

# 01 Background:

Article 5 of the European Convention of Human Rights states that everyone has the right to liberty and security of person. No one shall be deprived of their liberty, except in certain circumstances and in accordance with a procedure prescribed by law.

A person may be lawfully deprived of their liberty if they are of "unsound mind".

The Mental Capacity Act 2005 applies to everyone involved in the care, treatment and support of people **aged 16 and over** living in England and Wales who are unable to make all or some decisions for themselves.

# Why it matters:

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A young person who lacks capacity to decide on their accommodation, care and/or treatment may be deprived of their liberty in any setting, for example: at home, in foster care, supported living, residential care or in hospital.

It is important to ensure that our practice is lawful and that we are upholding people's human rights. The Mental Capacity Act 2005 restores power to those who are most vulnerable.

If our practice were found not to be lawful, the person may be entitled to some form of remedy or financial recompense.

# 03

## Information:

Identifying a deprivation of liberty. Supreme Court ruling 2014 - Three elements need to be present:

1. The objective element – The young person is subject to constant supervision and control and is not free to leave.
2. The subjective element – The young person lacks mental capacity to consent to the controls placed on them.
3. The state element – The care arrangements are either directly or indirectly the responsibility of the state.

To satisfy the objective element, the care arrangements must be compared with those of a young person of the same age, who is free from disability, in order to determine whether the restrictions in place amount to a deprivation of liberty, or are part and parcel of the 'universal constraints' applied by a responsible parent, which lessen over time in accordance with the young person's level of maturity.

The greater the comparative restrictions, the more likely the objective test will be met.

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## What to do?

This is a highly complex area. If you think that a 16 or 17 year old may be being deprived of their liberty please contact your agency legal advisor/dept.

[dols@rochdale.gov.uk](mailto:dols@rochdale.gov.uk)

## Questions:

If there is doubt about whether or not parental consent can be relied upon to authorise the particular intervention, professionals should take legal advice so that account may be taken of the most recent case law.

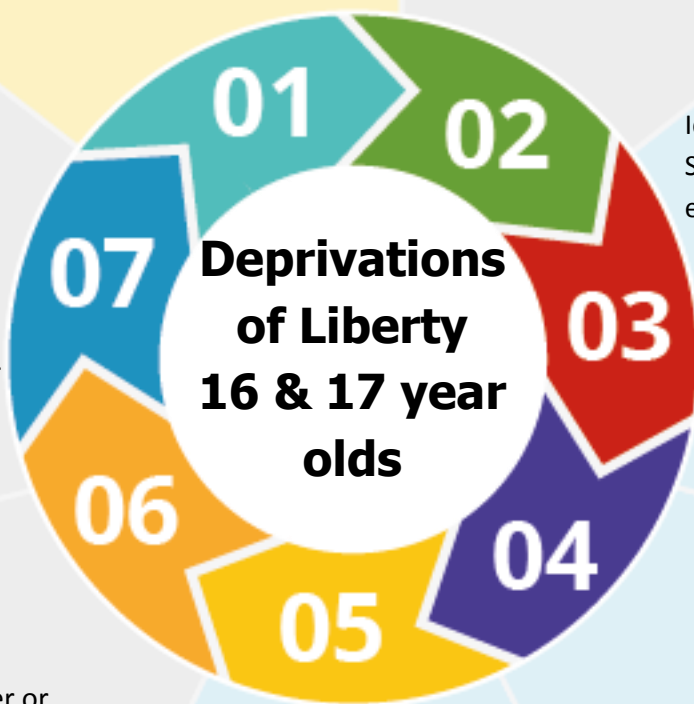
[Ofsted Guide for Inspectors](#)

# 06

Approving or agreeing to the deprivation of liberty.

**Re D (A Child) [2017]** The Court of Appeal held that a capacitous parent of a 16 or 17 year old can give consent to what would otherwise be a deprivation of liberty. This negates the need to apply to the Court of Protection. However, a parent will still not be able to agree to support that amounts to secure accommodation regardless of the child's age.

# 05



**Deprivations of Liberty 16 & 17 year olds**

