

# #13

# Deprivation of Liberty Orders

What are they, and what should youth justice professionals in England and Wales know about them?

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**This guide will provide an overview of Deprivation of Liberty (DoLs) Orders. It will explain what they are, and what youth justice professionals need to know about them.**

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# Introduction

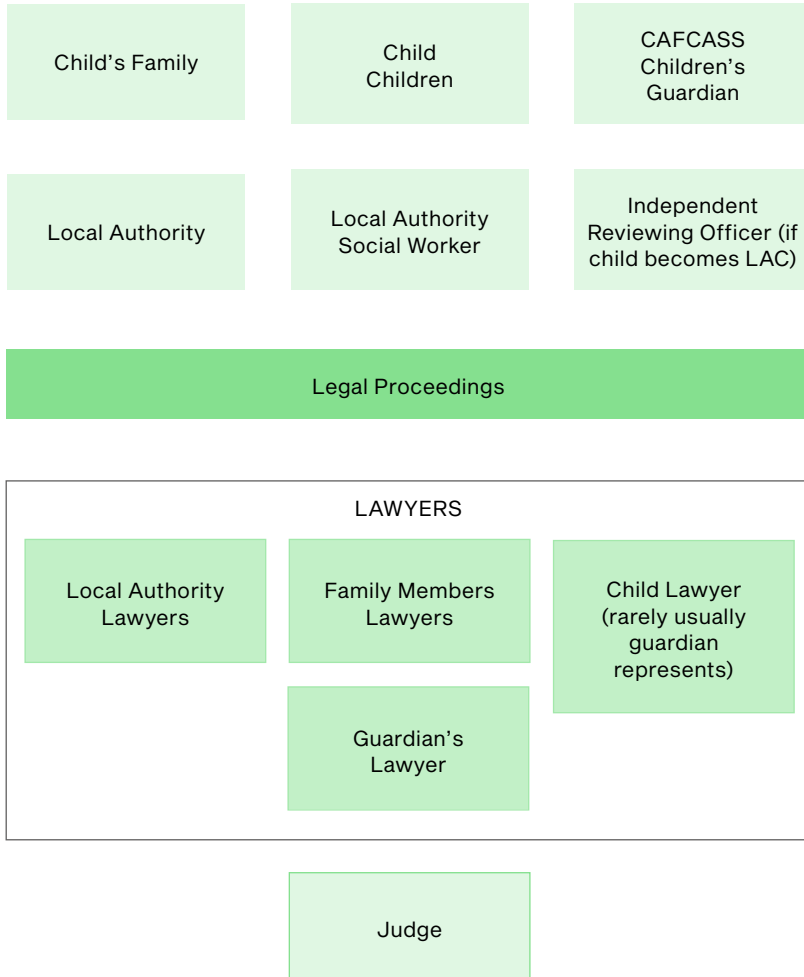
The year 2021 saw a dramatic increase in the use of Deprivation of Liberty (DoLs) Orders – a 462% increase since 2018.

These orders, made by the High Court (Family Division), deprive children of their liberty, often in unregistered or unregulated placements, outside of the statutory regime (Secure Accommodation Orders: s25 Children Act 1989). The High Court has the power to deprive children of their liberty outside of the statutory regime under the court's 'inherent jurisdiction'.

The size of the secure estate in England and Wales has declined over the past two decades, in particular with the closure of 16 secure children's homes since 2002. In 2020/21, 'inherent jurisdiction placements' outnumbered secure accommodation applications (s25 Children Act 1989) for the first time.

Children in the youth justice system (YJS), who are also on Care Orders or Interim Care Orders, are being made subject to DoLs, therefore youth justice practitioners need to understand them and know how to work with them.

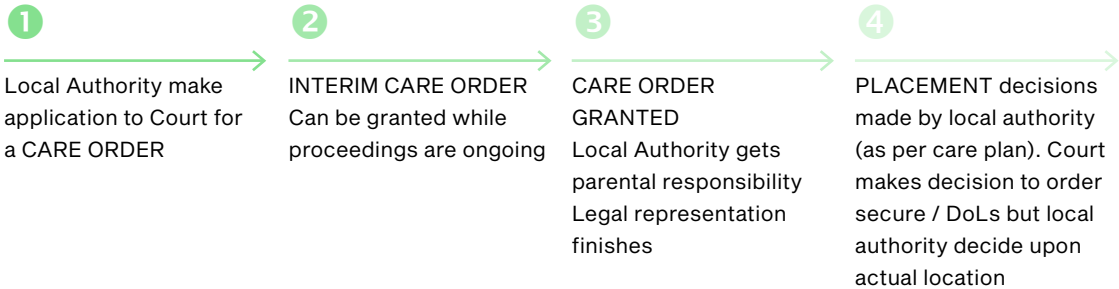
# Actors – the people and professionals involved in care proceedings



# Getting care orders – the process (simplified)

The local authority applies to the High Court for either a Secure Accommodation Order, or an order to deprive a child of their liberty under their inherent jurisdiction.

However, the local authority actually finds the placement and implements the restrictions of liberty.



# What does 'deprivation of liberty' mean?

The term 'deprivation of liberty' comes from Article 5 of the European Convention on Human Rights (ECHR), which provides that everyone, of whatever age, has the right to liberty.

'Deprivation of liberty' occurs when restrictions are placed on a child's liberty beyond what would normally be expected for a child of the same age.

In England and Wales we can deprive children of their liberty for reasons of **criminal justice** (punishment), **welfare** (risks to their safety) or **mental health**. In these circumstances, children can be detained in secure children's homes, the youth custodial estate or mental health settings, provided the statutory criteria are met.<sup>1</sup>

<sup>1</sup> For welfare - s25 Children Act 1989 and s119 Social Services And Well-being (Wales) Act 2014. For mental health: Mental Health Act 1983 or Mental Capacity Act 2005

# Welfare considerations

In a welfare context, when there are no secure beds available and the criteria for detention under the Mental Health Act 1983<sup>2</sup> are not met, the local authority can apply to the High Court, if the child is 'looked after', to deprive a child of their liberty through the court's 'inherent jurisdiction'.

Examples of circumstances which result in a deprivation of liberty for welfare reasons include:

- to protect a child vulnerable to criminal or sexual exploitation
- to prevent a child with a history from harming themselves
- to prevent a child with a history from harming others
- to provide support to a child with extreme behavioural problems who becomes physically and verbally aggressive when distressed.

'[T]he prospects of a place in secure accommodation being found ... are "vanishingly small". At that hearing I was told that there were 59 children on the waiting list for secure accommodation and, that day, there was one space available in the whole country. Today I was told that on 10 October there were 62 referrals for places in secure accommodation across the country and only one vacancy for a female.'

Re J (Deprivation of Liberty: Hospital) [2022] EWHC 2687 (Fam), para 13

## Why would no secure bed be available?

- The demand for welfare placements in secure children's homes exceeds both capacity and capability.
- There are not enough secure placements due to the shrinking of the secure estate.
- Children with particularly complex needs who are seen to be too 'challenging' to be placed in a secure children's home are refused placements.
- Some children with severe mental health needs do not meet the criteria under the mental health act for in-patient mental health treatment as they do not have a 'mental illness'.

## What happens when no secure beds are available?

Due to the lack of secure accommodation, local authorities are often by-passing the secure process and asking for DoLs Orders under the court's 'inherent jurisdiction'. This means the child is deprived of their liberty outside of any statutory

protective, reviewable system. The child that is on a DoLs Order rather than a Secure Accommodation Order has none of the safeguards, protections and due process that exist under the secure accommodation regulations.

'These children exist in a grey area of the law, with fewer legal safeguards than other children.'

Anne Longfield, former Children's Commissioner for England

'This scandalous lack of provision leads to applications to the court under its inherent jurisdiction to authorise the deprivation of a child's liberty in a children's home which has not been registered, there being no other available or suitable accommodation.'

Lord Stephens in Re T (a child) [2021] UKSC 35, para 166

The High Court is often granting the DoLs Orders because they are told by the local authority that this is 'least worst' option – but the children are then placed in unregulated and unregistered placements which are unsuitable and would not be

permitted under a secure order. Examples include a child in a caravan, or in an isolated house with no contact with anyone other than staff, or even in some instances a camp-bed in social services offices guarded by staff.

<sup>2</sup> Mental Health Act 1983 or Mental Capacity Act 2005

# The National Deprivation of Liberty Court

In July 2022 the President of the Family Division created a National Deprivation of Liberty Court.<sup>3</sup>

Nuffield Family Justice Observatory agreed to monitor the types of cases where DoLs Orders were being applied for and to look at the data to have a sense of the kinds of cases the court was seeing<sup>4</sup> – numbers, ages and regional differences<sup>5</sup> – for a pilot year.

<sup>3</sup> [bit.ly/3HhpwLT](https://bit.ly/3HhpwLT)

<sup>4</sup> 'Deprivation of liberty: A review of published judgments', March 2022, [bit.ly/3jeqaSg](https://bit.ly/3jeqaSg)

# Cross-border placements

Children from England and Wales on DoLs Orders are being placed in unregulated Scottish children's homes that are not approved for secure care.

There are concerns about this, including:

- The accommodation is not regulated, nor required to comply with the Scottish statutory regulations for secure accommodation.
- If the English and Welsh children get arrested or in trouble with the law, there is not an equivalent YJS. Youth justice workers in England and Wales might be asked to write reports for Scottish Courts with no understanding of the system, the possible outcomes and what they mean.
- The English and Welsh children do not have the equivalent protections of Scottish children or access to the children's hearing system.

- There is no involvement of Scottish public authorities in an assessment of whether the placement meets the child's needs and whether their rights are being upheld.
- There is no guaranteed right of access to legal advice and representation, and therefore no support to challenge failure to respect their rights in terms of Scottish law.

The Children and Young People's Commissioner Scotland (CYPCS) has released a briefing for professionals involved with children in DoLs proceedings in the High Court in England and Wales, setting out protections the lawyers should ask for if a child is likely to be placed in unregulated accommodation in Scotland.<sup>6</sup>

5 'National deprivation of liberty court: Latest data trends – November 2022', [bit.ly/3HKRX6t](https://bit.ly/3HKRX6t)

6 Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022, Children and Young People's Commissioner Scotland ([cypcs.org.uk](https://cypcs.org.uk)), [bit.ly/3JtHAVM](https://bit.ly/3JtHAVM)



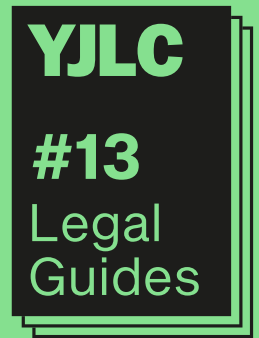
# What can criminal justice practitioners in the youth justice system do about DoLs Orders?

1. Provide explanation to any criminal court, Crown Prosecution Service (CPS) and defence lawyer about what a DoLs Order means; and about 'inherent jurisdiction' and what it means for the child before the criminal court.
2. Set out clearly in any pre-sentence report what a DoLs Order means.
3. Assist Scottish courts with Criminal Justice Social Work Reports if needed. Try to get information on the process in Scotland and any outcomes (sentences). Share these with child's social worker and lawyers.
4. Contact the child's social worker for background information about the DoLs and any links to alleged offending before the court.
5. Have to hand and share with the court the government's 'National protocol on reducing unnecessary criminalisation of looked-after children and care leavers'.<sup>7</sup>
6. Set out clearly the logistical and geographical barriers to undertaking an order with the Youth Justice Service.
7. Suggest that the court orders an absolute discharge for a child on a DoLs Order, if appropriate.
8. Suggest that the CPS recommends an out-of-court disposal due to the DoLs Order, if appropriate.
9. Work collaboratively. Ask to be present at any multi-agency meetings involving the child.
10. Suggest that the different court systems (family and criminal) judges and lawyers work collaboratively.
11. Hear the child's views on the DoLs Order, and if required, relay those to the child's social worker.
12. Note any concerns about the placement, the support or the staffing of the placement and the child's socialisation. Put this in writing and send any concerns you have raised that you feel need to be properly considered to the court.
13. If the child is from your local area but moved on a DoLs Order, do you need to let the YJS in the area the child is moved to know? Similarly, if the child is from another local authority but is facing criminal proceeding in an area they have been placed, does their 'home' YJS know?

<sup>7</sup> November 2018, [bit.ly/40s0ant](https://bit.ly/40s0ant)

## #13 Deprivation of Liberty Orders

Written by Shauneen Lambe (Child Law Network) in collaboration with Katya Moran and Laura Cooper at the Youth Justice Legal Centre. With thanks to Peggy Ray (Goodman Ray Solicitors), CLAN Childlaw Scotland, Children and Young Person's Commissioner Scotland and the Nuffield Family Justice Observatory.



#01 Turning 18	#02 Intermediaries for child defendants	#03 Child Criminal Exploitation	#04 Criminal Behaviour Orders
#05 Trauma Informed Lawyering	#06 Criminal Practice Directions	#07 Effective Participation	#08 Police bail and remand
#09 Court Bail and remand	#10 Anonymity	#11 Sexual allegations	#12 Sexting

### Youth Justice Legal Centre [yjlc.uk](http://yjlc.uk)

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

### Just for Kids Law [justforkidslaw.org](http://justforkidslaw.org)

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.