

Guidance on inherent jurisdiction Deprivation of Liberty High Court orders for children

This guidance is for care home service providers who are considering or providing care to children who are subject to a deprivation of liberty order made under the inherent jurisdiction of the High Court.

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1. Introduction

1.1 This guidance is for care home service providers who are considering or providing care to children who are subject to a deprivation of liberty order made under the inherent jurisdiction of the High Court. Deprivation of liberty orders are made by the High Court of England and Wales following proceedings being initiated by the placing local authority.

1.2 The guidance has been developed to support service providers' understanding of these arrangements and to set out CIW's expectations under the Regulation and Inspection of Social Care (Wales) Act 2016.

1.3 CIW wants to ensure children placed under these arrangements are appropriately safeguarded, alongside other children living in the home, who are not subject to such orders. It is important these arrangements do not compromise children's rights under the European Convention on Human Rights (ECHR).

2. Background

2.1 CIW recognise that children of any age, subject to a deprivation of liberty (DoL) order, generally require high levels of care and support and a high degree of supervision.

2.2 A DoL order makes it lawful for the child to be deprived of their liberty and also allows the provider to apply restrictions set out in the order as a maximum and only when absolutely necessary.

2.3 This is particularly relevant for children who have complex care needs, and where there is a need for them to be appropriately safeguarded when they are at risk from criminal and sexual exploitation. We know in most of these circumstances children will have experienced significant trauma in their lives and will need to have specialist care and support, which provides them with a consistent and nurturing home.

3. Legal framework for 'deprivation of liberty'

3.1 It is important that service providers who agree to a child moving into a registered care home under a DoL order, understand the legal position of these arrangements and the conditions they agree to comply with according to the specific order imposed by the High Court.

3.2 The term 'deprivation of liberty' (DoL) comes from Article 5 of the European Convention on Human Rights (ECHR), which provides that everyone, of whatever age, has the right to liberty. Article 5 sets out the circumstances which a DoL is allowed and requires strict safeguards to be in place for those who are deprived of their liberty. Such

safeguards include the requirement that any DoL must be by 'a procedure prescribed by law' and that those who are deprived of their liberty have the right to have the lawfulness of their detention reviewed by a court.

3.3 The European Court of Human Rights (Storck v Germany [2005] ECtHR) confirmed that a person's care arrangements will give rise to a DoL if the following three conditions are met:

- they are confined in a particular place for a non-negotiable period of time.
- they do not consent to this confinement.
- the state is responsible for the DoL. (The state in this case is the placing local authority).

3.4 A DoL occurs when restrictions are placed on a child's liberty beyond what would normally be expected for a child of the same age. This may include them being kept in a locked environment, and they are not free to leave, being kept under continuous supervision and control, and being subject to restraint or medical treatment without consent. The United Nations Convention on the Rights of the Child states the restriction of a child's liberty should be used only as a measure of last resort and for the shortest appropriate period of time.

3.5 The family courts can authorise a child's DoL via two routes:

- s.25 of the Children Act 1989 (Children residing in England)
- s.119 of the Social Services and Well-being Act (Wales) 2014, (children residing in Wales).

3.6 For an order to be made under s.25 or s.119 the following criteria must be met:

- the child has a history of running away,
- and if they run away they are likely to suffer significant harm,
- or that the child will injure themselves or other persons if they are placed in any other form of accommodation.

3.7 In such cases, the child must be placed in a registered secure children's home. These are specialist facilities which are few in number and in which children are detained in very restrictive settings.

3.8 The High Court can authorise the deprivation of the child's liberty under its inherent jurisdiction when none of the other legal mechanisms apply, e.g., if there are no beds available in secure children's homes or the secure accommodation criteria are not met. However, it can also be used in cases where it is considered that formal secure accommodation would be disproportionate, but restrictions are required to keep a child

safe within a care home setting. Indeed, the High Court is increasingly being asked to make orders which enable a child to step down from secure accommodation to a care home. In such instances, a DoL order can be used as a stepping stone, prior to restrictions being lifted altogether.

3.9 The DoL order will specify the restrictions which apply to the child in depriving them of their liberty, and those responsible are required to ensure the details as set out within the order are implemented when providing care to the child subject to the order. Generally, the nature of the restrictions imposed can include (but are not limited to).

- constant supervision
- doors and windows locked/alarmed to prevent child from leaving the home
- use of physical restraint
- restrictions of mobile phone use
- restrictions of internet use
- child not free to leave the home unsupervised
- removal of items that may cause harm to the child or others
- searches of child's room and/or self
- night-time checks
- child subject to checks when in bedroom/ bathroom
- restrictions about who the child can contact.

3.10 A case considering the position of children in the UK Supreme Court (Re D (A Child) [2019] UKSC 42), made it clear that deciding on whether a child is confined will depend on whether the restrictions imposed are within the normal parental controls for a child of this age. In relation to the issue of consent, this will depend on the child's age and also on their capacity.

3.11 When deciding whether to make a DoL order, the primary consideration of the High Court is the best interests of the child.

4. Service provider responsibilities

4.1 It is critical when making decisions about providing a home for a child who is subject to a DoL order, service providers, give full consideration, to the service's Statement of Purpose (SoP) and the responsibilities imposed under the Regulated Services (Service Providers and Responsible Individuals) Wales) Regulations 2017 ("the Regulations") and the accompanying Statutory Guidance.

4.2 Regulation 7 of the Regulations requires the service is provided in accordance with the SoP for the service. There is a duty to keep the statement of purpose under review and, where appropriate, revise it. The Statutory Guidance states that the SoP should

accurately describe the services provided, and it should be updated when changes are made to the service. An example of a change to the service which warrants an update is the provision of additional specialist services.

4.3 The Regulations require that the service provider notifies CIW of any planned revision to the SoP at least 28 days before it is to take effect. In urgent circumstances, where there is an intention to change the service being provided with immediate effect, the service provider is required to notify CIW immediately and, where practicable, prior to implementing the change. The statement of purpose for the service must be updated to reflect the change without delay and a copy provided to CIW.

4.4 Where a service provider is planning to care for a child under a DoL order with the associated restrictions in place, this will likely amount to some changes in the way in which the service is provided to children. Therefore, the SoP must be amended to reflect this change. It should set out how care will be safely provided, and how the service provider will ensure that any restrictions will not impact negatively on other children living in the home. In doing so consideration must be given to The United Nations Convention on the Rights of the Child.

4.5 Service providers must ensure any decision made to admit a child into a registered care home service who is subject to a DoL order, demonstrates they meet the requirements set out under Regulation 14 of the Regulations and the Statutory Guidance are fully considered and applied. The service provider must not provide care and support for a child subject to a DoL order, unless it has determined that the service can meet their needs and the ability to safely implement and maintain the restrictions set out in the deprivation of liberty order. The provider's determination must also take into account any risks to the child's well-being as well as risks to other children living in the home. The service provider will need to consider in providing the service how they can safely implement and maintain the restrictions set out in the DoL order.

4.6 The service provider **must** notify CIW when a child subject to a DoL order moves into a care home via the online notification portal.

4.7 The service provider must ensure it conducts a provider assessment as required under Regulation 18 of the Regulations and the Statutory Guidance within **7 days** of the commencement of service.

Appendix legal frameworks

- Section 25 **Children Act 1989** (<https://www.legislation.gov.uk/ukpga/1989/41/section/25>)(External link)
- Section 119 of the **Social Services and Well-being Act (Wales)**

- <https://www.legislation.gov.uk/ukpga/1989/41/section/25>) (External link)
- **Regulation and Inspection of Social Care (Wales) Act 2016**
<https://www.legislation.gov.uk/anaw/2014/4/section/119>) (External link)
 - **Regulated Services (Service Providers and Responsible Individuals) Wales) Regulations 2017** (<https://www.legislation.gov.uk/anaw/2016/2/contents/enacted>) (External link)
 - **Statutory Guidance for Regulated Services (Service Providers and Responsible Individuals) Wales) Regulations 2017** (<https://www.legislation.gov.uk/wsi/2017/1264/contents/made>) (External link)
 - **Inherent Jurisdiction Order Practice direction 12D - Inherent jurisdiction proceedings** (https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12d) (External link)
 - **European Convention on Human Rights (ECHR)** (https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12d)Article 5(External link)
 - **In the matter of D (A Child) - The Supreme Court**
(<https://www.supremecourt.uk/cases/uksc-2018-0064.html>) (External link)



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