



A presentation by

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# Deprivation of liberty: Children and Young People

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## Deprivation of Liberty – CYP

- DoLS was 18+, LPS is 16+
- Challenges and current issues
- 16-17 year olds under LPS: implications for practice and understanding who will need LPS authorisation
- Implications for child and adolescent mental health services (CAMHS) and learning disability services
- Moving forward

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## Deprivation of Liberty – CYP

- Who needs to know about this?
- Increasing number of cases requiring legal representation
- What is a DoL for a CYP?
- When does this require court involvement?
- High Court (Family Division)
- Court of Protection
- Public Judgments
- Will all of that fall away with LPS?

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## Deprivation of liberty - CYP

- A person can be deprived of their liberty at any age, and in any place
- Article 5 ECHR
- Cheshire West

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## Deprivation of liberty - CYP

- Who can authorise?
- Aged 10-16

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## Deprivation of Liberty – Recap

- ***Re:D (A Child) (Deprivation of Liberty) [2015]EWHC 922 (Fam)*** - proper exercise of parental responsibility to consent to his constant supervision and control while he was under 16.
- ***In the matter of D (A Child) [2019] UKSC 42*** – 16-17 year old issue dealt with in the UKSC. D's living arrangements had to be compared with those of children of the same age without disabilities, and the fact that they were made in his best interests did not mean he was not deprived of his liberty. Parental consent could not substitute for the subjective requirement under Article 5 ECHR for valid consent to the deprivation.
- Obiter comments.

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## Deprivation of Liberty – Recap

- ***Re A-F* [2018] EWHC 138 (Fam) - Confinement** - a “rule of thumb” is that:
  - A child aged 10, even if under pretty constant supervision, is unlikely to be “confined”;
  - A child aged 11, if under constant supervision, may, in contrast be so “confined”, though the court should be astute to avoid coming too readily to such a conclusion;
  - Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.

If a child is confined, and no person with true parental responsibility can give consent on their behalf (including where the child is subject to a care order or is in foster care) – application to the court



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## Deprivation of liberty - CYP

- *Re T (A Child)* [2021] UKSC 35 - unregulated placement
- Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021
- *MBC v AM & Ors* (DOL Orders for Children Under 16) [2021] EWHC 2472 (Fam) by Mr Justice MacDonald

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# Deprivation of liberty - CYP

- Aged 16-17
- MCA 2005
- High Court
- COP
- LPS is coming.....

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## Deprivation of liberty - CYP

Who might be affected?:

- CYP awaiting bed for MHA admission in acute trust
- CYP having been detained under MHA - no longer detainable - awaiting discharge destination
- CYP in s.136 suite/acute trust – not MHA detainable – no discharge destination identified
- CYP in community placement requiring DoL authorisation

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## Available frameworks

- MHA 1983
- MCA 2005 (16 and over – COP)
- LPS in future
- Children Act 1989
- Inherent jurisdiction of the High Court
- Other powers including common law and PPO

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# What if a DoL is not authorised?



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## Deprivation of liberty - CYP

- What if the court refuses to authorise a DoL?
- *Wigan BC v Y* (Refusal to Authorise Deprivation of Liberty) [2021] EWHC 1982 (Fam)
- Nottinghamshire County Council v LH (A child (No. 1) [2021] EWHC 2584 (Fam) and (No. 2) [2021] EWHC 2593 (Fam) (28 September 2021)

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## Wigan BC v Y (Refusal to Authorise Deprivation of Liberty) [2021] EWHC 1982 (Fam)

*63. For the reasons set out in my judgment, I decline to authorise the continued deprivation of liberty of Y on the paediatric ward at [the named hospital]. Given the conditions in which Y is currently deprived of his liberty, which I am satisfied breach Art 5 of the ECHR, it is simply not possible to conclude that the restrictions that are the subject of the local authority's application are in his best interests, even where there is no alternative currently available for Y.*

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## LPS: 16/17 – implications for practice

- Will not need to apply to court in most circumstances to authorise a DoL if YP lacks capacity
- More flexible applying to more than one setting
- Will still be High Court matters involving those who do not lack capacity
- Circumstances where other legal frameworks will still be applicable
- Synchronise LPS reviews with others – e.g. EHCP



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## LPS: 16/17 – implications for practice

- Identifying CYP across wide variety of settings which will require authorisation (including those coming up to 16) – how is that being done in your services?
- Liaison with children's services
- Identify where objection is being expressed
- Identify if disagreement between professionals and/or family/carers
- Unlikely any reduction in numbers of authorisations – likely many more

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## LPS: 16/17 – who will require authorisation

- Anyone deprived of their liberty who lacks capacity to consent to the arrangements amounting to a DoL
- Those who LPS will not apply to but are still DOL – not to be overlooked
- Broad range of settings LPS can be applied, including:
  - social care settings including children’s homes, short breaks and youth club provision
  - education settings including day and residential schools and colleges
  - hospitals, including inpatient mental health units

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## LPS: 16/17 – responsible bodies

- Arrangements mainly in hospital – difference between NHS and Independent, and England and Wales
- Arrangements mainly in other places – EHCP/ IDP (Wales)? Accommodated by LA? Care order?
- Consider the difference on moving to adult services

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## LPS: 16/17 – CAMHS and LD services

- CAMHS –
  - Professionals need to familiarise themselves with legal position
  - identify 16/17 year olds who are DoL in community and in hospital (acute or mental health) who will require authorisation
  - Partnership working
  - Focus on embedding good MCA practice and broader knowledge of DoL CYP
- MHA reform proposals – LD/ASD may be excluded from being a basis for detention under the MHA – in scope of LPS

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## Deprivation of liberty: CYP - Moving forward

- LPS will largely assist professionals by having a more streamlined process, applicable in a broad range of settings, able to move authorisation between settings and cover transition without the need for a court application for 16/17 year olds
- Still will be cases where other legal frameworks may be applicable/more appropriate
- MHA reform – keep under review
- Partnership working

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# Deprivation of liberty - CYP

- Code of Practice....
- Joint working
- Responsibilities
- Strategy
- Useful resources:
  - <https://www.hilldickinson.com/sectors/health/liberty-protection-safeguards>
  - <https://www.gov.uk/government/publications/liberty-protection-safeguards-factsheets/liberty-protection-safeguards-young-people-and-responsible-bodies>

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# Questions



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