

Planning Liberty Safeguards in Children's Services

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Liberty Safeguards

Deprivation of liberty includes actions to restrict a person's liberty or freedom of movement, whether or not that person resists. Some individuals will not offer any objection and may agree with, or even ask for, their movement to be restricted in this way. However, such actions may still amount to a "deprivation of liberty."

Monitoring and supervision of children and vulnerable adults is normal and good practice in a range of circumstances where failure to monitor and supervise them would be negligent. It therefore logically follows that deprivation of liberty must sometimes be reasonable, proportionate, and necessary, even outside of secure provision. The key issue is that it must be authorised. That already becomes a statutory requirement once a young person reaches their 16th birthday, under the Mental Health Act 2005.

This caused considerable confusion after the 2014 Supreme Court defined deprivation of liberty as applying to:

1. Anyone who is subject to continuous supervision and control.
2. Anyone who is not free to leave.

The Supreme Court definition has become known as the 'Acid Test' for deprivation of liberty. The definition was deliberately broad, as it was intended to encompass the liberty safeguards of as many adults as possible. The implications for children and young people were not recognised immediately. Aspects of the school or home's physical environment could also mean that individuals are deprived of their liberty.

It means, in effect, that all children are deprived of their liberty at some time in their lives. They all begin life under constant supervision and control, unable to leave home and entirely depended on adults. As they grow and develop, the supervision and control is relaxed and becomes fluctuating and intermittent. They are allowed certain freedoms, including the freedom to leave at times. Some children are only allowed out under supervision. Some are allowed out at certain times of the day without supervision. Others are allowed to come and go as they please and stay out all night. Whether or not such restrictions are reasonable and proportionate depends on the age and understanding of the individual child.

In the case of those young people who are 16 or 17 years of age, currently only the Court of Protection can authorise deprivations of liberty, under the Mental Capacity Act 2005. For people aged 18+, applications can be made to the relevant local authority under Deprivation of Liberty Safeguards (DoLS).

The best interests of children and young people are best protected by open, honest and transparent guidance and practice. The Lords Select Committee told the government this system was not working and was not fit for purpose in 2014. Between 2014 and 2016 children's services lobbied the government and Ofsted, pointing out that the current system was unworkable and that local authorities were not even seeking authorisation for young people aged between 16 and 18 years. In March 2017 the Law

Commission called for changes in the law to reduced pointless bureaucracy and emphasise liberty safeguards.

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It is not good practice, nor is it necessary, to wait until a Deprivation of Liberty has taken place before requesting formal authorisation. Instead, it remains good practice to ensure that liberty is safeguarded by planning ahead whenever there are arrangements in place which might foreseeably result in a deprivation of liberty - even a temporary one. Those arrangements should be set out in detail in Education Health and Care plans (EHCPs) and reviewed annually.

The Law Commission has recommended that the government should legislate to allow such arrangements to be formally authorised, normally by the Responsible Local Authority, before the young person's 16th birthday. This means that Liberty Safeguarding Arrangements should already be detailed in Education Health and Care plans in the years approaching the legal transition at 16.

For children and young people under the age of 16 years, the term Gillick Competence is used in place of Mental Capacity, to describe their age and stage of development. Both terms can be used in plans which set out liberty safeguarding arrangements.

Fluctuating Competence/Capacity & The Doctrine of Emergency

Even when people have fluctuating competence/capacity, and do not require constant deprivations of liberty, as defined in the Acid Test, arrangements which could result in any temporary deprivations of liberty should be clearly set out in Education Health and Care plans.

The Law Commission recommends the use of the term "of unsound mind", as it is used in the European Convention on Human Rights (ECHR), to describe intermittent or fluctuating capabilities/capacity. The arrangements need to be planned, set out in detail, and authorised by the relevant authority, even if they are rarely called upon.

There may be a range of circumstances, in which a dynamic risk assessment determines that older children, or younger adults, lack capacity in the short term. For example, somebody under the influence of alcohol or drugs, suffering from hypothermia, a head injury or a blood sugar imbalance, or suffering extreme emotional distress, may lack capacity in the short term. In such an emergency there is a positive duty to do whatever is immediately necessary to prevent a serious deterioration in the physical or mental well being of the child or adult concerned.