

Guidance on authorisation of deprivation of liberty under the Court's Inherent Jurisdiction

1. Overview

- 1.1** This guidance sets out the legal framework for authorisation to deprive a child of their liberty where it is not authorised by a Secure Accommodation Order, the Mental Health Act 1983, Coronavirus Act 2020 or the criminal justice system. It amends and updates previous guidance dated 2018. Please see appendix 1 for the detailed legal framework on deprivation of liberty cases.

2. Covid 19

- 2.1** Please note that at the current time the provisions in section 2 apply in relation to coronavirus only and the remainder of this document applies to all other circumstances:

The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 amend the Children's Homes (England) Regulations 2015 in light of schedule 21 of the Coronavirus Act 2020.

Regulation 11(4) of the 2020 regulations amends (4) Regulation 20(3) of the 2015 Regulations as in bold below:

Regulation 20 now states:

(1) Restraint in relation to a child is only permitted for the purpose of preventing—

(a) injury to any person (including the child);

(b) serious damage to the property of any person (including the child);

or

(c) a child who is accommodated in a secure children's home from absconding from the home.

(2) Restraint in relation to a child must be necessary and proportionate.

(3) These Regulations do not prevent a child from being deprived of liberty where that deprivation is authorised in accordance with a court order **or in accordance with exercise of powers under Schedule 21 of the Coronavirus Act 2020**.

Schedule 21 of the Coronavirus Act 2020 sets out the circumstances in which a person potentially or actually infected with Coronavirus can be deprived of their liberty.

3. Role of the Guardian

- 3.1** Upon becoming aware that a child is subject to a deprivation of their liberty and is either unwilling or unable to consent to the arrangement, it will be for the local authority in whose operational area the child resides to make an application to the court for approval of the arrangement. Except in the case of a young person over 16 and who lacks capacity to make decisions, the application will be made to the High Court to exercise its inherent jurisdiction to approve the placement.

- 3.2** The local authority may not make an application for the exercise of the High Court's inherent jurisdiction unless it first obtains the permission of the court. According to s.100(4), the court may only grant leave if it is satisfied that an Order cannot be made to achieve the same result under statute (i.e under the Children Act 1989, the Mental Health Act 1983, the Mental Capacity Act 2005, the Coronavirus Act 2020). The purpose of this provision is to prevent the Court's inherent jurisdiction contradicting or being used to circumnavigate statute.
- 3.3** Where an application is made by the local authority in respect of a possible deprivation of liberty, the proceedings will be heard separately from any ongoing proceedings under the Children Act 1989. The application can only be heard by a High Court judge (this includes deputy High Court Judges and Circuit Judges sitting as High Court under section 9 of the Senior Courts Act ('a section 9 Judge')). The Children's Guardian acting within any ongoing Children Act proceedings is likely to be appointed to represent the child in the inherent jurisdiction proceedings. As these are not specified proceedings as defined by section 41 of the Children Act 1989 the child is not automatically a party to proceedings. Therefore the Court needs to confirm that the child is joined to the proceedings to enable a Guardian to be appointed under Rule 16.4 of the Family Procedure Rules 2010.
- 3.4** The Guardian will be required to express a view as to whether a deprivation of liberty has indeed taken place, and if so, whether it is proportionate and necessary in order to safeguard the child. If the child has capacity, is competent to make decisions concerning the proceedings and does not agree with the Guardian's view, it is likely that separate representation will be required for the child. It will then be for the court to determine what, if any, role the Guardian will play in the proceedings. In the event that the Guardian continues to participate in the proceedings and their position is not aligned with any other party, raising a distinct legal issue, separate legal representation of the Guardian may be appropriate but this is an internal decision for Cafcass as distinct from whether the child should be separately represented which is a matter for the Court. (Please see separate guidance on [Separate Legal Representation](#)).
- 3.5** Any grant of approval by the High Court for deprivation of liberty to continue will be time limited, and it will be necessary for the local authority to make fresh applications from time to time for the Court to re-examine the circumstances and determine whether the deprivation remains justified. In these circumstances, it is likely that the Guardian will be re-appointed on each occasion. The duration of any Order should not exceed the maximum durations for Secure Accommodation Orders.
- 3.6** In the event that a practitioner identifies a possible deprivation of liberty, but the local authority refuses to make an application to the High Court, it may be necessary for Cafcass to take separate action to remedy the situation. In this instance, legal advice should be sought as to how best to proceed.
- 3.7** In the case of Cafcass, the law requires a practitioner who encounters a potentially unlawful deprivation of liberty report the matter to the local authority and the court if applicable. It would then be for the local authority to seek to put in place measures to end the deprivation of liberty. This should be highlighted in the case analysis prepared by the Guardian for the proceedings.

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Appendix

Annex 1: Legal Framework

Article 5 of the European Convention on Human Rights (ECHR)

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.

(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 for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants [2]

The Human Rights Act 1998 incorporates the Articles of the ECHR into United Kingdom law. Article 5 prevents the arbitrary detention of any adult or child, except in specified circumstances when it is necessary to achieve a lawful purpose.

The exceptions set out at Article 5(1) (d) & (e) above are those which are particularly applicable to children involved in family proceedings. 5(1)(d) is the exception which allows a child to be lawfully made subject to a secure accommodation order if the criteria are met, whereas 5(1)(e) can be applied to children who lack capacity and are detained for their own safety and protection. It is this latter category of children to whom this guidance note primarily applies.

The following legal means can be employed to authorise a deprivation of liberty:

- Section 100 of the Children Act 1989 - The Inherent Jurisdiction of the High Court
- Section 25 of the Children Act 1989/Section 119 of the Social Services and Wellbeing (Wales) Act 2014 – Secure Accommodation Order
- Sections 2 & 3 of The Mental Health Act 1983 – detention in a hospital setting for a mental disorder
- Schedule 21 of the Coronavirus Act 2020

While it will often be lawful for a local authority to detain and restrict the movements of a child in its care, and indeed necessary to ensure the safety and well-being of the child, it is essential that the detaining authority (Local Authority or NHS Trust) takes the correct legal and procedural steps to ensure that the detention of the child is lawful.

This guidance is derived from the principles set down in the European Convention on Human Rights (ECHR) as contained in the Human Rights Act 1998 (HRA 1998), as well as the Children Act 1989, the Mental Capacity Act 2005 and relevant case law.

Please note that this guidance only relates to deprivation of liberty under the Court's inherent jurisdiction. Please refer to the separate guidance on Secure Accommodation [link to be added] in relation to deprivation under liberty under section 25 of the Children Act 1989.

Case law has identified three necessary elements of an unlawful deprivation of liberty *Storck v Germany* (2006) 43 EHRR 6 4:

- **The objective element** – The person is confined to a particular restricted place for not a negligible length of time

- **The Subjective element** – there is no consent either because the person has not consented to, or lacks capacity to consent to, the confinement.
- **The state element** – the deprivation of liberty is the responsibility of the state either directly or indirectly

When seeking to determine whether there is a deprivation of liberty Cafcass practitioners should consider whether each of the above elements is present.

Objective element - confinement

P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents) [[2014] UKSC 19 (known as Cheshire West) set out the “acid test” for determining whether there has been a deprivation of liberty. It is necessary to consider:

- Is the person subject to continuous supervision and control?
- Is the person free to leave?

When considering whether the person is free to leave the placement, the fact that the person may appear to be content with their situation and not actively be seeking to leave is irrelevant. The person's compliance or lack of objection, the relative normality of the placement and the purpose behind it are all irrelevant. The focus should instead be on what those with control over their care arrangements would do if the person sought to leave.

Whether or not the child's placement amounts to a deprivation of liberty will depend upon the facts of the particular case. There must be more than a mere restriction of the child's liberty. Consequently, practitioners will have to explore the restrictions and limitations placed upon the child within the placement setting and determine whether they amount to a deprivation of liberty.

Practitioners should consider the practical arrangements for the placement, bearing in mind the age of the child. For example, is a child who is of an age where they would normally be permitted to go out alone, prevented from doing so? Are the doors of the placement locked and/or is the child subject to any other form of physical restraint? Is the degree of supervision to which the child is subjected normal for a child of that age?

When considering the arrangements in place for a child with physical or mental disability, practitioners should consider whether they would be reasonable for a child of the same age without a disability. The Supreme Court in Cheshire West held that human rights have a universal character and physical liberty is the same for everyone, regardless of their disabilities. What would be a deprivation of liberty for a non-disabled person is also a deprivation for a disabled person.

For example, it would be reasonable (and indeed essential) to provide continuous supervision to a child of 3, whether disabled or not, and such supervision would not amount to a deprivation of liberty. However, it is likely that a non-disabled child of 12 would be deemed to have been deprived of their liberty if they were subject to continuous supervision and prevented from leaving their placement. Accordingly, a child with a mental disability would be deemed equally to have been deprived of their liberty under such arrangements.

It should be noted that court approval for a deprivation of liberty will apply to a particular set of arrangements within a specified placement. Should the child's placement or the nature of the restrictions in place change, it will be necessary for the local authority to seek fresh approval from the court. It is also not possible for the Court to make a pre-emptive Order in relationship to circumstances that would give rise to deprivation of liberty but which do not currently exist.

There must be an absence of consent for there to be a deprivation of liberty. In the case of children who are not Gillick competent, it is possible for parents or others with parental responsibility to provide the required consent. In the absence of valid parental consent, Cafcass practitioners will need to consider, firstly, is the child capable of giving consent and, if so, does the child consent to their care arrangements.

If the child is considered to be Gillick competent and in a position to consent to their care arrangements, they will be entitled to consent to a care setting that amounts to a deprivation of liberty. In practice this would enable a local authority to place a child in a foster or residential placement where they are subjected to continuous supervision and not free to leave, so long as the competent child was in agreement. For a child to be Gillick competent, he/she must possess sufficient understanding and intelligence to understand fully the decision being proposed to be taken. In these circumstances, while there will be an ongoing deprivation of the child's liberty, there will be no need for the local authority to seek approval from the court.

When faced with such a situation, Cafcass practitioners should ensure that the child's consent has been provided freely and with full understanding. In seeking to ascertain whether a child is Gillick competent, it will usually suffice for the Guardian and/or solicitor for the child to make an assessment. However, in the case of children with known or suspected learning difficulties or disabilities, it will likely be necessary to arrange an expert assessment of the child to ascertain whether they possess enough understanding to consent to their care arrangements.

Where a child or young person has capacity to make decisions, any lack of consent to their care arrangements will be evident, as they will be able to vocalise their wishes and feelings. In practice, local authorities will usually seek the approval from the court to detain such children either via an application for a secure accommodation order or, where the placement is outside the statutory scheme of section 25, for example the placement is in a placement not approved by the secretary of state, under the Court's inherent jurisdiction.

Subjective element

Children with capacity and children without capacity

If a child has capacity to consent but objects it will be necessary to make an application to authorise the deprivation of their liberty either under one of the statutory regimes of the Court's inherent jurisdiction if the circumstances fall outside the statutory schemes.

Where the child lacks capacity, they will not be able to provide valid consent to their care arrangements. Children who lack capacity may be younger children who are not yet Gillick competent and children with mental disabilities.

The fact that a child makes no active objection to their situation and does not seek to leave does not amount to consent. Local authorities care for children with severe mental disabilities who will often not be able make known their wishes and feelings or understand their situation. Although the child may not be aware that they are being deprived of their liberty, the deprivation exists in any event.

The confinement must be imposed by the state for there to be a deprivation of liberty. Cafcass practitioners will most often encounter children who are looked after by a local authority and confined within a foster placement or a residential unit. However, children residing in a hospital or educational setting will also fall within this category.

State element

Categories of children where there is a deprivation of liberty can be divided into two broad categories.

Children under the age of 16

Children who have not reached age 16 fall under the jurisdiction of the Family Division of the High Court. Where there is a deprivation of liberty and it is not possible for the child or their parents to consent to the arrangement, the local authority should seek authorisation from the High Court for the deprivation to continue.

The question of whether the approval of the High Court will need to be sought will depend upon the precise circumstances of the child. A Gillick competent child or person with parental responsibility is able to provide valid consent to the child being deprived of their liberty. A parent can also exercise parental responsibility to authorise deprivation in a hospital, educational setting, in day care or with a private foster carer, regardless of the child's personal mental capacity. It will therefore not be necessary for a practitioner to refer such a case to the local authority or court.

A local authority can never authorise the deprivation of liberty of a child in its care. However, the High Court has held that an agreed reception of a child into care, which was beneficial and for a short-lived period, where the parent and the local authority were working together in the best interests of the child, might be an appropriate exercise of parental responsibility by the parent *A Local Authority v D and others* [2015] EWHC 3125 (Fam).

Therefore, in some circumstances it may be possible for a parent to consent to their child's deprivation of liberty while in voluntary care of the local authority. If there is any doubt as to the validity of the parent's consent, the practitioner should refer the matter to the court to seek clarification.

However, where a child is voluntarily accommodated as a prelude to, or during the course of, care proceedings it is unlikely that the child's parents could provide consent to a deprivation of liberty, as the parent's past exercise of parental responsibility had been seriously called into question. In these circumstances, the authorisation of the High Court should be sought. The authorisation of the Court is necessary in relation to the deprivation of a child who is subject to an Interim Care Order or Care Order as the Local Authority is unable to exercise parental responsibility to consent to the same.

Young people aged 16 and over

The legal status of children aged 16 and over is distinguished from those who have not yet reached that age. The law recognises the need for a greater degree of respect for autonomy of those older children. They are included within the remit of the Mental Capacity Act 2005 (MCA 2005). In practice this means that any decision concerning a possible deprivation of liberty in the context of a young person lacking capacity aged 16 or over where there is no valid consent provided is likely to be decided by the Court of Protection, as opposed to the Family Division of the High Court unless it is agreed in the content of ongoing proceedings within the Family Division that the Family Division is best placed to hear the matter *A-F (Children) (No 2)* [2018] EWHC 2129 (Fam). For further information about the basis for transferred matters to or from the Court of Protection for 16 and 17 year olds please see Annex 2.

Within proceedings under the MCA 2005 there will be no role for the Guardian. Accordingly, any request by the court for a Guardian to be appointed within Court of Protection proceedings should be refused.

It is permissible for a parent or other person with parental responsibility to consent to the confinement of their 16 or 17 year old child who lacks capacity, whether in their own care or in the care of the state. Therefore, where such consent has been provided, it will not be necessary to seek authorisation from the Court of Protection.

The local authority can never consent to the deprivation of a child's liberty and, in the absence of valid parental consent, must always seek the authorisation of the High Court or Court of Protection to detain a young person in its care aged 16 or over.

If it is believed that a young person over 16 lacks capacity to consent to a deprivation of liberty and there is no valid parental consent, a specialist assessment that complies with the requirements in the MCA 2005 must be carried out. Under the MCA, it is presumed that a person has capacity unless it is established on the balance of probabilities that they lack capacity.

According to the MCA Code of Practice assessing someone's capacity to make a decision for themselves should use a two-stage test of capacity:

- Does the person have an impairment of the mind or brain (temporary or permanent), or is there some sort of disturbance affecting the way their mind or brain works?
- If so, does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

All public bodies are under a positive obligation to protect a child's rights under Article 5 and to prevent unlawful detentions. Where a public body knows or ought to know that a child or adult is subject to restrictions that may give rise to a deprivation of liberty, it has a duty to investigate the circumstances and take action if required.

Annex 2

The Mental Capacity Act 2005 (Transfer Of Proceedings) Order 2007, SI 2007/1899

(Article 2 – transfers to the Court of Protection, Article 3 – transfers from the Court of Protection)

Article 2 -Transfers from the Court of Protection to a court having jurisdiction under the Children Act”, provides as follows:

“2 (1) This article applies to any proceedings in the Court of Protection which relate to a person under 18.

(2) The Court of Protection may direct the transfer of the whole or part of the proceedings to a court having jurisdiction under the Children Act where it considers that in all the circumstances, it is just and convenient to transfer the proceedings.

(3) In making a determination, the Court of Protection must have regard to –

(a) whether the proceedings should be heard together with other proceedings that are pending in a court having jurisdiction under the Children Act;

(b) whether any order that may be made by a court having jurisdiction under that Act is likely to be a more appropriate way of dealing with the proceedings;

(c) the need to meet any requirements that would apply if the proceedings had been started in a court having jurisdiction under the Children Act; and

(d) any other matter that the court considers relevant.

(4) The Court of Protection –

(a) may exercise the power to make an order under paragraph (2) on an application or on its own initiative; and

(b) where it orders a transfer, must give reasons for its decision.

(5) Any proceedings transferred under this article –

(a) are to be treated for all purposes as if they were proceedings under the Children Act which had been started in a court having jurisdiction under that Act; and

(b) are to be dealt with after the transfer in accordance with directions given by a court having jurisdiction under that Act.”

Article 3 - Transfers from a court having jurisdiction under the Children Act to the Court of Protection

“3 (1) This article applies to any proceedings in a court having jurisdiction under the Children Act which relate to a person under 18.

(2) A court having jurisdiction under the Children Act may direct the transfer of the whole or part of the proceedings to the Court of Protection where it considers that in all circumstances, it is just and convenient to transfer the proceedings.

(3) In making a determination, the court having jurisdiction under the Children Act must have regard to –

(a) whether the proceedings should be heard together with other proceedings that are pending in the Court of Protection;

(b) whether any order that may be made by the Court of Protection is likely to be a more appropriate way of dealing with the proceedings;

(c) the extent to which any order made as respects a person who lacks capacity is likely to continue to have effect when that person reaches 18; and

(d) any other matter that the court considers relevant.

(4) A court having jurisdiction under the Children Act –

(a) may exercise the power to make an order under paragraph (2) on an application or on its own initiative; and

(b) where it orders a transfer, must give reasons for its decision.

(5) Any proceedings transferred under this article –

(a) are to be treated for all purposes as if they were proceedings under the Mental Capacity Act 2005 which had been started in the Court of Protection; and

(b) are to be dealt with after the transfer in accordance with directions given by the Court of Protection.

Annex 3: What constitutes registered, unregulated and unregistered provision?

What are registered children's homes?

An establishment is a children's home 'if it provides care and accommodation wholly or mainly for children' and if it is a children's home, it must be registered. Semi-independent accommodation (also known as 16+ or supported accommodation) and constantly moving accommodation (for example placements on boats, barges and caravans) are not required to register.

To register, an establishment must meet a series of requirements¹. In summary, this involves:

- Becoming a registered provider with Ofsted with a registered individual who represents the provider to Ofsted;
- Employing a registered manager who is individually registered with Ofsted;
- Producing a statement of purpose including the information required in Schedule 1 of the 2015 Regulations and a children's guide;
- Complying with numerous policies and procedures as set out in the 2015 Regulations.

Ofsted inspects children's homes at least biannually if they are judged to be inadequate or requires improves, and at least annually if outstanding or good.

What constitutes unregulated provision?

There are exemptions to the expectation that establishments who care mainly or wholly for children should register as a children's home. This includes when the home has no permanent base or is constantly moving (like a caravan, barge or boat). It also includes supported/semi-independent accommodation for children aged 16 or 17 who need support to live independently rather than needing full-time care. Ofsted do not regulate this type of provision.

Semi-independent accommodation is not subject to any minimum standards in law and the responsibility for determining the suitability of the accommodation falls to the placing local authority. The placements fall under the definition of 'other arrangements' under s22C(d) Children Act 1989 which means that the placing local authority is responsible for the scrutiny and monitoring of the placement rather than any Ofsted registration. The local authority must be satisfied that the accommodation is suitable for the child, having had regard to the matters set out in Schedule 6 to Children Act 1989.

These placements are therefore 'unregulated' – they are not required to comply with the expectations and scrutiny of a children's home – but not 'unregistered', where a children's home fails to register with Ofsted. Unregulated provision is allowed in law whereas unregistered provision is illegal.

Semi-independent accommodation must 'support' rather than 'care' for young people. This line may become blurred when a child is placed in semi-independent accommodation because there are no secure beds and no children's homes that will take them, especially where the High Court is asked to authorise them being deprived of their liberty. Semi-independent accommodation that provides **care** rather than support for a young person should be registered as a children's home. 'Care' is not defined in law but is about the child's vulnerability and level of help they need. Ofsted has produced a checklist to assist providers in distinguishing between semi-independent accommodation and a registered children's home (Annex 4).

¹ This is under the Care Standards Act 2000, Care Standards Act 2000 (Registration) (England) Regulations 2010 and the Children's Home (England) Regulations 2015 ('the 2015 Regulations').

Unregulated accommodation are examples of 'other arrangements' under s22C(d) Children Act 1989 which means that the placing local authority is responsible for the scrutiny and monitoring of the placement rather than any Ofsted registration. The local authority must be satisfied that the accommodation is suitable for the child, having had regard to the matters set out in Schedule 6 to Children Act 1989.

What constitutes unregistered provision?

Unregistered provision is either a children's home that has not registered with Ofsted or semi-independent accommodation who are providing 'care' rather than 'support' to a young person over 16 years old. Semi-independent accommodation also cannot offer a placement for under 16 year olds without registering as a children's home. These situations would all be illegal and the provider of the establishment may be liable to prosecution.

Annex 4: Checklist produced by Ofsted to distinguish between semi-independent accommodation and a registered children's home

Criteria	Yes?	No?
Can young people go out of the establishment without staff permission?	Supported accommodation	Care
Do young people have full control of their own finances?	Supported accommodation	Care
Do young people have control over what they wear and of the resources to buy clothes?	Supported accommodation	Care
Are young people in charge of meeting all of their health needs, including such things as arranging GP or specialist health care appointments? Are young people in full control of their medication?	Supported accommodation (note that young people may ask for advice and help on their health, but if decisions rest with the young person, the establishment is not providing care.)	Care
Do staff have any access to any medical records?	Care	Supported accommodation
Can young people choose to stay away overnight?	Supported accommodation (note that being expected to tell someone if they are going to be away overnight does not indicate providing care, but needing to ask someone's permission does.)	Care
Is there a sanctions policy that goes beyond house rules and legal sanctions that would be imposed on any adult?	Care	Supported accommodation
If the establishment accommodates both adults and young people, do those under 18 have any different supervision, support, facilities or restrictions?	Care	Supported accommodation
Are there regularly significant periods of time when young people are on the premises with no direct staff supervision?	Supported accommodation	Care
Do staff have any responsibility for aftercare once a young person has left?	Care (note that some supported accommodation services will offer some support to help young people get established in their next accommodation – this is not care.)	Supported accommodation
Does the establishment's literature promise the provision of care or relate to specific care support provided to all residents?	Care	Supported accommodation
Does the establishment provide or commission a specialist support service, which forms part of the main function of the establishment?	Care	Supported accommodation