STEAMING

Training - Consultancy - Expert Witness Services

Improving Guidance on Reducing Risk, Restraint and Restriction In Children's Services

Bernard Allen

www.steaming-training.co.uk

steaming@me.com

Steaming Ltd
Byways
Lodge Lane
Redhill
RH1 5DJ

www.steaming-training.co.uk

steaming@me.com

Table of Contents

Introduction

At the time of writing, in Autumn 2014, we are in the middle of another media storm following the publication of a damning report detailing the "collective failures" of political, police and social care leadership over the first 12 years covered by the inquiry into child protection in Rotherham. In 2012 courts heard appalling stories of young girls, some as young as 12 years old, being allowed to leave children's homes to be groomed and abused by gangs of older men in Rochdale, Rotherham and Oxfordshire. Commentators are at a loss to understand why the professionals did not stop them and the staff who allowed it were described in Court as displaying wilful blindness.

This guidance came about after a large number of professionals, including a number of recognised national experts in their respective fields, raised similar concerns throughout 2013 and 2014. They were being told not to stop children from leaving residential homes and schools under any circumstances even when risk assessments indicated that they could be at risk of harm. They were being told that reducing numbers of recorded restraints and incidents of restriction should take precedence over safeguarding children. Those views do not represent a responsible body of professional opinion.

At senior levels there has been evident confusion, particularly between restriction and deprivation of liberty in the case of children and more generally between the concepts of restraint and abuse. It has become apparent that a gulf in understanding has opened up between the authors of guidance and professionals in the field. Since the introduction of the Children Act (1989) there has been a pattern of policy created in a climate of panic lurching from one extreme to the other. When the latest scandal involved abusive professionals misusing restraint the policy makers responded by rushing out simplistic guidance directing all professionals to avoid restraint - often under the threat of being labelled abusers themselves. When this inevitably resulted in children coming to harm, it was the professionals who were accused of negligence, rather than the authors of the guidance, who issued a hasty "clarification" - a euphemism used to disguise changes of policy and avoid any admission of error.

Lord Laming has been responsible for some of the largest and most wide ranging inquiries into child protection failures, including the inquiry into the tragic death of Victoria Columbié in 2003 which led to a comprehensive review of the whole child protection system in 2009, which for which he was also responsible. As Chief Inspector at the Social Services Inspectorate in 1997, Lord Laming set out clear examples of the circumstances in which staff should take positive action to protect children including the following quote:

"Staff can and must intervene immediately to try to prevent young people leaving the children's home when there are grounds for believing that they are putting themselves or others at risk or are likely seriously to damage property. In assessing whether harm is likely staff must take into account all the circumstances, including the child's own background and the reasons why he or she came into care. Staff need to be reminded that, in the day to day care of children, they have the responsibility and the authority to interpret 'harm' widely and to anticipate when it is clearly likely to happen. For example, unless the particular circumstances of the case dictate otherwise, it would be reasonable to assume that a young child of 11 or 12 years of age who persists in wanting to leave the home in the evening against the instructions of staff where these instructions are based on a considered and reasonable view of the child's welfare is likely to put himself or herself at risk of harm. The same would be true of young teenagers known to be involved with vice or criminal activity or otherwise likely to come under bad influence or be at risk of harming themselves or others."

SIR HERBERT LAMING - LETTER TO ALL DIRECTORS OF SOCIAL SERVICES (1997)

That guidance is still supported by a reasonable body of professional opinion and has been successfully defended in Court, yet in recent years it has been ignored by authors who have allowed other considerations to take precedence over the best interests of the child.

Since the introduction of the Children Act (1989), in 1991, writers have struggled to produce coherent guidance balancing the increasing rights and powers of children against the diminishing rights and powers of adults. The concepts of empowering children and professionals inevitably pull policy in opposite directions. As the focus of successive attempts at 'clarification' promoted one at the expense of the other, according to the most recent scandal, the "message" in guidance has swung to and fro over recent decades. On several occasions the introduction to revised guidance admitted that they had got it wrong in the past - then what followed swung too far in the opposite direction. The resulting confusion has placed children at risk. In their day-to-day work professionals have to balance many considerations when deciding what to do in fast moving and stressful circumstances. They deserve better guidance.

A particular source of confusion in recent years has been a failure to recognise that risk, restraint and restriction are irrevocably linked and also pull policy in different directions. In many areas of the law measures which were intended to

reduce risk necessarily reduce freedom - even when restriction of liberty was not the intention. Most laws and regulations are passed to restrict and restrain people from harming themselves and others. Other measures, intended to prevent governments from arbitrarily depriving citizens of their rights to life and liberty, can have the unintended side effect of increasing risk. For example, failures to apply effective restraint and restriction which resulted in children coming to harm, when the risk was reasonably foreseeable, have become an increasingly common feature in criminal and civil cases in recent years. Insurers have had to pay out so much that some are withdrawing from the market.

Attempts to reduce risk, restraint or restriction in isolation, without considering the likely increase in one or both of the others, is an indication of incompetent risk assessment. Competent risk assessment requires a more thoughtful and balanced approach.

Simplistic bans, which prevent professionals from taking the necessary measures to protect children, have resulted in tragedy and court cases. Legislation in 2007 which supposedly provided school staff with 'new' legal powers to use reasonable force in schools has not been effective. Staff did not need more legal powers. Rather than rights and powers guidance across all children's services should focus on the duty of care that professionals have to the children they care for and those around them.

In the Rotherham case social workers believed that children were choosing to have consensual sexual relationships with older men and that they had the right to make those choices. They were wrong. They also believed that the policy was that staff were not allowed to use of any form of restraint or restriction to prevent children from leaving residential care homes no matter what the risk. They believed that if they had taken effective steps to physically stop the girls from going they would have faced disciplinary proceeding. The real scandal is that in that respect they were probably correct. It was the policy and guidance that was wrong. In some areas of the country similar directives were being given out by officials in 2014.

The best way to protect children and staff is to encourage everyone to focus on one simple question: "What would I want somebody else to do if that was my child?" The authors of guidance need to imagine it being applied to their own child - in the full range of reasonably foreseeable circumstances. Staff who have to apply the guidance should be encouraged to think in the same way. That form of thinking directs people towards best practice - it also provides the most effective legal defence in the future should their actions be questioned at a later date.

Developing Guidance

To some extent the failures in leadership and policy that have put so many children at risk at various times over recent decades can be traced back to flawed and incoherent guidance. In the past the authority of guidance was hierarchical. Parliament passed Laws and ministerial departments issued Regulations and binding Statutory Guidance. Civil servants and officers in local authorities issued 'non-statutory' guidance and professional associations, other organisations and employers produced their own policy digests. So as far as Whitehall and Local Government were concerned there was some democratic accountability. This is important because, to some extent, those who write the guidance get to make the law until it is challenged in Court, which takes time.

The constitutional concept of "Separation of powers" is that the major institutions of state, the legislature, the executive and the judiciary, should be functionally independent. The purpose was to ensure that no individuals should assume powers that spanned these offices. Parliament traditionally determined policy, the civil service and local government put it into effect and the courts made sure the law was followed.

In recent years, by accident rather than design, the separation of powers has broken down. Severe cuts to staffing in Whitehall and local government departments have resulted in the loss of expert knowledge and a weakening in the quality of guidance coming from the centre in specialist areas. These days all sorts of people are throwing out guidance and it is not always easy to discover the provenance of the documents being offered. Government agencies, at national and local level, and the increasing number of non-governmental agencies such as Ofsted and CQC have become increasingly reliant on commercial providers of information. The separation of powers has become blurred with commercial providers themselves employing independent consultants to write policy digests, guidance and in some cases practice manuals for government agencies.

At lower levels in organisations, commercially produced policy digests and briefings have a place. However, professional organisations retain the responsibility for their own policies and guidance irrespective of who wrote it. Somebody within the organisation should, as a minimum requirement, be sufficiently knowledgeable about the issues to recognise bogus claims, understand rules of evidence and distinguish appeals to emotion from logical justification. This has not always been the case within government agencies and within the commercial companies selling expertise to them.

Some of the same people who work as consultants drafting policy digests also work as regulatory inspectors. This places them in a powerful position to enforce the imposition of their own ideas. The authors of some of these briefings, particularly in relation to restraint, have been enthusiastic campaigners with a mission to change national policy. That is a conflict of interest. It is all too easy for information digests to be selective about the information they leave out, failing to accurately reflect the range of competent expert opinion on the issues. This has at times allowed political campaigners to exert undue influence on national policy and guidance.

There are also risks when many agencies depend on the same source of information. It can concentrate considerable power over national policy and guidance within a small group of unaccountable consultants and give a false impression of authority to their opinions.

For example, in 2014, one commercial provider of policy digests advertised on its own website that over 200 local authorities, safeguarding boards, independent providers and national agencies had commissioned it to develop their practice manuals and then keep them updated. In general the quality of these briefings is good enough, but one 'policy digest' given out by an Ofsted Inspector during an inspection in 2014 was a polemic calling for a policy change, rather than an attempt to explain current government policy. This document contained significant errors and omissions. Ofsted inspectors, service providers, managers and leaders have a duty to conduct due diligence to check the authority of their sources of information but that is not always easy. Sometimes it takes an expert to recognise a lack of expertise.

This exposes structural weaknesses in the process of policy development. This is particularly the case in areas where specialist knowledge is in short supply. Changes in policy and guidance have begun to emanate directly from regulators, such as Ofsted and QCC. Providers need to obtain a favourable rating to stay in business, so they try to comply with the opinions of the inspector, even when they do not agree with them. Guidance provided to, or chosen by, individual inspectors has become, de facto, the guidance on risk, restraint and restriction. When guidance from the same commercial source is uncritically disseminated across various arms of government, it can gain a false impression of authority and credibility as has already been demonstrated.

We need to take care to ensure that idealistic guidance, policy and practice does not become divorced from reasonable and good practice.

What Is Good Practice?

Ultimately it will be for Courts to decide what is reasonable and good practice To help them they often turn to expert witnesses. Yet even some of the individuals who advertise themselves as expert witnesses have made inflated claims about their own expertise. Knowing about something and being able to do it are not the same thing. In the internet age it is now very easy to gather information and regurgitate it without actually having demonstrated any evidence of personal competence. Radio phone-in programmes manage to find 'experts' willing to speculate widely and form obese opinions on a range of topics from meagre crumbs of knowledge. Credible experts are required to provide evidence of extensive personal experience, competence and success in their field.

There are a number of recognised and respected technical and medical experts who have advised Courts and Independent Inquiries in recent years in relation to risk, restraint and restriction. The authors of guidance need to conduct due diligence to ensure that their sources of information are reliable and comprehensive. Employers need to conduct due diligence when selecting which guidance to follow. Court reports often include a sworn statement which might be adopted by the authors of guidance:

I have done my best, in preparing this report, to be accurate and complete.

I have mentioned all matters which I regard as relevant to the opinions I have expressed.

I consider that all of the matters on which I have expressed an opinion lie within my field of expertise.

I have drawn to the attention of the court all matters, of which I am aware, which might adversely affect my opinion.

In preparing and presenting this report I am not aware of any conflict of interest actual or potential save as expressly disclosed in this report.

In respect of matters referred to which are not within my personal knowledge, I have indicated the source of such information.

I have not included anything in this report which has been suggested to me by anyone, including the lawyers instructing me, without forming my own independent view of the matter.

Where, in my view, there is a range of reasonable opinion relevant to the opinions I express, I have indicated the extent of that range in the report.

When Courts judge what is reasonable practice they use standard tests. The "Bolam" test is applied widely in civil and criminal cases. Reasonable practice

is taken to mean that which is supported by a reasonable body of professional opinion. The "Bolitho" test requires a bit more than that. An expert must provide a logical, reasoned and informed defence of the practice sufficient to persuade the judge that it is reasonable. Those tests can be applied to guidance wherever there are legitimate differences of opinion about what constitutes good practice. Some of the current guidance fails both tests.

For example:

> *"I am therefore writing to remind all authorities of the legal provision for restriction of liberty, which is that in order to safeguard the welfare of these children, liberty can only legally be restricted in premises approved as secure accommodation."*

OFSTED GUIDANCE APRIL 2007

This is incorrect and does not reflect the balance of professional expert opinion. There are a number of circumstances in which liberty is lawfully restricted outside of secure provision (Allen 2012).

> *"As restraint can only be used to prevent a child from leaving a secure children's home, there is no purpose to be served in seeking an order of the Court of Protection."*

OFSTED GUIDANCE FEBRUARY 2014

The premise in the first statement is false, rendering the second statement incorrect too. As a matter of fact, if anybody aged 16 years or over is deprived of their liberty the authority must apply to the Court of Protection on order to comply with the Mental Capacity Act 2005. That is the only legal protection available for people under the age of 18 years under the Act, which applies to anyone over the age of 16 years.

> *"It is not appropriate in most mainstream schools to start from the premise that force or restriction of liberty is used as the 'norm'. However specialist inspectors recognise that this is more usual in special schools and PRUs."*

OFSTED GUIDANCE APRIL 2013

As a matter of fact mainstream nursery and primary schools do routinely restrict the liberty of children for their own safety when it is necessary. The same could be said for special schools and PRUs catering for older children. Yet it is not

true to say it is the 'norm'. Most of the time there is no need for restraint or restriction. Courts have to decide whether any action or inaction by staff, responsible managers or organisations was reasonable or not. What is reasonable depends on the circumstances of each case, which is why simplistic prescriptions and proscriptions in guidance are unwise.

Most guidance, whether statutory or non-statutory, is open to interpretation. In the decades that have passed since the enactment of the Children Act 1989, the Health and Safety at Work Act 1974 and the Human Rights Act 1998, there have been volumes of guidance, both statutory and non-statutory, all attempting to interpret the legislation and apply it in ordinary life. When people disagree about the interpretations they may end up in Court to decide which is correct. Lawyers do not always agree, which is why they go to Court. Judges do not always agree either. Appeal courts sometimes reverse the decisions of lower courts, then the supreme court overturns those judgements. Authors of guidance, consultants and trainers who confidently claim the authority of the Law for their own personal opinions should be treated with caution.

The new section in the draft guidance (beginning at page 58)[1] goes a long way towards correcting some of the confusion that has been evident in recent years. There are still some errors and a few key issues require clarity

This section now means that there are a number of contradictory statements in the Standards and throughout the guidance. To achieve consistency and coherence obsolete guidance must be withdrawn and replaced with guidance that reflects the full range of reasonable professional opinion[2].

In recent years policy has become fragmented as individuals imposed their own opinions in different areas of the country. It is important from now on that professionals are given clear, authoritative and consistent advice in this important area. To provide authority the sentiments reflected in the section beginning at page 58 need to be incorporated into the standards themselves without equivocation.

The following text builds upon the excellent start in the draft guidance and has been agreed by a responsible body of professional opinion and recognised experts in the field as good practice. It includes clear and detailed statements on the key issues that have caused confusion over the past 30 years, giving examples to illustrate some of the key points. Clarity is preferred to emollient ambiguous language that sometimes disguises fundamental disagreements.

---

[1] Consultation on Children's Homes Standards September 2014.

[2]In particular the internally inconsistent guidance from Ofsted on restriction and deprivation of liberty (2007 - 2014). The revised statutory guidance to the Children Act 1989, issued in October 2013, also needs to be revised again, removing the sections copied from flawed Ofsted guidance published in April 2007.

Human Rights

The Human Rights Act 1998 was drafted to prevent the state from bossing around the people it is supposed to serve. As a general rule people should be allowed to choose how to conduct their own lives without being continuously monitored and supervised by the state or anybody else. The state should protect and in some cases provide for people but it should not unnecessarily interfere in their lives without legal authority. In relation to residential care two articles in particular have causes considerable confusion in recent years.

Article 5 sets out the right to liberty.

Article 8 sets out the right to private and family life.

The latest judgement by the Supreme Court defines deprivation of liberty as a person being under continuous supervision and control and not free to leave.[3]

Mental Capacity

Mental capacity is the ability to make choices and decisions. Babies are not born with mental capacity. It is something that develops gradually. Good parenting involves supervising, monitoring and sometimes making decisions on behalf of children who do not yet have the capacity to make them unaided. Young children are not normally able to come and go as they please. They are not allowed to stay out late at night. For their own protection, children's liberty is routinely restricted by the use of mechanical devices such as high door handles, locks, window restraints, stair gates, play pens and high cot sides. Their parents and other carers may at time physically prevent young children from running off, for example by holding their hand or physically blocking avenues to danger.

Therefore it logically follows that children are at times deprived of their liberty, although we may not choose those words to describe it. As children develop the capacity to make decisions for themselves, good parents support and enable them to take more responsibility. Yet parents retain a duty to protect children, which involves making some decisions on their behalf. Children develop at different rates and only gradually assume responsibility for themselves. Parental rights are diminishing rights. The rate at which they diminish, in respect of each individual child, is related to the rate at which the child develops capacity.

[3] Cheshire West and Chester Council v P (2014) UKSC 19, (2014) MHLO 16

In law there are set ages at which a child is allowed to do certain things such as buy fireworks, knives and glue, driving motorcycles, cars and trucks, buying alcohol, tobacco and 18+ video games, flying aircraft, gambling and having sexual intercourse with adults. These ages are different and to some extent arbitrary. They do not always reflect the capacity of the individual child.

In an ideal world for legislators, all children would attain full mental capacity at the same chronological age. In reality there is no set age at which children turn into adults. In many parts of the world children have to fend for themselves from an early age. In others they are supported throughout childhood, adolescence and sometimes longer. Individual children develop at different rates. Some are mature beyond their years. Some have a disability which limits their capacity in some areas. Others simply take longer to reach the level of maturity of the majority of their peers.

The Children Act 1989 was drafted to protect the rights of children. It recognises that children are not born with the capacity to care for themselves. They need protection, support and nurturing from caring adults - usually parents and family but sometimes governments and charities. Good parenting is a gradual process in which children are encouraged and supported to learn to care for themselves until at some stage they are completely self sufficient.

The Mental Capacity Act (2005) was drafted to protect the rights of adults. It applies to adults who may be deprived of their liberty because they have not yet gained the capacity to look after themselves or have lost that capacity as a result of accident, illness or infirmity. If the state, or others acting on behalf of the state, wants to interfere in the lives of adults they must seek legal authority. Without that specific legal authority, the presumption is that nobody has the right to interfere in the affairs of any person over the age of 16 years. It does not apply to children under the age of 16 years.

Restraint

Residential schools and children's homes[4] have a responsibility to protect the children in their care. There may be circumstances when it is permissible to restrain a child if there is reasonable cause for believing that this is the best way possible to prevent the child from coming to harm.[5] For example, to prevent a child from leaving the home to take drugs or put themselves at risk of sexual exploitation, or to prevent a child from absconding into a risky

[4] We need to move towards consistent standards.

[5] There may be alternatives that are worse - such as use of taser, incapacitating spray and handcuffs by other agencies.

environment.[6] Children's homes staff must be able to use their professional judgement in these very difficult situations, which are likely to demand split-second decision making. When making split-second decisions staff should consider what they would want somebody else to do in similar circumstances if that was their child.[7] Such decisions are called dynamic risk assessments and staff should get into the habit of making reference to them in reports. They should explain which options were available and why they chose one in preference to another. In an emergency situation the dynamic risk assessment may include a judgement of the capacity of a young person at that moment to make a safe choice.

When time allows any planned[8] action to restrain a child should be based on a careful risk assessment centred on an understanding of the needs of the child (as set out in their relevant plans) and evidence about the risks the child faces. Many plans are in effect risk assessments.[9] Any use of restraint carries risks. These need to be balanced against the risks associated with other courses of action, including not taking any action at all. When people are prevented from doing one thing and do another instead, the resultant effects are called "substitution effects". Failure to consider substitution effects is a feature of incompetent risk assessment.[10] Risks associated with both applying and failing to apply physical restraint include causing physical injury, psychological trauma, distress and emotional disturbance.[11] When considering whether the application of restraint on a child is warranted, staff in children's homes need to take into account:

the age and understanding of the child;

the size of the child;

specific hazards in the locality;[12]

---

[6] This is wrong in law. It is not only children who are subject to court order who may need to be protected. Think about toddlers.

[7] This question should form the core of good practice. It reflects guidance from the H&S Executive and QCC

[8] As we just acknowledged - sometimes these are split second decisions.

[9] In Court cases it has proved helpful to describe them as risk assessments somewhere in the title so that they can be considered by the Court.

[10] Guidance and training should encourage consideration of substitution effects - essential for competent risk assessment.

[11] What sort of injury do you think is not serious enough to consider?

[12] This is now a mandatory consideration.

the relevance of any disability, health problem or medication to the behaviour in question and the action that might be taken as a result;

the relative risks of not intervening;

the child's previously sought views on strategies that they considered might de-escalate or calm a situation;

the method of restraint which would be appropriate in the specific circumstances; and

the impact of the restraint on the carer's future relationship with the child.

Staff need to demonstrate that they understand the risks associated with any restraint technique deployed in the home and the risks associated with not using restraint.[13] For example, any techniques that may interfere with breathing are likely to present an unacceptable risk and should be avoided wherever possible.[14] Holding a child by the neck carries a risk of suffocation or restricting blood flow to the brain, as well as a risk of spinal injury, and so should be avoided wherever possible. The so called "nose distraction" technique involves the deliberate infliction of pain and therefore should be avoided.[15] Attempting to apply restraint to prevent self-harm may result in an escalation of the behaviour and increase the risk of injury. Failing to apply restraint may have the same effect. What is the correct approach will depend on the individual circumstances and be a matter of judgement.

In some cases behaviour necessitating the use of physical restraint may be due to a child's impairment or disability. If children have a disability or special educational need, it is essential that staff identify and utilise existing behaviour management plans or techniques developed by the child's school, family or by child psychology or other services.

Providers should ensure that all their staff have been thoroughly trained in the use of restraint techniques when there is a reasonably foreseeable likelihood that restraint will be required. The levels of training required should be determined by a risk assessment based on the needs of the children at the home. Confusing all forms of restraint with abuse is a mistake. There is no evidence that providing good training increases abuse.

---

[13] The relative risks are matters which are disputed by responsible bodies of professional opinion, so claims to "fully" understand them are probably exaggerated.

[14] It is sensible to avoid absolutes unless you have really considered all the possible circumstances.

[15] Well done to whoever decided not to include the ill informed so called 'ban' on prone restraint

Providers should ensure that admissions are appropriate to the needs of the children in the home's care, as defined by the Statement of Purpose. It must not be assumed that a technique designed for use with adults can be safely applied to children. Those commissioning training in restraint for children's homes staff must be satisfied that the ethical values informing any system of restraint are appropriate to the needs of the children in the home's care. This would normally preclude any deliberate infliction of pain as part of a restraint. They should also ensure that the training has been devised by experts with a successful track record of working in the relevant specialism as part of a holistic psychological approach. They must see evidence that the system has been medically risk assessed to demonstrate its safety for use in a context caring for children who are still developing, physically and emotionally. The registered person must routinely review the effectiveness of any restraint system commissioned. Employers have a legal duty to conduct due diligence before commissioning advice and training. Professional associations and independent accrediting bodies may be able to provide assistance in this respect. In particular, they should check that the medical assessment of the system remains up to date.

Any child who has been restrained should be given the opportunity to be debriefed and talk through their experience by a responsible adult who was not involved in the restraint incident, normally within 24 hours. Children should be encouraged to add their views and comments to the record of restraint. Children must be offered the opportunity to have access to an advocate to help them with this.

The purpose of record keeping is so the registered person and staff can review behaviour and respond promptly where any worrying issues or trends emerge. Records should also inform revised risk assessments. The review should provide the opportunity for amending behaviour management practice to ensure this offers an effective response that is sensitive to the needs of all the children in the home's care.

Risk Assessment

Competent risk assessment is at the heart of good child care. It also forms a basis for a legal defence if the actions of any professional are challenged. Any use of restraint must be reasonable according to the individual circumstances of the case. Reasonable, in law, means proportionate and necessary. For a decision to be reasonable it must be logically defensible.[16] Good practice is judged according to what a reasonable body of professional opinion would

[16] Called the Bolitho test in Court - the judge must be persuaded on the basis of logic and evidence.

support. This refers to what other practitioners with similar experience, qualifications and expertise would do in similar circumstances.[17]

Good practice involves anticipating foreseeable risks and sometimes avoiding unnecessary delay by taking early effective action. Imminent action is sometimes necessary to prevent harm that may arise some time in the future.[18]

A failure to balance competing risks and removing effective tools from professionals without replacing them with equally or more safe and effective tools is a sign of incompetent risk management. For example, according to recognised experts there may be circumstance in which a prone restraint position would be safer, and therefore preferable, to a seated or supine position.[19] Those circumstances can only be determined by a careful consideration of all the facts of the case. At the heart of good risk assessment should be the question, "what would I want somebody to do in similar circumstances if that was my child?"

When considering numbers of recorded incidents it is not possible to say anything meaningful about whether a number is too big or too small without knowing a reasonable baseline figure. Competent assessments need to be based upon an informed consideration of the nature of the hazard and the likelihood of its occurrence. Past behaviour is a good guide to future behaviour, which is why good record keeping and communication are so important. Judgements based only on the number of restraints, which take no account of the nature of the hazard being controlled or the likelihood of occurrence, are likely to be unreliable and misleading. Inspections of specialist provision must be undertaken by professionals with the relevant expertise.

Deprivation of Liberty

Restraint includes actions to restrict a child's liberty or freedom of movement, whether or not that child resists. Indeed some children will not offer any objection and may agree with, or even ask for their movement to be restricted in this way. [20]

---

[17] Called the Bolam test in Court - expert witnesses have a duty to tell Courts what most people would have done - not just what the expert would have done.

[18] Restraint as a "last resort" does not mean that all other alternatives must have been tried and seen to fail. Staff are expected to think and make a judgement about what is likely to succeed.

[19] Gareth Myatt (aged 15 yrs) died in 2004 after being held in a seated position.

[20] It is important to recognise this reality.

However, such actions may in certain circumstances amount to a "deprivation of liberty." A deprivation of liberty may occur where a person is under continual supervision and/or is not free to leave the home at any time.[21] Aspects of the home's physical environment could also mean that residents are deprived of their liberty.[22]

Monitoring and supervision of children is normal and good practice in a range of circumstances. Failure to monitor and supervise children would be negligent; therefore it logically follows that deprivation of liberty is sometimes reasonable, proportionate and necessary even outside of secure provision. This applies in a range of circumstances in relation to children under the age of 16 years. The best interests of children are best protected by open, honest and transparent guidance and practice.

The Supreme Court definition means, in effect, that all children are deprived of their liberty at some time in their lives. Whether or not this is reasonable depends on the age and understanding of the individual child.

In the case of young people aged 16+, but under the age of 18 years, who lack capacity the Court of Protection may authorise some form of deprivation of liberty under the Mental Capacity Act 2005.

It is good practice to consider whether this is likely to be necessary at any review meeting for the education health and care plan (EHC) of a 15 year old who has been subject to deprivation of liberty in the previous year. Remember, being unable to choose to go and live wherever the child wants or be free of continual monitoring and supervision may be a deprivation of liberty."

The Doctrine of Emergency

Parents rights are diminishing rights as children grow older and become more capable of making their own decisions. Good parenting involves encouraging and supporting children to assess and manage risks for themselves. There may, however, be circumstances in which a dynamic risk assessment determines that older children, or young adults, lack capacity in the short term. For example, somebody under the influence of alcohol or drugs, suffering from hypothermia, a head injury or a blood sugar imbalance related to diabetes or suffering extreme emotional distress, may lack capacity in the short term. In such an emergency there is a positive duty to do whatever is immediately necessary to prevent a serious deterioration in the physical or mental well

[21] The supreme court judgement was "either / or " - not necessarily "both"

[22] It is not always about modifications.

being of the child or adult concerned. In such circumstances restraint or other deprivations of liberty may be justifiable for children aged 16-18 years.

Elevated Risk

There has been a great deal of controversy surrounding the issue of training staff in physical interventions to deal with the most extreme circumstances. An unanticipated consequence of a policy that punishes providers for using restraint and restriction, without adequately considering the circumstances or substitution effects, can be that children who exhibit hazardous behaviour are deprived of the provision they need.

Some policy makers have imposed blanket bans on particular techniques in certain settings, or for certain staff, without conducting a competent risk assessment. They failed to balance the worthy objective of reducing restraints with the practical and legal necessity of safeguarding people and services.

Some children display extreme self-injurious behaviours or behaviours likely to cause bruising, lacerations, fractures and in some cases life changing injuries to others. When children are extremely strong and extremely violent the risk that they will cause themselves or others serious injury escalates.

Techniques designed for small people or low level risk cannot be adapted to work for larger people or more extreme behaviours simply by adding more force. Such responses have themselves been associated with injuries that could have been avoided had staff been provided with better training.

Some organisations have chosen to abandon training in this controversial area altogether. Some employers evade the issue in their policies by giving their staff deliberately vague advice to use their own judgement under their duty of care. Some providers have been encouraged to collude with commissioners in a deception in which it is agreed that certain forms of restraint should not be recorded in policy or plans, even though it is acknowledged that there will be occasions when such measures are likely to be required. The outcome may be that in the absence of training untrained staff resort to dangerous interventions. This is an irresponsible attitude which places people at unreasonable risk. It will also open employers to legal challenge for failure to comply with Management of Health and Safety Regulations 1999, claims for compensation in the civil courts and in the worst scenario result in criminal action under the Corporate Manslaughter and Corporate Homicide Act 2007.

Locked Doors, Spaces and Rooms

Withdrawal means removing children from a situation they cannot cope with and taking them to a safer place. They may be taken to a place where they have a better chance of calming. Staff would normally stay with them to support and monitor their progress.

In rare circumstances, it may not be in the best interests of the child or advisable for safety reasons, to remain in close proximity. For example, there is no reason why staff should be expected to endure risk of injury from sustained violence. When a person is forced to spend time alone the correct term is seclusion.

Ofsted is a corporate member of the Plain English Campaign committed to clearer communication. In September, 2014, it published a briefing paper for inspectors undertaking section 5 inspections. Paragraph 24 advised them to ensure that:

"Children do not have their liberty restricted".[23]

The regulations for schools and children's homes have contained a similar statement since 2001 and the authors of guidance have been baffled about what it means ever since - because it is not actually true. Perhaps what they meant to say was *"children do not have their liberty unnecessarily restricted."*

Schools and children's homes do restrict the liberty of children and sometimes they do it as a matter of routine. Children have to stay in school during term time, whether they want to or not. Some are not even allowed out of the school grounds at lunch or break times. They have magnetic door restrictors requiring electronic fobs which only the staff have, they have high door handles, coded security locks, locked gates with combination locks and high fences to prevent children from escaping. Some children are kept in a caged playground during break times.

Employers have a legal duty of care to protect people from harm or risk of harm. They would be negligent under the Children Act 1989 and the Health and Safety Act 1974 if they did not sometimes restrict the liberty of children. Paragraph 27 goes on to advise inspectors to check that:

"The physical environment for children is safe and secure and protects them from harm or the risk of harm."

---

23 Inspecting safeguarding in maintained schools and academies - briefing for section 5 inspections - September 2014

In 2000, a 17 year old boy with Autistic Spectrum Disorder "escaped" from a special school, ran on to a busy road and was killed. The head teacher was charged with manslaughter for failing to restrict his liberty.

In 2009 Ofsted issued guidance telling primary schools that they would be judged inadequate for safeguarding if they did not have high door handles to restrict the liberty of small children. In the same year the Crown Prosecution Service was considering charging teachers in a primary school with assault for using high door handles. Guidance on the use of restriction of liberty outside of secure provision has been anything but clear.

In 2012 a teacher sued a school for damages after sustaining a serious injury in an attempt to prevent another boy from escaping from the grounds of a special school. An expert witness told the court that the boy should have been kept (locked) in a safe area so that the teacher did not have to risk life and limb to physically stop him from leaving.

In 2010 departmental guidance was issued on the use of "isolation" or "withdraw" rooms in mainstream secondary schools. Such rooms are used for internal exclusion where pupils are forced to work alone to prevent them disrupting the school.

The 2013 departmental guidance on use of reasonable force in schools made clear that force could be used to keep pupils in such rooms:

> *"Reasonable force can be used to prevent pupils from hurting themselves or others, from damaging property, or from causing disorder."*
>
> (PAGE 4)

Since 2011 some inspectors have become confused by the "Blue Room" judgement and spread a myth that it was now unlawful to prevent a child from leaving a room under any circumstances. That is not true. The issue in that case was that, for a young person over the age of 16 years, authorisation must be obtained for any deprivation of liberty from the Court of Protection. The court did not say that withdrawal, or even seclusion, was necessarily wrong. In fact the court in that case gave detailed consideration to the situations in which it was lawful and in the child's best interests.

The view of the Court was that seclusion could be used to control aggressive behaviour, but only so long as was necessary and only if it was proportionate and the least restrictive option likely to succeed. Seclusion also had to be exercised in accordance with a risk, restraint and restriction reduction plan designed to safeguard the young person's psychological and physical health.

That Court said that the plan, together with guidance for use of the room, should be written up in an individual care plan, specifically designed for that child.

The key point coming out of the Blue Room judgement was that a room may be used as a safety measure where aggressive behaviour could put other people at risk. It was not to be used as a punishment, as a behaviour management tool, to save embarrassment (in the case of a child undressing) or for the convenience of staff.

It was not lawful in that case to seclude the young person solely for reason of self-harm but the Court judged that it could be used in situations when self-harm was coupled with aggressive behaviour which of itself necessitated the use of seclusion.

What has been misunderstood is that the critical aspect of the judgement related to the Mental Capacity Act 2005. The court confirmed that using seclusion in the case of a young person over the age of 16 years came under the Mental Capacity Act. Those responsible should have made an application to the Court of Protection for legal authorisation.

Children's Ages - Under and Over 16s

The Children Act 1989 applies to all children up to the age of 18 years.

In some cases children who are not yet 16 years of age can pose a significant risk to themselves and others. The intervention strategy chosen must be proportionate to that risk. The Blue Room judgement established that there are circumstances in which the use of seclusion can be justified under the Children Act 1989. Those arguments apply to all children up to the age of 18 years. The simple rule is "*minimum force for the shortest time"* and in the overwhelming majority of situations that means no force at all. If less restrictive interventions are likely to achieve the same result, then they should be used irrespective of the age of the child.

Up to the age of 16 years it is still good practice to take into account the wishes of the child but adults have the final say in deciding what is in their best interests.

From 16 years onwards, the Mental Capacity Act 2005 presumes that an individual has the capacity and legal right to make his or her own decisions - even bad decisions. Other people have no legal authority to interfere, even if they think it is in the individual's best interests.

There are circumstances in which children over the age of 16 years lack the capacity to make decisions and it is in their best interests for others to help them. If professionals are planning to make decisions on their behalf they need to obtain legal authority from the Court of Protection. This applies to all residential services including schools, children's homes and respite care provision.

Authority, Power and Reason

What is most important is that interventions are effective so that children are free from fear and safe from harm. Professionals sometimes need the authority and power to take effective action to protect children. The pervasive delusion that children can be protected by removing all authority and power from the adults who look after them must be challenged. This has been tried before with disastrous results. When power is removed from professionals it may be grabbed by others who are likely to abuse it. Bullying happens when there is nobody there to stop it. It happens when individuals are allowed to wield power without legitimate authority. If professionals are given legal rights and powers they should know what they are.

In order to protect children and professionals we need to ensure that guidance accurately reflects these three sources of authority. In recent years it has failed to do so. That is why we have ended up with guidance that has been rejected by a responsible body of professional opinion and cannot be defended on the basis of case law or logical reasoning.

There are three forms of legitimate authority.

1. Legal authority which comes from primary legislation and developing case law.
2. Expert authority which comes from the experience and expertise of a responsible body of professional opinion.
3. Reasonable authority that comes from logical argument and reliable evidence.

Summary

1. A child is any person up to the age of 18 years. Deprivation of Liberty Standards guidance does not apply to children under the age of 18 years but for those over the age of 16 years an application to the Court of Protection is required to authorise any deprivation of liberty.

2. In any decision relating to a child, the paramount consideration must be the best interests of that child.

3. Staff should be encouraged to consider what they would want somebody else to do if that was their child.

4. Good parenting and child care enables and encourages children to make their own choices and decisions whenever they have the capacity to do so.

5. Some degree of restriction of liberty is a necessary part of normal good parenting and child care.

6. When a dynamic risk assessment indicates that a temporary period of incapacity may place a child at risk of significant physical or emotional harm, caring adults may need to use physical restraint as one of the measures to protect the child.

7. Physical restraint must be judged according to the particular circumstances of each case and take account of the nature of the hazard and the likelihood of occurrence.

8. There are circumstances in which children may be confined to a room, or other space, to control aggressive behaviour, but only for as long as necessary to prevent physical or psychological harm. The measure should be proportionate to the circumstances it is intended to prevent.

9. Providers of services have a duty to conduct due diligence to check that the sources of advice and training they commission are reliable.

10. The interests of children and professionals are best served when guidance accurately reflects the full range of expert professional opinion and is expressed in clear language to avoid ambiguity.

11. Consistent guidance should apply across all children's services based on the best interest principle.

12. When statements in guidance are identified as ambiguous or false they should be removed without delay to promote clearer communication.

Post Script

This is a fast moving area and at present any guidance should be considered to be in perpetual draft form.

New guidance from the Department of Health, in the form of a revised Code of Practice for the Mental Health Act 1983, was published in January 2015. This contains some useful clarifications.

The new wording is more careful than that used in the April 2014 document, "Positive and Proactive Care", avoiding the 'absolute' terminology that has created problems so many times in the past. For example, instead of a blanket ban on prone restraint in all circumstances, the wording is now that prone restraint should be avoided unless there is a "cogent reason". for using it. That phrase should really be applied to all forms of restraint and restriction. Nobody should be using any form of restraint or restriction unless there is a cogent reason for doing so. (Why do anything unless there is a cogent reason?)

We have seen this vacillation before when similar attempts at absolute bans have had to be reversed. It should be a warning for authors of guidance in the future.

The guidance also uses the term "child" for a person up to 16 years and "young person" for 16 and 17 year olds. This is also helpful with regard to the confusion over ages in relation to the Children Act 1989 and Mental capacity Act 2005. We may choose to use the term "young adults" for the 18 to 25 year olds to bring in the SEND Code of Practice 2014.

At the last NSEND committee meeting I was asked to add a glossary of terms to promote greater clarity, which I have added below.

Bernard Allen

March 2015

Gossary of Terms	
Child	Any person under the age of 16 years (The Children Acts of 1989 & 2004 take priority. Adults can make decisions on behalf of children but should take not of “Gillick Competence” to allow children to make their own decisions when they are able to do so).
Young Person	A person aged 16 or 17 years old (The Mental Capacity Act 2005 applies and they have the legal right to make their own decisions if they have “mental capacity”. If adults want to make decisions for them they must apply to the Court of Protection for legal authority. Adults are still responsible for protecting the under 18s).
Young Adult	A person aged 18 to 25 years. If they have special needs or disability they have additional rights to support. They have the legal right to make their own decisions if they have “mental capacity”. If adults want to make decisions for them they must apply to the Local Authority Deprivation of Liberty Safeguards (DoLS) team.
Cogent	A rational, reasonable and concise expression of thought. As a general rule nobody should do anything unless there is a cogent reason for doing so. According to the 2015 Mental Health Act Guidance, staff should not plan to use the most restrictive measures of restraint or restriction available unless there is a cogent reason for doing so. That sounds like common sense.
Restriction	Anything that prevents freedom of thought, expression or action.
Physical Restraint	The use of the human body to prevent or cause movement by applying or resisting pressure through the use of muscles and bone.
Mechanical Restraint	The use of inanimate objects to prevent or cause movement by applying or resisting pressure.
Chemical Restraint	The use of drugs to prevent or cause movement by inhibiting the normal functions of the mind and body.
Standards	Statements which call to different minds the same representations of reality.
Accuracy	The correspondence between a representation and reality.

Judgement	The ability to construct the accurate representations using reason, logic. probability and prior knowledge when evidence in incomplete. Alternatively - the ability to be proved right by subsequent events.