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NATIONAL CHILDREN'S BUREAU
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Deprivation of Liberty: Children and young people

A review of legal frameworks

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Case law briefing: Deprivation of Liberty: Children and Young People[1]

Preface

A change to section 25 of the *Children Act 1989* is set out in the Children's Wellbeing and Education Bill which is expected to pass into law in 2026. This measure will augment existing legal frameworks for authorising the deprivation of liberty of a child or young person aged under 18, the details of which are outlined below.

Prior to this change, section 25 only allowed local authorities to deprive children of their liberty in a placement designed for, or with the primary purpose of, restricting liberty; only Secure Children's Homes (SCH) met this definition.

The new measure will provide a statutory framework to authorise the deprivation of liberty of a child or young person in England in provision which has the primary purpose of care and treatment and where restrictions that amount to deprivation of liberty can be imposed, if required to keep children safe. The care and/or treatment delivered, in combination with the physical features that enable deprivation of liberty, will be the purpose of the newly authorised accommodation. The measure will only apply where a child absconds from other types of accommodation and is at risk of significant harm or where they are at risk of causing injury to themselves or others.

This measure is one element in a range of responses to address the sharp increase in the numbers of applications made to the High Court for deprivation of liberty orders for under 18 year-olds.[2] In turn the courts have expressed their serious concerns about the lack of appropriate placements for children and young people with significant and complex needs and/or have raised questions about the suitability of the proposed placements for some of these children and young people.[3] Such concerns were acknowledged in the Department for Education's policy statement, *Keeping Children Safe, Helping Families Thrive,* which states:

> 'There is a gap in provision for children deprived of their liberty, due to their challenging behaviour and complex needs, often linked to trauma. This can result in children being placed in unregistered or otherwise unsuitable homes. In recent years we have seen a steep rise in the number of children deprived of their liberty under the inherent jurisdiction of the High Court.'[4]

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1 The original version of this briefing was written by Dr Camilla Parker KC (Hon) in May 2025 and published in September 2025 by DfE as one section in this report: www.gov.uk/government/publications/improving-outcomes-for-looked-after-children-in-complex-situations .
With DfE permission Research in Practice have updated the introductory section to include a Preface and publish here as a standalone briefing. The briefing has been amended to note subsequent developments in legislative reform (e.g. the Children and Wellbeing Bill and the Mental Health Act 2025).
We thank HHJ Carol Atkinson and Alex Ruck Keene KC (Hon) and officials at the Department for Education and Department of Health and Social Care for their helpful comments.

2 See for example, Children's Commissioner, *Children with complex needs who are deprived of liberty – Interviews with children to understand their experiences of being deprived of their liberty,* November 2024 and Roe, A., *Children subject to deprivation of liberty orders, Nuffield Family Justice Observatory,* September 2023.

3 See for example, *Re T (A Child)* [2021] UKSC 35 paragraphs 2–11 and 166; *Lancashire County Council v G (Unavailability of Secure Accommodation)* [2020] EWHC 2828, paragraphs 49-59 and *Re MK: Deprivation of Liberty and Tier 4 Beds* [2024] EWHC 1553 (Fam).

4 Department for Education, *Keeping Children Safe, Helping Families Thrive, Breaking down barriers to opportunity,* November 2024, p.21.

Ahead of this measure becoming law we are publishing this overview of the existing legal frameworks for the deprivation of liberty of children and young people and of the legal issues raised by the current 'gap in provision'. How planned reforms are intended to amend these legal frameworks is also noted. The briefing was first published in September 2025 as one section in an extensive report commissioned by DfE on *Improving the outcomes of looked after children and young people in complex situations with multiple needs, at risk or subject to a Deprivation of Liberty* (Research in Practice/NCB 2025). We thank DfE for permission to reproduce this overview as a standalone briefing.

Research in Practice, February 2026

Introduction

A crucial question for those engaged in providing care and support to people with health and/or social care needs is whether the proposed arrangements to meet such needs are likely to amount to a deprivation of liberty. If they are, unless the care arrangements for that person can be revised, action must be taken to obtain legal authority for the deprivation of liberty. Failure to do so would mean that the responsible public body (for example a local authority or NHS Trust) would be breaching the person's right to liberty under Article 5 of the European Convention on Human Rights (ECHR) and therefore acting unlawfully under the Human Rights Act 1998.[5]

The question of whether care arrangements for an individual give rise to a deprivation of liberty is as important for children and young people aged under 18, as it is for adults. However, there are additional factors to consider when determining whether a child or young person is being deprived of their liberty, in particular, the decision-making role of parents (and others with parental responsibility).[6] As a result, the law relating to the determination of a deprivation of liberty for under 18 year-olds whose health and/or social care needs require additional care and support is complex and not well understood.[7] It is also an area in which the law is continuing to develop.[8]

This briefing provides an overview of the legal issues raised by the current 'gap in provision' for children and young people aged under 18. It focuses on three areas:

1. Determining a deprivation of liberty

The circumstances in which a child or young person's care arrangements may give rise to a deprivation of liberty are considered together with what is meant by a deprivation of liberty, how it is identified and why these questions matter.

2. The role of the High Court in authorising a deprivation of liberty

The High Court's extensive powers under its inherent jurisdiction includes the power to authorise the deprivation of liberty of children and young people aged under 18.[9] This power is one of four legal mechanisms for authorising under 18-year-olds' deprivation of liberty. It only applies where the legislative powers for authorising a deprivation of liberty do not apply. These are: secure accommodation orders (section 25 of the Children Act 1989);[10] an order of the Court of Protection (Mental Capacity Act 2005) and detention in hospital (Mental Health Act 1983).

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5 Human Rights Act 1998, section 6. See for example: *LBC of Lambeth v L (Unlawful Placement)* [2020] EWHC 3383, paragraph 32.

6 People who are not parents may acquire parental responsibility through orders under the Children Act 1989 (e.g. a special guardianship order (sections 14A-14F)). A local authority which has obtained a care order (section 31) or interim care order (section 38) will have parental responsibility for that child or young person.

7 Law Commission, *Deprivation of Liberty in the context of disabled children's social care. Research Paper,* September 2024, paragraphs 1.2 and 1.7

8 At the time of publication (Feb 2026) we await the Supreme Court's decision on a case heard in October 2025 challenging the Cheshire West approach to determining if a Deprivation of Liberty has arisen www.supremecourt.uk/cases/uksc-2025-0042#case-summary

9 *A-F (Children)* [2018] EWHC 138 (Fam) at paragraph 27. Giving judgment, Sir James Munby, President of the Family Division set out the procedures to be followed where such applications are made (see paras 46-53).

10 See below on the forthcoming amendments to section 25 of the Children Act 1989.

Given the increased numbers of applications made to the High Court for deprivation of liberty orders for under 18-year-olds, this briefing explains when the inherent jurisdiction may be engaged and how this relates to the current statutory legal mechanisms for authorising a deprivation of liberty.

3. Placements in settings other than registered children's homes

One of the consequences of the lack of adequate provision for children and young people with significant and complex needs noted above has been that the courts have been asked to authorise the deprivation of liberty of under 18-year-olds in a range of settings, both in the community and in hospitals. In some cases, the courts have raised significant concerns about the suitability of the placement.[11]

Another related issue that has troubled the courts is whether a deprivation of liberty can be authorised in cases where the child or young person is (or is intended to be) placed in a setting that is not registered with Ofsted (as the body responsible for the registration and inspection of children's social care services, including children's homes). The courts' approach to this question when considering whether a deprivation of liberty in such settings should be authorised is explained.

11 See for example, *Lancashire County Council v G (Unavailability of Secure Accommodation)* [2020] EWHC 2828; *Re W (Young person: Unavailability of Suitable Placement)* [2021] EWHC 2345 (Fam) and *Re J (Deprivation of Liberty: Hospital)* [2022] EWFC 121.

1. Determining a deprivation of liberty

Understanding whether the care arrangements for an individual may amount to a deprivation of liberty is important because everyone, whatever their age, has a right to liberty under Article 5 of the ECHR, which protects us all from arbitrary detention.

Article 5 states that no one shall be deprived of their liberty save for the limited cases specified, which for children and young people receiving care and support for their health and social care needs would either be 'the lawful order for the purpose of educational supervision' (Article 5(1)(d)), or the 'the lawful detention of persons... of unsound mind' (Article 5(1)(e)).

Whenever a deprivation of liberty arises and in whatever setting, Article 5 will be engaged. It requires any deprivation of liberty to be 'in accordance with a procedure prescribed by law' and action must be taken to obtain a legal authority for that deprivation of liberty. Accordingly, action to seek an authorisation of a deprivation of liberty must be taken if there are any concerns that a deprivation of liberty has, or is likely to, arise.

Compliance with the requirement to seek a legal authority depends upon those engaged in the care arrangements for a child or young person being able to recognise when such arrangements might amount to a deprivation of liberty. This entails the consideration of what is meant by a deprivation of liberty and how to identify whether the care arrangements for a child or young person may amount to a deprivation of liberty.

What is meant by 'deprivation of liberty'?

The essential characteristics of a 'deprivation of liberty' are now well established. The Supreme Court has adopted the approach developed by the European Court of Human Rights (ECtHR) when considering a deprivation of liberty in the context of the provision of health and/or social care. The care arrangements for an individual (of any age) will amount to a deprivation of liberty if the following three conditions are all met:

a. the objective component of confinement in a particular restricted place for a not negligible length of time; ('the confinement condition')
b. the subjective component of lack of valid consent; ('the lack of valid consent condition')
c. the attribution of responsibility to the State ('the State responsibility condition').

This three-part test was first articulated by the ECtHR in 2005, in the case of *Storck v Germany,*[12] so the conditions are sometimes referred to as the '*Storck* limbs' or '*Storck* components'. It was adopted by the Supreme Court in 2014, in *Surrey County Council v P; Cheshire West and Chester Council v P* (commonly known as *'Cheshire West').*[13] Five years later, the Supreme Court confirmed in *Re D (A Child)* (2019)[14] that the *Storck* test also applies to those aged under 18.

A deprivation of liberty will only arise if all three of the *Storck* conditions are met. The challenge for the courts has been how to determine whether each of these conditions are satisfied.

12 (2005) 43 EHHR 96, paragraph 74.

13 [2014] UKSC 19, paragraph 37.

14 [2019] UKSC 42; paragraph 1.

An additional complexity for children and young people aged under 18 is the reality that they will be 'subject to some level of restraint'[15] by their parents (or others with parental responsibility). Accordingly, a significant question for the courts when considering cases concerning under 18-year-olds has been to what extent (if at all) the decision-making role of parents (and others with parental responsibility) is a relevant consideration to a deprivation of liberty determination.

Each of the '*Storck* components' (the confinement condition; the lack of valid consent condition and the State responsibility condition) are discussed below. The discussions highlight the significant difference in approach for determining whether a child aged under 16 is deprived of his or her liberty, compared to the approach adopted for young people aged 16 and over.

As the Law Commission's recent research paper on this issue explains, the circumstances in which a deprivation of liberty arises:

> '...is mostly determined by case law, which can be complicated and difficult to understand. This is also an area of developing law. It is not surprising, therefore that this deprivation of liberty is not as well understood as it should be.'[16]

To understand when a deprivation of liberty arises, it is necessary to consider each of the *Storck* conditions, starting with the first condition, referred to in this briefing as 'the confinement condition'.

The confinement condition

The confinement condition refers to the first of the *Storck* conditions, namely, 'the objective component of confinement in a particular restricted place for a not negligible length of time'. This is the starting point for the determination of a deprivation of liberty. It is concerned with the person's 'concrete situation',[17] meaning that it focuses on the restrictions being placed on the person's physical liberty. Such restrictions might relate to the person's choice of where to live (and who to live with), what activities to engage in, who to socialise with and when.

There is little guidance on what is meant by 'not negligible length of time' and much will depend on the circumstances of the case and in particular the nature of the confinement and its impact upon the person subject to it. For example, in *ZH v Commissioner of the Police for the Metropolis,* police officers restrained a 16-year-old autistic young man and placed him in the back of the police van for a duration of 40 minutes. This was held to amount to a deprivation of liberty. The Court of Appeal noted that the restraint was 'intense in nature' and its effects on ZH were serious.[18]

15 *Cheshire West* [2014] UKSC 19, paragraph 78 (Lord Kerr).

16 Law Commission, *Deprivation of liberty in the context of disabled children's social care. Research Paper,* September 2024, paragraph 1.7.

17 *Guzzardi v Italy* (1980) 3 EHHR 333.

18 *ZH v Commissioner of the Police for the Metropolis* [2013] EWCA Civ 69. See discussion in the Law Society, *Identifying a deprivation of liberty: a practical guide,* Chapter 3, paragraphs 3.30-3.33.

When considering the confinement condition, it is important to be aware of an area of potential confusion. As this condition concerns the person's actual situation – the restrictions being imposed on them, it is directed to what many would regard as the essence of a deprivation of liberty. Therefore, where the restrictions imposed satisfy the confinement condition, there is a tendency to refer to this as being a 'deprivation of liberty'.[19] However for a person to be deprived of their liberty for the purpose of Article 5, all three of the *Storck* conditions must be met. This point was emphasised by Sir James Munby, President of the Family Division in his careful explanation of the relevant terminology in *Re A-F (Children)*:

> 'To ensure clarity of exposition, I use the phrase 'deprivation of liberty' to describe the state of affairs where all three components of *Storck* are satisfied, that is, where there is a deprivation of liberty within the meaning of Article 5(1)… …In contrast, I use the word 'confinement' to describe the state of affairs referred to in *Storck* component (a).'[20]

a) Determining the 'confinement condition'

In *Cheshire West,* the Supreme Court held that the confinement condition would be met where the person was *'under the complete supervision and control of those caring for her and is not free to leave'.*[21] This test (commonly known as 'the acid test') is applied by the national courts when considering the care arrangements for an adult. However, the courts have recognised that it requires some modification for under 18-year-olds because supervision and control is part of normal parenting. Children and young people will ordinarily be subject to restrictions that would not be usual for adults, but equally such parental control and supervision should lessen as the child gets older.[22]

In *Re D (A Child)* the Supreme Court adopted an age-comparator approach when considering the restrictions placed on a young person who had learning disabilities and was autistic. Having noted the *Cheshire West's* acid test (which she had formulated when giving the leading judgment in *Cheshire West*), Lady Hale went on to consider how this might be applied to an under 18-year-old, given that restrictions are imposed on them by parents in the exercise of normal parental control. Lady Hale concluded that the 'crux of the matter' was to ask:

> *'Do the restrictions fall within normal parental control for a child of this age or do they not'?*

Accordingly, while the focus of attention remains the level of supervision and control, this age-comparator test reflects the role of parents in exercising control and supervision over their child, while also taking into account that such parental control and supervision diminishes as their child develops and matures. However, the courts have emphasised that such matters are fact specific. Determining whether the restrictions placed on the child or young person mean that they are 'confined' (i.e. that the *Storck* confinement condition is met) requires consideration of the particular circumstances of the case.[23]

19 See for example, Lady Hale's comment in *Re D (A Child)* [2019] UKSC 42, paragraph 7.

20 *Re A-F (Children)* [2018] EWHC 138 (Fam), paragraph 9.

21 [2019] UKSC 42; paragraph 54. See also paragraph 48.

22 See Lord Kerr's comment in *Cheshire West* [2014] UKSC 19, paragraphs 77-78, which were endorsed by Lady Hale in *Re D (A Child)* [2019] UKSC 42. See also *Re A-F (Children)* [2018] EWHC 138 (Fam) in particular paragraphs 21-24, 33 and 39.

23 See for example, *Re A-F (Children)* [2018] EWHC 138 (Fam) where Sir James Munby, President of the Family Division noted the need to 'proceed on a case-by-case basis'.

b) Applying the 'normal parental control' test

The following two points are key to determining whether the confinement condition is met:

- Comparator is a child or young person of the same age, without disabilities: When considering whether the restrictions placed on the under 18-year-old go beyond normal parental control, the comparator is a child or young person of the same age, without disabilities. [24] This was made clear by *Lady Hale in Re D (A Child):*

  > 'It follows that a mentally disabled child who is subject to a level of control beyond that which is normal for a child of his age has been confined within the meaning of article 5'.[25]

- Focus is on **what** restrictions are *in place not **why** they are needed:* the confinement condition requires consideration of the restrictions being imposed. The justification for imposing such restrictions is not relevant to this question. It is relevant to the separate matter of whether a deprivation of liberty should be authorised, but not to whether a deprivation of liberty has arisen.

  The fact that arrangements are put in place for a person's best interests and 'for the most benign of motives' is not relevant to the confinement condition.[26]

Lack of valid consent condition

The lack of consent condition is considered if the confinement condition is met. If the person is confined, then the next question is whether there is any consent to the restrictions that have been imposed. If a person is confined, but has validly consented to such restrictions, there will be no deprivation of liberty.

This condition therefore requires consideration of what it means to give valid consent. Guidance (based on case law) identifies three essential requirements for a person to be able to give consent to their care and support: sufficient information about the proposed intervention (including its purpose, nature and likely effects), the person's decision is voluntary, and they have the ability to make the decision (capacity (if aged 16 or over) or competence (if aged under 16)).[27]

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24 [2019] UKSC 42, para 41, As Lady Hale noted, the need for such an age-comparator approach had been highlighted by Lord Kerr in *Cheshire West* [2014] UKSC 19. Both Lord Kerr (in *Cheshire West)* and Sir James Munby P referred to other factors, such as 'familial background' and 'relative maturity', Lady Hale focused on age alone. All considered that the compactor is a child of the same age who is not disabled.

25 [2019] UKSC 42, paragraph 42. A different approach was adopted in *Peterborough City Council v Mother & Ors* [2024] EWHC 493 (Fam) in which Mrs Justice Lieven held that a 12-year-old girl was not deprived of her liberty given that she was incapable of leaving because of her disabilities, 'not by reason of any restraints placed on her'. As the Law Commission notes, this decision is difficult to reconcile with *Cheshire West and Re D (A Child)* (see discussion in Law Commission, *Deprivation of liberty in the context of disabled children's social care – Research Paper,* September 2024, paragraphs 1.13-1.15).

26 *Re D (A Child)* [2019] UKSC 42 paragraph 42; see also *Cheshire West* [2014] UKSC 19 paragraph 50.

27 See Department of Health, *Mental Health Act 1983: Code of Practice* (2015), paragraphs 22.34-24.37. A child's competence to consent is considered in chapter 19 (paragraphs 19.34-19.37, 19.63).

a) Assessing capacity and competence

Whether an under 18-year-old can give consent to the care arrangements that give rise to their confinement will depend on whether they have the capacity to make the decision (for those aged 16 and 17) or they are '*Gillick* competent' (for those aged under 16).

- *Young people aged 16 and 17:* Under the Mental Capacity Act (MCA) 2005, young people aged 16 and 17 will (like adults), be assumed to have capacity to make such decisions unless evidence shows otherwise.[28]
- *Children aged under 16:* In contrast to people aged 16 and over, the law assumes that under 16-year-olds are not able to make decisions for themselves unless it is determined that they are '*Gillick* competent', a term derived from the House of Lords' decision in *Gillick v West Norfolk and Wisbech Health Authority (Gillick).* In that case, the House of Lords held that children aged under 16 could consent to their own medical treatment if they have 'sufficient understanding and intelligence to make the decision'.[29]

b) Consent to confinement by a child or young person

If able and willing to do so, children and young people can consent to their confinement. If they do give consent, they will not be deprived of their liberty. This is illustrated by *Re C (A Child),*[30] in which the court found that a child aged 15 was able to consent to his confinement so that there was no deprivation of liberty. Mr Justice Keehan stated:

> '54. ...I accept the opinion of the guardian and of C's legal team that he is of sufficient understanding and intelligence to enable him to understand fully what is involved in him living at the unit and the restrictions which are imposed upon. I am satisfied, on the totality of the evidence before me, that he not only understands those matters but he also understands why they are necessary and why and how they benefit him, although he may from time to time find the pressures of living so closely a supervised and restricted life difficult to bear. He is, in my judgment, 'Gillick competent'.
>
> 55. I am wholly satisfied that C is capable, in law, of consenting to his confinement at the unit.'

a) The need for caution before relying on a child's consent

The courts have highlighted the need for careful consideration before concluding that a child is giving valid consent.

This point was raised by Lady Black in *Re T (A Child)* when considering the relevance of consent. Although recognising that a child may be 'expressing a carefully considered view', Lady Black noted 'the pressures that circumstances may place on a child to consent to a proposed arrangement' and stressed that 'an apparently balanced and free decision made by a child may be quickly revised and/or reversed'.[31]

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28 This presumption of capacity is the first of five principles of the Mental Capacity Act 2005, which apply 'for the purpose of this Act' (section 1(2)). As noted by the Law Commission in its paper, *Deprivation of liberty in the context of disabled children's social care,* the test for young people to be able to consent to their confinement is generally understood to be that of capacity under the Mental Capacity Act 2005 and this was the approach adopted by all the justices in the Supreme Court's decision in *Re D (A Child)* [2019] UKSC 40.

29 *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112. See also *Bell & Another v Tavistock* [2021] EWCA Civ 1363.

30 [2016] EWHC 3473 (Fam).

31 *Re T (A child)* [2021] UKSC 35, para 161 (Lady Black).

b) The lack of valid consent condition and the relevance of parental consent

Another question for the courts has been the relevance of the decision-making role of parents in determining whether the second *Storck* component ('the lack of valid consent condition') is met: whether parents can consent to their child's confinement so that no deprivation of liberty arises.

The position is summarised below:

- *Young people aged 16 and 17:* For this age group, the Supreme Court in *Re D (A Child)* held that parents (and others with parental responsibility) **cannot** consent to their child's confinement.[32] This means that where the confinement condition is met for a young person and that young person does not consent to their confinement (whether because they have capacity and do not agree to their confinement, or they lack the capacity to make such a decision) that young person will be deprived of their liberty (provided that the third condition (State responsibility) is met).

- *Children aged under 16:* For this age group, the courts are of the view that it is **possible** for parents to consent to their child's confinement so that their child is not deprived of his or her liberty (because parental consent means that the second *Storck* component (lack of valid consent is not met)).[33] However, as noted below, the circumstances in which parents can consent to their under 16-year-old child's confinement can raise complex questions and is an issue that continues to be explored by the courts.

c) Limitations on parental consent: an area of developing law

The following three points are relevant to the question concerning the circumstances in which it might be possible for parents (or others with parental responsibility) to consent to an under 16-year-old's confinement.

- *The child's competence:* Based on current case law, parental consent to a child's confinement appears to be limited to where the child is not '*Gillick* competent' to make decisions about their care arrangements and the decision to consent to the confinement falls within the 'scope', or 'zone', of parental responsibility.[34]

  > Although this has not been addressed specifically by the courts, the cases in which the courts have considered the relevance of parental consent have concerned children who were not competent. In addition, comments from judges concerning children's medical treatment suggest that parental consent would not be relied upon where the child is competent and does not consent to their confinement.[35]

- *Care orders:* Another limitation identified by the courts concerns children who are subject to a care order, or interim care order. The general view is that **neither** the parents **nor** the relevant local authority can consent to a child's confinement.[36]

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32 *Re D (A Child)* [2019] UKSC 42.

33 See: *Re D (A Child; deprivation of liberty)* [2015] EWHC 922; *Lincolnshire CC v TGA & Ors* [2022] EWHC 2323; *RN (Deprivation of Liberty and Parental Consent)* [2022] EWHC 2576 (Fam) and *Lancashire CC x PX & Ors* [2022] EWHC 2379 (Fam).

34 See for example *Re D (A Child; deprivation of liberty)* [2015] EWHC 922, paragraph 66.

35 *Re AB v CD* [2021] EWHC 741, paragraph 114.

36 *Re AB* (A child: deprivation of liberty) [2015] EWHC 3125 (Fam), paragraphs 26-29.

This was the position of the then President of the Family Division, Sir James Munby in *Re A-F (Children).*[37] Although, in *Re J: Local Authority consent to Deprivation of Liberty,*[38] the court held that local authorities can consent to the confinement of a child who is subject to a care order, this decision has been overruled by the Court of Appeal.[39] The Court of Appeal explains that a local authority cannot consent to a child's confinement because this would be incompatible with Article 5's purpose of protecting individuals against arbitrary detention. It would 'remove the case from Art 5, thereby avoiding the important protection, safeguards and independent authorisation by a court that would be otherwise required'.[40]

- *Factors to take into account:* To date, there has been little detailed guidance on the circumstances in which parents (and others with parental responsibility, such as special guardians)[41] can give such consent. The courts have emphasised that such cases must be considered on their own particular facts.[42] It is also clear that in considering whether the decision falls within parental decision-making powers, the parents must be acting in their child's best interests.[43]

  The Law Society's guide on deprivation of liberty suggests that the factors set out in guidance concerning the 'scope of parental responsibility' in the *Mental Health Act 1983: Code of Practice* (the Code) are relevant to the question whether parents can consent to their child's confinement.[44] The factors include the type and invasiveness of the intervention and whether the child is resisting.

  Another factor will be the level of restraint being considered. For example, in *Re Z (A Child: Deprivation of Liberty: Transition Plan) (Re Z)* the court concluded that the level of restraint that might be needed to transport a 14-year-old autistic boy from his family home to a residential school were beyond the scope of what his parents could lawfully agree.[45]

  Although not an issue in *Re Z*, the Judge also observed that 'some of the more extreme circumstances that may arise in specialist schools for children with significant behavioural problems could fall outside the boundaries of parental responsibility, whether delegated or not'.[46]

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37 [2018] EWHC 138 (Fam) at para 12(i). The judge also noted (at para 12(ii)) that 'a foster carer does not have responsibility enabling the carer to provide a valid consent for the purposes of *Storck* component (b)' i.e. the lack of valid consent condition.

38 *Re J: Local Authority consent to Deprivation of Liberty* [2024] EWHC 1690 (Fam).

39 *J v Bath and North East Somerset Council & Ors* [2025] EWCA Civ 478. The charities, Article 39 and Mind were given leave to intervene jointly. See Article 39, *Charities join forces to defend the human rights of children in care,* 15 November, 2024. The Department for Education and the Children's Commissioner also intervened. The Court of Appeal gave its decision on the day of the hearing of the appeal in February 2025. Its written judgment was published on 29th April 2025.

40 [2025] EWCA Civ 478, paragraph 50 (Sir Andrew McFarlane, President of the Family Division). See also paragraph 57 (Lady Justice King).

41 Children Act 1989, sections 14A-14F.

42 See for example *RN (Deprivation of Liberty and Parental Consent)* [2022] EWHC 2576 (Fam), paragraph 46.

43 See for example, *Lincolnshire County Council v TGA & Ors* [2022] EWHC 2323 (Fam).

44 Law Society, *Identifying a deprivation of liberty: a practical guide,* Chapter 4, paragraph 4.22. The author in her capacity as a member of the Law Society's Mental Health and Disability Committee contributed to this publication.

45 *Re Z (A Child: Deprivation of Liberty: Transition Plan)* [2020] EWHC 3038, paragraph 44.

46 *Re Z (A Child: Deprivation of Liberty: Transition Plan)* [2020] EWHC 3038, paragraph 39.

State responsibility condition

This condition will be relevant if both the confinement condition and the lack of valid consent condition are met. Its threshold is low. Not only will it be met if a public body, such as a local authority or NHS body is directly involved in the person's care, but it will also be met if a public body knows, or ought to know of the situation. This was made clear in *Re D (A Child).* Lady Hale concluded that the State (in the form of the local authority) was 'actively involved in making and funding the arrangements' for the young person concerned and had assumed statutory responsibilities for him by accommodating him under section 20 of the Children Act (CA) 1989 (which meant that he was a 'looked after child').[47]

In addition, Lady Hale considered that the State responsibility condition could be met even if a public body is not directly involved in the confinement of the person. This is because States are under a positive obligation to protect individuals' right to liberty under Article 5 of the ECHR:

> '... it is clear that the first sentence of article 5 imposes a positive obligation on the State to protect a person from interferences with liberty carried out by private persons, at least if it knew or ought to have known of this.'[48]

Given that the State responsibility question will be met if a public body is directly or indirectly involved in the person's care arrangements, the question whether such arrangements amount to a deprivation of liberty is likely to focus on determining whether the confinement condition and the lack of consent condition are met.

47 *Re D (A Child)* [2019] UKSC 42, paragraph 43.

48 *Re D (A Child)* [2019] UKSC 42, paragraph 43.

2. The role of the High Court in authorising a deprivation of liberty

As noted above, the High Court is one of four legal mechanisms for authorising an under 18's deprivation of liberty. However, there are limits on the use of the inherent jurisdiction: it should only be resorted to if none of the statutory frameworks for authorising a deprivation of liberty apply. These are: a court order under section 25 of the Children Act (CA) 1989,[49] an order of the Court of Protection under the Mental Capacity Act (MCA) 2005 and detention in hospital under the Mental Health Act (MHA) 1983).

The inherent jurisdiction cannot be used to cut across statutory schemes for authorising a deprivation of liberty. It is 'the ultimate safety net' where other legal measures are not available.[50] The Practice Direction on the inherent jurisdiction states:

> 'It is the duty of the court under its inherent jurisdiction to ensure that a child who is the subject of proceedings is protected and properly taken care of. The court may in exercising its inherent jurisdiction make an order to determine any issue in respect of a child unless limited by case law or statute'.[51]

In addition, where the application for an order authorising a child or young person's deprivation of liberty is made by a local authority, section 100 of the CA 1989 applies, which prevents the inherent jurisdiction from being used if the CA 1989 provides an alternative legal framework.[52] This means that the court must consider whether it has the jurisdiction to make a deprivation of liberty order, before it can then consider whether a deprivation of liberty order should be made.

Legal frameworks for authorising a deprivation of liberty

The lawful ways in which a child or young person can be deprived of their liberty are outlined below.[53]

a) Court order under section 25 Children Act (CA) 1989 ('Use of accommodation for restricting liberty')

Although this will change when it is amended by forthcoming legislation (the Children's Wellbeing and School's Bill -see below), currently section 25 provides for the circumstances in which a court can order that a child or young person who is being looked after by a local authority is placed in 'secure accommodation'.[54] This term means 'accommodation designed for, or having as its primary purpose, the restriction of liberty'.[55] Secure children's homes provide such accommodation.[56]

49 In Wales, see section 119 of the Social Services and Wellbeing (Wales) Act 2014.

50 *A Local Authority v EBY & Others* [2023] EWHC 2494 (Fam), paragraph 34.

51 *Practice Direction 12D – Inherent Jurisdiction (Including Wardship) Proceedings* (updated 1 December 2021).

52 See the Children Act 1989, sections 100(2) and 100(5).

53 Details on where further information can be found for each of the legal frameworks are noted below. See also: 39 Essex Chambers *Guidance Note: Deprivation of Liberty and those under 18,* February 2022.

54 See chapter 4 of *Court Order and Proceedings, For local authorities,* April 2014. The procedures for allocating a placement for the child or young person are outlined in *Re X (Secure Accommodation: Lack of Provision* [2023] EWHC 129, paragraphs 44-49. In Wales such placements are provided for under section 119 of the Social Services and Wellbeing (Wales) Act 2014.

55 *Re B Secure Accommodation Order) (Rev 1)* [2019] EWCA Civ 2025 at para 59. See also *Re D (A Child)* [2019] UKSC 42 paras 113-115 and *Re T (A Child)* [2021] UKSC 35 para 133: 'the focus should be on the accommodation itself and the purpose for which it is provided, rather than the regime in the accommodation' (Lady Black).

56 Children (Secure Accommodation) Regulations 1991 (SI 1991 No. 1505) reg 3 provides that (in England) they must be approved for such use by the Secretary of State.

The court must be satisfied that the child or young person has a history of absconding and is likely to abscond again from any other type of accommodation (and if they do so, they are 'likely to suffer serious harm'),[57] or that if they are kept in any other type of accommodation, they are likely to injure themselves or some other person.[58]

An important limit on the use of secure accommodation orders is that they cannot be made where the young person is aged 16 or over and is being accommodated by the local authority under section 20(5).[59] In addition, children aged under 13 cannot be placed in secure accommodation without the prior approval of the Secretary of State.[60]

Given the lack of placements in secure children's homes (SCHs), a local authority might be required to apply to the High Court for the authorisation of the deprivation of liberty for a child or young person who falls within the scope of section 25 but a SCH placement cannot be found. Such applications will also be required in cases where, although section 25 is applicable, the local authority considers that the child or young person's specific needs would be better met in an alternative placement.[61]

In his judgment of January 2023, *Re X (Secure Accommodation: Lack of Provision)*, Sir Andrew McFarlane, President of the Family Division, noted that of the estimated 1,000 annual deprivation of liberty applications to the High Court, many would concern under 18-year-olds who should be in secure accommodation.[62] The President expressly stated that the primary purpose of his judgment was to 'draw attention to the very substantial deficit that exists nationally in the provision of facilities for the secure accommodation of children.' As the President noted, he was reiterating the views expressed by senior judges in the previous six years and the call for 'action to address the gross lack of registered secure accommodation units'.[63]

Potential Reform: Extension to section 25 CA 1989

The Children's Wellbeing and Schools Bill, published in December 2024, includes a provision to amend section 25 of the CA 1989. Clause 10 (Use of accommodation for deprivation of liberty) makes provision for children and young people aged under 18 to be deprived of their liberty in accommodation that falls outside the definition of 'secure accommodation'.[64] It will allow under 18-year-olds to be:

> '…deprived of their liberty in accommodation that has the primary purpose of care and treatment, and where restrictions that amount to deprivation of liberty, can be imposed but it is not designed for that purpose alone'.[65]

57 Children Act 1989, section 25(1)(a).

58 Children Act 1989, section 25(1)(b).

59 Children (Secure Accommodation) Regulations 1991 (SI 1991 No. 1505); (reg 5(2))(a).

60 Children (Secure Accommodation) Regulations 1991 (SI 1991 No. 1505); (reg 4).

61 *Re T (A Child)* [2021] UKSC 35, paragraph 17.

62 *Re X (Secure Accommodation: Lack of Provision* [2023] EWHC 129 (Fam), paragraph 23. The President noted that given the lack of secure placements, some local authorities 'simply by-pass the s25 procedure and apply directly to the High Court for a [deprivation of liberty order]'.

63 *Re X (Secure Accommodation: Lack of Provision* [2023] EWHC 129 (Fam), paragraph 62. For example, concerns have also been expressed by the Supreme Court in *Re T (A Child)* [2021] UKSC 35 and the Court of Appeal in *Re B (Secure Accommodation Order) (Rev 1)* [2019] EWCA Civ 2025.

64 For further information on this measure see: Children's Wellbeing and Schools Bill: policy summary notes, January 2026.

65 Children's Wellbeing and Schools Bill – European Convention on Human Rights Memorandum, 17 December 2024.

This amendment therefore extends the scope of section 25 to provide a statutory framework for the authorisation of the deprivation of liberty of children in accommodation that is not a secure children's home. The Explanatory Notes to the Bill outline that an amended section 25 will include accommodation that is 'primarily to be used to provide care and treatment for a vulnerable, complex cohort who may need restrictions which deprive them of their liberty'.[66]

The intended effect of this legislative change (as stated in the Explanatory Notes to the Bill) is to provide an alternative statutory route to authorise the deprivation of liberty of a child in a more flexible form of accommodation. The Explanatory Notes add that this will bring 'more deprivation of liberty cases under a statutory framework via s.25 Children Act 1989, with clear criteria for access, mandatory review points and parity with SCH in terms of access to legal aid'.[67]

Like the current provision in section 25 the amendment is limited in its application. It applies to under 18-year-olds who either:

a) have a history of absconding and are likely to abscond from any other description of accommodation and if they abscond, they are likely to suffer significant harm; or

b) if they are kept in any other description of accommodation, they are likely to injure themselves or other persons.[68]

This proposed legislative change is intended to help ensure that under 18-year-olds with complex needs are provided with 'the right place to live, which offers the right level of care, and that can truly meet their needs and keep them safe'.[69]

To ensure compliance with the ECHR, the courts would need to be satisfied that the deprivation of liberty was justified under Article 5(1) (e.g. Article 5(1)(d) 'the lawful order for the purpose of educational supervision').[70]

66 Children's Wellbeing and Schools Bill, Explanatory Notes (Bill 151-EN) referring to the Bill, as introduced in the House of Commons on 17 December 2024, p.15, paragraph 16.

67 Children's Wellbeing and Schools Bill, Explanatory Notes (Bill 151-EN) referring to the Bill, as introduced in the House of Commons on 17 December 2024, p.16, paragraph 18.

68 See clause 11(3) of the Children's Wellbeing and Schools Bill (HL Bill 84)

69 Department for Education, *Keeping Children Safe, Helping Families Thrive, Breaking down barriers to opportunity,* November 2024, p.21. The Explanatory Notes to the Children's Wellbeing and Schools Bill (Bill 151-EN), p.16, paragraph 17 state:

"Currently, the only statutory framework for depriving a child of their liberty on welfare grounds (outside other relevant legal frameworks such as in relation to mental health) is via section 25 of the Children Act 1989. This power enables a child to be placed or kept in accommodation provided for the purpose of restricting liberty (a SCH). A core feature of a SCH is that it should be designed for, or has as its primary purpose, prevention of a child from absconding or causing harm to his/herself or others. Other, highly therapeutic accommodation designed for a child would have as its primary purpose the care and/or treatment of the child, as opposed to prevention of absconding or harm, and so cannot currently be used to deprive a child of their liberty via section 25 of the Children Act 1989."

70 Article 5 permits a deprivation liberty but only in the specified cases listed in Article 5(1) and 'in accordance with a procedure prescribed by law'. See commentary in 39 Essex Chambers *Children's Capacity,* February 2025, pp. 3-5.

b) An order of the Court of Protection (Mental Capacity Act 2005)

The Court of Protection (CoP) can authorise a deprivation of liberty in any setting.[71] As noted in *Re NRA & Ors,* the decision whether to authorise a deprivation of liberty 'is a best interests test, namely is the care package the least restrictive available option'.[72]

Regulations issued under the MCA 2005 provide for the transfer of proceedings concerning young people aged 16 and 17 from, or to, the Court of Protection where such a transfer is considered to be 'just and convenient' in all the circumstances.[73] The *Revised National Listing Protocol for applications that seek Deprivation of Liberty Orders relating to children under the inherent jurisdiction* (the 'National DoL List') highlights the need to transfer the case from the High Court to the Court of Protection where there is reason to believe that the young person 'may lack capacity and would be likely to be transferred to the Court of Protection at the age of 18 years'.[74]

In relation to deprivation of liberty, the MCA 2005 is only relevant to individuals aged 16 and over who lack the capacity to make decisions about their care or treatment arrangements. Accordingly, this legal mechanism for authorising a deprivation of liberty is not applicable to young people who have capacity to make such decisions, nor to children aged under 16 (irrespective of their ability to make such decisions (i.e. whether or not they are '*Gillick* competent')).

Potential Reform: Liberty Protection Safeguards

The Mental Capacity (Amendment) Act 2019 was passed to replace the Deprivation of Liberty Safeguards (an administrative scheme within the Mental Capacity Act 2005) with the Liberty Protection Safeguards (LPS). The implementation of the LPS was paused by the previous government.[75] If implemented, LPS would apply to individuals aged 16 and over who lack the capacity to consent to arrangements for their care or treatment where such arrangements amount to a deprivation of liberty. The current government announced in October 2025 that they intend to consult in the first half of 2026 on introducing the LPS.[76]

71 The authority for making such an order is set out in sections 4A and 16(2) and Schedule 1A of the Mental Capacity Act 2005.

72 *Re NRA & Ors* [2015] EWCOP 59, paragraph 41 (i). See also *Re KL (A Minor: deprivation of liberty)* [2022] EWCOP 24, which considers the procedures involved where the application for a deprivation of liberty order is made in relation to young people aged 16 or 17.

73 Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 (SI 2007/1899), paras 2 and 3.

74 *Revised National Listing Protocol for applications that seek Deprivation of Liberty Orders relating to children under the inherent jurisdiction,* (October 11, 2023) paragraph 7). See also, *Practice Guidance in Respect of Transition of Matters From the National DoL List to the Court of Protection,* The President of the Family Division, January 2025.

75 In a letter dated 5 April 2023, the then Minister of State for Care (Department of Health & Social Care), Helen Whately stated that 'the Government has decided to delay the implementation of the LPS beyond the life of this Parliament'.

76 www.gov.uk/government/news/improved-safeguarding-and-protections-for-vulnerable-people

c) Detention in hospital (Mental Health Act 1983)

The Mental Health Act (MHA) 1983 provides for the circumstances in which individuals (of any age) can be compulsorily admitted to hospital and treated for their mental disorder.

The powers of detention under the MHA 1983 will only be relevant to children and young people who are considered to require a period of inpatient psychiatric treatment and otherwise meet the criteria for detention under the MHA 1983.[77] Where the MHA 1983 is considered not to apply, for example because the child or young person does not have a mental disorder,[78] (or otherwise does not meet the criteria for detention under this Act), or this intervention is not considered to be an appropriate option, the High Court may be asked to authorise the child or young person's deprivation of liberty.

There are also cases in which the child or young person has mental health needs, but children and young peoples' mental health services have concluded that inpatient psychiatric care (often referred to as 'Tier 4 CAMHS provision') would not be appropriate for that child or young person.[79] Depending on the circumstances of the case, the High Court may be asked to consider whether the child or young person is being deprived of their liberty, and if so, authorise that deprivation of liberty in a hospital (while an alternative placement is being found),[80] or in a community setting.[81]

Although holding that there is no power to require the provision of an inpatient bed for a child or young person,[82] the courts have in some cases asked the relevant NHS bodies to reconsider the decision not to offer a bed[83] or have arranged for a second opinion to consider the child's 'overall mental health care and direction of that care'.[84]

Potential Reform: Detention criteria under the MHA 1983

The Mental Health Bill [HL], published in November 2024 received Royal Assent in December 2025 and became the Mental Health Act 2025. The Act, sets out extensive amendments to the MHA 1983, including the criteria for detention in hospital for treatment for mental disorder (section 3).[85] Section 3 (Application of the Mental Health Act 1983: autism and learning disability) removes people with a learning disability and autistic people (of any age) from the scope of the powers of detention under section 3 of the MHA 1983. The effect of such an amendment would be that it will only be possible for people with a learning disability and autistic people (including those aged under 18) to be detained in hospital for treatment for mental disorder under section 3 if 'they have a co-occurring mental disorder which is not learning disability or autism' (and the rest of the criteria for detention under this section are met).[86]

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77 Guidance on the application of the MHA 1983 is provided in the Mental Health Act 1983: Code of Practice (Department of Health, 2015). See in particular Chapter 14 (Applications for detention in hospital) and Chapter 19 (Children and young people under the age of 18).

78 *Wigan BC v Y (Refusal to Authorise Deprivation of Liberty)* [2021] EWHC 1982 (Fam) paragraph 2. Mental Health Act 1983, section 1(2) defines 'mental disorder' as 'any disorder or disability of the mind'.

79 *Blackpool CC v HT* [2022] EWHC 1480 (Fam).

80 *Re D (A Child)(Deprivation of Liberty)* [2015] EWHC 922 (Fam).

81 *Blackpool BC v HT* [2022] EWHC 1480 (Fam).

82 See for example: *Blackpool BC v HT* [2022] EWHC 1480 and *Lancashire CC v Claire X* [2023] EWHC 2667.

83 *Re MK: Deprivation of Liberty and Tier 4 Beds* [2024] EWHC 1553. See also *Re X (A Child) (no 3)* [2017] EWHC 2026.

84 *Lancashire CC v X* [2023] EWHC 2667.

85 The Bill is now in the House of Commons (Bill 225 (2024-25 (as brought from the House of Lords).

86 Mental Health Bill [HL] Explanatory Notes, 6 November 2024, paragraph 34.

Concerns have been expressed that rather than preventing their admission, this amendment could lead to people with a learning disability and autistic people, being deprived of their liberty in hospital under alternative legal frameworks, such as under the Mental Capacity Act 2005.[87] In the case of under 16s, the alternative framework might be a deprivation of liberty order under the inherent jurisdiction of the High Court, which is considered next.

d) Inherent Jurisdiction: Where the statutory frameworks for deprivation of liberty do not apply

For children aged under 16 who do not fall within the statutory test for a placement in secure accommodation under section 25 of the CA 1989 (or where they do but such a placement is not available), and do not require admission to hospital for inpatient psychiatric care under the MHA 1983, the only legal mechanism for authorising their deprivation of liberty has been through the inherent jurisdiction of the High Court. (However, as noted above, the Children's Wellbeing and Schools Bill will extend the scope of section 25).

Similarly, the inherent jurisdiction of the High Court is currently the only legal mechanism available to authorise the deprivation of young people aged 16 and 17 who have capacity to make decisions about their care arrangements (so the MCA 2005 does not apply) and whose proposed placement is neither secure accommodation nor hospital admission for inpatient psychiatric care (so neither section 25 of the CA 1989 nor the MHA 1983 apply).[88]

The procedure for making an application to the High Court is set out in the Practice Guidance, *Revised National Listing Protocol of applications that seek Deprivation of Liberty Orders relating to children under the inherent jurisdiction* ('National DoL List').[89]

Key considerations for the court when considering whether to authorise a child or young person's deprivation of liberty will be whether the restrictions are 'necessary and proportionate' and are in the child or young person's best interests.[90] For example, in *Re J (Deprivation of Liberty: Hospital),* Mr Justice Poole observed that very often the court is told that there is only one place where the child can be accommodated and that the court's role is very limited in that it cannot direct that placements are made available, nor inspect potential placements, nor oversee care regimes. Nonetheless he added:

> '…even where there are no other placement options, the court does not merely provide a rubber stamp for the restrictions sought, and there are decisions to be made about the extent of the restrictions are necessary and proportionate and in the child's best interests'.[91]

87 HC 696, HL Paper 128, Joint Committee on the Draft Mental Health Bill, *Draft Mental Health Bill 2022,* paragraph 152.

88 See for example, *EBY (A Child) (Deprivation of Liberty Order: Jurisdiction) (17-year-old)* [2023] EWHC 2494.

89 This guidance, which was published in October 2023, is referred to as the 'National DoL List' ('NDL'). It replaced guidance known as 'the National DoL Court' (see: www.judiciary.uk/guidance-and-resources/revised-national-listing-protocol-for-applications-that-seek-deprivation-of-liberty-orders-relating-to-children-under-the-inherent-jurisdiction) See also *Re A-F (Children No 2)* [2018] EWHC 2129 which sets out the procedure to be followed when making an application to the court.

90 See for example, *Blackpool BC v HT (A Minor) & Ors* [2022] EWHC 1480, paragraph 49.

91 *Re J (Deprivation of Liberty: Hospital)* [2022] EWFC 121, paragraph 36.

In *Re T (A Child),* Lady Black noted that the court will not make a deprivation of liberty order 'without considerable exploration of the circumstances to ensure that the proposal is appropriate' and the court must be 'provided with evidence describing the nature of the proposed regime and justifying why the proposed arrangements are necessary and proportionate in meeting the child's welfare needs'. She added that the court 'will want to know the child's views on the matter'.[92]

In some cases, the courts have refused to authorise a deprivation of liberty on the basis that the arrangements for the child or young person were so inappropriate that it clearly was not in the child or young person's best interests to do so.[93]

The recent case, *Re EM (Deprivation of Liberty, Care Planning & Costs) (Re EM)*[94] HHJ Burrows highlighted the need for both clarity on language used when deprivation of liberty orders are made and an understanding of the effect of such orders. While noting that such orders 'could be called a DoL or DoLs order' the children and young people subject to those orders, are 'not on a DOLS'. The term 'DOLS' is used as an abbreviation of 'Deprivation of Liberty Safeguards', which refer to a legal mechanism for authorising a deprivation of liberty under the Mental Capacity Act (MCA) 2005 that only apply to adults.[95] The Judge also expressed concern that DoL orders were sometimes seen as being mandatory, 'like a prison sentence', whereas they are permissive. [96]

That a deprivation of liberty order **does not require** the child or young person to be deprived of their liberty was also emphasised in *Re F (A Child) (Care Order: Deprivation of Liberty).* Noting that the restrictions authorised 'are permissive only and are not a requirement', the Judge asked that this be explained to the children's home in which the child, referred to as 'Fiona' was to be placed. He added that it 'would not be right for Fiona to be subject to a greater degree of control or supervision than is strictly necessary to protect her from harm' simply because of the order authorising her deprivation of liberty.[97]

92 *Re T (A Child)* [2021] UKSC 35, paragraph 155.

93 See for example, *Wigan BC v Y (Refusal to Authorise Deprivation of Liberty)* [2021] EWHC 1982 (Fam); *A county council v A Mother & Ors (Refusal to make a DOLS order)* [2021] EWHC 3303 and *An NHS Trust v ST (Refusal of Deprivation of Liberty)* [2022] EWHC 719.

94 [2024] EWCOP 76

95 *Re EM (Deprivation of Liberty, Care Planning & Costs)* [2024] EWCOP 76, paragraph 46. In *Re J: Local Authority consent to Deprivation of Liberty* [2024] EWHC 1690 (paragraph 1) the Judge referred to a 'Deprivation of Liberty Order ('DoLs order'). In *EBY (A Child) (Deprivation of Liberty Order: Jurisdiction) (17-year-old)* [2023] EWHC 2494, the Judge refers to the order as a 'DOLO'.

96 *Re EM (Deprivation of Liberty, Care Planning & Costs)* [2024] EWCOP 76, paragraph 50.

97 *F (A Child) (Care Order: Deprivation of Liberty)* [2021] EWHC 3527 paragraph 43.

3. Placements in settings other than registered children's homes

A significant question for the courts has been whether it is permissible to authorise the deprivation of liberty of under 18-year-olds in settings that are not registered with Ofsted as a children's home but should be, and as a result they do not benefit from the safeguards of regulation and inspection.

This is another area in which there has been some confusion in terminology. The courts have in some cases referred to such placements as being 'unregistered' and/or 'unregulated'.[98] Although these terms are often used interchangeably, as both the Supreme Court[99] and the Court of Appeal[100] have made clear, they are not the same:

- **Unregistered placement:** This term refers to a placement in an establishment that falls within the definition of 'children's home' and therefore should be registered with Ofsted, but despite this requirement to register,[101] has not done so.
- **Unregulated placement:** This term refers to placements for which there is no requirement to register with Ofsted on the basis that it does not fall within the definition of a children's home: 'for example because it cannot be said that it '"provides care and accommodation wholly or mainly for children"'.[102]

This distinction is important because where an establishment 'provides care and accommodation wholly or mainly for children',[103] it will be a children's home. If it is a children's home 'it is undoubtedly "regulated", even if it is not registered'.[104] Furthermore, it has been suggested that although there is no definition of 'care' in this context, where a local authority is seeking a court authorisation for a child or young person's deprivation of liberty, it is 'hard to contemplate' that such a placement 'does not involve the child receiving "care" for the purposes of the definition of "a children's home"'.[105]

98 See for example, *Dorset Council v E (Unregulated Placement: Lack of Secure Placement)* [2020] EWHC 1098 (Fam) and *Re H (Interim Care: Scottish Residential Placement)* (in which the court noted that the 15-year-old boy concerned had been 'placed in two consecutive short-term unregulated placements, one of which was a caravan' (paragraph 2).

99 *Re T (A Child)* [2021] UKSC 35, paragraph 58 (Lady Black noting that this has caused 'some unfortunate confusion'.

100 *A Mother v Derby City Council & Anor* [2021] EWCA Civ 186, paragraphs 19 and 20.

101 Care Standards Act 2000, section 11(1).

102 *Re T (A Child)* [2021] UKSC 35, paragraph 58.

103 Care Standards Act 2000, section 1(2).

104 *Re T (A Child)* [2021] UKSC 35, paragraph 58.

105 *A Mother v Derby City Council & Anor* [2021] EWCA Civ 1867, paragraph 15 (Sir Andrew McFarlane President of the Family Division: simply noting that such submissions were made). See also the President's guidance: *Practice Guidance: Placements in unregistered children's homes in England or unregistered care homes in Wales,* November 2019, paragraph 16 which notes that registration may not be required because the provision is unregulated (e.g. it is supported living) but adds that if care rather than support is being provided 'then the provision is likely to require registration as a children's home'.

Although expressing serious concerns about the failings in the provision of care that present such a dilemma, the Supreme Court held in *Re T (A Child)* that a deprivation of liberty can be authorised in an unregistered children's home.[106] Lady Black highlighted that there was a need to balance the consequences of making such orders, for example, managing a children's home that is not registered is a criminal offence,[107] against the consequences of not authorising the deprivation of liberty. In addition to noting the extensive duties on local authorities to protect children and young people, Lady Black stated that ultimately, she recognised that: '... there are cases in which there is absolutely no alternative, and where the child (or someone else) is likely to come to grave harm if the court does not act.'[108]

In summary, the deprivation of liberty arising from a child's placement in an unregistered children's home can be authorised under the inherent jurisdiction 'where imperative conditions of necessity justify doing so and there is no alternative available'.[109]

Revision of the President's Practice Direction

Before concluding that the inherent jurisdiction could be exercised to authorise a deprivation of liberty in placements falling outside the regulatory frameworks in *Re T (A Child*), Lady Black considered the range of procedural safeguards that would apply in such cases. This included the President of Family Division's Practice Guidance which set out the actions to be taken by the applicant and the High Court when an application was made for a deprivation of liberty order relating to an unregistered children's home.[110]

Significantly, the Practice Guidance required the court to monitor the process for seeking registration and keep the case under review while the registration was being processed. Lady Black regarded this Practice Guidance as an important contribution to 'the procedural protection for a child'.[111] However, this guidance has been replaced by the *Revised Practice Guidance on the Court's approach to unregistered placements,* which reduces the role of court considerably. It notes that the monitoring requirements under the previous Practice Guidance had placed considerable burdens on the Court system and that it is not a function of the court 'to become a regulatory body or the overseer of the regulatory process'.[112]

The revised Practice Guidance states that the Court should enquire into the registration status of the proposed placement and if it is unregistered, the court 'should enquire as to why the local authority considers an unregistered placement is in the best interests of the child'. The guidance adds that the court 'may order the local authority to inform Ofsted/CIW within seven days if it is placing the child in an unregistered placement'.

106 *Re T (A Child)* [2021] UKSC 35. Lady Black noted that the shortage of provision provided the background to this case. Lord Stephens noted that the context to the case was 'the enduring well-known scandal of the disgraceful and utterly shaming lack of provision for children who require approved secure accommodation'.

107 Care Standards Act 2000, section 11(1).

108 *Re T (A Child)* [2021] UKSC 35, paragraph 145.

109 *A Mother v Derby City Council & Anor* [2021] EWCA Civ 1867, paragraph 83. The court concluded that the position taken by the Supreme Court in *Re T (A Child)* was unaffected by subsequent regulations (*Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021* (SI 2021/161) placing restrictions on the type of accommodation in which local authorities can place children aged under 16 (see the amended *Care Planning, Placement and Case Review (England) (Amendment) Regulations 2010* (SI No.959) reg. 27A)

110 Sir Andrew McFarlane, President of the Family Division, *Practice Guidance: Placements in unregistered children's homes in England or unregistered care homes in Wales,* November 2019, (an addendum to this guidance was issued in December 2020). Paragraph 16 covers the question on the need to register, noting that if care is being provided, this is likely to require registration as a children's home.

111 *Re T (A Child)* [2021 UKSC 35, paragraph 147

112 Courts and Tribunals Judiciary, October 11, 2023.

Conclusion

This briefing has considered three key areas: determining a deprivation of liberty; the role of the High Court in authorising a deprivation of liberty and the court's approach to placements settings other than registered children's homes.

Such matters will be of central importance to those responsible for the care and support given to children and young people whose highly complex needs, such as significant mental distress, require that their care arrangements include restrictions on their personal liberty (including, in some cases, the use of physical and/or chemical restraint).

Key points relevant to each of the three areas are set out below:

1) Determining a Deprivation of Liberty

Those involved in the provision of care and support to children and young people must have a good understanding of the circumstances which may give rise to a deprivation of liberty. This will require keeping abreast of case law in this area, as well as any changes to relevant legislation.

As outlined above, the legislative frameworks for authorising a child or young person's deprivation of liberty are due to be subject to significant reform. The Children's Wellbeing and Schools Bill currently being considered by Parliament includes amendments to section 25 of the Children Act 1989. When they come into force, provisions of the Mental Health Act 2025 will amend the detention criteria for admission to hospital. Furthermore, the Government has committed to introducing a consultation on the Liberty Protection Safeguards (LPS), as set out in the Mental Capacity (Amendment) Act 2019), in 2026. The LPS will be relevant to young people aged 16 and over who lack the capacity to make decisions about their care arrangements.

2) The role of the High Court in authorising a deprivation of liberty

The High Court has played an important role in this area given the increase in numbers of applications seeking a deprivation of liberty order under the inherent jurisdiction.

Cases coming before the High Court include cases where the child or young person meets the criteria for placement in 'secure accommodation' (section 25 of the Children Act 1989), but a placement cannot be found or where the local authority considers that due to the specific needs of the child or young person, an alternative placement is required.

However, the types of cases before the court are not limited to such cases. There are also cases concerning children and young people with complex mental health needs for whom admission to Tier 4 inpatient provision is deemed to be inappropriate. As noted, in *Re X (A Child: Deprivation of Liberty: Lack of Placement),* there are many children and young people who 'do not easily fit the criteria of established services'.[113]

113 *Re X (A Child: Deprivation of Liberty: Lack of Placement)* [2023] EWHC 3416 (Fam).

It is hoped that the proposed changes to section 25 of the CA 1989 (currently being considered by Parliament in the Children's Wellbeing and Schools Bill) together with the non-legislative elements of the Government's programme, outlined in *Keeping Children Safe, Helping Families Thrive* to support the delivery of specialist care and accommodation for children and young people with complex needs will address such concerns.[114]

3) Placements in settings other than registered children's homes

The courts have expressed significant anxieties about the inadequacy of provision for children and young people with complex needs, particularly in cases where the lack of alternative placements, have necessitated the authorisation of a deprivation of liberty in 'unregistered children's homes'.[115]

It is therefore of some concern that the President of the Family Division's amended guidance (*Revised Practice Guidance on the Court's approach to unregistered placements*), reduces the monitoring and review role of the courts when the child or young person's placement is not registered as a children's home. However, as the Practice Guidance notes, this is not the function of the court. As noted above, at least some of the cases currently falling within the remit of the High Court would in the future be covered by the statutory framework of the amended section 25 of the CA 1989.

114 Department for Education, *Keeping Children Safe, Helping Families Thrive, Breaking down barriers to opportunity,* November 2024, p.21.

115 *Re T (A Child)* [2021] UKSC 35.

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