# Children's Safeguarding and Social Work

## Deprivation of liberty safeguards; guidance for social workers

Draft operational document to be amended in line with new case law.

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# 1 Introduction

Camden aims to ensure that all children and young people receiving a social care service are able to take part in decisions about their care and that their wishes and feelings are taken into account when planning services. This includes children and young people with disabilities.

However, some children and young people have complex needs that require packages of care that imposes a restriction on their movements, and which may amount to a deprivation of their liberty. In these cases, it may be necessary to seek parental consent or apply for a court order to authorise the use of these restrictions.

**Social workers should note that the area of law relating to deprivation of liberty is still evolving and may change quickly. The legal framework described in this policy reflects the situation at the time it was written. Although the policy will be updated on a regular basis, it is strongly recommended that social workers and managers seek legal advice where necessary.**

# 2 Purpose and scope of policy

This policy sets out the legal framework and specific procedural steps for gaining valid consent where care arrangements for a young person involves their confinement or restriction on their movements and which may amount to a deprivation of their liberty. The policy applies to:

- children and young people up to the age of 18 provided with care packages in a residential or home setting;

- young adults up to the age of 25 provided with care packages in a registered residential or hospital setting.

The policy is likely to apply predominantly to cases in the Children and Young People's Disability Service (CYPDS) but may also apply to young people receiving other CSSW services.

This policy does not apply to young people in the following situations as their confinement has already been authorised by the courts or under legislation:

- Children and young people placed in secure accommodation by virtue of section 25 or because they have been remanded by the criminal court;

- Children and young people detained for treatment under the Mental Health Act 1983.

## 3 Principles

The principles guiding this policy are as follows:

- Professionals will maintain a balance between a child or young person's right to exercise some freedom of movement relative to their age and development and the need to safeguard and promote their welfare under the Children Act.

- Where decisions are being made about care packages that may involve the confinement of a child or young person, these decisions are focussed on their wellbeing and are in their best interests; parents will remain involved in decision-making as far as this is consistent with the young person's welfare.

- Where a young person is aged 16 and over, professionals will understand and respect the young person's right to be involved in decision making and wherever possible help and support them to make their own decisions.

- Professionals will avoid imposing unnecessary restrictions on children and young people and allow them an opportunity to take increasing control of their lives, using the least restrictive option to ensure their safety and welfare. Restrictions will only be imposed as part of an agreed package of care that has been approved at a Best Interest Meeting or where necessary, either consented to by parents or authorised by the court as appropriate.

## 4 Definition of a deprivation of liberty

A deprivation of liberty can occur where a person is receiving health or social care services and the nature of the care arrangements means that person is deprived of their liberty and freedom of movement under Article 5 of the Human Rights Act.

The key elements of a deprivation of liberty are:

- The restriction involves confinement in a limited space for a length of time that is not negligible. (see section 5)

- There is no valid consent for the confinement. (see section 6)

- The confinement is attributable to the state. (see section 7)

Each element is considered further below and sets out how the Court decides what evidence is needed under each element to establish a deprivation of liberty in relation to the care of children and young people.

## 5 Does the restriction amount to a deprivation of liberty?

The key test for a deprivation of liberty is whether the restrictions imposed mean that the person:

- is under constant supervision and control
  **and**
- is not free to leave.

Decisions on whether any restrictions on movement are a deprivation of liberty will be based on the degree and intensity of the confinement and levels of surveillance. A deprivation of liberty needs to be more than a general restriction on movements. It must involve a confinement to a narrow area for a considerable period of time and with a high level of supervision.

However, when considering whether an aspect of a child or young person's care amounted to a deprivation of liberty, the court would consider whether such a restriction would be placed on another child or young person of the same age, station, background and relative maturity who is free from disability.

Appendix 1 provides a list of measures that may be considered to be a deprivation of liberty for children and young people receiving social care based on the level of supervision and restrictions on movement.

## 6 Is there valid consent to the deprivation?

Consent to a deprivation of liberty can only be valid if:

- the person giving consent has competence or capacity to do so;
- they are giving informed consent and have an understanding of all the issues;
- they are free from any form of duress, coercion or undue influence;
- they are not overwhelmed by the decision.

**Children under 16**

Children under 16 cannot consent to a deprivation of liberty but their parents can if the decision falls within the normal scope of parental responsibility and the care arrangements are in the child's best interests.

A decision will fall within the scope of parental responsibility if it is a decision that a parent would reasonably be expected to make taking into account the following issues:

- whether it reflects normal parenting practice and the parents are making decisions in the child's best interests;
- the type and degree of invasiveness of the restriction;
- whether the confinement is reasonable given the age, maturity and understanding of the child or young person.

In general:

- For younger children, most normal age appropriate restrictions on freedom of movement to keep them safe will be within the scope of parental responsibility.

- Generally, parents will exercise less control as the child gets older and takes more responsibility for their own decisions; the older the young person the more likely the decision will be not within the scope of parental responsibility.

- Restrictions placed on children in order to safeguard them which would normally be in place in any family would not be considered a deprivation of liberty where the child is aged 10 or under.

- If the child is aged 11, the court may consider any restriction to be a deprivation of liberty.

- If the child is aged 12 and above, the court is more likely to consider any restrictions to be a deprivation of liberty.

Situations in which parents **may not be able** to give valid consent are:

- they do not have capacity under the Mental Capacity Act 2005;
- there are concerns about parental capacity and it is thought parents cannot make a decision based on the best interests of the child or young person;
- they are overwhelmed by the decision due to significant distress;
- the parents cannot agree on a decision.

Where parents are unable to give valid consent, and the package of care involves confinement that may be a deprivation of liberty, authorisation of the care package would be needed from the Court under its inherent jurisdiction.

Consent to a deprivation of liberty cannot be given by the state so where the child is **subject to a Care order or accommodated under section 20** and parents are unable or unwilling to give consent, Camden will not be able to consent to the care arrangements and must seek the authorisation of the court.

**Young people aged 16 and 17**

Young people aged 16 and 17 have the right to make their own decisions, including consenting to a deprivation of their liberty, if they have the mental capacity to do so under the principles of the Mental Capacity Act 2005.

If a young person lacks the capacity to consent to confinement that may be a deprivation of liberty the care arrangements would need to be authorised by the Court of Protection.

Further details on capacity under the Mental Capacity Act and the mental capacity assessment can be found in section 10.

# 7 Is the deprivation attributable to the state?

Any decision by a public body, such as the NHS or a local authority, to provide care that involves a person's confinement will be attributable to the state and therefore will be a deprivation of liberty. This will be the case where the package of care is commissioned or paid for by a public body.

A deprivation of liberty may also be attributable to the state if a public body is aware of a deprivation of liberty even if the decision to confine the person was not made by that public body. An example would be where parents make arrangements for a child or young person's care at home that involves confinement and the local authority becomes aware of this.

# 8 Procedures for cases involving deprivation of liberty

## 8.1 Children under 16

- A child and family assessment, updated assessment or transition assessment should identify those children and young people with complex needs where service provision may involve their confinement.

- Where a care package is likely to involve a potential deprivation of liberty, the next scheduled review of the child's plan and/or short breaks panel should make a recommendation that a Best Interest Meeting (BIM) is held. See section 11 for further details of this meeting.

- If the child is looked after, the views of their IRO should be sought.

- It is essential that any care package is discussed with parents and their consent sought. Parents should have a full explanation of the nature of any restriction and the reasons it is thought to be in the child's best interests. Consent should be in writing and included in the case record. The BIM is the most appropriate forum for this discussion.

- Where CSSW are applying for an interim or full care order and the proposed placement and care package are likely to involve a deprivation of liberty, the care proceedings should include an application to authorise this.

### 8.2 Young people aged 16/17

- The CYPDS should use the transition assessment that takes place at 14 years as an opportunity to identify those young people with complex needs who may not have the capacity to give consent to services to be provided at 16 and/or where service provision may involve a deprivation of liberty. This will allow for planning ahead in these cases, especially if the young person is not likely to gain capacity in the future.

- The review of the young person's plan that is held when the young person is 15½ should begin the process of planning and decision making with any agreed actions noted in the young person's plan and should look at:

    - whether the young person is likely to have capacity to consent to the services provided and
    - whether service provision is likely to constitute a deprivation of liberty.

- The transition assessment (or pathway needs assessment where the young person is looked after) that takes place at 16 years should include a mental capacity assessment carried out by the allocated social worker in partnership with the most relevant professional (see section 10).

- The outcome of this assessment should be presented to the review of the young person's plan held when the young person is 16. The review should then decide on the most appropriate action.

- If the mental capacity assessment has confirmed that the **young person does not have the capacity to consent** a BIM should be convened (see section 11).

## 9 Young adults aged 18-25

Where a young person aged 18 and over:

- is placed in a registered residential or hospital setting **and**
- their care package involves a restriction that amounts to deprivation of liberty **and**
- they do not have the capacity under the Mental Capacity Act to consent to the care arrangements:

The residential or hospital setting would need to get approval for the deprivation from the local authority that placed the young person under the Deprivation of Liberty Safeguards (DOLS).

However, if the young person and/or their family makes clear and consistent objections to the care arrangements, the arrangements may need to be authorised by the Court of Protection. Camden would need to take any steps necessary to support the young person to challenge any deprivation of liberty.

Where the young person is living at home, or living in a staying put arrangement or shared lives arrangement, a deprivation of liberty would always need to be authorised by the Court of Protection.

**Procedures where the person is placed in a registered residential home or hospital setting and there are no objections**

Although it is the responsibility of the setting to apply to Camden for authorisation of a deprivation of liberty, best practice dictates that social workers should liaise with the setting to ensure that they are taking the necessary action.

Applications for authorisation under the DOLS should be sent to the DOLS team based in Camden's Adult Social Care division where the Best Interests Assessor will carry out a DOLS assessment.

Telephone: 020 97974 5962
Email: DoLS-DeprivationofLiberty@camden.gov.uk

**Procedures where the person is placed in a registered residential home or hospital setting and there are objections**

These arrangements must be subject to scrutiny and a BIM should be convened to look at whether the arrangements are in the person's best interests or whether an application needs to be made to the Court of Protection.

As Camden will have a duty to support the young adult to challenge the deprivation, the BIA will consider whether or not to support them to make an application to the courts as part of the DOLS assessment. If the outcome of the assessment is that the young person should be supported, the BIA will inform the CYPDS 14-25 team and arrangements should be made to convene a BIM.

**Procedures where the person is living at home or in a staying put or shared lives care arrangement**

These arrangements must be scrutinised by the Court so the CYPDS social worker should convene a BIM to decide whether an application needs to be made to the Court of Protection.

## 10 Mental Capacity Assessment

The Mental Capacity Act states that a person lacks the capacity if they are unable to make a decision for themselves at the time the decision needs to be made and this lack of capacity is due to an impairment or disturbance in the functioning of the mind or brain.

To establish whether young people have the capacity to agree to the services provided to meet their needs on reaching the age of 16, a mental capacity assessment should be carried out following the review of their plan held when the young person is 15½.

The assessment should look at the extent to which the young person is able to make this specific decision (for example retain and weigh up information) and the extent to which they are unable to do this due to any impairment or disturbance of the mind or brain.

As capacity is being assessed in connection to service provision, CSSW will make the final decision on capacity to consent, but social workers will need to consult with those people who are directly involved with the young person's care.

Also, as the decision involves complex and important issues around where the young person will be living and how they will be prepared for adulthood, relevant professional advice should also be sought in connection to the young person's impairment and how this affects functioning.

Principles that should guide any assessment are:

- The young person should be presumed to have capacity until assessment establishes otherwise;
- The assessor should make no presumptions a young person's capacity based on their age, appearance or condition;
- The assessor should use whatever means are available to support the young person to make the decision themselves;
- Young people have a right to make unwise decisions (but this would need to be balanced against the safeguarding duty).

The assessment should provide details of the following:

- the impairment or disturbance of the functioning of the brain that is affecting capacity, how long it has affected the young person and how long it is likely to last

- what decision needs to be made

- what evidence there is that the young person is unable to:
    - follow relevant information
    - retain relevant information
    - use or weigh up relevant information to make a decision
    - communicate that decision.

Where a young person's capacity fluctuates social workers and those involved in the young person's care should make arrangements to discuss future care arrangements and service provision and seek consent when the young person is known to have capacity.

Further guidance for professionals carrying out assessments can be found in section 4 of the Mental Capacity Act code of practice available at: https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice

Social workers should complete the Mental Capacity Act assessment record available on MOSAIC, recording the decision made on capacity and the reasons and evidence for this decision. Any reports or assessments provided by other professionals in relation to the decision should be referred to in the assessment record and uploaded onto the young person's MOSAIC record.

## 11 Best interest meeting (BIM)

The BIM is the key mechanism for safeguarding children and young people who are receiving packages of care that may involve restrictions on their movement as it provides an opportunity to scrutinise decisions and ensure that any decisions taken are in the child or young person's best interest.

Under the Mental Capacity Act, whenever a decision needs to be taken on behalf of a young person aged 16 or 17 who lacks capacity must be in their best interests and be the least restrictive of their freedom. The BIM will be the forum for this discussion where professionals, family members and others involved in the young person's care (and the young person where appropriate) can discuss any proposed packages of care and decide whether they are in the young person's best interests.

For children under 16 who are unable to consent to their care package because they are not Gillick competent, parental consent would normally be sought. A BIM can provide a suitable forum for discussing care packages with parents as it enables professionals to provide parents with the information needed to make an informed decision.

However, the BIM **cannot** authorise care arrangements that may amount to a deprivation of liberty, and if the meeting identifies a potential deprivation of liberty, it must recommend that the case is referred to the Agency Decision Maker to decide whether a legal planning meeting should be convened to look at making an application to the Court for authorisation. This will be the case where the young person is aged 16 or over, or the parents of a child under 16 cannot give valid consent.

For further information on the BIM, please refer to the "Best Interest Meeting procedures" available at: Best interest meeting guidance.docx

## 12 Role of the agency decision maker

The role of the Agency Decision Maker is to oversee cases referred by the BIM in order to ensure the authorisation of the Court is sought where service provision will lead to a deprivation of liberty.

Where the BIM concludes that a child or young person's care package may constitute a deprivation of liberty the Agency Decision Maker will consider the evidence and will advise the social worker to convene a legal planning meeting in order to make arrangements to apply for a Court order.

The chair of the BIM should ensure that the following documents are available to the Agency Decision Maker:

- the child and family assessment or preparation for adulthood assessment or most recent update
- minutes of the last review of the young person's plan
- the Mental Capacity assessment
- any medical evidence or diagnosis relating to the impairment or disturbance of the brain affecting capacity
- any relevant court orders
- minutes of the BIM.

## 13 Legal planning meeting

Where the Agency Decision Maker agrees that an application to the Court to authorise a deprivation of liberty should be made, the social worker should convene a legal planning meeting.

The meeting should be attended by the social worker and their manager/supervisor and any relevant professional.

Copies of the following documents should be made available to Legal Services:

- the child and family assessment or preparation for adulthood assessment or most recent update
- minutes of the last review of the young person's plan
- the Mental Capacity assessment
- any medical evidence or diagnosis relating to the impairment or disturbance of the brain affecting capacity
- any relevant court orders
- minutes of the BIM
- social work statement.

The legal planning meeting will prepare the relevant documentation for making an application to the Court.

## 14 Reviewing decisions

Care packages that involve a deprivation of liberty must be regularly reviewed to ensure whether the confinement is still necessary and in their best interests. The 6 monthly review of the child or young person's plan should consider whether the child or young person's circumstances have changed and whether a BIM should be convened to look at the care arrangements.

If the Court has authorised a deprivation of liberty this will need to be reviewed by the Court on an annual basis. Social workers should liaise with Legal Services to ensure that an application is made.

**Appendix 1: Measures indicating possible deprivation of liberty**
(taken from the Law Society guidance "*Identifying a deprivation of liberty; a practical guide (under 18s)*

- 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 person leaving;
- A member or members of staff accompanying the child or young 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 lap-strap 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 child or young person cannot leave of their own free will (eg padded tent to sleep in);
- Restricted access to personal allowances;
- Searching of the child or young 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. "Team-Teach" 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.