continuous' in nature if the overall impact on the young person's life is significant.

The following are examples of situations when supervision and control is likely to be continuous:

- The young person needs frequent or constant supervision for their safety;
- The young person is only ever left on their own for short periods of time;
- Most aspects of life are decided by others (e.g. what to wear, what to eat, when to get up or go to bed, how to spend their time);
- The young person is not permitted to carry out everyday tasks (such as cooking or cleaning) without the support of others;
- The use of restraint or medication to routinely manage behaviour.

4.5 Not free to leave

A young person is not free to leave if they:

- Are required to be there to receive the care or treatment; and
- Would be prevented from leaving if they attempted to do so.

An important thing to remember about being 'free to leave' is that it does not matter whether the young person is asking or attempting to leave; what matters is the response that they would receive if they were to do so.

4.6 Imputable to the state

The detention must be "imputable to the State". Care and treatment is imputable to the state if:

- It has been arranged or provided by the Local Authority; or
- It has been arranged or provided by the NHS; or
- A young person (or their family) has made their own arrangements for care, but if they didn't have the means to continue the Local Authority would have (or be likely to have) a duty to meet their needs.

4.7 The difference between a deprivation of liberty and 'restraint'

Restraint is defined in the Mental Capacity Act 2005 as:

- Any act that uses, or threatens to use, force to carry out another function to which the young person resists; or
- Any act that restricts the young person's freedom of movement, whether or not they resist.

The use of restraint does not surmount to a deprivation of liberty when:

- The person providing care or treatment believes that it is necessary to restrain the young person in order to prevent them from being harmed; *and*
- There is evidence that restraint is a proportionate response to the likelihood and seriousness of harm; *and*
- Restraint is not used routinely as a method to manage behaviour.

If restraint is being used routinely as a way to manage the young person's behaviour it is likely that this surmounts to continuous supervision and control, which would then indicate that a deprivation of liberty may be occurring.

4.8 If a deprivation is occurring

If you believe that a deprivation is occurring you need to make a decision about whether or not the deprivation is in the young person's Best Interests by applying the Best Interests principle.

See [Section 6, Best Interests \(ages 16 and 17\)](#) for guidance about determining whether a deprivation is least restrictive.

5. Least Restrictive

5.1 This section of the procedure should be used by practitioners when:

- A child is being deprived of their liberty; and
- A decision needs to be made whether the deprivation is the *least* restrictive way to provide the care and treatment required and reduce likely significant harm.

5.2 Consulting with parents and those with parental responsibility

You must consult with the child's parents (and any persons with parental responsibility) when deciding whether the deprivation is least restrictive.

5.3 Deciding whether the deprivation is least restrictive

To decide whether a deprivation of liberty is the least restrictive way of providing care and treatment and reducing likely significant harm you should:

- Identify all other available options for providing the care or treatment; and
- Identify all other available options for reducing likely significant harm; and
- Explore the likely impact on deprivation of liberty of all the available options.

This will determine whether there is a less restrictive way of providing care or treatment and reducing likely significant harm.

5.4 If there is a less restrictive way

If there is a less restrictive way of providing care or treatment and reducing likely significant harm steps should be taken to review and amend any care or treatment plan (or the manner in which informal care is provided) so that:

- The deprivation is no longer occurring; or
- The deprivation that is occurring is least restrictive.

If the deprivation can be eliminated, yet the person providing care or treatment does not take steps to do so consideration should be given to:

- Raising a safeguarding concern;
- Raising a service provider concern; or
- Applying to the Court (especially if there is disagreement about what is least restrictive).

5.5 When a deprivation requires authorisation

A deprivation requires authorisation by a Court of Law when:

- The child's parents do not have the authority to agree to the deprivation;
- There is disagreement about whether the deprivation is the least restrictive way of providing care or treatment and reducing likely significant harm.
- All children who do not have capacity to consent or do not consent.

6. Best Interests (ages 16 and 17)

6.1 A best interest assessment is required for all young people aged 16 and 17 years. The principals of Best Interests should apply to all children and young people who are likely to be or who are deprived of their liberties.

6.2 Consulting with parents and those with parental responsibility

You **must** consult with the young person's parents (and any other persons with parental responsibility) when deciding whether the deprivation of liberty is in their Best Interests.

6.3 Making a Best Interests decision

To make a best interests decision the principles of the [Mental Capacity Act 2005](#) should be followed.

6.4 If the deprivation is not in the young person's Best Interests

If, through the process of Best Interests decision making, it is agreed that the deprivation of liberty is not in the young person's Best Interests or most effectively provides best for the welfare of the child, steps should be taken to review and amend any care or treatment plan (or the manner in which informal care is provided) so that the deprivation is no longer occurring.

If the person providing care or treatment continues to do so in a way that deprives the young person of their liberty when it is not in their Best Interests or most effectively provides best for the welfare of the child, to do so consideration should be given to:

- Raising a safeguarding concern;
- Raising a service provider concern; or
- Applying to the Court of Protection (especially if there is disagreement about what is in the young person's Best Interests).

6.5 When a deprivation requires authorisation

A deprivation requires authorisation by a Court of law when:

- The child's parents do not have the authority to agree to the deprivation (see below); or
- There is disagreement about whether the deprivation is in the Best Interests or most effectively provides best for the welfare of the child, of the young person.

7. When Parents Can Agree to a Deprivation

Need to Know

Case law is evolving in this area. You should always seek legal advice if the authority of a parent to agree to a deprivation of liberty is unclear.

7.1 Children under the age of 18 who are not subject to a care or interim care order

If the child is *not* subject to a care or interim care order their parents can agree to the deprivation in the exercise of their parental responsibility so long as the deprivation of liberty is in the child's Best Interests.

7.2 Accommodated children under the age of 16

If the child is accommodated under Section 17 or Section 20 of the Children Act 1989, their parents can agree to the deprivation in the exercise of their parental responsibility, so long as:

- The deprivation is in the child's Best Interests; and
- The accommodation is not a prelude to child protection proceedings.

7.3 Children aged 16 and 17

If the child is accommodated under Section 17 or Section 20 of the Children Act 1989, their parents can agree to the deprivation in the exercise of their parental responsibility, so long as:

- The deprivation is in the child's Best Interests; and
- The accommodation is not a prelude to child protection proceedings.

8. Authorising Deprivations of Liberty

Need to Know

You should always seek legal advice if the appropriate route to authorise a deprivation of liberty is unclear.

8.1 Principal routes of authorisation

There are 3 principal routes to authorise a Deprivation of Liberty:

- The use of Section 25 of the Children Act 1989 (secure accommodation orders);
- The inherent jurisdiction of the High Court under Section 100 (4) of the Children Act 1989; or
- The Court of Protection.

Further information about each route is set out below.

8.2 Secure accommodation orders

A placement that deprives a looked after child in accommodation of their liberty can be authorised as part of a secure accommodation order for a period directed by the Court, or for as long as the Section 25 criteria are met, whichever is the shorter period.

To read more about secure accommodation orders - see [Placements in Secure Accommodation Procedure](#).

8.3 The inherent jurisdiction of the High Court

Before seeking an authorisation using the inherent jurisdiction of the High Court you must decide which jurisdiction applies. This will depend on the specific circumstances of the young person and each case should be considered on its own facts.

If a child is under 16 and *not* subject to a care or interim care order, the High Court should be asked to authorise a deprivation when the decision made by their parents is not consistent with the welfare of the child or young person.

If a child or young person under the age of 18 is accommodated under Section 17 or Section 20 of the Children Act 1989, the High Court should be asked to authorise a deprivation when:

- The decision made by their parents is not in the child or young person's consistent with their welfare.
- The accommodation is a prelude to child protection proceedings.

Whenever a child or young person is subject to a care or interim care order, the High Court must always be asked to authorise a deprivation of liberty. This authorisation must take place *before* the deprivation occurs.

8.4 The Court of Protection

The Court of Protection is the Court of Law responsible for authorising a deprivation of liberty when:

- The young person is aged 16 or over; and
- The young person lacks capacity; *and*
- The young person's parents do not have the authority to agree to the deprivation (see above); or
- It is not the responsibility of the High Court to authorise the deprivation (see above);
- It is not appropriate for the young person's parents to authorise their deprivation of liberty.

To prevent the need for the involvement of multiple Courts, the Mental Capacity Act 2005 gives permission for a family Court that is already involved in family proceedings to:

- Make decisions regarding mental capacity; or
- Transfer cases about mental capacity to the Court of Protection.

You must therefore establish whether:

- There are on-going family proceedings in a family Court; or
- There is an existing Court Order made by a family Court; and then
- Notify your legal support as soon as possible; so that
- Arrangements can be made to establish whether the family Court will hear the matter.

You should only proceed to make the application to the Court of Protection if:

- The family Court declines to hear the case; *and*
- The family Court does itself not transfer the case to the Court of Protection.

Any application to the Court of Protection that you make in this situation should explain:

- The on-going role of the family Court; and
- The reasons that the family Court have provided about why they will not hear the case.

Appendix 1 - Deprivation of Liberty Resource

[Click here to view Appendix 1 - Deprivation of Liberty Resource.](#)