Law Commission
Reforming the law

Deprivation of liberty in the context of disabled children's social care

Research Paper

September 2024

INTRODUCTION

1.1 We are publishing this research paper on deprivation of liberty as part of our project addressing the law relating to social care for disabled children.[1] The terms of reference for that project do not include deprivation of liberty or secure accommodation of disabled children.[2]

1.2 We are, however, aware from both our pre-consultation engagement on our project and from the work of the Children's Commissioner, which we discuss at paragraph 1.31 below that there remains a widespread lack of knowledge of what deprivation of liberty means in the context of disabled children. This is problematic because, for the reasons we set out below, local authorities discharging their social care obligations to disabled children may regularly be either directly or indirectly responsible for situations where such children are deprived of their liberty.

1.3 We are therefore publishing this stand-alone research paper so that readers of the consultation paper can understand the context.

DEPRIVATION OF LIBERTY

1.4 When we talk about deprivation of liberty, we are primarily talking about the right to liberty protected by article 5 of the European Convention on Human Rights.[3] Local authorities as public bodies are bound by section 6 of the Human Rights Act 1998, which makes it unlawful for them to act in a way incompatible with a right protected under the European Convention on Human Rights.

1.5 The relevant parts of article 5 for our purposes are the following:[4]

> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
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> ...
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> > (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
> >
> > (e) the lawful detention of persons … of unsound mind;

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1 For more details of the project, see https://lawcom.gov.uk/project/disabled-childrens-social-care/. References in this research paper to "our project" and the consultation paper" and are therefore to that project and the consultation paper published as part of that project unless otherwise specified.

2 At the request of the then-Department of Health, we examined and made recommendations on the law relating to deprivation of liberty of those aged 16 and over with cognitive impairments in our report Mental Capacity and Deprivation of Liberty (2017) Law Com No 372. Our recommendations were implemented in somewhat different form in the Mental Capacity (Amendment) Act 2019, which has not yet been brought into force.

3 We address two further relevant rights to liberty in the last section of this research paper.

4 "His" appears in the original text, but the protections of the Convention apply to everyone.

…

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

1.6 There are therefore two key aspects for local authorities:

(1) Recognising when a disabled child is deprived of their liberty.

(2) Understanding what they should then do to secure authorisation of that deprivation of liberty.

1.7 Determining when a disabled child is deprived of their liberty is complex. It often relies on the specific circumstances. It is mostly determined by case law, which can be complicated and difficult to understand. This is also a developing area of the law. It is not surprising, therefore, that this deprivation of liberty not as well as understood as it should be. Our intention in setting out this research paper is to provide clarification of this complex area of the law.

WHAT DOES IT MEAN TO BE DEPRIVED OF LIBERTY?

1.8 None of the statutes that apply to the assessment and meeting of needs of disabled children addresses what it means to be deprived of liberty.[5] Rather, this is something that has been determined by the courts. The Supreme Court has given two decisions in which it has set out conclusively what it means in the law of England and Wales to be deprived of liberty in the context of the delivery of social care. These decisions are *P v Cheshire West and Chester Council*[6] (*Cheshire West*) and *Re D (A Child)*[7] (*Re D*). Both provide insight into when a disabled person is deprived of their liberty, as well as the approach to assessing whether a child is deprived of their liberty. Consequently, they are particularly relevant to an understanding of deprivation of liberty of disabled children.

1.9 In *Cheshire West*, the Supreme Court made it clear that a person is deprived of liberty for the purposes of article 5 of the European Convention on Human Rights where three elements are satisfied. These three elements are derived from the case law of the European Court of Human Rights, and in particular the case of *Storck v Germany*:[8]

(1) the "objective element," in other words that the person is confined for more than a negligible period;

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5 This section draws on N Allen, A Ruck Keene, A Kelly, S Broach and V Butler-Cole, *Guidance Note: Deprivation of Liberty and those under 18* (January 2024) https://www.39essex.com/information-hub/insight/new-39-essex-guidance-note-deprivations-liberty-those-under-18.

6 *P v Cheshire West and Chester Council* [2014] UKSC 19, [2014] AC 896.

7 *Re D (A Child)* [2019] UKSC 42, [2019] PTSR 1816.

8 *Storck v Germany* (2006) 43 EHRR 96 (App No 61603/00).

(2) the "subjective element," in other words that there is no valid consent to that confinement; and

(3) that the state is responsible, either directly or indirectly for that confinement

1.10 It is also particularly important to emphasise the distinction between the question of whether a person is deprived of their liberty and the question of why that person is deprived of their liberty. A person may be deprived of their liberty even if this deprivation arises because of the nature of their disability. As Lady Hale emphasised when giving the lead judgment for the majority in *Cheshire West*:

> what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage.[9]

(1) Confinement: the objective element

1.11 As well as difficulties that arise with assessing whether a disabled person is confined, problems also arise when thinking about the meaning of confinement when applied to children. The youngest of children remain in the control (or what has been described in older cases as the custody[10]) of those with parental responsibility. As children mature, the "dwindling right" of parental responsibility tends to fade from that right of control to, as they approach adulthood, "little more than advice".[11] The consequence of this is that a nuanced comparator test is used to determine whether a child is confined for Article 5 purposes. This test was set out by Lord Kerr in *Cheshire West*[12] and refined by Lady Hale in *Re D*.[13] The question is whether the child is subject to a level of control which is normal for a child of their age. The greater the divergence, the more likely those arrangements amount to confinement. In *Re A-F (Children),*[14] Sir James Munby, then President of the Family Division, laid down what he described as being a "rule of thumb" that:

> (i) a child aged 10, even if under pretty constant supervision, is unlikely to be "confined" for the purpose of *Storck* component (1);
>
> (ii) a child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion; and

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9 *Cheshire West* at [46].

10 See the discussion in *Re D* at [21] to [23] by Lady Hale.

11 *Hewer v Bryant* [1970] 1 QB 357 at 369 by Lord Denning.

12 *Cheshire West* at [77]-[79].

13 *Re D* at [42].

14 *Re A-F (Children)* [2018] EWHC 138 (Fam).

(iii) once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.[15]

1.12 Sir James Munby continued that "all must depend upon the circumstances of the particular case and upon the identification by the judge in the particular case of the attributes of the relevant comparator as described by Lord Kerr [in *Cheshire West*]".[16] We note, however, that *Re A-F* was decided before the judgment in *Re D*, when Lord Kerr's test was further refined so as to focus on the age of the child, rather than any other attributes. The potential for modifying the test depending upon factors other than age would therefore seem to be more limited than Sir James may have suggested.

1.13 One more recent decision that we need to note in this context is that of *Peterborough City Council v Mother & Ors*.[17] In this case, Mrs Justice Lieven considered the position of a 12-year-old girl with profound disabilities, who was (on the evidence) said to be incapable either physically of leaving the place she was being cared for, or of communicating in any form. Mrs Justice Lieven considered that the girl in question was not to be considered to be deprived of her liberty because the reason she could not leave was:

> her profound disabilities, not any action of the State, whether by restraining her or by failing to meet the State's positive obligations to enable her to leave.[18]

1.14 The approach in this case is difficult to reconcile with the decisions in *Cheshire West* (which Mrs Justice Lieven referred to in her judgment) and *Re D* (which she did not). The Supreme Court in *Cheshire West* proceeded on the basis that a situation where the person was confined in consequence of their own disabilities could still amount to a deprivation of liberty. *Re D* applied that logic to children of 16 and above. There is nothing to suggest that the circumstances of the girl in the *Peterborough* case would change when she turned 16. At that point, *Cheshire West* and *Re D* would suggest that she was deprived of her liberty; it is not easy to identify a reason why she should not be considered to be deprived of her liberty before that age. It also does not appear that Mrs Justice Lieven had cited to her the Court of Appeal's decision in *Rochdale Metropolitan Borough Council v KW*,[19] which concerned the situation where a person is physically unable to move. In that case, Mr Justice Mostyn had taken the view that the woman concerned was not "in any realistic way being constrained from exercising the freedom to leave, in the required sense, for the essential reason that she does not have the physical or mental ability to exercise that freedom."[20] An appeal against his decision was allowed by consent. Mr Justice Mostyn then sought to reconsider the question. On a further appeal, the Court of Appeal made clear that, in endorsing the first consent order, it had necessarily been deciding that the woman was deprived of

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15 *Re A-F (Children)* [2018] EWHC 138 (Fam) at [43].

16 *Re A-F (Children)* [2018] EWHC 138 (Fam) at [43].

17 *Peterborough City Council v Mother & Ors* [2024] EWHC 493 (Fam).

18 *Peterborough City Council v Mother & Ors* [2024] EWHC 493 (Fam) at [35].

19 *Rochdale Metropolitan Borough Council v KW* [2015] EWCA Civ 1054, [2016] 2 All ER 181. It appears that this may have been because counsel before her did not identify the case: see *Peterborough City Council v Mother & Ors* [2024] EWHC 493 (Fam) at [34].

20 *Rochdale Metropolitan Borough Council v KW* [2014] EWCOP 45 at [25].

her liberty, and in doing so was applying the ratio of the Supreme Court in *Cheshire West*.[21]

1.15 The current law is best understood, therefore, as recognising that a disabled child could be deprived of their liberty even in those circumstances where their disabilities are so profound that they are incapable of leaving a place in which they are confined.

(2) The subjective element

1.16 If a child is confined, the next question is whether they or (in some cases) someone else has consented to that confinement. If they have, there is no deprivation of liberty.

(i) Consent of the confined child

1.17 There is no statutory test for whether a child can consent to their own confinement:

(1) In respect of children under 16, the test is widely understood to be that of *Gillick* competence,[22] after the decision of the House of Lords in *Gillick v West Norfolk and Wisbech Health Authority*.[23]

(2) In respect of children aged 16 or over, the test is generally understood to be that of mental capacity under the Mental Capacity Act 2005. In *Re D*, all the Supreme Court justices proceeded on this basis.[24]

1.18 The courts have, however, made clear that caution must be exercised in relying upon the consent of a child. In the context of the exercise of the High Court's inherent jurisdiction, the Supreme Court has held that the child's consent is not determinative, but rather forms part of the court's evaluation as to whether an order should be made.[25]

(ii) Consent of the parent(s) to a child's confinement

1.19 For those under 16 whose arrangements amount to confinement, the child's parent(s) can provide consent if that is an appropriate exercise of parental responsibility.[26] There is a complicated technical question as to whether the parent is consenting for the child so that the confinement is not to be seen as a deprivation of liberty, or whether the parent is in some way authorising the deprivation of liberty. Either way, the important point is that there is no need for any public body to seek formal authority so as to comply with their obligations under section 6 of the Human Rights Act 1998.

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21 *Rochdale Metropolitan Borough Council v KW* [2015] EWCA Civ 1054, [2016] 2 All ER 181 at [18] and [31] by the Master of the Rolls giving the judgment of the court.

22 *A Local Authority v D and others* [2016] EWHC 3473 (Fam), [2017] 2 FLR 875.

23 *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112.

24 See Lady Hale (with whom Lady Black and Lady Arden agreed) at [26(iii)] and [49], and Lord Carnwath (with whom Lord Lloyd-Jones agreed) at [23].

25 *Re T (A child)* [2021] UKSC 35, [2022] AC 723 at [162] by Lady Black.

26 *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142.

1.20 A key factor in determining whether giving consent to their child's confinement falls within the proper exercise of parental responsibility[27] will be whether the parent exercising that responsibility is acting in their child's best interests.[28] This means that the relevant state body must have:

(1) identified that the child is confined; and

(2) considered whether the parent is properly exercising their parental responsibility so as to consent to or otherwise authorise that confinement.

1.21 In *Re D*, the Supreme Court made clear that the ability of a parent to consent to the confinement of their child stops when the child is aged 16. This is the case even if the child lacks the capacity to consent. Lady Hale explained in *Re D* why it was not within the scope of parental responsibility for his parents to consent to the placement which deprived him of his liberty:

> Although there is no doubt that they, and indeed everyone else involved, had D's best interests at heart, we cannot ignore the possibility, nay even the probability, that this will not always be the case. That is why there are safeguards required by article 5. Without such safeguards, there is no way of ensuring that those with parental responsibility exercise it in the best interests of the child.[29]

(iii) Children subject to care orders / in foster placements

1.22 If a child is subject to a care order (whether interim or final) it is generally understood neither the local authority nor a parent can exercise their parental responsibility in such a way as to provide a valid consent so as to prevent a confinement being seen as a deprivation of liberty.[30] Unless the child themselves is able to and does consent to the confinement, authority will have to be sought for the resulting deprivation of liberty. The courts have also held that a foster carer does not have parental responsibility enabling them to give a valid consent for these purposes.[31]

(3) State responsibility

1.23 The state can be responsible either directly or indirectly for the confinement of a child. Direct responsibility arises where the state is actively involved in making and funding the arrangements, for instance by discharging functions under section 17 of the Children Act 1989. Indirect responsibility arises where the state knows or ought to know that someone is confined without valid consent. This reflects the positive

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27 See the Glossary in our consultation paper for more on "parental responsibility".

28 *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142 at [58] by Keehan J and *Lincolnshire County Council v TGA and others* [2022] EWHC 2323 (Fam), [2023] Fam 59 at [58] by Lieven J.

29 *Re D* at [49].

30 *Re A-F (Children)* [2018] EWHC 138 (Fam) at [12(i)] by Sir James Munby. More recently, Mrs Justice Lieven in *Re J: Local Authority Consent to Deprivation of Liberty* [2024] EWHC 1690 (Fam) has suggested to the contrary, but without apparently having had this decision cited to her. We understand at the time of publishing this research paper that her decision may be subject to appeal.

31 *Re A-F (Children)* [2018] EWHC 138 (Fam) at [12(ii)] by Sir James Munby.

obligation imposed on the state by article 5 of the European Convention on Human Rights.[32] In *Re D*, Lady Hale observed that:

> 47. There are two contexts in which a parent might attempt to use parental responsibility in this way. One is where the parent is the detainer or uses some other private person to detain the child. However, in both *Nielsen*[33] and *Storck* it was recognised that the state has a positive obligation to protect individuals from being deprived of their liberty by private persons, which would be engaged in such circumstances.
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> 48. The other context is that a parent might seek to authorise the state to do the detaining. But it would be a startling proposition that it lies within the scope of parental responsibility for a parent to license the state to violate the most fundamental human rights of a child: a parent could not, for example, authorise the state to inflict what would otherwise be torture or inhuman or degrading treatment or punishment upon his child. Likewise, section 25 of the Children Act 1989 recognises that a parent cannot authorise the State to deprive a child of his liberty by placing him in secure accommodation. While this proposition may not hold good for all the Convention rights, in particular the qualified rights which may be restricted in certain circumstances, it must hold good for the most fundamental rights - to life, to be free from torture or ill-treatment, and to liberty. In any event, the state could not do that which it is under a positive obligation to prevent others from doing.

1.24 In *Re A and Re C*,[34] Lord Justice Munby[35] made clear the obligations on local authorities in circumstances where they become aware a child is being confined in a private setting – in that case, the family home:

> (i) These will include the duty to investigate, so as to determine whether there is, in fact, a deprivation of liberty. In this context the local authority will need to consider all the factors relevant to the objective and subjective elements of the test for deprivation of liberty [discussed above].
>
> (ii) If, having carried out its investigation, the local authority is satisfied that the objective element is not present, so there is no deprivation of liberty, the local authority will have discharged its immediate obligations. However, its positive obligations may in an appropriate case require the local authority to continue to monitor the situation in the event that circumstances should change.
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> (iii) If, however, the local authority concludes that the measures imposed do or may constitute a deprivation of liberty, then it will be under a positive obligation, both under Article 5 alone and taken together with Article 14, to take reasonable and proportionate measures to bring that state of affairs to an end. What is reasonable and proportionate in the circumstances will, of course, depend upon the context, but it might for example, … require the local authority to exercise its statutory powers

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32 *Re D* at [43].

33 *Nielsen v Denmark* (1988) 11 EHRR 175 (App No 10929/84).

34 *Re A and Re C* [2010] EWHC 978 (Fam), [2010] 2 FLR 1363.

35 Delivering a judgment after he had been appointed to the Court of Appeal, but relating to a hearing that he had heard as a High Court judge.

and duties so as to provide support services for the carers that will enable inappropriate restrictions to be ended, or at least minimised.

(iv) If, however, there are no reasonable measures that the local authority can take to bring the deprivation of liberty to an end, or if the measures it proposes are objected to by the individual or his family, then it may be necessary for the local authority to seek the assistance of the court in determining whether there is, in fact, a deprivation of liberty and, if there is, obtaining authorisation for its continuance.[36]

1.25 Even in cases of indirect responsibility, therefore, local authorities are under an obligation to ensure that there is proper authority in place for the deprivation of liberty.

AUTHORISING DEPRIVATION OF LIBERTY

1.26 Article 5 of the European Convention on Human Rights provides that a person may only be deprived of their liberty on one of six specified grounds. For our purpose, there are two possible grounds which might apply: educational supervision,[37] or on the basis that they are of "unsound mind".[38]

1.27 Deprivation of liberty must also be in accordance with a procedure prescribed by law. In most of the cases with which we are concerned, it will be the local authority which is required to follow that procedure in question. In so doing, it will be complying with its obligations under section 6 of the Human Rights Act 1998, which makes it unlawful for it to act in a way incompatible with a right protected under the European Convention on Human Rights. However, this is not invariably the case. If a child is confined in hospital, for instance, then the expectation would be that it is the hospital trust which takes the relevant steps.

1.28 At the moment, the procedures for authorising deprivation of liberty largely involve going to court.[39] The only route for authorising deprivation of liberty of a child which does not involve an application to court is admission to hospital for assessment and / or treatment for mental disorder under the Mental Health Act 1983. If the Mental Capacity (Amendment) Act 2019 comes into force, it will provide a route for administrative authorisation of deprivation of liberty of anyone aged 16 or above who lacks capacity to consent to the arrangements in question. At present, we are not aware of any plans to implement the Act.

1.29 If a person is deprived of their liberty, certain safeguards must be provided; these include entitlement to take proceedings by which the lawfulness of the detention is decided speedily by a court, and the person's release if the detention is not lawful. They can also bring a claim for unlawful deprivation of liberty either against a public

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36 *Re A and Re C* [2010] EWHC 978 (Fam), [2010] 2 FLR 1363 at [95].

37 Article 5(1)(d).

38 Article 5(1)(e).

39 For these purposes, a court does not include the Special Educational Needs and Disability Tribunal (SEND Tribunal), which does not have the power to authorise deprivation of liberty. Any deprivation of liberty arising out an order made by the SEND Tribunal has to be authorised by a public body (usually the local authority) seeking judicial authorisation.

body responsible for the deprivation of liberty, or against a public body that failed to prevent or regularise a deprivation of liberty at the hands of private individuals.[40]

WHERE DISABLED CHILDREN ARE DEPRIVED OF THEIR LIBERTY

1.30 The Children's Commissioner for England published two reports in 2019[41] and 2020[42] called *Who are they? Where are they?* These reports focused on children living in secure accommodation. However, they also highlighted the fact that there was no data available in relation to children deprived of their liberty by way of orders made under the Mental Capacity Act 2005 (MCA 2005), those deprived of their liberty under the inherent jurisdiction of the High Court, and those deprived of their liberty without any legal authorisation.[43]

1.31 Some information is available in relation to 16 and 17 year olds deprived of their liberty by way of orders made under the MCA 2005.[44] The data shows that, as at March 2023, around 13 applications per month were being made to the Court of Protection for authority to deprive 16 and 17 year olds of their liberty. Of particular relevance is the fact that 22.5% of the placements authorised were in the family home. Based on our pre-consultation work, we have no reason to consider that the position is any different now a year later.

1.32 The Nuffield Family Justice Observatory (the NJFO) undertook a review of the evidence that they had gathered as part of their work in relation to the so-called "national deprivation of liberty court". For a period of 12 months from July 2022 to July 2023, all applications from England and Wales to deprive children of their liberty under the inherent jurisdiction of the High Court were coordinated through this framework. The NFJO had access to the materials put before the court in the 208 applications made and published a number of reports.[45] At our request, the NFJO undertook a further examination of the materials. The NFJO identified that the child's disability was the primary reason for the application being made in 46 (22.1%) of the cases.[46] The applications reviewed by the NFJO included information about the care plan for the child while subject to the deprivation of liberty, including where the child would be placed. Whilst the majority of children (31; 70.5%) were living in a residential placement (children's home or residential school) at the time of the application, seven (15.9%) were in foster care and four (9.9%) were living in the family home. In other

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40 For a further discussion, see Mental Capacity and Deprivation of Liberty (2015) Law Com Consultation Paper No 222 paras 15.25 to 15.42.

41 Children's Commissioner for England, *Who are they? Where are they?* (2019).

42 Children's Commissioner for England, *Who are they? Where are they?* (2020).

43 See in particular, page 35 of the 2020 report.

44 See the slides prepared by Senior Judge Hilder for a seminar held at 39 Essex Chambers in March 2023, https://www.39essex.com/sites/default/files/2023-03/COP Seminar Slides %28Final%29_2.pdf.

45 In particular, A Roe and M Ryan, *Children deprived of their liberty: An analysis of the first two months of applications to the national deprivation of liberty court* (February 2023) and A Roe, M Ryan A Saied-Tessier and C Edney, *Legal outcomes of cases at the national deprivation of liberty court* (June 2023).

46 In a further 26 cases, the child's mental health was identified as the primary reason for the application. They tended to have multiple mental health and neurodevelopmental diagnoses, including (complex) post traumatic stress disorder, attachment disorder, depression, anxiety, autism, attention deficit hyperactivity disorder, obsessive compulsive disorder and eating disorders.

words, approximately 25% of the children were being accommodated in home or home-equivalent settings, highlighting that deprivation of liberty is not just an institutional issue. Whilst the NFJO's project of examining the cases on an ongoing basis has stopped, we have no reason to believe that the position is materially now different as regards cases being brought forward for authorisation.

1.33 We do not know the numbers of children who are in situations that are not recognised as giving rise to a deprivation of liberty. However, even though we only have relatively limited data, it is clear that local authorities in the context of assessing and meeting the needs of disabled children will:

(1) be directly responsible for situations where children are confined by their parents or carers;

(2) become aware of situations where children are confined by their parents or their carers; or

(3) be directly responsible for situations where children are confined with the agreement of their parents (for instance under arrangements to which the parents' agreement is recorded under section 20 of the Children Act 1989).

1.34 In each scenario, given the (complex) operation of the law described above, there will be situations where, either because of the age of the child or owing to some other factor, the child is deprived of their liberty for purposes of Article 5 ECHR. At that point, the local authority will have an obligation either to find a way to bring that situation to an end or to seek formal authority.

OTHER DEFINITIONS OF DEPRIVATION OF LIBERTY

1.35 We have focused in this research paper on deprivation of liberty for purposes of Article 5 ECHR. It is, however, necessary to touch briefly on two other definitions that are engaged given the United Kingdom's international obligations.

1.36 The first is the definition of deprivation of liberty in Article 14 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). This states in material part that:

> States Parties shall ensure that persons with disabilities, on an equal basis with others:
>
> (1) Enjoy the right to liberty and security of person;
>
> (2) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

1.37 It is not entirely clear what the United Nations Committee on the Right of Persons with Disabilities considers what the concept of deprivation of liberty means in the context of

children. Whilst it is has issued guidance on deprivation of liberty more broadly,[47] that guidance did not address the position of children. Difficult questions also arise as to whether the regimes provided for authorising deprivation of liberty, especially those which are linked to the mental disorder, comply with Article 14. These issues were discussed in our work on Mental Capacity and Deprivation of Liberty.[48]

1.38 The UNCRPD is not incorporated into the law of England and Wales,[49] and for present purposes, what it means to be deprived of liberty is as set out in *Cheshire West* and *Re D*. We note, however, that Lady Hale drew upon the UNCRPD in *Cheshire West* to reinforce her interpretation of the right to liberty to ensure that it meant the same for everyone, irrespective of their level of impairment.[50] In *Re D*, Lady Hale considered that the UNCRPD supported her conclusion that the child in that case should be identified as deprived of his liberty.[51]

1.39 The second definition of deprivation of liberty we need to address is that used for purposes of the Optional Protocol to the United Nations Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The purpose of OPCAT is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.[52] It is overseen by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment (the Subcommittee).

1.40 Deprivation of liberty is defined in OPCAT as:

> any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.[53]

1.41 The Subcommittee has adopted the following approach to the definition of Article 4:[54]

> 11. Throughout its history and consistent practice, the Subcommittee has required that the term "places of deprivation of liberty" extend to any place, whether permanent or temporary, where persons are deprived of their liberty by, or at the instigation or with the consent and/or acquiescence of public authorities. It has clarified that any place in which persons are deprived of their liberty, in the sense of

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47 UN Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities (September 2015).

48 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, Appendix B.

49 We discuss this issue further in ch 20 of the consultation paper.

50 *Cheshire West* at [36].

51 *Re D* at [45].

52 OPCAT Article 1.

53 OPCAT Article 4(2).

54 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment, *General Comment No 1 (2024) on article 4 of the Optional Protocol (places of deprivation of liberty)* (July 2024), footnotes omitted.

not being free to leave, [55] or in which the Subcommittee considers that persons might be deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises or might be expected to exercise a regulatory function.

…

49. Consent and acquiescence concern situations in which State authorities are or should have been aware of the deprivation of liberty but fail to take any actions aimed at preventing or ending it, with consent referring to deprivation of liberty that has been expressly agreed to, and acquiescence referring to tacit consent. In the context of the Optional Protocol, acquiescence may concern situations in which the State tolerates, allows or in any other form chooses to turn a blind eye to deprivation of liberty caused by any other entity or person, allowing the specific situation of deprivation of liberty to take place and not exercising the powers of the authority to prevent, disallow or end it. States are accountable for the actions of both their public officials and private persons or non-State actors if the State, in any way, consents to those actions, either expressly or tacitly. The fact that States may choose not to undertake any actions aimed at preventing or ending such deprivation of liberty or that they may in any other way allow the existence of places of deprivation of liberty outside their authority does not exclude such places from the mandate of the Subcommittee and national preventive mechanisms.

1.42 This is a deliberately broad interpretation, focusing on whether the person is free to leave. It appear to us that it aligns with the broad definition of deprivation of liberty for purposes of Article 5 of the European Convention on Human Rights given by the Supreme Court in *P v Cheshire West and Chester Council*[56] and *Re D (A Child)*.[57] In particular, it aligns with the approach that: (1) deprivation of liberty can take place anywhere, not just an institution; and (2) the state can be indirectly responsible for "private" confinements.

1.43 Member states are required to grant National Preventive Mechanisms the power to regularly examine the treatment of the persons deprived of their liberty in places of detention.[58] In the context of children, the National Preventative Mechanisms include the Office for Standards in Education, Children's Services and Skills (Ofsted) and the Care Quality Commission. Difficult questions arise, which are outside the scope of this research paper, as to whether these two bodies have the powers required to examine the position of children who are confined other than in institutional settings.

CONCLUSION

1.44 As set out above, the concept of deprivation of liberty is one that still evolving, especially in the context of disabled children. As matters stand, whether a child is

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55 The Subcommittee also notes (at para 57 of the *General Comment*) situations in which a lack of support compels disabled people to remain in living situations – including in the family home – that deprive them of their liberty and may subject them to harmful practices.

56 *P v Cheshire West and Chester Council* [2014] UKSC 19, [2014] AC 896.

57 *Re D (A Child)* [2019] UKSC 42, [2019] PTSR 1816.

58 OPCAT Article 19.

deprived of their liberty for purposes of article 5 of the European Convention on Human Rights is a question which is answered by reference to a test:

(1) For confinement that is modified in relation to younger children, but increasingly looks like that for adults by the age of 16 at the latest. The test looks at whether the child is free to leave the place they live or are being cared for, and is subject to continuous supervision and control. It is a test which applies in any setting.

(2) To determine whether the child can consent to the confinement, or, in the case of a child under 16, whether some other person can in some way authorise that confinement so as to take it out of the scope of article 5 of the European Convention on Human Rights. When the child turns 16, it is only the child's consent (if they can give it) which is relevant.

(3) Which can fix the state with responsibility for confinement both where it is directly commissioning or otherwise arranging the care giving rise to confinement, and where it is aware that private individuals are confining the child.