Deprivation of Liberty Safeguards

What is Deprivation of Liberty?

There is no simple definition of deprivation of liberty. The question of whether the steps taken by staff or institutions in relation to a person amount to a deprivation of that person’s liberty is ultimately a legal question, and only the courts can determine the law. This guidance seeks to assist staff and institutions in considering whether or not the steps they are taking, or proposing to take, amount to a deprivation of a person’s liberty. The deprivation of liberty safeguards give best interests assessors the authority to make recommendations about proposed deprivations of liberty, and supervisory bodies the power to give authorisations that deprive people of their liberty.

This document provides guidance for staff and institutions on how to assess whether particular steps they are taking, or proposing to take, might amount to a deprivation of liberty, based on existing case law. It also considers what other factors may be taken into account when considering the issue of deprivation of liberty, including, importantly, what is permissible under the Mental Capacity Act 2005 in relation to restraint or restriction.

Further legal developments may occur after this guidance has been issued, and healthcare and social care staff need to keep themselves informed of legal developments that may have a bearing on their practice.

What does case law say to date?

The European Court of Human Rights (ECtHR) has drawn a distinction between the deprivation of liberty of an individual (which is unlawful, unless authorised) and restrictions on the liberty of movement of an individual.

The ECtHR made it clear that the question of whether someone has been deprived of liberty depends on the particular circumstances of the case. Specifically, the ECtHR said in its October 2004 judgment in HL v the United Kingdom: ‘to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance.’

The difference between deprivation of liberty and restriction upon liberty is one of degree or intensity. It may therefore be helpful to envisage a scale, which moves from ‘restraint’ or ‘restriction’ to ‘deprivation of liberty’. Where an individual is on the scale will depend on the concrete circumstances of the individual and may change over time.

Although this guidance includes descriptions of past decisions of the courts, which should be used to help evaluate whether deprivation of liberty may be occurring, each individual case must be assessed on its own circumstances. No two cases are likely to be identical, so it is important to be aware of previous court judgments and the factors that the courts have identified as important.

The ECtHR and UK courts have determined a number of cases about deprivation of liberty. Their judgments indicate that the following factors can be relevant to identifying whether steps taken involve more than restraint and amount to a deprivation of liberty. It is important to remember that this list is not exclusive; other factors may arise in future in particular cases.

- Restriction is used, including sedation, to admit a person to an institution where that person is resisting admission.
- Staff exercise complete and effective control over the care and movement of a person for a significant period.
- Staff exercise control over assessments, treatment, contacts and residence.
- A decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate.
- A request by carers for a person to be discharged to their care is refused.
- The person is unable to maintain social contacts because of restrictions placed on their access to other people.
- The person loses autonomy because they are under continuous supervision and control.
How can deprivation of liberty be identified?

In determining whether deprivation of liberty has occurred, or is likely to occur, decision-makers need to consider all the facts in a particular case. There is unlikely to be any simple definition that can be applied in every case, and it is probable that no single factor will, in itself, determine whether the overall set of steps being taken in relation to the relevant person amount to a deprivation of liberty. In general, the decision-maker should always consider the following:

- All the circumstances of each and every case
- What measures are being taken in relation to the individual? When are they required? For what period do they endure? What are the effects of any restraints or restrictions on the individual? Why are they necessary? What aim do they seek to meet?
- What are the views of the relevant person, their family or carers? Do any of them object to the measures?
- How are any restraints or restrictions implemented? Do any of the constraints on the individual’s personal freedom go beyond ‘restriction’ or ‘restriction’ to the extent that they constitute a deprivation of liberty?
- Are there any less restrictive options for delivering care or treatment that avoid deprivation of liberty altogether?
- Does the cumulative effect of all the restrictions imposed on the person amount to a deprivation of liberty, even if individually they would not?

What practical steps can be taken to reduce the risk of deprivation of liberty occurring?

There are many ways in which providers and commissioners of care can reduce the risk of taking steps that amount to a deprivation of liberty, by minimising the restrictions imposed and ensuring that decisions are taken with the involvement of the relevant person and their family, friends and carers. The processes for staff to follow are:

- Make sure that all decisions are taken (and reviewed) in a structured way, and reasons for decisions recorded.
- Follow established good practice for care planning.
- Make a proper assessment of whether the person lacks capacity to decide whether or not to accept the care or treatment proposed, in line with the principles of the Mental Capacity Act.
- Before admitting a person to hospital or residential care in circumstances that may amount to a deprivation of liberty, consider whether the person’s needs could be met in a less restrictive way. Any restrictions placed on the person while in hospital or in a care home must be kept to the minimum necessary, and should be in place for the shortest possible period.
- Take proper steps to help the relevant person retain contact with family, friends and carers. Where local advocacy services are available, their involvement should be encouraged to support the person and their family, friends and carers.
- Review the care plan on an ongoing basis. It may well be helpful to include an independent element, possibly via an advocacy service, in the review.

What does the Mental Capacity Act mean by ‘restraint’?

Section 6(4) of the Act states that someone is using restraint if they:

- use force – or threaten to use force – to make someone do something that they are resisting, or
- restrict a person’s freedom of movement, whether they are resisting or not.

The Mental Capacity Act Code of Practice contains guidance about the appropriate use of restraint. Restraint is appropriate when it is used to prevent harm to the person who lacks capacity and it is a proportionate response to the likelihood and seriousness of harm. Appropriate use of restraint falls short of deprivation of liberty.

Preventing a person from leaving a care home or hospital unaccompanied because there is a risk that they would try to cross a road in a dangerous way, for example, is likely to be seen as a proportionate restriction or restraint to prevent the person from coming to harm. That
would be unlikely, in itself, to constitute a deprivation of liberty. Similarly, locking a door to guard against immediate harm is unlikely, in itself, to amount to a deprivation of liberty. The ECHR has also indicated that the duration of any restrictions is a relevant factor when considering whether or not a person is deprived of their liberty. This suggests that actions that are immediately necessary to prevent harm may not, in themselves, constitute a deprivation of liberty.

However, where the restriction or restraint is frequent, cumulative and ongoing, or if there are other factors present, then care providers should consider whether this has gone beyond permissible restraint, as defined in the Act. If so, then they must either apply for authorisation under the deprivation of liberty safeguards or change their care provision to reduce the level of restraint.

How does the use of restraint apply within a hospital or when taking someone to a hospital or a care home?

**Within a hospital**

If a person in hospital for mental health treatment, or being considered for admission to a hospital for mental health treatment, needs to be restrained, this is likely to indicate that they are objecting to treatment or to being in hospital. The care providers should consider whether the need for restraint means the person is objecting. A person who objects to mental health treatment, and who meets the criteria for detention under the Mental Health Act 1983, is normally ineligible for an authorisation under the deprivation of liberty safeguards. If the care providers believe it is necessary to detain the person, they may wish to consider use of the Mental Health Act 1983.

**Taking someone to a hospital or a care home**

Transporting a person who lacks capacity from their home, or another location, to a hospital or care home will not usually amount to a deprivation of liberty (for example, to take them to hospital by ambulance in an emergency.) Even where there is an expectation that the person will be deprived of liberty within the care home or hospital, it is unlikely that the journey itself will constitute a deprivation of liberty so that an authorisation is needed before the journey commences. In almost all cases, it is likely that a person can be lawfully taken to a hospital or a care home under the wider provisions of the Act, as long as it is considered that being in the hospital or care home will be in their best interests.

In a very few cases, there may be exceptional circumstances where taking a person to a hospital or a care home amounts to a deprivation of liberty, for example where it is necessary to do more than persuade or restrain the person for the purpose of transportation, or where the journey is exceptionally long. In such cases, it may be necessary to seek an order from the Court of Protection to ensure that the journey is taken on a lawful basis.

How should managing authorities avoid unnecessary applications for standard authorisations?

While it is unlawful to deprive a person of their liberty without authorisation, managing authorities should take into consideration that unnecessary applications for standard authorisations in cases that do not in fact involve depriving a person of liberty may place undue stress upon the person being assessed and on their families or carers. Moreover, consideration must always be given to the possibility of less restrictive options for delivering care or treatment that avoid deprivation of liberty altogether.

*This guidance is taken from the Deprivation of Liberty Safeguards Code of Practice*

*This guidance should be read with the rest of the Code, which supplements the main Mental Capacity Act 2005 Code of Practice*

*Both Codes are available from the Department of Health:*
  http://www.dh.gov.uk

*or from The Stationery Office:*
  http://www.tso.co.uk