



Position paper - Depriving and restricting liberty for children and young people in care home, school care and secure accommodation services

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Introduction

Why have we written this paper?

This paper sets out the attitude, expectations and actions of the Care Inspectorate where children and young people may be deprived of their liberty, where their liberty is restricted, or where this is a risk, through the design and/or care practices of:

- Secure accommodation services
- Care homes for children and young people
- School care accommodation services

This paper complements recent Care Inspectorate publications, such as:

- [Restrictive Practices Self Evaluation Tool](#)
- [Care Homes for Children and Young People – The Design Guide](#)
- [Short thematic review of children and young people placed on Deprivation of Liberty Orders](#)
- [Distance placements: exploration of practice, outcomes, and children’s rights](#)
- [Matching Looked After Children and Young People: Admissions Guidance for Residential Services](#)
- [Records that all registered children and young people’s care services must keep and guidance on notification reporting](#)

A shared aspiration for children and young people

Scotland is, rightly, striving to become a country where no child or young person is deprived of their liberty. Being deprived of one’s liberty, even for a short period, can have a profound impact on a person’s lived experience. It can have long-lasting implications for their mental health and well-being, and their ability to trust others and to form positive relationships. Being deprived of liberty without due process breaches children and young people’s rights.

We understand that the reasons children come to be looked after in residential or secure care are complex, and will be informed by an assessment of risk and need. We accept that this combination of risk and need will mean there may be occasions where it is necessary to place certain restrictions on a child or young person to keep them, and/or other people, safe and well. Good parenting involves exercising wise judgement in balancing safety and risk. Good parents understand their child very well. They care about them and how they feel, they respect their rights, and they act in their best short and long-term interests. Good parents work hard to ensure their child feels loved and supported. They help their child take age-appropriate risks as they grow and mature, to show care and respect for other people, to make good decisions and develop their own judgement over time.

Corporate parents need to demonstrate the same care and attention for the children and young people they have responsibility for as they would for their own children.

They need to know what the law says about how to protect and uphold children’s rights. Furthermore they need to understand how their actions contribute to whether children and young people feel loved and protected and whether they have the same opportunities as their peers to grow, develop and mature into adulthood. And they need to do it, understanding that the children they are caring for may already have experienced disadvantage, trauma, loss, rejection and disappointment. In this context, our intentions, motivations and actions and how we communicate them are particularly important.

What the law says

Article 5 of the [European Convention on Human Rights](#) (ECHR) provides that, “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save.... In accordance with a procedure prescribed by law”.

[Article 37 of the UN Convention on the Rights of the Child](#) (UNCRC) provides that:

- No child or young person shall have their liberty deprived unlawfully or arbitrarily;
- Every child deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age;
- Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty.

Both the European Convention on Human Rights and UN Convention on the Rights of the Child are given effect in domestic law.

Deprivation of liberty

The established three broad elements comprising a deprivation of liberty for the purposes of Article 5 of the ECHR, are:

- i. An objective element of confinement to a certain limited place for a not negligible period of time;
- ii. A subjective element of absence of consent to that confinement;
- iii. The confinement is imputable to the State.
- iv. Only when all three components are present is there a deprivation of liberty.

The Supreme Court further articulated an “acid test” to be used to determine whether a person who lacks capacity is deprived of their liberty, namely:

- a. The person is unable to consent to the deprivation of their liberty;
- b. The person is subject to continuous supervision and control;
- c. The person is not free to leave.

The assessment of whether the “acid test” is met is determined by comparing the extent of the child’s actual freedom with someone of the child’s age and ‘station’ whose freedom is not limited. That is, there should be a comparison to the restrictions to which a child is subject to, against the restrictions that would apply to a

child of the same ‘age’, ‘station’, ‘familial background’ and ‘relative maturity’ who is ‘free from disability’. As a general rule the younger a person is, the greater the level of constraint to which they would be typically subject. You can read more about this in:

- [P v Cheshire West & Chester Council; P & Q v Surrey County Council \(2014\) UKSC 19](#)
- [A-F \(Children\) \(No 2\) \[2018\] EWHC 2129 \(Fam\)](#)
- [Re A-F \(Children\) \[2018\] EWHC 138 \(Fam\)](#)
- [Deprivation of liberty in relation to children and young people: Strategic Briefing \(2017\)](#)

These are examples of broad legal principles, and each case will depend on its individual circumstances. Where children are particularly vulnerable, decision makers should err on the side of caution when making decisions about deprivation of liberty. Providers should seek their own legal advice on this matter.

Restricting liberty

In Scotland, the aim is for all children and young people, whatever the vulnerabilities and risks associated with their distress and actions, to be cared for as children. The aspiration is for a country where no child is deprived of their liberty while recognising that, at present, the right of a young person to be safe may mean it is sometimes necessary, and indeed good child-care practice, to deprive a young person of their liberty for a period of time or to restrict their liberty in some respects. See [Secure Care Strategic Board: report to Scottish Ministers April 2019](#) for more on this.

Assessments of risk and need are undertaken dynamically by staff, and are used to inform support provided to young people, which may take the form of agreed restrictions. The judgement on whether or not a child is being *deprived* of their liberty relates to the degree or intensity of measures which *restrict* their liberty, as explored in [Identifying a deprivation of liberty: a practical guide – Under 18s](#). Examples of restrictions of liberty, are also detailed in [Rights, risks, and limits to freedom](#), and include the following:

- Decisions about contact with others, or where to live, being taken by others;
- Doors and/or windows of the accommodation are locked or secured in some other way, for security reasons or to prevent children and young people from leaving;
- Support staff accompanying young people to carry out care and support tasks in their accommodation, including overnight, or when accessing the community;
- Lack of flexibility in daily life and access to activities;
- Removing a child or young person’s phone, or preventing access to the internet/social media;
- Restricted access to personal belongings and/or age appropriate items;
- Search of possessions, or the young person’s room;
- Environmental restraint to prevent children or young people leaving certain areas, through periods of time spent in “Safe Space” facilities, “time out”, locked internal doors, or internal doors held shut by adults;
- Chemical restraint, such as the use of a sedative medication, which alters a young person’s behaviour;

- Mechanical restraint such as equipment which restricts limbs or movement, including safety clothing or the use of equipment such as wheelchair straps or special harnesses;
- Use of physical restraint;
- Court orders, that place restrictions on young people's movement.

Young people who are placed cross border into Scottish care services may be subject to a Deprivation of Liberty (DoL) order which authorises any number of these measures particular to the needs and risks for each individual young person (see [Deprivation of liberty in relation to children and young people - Strategic briefing](#) for more on this). It should be noted that these measures are applied with 'permissive intent' meaning that although the measures have been authorised for use, the services does not need to implement all of the measures.

Which care services are allowed to deprive a child or young person of their liberty?

In Scotland, the only services which normally may lawfully *deprive* a young person of their liberty are those approved by Scottish Ministers and registered with the Care Inspectorate as a secure accommodation service.

[The Public Services Reform \(Scotland\) Act 2010](#) defines a secure accommodation service as one which:

- “(a) provides accommodation for the purpose of restricting the liberty of children in residential premises where care services are provided; and
(b) is approved by the Scottish Ministers for that purpose.”

Only services registered as secure accommodation services have a statutory authority to practice restrictions on liberty that would meet the threshold to be defined as deprivation of liberty.

When does a restriction of liberty amount to a deprivation of liberty?

When assessing whether a child or young person's liberty is restricted to the extent that it amounts to depriving them of their liberty, services should be considering the following issues. These are the factors that the Care Inspectorate will consider when assessing whether services are acting in accordance with the law, and making judgements about the quality of care they provide:

- The extent to which the child or young person is actively prevented from leaving the service, or any part of the service, and the care practices implemented to monitor or return the child or young person if they leave. This includes environmental means such as the location and design of the premises, locked doors and entrances, and the use of door alarms as detailed in our [Care Homes for Children and Young People – The Design Guide](#);
- The extent to which forms of restraint or other restrictive practices are used in respect of the child or young person in the service, and their nature, intensity, frequency, and duration (see [Identifying a deprivation of liberty: a practical guide – Under 18s; Rights, risks, and limits to freedom](#); and [Restrictive Practices Self Evaluation, Care Inspectorate](#) for more on this);

- The nature and level of monitoring that is in place in respect of the child or young person in the service. This includes environmental means such as premises design and CCTV;
- The degree to which behaviours caused by trauma are managed within the service and the level to which they differ from other age-appropriate settings for the child or young person;
- The extent to which the child or young person's access to mobile phones and the internet is restricted or otherwise controlled;
- The degree of freedom the child or young person has to experience the local area in proximity to the care service, and the extent to which this is supervised;
- The extent to which other periods outside the care service are either controlled, monitored or supervised.

Can providers prevent a child or young person from going out of a service?

Some of the most intense restrictions of liberty are those that prevent young people from leaving their living accommodation, or any part of this accommodation, when they wish. This might be due to:

1. The environmental design of the accommodation and/or the management of the accommodation and/or;
2. Restrictive care practices which mean the young person is not able to leave the accommodation, or any part of the accommodation, when they wish.

Services which deprive the liberty of young people to this intensity may meet the definition of a secure accommodation service under the Public Services Reform (Scotland) Act 2010). They must have the approval of Scottish Ministers and be registered with the Care Inspectorate as a secure accommodation service.

Even where it is agreed that a service does not meet the threshold for registration as a secure accommodation service, preventing a child or young person from leaving a service is still a restriction on their liberty. Any restriction on liberty should be agreed on a planned, risk-assessed and multi-agency basis and regularly reviewed. There may be instances when there is reason to believe that a child or young person would put themselves or others at risk of harm were they to run away. On occasion, staff will need to make judgements in very challenging situations about what action they need to take to keep a child or young person safe. This is why it is essential that children and young people's plans are robust and well considered at an early stage. Wherever possible, children and young people should be involved in identifying what actions the adults caring for them could take to best keep them and others safe.

We expect services to be able to evidence that their staff are acting in accordance with an agreed plan which has been made in the context of upholding children and young people's rights and meeting their needs, and is regularly reviewed.

Preventing a child or young person from leaving a service would meet the threshold of a deprivation of liberty where this is used:

- As a standard response to the young person indicating an intention to run away;
- Proactively, or as a matter of routine;

- When there is no reason to believe that a child or young person would place themselves or others at risk of harm.

What responsibility does the registered provider have in the context of this guidance?

When registering a service or at any time thereafter

Every provider of care services for children and young people is responsible for assessing whether its practices and/or building design are likely to deprive any young person of their liberty. They should seek their own legal advice about whether their building design and care practices have, or are likely to have, this impact.

Should the assessment and/or legal advice indicate that a child or young person's liberty is being deprived, the service must urgently amend its care practices and ensure the child or young person has informed access to independent advocacy and legal advice. The provider may also require to consider whether it ought to seek approval from Scottish Ministers, and apply to the Care Inspectorate, to register as a secure accommodation service.

On agreeing to care for a child or young person

Providers who admit a child or young person subject to any restriction on their liberty, or who implement a care practice which restricts a young person's liberty, must ensure that:

- The young person's rights, and the emotional impact of any restriction of liberty (for example, consideration of their history), are central to all decision making;
- The restriction of liberty is proportionate and solely relates to the specific risks to the young person's right to be safe;
- They seek and can show evidence that there is a legal authority for the restrictions of liberty, where this is required, and that agreement (no matter the age of the young person) is made on a multi-agency basis;
- Any restriction of liberty is time limited, recorded, reported (see [Records that all registered children and young people's care services must keep and guidance on notification reporting](#) for more detail on this), and regularly and formally reviewed with a clear reduction plan;
- For young people over the age of 16 who lack capacity, the power to authorise the use of restraint is detailed as part of their Welfare Guardianship Order;
- The young person has access to advocacy and/or legal representation;
- An assessment on whether the restrictions meet the threshold for a deprivation of liberty is made on each occasion;
- The restriction of liberty is practiced for the least amount of time necessary to ensure the safety and wellbeing of the young person;
- Staff are appropriately skilled and supported to understand restrictive practices through the provision of training and regular supervision, and supporting policies and procedures.

We expect providers to be able to evidence that they have taken all reasonable steps to ensure they have full information about children or young people *before* they agree to care for them (see [Matching Looked After Children and Young People: Admissions Guidance for Residential Services](#)). This includes knowledge of any

existing or pending legal order that places restrictions on the liberty of a child or young person.

The Care Inspectorate's responsibilities

We check that services are acting in accordance with the law. We have a responsibility to ensure that services are upholding, protecting and promoting the rights of children and young people; meeting their needs; keeping children, young people and others safe; and helping them develop good decision-making skills as they mature. We make available guidance and other resources aimed at helping services provide high quality care for children and young people. We are committed to supporting services to continuously improve. Our inspectors take seriously their responsibility to work alongside providers to ensure that children and young people get the care and support they need. Nonetheless, where providers' actions do not reflect the seriousness and urgency of a potentially unlawful deprivation of liberty, we may take enforcement action to ensure that the rights of children and young people are protected.

Summary

- Our regulatory interventions will always be consistent with the 'deprivation of liberty' articles of the European Convention on Human Rights and UN Convention on the Rights of the Child.
- We recognise that protective care planning interventions, which may restrict some liberties of a young person, may be needed, and necessary, to meet that young person's right to be safe.
- The question of whether or not a child is being deprived of their liberty relates to the degree or intensity of measures which restrict their liberty.
- Decisions and care practices that restrict any liberty of a young person must be made on a multi-agency basis. They must always be centred on the rights, needs and impact on the young person, and always be legally compliant. This is the responsibility of the provider of the care service.
- The implementation of any care practice that restricts the liberty of a young person should be time limited, recorded, communicated to relevant others, and regularly and formally reviewed. The young person should be provided with accessible information about the reasons for the restriction of their liberty and always have access to advocacy and/or legal representation. An assessment on whether the restrictions meet the threshold for a deprivation of liberty should also be made on each occasion.
- A restriction of liberty must only be implemented for the least amount of time necessary to ensure the safety and wellbeing of the young person.
- Normally only services registered as secure accommodation services may lawfully place restrictions on the liberty of a young person that would meet the threshold of a deprivation of liberty.

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