

Information Leaflet: Deprivation of Liberty in Community Settings.

Central
Bedfordshire



**What is a Deprivation of Liberty in
community settings and what are the
steps that might be necessary to protect
and support people.**

1. Introduction:

The purpose of this leaflet is to assist social care practitioners when having discussions with people about Deprivation of Liberty (DoL) in community settings. It may also be given to family members and/or friends of people that may be deprived of their liberty if considered helpful. Practitioners should also have discussions directly with the relevant person themselves (the person receiving the care and/or treatment) in ways that are appropriate to their needs and circumstances.

2. The Starting Place: The Human Rights Act 1998 and Article 5: Right to Liberty.

Human Rights are the basic rights and freedoms that belong to everyone. They apply to all people equally, regardless of race, sex, nationality, ethnicity, disability or any other status of an individual. This is why human rights are often referred to as 'universal' rights and freedoms.

The UK Supreme Court reinforced the universal character of human rights¹:

"[....] people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else [...]"

Article 5 of the Human Rights Act 1998 protects all people's rights to **liberty** and **security**. It focuses on protecting everyone from unreasonable detention. It is vital to understand that 'detention' and 'liberty' does not just apply to settings that might typically come to mind, such as those relating to the criminal justice system or mental health inpatient hospitals. A person could potentially be 'deprived of their liberty' in any setting, including one's own home. The focus should be on the arrangements and limitations in place and not necessarily the specific location or type of accommodation.

Article 5 states that it is unlawful for someone to be deprived of their liberty without their consent unless it has been authorised by a fair and proper legal process. It provides protection from situations where a person's freedom may be taken away inappropriately.

¹ See para 45 of Cheshire West Judgment (<https://www.supremecourt.uk/cases/uksc-2012-0068.html>)

3. Care and Treatment

It is recognised that some people require particular care or treatment that will amount to a deprivation of their liberty. In other words, a person's care or treatment might require that they are under: **'complete/continuous supervision and control,' and are 'not free to leave' the care setting or accommodation where they reside.** This is the current threshold for what amounts to a deprivation of liberty, known as the 'acid test'.²

When a person is unable to give their informed and valid consent to such arrangements, including when this is due to an impairment, illness, or injury that affects the functioning of their mind or brain, this is considered to be a Deprivation of their Article 5 right to Liberty.

Such care arrangements should always be considered as a last resort however, in many situations, this may be unavoidable and, in the person's, best interests to keep them safe from harm.

It is important to understand that identifying a particular care arrangement as a 'deprivation of liberty' does not necessarily mean that the care is in some way 'wrong' or inappropriate, rather, that the level and nature of the required arrangements simply warrants additional safeguards and a higher level of authorisation to be lawful.

Case law explains that a person, without the relevant mental capacity to give their consent, could be considered as deprived of their liberty even if they appear happy or accepting of the care arrangements. Likewise, such a person could also be considered as deprived of their liberty even if the care is normal for a person with similar needs or when the purpose of the care is completely understandable.

It is vital that we understand that the systems are there to protect those that could *potentially* have their rights inappropriately or disproportionately infringed. It is important that systems are in place to ensure that care is appropriate and decisions are made in a fair and proper way.

4. Authorisation

If a person cannot consent to care that amounts to a deprivation of their liberty, the local authority cannot authorise the care arrangements. This is also the case for any appointed attorneys or court appointed deputies.

If the relevant person is over the age of 16, these cases must be referred to the Court of Protection by those that are responsible for the arrangements. This is a court

² Cheshire West Judgment (<https://www.supremecourt.uk/cases/uksc-2012-0068.html>)

specifically set up to deal with certain financial and welfare matters relating to people who lack the capacity to make these decisions themselves.

This remains to be the case even if the arrangements were put in place without the council being involved or providing any funding. There is a positive obligation upon local authorities to uphold human rights and freedoms.

There is a current procedure (known as the 'Re: X procedure') which allows for non-controversial applications to be considered by a judge 'on paper' and without an oral hearing.

The court is able to look at the circumstances and check that the care provided is necessary and proportionate, is least restrictive, and is in the person's best interests. The court can authorise the deprivation for up to 12 months; and when the authorisation period is due to expire, the case needs to be presented to the court again if the care arrangements need to continue.

In preparation, a social worker, case manager or care co-ordinator will be required to complete the necessary court paperwork with legal guidance being received. The required paperwork will include a mental capacity assessment and best interests analysis as well as gathering any ascertainable wishes and feelings of the relevant person and valuable insights from those involved in the person's life.

A Doctor will also need to be consulted so that the application includes a statement about the person's mental health, or relevant cognitive impairment. This is often the person's GP or in some circumstances another doctor / consultant involved in the person's care.

If the individual has a close relative or friend, they may be asked to consider being what is referred to as a Rule 1.2 Representative or a Litigation Friend.

The role of the Rule 1.2 Representative or Litigation Friend is to ensure the individual's participation in the overall process is secured and that their views/wishes and feelings are made known, where they cannot do this themselves, due to a lack of capacity.

Once the judge is satisfied that the care arrangements are necessary and proportionate, the deprivation can be authorised. The judge may seek additional clarification from the Local Authority on any points.

5. Timeframe

Due to the demands on Local Authorities and the Courts, by the unanticipated high number of cases being referred for authorisation, the DoL process may be subject to delays.

At the moment, all local authorities are prioritising cases using nationally recognised risk assessment tools and good practice principles. Unfortunately this does mean that some cases are waiting for prolonged periods before being dealt with, especially where the person has been in receipt of their care for a number of years, and where they are settled and no concerns have been raised by anyone involved.

The current process is designed to protect the human rights of people who are unable to protect themselves. In the future, these processes will change and a new piece of legislation has already been enacted.

The new process, commonly referred to as the Liberty Protection Safeguards, is aiming to simplify the processes. In most cases this will enable the authorisations to be agreed as part of the assessment process when the care arrangements are being set up and reviewed. This will vastly reduce the number of cases that need to be presented to the courts. However, until it is implemented, the current authorisation process will continue.