GARDEN COURT CHAMBERS

Children's Rights Autumn Conference: Children and Detention

2pm - 6.30pm

Wednesday 22 November 2023

Children's Rights Autumn Conference

Children & Detention

Garden Court Chambers

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Keynote: Children in Police Detention

Dr Miranda Bevan, Lecturer in Criminal Law & Criminal Justice,

Goldsmiths University

Dr Vicky Kemp, Principal Research Fellow & Co-director

Criminal Justice Research Centre, University of Nottingham

Children in Police Detention

Garden Court Chambers
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Dr Vicky Kemp

The University of Nottingham
UNITED KINGDOM · CHINA · MALAYSIA

Dr Miranda Bevan

Goldsmiths
UNIVERSITY OF LONDON

Overview

- Nuffield funded study examining the impact of PACE on the detention and questioning of child suspects:
  - Analysis of over 50,000 custody records (from 8 police forces) – 3,722 children
  - 32 case studies (in 3 police forces – eight custody suites) including engaging with all those involved in the police interview
  - For the first time in England and Wales, engaged with children while detained about their legal rights – viewing the process through the lens of a child
- UN Convention on the Rights of the Child – understanding, participation and 'best interests' of the child
- Accessing legal safeguards – legal advice and limitations of the fixed fee
- Next steps – piloting a Child First approach in police custody

Statistical findings relating to child suspects

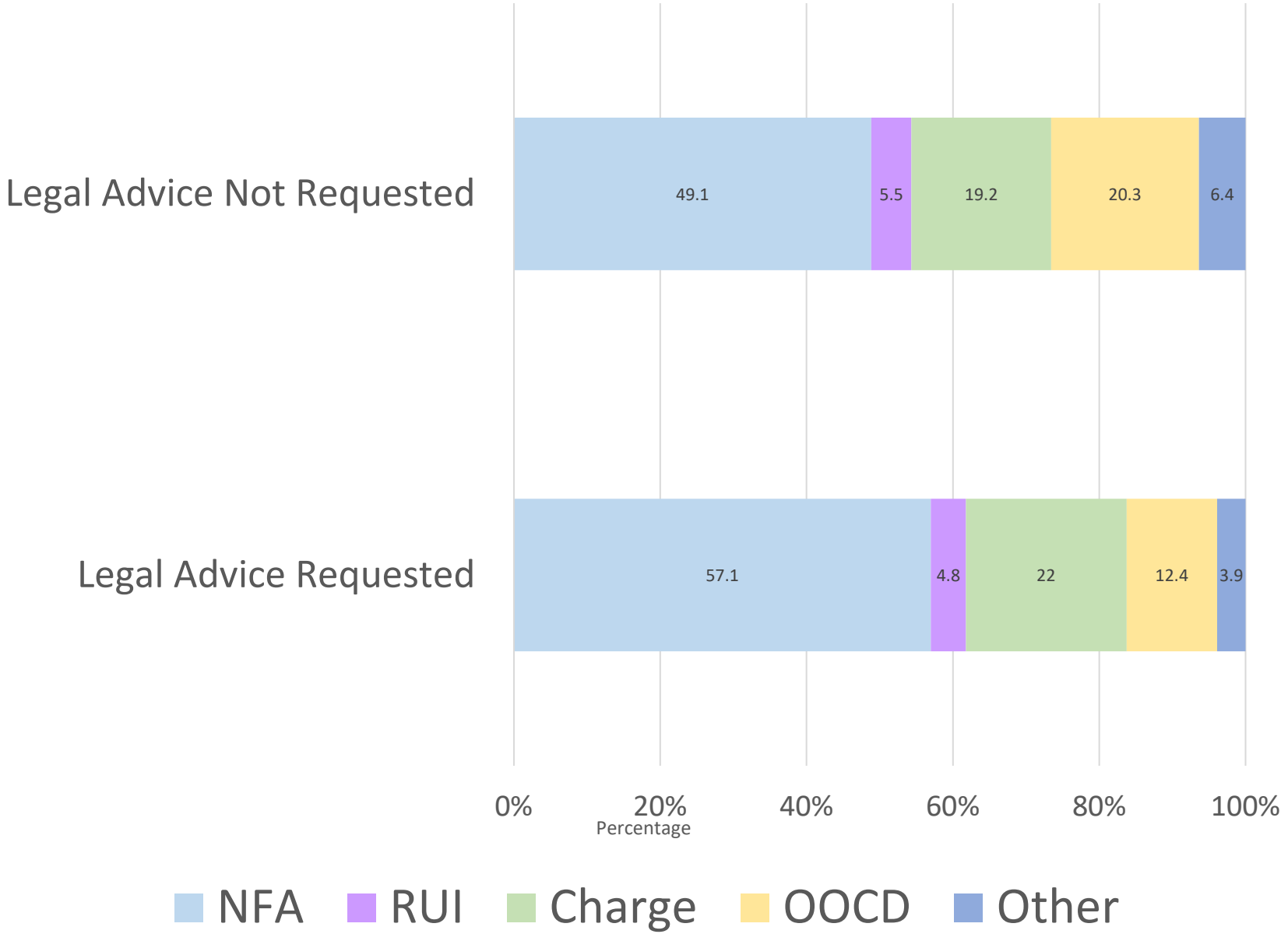
- The number of children detained fell by over two-thirds 2012-2022 but now increasing in some forces
- Custody officers authorise detention in 99% of cases – a rubber stamping approach is adopted
- 80% of children requested legal advice – which is much higher than 45% identified in 2009
- 10- to 13-year-olds are less likely to request a lawyer than older age groups
- Children are held in custody on average for 11 hours and 36 minutes – it was almost 9 hours in 2009
- 54% of children were held overnight in police custody

Case Outcomes – 2019/21 and 2009

	NFA	*Charge*	*OOCD*
2019/21	**61%**	**21%**	**14%**
2009	**32%**	**42%**	**26%**

- An increase in the involvement of lawyers is likely to increase ‘no comment’ responses in police interviews
- Children are spending over 11 hours in police custody and no action is taken in the majority of cases – the process is the punishment?
- Raises questions about the type of cases brought into police custody – reserve the adversarial process for more serious offences?

Proportion of case outcomes for children who did/did not request legal advice



Findings from 32 case studies

- From a child's perspective:
  - Most difficult is being left alone in a cell for many hours – with little or no distractions – 'dehumanising'
  - On average children spending 9/10 hours detained before the police interview
  - Half did not eat the food - 6 held for over 15 hours
  - Most experienced police custody as part of their punishment
  - A high proportion of NFAs means no help or support at this early stage in addressing the needs of a child
  - Custody seen to be harsh and punitive, fostering resentment and undermining trust in the police

Children's experiences in police custody

I feel like a caged animal

You don't know what's going on. You're treated like you're an adult already

I literally went insane. I thought at one point I was losing my brain

The food is horrible

There's nothing soft in here - I'm missing home –I'm bored

From the child's perspective:
The conveyor belt of police custody

Risk assessment: Vulnerabilities and child suspects

Children reporting:	%
Suicide	13%
Self-Harm	25%
Drugs	15%
Mental/Health	24%

- The assessment of risk in custody is an underestimate as many children are reluctant to answer police questions honestly – some are unaware of their health problems
- Risk assessment is about safeguarding issues - not about a child's health and well-being
- Out of our 32 case studies, 18 children reported having neurodivergent or mental health issues = 56%

Access to legal rights

- 18 out of 32 child participants did not understand their legal rights
- But - 29 out of 32 had a lawyer
- In 25 out of these cases the first contact the child had with their lawyer was just prior to the police interview
- This means that children are spending around 9 to 10 hours in custody before speaking to their lawyer
- A child's main contact with their Appropriate Adult was also just prior to the police interview
- Children have a fundamental right to speak to their lawyer and AA in private at any time – including over the phone - but this rarely happens in practice
- The fixed fee is insufficient to pay lawyers for the advice and assistance required for children held in police custody

PACE and police custody

- Apart from a mandatory requirement for an AA - very little difference required in treatment of adults and children
- Held in the same type of cells as adults – interviewed in the same way – no specialist training
- Police left on their own to cope with children in custody – limited contact social services and youth justice services while child is detained
- Without multi-agency working in police custody – children can be criminalised and detained unnecessarily
- A ‘justice’ approach is dominant in adversarial system of justice – not focused on identifying and meeting the needs of the child

Effective participation pre-charge:

Panovits v Cyprus (2008) 27 BHRC 464, [67]

'The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with with due regard to his vulnerability and capacities **from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police**. The authorities must take steps to reduce as far as possible his feelings of intimidation and inhibition…and ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent … It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police.'

1. **Ensuring adjustment** which:
   - seeks to minimise the child's situational adversity, and,
   - Takes account of their inherent need for special care and protection

2. **Fostering appreciation** of their:
   - legal jeopardy
   - options (vis a vis the allegation)
   - defence rights (inc. right of silence)

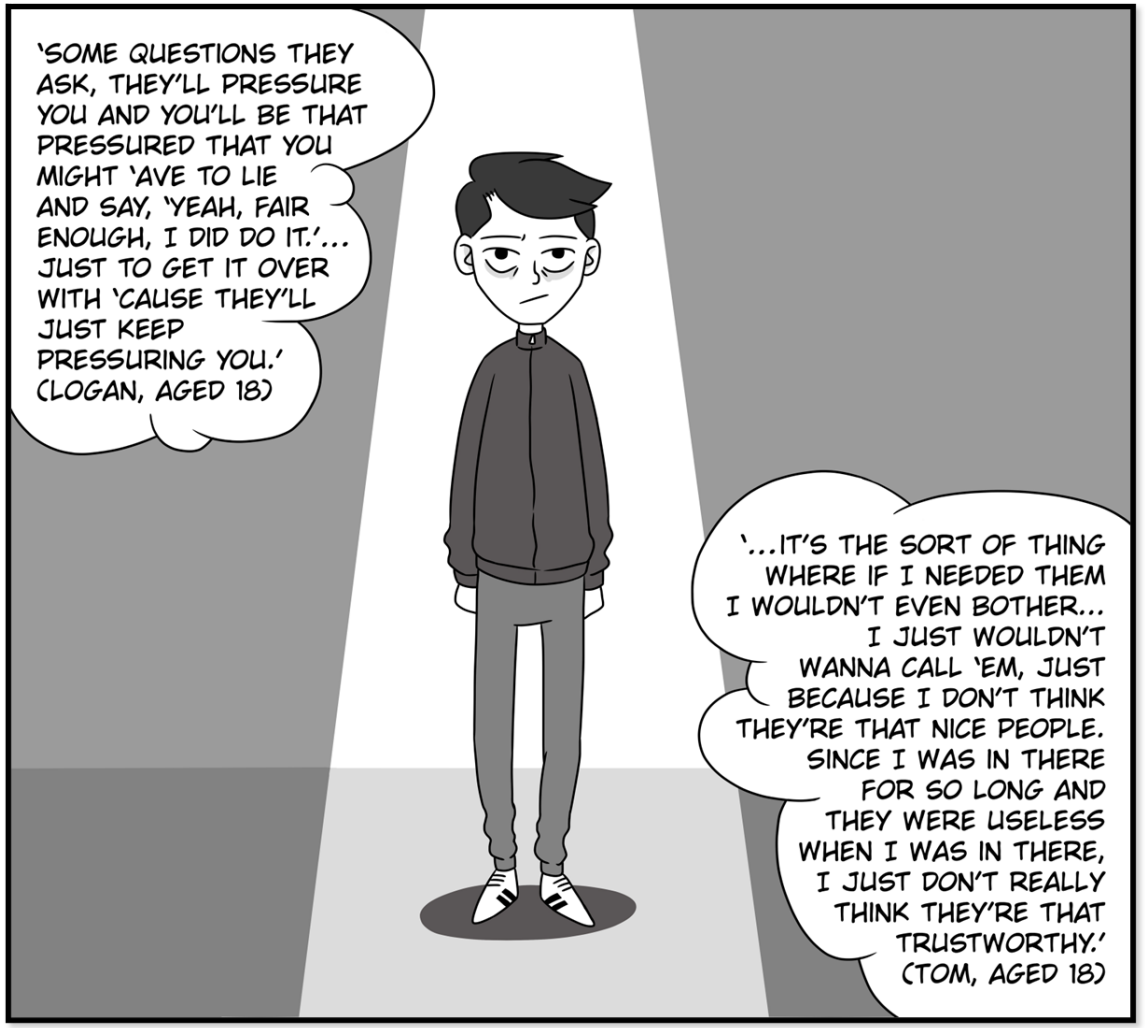
3. **Enabling understanding** to achieve:
   - a general level of comprehension sufficient to enable them to participate directly in questioning
   - with such assistance as they require, eg a lawyer or appropriate adult

Counter-productive

- Risks gathering unreliable evidence, or (commonly) no evidence at all

AND

- Alienates children and their families



Recommendations for change in police custody

Recommendations for adopting a Child First approach:

- Custody to be used as a ‘last resort’
- Shorter PACE clock for children
- Presumption of legal advice – restrictions on waiver – requiring access when key decisions are made
- AA safeguard to be reviewed
- Different model for interviewing child suspects (ABE?)
- Specialist training for all those involved with child suspects – specialist ‘youth’ lawyers
- National collation and reporting of electronic custody record data – to provide strategic oversight of PACE

All-Party Parliamentary Group on Children in Police Custody

Inquiry into Achieving the Rights of Children in Police Custody

Focusing on five central questions:

- Reducing the numbers of children in police custody
- Reducing detention times for children
- Ensuring effective independent adult support for child suspects
- Ensuring all children receive legal advice
- Reducing the numbers of children strip-searched by police

- For more information on the Inquiry see here.

Children's Rights Autumn Conference

Remand of age disputed asylum-seeking children into adult prisons on immigration charges

Whitney Hard, Coram Children's Legal Centre

22 November 2023

Children's Rights Autumn Conference

Children in the Immigration & Asylum System

Irena Sabic KC, Garden Court (Chair)
Whitney Hard, Coram Children's Legal Centre
Stephanie Harrison KC, Garden Court
Nicola Braganza KC, Garden Court

22 November 2023

Children's Rights Autumn Conference

Post-conviction appeals of age disputed asylum-seeking children

Stephanie Harrison KC, Garden Court

22 November 2023

First Defendant Duties: Immigration Powers

Paragraph 18B of Schedule 2 to the IA 1971 provides for the detention of children who are subject to examination or removal under paragraph 16(2) of that Schedule, and states that:
"18B [...]
(2)An unaccompanied child may be detained under paragraph 16(2) in a short-term holding facility for a maximum period of 24 hours, and only for so long as the following two conditions are met."

In *R (AA (Sudan)) v Secretary of State for the Home Department* [2017] 1 WLR 2894) the Court of Appeal confirmed that in interpreting the meaning of "unaccompanied child" in para 18B above, the age of the individual is "an objective fact".

Criminal Offences and CPS Policies

Section 24(D1) Immigration Act 1971 creates the offence of illegal arrival:
"(D1)A person who—

(a)requires entry clearance under the immigration rules, and

(b)knowingly arrives in the United Kingdom without a valid entry clearance,

commits an offence."

Section 25(1) IA 1971 creates the offence of unlawful facilitation of the commission of a breach of immigration law. Under s 25(6) a conviction on indictment for the offence carries a maximum sentence of life imprisonment.

Section 45 Modern Slavery Act 2015

Section 45 Modern Slavery Act 2015 provides a defence to certain offences where committed as a result of Modern Slavery. The relevant subsection as it pertains to adults, is Section 45(1), which provides that:

"(1)A person is not guilty of an offence if—

(a)the person is aged 18 or over when the person does the act which constitutes the offence,

(b)the person does that act because the person is compelled to do it,

(c)the compulsion is attributable to slavery or to relevant exploitation, and

(d)a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act."

The defence for children is set out at section 45(4) MSA 2015:

"(4)A person is not guilty of an offence if—

(a)the person is under the age of 18 when the person does the act which constitutes the offence,

(b)the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and

(c)a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act."

Code for Crown Prosecutors

The CPS's decision to charge and prosecute the Claimant is governed by the Code for Crown Prosecutors, which sets out a two-stage "Full Code Test": the evidential test and the public interest test. Paragraph 4.14 sets out six factors to consider in deciding whether the public interest test has been met. Factor 4 at para 4.14(d) is "Age and Maturity of the Offender." In relation to the age and maturity of the Claimant, the Code provides that:

> "The criminal justice system treats children and young people differently from adults and significant weight must be attached to the age of the suspect if they are a child or young person under 18.
>
> The best interests and welfare of the child or young person must be considered, including whether a prosecution is likely to have an adverse impact on their future prospects that is disproportionate to the seriousness of the offending.
>
> Prosecutors must have regard to the principal aim of the youth justice system, which is to prevent offending by children and young people. Prosecutors must also have regard to the obligations arising under the United Nations 1989 Convention on the Rights of the Child.
>
> Prosecutors should consider the suspect's maturity, as well as their chronological age, as young adults will continue to mature into their mid-twenties.
>
> As a starting point, the younger the suspect, the less likely it is that a prosecution is required."

Determining Age in the Criminal Courts

Children and Young Persons Act 1933, section 99(1) allows any court to deem the age of a person before it:

> *"The court shall make due inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case […]"*

It is usually appropriate to adjourn for further enquiries to be made when the age of the defendant is unclear. Guidance for the judiciary is set out in the 'Youth Defendants in the Crown Court Benchbook', at Chapter 15.5C "Determining Age: Deeming". This provides, at paragraph 38, that *"The age of a young defendant is a very important matter,";* and, at paragraph 39, that where there is uncertainty as to a Defendant's age "*Such uncertainty will need to be resolved by the court, which is under a duty to determine the age of the defendant. There is no onus of proof on the defendant himself/herself."*

Determining Age in the Criminal Courts

R v O [2008] EWCA 2835

"Prosecutors must be aware of the protocols which, although not in the text books are enshrined in their Code. Defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who might have been the victim of trafficking, especially a young client. Where there is doubt about the age of a defendant who is a possible victim of trafficking, proper inquiries must be made, indeed statute so required."

Determining Age in the Criminal Courts

Difficulties can arise when the offender is a refugee or asylum seeker, as the documentary evidence listed in the paragraph above may well have been lost in transit. Guidance as to the assessments to be conducted in these circumstances is contained in the case of R (on the application of B) v Merton LBC [2003] EWHC 1689 (Admin). Despite the age of the case, this approach has been endorsed and re-stated in the 14 January 2022 Home Office guidance Assessing Age, which refers to Merton-compliant age assessments.

Determining Age in the Criminal Courts

***R v L and Others [2013] EWCA Crim 99* and *R(M) v Hammersmith Magistrates Court [2017] EWHC 1359*.**

Both these cases held that visual assessments of physical appearance are not a lawful or adequate evidential basis to determine the age of a disputed child Defendant. Where there is uncertainty, the disputed child is to be treated as a child pending verification of age.

Determining Age in the Criminal Courts

Policy and/or Practice on referral for criminal investigation and prosecution of children with immigration offences

The judgment in ***R(HBH) v Secretary of State for the Home Department [2009] EWHC 928 (Admin)*** at [45-46] found that it was unlawful to treat an initial age assessment and the conclusion based on appearance and demeanour alone as a determinative, not provisional, assessment of age and as a basis for referral for criminal prosecution. The Judge made the following generic declaration:

> *"The Secretary of State's methodology prior to 30 November 2005 of treating as adults asylum applicants who claimed to be under 18 years of age, for the purposes of deciding whether to prosecute and/or refer them for prosecution for an immigration offence, on the basis that an immigration officer considered by way of his/her own brief assessment that the applicants' appearance and/or demeanour strongly suggested that they were 18 or over, was unlawful."*

R (BF(Eritrea)) v SSHD [2021] UKSC 38 [2021] 1 WLR 3967

Determining Age in the Criminal Courts

- ***Zenati v Chief Commissioner of the Metropolis*** **[2015] EWCA Civ 80**
- ***LL v Lord Chancellor [2017]*** **EWCA Civ 237, [2017] 4 WLR 162**

Children's Rights Autumn Conference

Illegal Migration Act 2023: Detention of children

Nicola Braganza KC, Garden Court Chambers

22 November 2023

The supposed thinking behind it…

"The policy objective here is **not to detain children**, but it's important that we don't inadvertently create a policy that ***incentivises*** **people to bring children** who wouldn't otherwise come here. And that's why it's important that it applies equally to families, because **otherwise you increase the likelihood that people bring children here, they make very dangerous crossings**. I don't think anyone would want to see that, that's not good for children. So, the policy should and must apply to families, but it's right that we then look at families differently, as we do, and they should be in accommodation that's appropriate for them and that those family groups should not be separated. I think that is **the right thing to do**, because otherwise, as I said, **you create an incentive for a criminal gang to tell people to bring a child with them** when they otherwise wouldn't be. And I don't think that is a good thing. I don't think we want to create ***a pull factor*** to make it more likely that children are making this very perilous journey in conditions that are appalling. I don't think that's the right thing to do. We should not create a system that makes that more likely." [emphasis added]

March 2023, PMRS before the Parliamentary Liaison Committee defending detaining children in new IMB
www.youtube.com/watch?v=Ux8qlmpGwY4

Detention of Children - unaccompanied children

- Para 16(2) of Sched 2 Immigration Act 1971 - unaccompanied child **may only be detained** in a **short-term holding facility** (STHF) and in no other place, except either:
  - during transfer to or from STHF
  - while being taken in custody for the purposes set out in para 18(3) of Sched 2 to the 1971 Act
    - (to and from any place where his attendance is required for the purpose of ascertaining his citizenship or nationality or of making arrangements for his admission to a country or territory other than the United Kingdom, or where he is required to be for any other purpose connected with the operation of this Act)

- Home Office Detention: General instructions Version 3.0 28/9/23

HO Detention: General instructions V3 28/9/23

- UC may be detained under para 16(2) Sched 2 1971 Act in STHF
  - for a **maximum of 24 hours &**
  - only while **both** of the following conditions met (para 18B):
    - **directions** requiring the child to be **removed** from the STHF **within 24 hours** of being detained in STHF in force, or decision likely to result in such directions being given
    - IO who gave authority to detain reasonably believes that the child **will be removed** from the STHF **within 24 hours** in accordance with those directions
- If UC is removed from an STHF and detained somewhere else, they may be detained in an STHF again but only if, and for as long as, it remains within 24 hours of first being detained
- Policy "*set at a high threshold and **compliant with the section 55 duty**, the Home Office continually monitors the case details of individuals detained under this policy to ensure that, if necessary, the policy could be promptly amended to **avoid the detention of children***".

Detention of Children

HO Detention: General instructions Version 3.0 28/9/23

- General principle - even where one of the statutory powers to detain is available, UC must not be detained other than in **very exceptional circumstances**.
- If UC detained, it must be for the **shortest possible time**, with appropriate care.
- This may include detention overnight, but a person detained as an unaccompanied child must not be held in an **immigration removal centre in any circumstances**.
- This includes age dispute cases where the person concerned has been given the benefit of the doubt and is being treated as a child.
- In all cases, the decision-making process **must be informed by the duty** to have regard to the need to safeguard & promote the welfare of children under **s55** of the Borders, Citizenship and Immigration Act 2009.
- Reviewing officers **must have received training** in children's issues (at least Tier 1 of Keeping Children Safe) and **must demonstrably** have regard to the need to safeguard & promote the welfare of children.

Illegal Migration Act - Power to detain

S11(2) IMA 2023 inserts 2C after paragraph 16(2B) of Sched 2 IA 1971: -

(a) where IO **suspects** that the person meets the four conditions in s2 IMA 2023, he may detain '**pending** a decision as to whether the conditions are met'

(b) if an IO **suspects** the SSHD has a duty to make arrangements for removal under s2, he may detain '**pending** a decision as to whether the duty applies'

(c) if there is such a duty, pending removal from the UK in accordance with that duty

(d) if the four conditions are met but there is no duty to remove by virtue of s4(1)

Duty to make arrangements for removal

Section 2 places duties on the SSHD to make arrangements for removal of a person if they:

First Condition (S2(2)(a) – (e))

Entered UK without leave to enter/entry clearance/electronic travel authorisation or obtained leave by deception OR Entered in breach of a deportation order OR an excluded person:

Second Condition (S2(3)) Entered After 20th July 2023

Third Condition (S2(4))

Did not come directly to the UK from a country in which the person's life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.

Fourth Condition (S2(6))

Person requires leave to enter or remain in the UK but does not have it (does not include leave given to a unaccompanied child under S4(1)

Powers to detain where no duty to remove

S2C(d) continued: -

(i) pending a decision to give limited leave to enter or remain for the purposes of s4(1):

(ii) pending a decision to give leave under s8AA of the 1971 Act (discretionary leave)

(iii) pending a decision to give leave under s65(2) of Nationality and Borders Act 2022 (leave to remain for victims of trafficking) or

(iv) pending a decision to remove an unaccompanied child under 4(2) of IMA 2023 and pending their removal under that section.

Unaccompanied Children – s4 IMA 2023

(1) The duty in s2 does not require the SoS to make arrangements for the removal of an unaccompanied child.

(2) SoS *may* make arrangements for the removal of an unaccompanied child.

(3) The power in subsection (2) may be exercised only—
(a) for the **purposes of reunion** with the person's parent
(b)where **removal to a** country listed in s80AA(1) NI&A Act 2002 (**safe States**)
(i)a country of which person is a national, or
(ii)a country in which person has passport or other ID document
(c)where the person has not made a protection claim or a HR claim and the person is to be removed to — country of which a national; where passport/ID document of identity, or country in which the person embarked for the United Kingdom;
(d) Or as may be specified in regulations by the SoS – may confer discretion on SoS.

(5) = "unaccompanied child" if—
(a) C meets the four conditions in s2, (b) C is under the age of 18, and (c) at the relevant time (entry/arrival) no individual (whether or not a parent of C) who was aged 18 or over had care of C.

Unaccompanied Children – IMA 2023 s11(2)

(2H) The powers in (2C) may be exercised **in respect of an unaccompanied child** only in the circumstances **specified in regulations** made by the SoS.

(2I) SoS may, by regulations, **specify time limits that apply** as to the detention of an unaccompanied child under (2C)(d)(iV) (detention of unaccompanied child in relation to removal).

(2J)Regulations under (2H) may confer a discretion on the SoS or an IO.

(2K)Regulations under (2H) or (2I) —

(a)may make different provision for different purposes;

(b)may make consequential, supplementary, incidental, transitional or saving provision;

(c)must be made by statutory instrument (SI).

(2M) Person (of any age) detained under (2C) anywhere that SoS considers appropriate.

(2N) SI with Regs under (2H)/(2I) subject to annulment under resolution of either House of Plt.

(2P) (2H) and (2I), “unaccompanied child” has the same meaning as per IMAct 2023 (s4)

IMA s13 Power to grant bail

S13 - amending Sched 10 to IA 2016 - inserts 3A

- (3A) A person who is being detained under para 16(2C)(d)(iv) of Sched 2 IA 1971 or s62(2A)(d)(iv) of NIAA 2002 (detention of unaccompanied child for purposes of removal) **must not be granted immigration bail** by the First-tier Tribunal until after the earlier of—
  - (a)the end of the period of 28 days beginning with the date on which detention began,and
  - (b)**the end of the period of 8 days** beginning with the date on which the person's detention (**unaccompanied minor**)

And no challenge in relevant period – IMA s13 (4)

S13: amends Schedule 10 to the Immigration Act 2016 - inserts 3A(1)

(a) a decision to detain a person by IO under para 16(2C) of Sched 2 IA 1971
(b) decision to detain a person by SoS under s62(2A) NI&AA 2002, and
(c) detained under paragraph (a) or (b) a decision of SoS to refuse to grant immigration bail

(2) Re detention during the relevant period, the decision is final and is not liable to be questioned or set aside in any court or tribunal.

Unless - (4), decision involves or gives rise to any question as to IO/SoS acting or has acted—

(a) in bad faith, or
(b) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

(5) Can apply for a writ of habeas corpus, or (b) in Scotland, apply to the Court of Session for suspension and liberation.
(6)“decision” includes any purported decision

No longer a duty to consult Independent Family Returns Panel

S14 IMA disapplies the duty on SoS to consult the IFRP on the detention of families with children under the powers of the Act and disapplies it for the purposes of removal of unaccompanied children.

Disapplication of duty to consult Independent Family Returns Panel

111.Section 54A of the BCI Act 2009 makes provision for the IFRP. The IFRP **provides advice on the safeguarding and welfare plans** for the removal of families with children who have no legal right to remain in the UK, and have failed to depart voluntarily.
The IFRP **makes recommendations to the Home Office, ensuring the welfare needs of children and families are met** when families are returned to their home country (or, in asylum cases, the third country where the asylum claim legally must be heard).
Section 54A(2) requires the SoS **to consult the IFRP** in every family returns case, **on how best to safeguard and promote the welfare** of the children of the family (subsection (2)(a)), and in each case where detention in pre-departure accommodation is proposed **on the suitability** of so doing, having particular regard to the need to safeguard and promote the welfare of the children of the family (subsection (2)(b)). This section inserts new subsections (3A) and (3B) into section 54A of the 2009 Act **which disapply the duty**. [Explanatory notes]- [emphasis added]

Where is this "*incentivising*" from?

Illegal Migration Bill: Child Rights Impact Assessment, Home Office, July 2023

Refers to UK commitment to consider United Nations Convention on the Rights of the Child (UNCRC)

"Detention
In order to **avoid creating a perverse incentive** for people smugglers to prioritise children and families with children for dangerous crossing across the channel, families and children who come to the UK illegally are not exempt from detention and removal under this Bill....

The Home Office already has the power to detain children at the border for the purpose of removal, but detention for the purpose of removal is limited to **a maximum of 24 hours and unaccompanied children can only be detained in a Short-term Holding Facility**"

https://bills.parliament.uk/publications/52110/documents/3774

Child Rights Impact Assessment cont'd

"Unaccompanied children will only be detained in circumstances **to be prescribed in regulations**, subject to the affirmative parliamentary procedure… The detention powers in relation to removal will only be exercised **in very limited circumstances** ahead of them reaching adulthood, such as where they are being **removed for the purposes of reunion** with a parent or where **removal is to a safe country of origin**.

Where a decision is made to remove an unaccompanied child under 18, detention will be for **the shortest possible time in appropriate detention facilities with relevant support provisions** in place and all international obligations, including the UN Convention on the Rights of the Child, respected. The Home Office is not currently in the position of corporate parent to any unaccompanied child and there is nothing in the Bill which changes this position. It will continue to be for the local authority where an unaccompanied child is located to consider its duties **under the Children Act 1989**."

Illegal Migration Bill: Child Rights Impact Assessment, Home Office, July 2023

S55 and the UNCRC

Illegal Migration Bill: **Child Rights Impact Assessment**, Home Office, July 2023

"**UNCRC directly relevant to detention**:
Article 3 (best interests of the child); Article 9 (separation from parents) Article 15 (freedom of association); Article 20 (right to special protection and help) Article 23 (children with a disability); Article 24 (health and health services) Article 25 (review of treatment in care)
Article 27 (adequate standard of living) Article 28 (education); Article 31 (leisure, play and culture) Article 37 (inhumane treatment and detention)

Home Secretary has a duty **under Section 55 of the Borders, Citizenship and Immigration Act 2009** to make arrangements for ensuring that immigration, asylum and nationality functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. **With respect to the detention of families with children and the implementation of Articles 3, 9 and 23, it is assessed that the impact will remain neutral.**"

Child Rights Impact Assessment cont'd

To mitigate any negative impacts, where possible, that the legislative changes and policy will have on Articles **15** (freedom of association)**, 20** (right to special protection and help)**, 24** (health and health services)**, 25**(review of treatment in care)**, 27**(adequate standard of living)**, 28**(education); **31**(leisure, play and culture) **and 37** inhumane treatment and detention) we will:

▪ Ensure these detention powers in relation to removal will only be exercised **in very limited circumstances** ahead of them reaching adulthood, such as for the purposes of family reunion or where removal is to a safe country of origin.

Detention will be **for the shortest possible time in appropriate detention facilities with relevant support** provisions in place.

In line with the current detention guidance, which we will review and update with the legislative changes, **any welfare, medical and other safeguarding issues will be considered in all detention decisions**.

▪ When developing the accompanying policy to accommodate the legislative changes on detention of children and families with children, we will work closely with the Department of Education, and continue open dialogue with the Family Returns Panel and Children's Commissioner to ensure that, where practicably possible, **children's needs can be met within detention**.

▪ Build upon our current detention facilities for families to ensure they are appropriate and provide safe and secure accommodation. We will ensure there are proper provisions in detention for children and families with children.

Statistics

2022 - 5,242 asylum applications from Unaccompanied Asylum-Seeking Children
=> 39% increase on the number prior to COVID19 pandemic

2019 - 3,775 - of these, 3,681 (70%) were aged 16 or 17

2016 – 3/2023: - there were 8,611 age disputed – 47%, 4088 found to be adults

1/7/21 – 31/12/22 - National Transfer Scheme facilitated the transfer of 4,187 children to LAs with children's services

To y/e 31/3/22 - 5,540 UASC cared for by LAs in England, increase of 34% from the previous reporting year

Illegal Migration Bill: **Child Rights Impact Assessment**, HO, 7/23

Regulations on time limits

Illegal Migration Bill: **Equality Impact Assessment**, HO 26/4/23

"The Bill also creates a power to detain those within scope of the scheme pending decisions on whether the conditions are met/the duty applies and pending their removal. The First-Tier Tribunal will not be able to grant immigration bail within the first 28 days and challenges to detention by way of judicial review will also be restricted in that period. However, applications to the High Court **for a writ of habeas corpus will be permitted at any time**. An individual will also still be able to apply to Secretary of State for bail at any point.

The Bill provides **that unaccompanied children may only be detained for purposes prescribed in regulations made** by the Secretary of State, such as for the purposes of removal to effect a family reunion (as is the case under current law) or for the purposes of age assessment. **It also allows the Secretary of State to make regulations specifying time limits to be placed on the detention of unaccompanied children for the purpose of removal, if required**."

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1155534/2023-05-03_Illegal_Migration_Bill_-_Overarching_EIA_FINAL.pdf

What about that deterrent effect?

Illegal Migration Bill: Equality Impact Assessment, Home Office, 26 April 2023
Assessment under PSED **s149 Equalities Act 2010**

"The Department's view is that the Bill ***should*** **have a deterrent effect which** can result in **fewer unaccompanied children** arriving in the UK by dangerous and unlawful means. This serves to mitigate in the long term how many children will arrive in the UK, which impacts on the risk of children absconding. The Home Office is also taking new accommodation and transfer powers, which are just some of the steps the Department is taking to ensure unaccompanied children are placed into local authority care as soon as possible. The Home Office does not have, and therefore cannot discharge, duties under Part 3 of the Children Act 1989 and there is nothing in the Bill which changes this position. Taking into account the above, any differential impact is **justified** and **proportionate** in order to achieve the legitimate aims of controlling migration and reducing crime.....

This approach is **designed to safeguard the most vulnerable** and ensure they are properly supported and cared for. The remaining provisions apply equally to all regardless of age and equal treatment could be considered to foster good relations"

But what about the evidence?

Illegal Migration Bill: **Impact Assessment**, Home Office, 26 June 2023

"It has not been possible to undertake a full value for money assessment of the Bill. This is because:

1. The Bill is **a novel and untested scheme**, and it is therefore **uncertain what level of deterrence impact it will have**. Therefore, a range is presented to set out varying levels of deterrence that may be achieved.
2. The delivery plan is still being developed, adjusting for changes during legislative passage, so the scale of the Bill's processes is not yet known. This includes **elements such as detention,** case working, judicial and third country capacity constraints.
3. No displacement effects of migrants shifting to other clandestine routes of entry are included in the core analysis, meaning wider socioeconomic costs of illegal migration through undetected routes are not included.
4. The baseline does not include impacts of to-be delivered projects within the NABA 2022"

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf

Children's Commissioner - Ongoing concerns following the passing of the Illegal Migration Bill, 19 July 2023

"I am deeply concerned about the impact it will have on children's rights and experiences. **The relaxation of rules around detention**. The lack of safeguards around Home Office accommodation. The inability for children to seek asylum. The removal of children at eighteen and the potential undermining of the Children Act 1989. It will mean that children fleeing war and persecution, and children who have been trafficked here, will no longer be able to claim asylum…
I do welcome the small changes around the detention of pregnant women and unaccompanied children.

But the impact the Act will have on children is still not fully understood. There has not been sufficient time to consider the implementation. Keeping children safe from harm, receiving care, should be a guiding principle for everything…

As the Bill becomes an Act of Parliament, I will continue to push for urgent answers to the questions I have raised about how the Act will be implemented in practice. **I remain unconvinced that it is possible for the Act to be implemented in a way that is compatible with the Children Act."**

Joint Child Detention Briefing, House of Lords Report, June 2023
Refugee & Migrant Children's Consortium

"What is **the impact of detention on children**?

As recently as 31 March 2023, the Home Office itself published guidance stating: '**a period of detention can have a significant and negative impact on a child's mental or physical health and development**'. Assessing Age v6, 31/3/23

Previous research conducted in the UK evidenced the **long-lasting damage detention** does to children's lives, both lone children and those with their families. The effects on their physical and mental health included weight loss, sleeplessness, nightmares, skin complaints, self-harm and attempted suicide, depression and symptoms of post-traumatic stress disorder…"

https://www.helenbamber.org/sites/default/files/2023-06/Joint%20child%20detention%20briefing%20-%20HoL%20Report%20270623.pdf

"Will not detaining children act as a pull factor?

Continuing to have limits on child detention **will not increase the number of children coming to the UK on small boats.** Once **routine child detention was ended in 2011, there was no proportional increase in children claiming asylum**. The Joint Committee on Human Rights, in looking at the removal of location and time limits on child detention, considered the Government's desire not to incentivise people smuggling gangs to target particular groups. The Committee stated: '**We have not seen evidence that this is likely to happen, nor that it would justify detaining children for periods previously considered to be excessive**.'

Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, June 2023: https://committees.parliament.uk/publications/40298/documents/196781/default

Implications and next steps?

- Await the Regulations
- S55 BCIA 2009 - all functions, incl. decisions to detain have to be *'discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'*

- Decision makers must have regard to guidance issued under these provisions
- Every Child Matters guidance (11/09) expressly states that HO must act in accordance with Article 3 of the UNCRC – best interests of the child a primary consideration.

- *ZH(Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4
- Failure to take account best interests of child can render decision to detain unlawful *R (on the application of Abdollahi) v SSHD* [2013] EWCA Civ 266

- See the HO 3 assessments in earlier slides:
  - Very shortest period?
  - Demonstrable (ie evidence) of s55 consideration and compliance?
  - Regard/provision for welfare, health, safety, education? Training of IO decision makers?
- Provision for the right to prompt access to legal and other appropriate assistance?

Implications and next steps?

- Article 3 ECHR - Detention of children in inappropriate accommodation can potentially engage Art 3 *Popov v France* [2016] 63 EHRR 8

- Article 5 ECHR - *Kanagaratnam v Belgium* [2012] 55EHRR 26, violation of 3 and 5 re mother and 3 children in closed transit centre.

- Consider with Article 14 - 'other status' of unaccompanied children seeking asylum being detained - without justification, *Thlimmenos* discrimination, requiring children to be treated differently

- *AN (a child) and FA (a child) v SSHD* [2012] EWCA Civ 1636 practice of detaining children for the purpose of conducting so called illegal entry interviews in breach of policy

UNHCR Guidance

UNHCR's clear view is that children should not in principle be detained at all (see UNHCR Detention Guidelines 9.2). It adopts the wording of Article 37 of the CRC (Convention on the Rights of the Child)

"States Parties shall ensure that:

...(b) **No child shall be deprived of his or her liberty unlawfully or arbitrarily**. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only **as a measure of last resort** and for the **shortest appropriate period** of time;
(c) Every child deprived of liberty shall be **treated with humanity and respect for the inherent dignity** of the human person, and in a manner which takes into **account the needs of persons of his or her age**. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the **right to prompt access to legal and other appropriate assistance**, as well as **the right to challenge the legality** of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Children's Rights Autumn Conference

Children & Detention

Garden Court Chambers

Wednesday 22 November 2023

GARDEN COURT CHAMBERS

Children's Rights Autumn Conference: Children and Detention

2pm - 6.30pm

Wednesday 22 November 2023

Use of Deprivation of Liberty Orders (DoLS) in Family Cases and Section 25 orders: “If we get it right for them, we get it right for everyone”

James Holmes, Garden Court (Chair)

Hannah Rought-Brooks, Garden Court

Beverley Barnett-Jones MBE, Nuffield Family Justice Observatory

Amanda Weston KC, Garden Court

22 November 2023

DoLS, Section 25 Accommodation and the High Court's Jurisdiction: Discussion & experience of two legal avenues restricting a child's liberty

Hannah Rought-Brooks

Garden Court Chambers

22 November 2023

What this Presentation will cover

- Section 25
- DOLS jurisdiction
- DOLs Court
- Judicial Commentary on Issues
- Issues with Placements & Experiences

“The maxim that the measure of a society can be obtained from how that society treats its most vulnerable members has been expressed in many different ways, and in many different contexts over time. In relation to children, it was perhaps most eloquently and most memorably expressed as 'there can be no keener revelation of a society's soul than the way in which it treats its children' (Nelson Mandela, 8 May 1995)”

MacDonald J in *Lancashire County Council v. G (Unavailability of Secure Accommodation) [2021] 2 FLR 34 at 37*

Section 25 Children Act 1989: Use of Accommodation for Restricting liberty

- Section 25 (1) provides that a child, who is being looked after, should not be placed or kept in secure accommodation unless it appears

(a) that

(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii) if he absconds, he is likely to suffer significant harm, or

(b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

....

- Section 25(4) concerns the maximum period for which a child may be kept in secure accommodation. The maximum period that a child may be held in secure accommodation without a court order is 72 hours per 28 days: C(SA)R 1991, reg 10. The initial maximum period for which a court may authorise a child to be held in secure accommodation is 3 months and thereafter for periods of up to 6 months: C(SA)R 1991, regs 11, 12.

Section 25

- **Criteria**:
  - the child must be a looked after child
  - the court does not have to find both s 25(1)(a) and (b) satisfied before making an order, either is sufficient
  - there should be a clear record of facts as found by the court and for which sworn evidence was necessary
- **Welfare Principle/Proportionality**: Welfare principle does not apply but the court cannot abdicate all responsibility for evaluating the impact of the proposed placement on the child's welfare. The court is obliged to consider whether the making of such an order is proportionate.
- **Article 5:** A secure accommodation order is a deprivation of liberty within the meaning of Art 5 of the ECHR, but is not incompatible with the Convention where it is justified under one of the exceptions in Art 5(1)
- **Appropriate Court:** Where a child has been remanded to local authority accommodation by a youth court pursuant to CJA, s 60(3), any application by the local authority under s 25 should be made to the youth court rather than the Family Court

Deprivation of Liberty Orders (DOLs)

- Well established that a judge exercising the inherent jurisdiction of the court with respect to children has power to direct that the child be detained in circumstances that amounts to a deprivation of liberty
- The absence of available accommodation does not lead to the structure imposed by section 25 being avoided. The terms should be treated as applying to the same effect as when an order under that section is being sought.
- The court may grant an order under its inherent jurisdiction authorising the deprivation of a child's liberty if it is satisfied that the circumstances of the placement constitute a deprivation of liberty for the purposes of Art 5 and in the child's best interests.
- The inherent jurisdiction can be used to authorise a deprivation of liberty when none of the other statutory mechanisms apply (i.e. there are no places available in secure children's homes or the criteria under s.25 are not met). A DoL order authorises the deprivation of a child's liberty in a setting that is not otherwise registered to do so.

DOLs Court

The DOLs court was formally launched on 4th July 2022. From that date; all new applications issued in the RCJ. The new court is supported by two Family High Court/deputy high court judges each week. Cases heard in National DoLs Court or will be returned to circuit.

Nuffield publish data on DOLs applications:

- During the 12 months July 2022 to July 2023, the national DoL court issued a total of **1389 applications**.
- a total of **1249 children** have been subject to DoL applications at the national DoL court since 4 July 2022
- On average, there have been 117 applications per month,
- The majority of children (59.4%) involved in applications were aged 15 and above, with a small minority relating to children under the age of 13 (9.2%).
- Data collected from the national DoL court between July 2022 and the end of June 2023 suggests that the number of applications has more than doubled since 2020/21

Shortage of Placements

- There is a serious shortage of regulated secure placements for children and young people.
- In some cases the absence of a regulated secure placement the court is left with no option but to make a deprivation of liberty order authorising the child or young persons placement at an unregulated placement.
- *Lancashire County Council v. G (Unavailability of Secure Accommodation) [2020] EWHC 2828 (Fam)* where MacDonald J granted order with great reservations given that an immediate decision had to be made about a very vulnerable girl, the court had no option but to grant the local authority the relief they sought under the inherent jurisdiction.
- *Re S (Child in Care: Unregistered Placement) [2020] EWHC 1012 (Fam)*, where Cobb J expressed real concern about the placement of a 15-year-old girl in a holiday cottage with three members of staff because there were no placements available for her in regulated accommodation.

Judicial Commentary – Sir James Munby (2017)

- Former President of the Family Division, Sir James Munby, in 2017 in Re X (A Child) (No 3) [2017] EWHC 2036 (Fam))

"What this case demonstrates, as if further demonstration is still required of what is a well-known scandal, is the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed by the increasing numbers of children and young people afflicted with the same kind of difficulties as X is burdened with. We are, even in these times of austerity, one of the richest countries in the world. Our children and young people are our future. X is part of our future. It is a disgrace to any country with pretensions to civilisation, compassion and, dare one say it, basic human decency, that a judge in 2017 should be faced with the problems thrown up by this case and should have to express himself in such terms."

Judicial Commentary - MacFarlane P in 2023

- Re X (Secure Accommodation: Lack of Provision) [2023] EWHC 129 (Fam) *MacFarlane P*

"The problem being faced by those trying to find a secure placement for X is not a one-off, it was, I explained, one being shared by the 70 or so others for whom places were being sought that day, and they and their forebears who have faced similar odds for the past decade or so, every time that these and similar statistics are quoted. The lack of secure placements is longstanding and chronic. My view, expressed during the hearing, was that the stance taken by the Department for Education, to the effect that it was not its problem and was the responsibility of individual local authorities, displayed a level of complacency bordering on cynicism. It was, I observed, shocking to see that the Department for Education seemed to be simply washing its hands of this chronic problem.' [para 55]

President's Guidance – September 2023

- Growth in number of DOLs applications, many orders made for unregistered placements.
- The 2019 Guidance set out the steps that the judges were encouraged to take in respect of establishing whether a placement was registered, and if not, in the process towards registration.
- The Court's role is to exercise its inherent jurisdiction to ensure that any deprivation of liberty is not itself unlawful. That is the extent of the Court's powers, and the Court's role should not go beyond those powers.
- Great benefits for children in registered placements and the regulatory regime provides very considerable safeguards for the child.
- If proposed placement is unregistered the court should enquire as to why the local authority considers an unregistered placement is in the best interests of the child.

Experience and Issues

- LA's remain under considerable pressure – experience shows can take months to find placements.
- Children left in unsuitable placements either unable to a placement; or remaining in placements not meeting their complex needs
- While it is often intended as a temporary measure, many children will continue to have their liberty deprived for many months while living in what are often unsuitable – and illegal – placements far from home and their communities.
- Children deprived of their liberty can feel they/ have little control over what happens to them. The child's voice is heard but not enough listening. Importance of role of child's lawyer/Judge.
- Courts will refuse applications where LA's cannot show that placement is in best interests/proportionate even where agreed that child suffering harm at home. [recent case before HHJ Roberts at CFC]

Nuffield Family Justice Observatory

Garden Court Chambers Childrens Right Conference

Children subject to deprivation of liberty orders: what we know

Beverley Barnett Jones MBE Associate Director NFJO Practice and System Impact

' If we get it right for these children, we get it right for all children '

National deprivation of liberty court

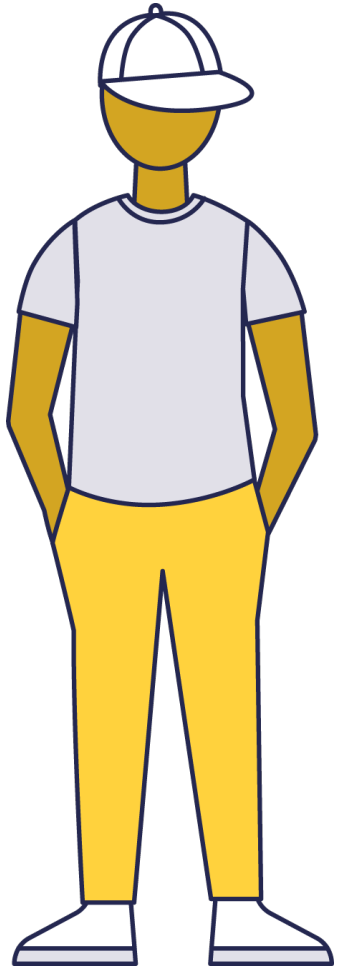
- Information about children deprived of their liberty under the inherent jurisdiction does not appear in national government statistics – up until now, we did not know how many children were affected, who they were or what happened to them
- In July 2022 the President of the Family Division set up the ‘national DoL court’ – centralising the process for applying for a deprivation of liberty order under the inherent jurisdiction
- Nuffield FJO were invited to collect and publish data about applications to the court during its 12 month pilot phase

Shane’s story

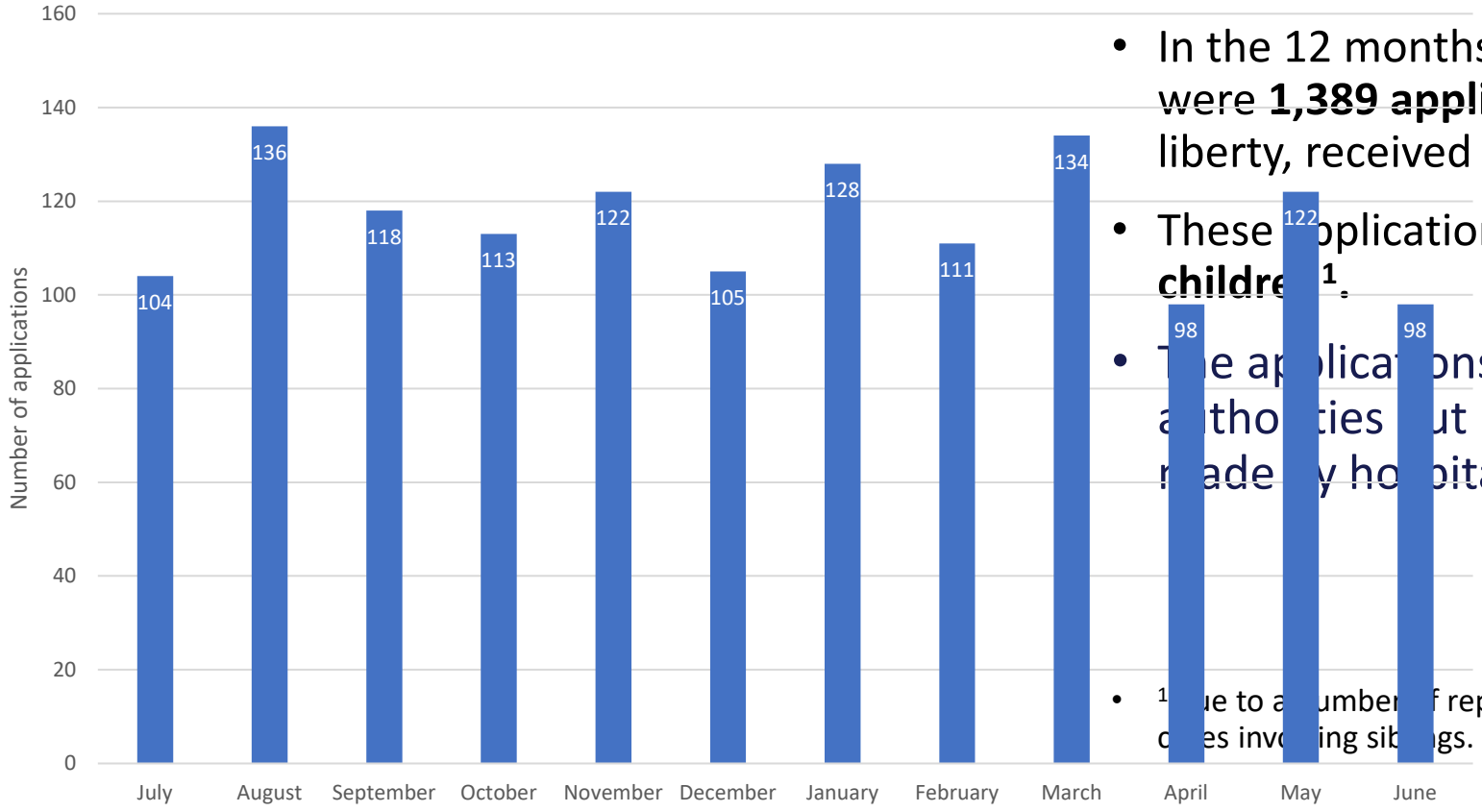
Shane is 15. He was removed from his birth parents as a baby and adopted when he was a year old. Concerns about his behaviours started to escalate when he was 8 years old, following an incident that led to him being temporarily excluded from school. His adoptive parents increasingly struggled with his behaviour and he came into care when he was 11. In the last four years he has lived in eight different places – including two placements with different foster carers and six different residential placements.

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 has been out of education for six months. He does not have any formal diagnoses, but the local authority are seeking re-assessment for ADHD.

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. The restrictions sought are 3:1 supervision, the removal of items that he could use to harm himself, monitoring throughout the night, doors and windows locked. He will not be permitted to leave the placement, and physical restraint will be used as a last resort. He will be looked after by carers from an agency who he has never met before.



Over 1,200 children subject to applications to deprive them of their liberty in the last year

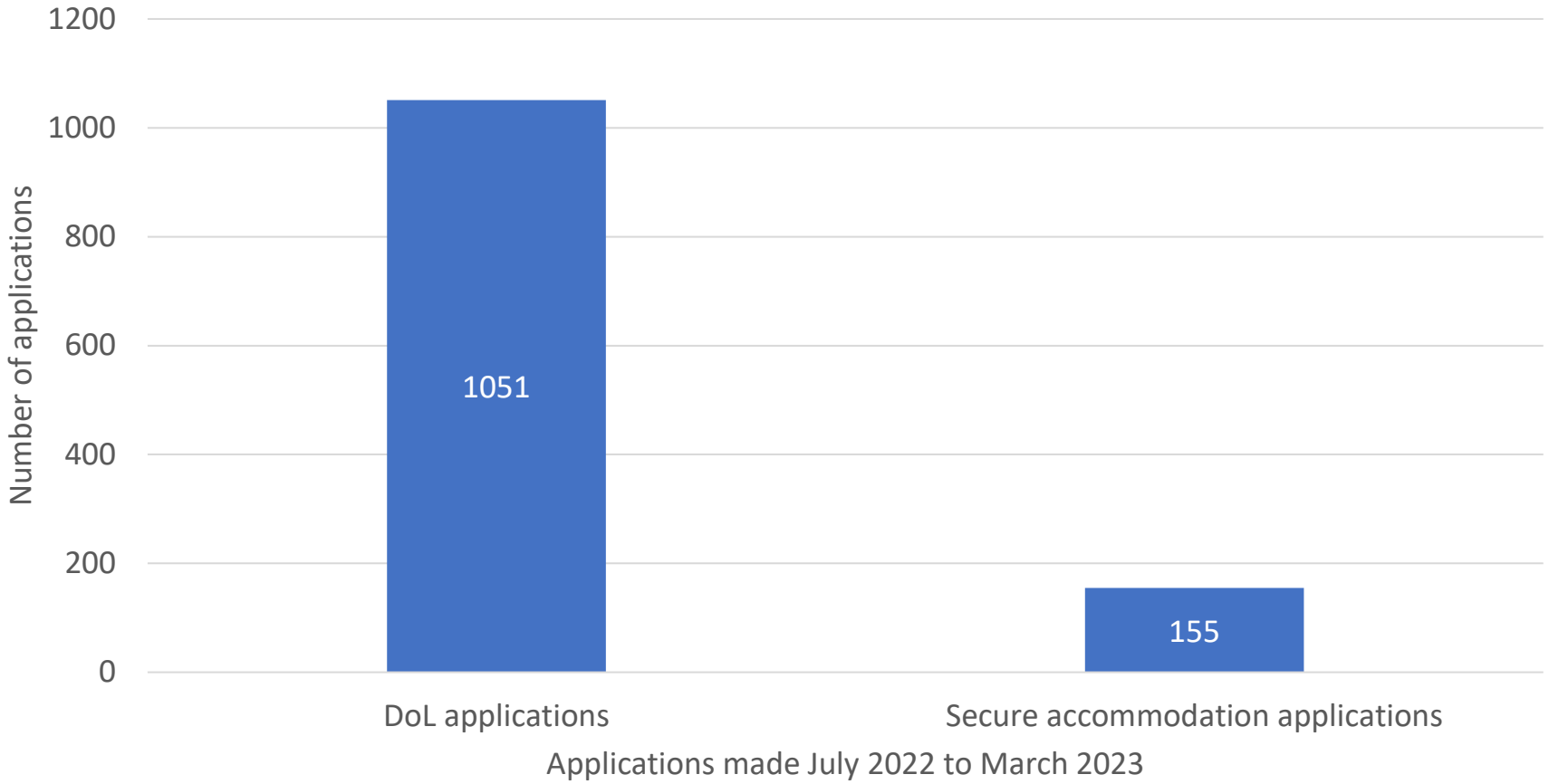


- In the 12 months, July 2022 to June 2023, there were **1,389 applications** to deprive a child of their liberty, received by the national DoL court.
- These applications relate to **1,249 individual children**[1].
- The applications were mostly made by local authorities but includes a small number (18) made by hospital or mental health trusts.

[1] Due to a number of repeat applications for the same child, and some cases involving siblings.

Figure 1: Number of applications issued by the national DoL court, per month, July 2022 to June 2023

Far more children are subject to DoLs applications than secure accommodation applications

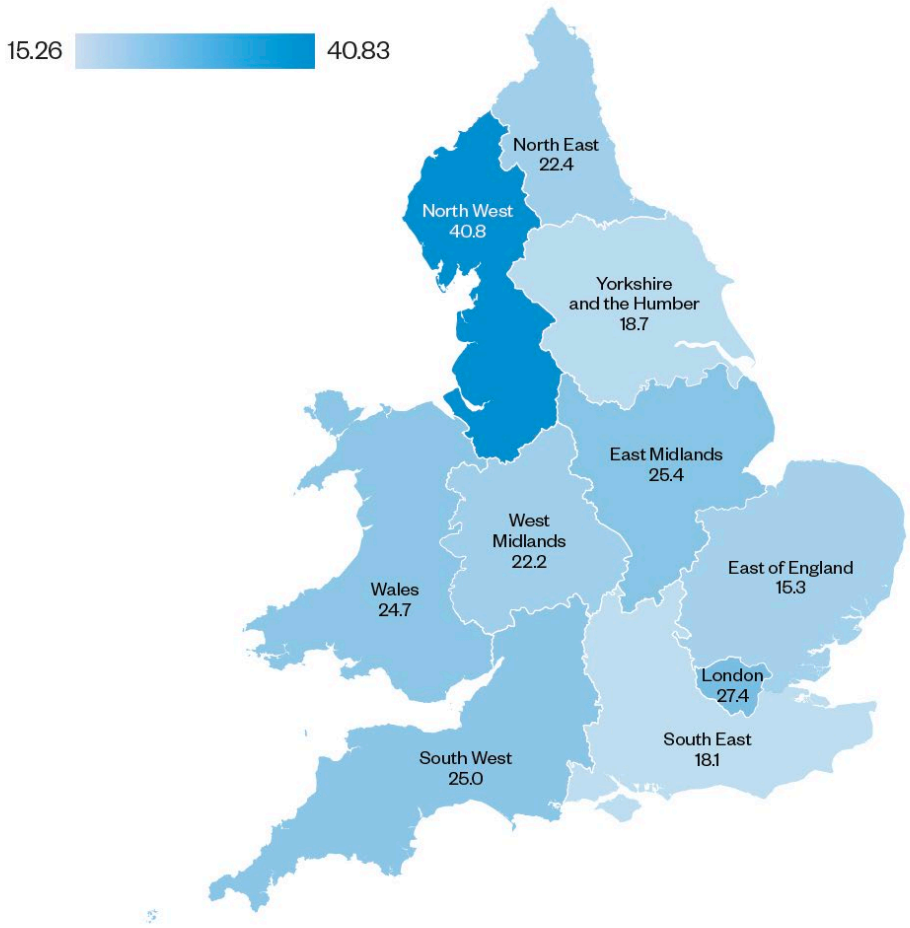


- Between July 2022 and March 2023, there were **almost 10 times more** applications to deprive children of their liberty under the inherent jurisdiction than there were applications for secure accommodation orders.

Note: data for DoL applications is from the national DoL court (NFJO 2023); data for secure accommodation applications is from MoJ Family Court Statistics Quarterly (MoJ 2023).

There are some regional differences in use of DoLs but it is a nationwide problem

Figure 3: Rate of applications per 100,000 children by region, England and Wales, July 2022 to June 2023

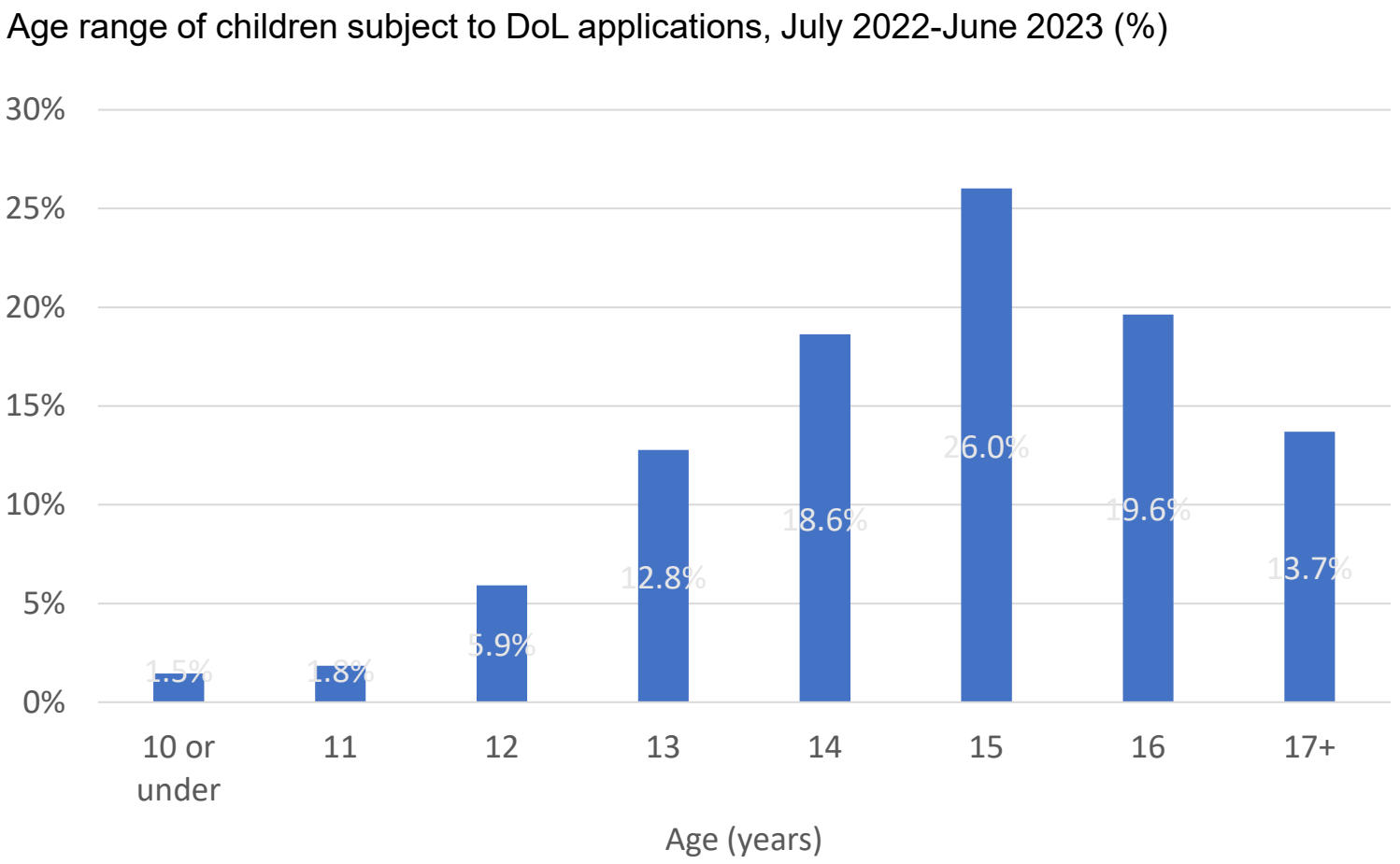


Over the last 12 months, most local authorities in England (94.0%) and Wales (77.3%) have made applications to the DoL court to deprive children of their liberty, indicating widespread use across the country.

Some regions are using DoLs more frequently than others. The North West had the highest rate of applications, with 40 DoL applications per 100,000 children, followed by **London (27 per 100,000),** the South West (25 per 100,000) and the East Midlands (25 per 100,000). The East of England had the lowest rates, with 15 applications per 100,000 children.

Source: Nuffield FJO (2023)

Most children are 15+ years old but some under 13 years



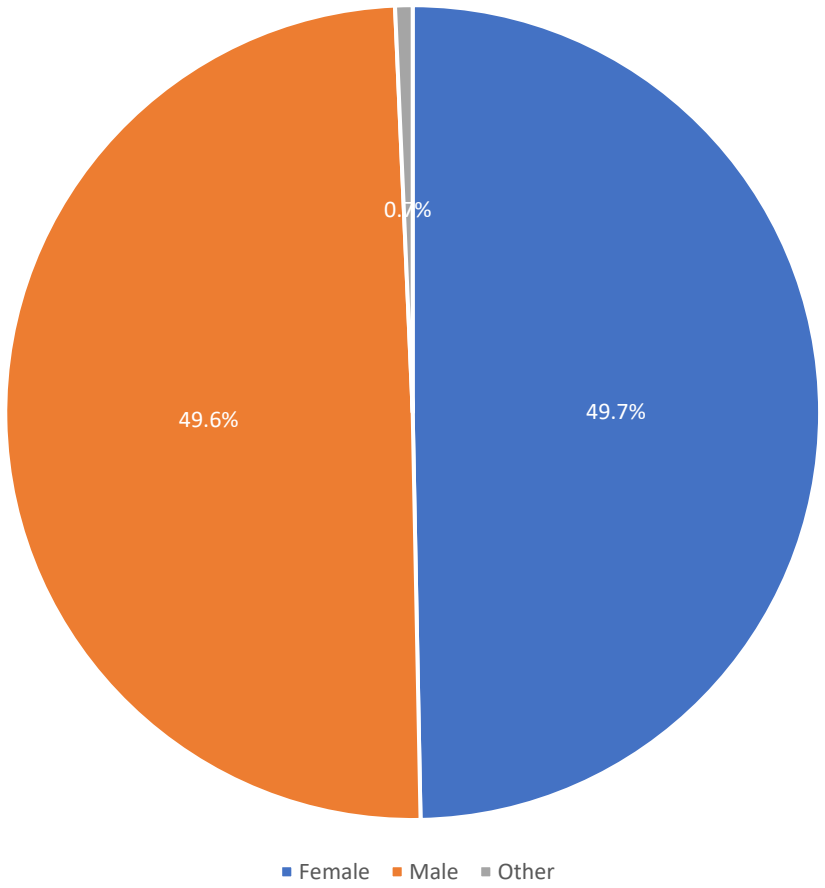
Between July 2022 and June 2023, the majority of children (59.4%) subject to DoL applications were aged 15 and above.

A small but significant number of applications (9.3%) relate to children under 13.

Source: Nuffield FJO (2023).

Boys and girls affected equally

Gender of children subject to DoL applications, July 2022-June 2023 (%)



- In the last 12 months the number of girls and boys subject to applications was almost equal.
- This pattern has remained broadly consistent month-by-month.
- A minority of children (<1%) were transgender or non-binary (where this was reported on the application form).

Source: Nuffield FJO (2023)

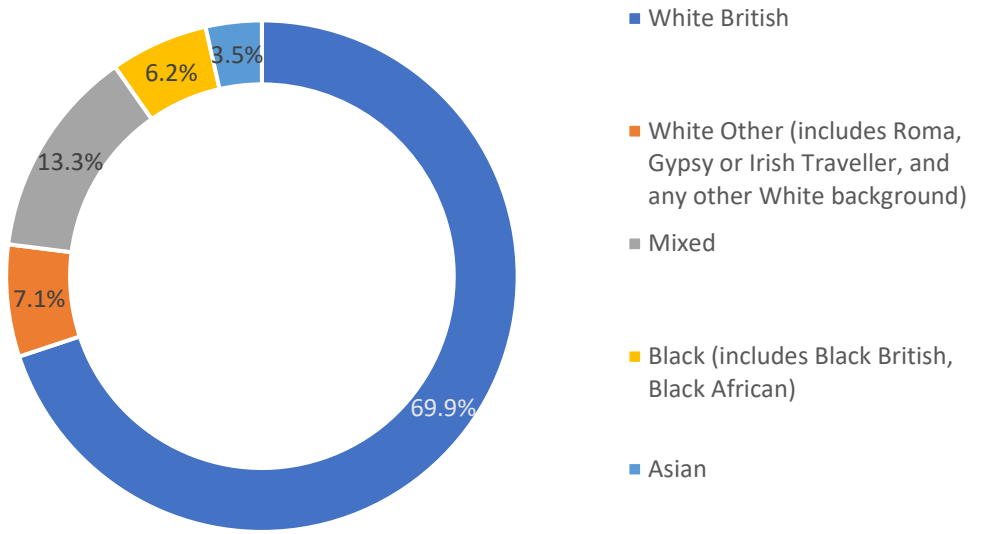
We do not have good data relating to ethnicity

Information about children's ethnicity is not required on the application forms to court so we do not have good data relating to children's ethnicity. We are reliant on this being included in the supporting statement from the local authority – but it is not always included. In an analysis of 208 applications issued in July and August 2022, information about the child's ethnicity was missing for almost half of cases (45.7%).

Where data was available, it suggested that children from Mixed and Black ethnic groups were overrepresented compared to the general population, and children from Mixed ethnic backgrounds were also overrepresented compared to the children in care population - but we cannot guarantee that the data is representative.

There is a need for further research to explore whether certain ethnic groups are overrepresented among children subject to DoL applications, and differences in the reason for the application, children's needs, risk factors, and outcomes.

Figure 7: Ethnicity of children subject to DoL applications, July and August 2022 (%)



Note: n=113. Percentages are reported as a proportion of the available data. Data was missing for 45.7% of the sample. Due to high proportion of missing data, findings should be treated as preliminary. Source: Roe & Ryan (2023).

Children have often experienced ongoing trauma and adversity

Children are already well known to services

- The vast majority of children were already well known to children's services, having had long-term involvement with children's social care throughout their lives.
- Of 208 applications made to the DoLs court in July and August 2022, only 10 children and their families had recently come to the attention of the local authority.
- Almost all children (96.6%) were already in care at the time of the DoL application.

Children experienced frequent disruption and instability

- During their time in care, over half of children (55.3%) had experienced the breakdown of multiple placements.
- Some had moved as many as 10 times in the period leading up to the DoL application.
- In the lead up to the DoL application, 19 children had experienced the breakdown of adoption or special guardianship arrangements, primarily due to carers being unable to manage the child's behaviour.

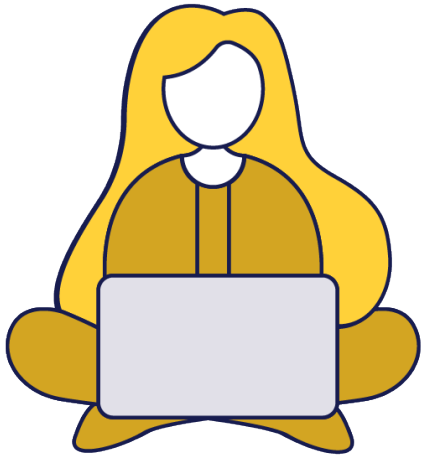
Frequent exposure to childhood adversity and trauma

- In the majority of cases (62.3%) – and where this was mentioned in the application for a DoL order – children had experienced ongoing exposure to issues in the family home, including neglect, abuse, parental substance misuse, and other adversities throughout their life. The actual number is likely to be far higher.

Source: Based on a case file analysis of 208 applications made in July and August 2022. Roe & Ryan (2023). *Children deprived of their liberty: An analysis of the first two months of applications to the national deprivation of liberty court.* Nuffield FJO.

Children have multiple and complex needs

- At the time of the DoL application, children were experiencing multiple, complex needs and circumstances.
- The application was made at a time of crisis for the child, when the risk of serious harm to the child, or to others as a result of the child's behaviours, was immediate and severe.
- In almost all cases (95.2%), there were multiple concerns that led to the DoL application being issued, including:
  - Concerns about the child's behaviour that were considered a risk to others, for example because of physical or verbal aggression (69.2%)
  - Mental health or emotional difficulties (59.1%)
  - Self-harm (52.4%)
- Some had physical or learning disabilities (33.7%)
- Others were at risk of criminal or sexual exploitation (33.2%)
- Over a quarter (26.9%) had a diagnosis of ASD, and 13.9% of ADHD



Roe & Ryan (2023). *Children deprived of their liberty: An analysis of the first two months of applications to the national deprivation of liberty court.* Nuffield FJO.

Broadly three groups of children

- Case file analysis identified three broadly distinct groups of children, for whom the DoL was sought for different reason(s):
  - Children with learning and physical disabilities needing support/supervision. Approximately a quarter of all cases.
  - Children who had multiple, complex needs, which were often recognised to be a response to complex and ongoing trauma (the majority). Approximately half of all cases.
  - Children experiencing or at risk of external or extrafamilial risk factors such as sexual or criminal exploitation. Approximately a quarter of all cases.

Source: Roe & Ryan (2023). *Children deprived of their liberty: An analysis of the first two months of applications to the national deprivation of liberty court.* Nuffield FJO.

What happens to children?

A study of legal orders made over 6 months in 113 cases (issued in July and August 2022) found:

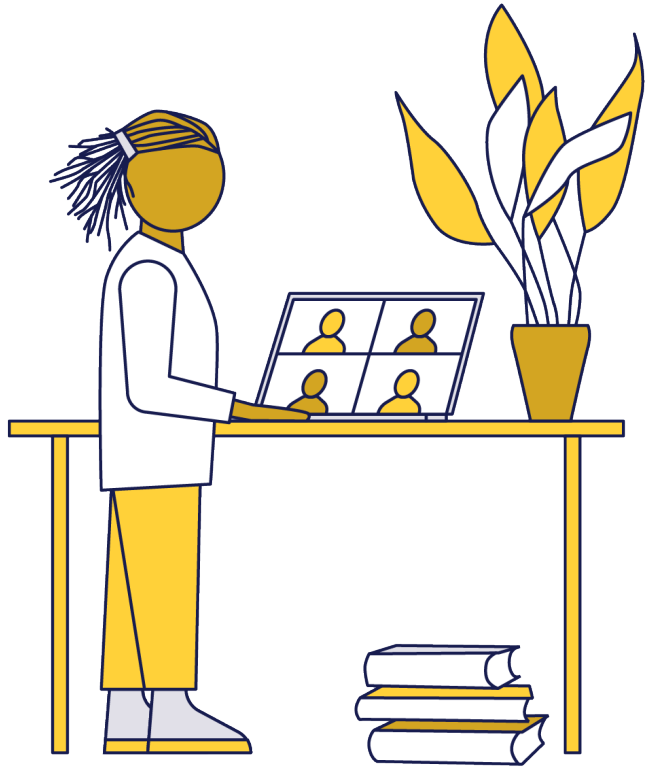
- These are **not short-term measures**: 68% of the children were still subject to a DoL order six months later.
- **The restrictions are severe.** Each child was subject to an average of 6 different types of restriction, including in almost all cases constant supervision. The use of restraint was permitted in over two-thirds of cases. Restrictions were rarely relaxed over the study period.
- **Over half of children were placed in unregistered provision.** 53.8% of children were placed in at least one unregistered placement up to 31 December 2022.
- **Children are living far from home.** The average distance that children were placed away from home while subject to a DoL order was 56.3 miles.

Source: Roe et al. (2023). *Legal outcomes of cases at the national deprivation of liberty court.* Nuffield FJO.

Children and parents/carers have limited opportunity to participate in proceedings

- Just 10 (9.6%) children attended at least one hearing in their case
- 5 (4.8%) spoke to the judge directly before the hearing
- 6 (5.8%) had written to the judge to share their views
- Reasons for children opposing the application included:
  - they did not want to move to a different placement
  - they wanted to be closer to home or to return to live with family members
  - they were unhappy in their placement – this included feeling isolated and issues with staff/carers
  - they felt that they had demonstrated a willingness to cooperate with the local authority/social worker without the need for restrictions
  - opposition to specific restrictions or requests for certain restrictions to be relaxed.

- The vast majority (88.5%) of parents and/or carers were not legally represented at any hearing in a DoL case



Source: Roe et al. (2023). *Legal outcomes of cases at the national deprivation of liberty court.* Nuffield FJO.

Five Principles of Care

Our research has confirmed that, in order to better meet the needs of children being deprived of their liberty, significant changes are required to ways of working as well as to the type, availability and provision of services.

In order to support the change needed, we developed five principles of care in collaboration with a panel of experts.

The principles set out what children with complex needs and circumstances – and at risk of being deprived of their liberty – need.

1. **Stable valued, trusted relationships**
2. **Holistic assessment, formulation and tailored plan of intervention**
3. **Long term support**
4. **Highly experienced multidisciplinary teams**
5. **Agency and respect**

These principles of care have been developed in collaboration with:

Dr Dickon Bevington, Consultant Child and Adolescent Psychiatrist, Anna Freud

Professor Robbie Duschinsky, Professor of Social Science and Health, University of Cambridge

Dr Rachel Hiller, Associate Professor in Child Mental Health, UCL and Anna Freud

Professor Lisa Holmes, Professor of Applied Social Science, University of Sussex

Professor Eamon McCrory, Professor of Developmental Neuroscience and Psychopathology, UCL and Anna Freud

Professor Helen Minnis, Professor of Child and Adolescent Psychiatry, University of Glasgow

Dr Alice Simon, Lecturer, University of Exeter.

See: https://www.nuffieldfjo.org.uk/resource/principles-of-care-for-children-with-complex-needs

Conclusions

- We do not have suitable provision for (many) children with complex needs
- This is a nationwide problem
- It will not be solved by simply building more of the same
- Requires a short-, medium- and long-term response
- Future provision relies on children’s social care and health working together

References and useful links

- Roe, A. (2023). *Children subject to deprivation of liberty orders: Key findings from 12 months of research.* Briefing. Nuffield Family Justice Observatory. https://www.nuffieldfjo.org.uk/resource/children-subject-to-deprivation-of-liberty- orders
- Nuffield Family Justice Observatory. (2023). *National deprivation of liberty court: Latest data trends – June 2023.* https://www.nuffieldfjo.org.uk/resource/national-deprivation-of-liberty-court- latest-data-trends-june-2023
- 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 FJO. https://www.nuffieldfjo.org.uk/resource/children-deprived-of-their-liberty-an-analysis-of-the-first-two-months-of-applications- at-the-national-deprivation-of-liberty-court
- Roe, A., Ryan, M., Saied-Tessier, A. and Edney, C. (2023). *Legal outcomes of cases at the national deprivation of liberty court.* Nuffield FJO. https://www.nuffieldfjo.org.uk/resource/legal-outcomes-of-cases-at-the-national-deprivation-of-liberty-court

Contact: bbarnett-jones@nuffieldfoundation.org

Sign up to our bulletin to receive updates about our research and events: https://www.nuffieldfjo.org.uk/contact-us

Deprivation of Liberty Orders
Potential Legal Challenges

Amanda Weston KC & James Holmes

Garden Court Chambers

22 November 2023

Regulations – Under 16-year-olds

- **Care Planning, Placement & Case Review Regulations 2021**
  - This statutory instrument added Regulation 27A into the Care Planning, Placement and Case Review Regulations 2010
  - The purpose of this was to limit the perceived exception in 'other arrangements' pursuant to Section 22C(5)(d) CA 1989
  - Section 27A explicitly states that a child under 16 can only be placed in either;
    - a care home
    - a hospital as defined in section 275(1) of the National Health Service Act 2006;
    - a residential family centre as defined in section 4(2) of the Care Standards Act;
    - a school within the meaning of section 4 of the Education Act 1996 providing accommodation that is not registered as a children's home;
    - an establishment that provides care and accommodation for children as a holiday scheme for disabled children as defined in regulation 2(1) of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013

- Was this necessary?
  - **A Mother v Derby CC & CK [2021] EWCA Civ 1867** – MacFarlane LJ concluded it was not

Points of tension

- Oversight – courts, regulatory bodies, local authorities, registration
- Sufficiency duty - Commissioning, contracts, strategic planning, impact assessments, evidence
- Allocation – the national hub, marketisation
- Article 5 – quality of law, 'a procedure prescribed by law', oversight
- Article 3 - lack of Tier 4 CAMHS provision, inappropriate and unsafe placements
- From secure to 'step-down'
- Urgent and Bespoke placements
- Supported accommodation for 16/17 year olds – new regs and guidance

Regulations - 16 – 17 year olds

- **The Support Accommodation (England) Regulations 2023**

- This provides that a local authority may only place 16 or 17 years in either;
  - Supported accommodation in accordance with regulation 2 Care Standards Act 2000;
  - Is 'excepted' accommodation.

- Excepted accommodation includes;
  - A care home
  - An institution within the further education sector.
  - A 16 to 18 academy
  - A hospital.
  - A residential family centre
  - A school
  - an establishment that provides care and accommodation for children as a holiday scheme for disabled children as defined in regulation 2(1) of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013

OFSTED

- As a regulator there are four elements to their role: registration; inspection; compliance; and enforcement.

- Now all placements for children and young persons under 18 will fall under OFSTED.

- There is detailed guidance produced by OFSTED around the process of applying to be a children's home;
  - Including details of the standards they have to meet, including around staff training.

- Under the new regulations.
  - In relation to 16 – 17 years the providers will need to complete a review of the support they offer young people every 6 months which will be submitted to OFSTED.

  - OFSTED will inspect at least every three years.

- Does OFSTED's oversight result in greater safeguards for the Young People and Children?

    - Whilst all placements will have to meet a certain criteria, the level of inspections and visits vary dependent on the type of placement.
    - Inspections to supported accommodation are not unannounced unlike, children homes.

Sufficiency Duty

- Section 22G Children Act 1989 referred to as a the 'Sufficiency Duty'
    - This is the general duty placed on a local authority to take reasonable steps to place such a child in accommodation that meets his/her needs within the authority's area.
- This means the Local Authority has a duty to provide sufficient appropriate provision, there is no duty on the Secretary of State for Education.
- The Department of Education has issued the following statutory guidance - Sufficiency: Statutory Guidance on Securing Sufficient Accommodation for Looked After Children
- Of note there is only one reference to the provision of secure accommodation in the 37 page document

Secure Welfare Coordination Unit ('SWCU')

- This was set up in May 2016 by the D of E
- It is operated by Hampshire County Council but funded by the D of E
- They are a broker for all local authorities
- They have no statutory decision-making powers
- The decision makers the Local Authority seeking a placement and the placement managers themselves
- To be replaced by Regional Care Cooperatives.

Human Right Gaps & Risks

- Article 5 – *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.***

- Article 3 not only negative but **positive** obligations - *No one shall be subjected to torture or to inhuman or degrading treatment or punishment – planning, prevention, systemic foresight*

- ***Re T (A child) [2021] UKSC 35*** *- where conditions of imperative necessity require, the common law steps in and allows the High Court to exercise its inherent jurisdiction. That exercise of the inherent jurisdiction is not in breach of Art 5 and nor does it cut across the statutory scheme, partly because the courts have been issued with guidance on incorporating oversight of the registration process where placements are unregistered – Nov 2019*

- ***Presidential Guidance on court oversight withdrawn – Sept 2023*** the courts should "restrict its considerations and orders to its own functions"

Potential avenues of legal redress – systemic challenges

- Challenges to how provision is funded and secured – Care Reviews recommendations
- Public Law & HRs Challenges to Local Authority decision making
- Human Rights Claims against the Secretary of State for Education
- Claims against the Department of Health, CAMHS/CYPMHS and NHS England
- Policy, service specifications, guidance, recommendations, consultations and clinical gatekeeping
- Section 11 CA 2004 – co-operation duties and 'joined up thinking'
- UNCRC – child impact assessments 'CRIA'

Children in Custody: “Custody as a last resort? Pre-trial detention and custodial sentences”

Joanna Cecil, Garden Court (Chair)

The Hon. Mrs Justice May DBE

Angus Jones, HM Inspectorate of Prisons

Sarah Hemingway, Garden Court

Kate Aubrey-Johnson, Garden Court

22 November 2023

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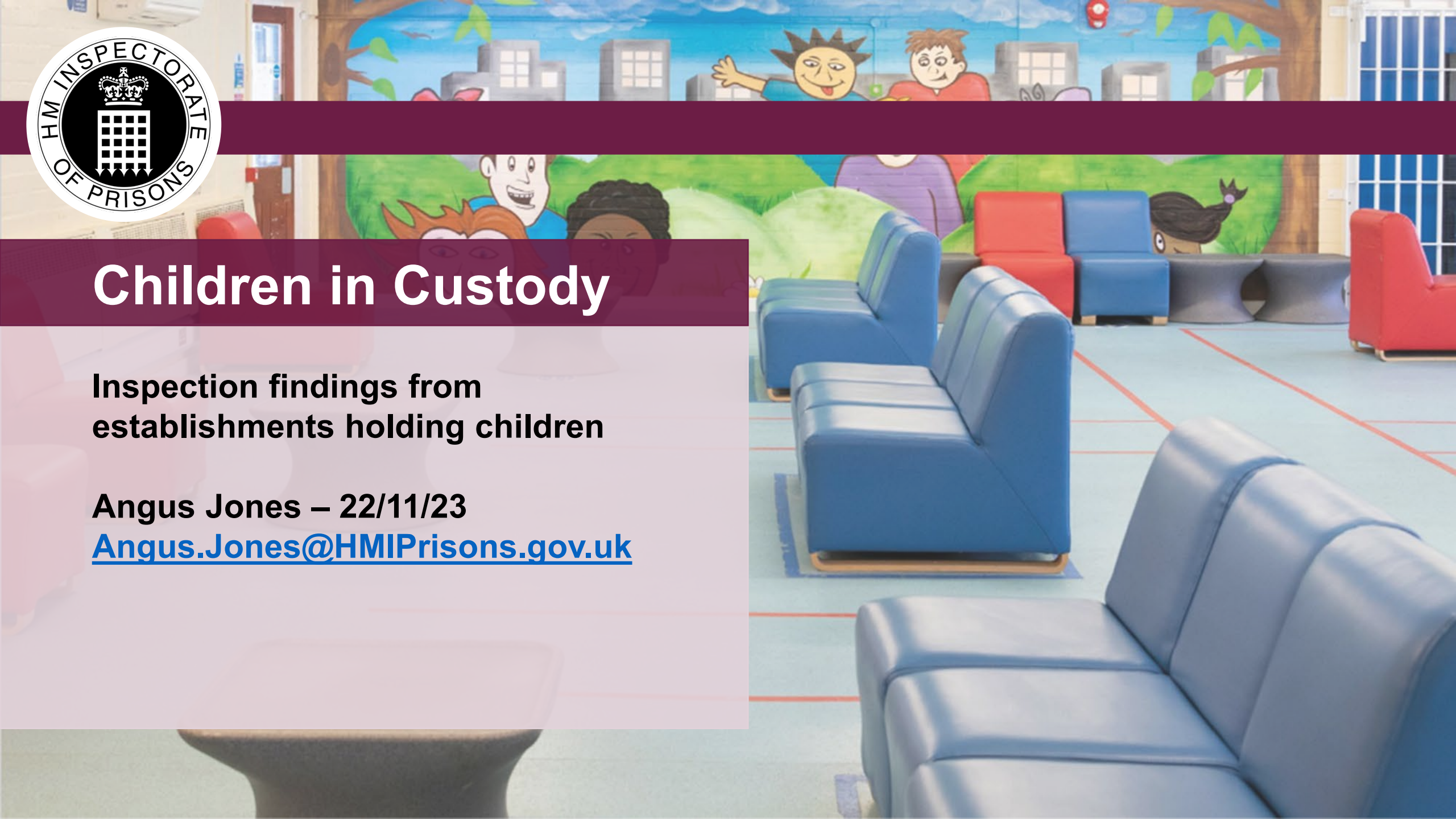
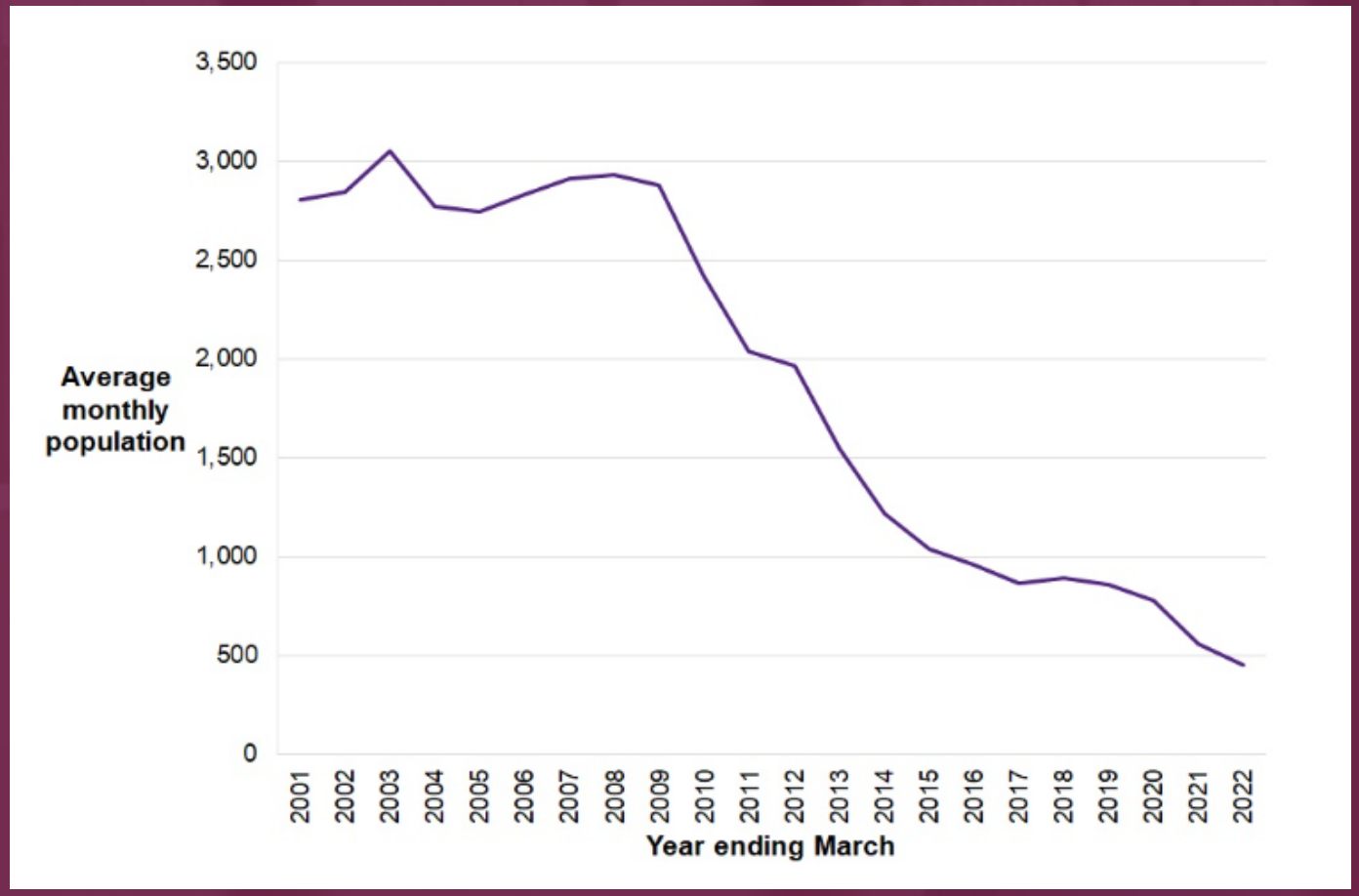


Children in Custody

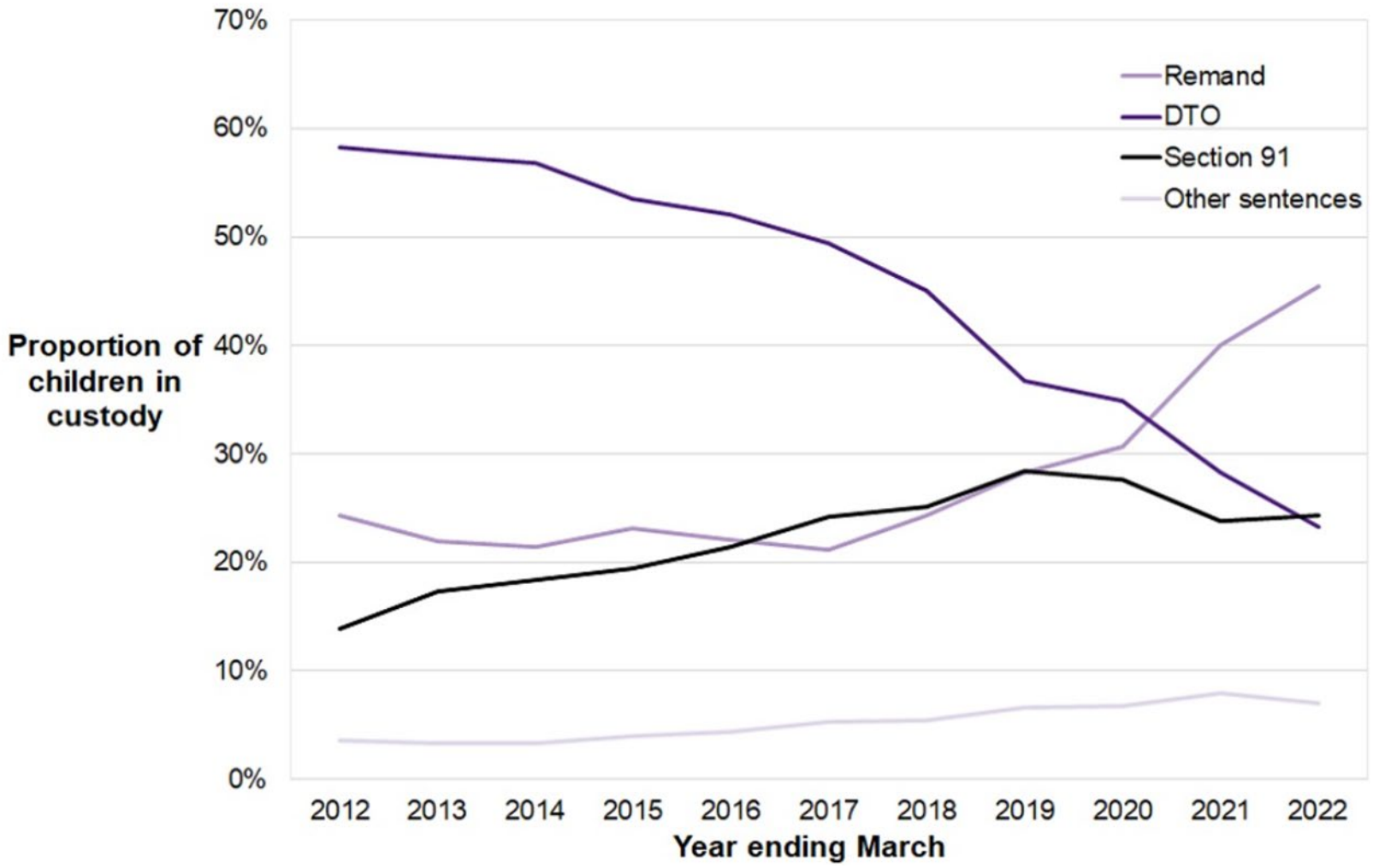
Inspection findings from establishments holding children

Angus Jones – 22/11/23
Angus.Jones@HMIPrisons.gov.uk

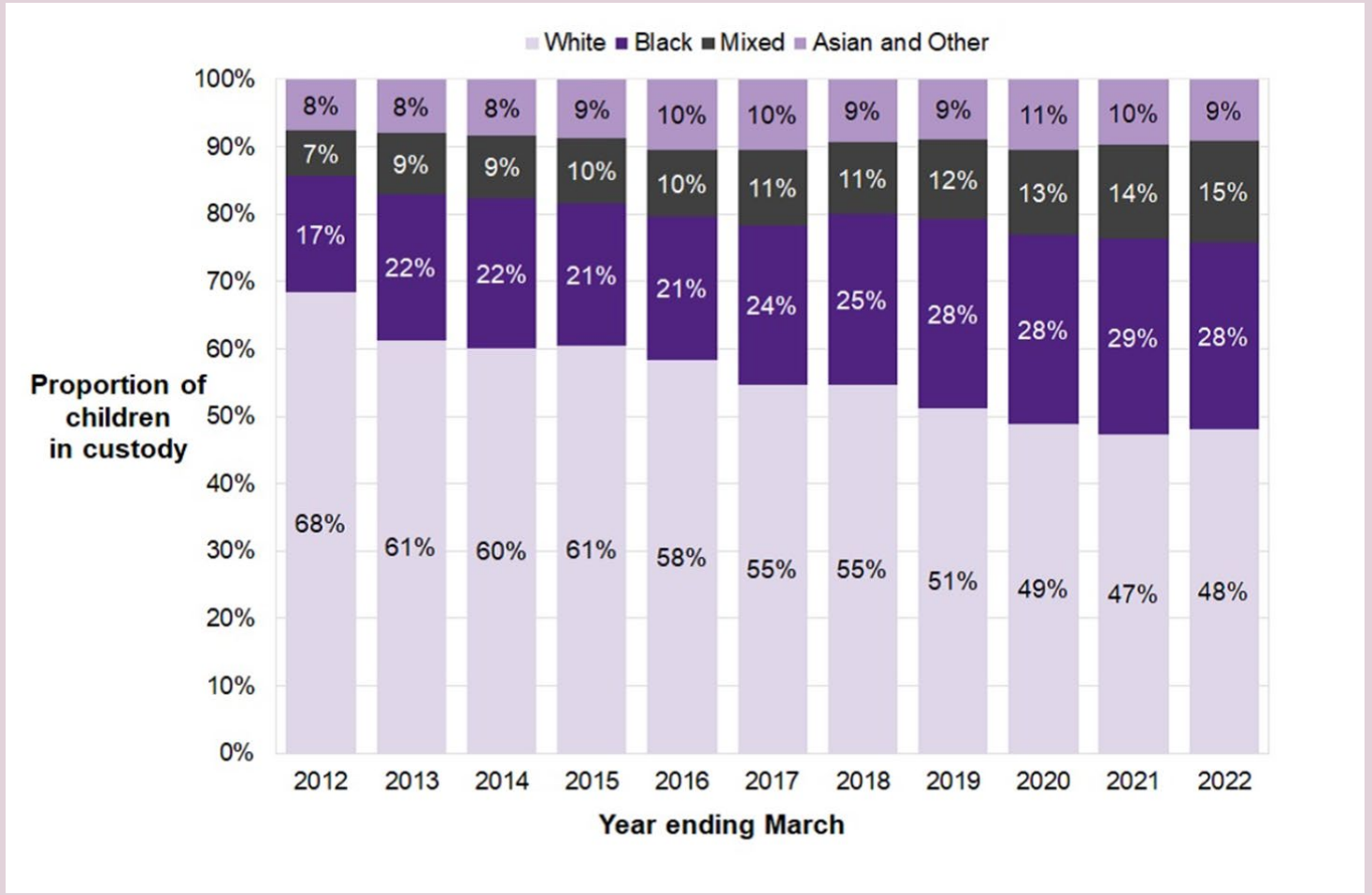
Diversion – A success story



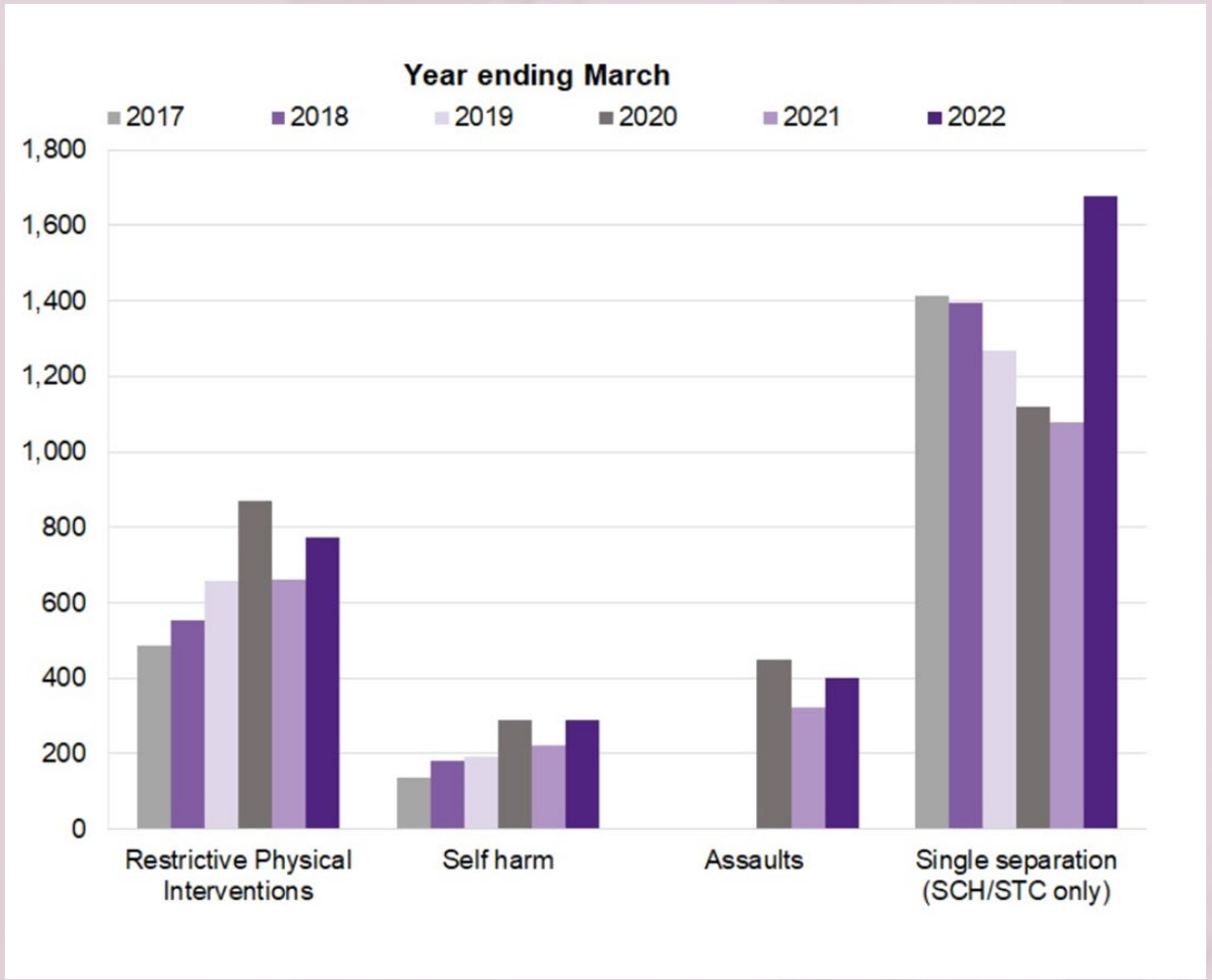
Changes in sentence type



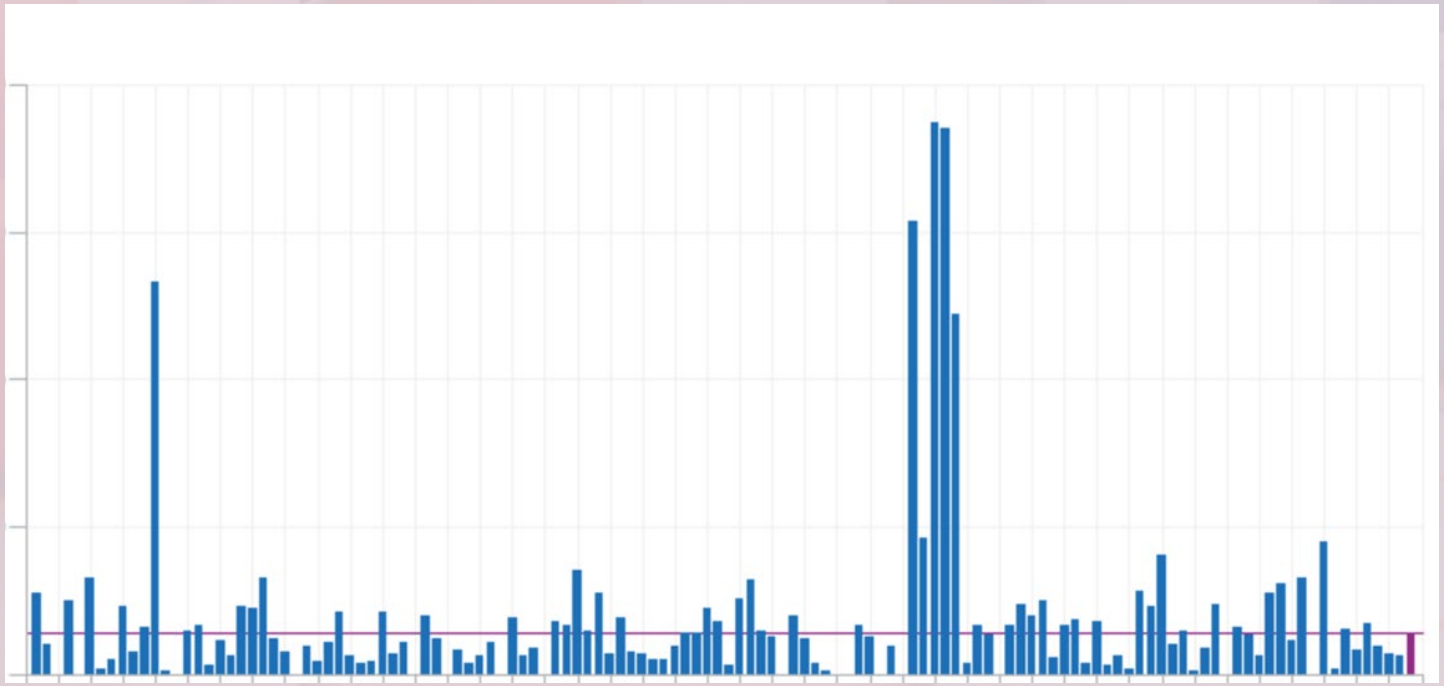
Ethnicity


White
Black
Mixed
Asian and Other
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Proportion of children in custody
8% 8% 8% 9% 10% 10% 9% 9% 11% 10% 9%
7% 9% 9% 10% 10% 11% 11% 12% 13% 14% 15%
17% 22% 22% 21% 21% 24% 25% 28% 28% 29% 28%
68% 61% 60% 61% 58% 55% 55% 51% 49% 47% 48%
2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022
Year ending March

Reportable incidents



Comparison with adults



Conflict, keep apart and time out of cell

Lack of care for children

Too many and too few staff

- Top heavy management structures
- 100s of non operational staff at every establishment
- High levels of vacancies, turnover and non-effective operational staff

Strategic drift

- The current estate is very similar to 2001
- Regular churn of senior leaders.
- There is no clear role for the three/four different types of establishment.
- Layers of process
- Muddled oversight and inspection arrangements.
- Secure school has taken 7 years to build and little prospect of another one.
- **Significant expenditure has had little impact – the YCS spent £190million on around 450 children in 2021/22 or £422,000 per child.**

Law and police guidance regarding the arrest of children following the case of

ST v Chief Constable of Nottinghamshire Police

Sarah Hemingway, Garden Court Chambers

22 November 2023

Brief chronology of the case

Date	Event	Outcome
8/12/2011	mobile phone stolen	
20/12/2011	Sanjay arrested	
	Complaint	
7 – 11/ 6/2021	Civil jury trial at Mansfield County Court before HHJ Godsmark	claim dismissed and permission to appeal refused
11/11/2021	Baker J granted the Claimant permission to appeal	
23/3/2022	Appeal heard by Cotter J at Birmingham High Court (judgment handed down on 26/5/2022)	Appeal allowed and permission to appeal refused
17/8/2022	Defendant applied to Court of Appeal for permission	
	Claimant submitted brief statement in accordance with CPR 52CPD.19. That statement set out in three pages why the application did not meet the relevant threshold test under CPR 52.7(2) for the grant of permission to appeal, in that the appeal did not have a real prospect of success.	
17/8/2022	Males LJ refused permission to appeal. There is no further bite at the cherry for the Appellant at that stage, unless the court directs an oral hearing (CPR 52PDC para 5A).	No direction for an oral hearing

Summary of facts

Around 5:30am on 20th December 2011, Sanjay, a 14 year old boy of good character, was arrested from his bed at his family home on suspicion of robbery.

The arresting officer, PC Laughland, had been tasked to make the arrest by way of 'arrestogram'. She had details of the person to be arrested (the Claimant) and that it was for an offence of robbery of a mobile phone, case and sim card on a 12 year old girl outside their school on 8th December 2011 and location. Yet she had no further knowledge of the circumstances of the offence. She had no knowledge of the situation of the victim, any co-accused, nor of the needs of the investigative process, other than information that there was outstanding property.

The Claimant was detained for about 6 hours.

The legal framework

s.24 *Police and Criminal Evidence Act* (PACE): honest and reasonable suspicion AND honest and reasonable belief in necessity of arrest.

Further guidance in PACE Code G:

- 1.3 reminds officers that the use of the power of arrest must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means.

- 2.8 In considering the individual circumstances, the constable must take into account the situation of the victim, the nature of the offence, the circumstances of the suspect and the needs of the investigative process.

Lead authority is *Hayes v Chief Constable of Merseyside Police* [2012] 1WLR 517 in which Hughes LJ set out the two-stage test for assessing the necessity of an arrest under section 24(4) PACE. The arresting officer must:

1) honestly believe that arrest is necessary for one or more identified section 24(5) reasons and

2) their decision must be one which, objectively reviewed afterwards according to the information known to them at the time, is held to have been made on reasonable grounds (at [40]).

Children and the Police

In all dealings with children (under the age of 18), police must have regard to the best interests of the child and international standards on the rights of the child.

- Section 11 of the Children Act 2004 requires police to ensure their functions are discharged having regard to the need to safeguard and promote the welfare of children.

- Article 3 UN Convention on the Rights of the Child (UNCRC) provides that in all actions concerning children taken by the state, the best interests of the child shall be the primary consideration.

- Article 37(b) UNCRC provides, 'The arrest, detention or imprisonment of a child shall be … used only as a measure of last resort and for the shortest appropriate period of time'.

Reports / Research Papers

- In November 2013, the Children's Rights Alliance for England provided a submission to the Carlile Inquiry, stating that, 'contact with the youth justice system does not serve children's best interests [at 3.1].
- The UK Children's Commissioners have urged the Government 'to respond to the significant body of evidence that demonstrates how contact with the formal criminal justice system and acquiring a criminal record has a significant negative impact on a child's entire life, and is ineffective in terms of reoffending'.
- The Justice Committee stated in 2022 *'we should avoid bringing children into the criminal justice system wherever possible'*.
- The Centre for Social Justice (CSJ) refers to strong evidence that contact with the criminal justice system can exacerbate delinquency, particularly in children.

Findings in *ST v CCNP*

County Court

When questioned on the topic of the best interests of the child, PC Laughland stated that she did not consider the Claimant a child, rather a teenager, and she believed she had acted in his best interest by arresting and detaining him.

Although the judge was concerned about the timing of the arrest, he found it was lawful, "*The decision made to arrest Sanjay at 5:30am by rousing him from his bed is disturbing. The timing of the arrest was tied to the shift pattern of CID officers, which is extraordinary. Although the arrest and subsequent detention was 'reprehensible' and the way in which police powers were exercised in relation to Sanjay 'lamentable', it was nonetheless lawful.*" His comments though were useful for the appeal.

High Court

Cotter J allowed the appeal on all grounds and made two key findings, which have set a precedent:

1) Police need to consider the **best interests of a child** they come into contact with and that will have a significant bearing on whether a decision to arrest can be deemed to be reasonable. He stated:

99. Proper recognition by those engaged within the criminal justice system of the need to consider the best interests, safeguarding and promotion of the welfare of children must begin with the first interaction, which, as regards a suspected offender, is usually within the investigation stage. Relevant to the current case, before any arrest, an officer should, as directed by guidance in Code G paragraph 2.8, consider the broader circumstances and whether arrest is necessary. Within that assessment process the fact that the person to be arrested is a child requires specific consideration due to the need to have regard to the duty to safeguard and promote the welfare of children. Indeed it should be front and centre of the consideration of relevant circumstances and requires an assessment of whether a less intrusive step than arrest or detention is a practical alternative.

2) The **timing** of an arrest can have a bearing on the necessity of an arrest. In disagreeing with the decision on the issue in *Mouncher and others -v- The Chief Constable of South Wales Police* [2016] EWHC 1367 (QB), Cotter J held that, at least as regards the arrest of a child, timing and/or the place of arrest can be highly material factors to be taken into account [at 123 – 124].

Reducing over-use of police detention, custodial remand and custodial sentences for children

Kate Aubrey-Johnson, Garden Court Chambers

22 November 2023

Children

- Children are defined as under 18-year-olds by the United Nations Convention on the Rights of the Child (UNCRC).

- 'One of the key principles of the United Nations Declaration is that **a child is to enjoy special protection**.' (Moses LJ, HC v. SSHD [2013] EWHC 982 Admin, para 28)

- Article 37(b) UNCRC 'The arrest, detention or imprisonment of a child shall be … used only as a measure of last resort and for the shortest appropriate period of time'.

‘Child First’

- Child First is the YJB’s evidence-based strategic approach: to prevent offending, we must address children’s unmet needs. Identifying their strengths and creating opportunities to realise their potential.

- The youth justice system previously focused on managing a child’s offending behaviour and the perceived risk.

- Contact with the formal justice system is stigmatizing and increases likelihood of reoffending - Edinburgh Study of Youth Transitions and Crime (McAra and McVie)

Core principles

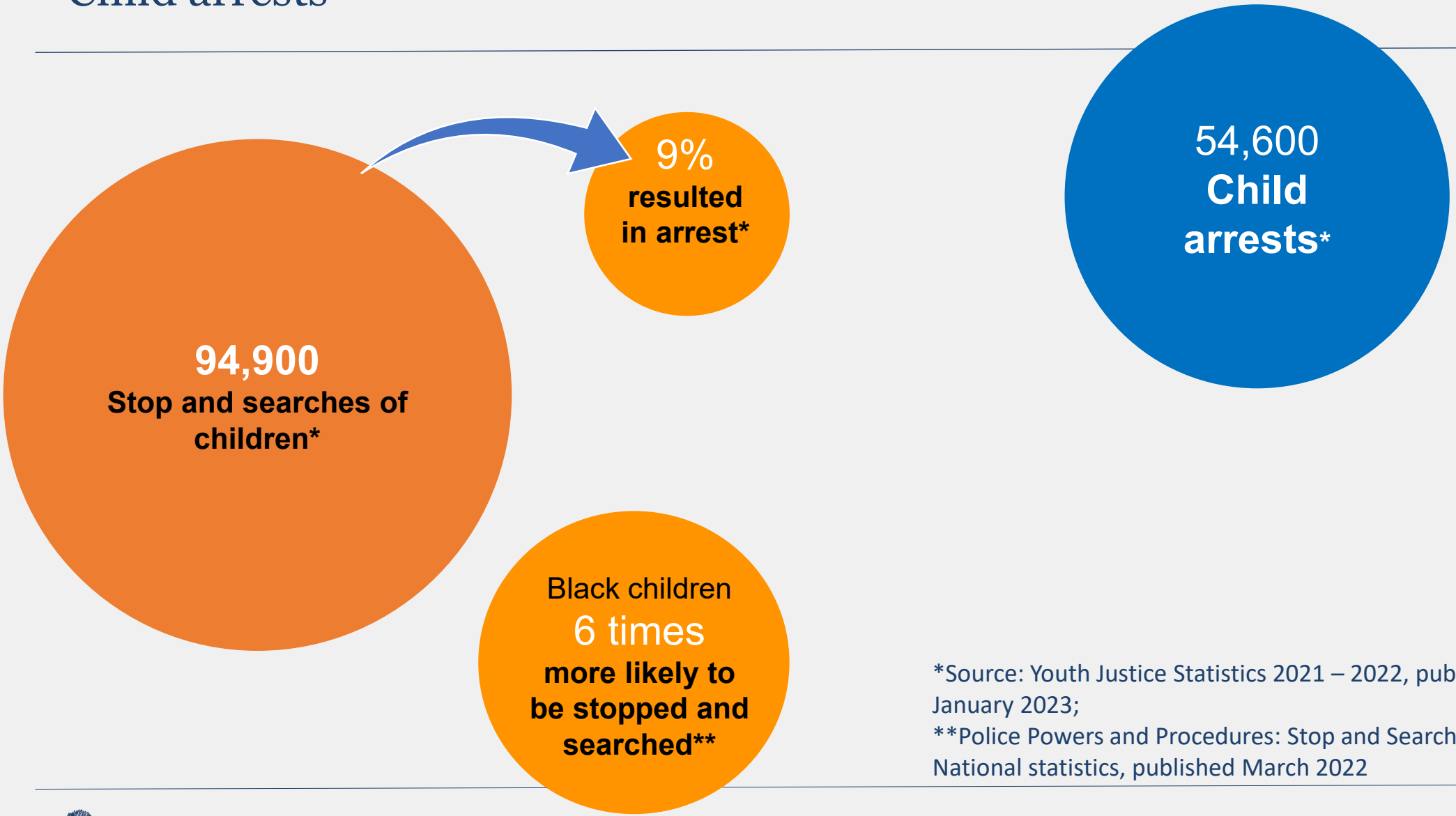
- '[T]he principal aim of the youth justice system [is] to **prevent offending by children** and young persons - s.37(1) Crime and Disorder Act 1998

- 'Every court in dealing with a child … shall have regard to the **welfare** of the child or young person' - s.44(1). Children and Young Persons Act 1933

- Duty to safeguard safeguard and promote the welfare of children. - Section 11 of the Children Act 2004

- Article 3(1) UNCRC 'The **best interests** of the child shall be a primary consideration'

Child arrests



*Source: Youth Justice Statistics 2021 – 2022, published January 2023;
**Police Powers and Procedures: Stop and Search, National statistics, published March 2022

Police detention

54,600 **Child Arrests***

49,140 children detained in police cells

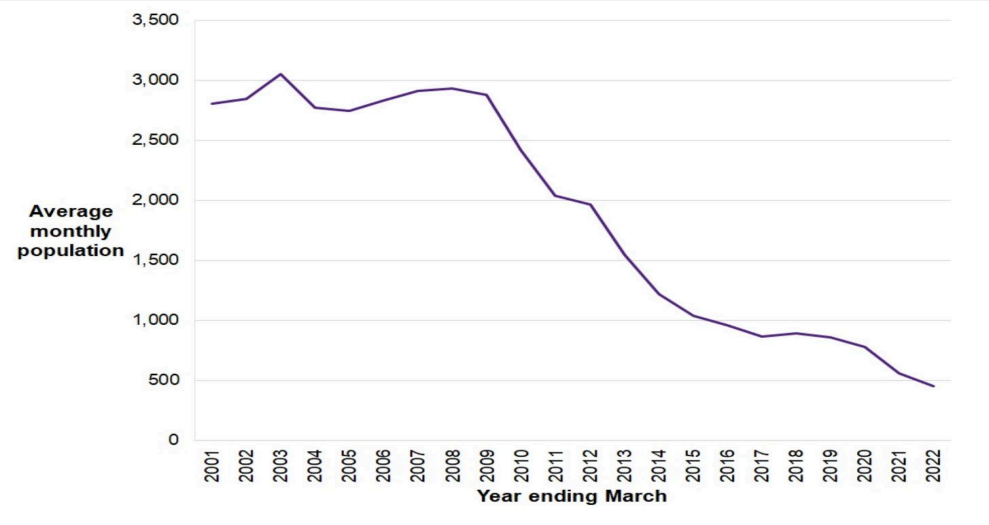
11 hours 36 mins average

60% NFA'd

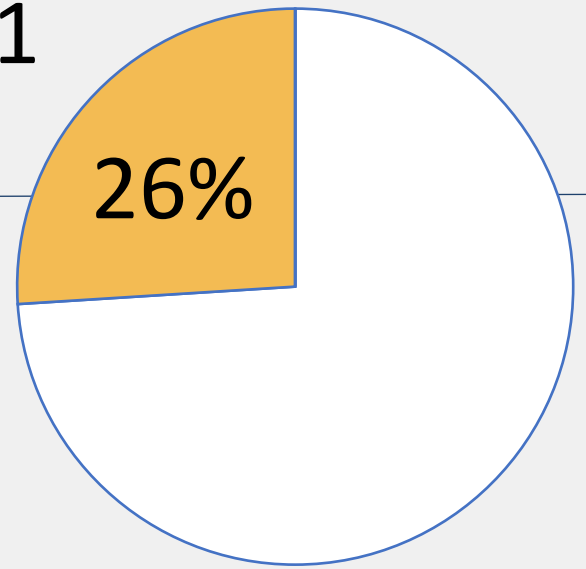
17,200 children charged*

Remand trends

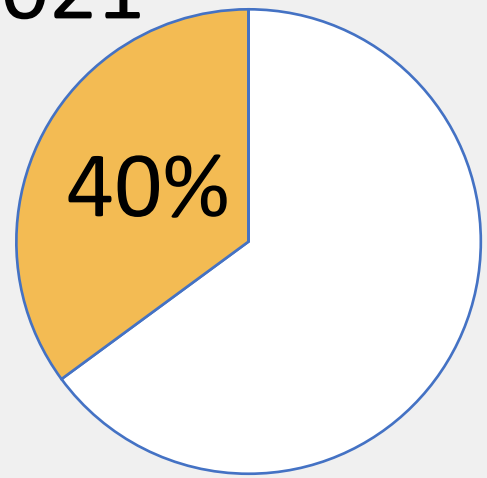
Number of children in custody steadily declining but proportion on remand increasing



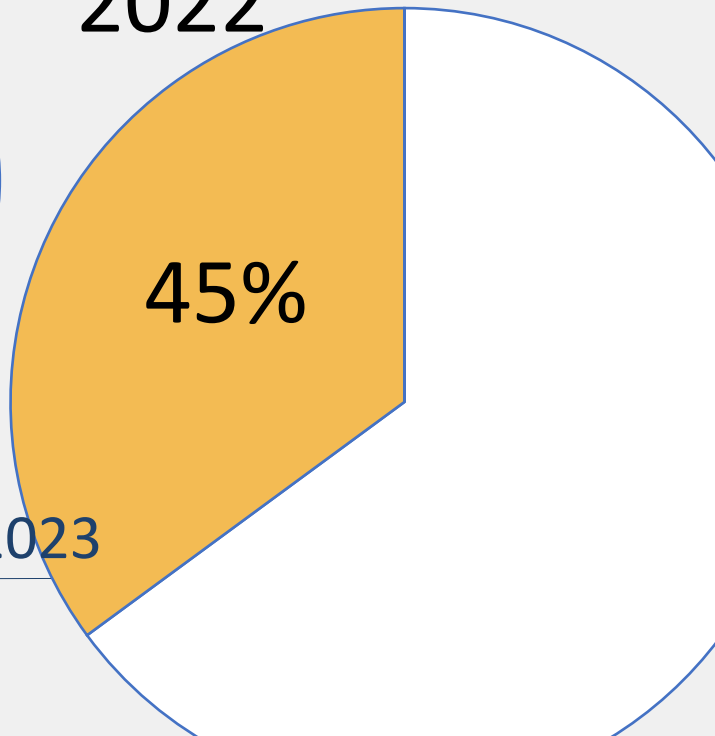
2011



2021

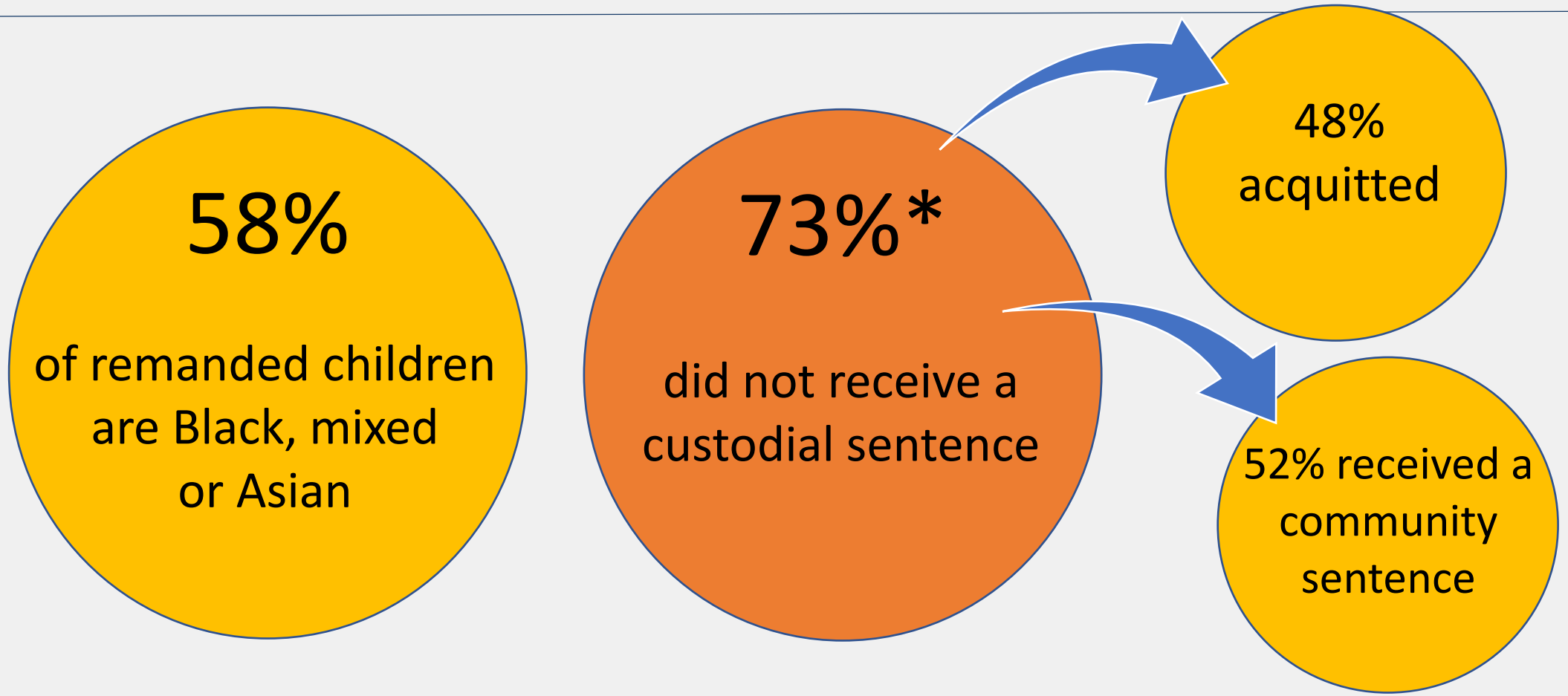


2022



Source: Youth Justice Statistics 2021 – 2022, published January 2023

Disproportionate use of child remand

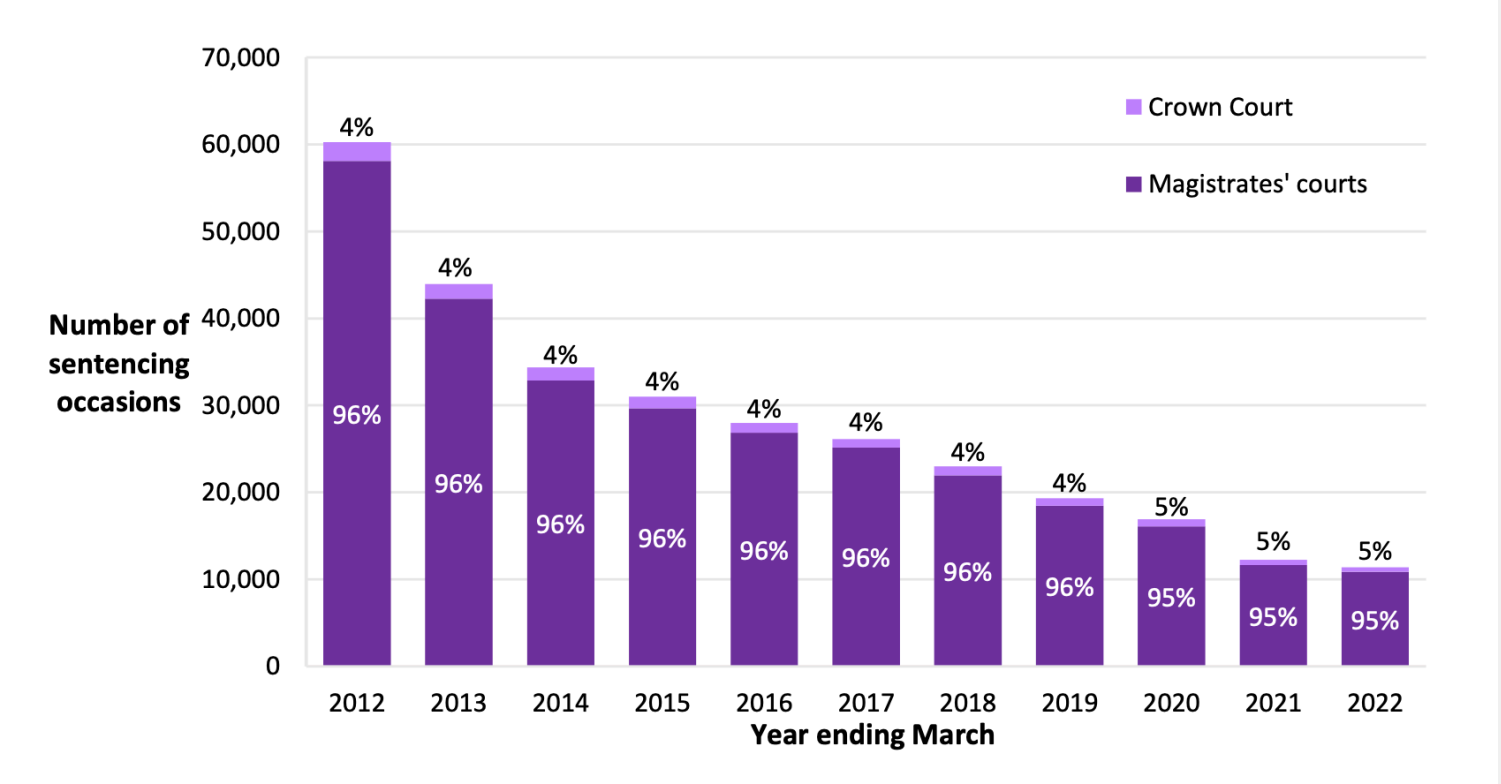


Source: Youth Justice Statistics, 2021-22, January 2023

*66% for White children,
79% for Mixed children and
72% for both Asian and Black children.

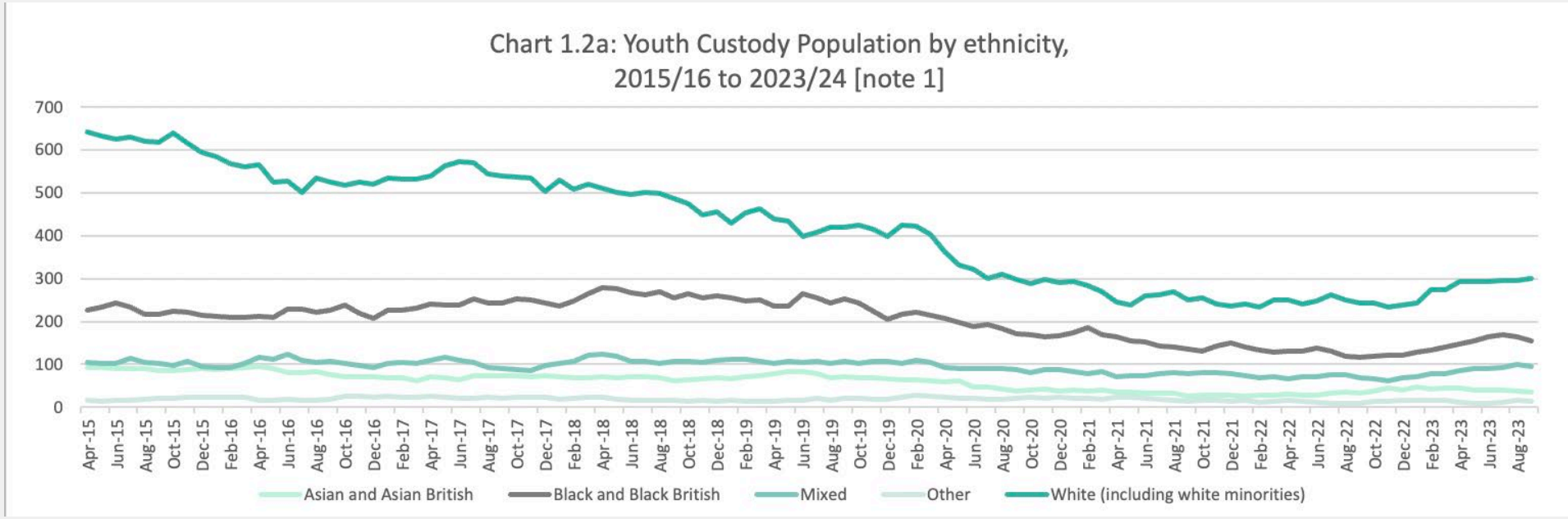
Sentencing children

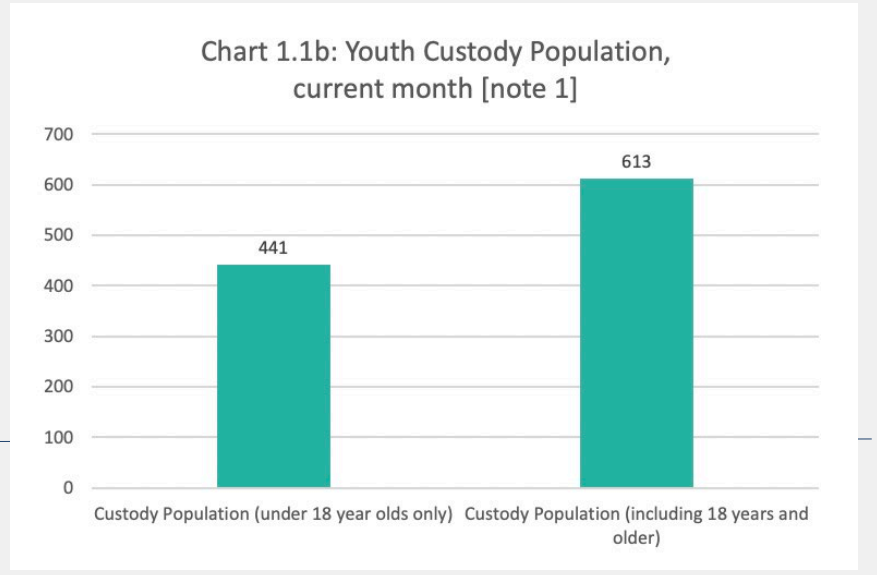
- 11,400 children sentenced, 553 custodial sentences
- 5% of sentencing occasions for children are in the Crown Court = 567
- 46% of sentencing occasions in the Crown Court resulted in a custodial sentence



- 454 average custodial population

Children in custody: racial injustice



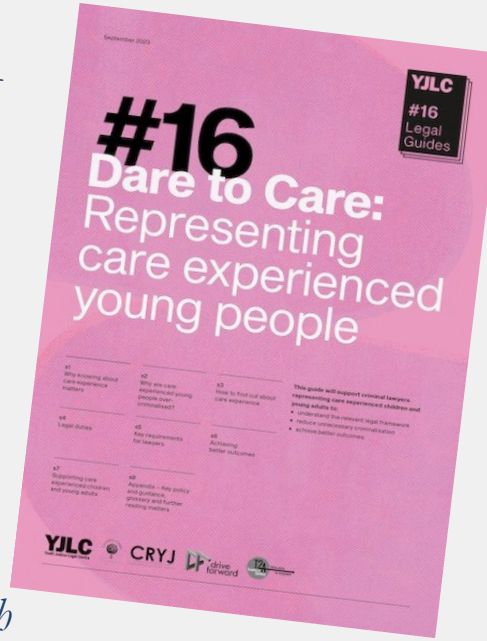


Care experience

59%

Children in custody are care experienced*

- 66% of children in custody have been in care**
- 1 in 20 care experienced children receive a custodial sentence by aged 18***
- 1 in 10 black and mixed ethnicity children***



*Anne Marie Day (2021) *Experiences and Pathways of Children in Care into the Youth Justice System;* **HM Inspectorate of Prisons (2023) *Children in Custody*, ***Katie Hunter (2023) *Care experience, ethnicity and youth justice*

Effective participation & procedural justice

- CrimPR 2020, rule 3.8(3)(b) requires the court to take '**every reasonable step** …to **facilitate the participation** of any person, including the defendant'

- "it is essential that a child charged with an offence is **dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities**, and that steps are taken to **promote his ability to understand and participate in the proceedings**" (V v UK)

- Article 12 UNCRC - every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously.

Thank you

020 7993 7600 | info@gclaw.co.uk | @gardencourtlaw