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**Guidance in Respect of Applications for Court authority for arrangements amounting to a Deprivation of Liberty (DOL)**

Introduction

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**Introduction**

This Guidance note is intended to provide practical advice in respect of applications to the Court for authorisation of safeguards within the Care Plan for a looked after young person. It covers applications to the Family Court and applications to the Court of Protection. It should be read in conjunction with the more detailed information as to the Mental Capacity Act and Deprivation of Liberty in the SCS Procedure Manual:<https://dols.trixonline.co.uk/chapter/mental-capacity-act-and-deprivation-of-liberty#mental-capacity>

Everyone has a right of liberty under Article 5 of the European Convention on Human Rights. Where the state interferes with that right it must be done in a lawful manner.

If a young person is being looked after by the local authority, then the state is involved. Court authorisation may therefore be needed to ensure that the local authority’s actions in depriving a young person’s liberty is lawful.

NB: This is different to Deprivation of Liberty Safeguards (DOLS) which may be invoked in health or adult social care settings.

**Legal advice** should be sought

* wherever there is doubt as to whether safeguards and restrictions amount to a deprivation of liberty
* where it is considered Court authorisation may need to be sought.

The Childcare Legal Team will provide legal advice and representation in respect of Court applications. A Legal Gateway Meeting should be booked to discuss the need for an application. <https://www.proceduresonline.com/surrey/cs/p_legal_planning_meetings.html>

 An LGM may not be necessary where

* a care plan for a young person open to the CWD Service amounts to a Deprivation of liberty
* there is a management decision that court authority for a DOL is needed,
* there are no other complicating or contentious matters,

In such cases, the necessary paperwork for the Court application (see Section 5 below) should be prepared and forwarded to legal.childcare@surreycc.gov.uk.

**Section 1 - What is a deprivation of liberty?**

The Law Society has published guidance to assist with determining whether the care plan of a child deprives them of their liberty:

Is the Young Person

* Under the complete supervision and control of those caring for them?
* Not free to leave the place where they live?

The following questions are helpful to consider:

* Compared to another person of the same age and relative maturity, how much greater is the intensity of the supervision, support, and restrictions?
* Can the person go out of the establishment without the carer’s permission?
* Can they spend nights away? How do the arrangements differ to the norm for someone of their age?
* Can the person choose what to wear outside school hours and buy his or her own clothes?
* To what extent do the rules and sanctions differ from other age appropriate settings?
* To what extent is contact with the outside world restricted?
* Are there regular private times, where the person has no direct carer supervision?
* What is the carer to person ratio and how different is this to what would usually be expected of someone of that age who is not disabled?
* Is physical intervention used? If so, what type? How long for? And what effect does it have on the person?
* Is medication with a sedative effect used? If so, what type? How often? And what effect does it have on the person?
* What extent is the person able to control his or her own finances? How does this differ to the norm for someone of the same age who is not disabled?
* To what extent do the rules and sanctions differ from non-disabled age-appropriate settings? Law Society 2015

Curfews and staffing ratios may amount to a deprivation of liberty as might the limiting of internet and phone use.

The restriction of the use of a phone for young people subject to Care or Interim care orders may be justified through exercise of S33 (3) powers to safeguard and promote the welfare of a child subject to a Care or Interim Care Order. However, it is important that, there is proper consultation with the child and parents, and the decisions and reasons for it are properly recorded. NB: s33 (3) CA89 does not apply to young people looked after voluntarily under S20 CA 89.

NB: In certain limited circumstances in which a care package is being provided by the local authority whilst the young person is being cared for at home pending a move to a suitable placement, the state may still be considered to be involved and thus interfering with that young persons’ liberty.

**Section 2 – Consent**

Where there is valid consent, the deprivation of liberty will be lawful. Unless there is valid consent authorisation from the Court under one of the routes outlined below is required.

**Who can consent?**

Parents of children and young people under 16 where

* the young person is looked after voluntarily via s20,
* lacks capacity and
* there is a settled care plan agreed by the parents.

but not if there is a Care Order in place in which case Court authorisation will always be required.

Court authorisation should also be sought when the young person is looked after voluntarily under S20 CA89, and there is any dispute in respect of the restrictions.

Parents of 16 or 17 year olds cannot use their parental responsibility to consent to a placement that deprives their child of their liberty,

The Local Authority cannot consent if there is a Care Order or interim Care Order in place and in a s20 scenario it does not share PR, so cannot consent

A Child/Young Person under 16 cannot consent and, as a general rule, a 16 or 17 Year old, even with capacity, cannot consent to restrictions amounting to a deprivation of liberty and can never do so where those restrictions amount to secure accommodation.

**Section 3 – Types of Court Authority**

For children and young people under 18, there are 3 routes to obtain Court authorisation to lawfully deprive them of their liberty:

1. Section 25 CA89 – Secure Accommodation
2. Inherent Jurisdiction of the High Court (Family Division)
3. Authorisation under the Mental Capacity Act 2005 (Court of Protection)

Section 25 CA89 only relates to Secure Accommodation placements specifically approved by Secretary of State for this purpose and the placement of a young person in secure accommodation is subject to the criteria in Section 25 CA89 being met and is and governed by the Children (Secure Accommodation) Regulations 1991. For further information in respect of Secure Accommodation please see: <https://proceduresonline.com/trixcms2/media/23511/placements-in-secure-accommodation-tri-x-with-legal-review-2024.docx>

For restrictions amounting to a deprivation of liberty in all other placements, the Court authority MUST be sought either from the Family Division of the High Court or from the Court of Protection (16 & 17 year olds without capacity only).

In these scenarios, the authority applies to the restrictions, not the placement and Court authority should be in place before restrictions are imposed.

NB: Other than in secure accommodation placements, Court Authority for a DOL can be given for restrictions within an **unregulated placement,** but it does not make an unregulated placement regulated – The LA still needs to comply with S22C CA89 & relevant Regulations

**Section 4 - Family Court Applications**

* For children under 16 years old deprived of their liberty
* For 16 or 17 year olds with capacity whose care plans includes restrictions depriving them of their liberty in order to safeguard them as a result of challenging, criminal or harmful behaviours
* In exceptional circumstances for 16 year old without capacity whose care plan includes safeguards that amount to a deprivation of liberty only ( but see COP applications below)

The inherent jurisdiction is considered the safety net for children and vulnerable people but should only be used where there is no alternative route available.

Legal advice should be sought as to the appropriate Court for the application.

**Application Process**

The social work team should prepare the following documents which are located in the SCS Procedures Document Library and forward these in draft form to the legal team:

1. Completed Crib Sheet for C66 Application Form
2. Statement using SWE Template for DOL applications to Family Court
3. Current Mental capacity assessment, where relevant

Please send the completed documents to legal.childcare@surreycc.gov.uk.

**The SWE Statement Template** contains detailed guidance in blue as to the areas to be addressed in the statement which should be followed in each case.

Draft statements should be quality assured by a Team Manager or above before being sent to the legal team, The allocated lawyer will then review the draft documents, suggesting any amendments or additional information needed before finalising and submitting the application to the Court

See below in respect of **Mental Capacity Assessments** and the further guidance at<https://dols.trixonline.co.uk/chapter/mental-capacity-act-and-deprivation-of-liberty#mental-capacity>

**Involving Parents**

The need for Court authority should be included in discussions with a young person’s parents regarding the Care Plan and any safeguards amounting to a deprivation of liberty. A template letter for parents is available in the SCS Procedures Document Library .

**Upon Issue**

* Applications are made to the National DOL Court and listed before a rota’d High Court Judge
* Where the application is linked to existing or recently concluded proceedings in the Court sitting at Guildford, the application may be transferred to be heard at Guildford
* The Child or Young person is made party to the application and a Children’s Guardian will be appointed.

**The Order, if granted:**

* will set out what restrictions/restraints authorised and for how long.
* may specify that there should be a further hearing to review the arrangements
* is not placement specific but is specific to the restrictions and restraints.
* is permissive and does not require that the restrictions/restraints remain in place for the duration of the Order
* should be shared with the placement caring for the young person.

**Review**

The use of the restrictions and restraints amounting to a deprivation of liberty should be kept under regular review in consultation with the Placement and the IRO. If a variation is needed that is different to, or exceeds, those authorised by the Court, a fresh application will need to made to the Court.

**Section 5 - Court of Protection Applications**

The use of the inherent jurisdiction of the Family Court in respect of young people aged 16 and 17 where it is clear they lack capacity, will only be appropriate in exceptional circumstances and such applications will usually be made to the Court of Protection.

The Mental Capacity Act 2005 established the Court of Protection which was given specific responsibility for welfare decisions of anyone aged 16 and over who lacks capacity. This guidance is designed to explain the legal principles in respect of applications to the Court of Protection along with outlining the practical steps in such proceedings.

**Mental Capacity Act 2005**

The starting point with the Mental Capacity Act 2005 (MCA 2005) is the principles found at Section 1, which, similar to the welfare checklist in the Children Act 1989, should be borne in mind at all times:

**The Principles**

* *A person must be assumed to have capacity unless it is established that he lacks capacity.*
* *A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
* *A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
* *An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.*
* *Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.*

The Court of Protection may only make decisions on behalf of an individual where they lack capacity.

**People who lack capacity**

Section 2 of the Mental Capacity Act 2005 sets out the relevant test to determine if someone lacks capacity:

*(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*

*(2) It does not matter whether the impairment or disturbance is permanent or temporary.*

*(3) A lack of capacity cannot be established merely by reference to—*

*(a) a person's age or appearance, or*

*(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.*

*(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*

It is important to remember that it is the Court that determines whether someone lacks capacity not an individual social worker. The role of a social worker or other professionals is to assess mental capacity, akin to parenting capacity or other assessments. The Court must be satisfied on the balance of probabilities that someone lacks capacity and where there is a dispute about this, the Court may appoint a special visitor to undertake a further assessment and report back to the Court.

**Authorisation of Deprivation of Liberty under the MCA 2005**

Applications for authorisation from the Court of Protection (COP) under the Mental Capacity Act 2005 are made under Section 16(2)(a) which provides a general power for the Court to make a decision in respect of welfare for someone who lacks mental capacity.

Alternatively, the Court may make a declaration under Section 15 that the deprivation of liberty is lawful (this is akin to what the High Court does in inherent jurisdiction proceedings).

In considering whether to make such an order, the court must consider whether the DOL is in the young person’s best interests S1(5) MCA and whether the DOL is the least restrictive option S1(6) MCA.

The assessment of person’s best interests is carried out under S4 MCA. It also requires the decision maker to consider all the relevant circumstances and directs them to take a number of steps including:

* Permitting and encouraging the young person to participate as fully as possible in the decision.
* Ascertaining, as far as is reasonably practicable, the young person’s past and present wishes and feelings, beliefs and values and any other factors that the young person would likely to consider if the young person were able to.
* Taking into account and, where practical and appropriate, consulting with anyone named by the young person as someone to be consulted.

The Court has recently confirmed that applications for a Deprivation of Liberty Order for those under 18 cannot be made under the streamlined COP procedure and instead should be made using the normal procedure and application forms.

**Application Process**

Like the Family Court, the Court of Protection has its own suite of application forms and the relevant ones for this application are as follows:

* + COP1
	+ COP 1B
	+ COP3 – Assessment of Capacity
	+ COP 24 – Witness statements
	+ Draft order – Legal to prepare
	+ Best interests assessment (to be approved by Service Manager)

The forms with guidance notes can be found in the document library and should be completed in draft form and sent to the legal team via legal.childcare@surreycc.gov.uk

When drafting witness statements, it is usual practice in the Court of Protection to reference the young person concerned by their full name at the start of the document and then by their initials for the rest of the statement. For example, Jane Smith would be JS for the rest of the statement.

In addition to these application forms, it is important to provide other supporting evidence for the application which can include the following:

* + Care plan for the child which should deal with health, education, placement, contact, etc.
	+ Any relevant papers from previous care proceedings if available.
	+ Most recent C&F assessment.
	+ EHCP
	+ Relevant documents from placement.

Similar to Family Court proceedings, the young person will be joined to the proceedings as a party and a Litigation Friend will be appointed for them, this will likely be the Official Solicitor.

The parents should also be joined to the proceedings if they wish to express a view. However, unlike care proceedings, parents do not automatically have to be a party, particularly if they have not been involved for a long period or there are other circumstances which would be contrary to the young person’s best interests. They should however be served with notice of the application, and they can request party status, if they wish.

**Official Solicitor**

The Official Solicitor is

* responsible for representing parties to proceedings who lack capacity.
* will be invited by the Court to act as the litigation friend for the subject child where there is no one else appropriate who can be their litigation friend.

In order for the Official Solicitor to act, the Court will need to make a financial order confirming that the young person does not have means of paying for legal representation themselves, thereby ensuring entitlement to legal aid. Therefore, as part of the application process information on the child’s saving if any will need to be made available.

**Court Hearings and Orders**

Once the application has been issued in the Court of Protection, the matter will be listed for a hearing. At the hearing, the Court will consider the application, determine whether the arrangements constitute a DOL and whether an Order or Declaration should be made.

The length of the order will vary depending on the circumstances of the case, but for the children supported by CWD teams, whose care arrangements are unlikely to change, the Court is likely to grant longer orders. The Court will generally not make an order for longer than 12 months, because it will still seek oversight of the ongoing DOL arrangements for the child and may seek updates as to the planning for care post 18.

It should also be noted that as a general rule proceedings in the Court of Protection are held in public, with a Transparency Order being made by the Court detailing what information can or cannot be reported.

**What decision is being made by the Court?**

It is important to be clear that in most cases you are not asking the Court to make a decision about how or where the child should be accommodated and cared for.

The authority to make those decisions will vary depending on how a child is accommodated whether this is under Section 20 or a Care Order but generally the application to the Court of Protection will be for a declaration that the Deprivation is lawful, and not for the Court to determine where a child should reside and how they should be cared for.

**Section 20 Cases**

Where a child is accommodated by the Local Authority under Section 20 of the Children Act 1989, the parents retain parental responsibility for the child and therefore decisions on where to accommodate and the care regime to be provided should be agreed with the parents. This will be subject to monitoring and discussion as part of the Looked after Child Review process, with involvement from the IRO and other professionals.

The Mental Capacity Act 2005 Code of Practice considers the situation when it comes to children and where parental responsibility continues to be relevant:

*‘Under the common law, a person with parental responsibility for a young person is generally able to consent to the young person receiving care or medical treatment where they lack capacity under section 2(1) of the Act. They should act in the young person’s best interests.’*

Therefore, it remains open to the parents to determine that a placement which involves a deprivation of liberty is suitable for the child. The parent cannot consent to the deprivation of liberty, but the placement and the wider care and support can be agreed by them.

There may be certain situations where a parent does not agree. For a young person already, or soon to be aged 17 years, there is not the option of applying for a Care Order. In these cases, application can be made to the Court of Protection for a Section 16 Welfare Decision, but separate advice should be sought from the legal team in these situations.

**16 and 17 year olds subject to a Care Order**

Where a child has been made subject to a Care Order under Section 31 Children Act 1989, the Local Authority has the ability to determine how parents can utilise their parental responsibility as per Section 33. The Local Authority also has a statutory duty under Sections 22, 22A, 22C and 23.

As part of the CLA processes, the Local Authority will determine how and where the child should be accommodated and cared for. This will be determined with reference to the Care, Planning and Placement Review Regulations 2010.

Appendix 1 – Mental Capacity Act 2005 Extracts

**3 Inability to make decisions**

(1)  For the purposes of [section 2](https://uk.practicallaw.thomsonreuters.com/Document/IE807E160E45311DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)), a person is unable to make a decision for himself if he is unable–

(a)  to understand the information relevant to the decision,

(b)  to retain that information,

(c)  to use or weigh that information as part of the process of making the decision, or

(d)  to communicate his decision (whether by talking, using sign language or any other means).

(2)  A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3)  The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4)  The information relevant to a decision includes information about the reasonably foreseeable consequences of–

(a)  deciding one way or another, or

(b)  failing to make the decision.

**4 Best interests**

(1)  In determining for the purposes of this Act what is in a person’s best interests, the person making the determination must not make it merely on the basis of–

(a)  the person’s age or appearance, or

(b)  a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2)  The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3)  He must consider–

(a)  whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b)  if it appears likely that he will, when that is likely to be.

(4)  He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5)  Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6)  He must consider, so far as is reasonably ascertainable–

(a)  the person’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b)  the beliefs and values that would be likely to influence his decision if he had capacity, and

(c)  the other factors that he would be likely to consider if he were able to do so.

(7)  He must take into account, if it is practicable and appropriate to consult them, the views of–

(a)  anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b)  anyone engaged in caring for the person or interested in his welfare,

(c)  any donee of a lasting power of attorney granted by the person, and

(d)  any deputy appointed for the person by the court,

 as to what would be in the person’s best interests and, in particular, as to the matters mentioned in subsection (6).

(8)  The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which–

(a)  are exercisable under a lasting power of attorney, or

(b)  are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9)  In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10)  *“Life-sustaining treatment”* means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11)  “Relevant circumstances” are those–

(a)  of which the person making the determination is aware, and

(b)  which it would be reasonable to regard as relevant.

**4A Restriction on deprivation of liberty**

(1)  This Act does not authorise any person (“D”) to deprive any other person (“P”) of his liberty.

(2)  But that is subject to–

(a)  the following provisions of this section, and

(b)  [section 4B](https://uk.practicallaw.thomsonreuters.com/Document/I3DA88D60192E11DE9416E5A3C7DD0972/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)).

(3)  D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.

(4)  A relevant decision of the court is a decision made by an order under [section 16(2)(a)](https://uk.practicallaw.thomsonreuters.com/Document/IE80FA990E45311DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) in relation to a matter concerning P’s personal welfare.

(5)  D may deprive P of his liberty if the deprivation is authorised by [Schedule A1](https://uk.practicallaw.thomsonreuters.com/Document/I42744DE048AE11DCB029F9561A6CCE51/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) (hospital and care home residents: deprivation of liberty).

**15 Power to make declarations**

(1)  The court may make declarations as to–

(a)  whether a person has or lacks capacity to make a decision specified in the declaration;

(b)  whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;

(c)  the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2)  *“Act”* includes an omission and a course of conduct.

**16 Powers to make decisions and appoint deputies: general**

(1)  This section applies if a person (“P”) lacks capacity in relation to a matter or matters concerning–

(a)  P’s personal welfare, or

(b)  P’s property and affairs.

(2)  The court may–

(a)  by making an order, make the decision or decisions on P’s behalf in relation to the matter or matters, or

(b)  appoint a person (a “deputy”) to make decisions on P’s behalf in relation to the matter or matters.

(3)  The powers of the court under this section are subject to the provisions of this Act and, in particular, to [sections 1](https://uk.practicallaw.thomsonreuters.com/Document/IE8071E11E45311DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) (the principles) and [4](https://uk.practicallaw.thomsonreuters.com/Document/IE808A4B0E45311DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) (best interests).

(4)  When deciding whether it is in P’s best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in [section 4](https://uk.practicallaw.thomsonreuters.com/Document/IE808A4B0E45311DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search))) to the principles that–

(a)  a decision by the court is to be preferred to the appointment of a deputy to make a decision, and

(b)  the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

(5)  The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).

(6)  Without prejudice to [section 4](https://uk.practicallaw.thomsonreuters.com/Document/IE808A4B0E45311DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)), the court may make the order, give the directions or make the appointment on such terms as it considers are in P’s best interests, even though no application is before the court for an order, directions or an appointment on those terms.

(7)  An order of the court may be varied or discharged by a subsequent order.

(8)  The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy–

(a)  has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P’s best interests, or

(b)  proposes to behave in a way that would contravene that authority or would not be in P’s best interests.

**17 Section 16 powers: personal welfare**

(1)  The powers under [section 16](https://uk.practicallaw.thomsonreuters.com/Document/IE80FA990E45311DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) as respects P’s personal welfare extend in particular to–

(a)  deciding where P is to live;

(b)  deciding what contact, if any, P is to have with any specified persons;

(c)  making an order prohibiting a named person from having contact with P;

(d)  giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P;

(e)  giving a direction that a person responsible for P’s health care allow a different person to take over that responsibility.

(2)  Subsection (1) is subject to [section 20](https://uk.practicallaw.thomsonreuters.com/Document/IE8117E50E45311DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) (restrictions on deputies).