



**Deprivations of  
Liberty of Children and  
Young People in the COP  
and Family Courts  
Seminar**

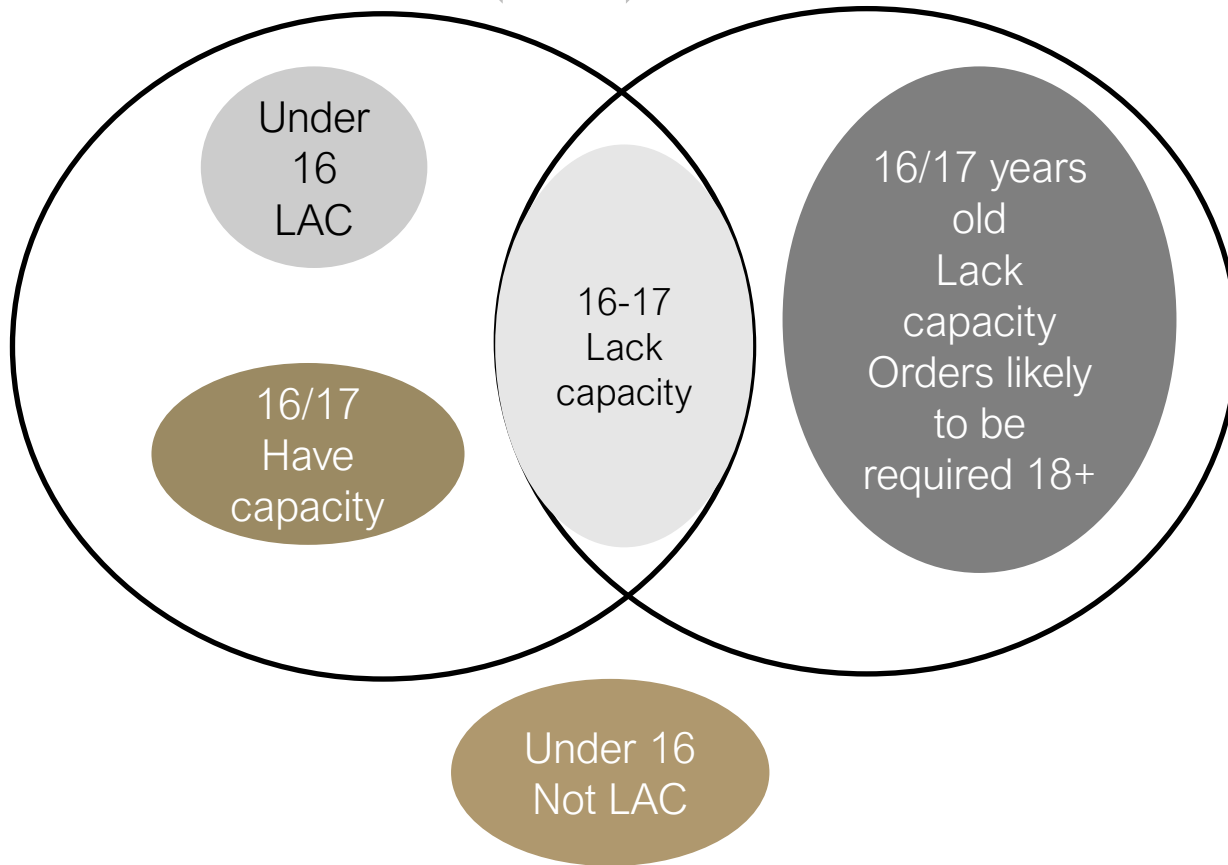
Monday 6 March 1:30pm – 4:30pm

**Senior Judge Hilder**  
**Dr Camilla Parker KC (Hon), Just Equality**  
**Alice Roe, Nuffield Family Justice Observatory**  
**Victoria Butler-Cole KC, 39 Essex Chambers**  
**Alex Ruck Keene KC (Hon), 39 Essex Chambers**  
**Anna Bicarregui, 39 Essex Chambers**  
**Arianna Kelly, 39 Essex Chambers**

# Which court or none?

Family Division,  
High Court ↔ Court of Protection

*“there is much still to be worked out”* HHJ Hilder  
– Bolton Council v KL  
(June 2022)



LPS: no COP applications unless challenged

# Applications in the COP

- COPDOL 11 – use to start but will probably be called in – Bolton v KL
- Procedural safeguards (joinder, LF, notification, judicial scrutiny, Rule 1.2 Rep)
- Likelihood that DOLs will be required post 18
- *“Experience since December 2019 has shown that, with the benefit of robust scrutiny by fully informed representatives of P, some of the applications relating to deprivation of liberty of 16/17 year olds throw up very worrying issues in transitional arrangements and in respect of restraint; but others can be finalised by consent quickly”.*

# Worrying issues

- Restraint
  - Frequency
  - What steps have been taken – PBS
  - Goes to what is the least restrictive
- Transitional arrangements

# “Swift resolution” cases

- Features of cases capable of swift resolution:
  - Detailed care planning;
  - Involvement of a range of professionals;
  - Evidence of lack of capacity;
  - Clear and detailed consideration of the different restrictions

# Mobile phones and DOL

- *Manchester City Council v CP & Ors* [2023] EWHC 133 (Fam)
- Article 5 – physical liberty
- Restriction of mobile phone and other devices is an Article 8 issues
- *It is important that the court be careful not to allow its jurisdiction to make orders authorising the deprivation of a child's liberty by reference to Art 5(1) to spill over into authorising steps that do not constitute a deprivation of liberty for the purposes of Art 5(1), particularly where those steps might constitute breaches of different rights, which breaches fall to be evaluated under different criteria* (para 50)
- Restraint to remove devices is a different matter

# Family Division, High Court: National DOL court

- Annual total number of DOL applications may exceed 1,000 (Re X)
- On any given day 60 or 70 children for whom a formal secure accommodation order has been made under CA 1989, s 25, yet no registered secure placement can be found (Re X)

# Spectrum of cases

15 year old child in an Ofsted  
registered outstanding children's  
home  
Multi disciplinary input  
Child successfully accessing  
education  
Family involvement  
Independent advocate

15 year old child on a hospital ward  
No options for residence  
No therapeutic input  
No education  
Limited/complicated family involvement  
5:1 +  
Long periods of restraint  
Criminal charges

Typically both applications will be authorised



# Common issues

Scarcity of  
secure  
accommodation  
places

Too few  
registered  
children's  
homes  
  
(Ofsted fast  
track)

Tier 4 beds –  
deemed  
inappropriate  
and short term

Limited  
availability of  
community  
based therapy



Least worst option is sanctioned

# Rubber stamp?

36. This case, as do many others involving the care of children with complex needs, calls into question the court's role. Very often the court is told that there is only one place where the child can be accommodated. The court's role is therefore very limited. There are no real choices for the court to make. The court cannot direct that placements shall be made available. The court is not a regulator and cannot inspect potential placements or oversee care regimes. On the other hand, even when there are no other placement options, the court does not merely provide a rubber stamp for the restrictions sought, and there are decisions to be made about the extent of the restrictions that are necessary and proportionate and in a child's best interests. However, the courts, like the parties, continue to be confined by the consequences of what Lord Stephens called a "scandalous lack of provision" for which it appears that there is no end in sight.

J, Re (Deprivation of Liberty: Hospital) [2022] EWFC 121 (12 October 2022) – Poole J – October 2022

# Refusals to authorise deprivations of liberty of children and young people

Arianna Kelly

March 2023

# Considering four recent cases

- a. *Wigan BC v Y (Refusal to Authorise Deprivation of Liberty)* [2021] EWHC 1982 (Fam) (MacDonald J); ('Wigan')
- b. *A County Council v A Mother & Others* [2021] EWHC 3303 (Fam) (Holman J); ('A County Council')
- c. *Nottinghamshire County Council v LH, PT and LT* [2021] EWHC 2584 (Fam); *Nottinghamshire v LH, PT and LT (No. 2)* [2021] EWHC 2593 (Fam) (Poole J); ('Nottinghamshire')
- d. *An NHS Trust v ST (Refusal of Deprivation of Liberty Order)* [2022] EWHC 719 (Fam) (MacDonald J); ('ST')

# When have courts refused to authorise deprivations of liberty

- Age: Children were particularly young (12 and 14)
- Detention settings: Hospital settings (acute and psychiatric) where the child had no medical need to be in hospital
- Child's background: Primarily related to children who had experienced trauma, for which they had received little or no formal therapy or support. Children had been in rolling crises over a matter of months, and had no appropriate places to live in the community (though in several cases, it was technically an option to return home to their families)

# When have courts refused to authorise deprivations of liberty

- Mental Health Act: In no case was detention under the Mental Health Act considered viable, though the children were assessed for detention in a Tier 4 CAMHS setting in three out of the four cases
  - It was unclear what support would be available for the children in the community from mental health services in the community, and the local authority was taken to have the responsibility of organising the child's care
  - See also *Blackpool Borough Council v Ht (A Minor by her Children's Guardian)*, CT, LT, Lancashire and South Cumbria NHS Foundation Trust [2022] EWHC 1480 (Fam)
- Recommendation in all cases was that inpatient admission would be harmful to the child, and the child needed skilled 24-hour support in the community (which was not available)

# When have courts refused to authorise deprivations of liberty

- Conditions of detention:
  - Strikingly bad, even by the standard of these cases
  - ‘Brutal’ and ‘abusive’
  - Children in very high states of distress
  - High levels of self harm; high levels of others being harmed
  - Very high levels of restraint (physical and chemical)
  - Frequent use of the police
  - Concerns about the skill of carers attending on the child
  - Concerns about the high levels of turnover of carers attending on the child
  - Detrimental effects on other inpatients and service

# When have courts refused to authorise deprivations of liberty

- Alternative options: Notably, yes, in half of the cases. Children had the option to return to family, but very high level of concern as to the harm to the children and parents if they were to do so.
- Reasons for refusing deprivation of liberty authorisation: courts consistently concluded that the detention was not in the child's 'best interests' as the conditions of the child's detention were so poor:
  - Strong implication that the court would have found Article 3 to be violated if it had reached the question.
  - lack of connection between the services provided by the hospital and the nature of the child's detention. It was strongly emphasised that the hospitals were not designed or prepared to provide care for these children, and arrangements were fundamentally ad hoc.



# When have courts refused to authorise deprivations of liberty

- Reasons for refusing deprivation of liberty authorisation:
  - As a result, there were very few or no safeguards which would be available in settings which were equipped to offer containment and restraint (such as secure psychiatric hospitals, which would have detailed frameworks for physical and chemical restraint and seclusion).
  - In the two judgments by MacDonald J, he also expressed concerns that if the risk of restraint going further than terms of the deprivation of liberty if authorisation were granted.

# Questions arising

- Does some option always have to be in a person's 'best interests'?
- Can detention in the sole available option breach Article 5 without breaching Article 3 or Article 8?
- What should hospitals do when asked to admit a child in crisis who they consider will be harmed in their care, and/or where they know there is no discharge option?

# Does some option always have to be in a person's 'best interests'?

*North Yorkshire v MAG* [2016] EWCOP 5 at [24]; Cobb J:

- i) Whether it is in MAG's best interests to live at the property, noting that although he is deprived of his liberty, there is no alternative available which offers a lesser degree of restriction;*
- ii) Whether the accommodation provided to MAG was so unsuitable as to be unlawfully so provided, breaching MAG's rights under the [ECHR](#) (notably Article 5).*

- No orders that the children be removed from hospital
- No orders that they return to families

# Can detention in the sole available option breach Article 5 without breaching Article 3 or Article 8?

- Not reached in the reported judgments
- Open question
- Strong implication that court would have found an Article 3 breach in *Wigan* had it reached the question
- Possible area of exploration

# Should hospitals admit in a crisis?

- Fact specific question
- Involves Article 2, 3, 5 and 8 obligations
- *ST* case: hospital had been advised not to admit in a crisis as a place of safety by CAMHS – however, admitted after family presented at hospital and refused to take *ST* home

# Should hospitals admit in a crisis?

- Fact specific question
- Involves Article 2, 3, 5 and 8 obligations
- *ST* case: hospital had been advised not to admit in a crisis as a place of safety by CAMHS – however, admitted after family presented at hospital and refused to take *ST* home

# Should hospitals admit in a crisis?

*36...I will require a detailed explanation from the Trust and the local authority as to why the advice of CAMHS given on 21 January 2022, that that ST should not be admitted to hospital unless there was a medical need as 'there is clear risk of harm to her and others if she is admitted and this is not an appropriate place of safety in a crisis', was not followed. In light of ST's diagnosed Autistic Spectrum Disorder and learning disability, that advice was self-evidently correct and redundant of argument. It does not take expert evidence for the court to understand the adverse impact of the current regime, with its uncertainty, its concentration on physical contact and its location in a loud and unfamiliar environment, on a child who is autistic and learning disabled. What this must be like for ST is hard to contemplate. Within this context, the failure of Trust and / or the local authority to follow the advice of CAMHS requires an explanation...*

# Should hospitals admit in a crisis?

- *University College London Hospitals NHS Foundation Trust v MB (Rev 1)* [2020] EWHC 882 (QB) (09 April 2020)
- Possession of a hospital bed
- Article 3 considerations
- Declarations of lawfulness of readmission?



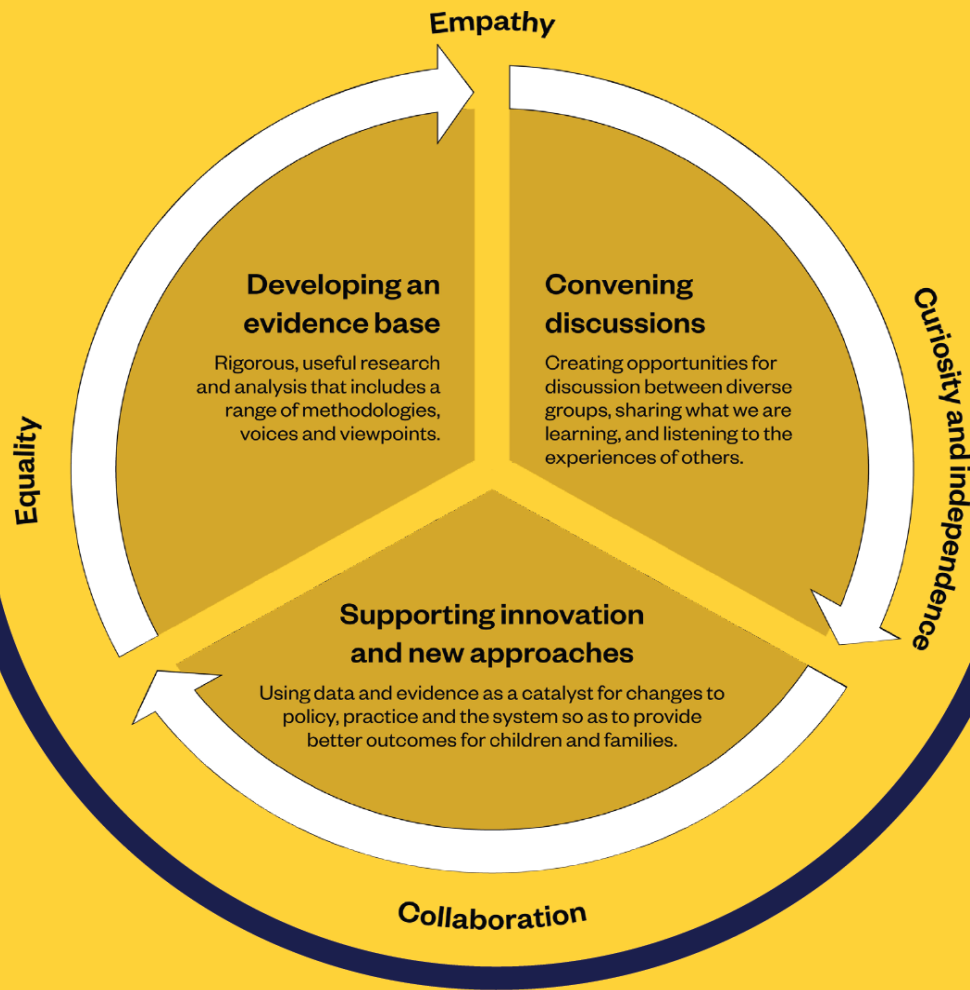


# Young people subject to deprivation of liberty orders via the family court

Findings from the National DoL Court

Alice Roe, Researcher, Nuffield FJO

6 March 2023



# About the Nuffield FJO

Our work

# Young people and the family justice system

How can we transform the family justice system to promote better outcomes for young people and their families?



<https://www.nuffieldfjo.org.uk/our-work/young-people-family-justice>

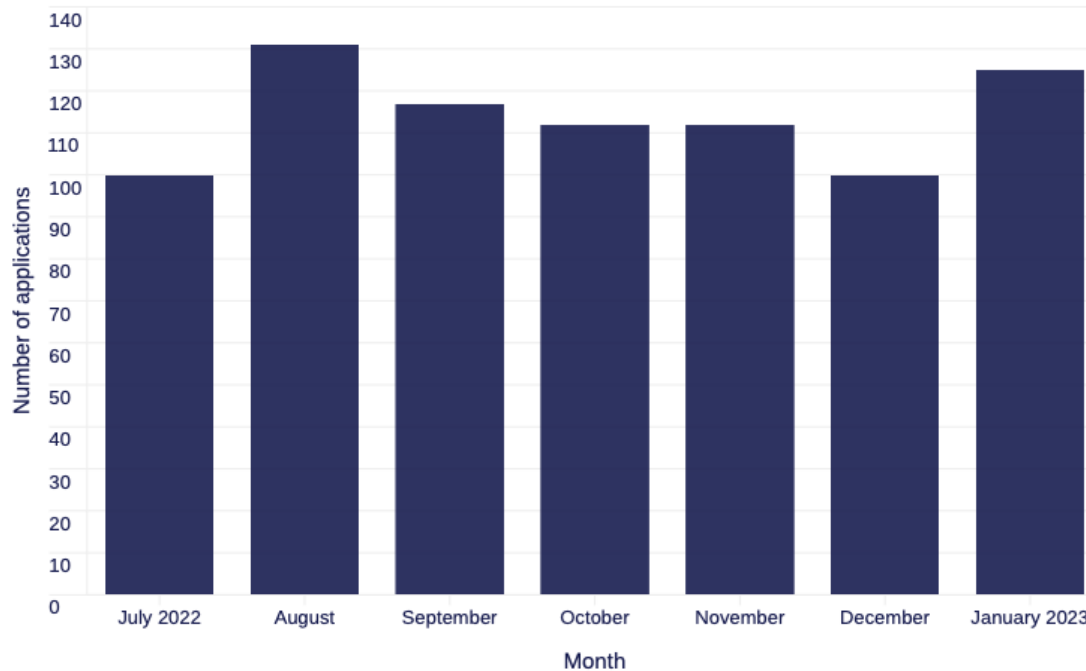
# The national DoL court



- Set up by the President of the Family Division in July 2022 for an initial pilot period of 12 months
- All applications to deprive children of their liberty under the inherent jurisdiction are issued at the Royal Courts of Justice
- The Nuffield Family Justice Observatory were invited to collect and publish data on applications
- Opportunity to build a national picture about what is going on

# Volume of applications to date

Number of applications received by the national DoL court per month, July 2022 - January 2023



■ Applications

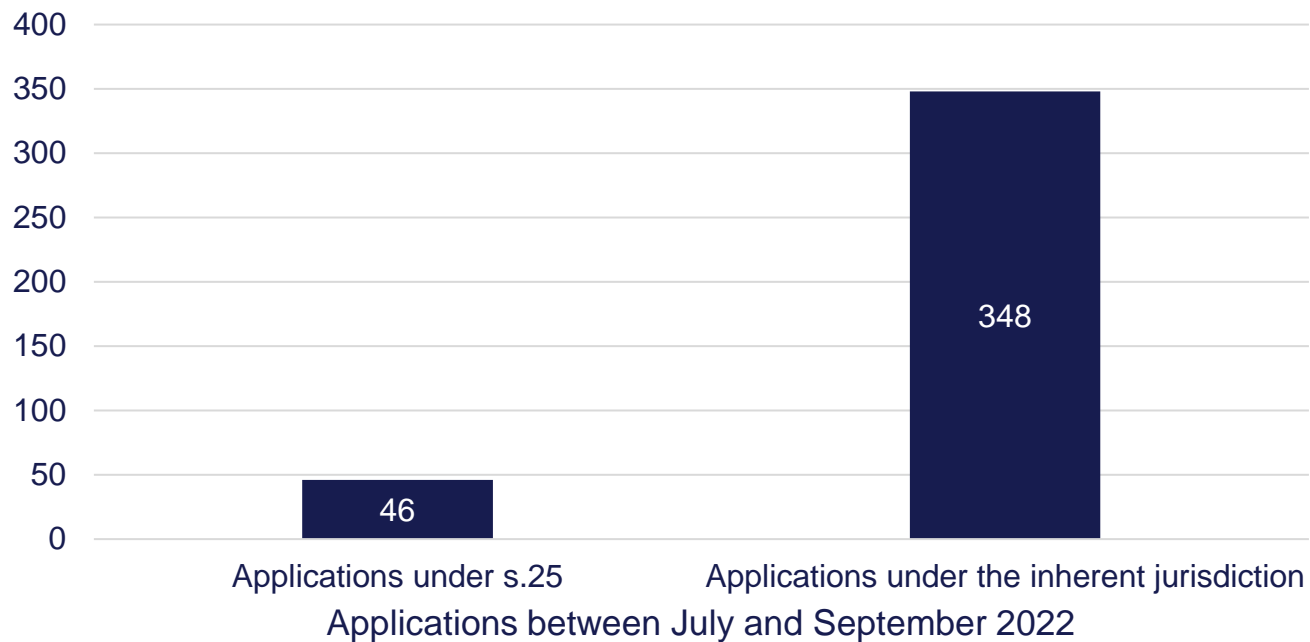
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Between July 2022 and January 2023, the national DoL court recorded a total of **797 applications**.

These applications relate to **762 individual children**.

<https://www.nuffieldfjo.org.uk/resource/national-deprivation-of-liberty-court-latest-data-trends-january-2023>

# Applications for DoLs orders outnumber those under s.25 of the Children Act 1989



Source: Ministry of Justice, NFJO. <https://www.nuffieldfjo.org.uk/resource/what-have-we-learnt-in-the-first-six-months-of-the-national-dol-court>

# What do we know about children subject to DoL applications?

- Analysis of the first two months of applications to the DoL court (208 children)
- Research questions:
  - What are the needs, characteristics and circumstances of children subject to DoL applications?
  - What the most common reasons for a DoL application being made?
  - Who is making the applications, what restrictions are being sought and where are children being placed?
- Information about the child's needs and care plan included in the C66 and evidence statement

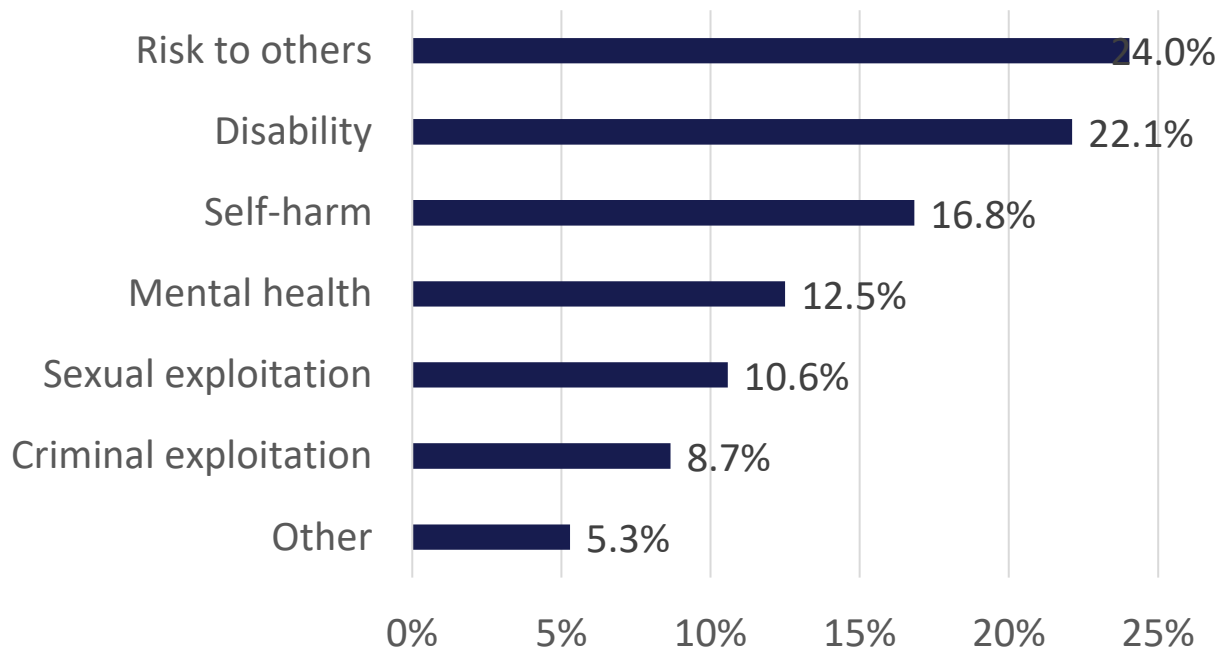
# Children's needs

- Children subject to DoL applications are highly vulnerable. They typically have multiple and complex needs.
- Common risk factors include:
  - behaviours that were considered a **risk to others** (69.2% of all cases)
  - concerns about **mental health or emotional difficulties** (59.1%)
  - **placement breakdown** (55.3%)
  - **self-harm** or suicidal ideation (52.4%)
  - **going missing** (46.6%)
- Most of the children had experienced significant adversity and trauma throughout childhood.






# Primary reason for the application



Roe and Ryan (2023).

# Are there distinct cohorts of need?



Children with  
learning and  
physical disabilities

Children with  
complex trauma

Children at risk of  
extrafamilial harm

Roe and Ryan (2023).

# Care plans

- Multiple and severe restrictions on the child's liberty
- Use of unregistered placements common: in just under half of applications, children were going to be placed in **unregistered settings** (45.6%)
- Those for whom DoL was sought for self-harm, risk to others and/or criminal exploitation were most likely to be placed in an unregistered setting

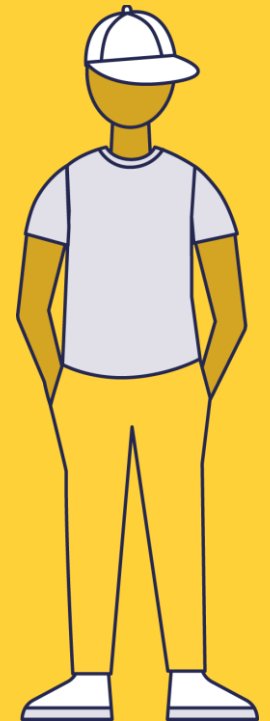
# Claudia's story

Claudia is 16 and is currently in hospital following an overdose of painkillers. She has been in hospital for a month and, although she is medically fit for discharge, the local authority cannot find a placement. She was living in a residential placement under s.20 but the placement provider has given notice. In the last 18 months, Claudia has tried to commit suicide on numerous occasions, through cutting herself, overdosing, and walking onto train lines. She regularly goes missing from home and school, and says that she no longer wants to be alive. Her mental health problems escalated with the recent death of a family member. When in hospital she attempts to leave constantly and is abusive to staff. She is continuing to self-harm. She has been diagnosed with autism spectrum disorder and anxiety. She was assessed under the Mental Health Act but did not meet the criteria for a secure bed. The local authority is seeking a DoL order while she remains in hospital and while it continues to search for a placement.



# Shane's story

Shane is 15. He was removed from his birth parents as a baby and adopted when he was a year old. Concerns about his behaviours started to escalate when he was 8 years old, following an incident that led to him being temporarily excluded from school. His adoptive parents began to struggle with his behaviour and he came into care under s.20 when he was 11. He has had a series of placements in residential care, all of which broke down because the home could not manage his behaviour. He can be verbally and physically aggressive, has assaulted staff, and damages property. He has self-harmed, taken overdoses of medication, and has said he wants to kill himself. He smokes cannabis and drinks alcohol. He was settled for several months in one placement, with a DoL in force, until an incident when he attacked staff and set fire to furniture, at which point the placement gave notice. The local authority has struggled to find a new placement for Shane and is proposing to place him in a rental flat under a DoL order while it continues to search for a registered placement.



# What next?

- These children are in need of intensive care: as a minimum, they are likely to require care that is **stable**, with **consistent** professional support from carers who are able to build **trusting relationships over time**, along with access to **specialist therapeutic support and education**. Yet we know that in many cases this is not available
- Our research underlines the urgent need to develop new provision, at a local level, with joint input from children's social care, mental health services and schools.
- And a nationwide strategy, with significant commitment at local and national level, including from national government.

# References and further reading

Roe, A. and Ryan, M. (2023). *Children deprived of their liberty: An analysis of the first two months of applications to the national deprivation of liberty court*. Nuffield Family Justice Observatory.  
<https://www.nuffieldfjo.org.uk/resource/children-deprived-of-theirliberty-an-analysis-of-the-first-two-months-of-applications>

What have we learnt in the first six months of the national DoL court? Briefing. (2023).  
<https://www.nuffieldfjo.org.uk/resource/what-have-we-learnt-in-the-first-six-months-of-the-national-dol-court>

National deprivation of liberty court: Latest data trends – January 2023.  
<https://www.nuffieldfjo.org.uk/resource/national-deprivation-of-liberty-court-latest-data-trends-january-2023>

Roe, A. (2022). *What do we know about children and young people deprived of their liberty in England and Wales? An evidence review*. Nuffield Family Justice Observatory.  
<https://www.nuffieldfjo.org.uk/resource/children-and-young-people-deprived-of-their-liberty-england-and-wales>

Parker, C. (2022). *Deprivation of liberty: Legal reflections and mechanisms*. Briefing. Nuffield Family Justice Observatory.  
<https://www.nuffieldfjo.org.uk/resource/deprivation-of-liberty-legal-reflections-and-mechanisms-briefing>

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Deprivations of  
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Seminar

Monday 6 March 1:30pm - 4:30pm

# Break



Deprivations of liberty for children and young people  
39 Essex Chambers Conference

A View from  
The Court of Protection:

What are we doing with 16/17 year olds?

HHJ Hilder, Senior Judge  
6th March 2023

# Mental Capacity Act 2005 s4A

## Restriction on deprivation of liberty

- (1) This Act does not authorise any person ('D') to deprive any other person ('P') of his liberty.
- (2) (2) But that is subject to –
  - (1) (a) the following provisions of this section, and
  - (2) (b) section 4B.
- (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) in relation to a matter concerning P's personal welfare.
- (5) ....

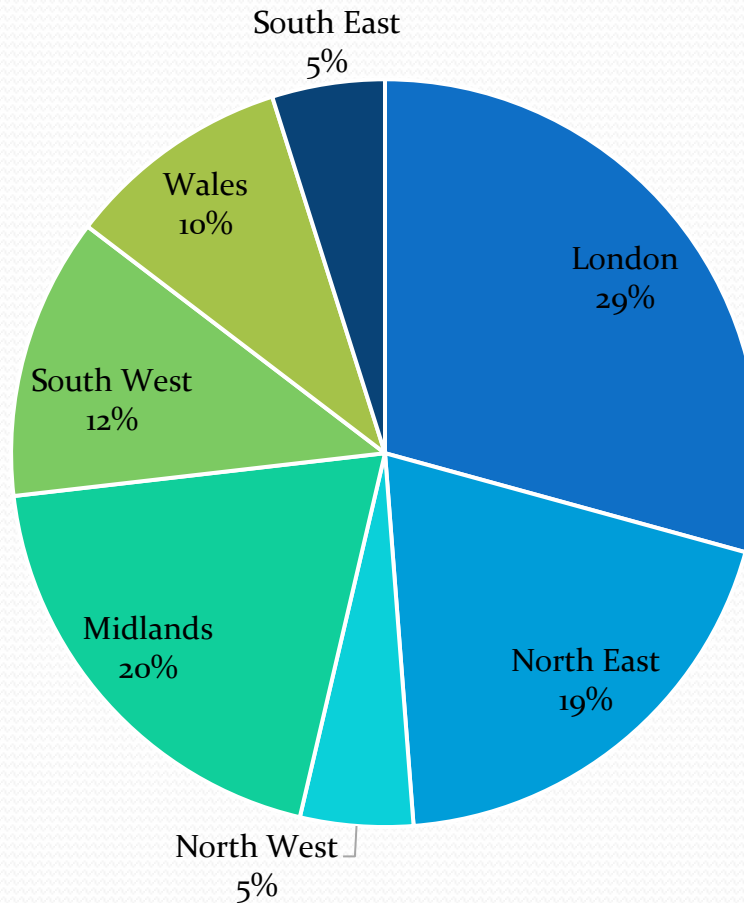
# Mental Capacity Act 2005 s16(2)(a)

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

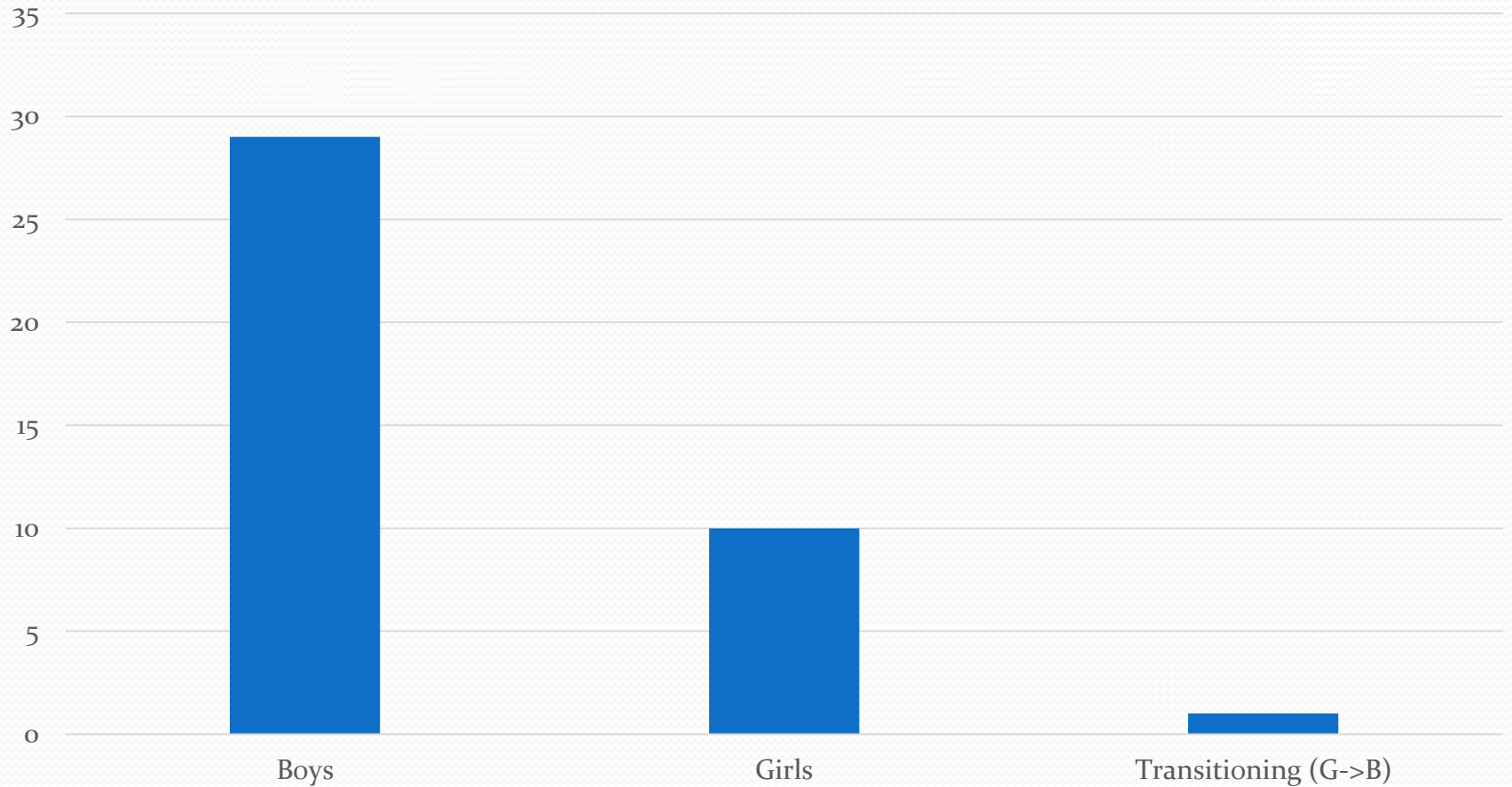
# Applications

- Since 1<sup>st</sup> December 2022 (the 3<sup>rd</sup> anniversary) : 40 cases through the streamlined procedure
- Approximately 13 per month
- Suggests about 1/10<sup>th</sup> of cases in the National DLS Court
- Combined total likely to be about 1 220 young people per year

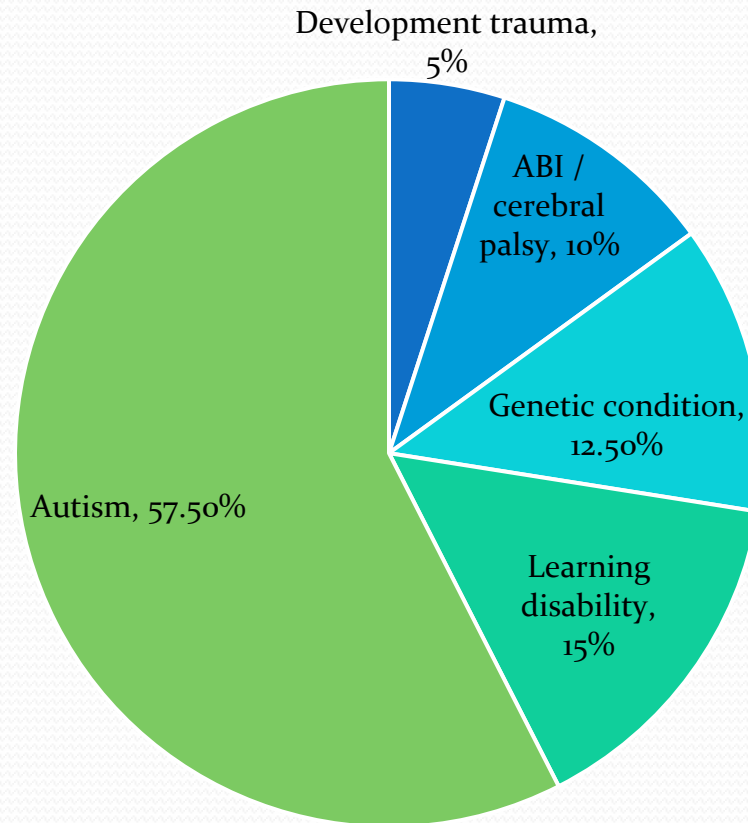
# Where are the applications coming from?



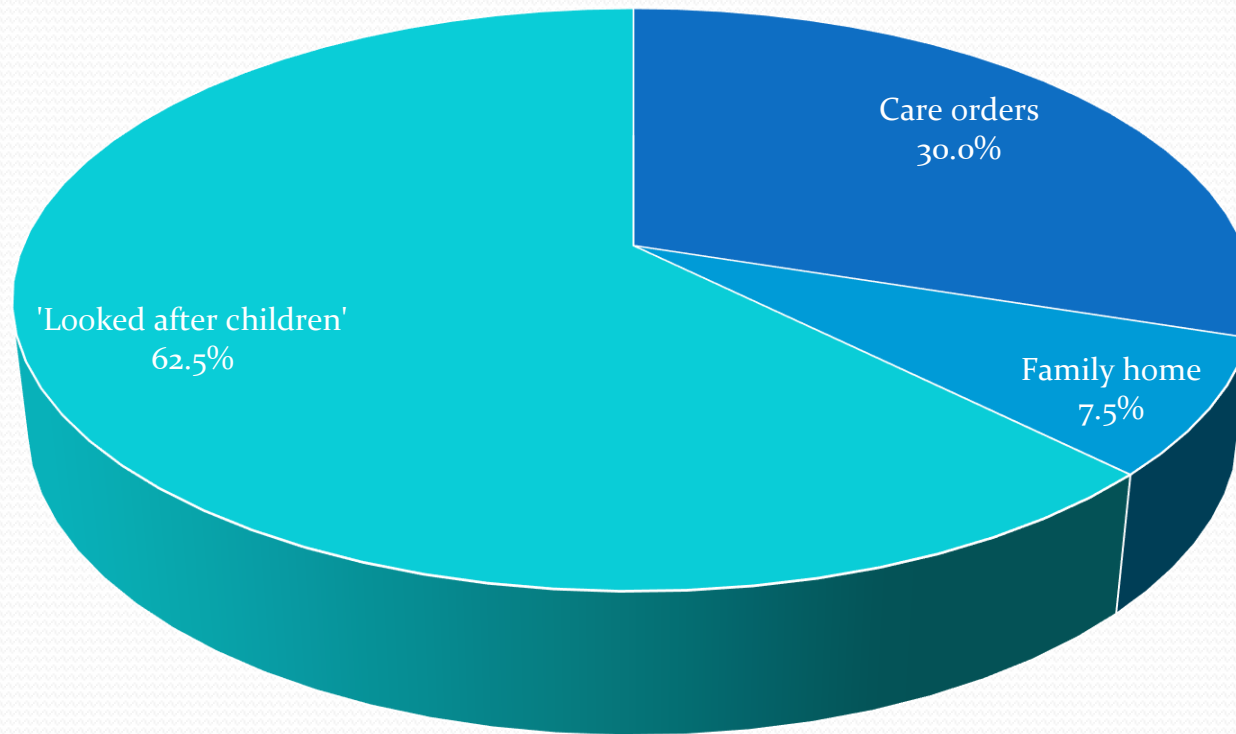
# Gender



# Mental impairment/disturbance of functioning

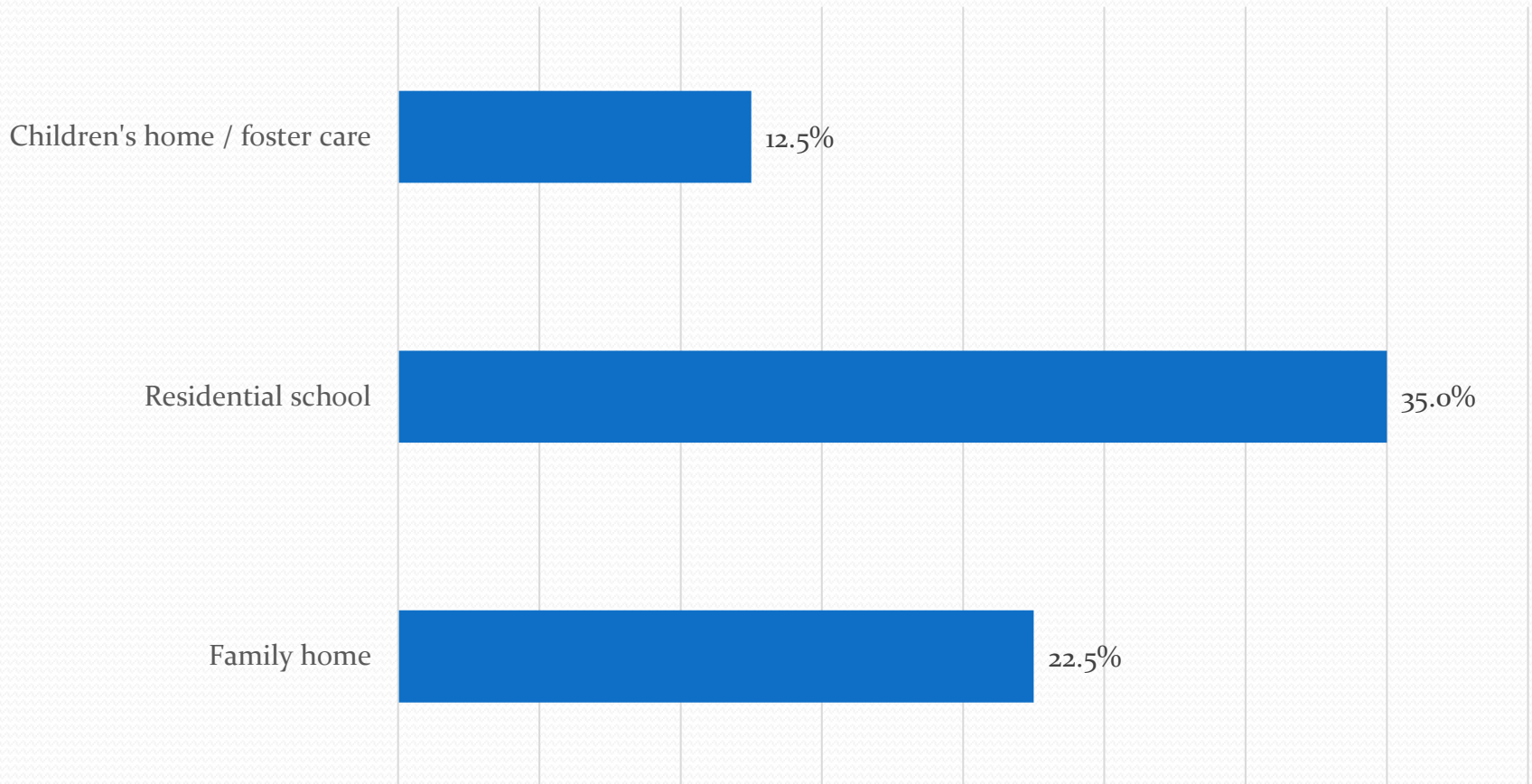


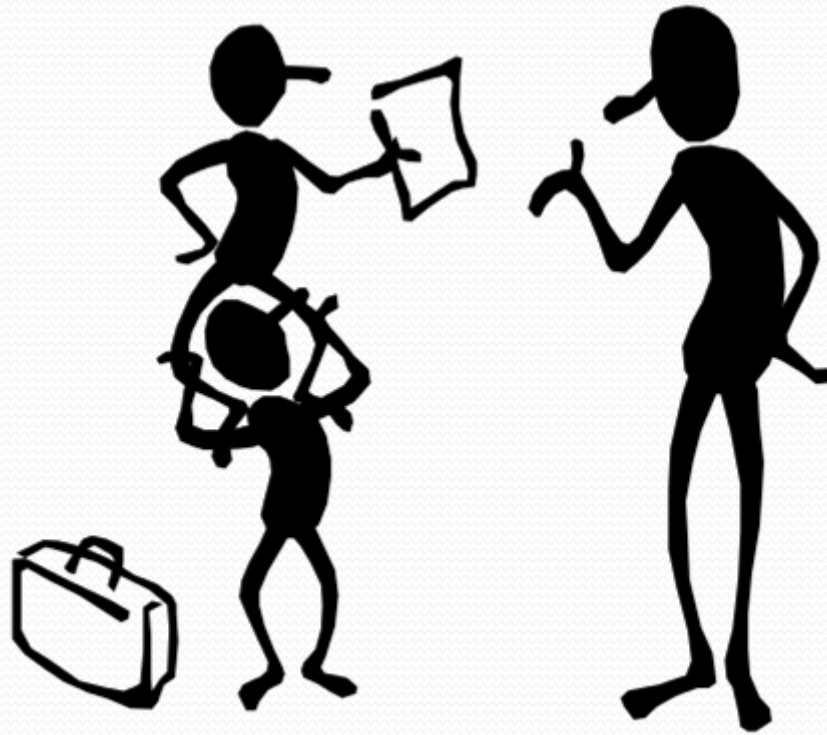
# Care orders or not?





# Placement





Any questions?



# Deprivation of Liberty of Children and Young People: Human Rights and Decision-Making Dynamics (Child-Parent-State)

6<sup>th</sup> March 2023

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Dr Camilla Parker KC (Hon), Legal & Policy Consultant

*Just Equality*

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# Context: Crisis, Conflicts & Confusion ~ Concerted Response is Required

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- DoL Court and NFJO: Shining a light on the failure of the “system” of care for children and young people with complex needs
- Collective responsibility
  - State responsibility for the provision of care and support
  - A CYP’s complex needs requires a multi-disciplinary, multi-agency response
  - Social care, health and education – joint working essential
- Collaborative engagement
  - Sharing of knowledge and expertise is crucial
  - Interplay of range of legislation, policies, funding streams
- Focus on the child/young person:
  - 1) What are the CYP’s needs?
  - 2) How can we meet those needs?
  - 3) Do these arrangements give rise to a deprivation of liberty?
- Process of determining whether DoL arisen crucial to ensuring respect for CYP’s rights

# Deprivation of liberty: why so important?

- Term from Article 5 of the European Convention on Human Rights (ECHR): Everyone (any age) has the right to liberty
- Protects us all from arbitrary interference with our liberty: DoL only permitted in specific cases eg Art 5(1)(e) “the lawful detention of ... persons of unsound mind...”
- Strict safeguards to be provided for those who are deprived of their liberty
  - Any deprivation of liberty must be by ‘a procedure prescribed by law’ (Article 5(1))
  - Those who are deprived of their liberty have the right to have the lawfulness of their detention reviewed by a court (Article 5(4))
- Importance: Provision of care may give rise to a deprivation of liberty
  - *P v Cheshire West and Cheshire Council: P and Q v Surrey County Council* [2014] UKSC 19 (*Cheshire West*)
  - ...and many more, including under 18s; e.g. *Re D* (2019) UKSC 42 (courts emphasis on importance of seeking authorisation of a deprivation of liberty *LB of Lambeth v L* (2020))

# Three Key Areas of Concern

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## State responsibility for provision of care

- Greater transparency required on the decision-making process of agencies
- MHA 1983 (legislation and Code of Practice) v Access Assessment (policy)
- Inappropriate settings; admissions to adult psychiatric wards, out of area placements
- 'Invisible children' (e.g. parental consent to a child's admission to a psychiatric unit)

## The voice of the child in decision making process

- Greater attention required: seeking & taking into account CYP's wishes & feelings
- 'During the short hearing I attended, I didn't get much of a sense of the young person at the heart of this case' Lucy R (legal blog) [Transparency Project](#)

## Parental decision-making powers

- Greater clarity required on the limits of parental control when considering if DoL arisen

# Inter-relationships: Protective Role of the State, Parental Responsibilities and the Evolving Capacities of the Child

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- State: to respect decision-making role of parents BUT this to be balanced against responsibility for protecting children's rights
- Both State and parents to act in best interests of child
  - Best interests of the child: 'a primary consideration' in all actions concerning children (under 18s) Art 3(1) UNCRC; Art 7(2) UNCRPD, *Neulinger v Switzerland* (2010) [135]
  - Applies to parents (Art 18 UNCRC, national law (*Gillick*))
- Views of the child are integral to determining the best interests of the child
  - Article 12 UNCRC: giving weight in accordance with age and maturity
  - Importance of views of child under national law (eg Children Act 1989, medical treatment cases, MCA 2005)
- Parental powers linked to their child's rights
  - Role is to assist children in exercising their rights by giving appropriate direction and guidance 'in a manner consistent with the evolving capacities of the child' (Art 5 UNCRC)

# Determinants of a Deprivation of Liberty: *Storck v Germany* 2005

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- Beware of ‘terminological imprecision’
  - 1) the objective component of confinement in a particular restricted place for a not negligible length of time; (**the confinement question**)
  - 2) the subjective component of lack of valid consent; and (**the lack of valid consent question**)
  - 3) the attribution of responsibility to the State (**the State responsibility question**)
- Low threshold for State responsibility (engaged if State actively involved in the provision of care arrangements or knows (or ought to know of the situation))
- Avoid conflation of *Storck* a) and *Storck* b)
- Both engage the decision-making role of parents – but differing aspects



# False Dichotomies

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## *Nielsen v Denmark* (1988): *Storck a*) or *Storck b*)?

- Predates *Storck* by nearly 20 years
- Confinement? Comparison to children's hospital wards (*Gard v UK*)
- Consent? Exercise of exclusive custodial rights over a child who was not capable of expressing a valid opinion (*Stanev v Bulgaria*)

## Under 16s v those aged 16+

- In relation to question of parental consent to confinement – age is not the determining factor

## Parental rights of the v role of the State / rights of the child

- Inter-relationship of State's protective role, parental responsibilities and the evolving capacities of the child
- Limits to parental decision-making powers (*Nielsen*, national law)

# Parental Decision-making powers and Deprivation of Liberty

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State responsibility (engaged where public body involved)

Confinement Question (*Storck* component (a))

- *What restrictions are being proposed? How do they compare to a child/young person of the same age (without disabilities??)*
- a) Acid test (constant supervision & control and not free to leave)
- b) Restrictions exceed normal parental control for a CYP of same age (Re D (2019))

Lack of valid consent question (*Storck* component (b))

- If the restrictions go beyond normal parental control, is there any consent?
- *Who can give valid consent to the restrictions and when?*
- a) Young person with capacity / competent child (consent also requires sufficient information and no pressure/ coercion)
- b) Parental consent: **possible** if child aged under 16 lacks competence to decide BUT what are the limits to this? (Not possible if child subject to a care order)

Lack of clarity on when parents can consent

- Courts refer to the proper exercise of parental responsibility / parents acting in their child's best interests/ 'no third party (such as the local authority or an NHS body) consider such deprivation to be contrary to his best interests' (see *Lincolnshire CC v TGA* and others [2022] EWHC 2323 (Fam))

# Limits on Parental Consent

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## Nielsen v Denmark 1988

- considered to be controversial but compare 12 year old's situation with current cases
- Made clear that there are limits to parental decision-making powers
- Pre UNCRC (1990)

## Substituted consent?

- ECtHR: where consent of 3<sup>rd</sup> party (the adult's legal guardian) meant no DoL where 'evidence showed that the person concerned was willing to stay where he or she was and was capable of expressing a view'.
- where the person confined has indicated an objection to the placement, for example expressing a desire to leave, or trying to escape, the ECtHR has concluded that there was no valid consent and a deprivation of liberty had arisen (e.g. *Shtukaturov v Russia*, 2008)


## Views of the child – central to decision-making by parents and the State

- UNCRC: best interests, Art 12, parents expected to take account child's views, in accordance with their age and maturity'; Art 8 ECHR involving the person concerned in the decision-making process

# Concluding remarks

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- UN view: Admission of child / young person for institutional care considered to be a deprivation of liberty irrespective of parents' consent
- Increased awareness of need to consider whether care arrangements give rise to a deprivation of liberty
- Clarity required on the role of parental decision-making
  - Guidance on limits of parental consent
  - Greater attention to the voice of the child
- Collective responsibility
- Collaborative engagement
- Place the child/young person at the centre of the decision-making process



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# Q&A

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**THANK YOU**

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