

# **Reforming Mental Health Laws**

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District Judge, Court of Protection**





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# 1 — Introduction

# Successes

Remember how it was



## Electric Razor Shaves Clean Without Lathering Face



Operating on the principle of a barber's clippers, this electric razor gives a clean shave without use of lather.

AT LAST the electrical dry shave is with us! Requiring no blades, no lather, no cleaning, the ingenious razor shown in action in the photo at the left gives a cleaner shave than any conventional type razor, it is claimed.

Plug the razor into a wall socket and it's ready for use—no hot water or towels required. The razor cuts the hair in exactly the same way as the clippers used by barbers. It has but one moving part.

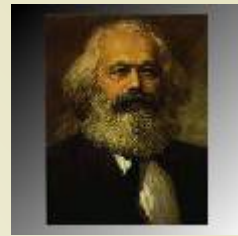
A tiny 1.00 horsepower motor revolving at 3,500 r.p.m. actuates a shearing plate which cuts the hair. The razor complete weighs but eight ounces. In use, it is pressed against the face, moved up and down over the surface to be shaved, and the job is done. The device never requires a new blade, and it is claimed to be impossible to cut one's self with it.

Either alternating or direct current can be used to operate it.

Progress is always slow

- A mental capacity court
- A PW jurisdiction
- The court is used
- A noticeable change of culture
- The success of LPAs
- DOLs

# The liberal society



**Individuality.** Society is made up of individuals, and each individual has distinctive feelings, personal goals, traits, habits and experiences. Variety is of the essence of the human race, and not a passing condition.

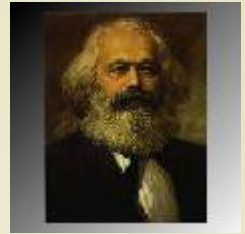
**Individual autonomy.** Because this is so, most individuals wish to determine and develop their own interests and course in life.

**Individual liberty.** The existence of a private sphere of action, free from public coercion or restraint, is indispensable to that minimum independence which everyone needs to develop as an individual.

**Individual responsibility.** The autonomous individual is responsible and liable for acts autonomously done.

**Tolerance.** A liberal state accepts that individuals have many different individual beliefs about the meaning and purpose of life and is pluralistic.

# The liberal society



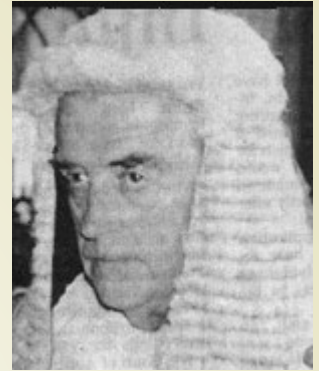
**Freedom of thought and expression.** Individual (and also, therefore, social) development requires that each person is free to develop and express their thoughts. Coercion is counter-productive over the long-term and truth emerges from free debate with falsehood.

**Justice.** Freedom of choice is only meaningful if individuals have opportunities, and options to choose from.

**Compassion.** The importance of each individual life necessitates caring for individuals in need of care.

**Individual restraint.** Governments of individuals exist to serve the needs and interests of the individuals they represent. The destruction by of these rights by individuals in positions of authority in order to build one universal self-directing human society – of everyone marching towards the same rational ends – destroys that area for individual choice without which life does not seem worth living.

# Loss of freedom



*'Loss of freedom seldom happens overnight. Oppression doesn't stand on the doorstep with toothbrush moustache and swastika armband – it creeps up insidiously ... step by step, and all of a sudden the unfortunate citizen realizes that it is gone.'*



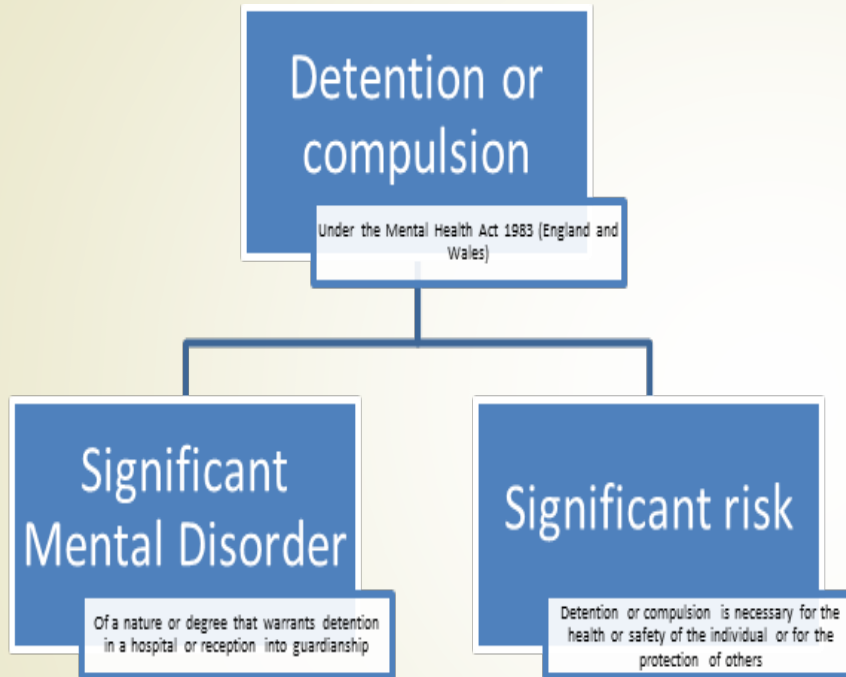
# 2 — Mental Capacity Act Issues





# *Deprivation of Liberty*

# Detention & Compulsion: Two Models

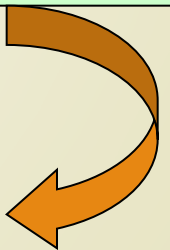


THE PERSON CANNOT UNDERSTAND OR WEIGH RELEVANT INFORMATION ABOUT THEIR PERSONAL WELFARE

THEREFORE, THE PERSON LACKS LEGAL CAPACITY TO DECIDE OR DO THE THING IN QUESTION

THEREFORE, I MUST DECIDE OR DO IT FOR THEM AND DO WHAT IS BEST FOR THEM

*What has happened here is that the person's freedom to do something they can do — to decide between alternatives — has been restricted. However, when it comes to justifying our act, our justification is that they are 'not able' to do the thing. We are not interfering at all with their freedom to do anything they can do and wish to do.*



# A lowering of the detention threshold

**SECTIONABLE**

DOLs/Sched A1  
DOES NOT APPLY  
(ELIGIBILITY  
REQUIREMENT)

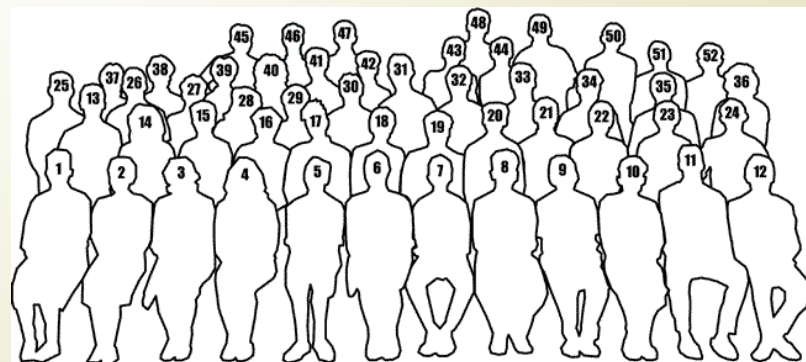
*1983 Act detention  
threshold*

NOT SECTIONABLE

**DETENTION UNDER DOLs**

**MENTAL HEALTH ACT MODEL**

**MCA DOLs MODEL**



# Hidden dangers

*If a standard authorisation is in force the managing authority ‘may deprive P of his liberty by detaining him’ ‘in circumstances which amount to a deprivation of liberty’. Schedule A1, paras 1 and 2*

*‘Insofar as orders’*

## IT'S ALL POSITIVE!

No new or extra population is being detained.

We were always detaining these people — but doing it without any legal authority.

Correctly interpreted, the DOLs scheme (inelegantly) plugged the Bournemouth gap for care homes and hospitals. A proper legal authority or order is now required for all deprivations of liberty.

## POTENTIAL NEGATIVE

- ▶ The order not only protects the vulnerable — it empowers those in whose power the incapacitated person is.
- ▶ The care home and hospital now have, or think they have, legal authority to deprive the person of liberty in every and all areas of their daily life.
- ▶ Interference with liberty is no longer occasional, guilty, tentative or furtive but confidently asserted against a person incapable of resisting.

# Cheshire West



It was said by Lady Hale in the English and Welsh *Cheshire West* case that whether or not the person objects to their arrangements is 'not relevant'. Whatever the answer, that is not it.

*P v Cheshire West and Chester Council and P and Q v Surrey County Council* [2014] UKSC 19, per Lady Hale at para. 50.



The ECHR case law on voluntary admissions refers to whether the individual has the 'mental ability to consent and comprehend the consequences' of being placed in a hospital or care home.

It also refers to whether the individual 'agreed' or 'tacitly agreed' to their placement, regarded it as 'consensual' or subjectively perceived their admission to be a deprivation of liberty.

# DOLs: A Widening Net (Mission creep?)

14

1

Bournewood Gap: Make sure every incapacitated person DOL has **protection** of a legal order and right of appeal

2

Applications to detain sectioned patients in care homes as alternative to MHA detention in hospital **on basis that it is in their best interests** (although can be equally Draconian)

4

The Mental Capacity (Amendment) Act allows for the detention under the Mental Capacity Act of people who satisfy the criteria for being sectioned under the MHA 1983

3

Applications to detain sectioned restricted patients and others in care homes as alternative to MHA detention in hospital on basis that it is in their best interests **and necessary to protect the public from harm.**

*Community care?  
A process of deinstitutionalisation?*

HOSPITALS



20,174  
MI/LD beds (E&W)

**55,494 new detentions**  
under the MHA 1983  
Annual (2020/22)

“COMMUNITY SETTINGS”



435,016  
Care home beds (E&W)

**300,765 applications**  
under MCA DOLs  
procedures in 2022/23

Supported living

**3,500 applications**  
under MCA Re X  
procedure



*Around 35-36,000 DOLs applications concern under-65s*

# Waypoint



Anselm Eldergill

- ▶ There are now far more new detentions outside psychiatric hospitals than in it.
- ▶ Detention has moved to community settings. Because the MHA does not allow for detention outside hospitals, the MCA has been called on to authorise the detention.
- ▶ Increasingly emphasis has shifted from being an enabling Act to being a restricting Act.
- ▶ People now talked about being 'DOLed'.
- ▶ **The Mental Health Bill and the Mental Capacity (Amendment) Act 2019 completely fail to address this 'elephant in the room'. 'Disappointing'.**



# *Liberty Protection Safeguards*



Mental Capacity  
(Amendment) Act  
2019

CHAPTER 18

# Mental Capacity (Amendment) Act 2019

## PURPOSE

- The Act replaces Schedule A1 with a new DOLs Scheme (Schedule AA1)

Subject to a couple of exceptions, the new Schedule AA1 Scheme supposedly replicates that currently found in Schedule A1



## Mental Capacity (Amendment) Act 2019

CHAPTER 18

# COP & Section 16A



Section 16 powers: Mental Health Act patients etc

**16A(1)** If a person is ineligible to be deprived of liberty by this Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty.

....

(4) For the purposes of this section—

(a) Schedule 1A applies for determining whether or not P is ineligible to be deprived of liberty by this Act;

## **Schedule 2:**

**1 The Mental Capacity Act 2005 is amended as follows.**

**2 Omit (a) section 16A.**

# The new framework

- Authorisations granted under Schedule **AA1** to the MCA 2005

The new authorisation scheme applies to **all** locations (hospitals, care homes, supported living, people's own homes). It also applies to 16- and 17-year-olds. **However, the arrangements must not be 'excluded arrangements.'**

- Court of Protection Orders under section 16

The court can authorise a DOL in all cases involving persons aged 16 or over. **No one will be ineligible to be deprived of their liberty under s4/16 by reason of a conflict with the MHA powers.**

# The Authorisation Conditions

*The [DOLs] authorisation conditions*

13 The authorisation conditions are that—

(a) the cared-for person **lacks** the **capacity** to consent to the arrangements,

(b) the cared-for person **has a mental disorder**, and

(c) the arrangements are **necessary to prevent harm to the cared-for person and proportionate** in relation to the likelihood and seriousness of harm to the cared-for person.

## COMPARE WITH CURRENT SCHEDULE A1

No reference in the criteria to:

- Best interests
- LPAs or advance decisions
- Age
- Eligibility

*In fact, the new approach simply separates out care/treatment and deprivation of liberty*

# The 'real conditions'

THE ARRANGEMENTS	ARE NOT EXCLUDED ARRANGEMENTS	AUTHORISATION CONDITIONS
<p>1. Are in the person's best interests</p> <p><i>(Apply usual best interests' law)</i></p>	<p>4. They are in accordance with any 'mental health requirements' imposed by MHA guardianship, CTO, s17, conditional discharge</p>	<p>6. The cared-for person lacks the capacity to consent to the arrangements.</p>
<p>2. Not inconsistent with a PW LPA or advance decision</p> <p>3. The person is aged 16 or over</p>	<p>5. They are not 'mental health arrangements', e.g. arrangements for enabling the medical treatment for mental disorder of someone on s17 leave, con dis or a CTO.</p>	<p>7. The cared-for person has a mental disorder.</p> <p>8. The arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person.</p>



Mental Capacity  
(Amendment) Act  
2019

CHAPTER 18

# Weaknesses

- 1) The Act permits the use of standard authorisations by the COP for people who are detainable under the 1983 Act.
- 2) The only mental health condition in the new scheme is that the person has a 'mental disorder'. The criteria do not rectify the existing problem that the DOLs legislation does not incorporate the first *Winterwerp* condition, which requires that 'the individual must be reliably shown to be of 'unsound mind'; a 'true' mental disorder must be established ... on the basis of objective medical expertise'.
- 3) Arguably, the DOLs legislation also does not incorporate the second *Winterwerp* condition (the 'threshold condition'). Although 'the arrangements' must be necessary to prevent harm and proportionate, that is not necessarily the same as requiring that their detention is necessary or justified to protect them from serious harm.
- 4) The scheme is not noticeably simpler or less bureaucratic. Superficially, it includes only what currently are the mental health and mental capacity requirements and part of the 'best interests' requirement. However, in reality, all six of the current requirements remain.



Mental Capacity  
(Amendment) Act  
2019

CHAPTER 18

## Weaknesses (2)

- 5) The Act 'bakes in' the current illegality of our standard authorisation DOLs scheme. There is no urgent authorisation process under the new scheme and section 4B appears to stand in place of one. It seems designed to permit citizens to be deprived of their liberty for weeks or months on end while a responsible authority deals with a request for an authorisation under Schedule AA1.

### EXAMPLE

- ▶ *X has been discharged to a care home from hospital and wishes to return home. A request for an authorisation has been submitted under Schedule AA1. It is likely to take many months to process. Section 4B provides that the present DOL is lawful during this period provided that:*
  - *A) the DOL is 'necessary to prevent a serious deterioration in P's condition'; and*
  - *B) The doer reasonably believes that P lacks capacity to consent to the steps in question.*





Mental Capacity  
(Amendment) Act  
2019

CHAPTER 18

## Weaknesses (3)

- 6) There is no objective reason to suppose that the scheme will lead to a reduction in the number of people who are detained.
- 7) Key aspects are not set out in the legislation and are left to the discretion of ministers.
- 8) There does not seem to be a clear commitment to funding the scheme.
- 9) The legal liability provisions are poorly drafted and have serious ramifications for professionals.
- 10) Two Acts and two streams.



# *Court of Protection Issues*



# COP Issues



**Participation**



**ECHR**



**Numbers**



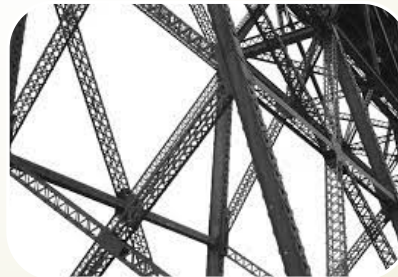
**BAME**



**Threshold**



**Legal Formality**



**Structural**



**Pointers**

# Why is participation important?

- It is P's life and the proceedings are for her/his benefit.

- Dignity — not allowing or facilitating participation degrades the individual and strips them of their rights as a citizen.

- One of the two basic principles of natural justice is *audi alteram partem*: “no man is to be condemned unheard”. A legal right of access to courts for citizens whose rights are affected by the litigation is a basic constitutional right.

- Procedural safeguard against arbitrariness

- The judge understands the emotional context and the importance of the decision to P.

- It improves the quality of the decision-making.

- It often changes the outcome.

- P can ensure that questions are asked of witnesses/they are challenged on key points

# European Case Law



- ▶ In incapacitation proceedings, the ECtHR has held that states must provide adequate safeguards to ensure that 'mentally disabled individuals' are able to participate in the process and that it is sufficiently individualised to meet their unique needs.
- ▶ Persons who are subject to proceedings to divest them of their legal capacity should be allowed to participate in those proceedings, either in person or, where necessary, through some form of representation. This may require the provision of legal aid, or the award of legal costs.
- ▶ It is relevant that the person concerned plays a dual role: they are an interested party and, at the same time, the main object of the court's examination. Their participation is necessary not only to enable them to present their own case, but also to allow the judge to have at least brief visual contact with them, and preferably question them in order to form a personal opinion about their mental capacity.
- ▶ Their statements are an important part of their presentation of their case, and virtually the only way to ensure adversarial proceedings.

# Different ways of involving “P”

Attending the hearing

Meeting judge in chambers

Judge travels to P

Telephone call

Skype/video

By letter, email, W statement

Through Official Solicitor

Through Litigation Friend

Through lawyer/advocate

Through rep (RPR/Re X)

Special or General Visitor

Independent experts/s49 rpts

Case professionals, e.g. S Wkr,  
intermediary

Evidence, e.g. family, friends

Doc evidence of wishes

Appointment of an examiner

Interpreters/translation

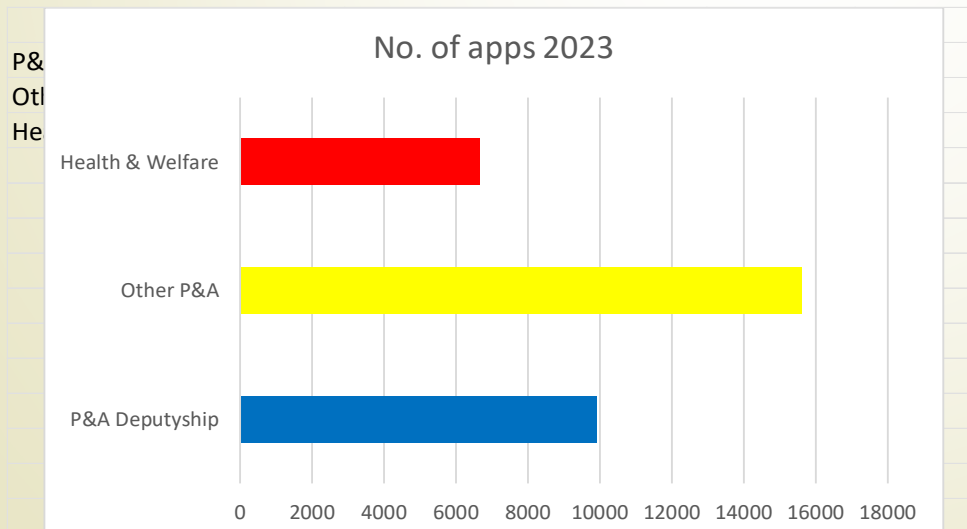
McKenzie Friends/Court Friends

Deputies and attorneys

Inferences from behaviour

# The problem of numbers

- ▶ The London region is based at First Avenue House.
- ▶ In 2022, FAH issued 31,840 applications.
- ▶ Delays issuing applications and orders
- ▶ There are 3 court rooms and approximately seven judges FTE



# P&A Deputy Applications & Forms

- Application Document (What order is being sought, i.e. deputy order)
- COP1A Financial statement
- COP3 Capacity certificate
- COP4 Deputy's declaration
- Followed by notification (See PD 7A).

COP 14 1213 Court of Protection  
Proceedings about you in the Court of Protection

Click here to reset form Click here to print form

For office use only

<p>Application has been issued by the court</p>	<p>Complete the sentence that starts “This notice is to tell you that...” with the following words – <b>an application about you will be considered by the Court of Protection</b>. Please add the following information:</p> <ul style="list-style-type: none"><li>• the application raises the question of whether the person being notified lacks capacity in relation to a matter or matters and what that means;</li><li>• what will happen if the court makes the order or direction that has been applied for; and</li><li>• where the application contains a proposal for the appointment of a person to make decisions on behalf of the person to whom the application relates, details of who that person is.</li></ul> <p>You must also provide the person being notified with a COP5 Acknowledgment of notification.</p>
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# P&A Deputy Applications

## NO BEST INTERESTS INFO

- ▶ No statement of wishes and feelings concerning the application.
- ▶ No statement of beliefs and values.
- ▶ No box setting out person's wishes re their residence, sale of their house/flat, surrender of tenancy, retention or disposal of property, pets, etc.
- ▶ No statements re race or cultural issues.
- ▶ No statement of what steps have been taken to help P make their own decision or to involve them in decision-making, e.g. supported decision-making or execution of an LPA.
- ▶ No statement of the views of non-professional carers.

## **FORM COP X ANSELM ELDERGILL PERSONAL STATEMENT**

Including  
Wishes, Feelings, Beliefs and  
Values

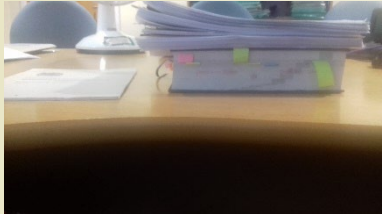
- No statement of what financial decisions the person still has capacity to make: All or nothing.
- No DOLs statement.
- No IMCA support
- HAS THE PERSON BEEN HEARD?

# BAME Issues

- ▶ MCA forms (such as LPAs), court forms and advice leaflets are only available in English.
- ▶ There is no monitoring of take-up amongst BAME groups (court forms do not require information of ethnicity, person's first language, etc).
- ▶ There is nothing on the forms re race, cultural and religious requirements, e.g. with regard to investment of funds.



# Rules, Procedures, Forms



*Original Act lying next to Blue Book and recent forms etc*

*COP Rules 2017 (24 parts/115pp), supplemented by 62 practice directions, numerous prescribed forms and where necessary the Civil Procedure Rules 1998 & Family Procedure Rules 2010*

*Practice Guidance*

*Orders and regulations, e.g. LPA, EPA and Public Guardian Regs 2007*

*Codes of Practice*

*CoP rules modelled on rules devised for the High Court.*

*No fast-track procedure for simple cases*

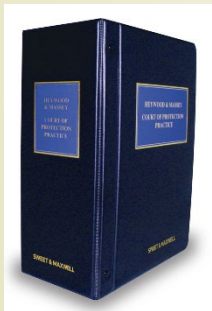
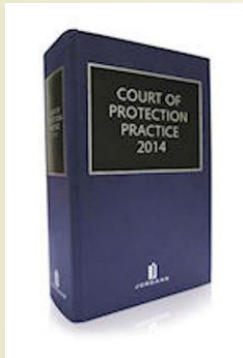
*No short/single order process.*

*The Blue Book is now almost 3,000 pages.*

*Excessive formalism*



*Who has to understand and use them*



# The Capacity threshold



## NEW COP3 -- FINANCIAL INFO NEED TO UNDERSTAND

The relevant information in this case includes:

- Understanding of number, skills in numeracy (arithmetic, value, magnitude)
- Concept of money and what it is used for, identification and use of UK currency
- That money is finite (and where the limits are)
- The value of items (from everyday to larger purchases)
- Making decisions about purchases and investments - risks and benefits
- Where money comes from
- How to store and access money
- Principles of budgeting and financial planning
- Matters of financial and account security
- Understanding of the process of a financial transaction
- Financial responsibilities and obligations of owning and running a home
- Financial implications of the individual's specific needs
- Investments, savings and how to ensure longevity of funds

# Legal Formality

- ▶ The COP has become much more formal in recent years, for example by issuing orders staying applications which are defective in some respect, requiring DOLs statements, etc.
- ▶ The tendency now is for judges and court officers to reserve functions to themselves (in particular in relation to purchasing, selling and letting property), rather than deputising the deputy to perform them.
- ▶ The court may also insist on a professional deputy for large value estates.

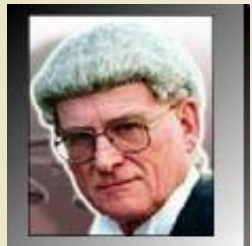
## Number of COP Orders



	2017	2022-23
Final Orders	24,281	24,893
All Orders	39,282	57,092
Ratio	1.62	2.29

Equivalent to an extra 16,766 orders today, i.e. there are 67% more orders per case.

# Court structures



**HYBRID FAMILY COURT**

**HYBRID COURT AND MH TRIBUNAL**

- DELEGATES**
- Guardians
  - **Deputies**
  - Appointees
  - Litigation friends
  - Court officers (ACOs)
- COMMISSIONS**
- Mental Health Commission
  - **Public Guardian**

Into court

Litigation friend for P

See learned person

Present the facts

Present expert evidence

Present the law

Make findings

Apply the law

Grant remedies

Tribunal goes to person

P instructs own lawyer

Expert membership

More inquisitorial

Fewer legal rules

Make findings of fact

Simpler laws

Simpler remedies

Usually, no costs awarded

# A Mental Health Court?

## A MENTAL HEALTH COURT

President, Vice President, HCJ: Full CoP Rules, Serious Medical Trt, etc

CoP Judges  
Circuit Judges, DJs

MHTs,  
MHT Judges

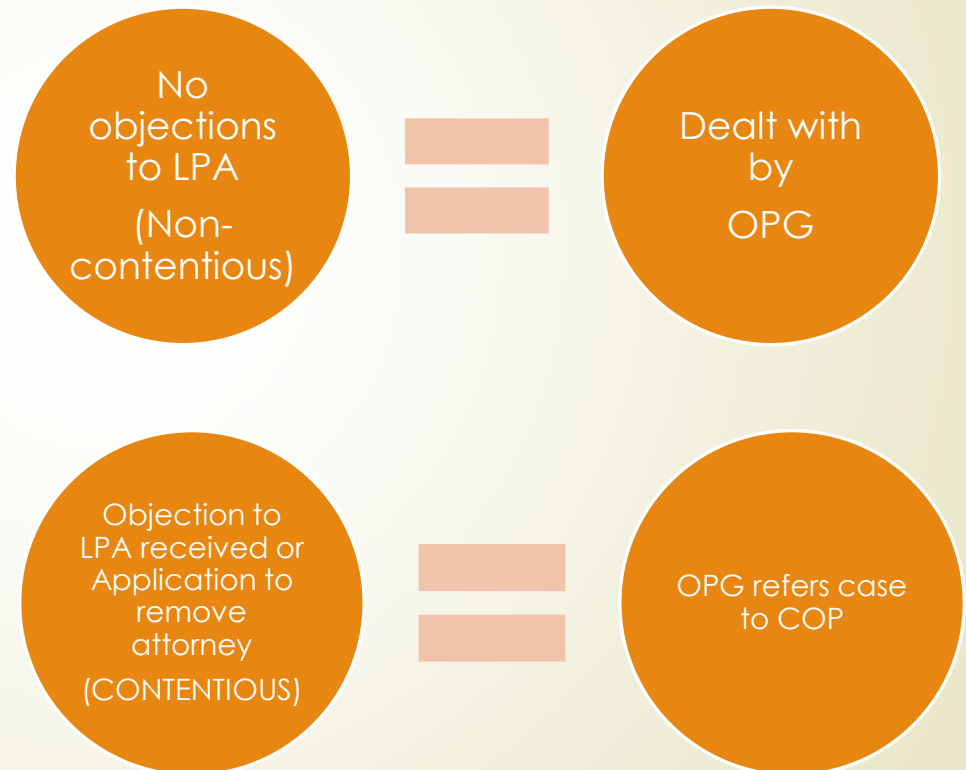
Other ticketed  
Judges

Allocation

*Contentious work*

# Should the COP be doing non-contentious work at all?

- Conventional courts deal with litigation. The Court of Protection is unusual in that much of its case load is non-contentious. For example, there are over 10,000 applications for a P&A deputy to be appointed where there is no objection.
- Should this work be done by the Public Guardian and the COP focus on contentious matters and special category cases, such as applications for a statutory will.

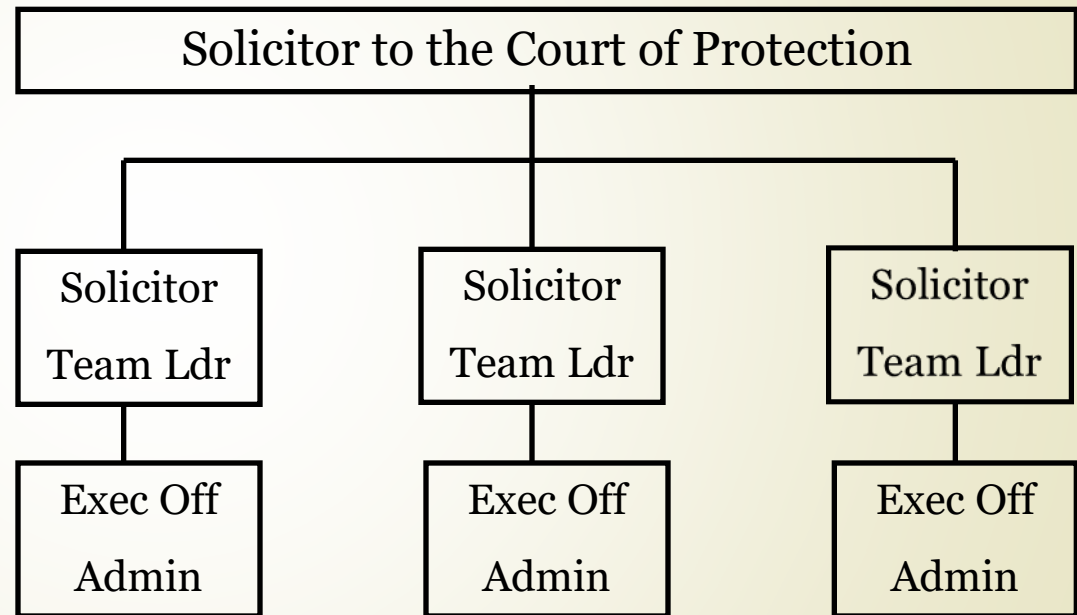




# Is in-house legal input desirable?

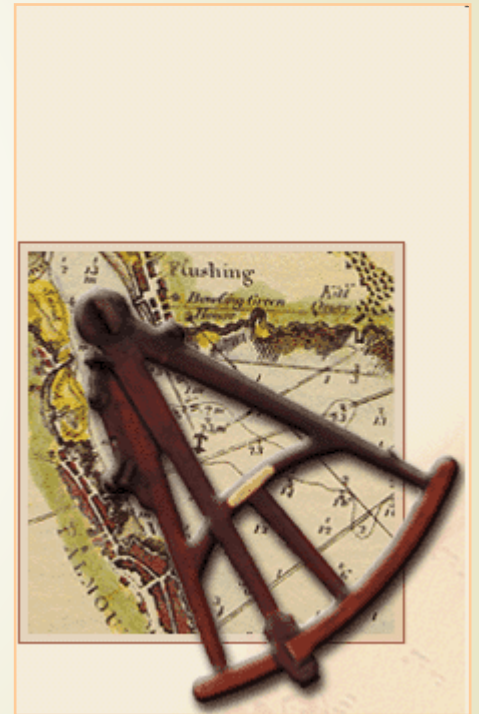
## *Non-contentious work & Case management*

- ▶ The COP receives around 32,000 applications per year.
- ▶ These cases are processed by teams of civil servants without input from a lawyer.
- ▶ ACOs are authorised to make some orders, such as standard PA deputyship orders.



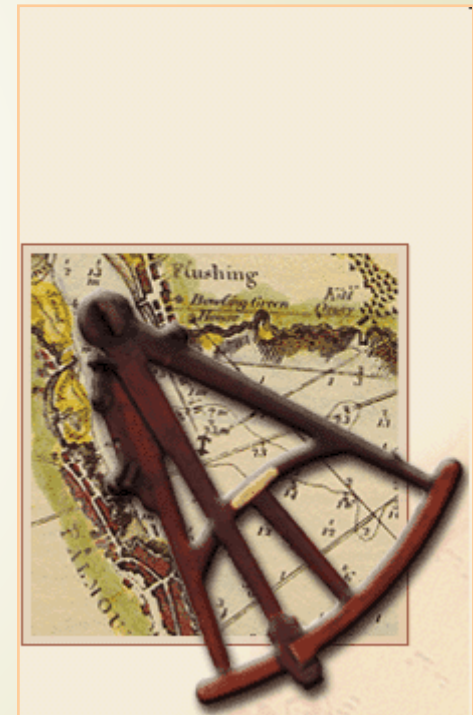
# Pointers (1)

1. Legally-qualified team leaders to improve case and file management techniques (OS model)
2. Simpler rules + fast-track procedure
3. Review issues of race and culture
4. Culturally appropriate forms and procedures
5. Appoint more specialist judges with relevant experience in the area
6. Consider dove-tailing CoP and MHT into a single Mental Health Court
7. Personal attendance on the person
8. Utilise the Mental Health Panel of Solicitors for panel deputyships and court representation
9. Mental Health Commission in place of CQC



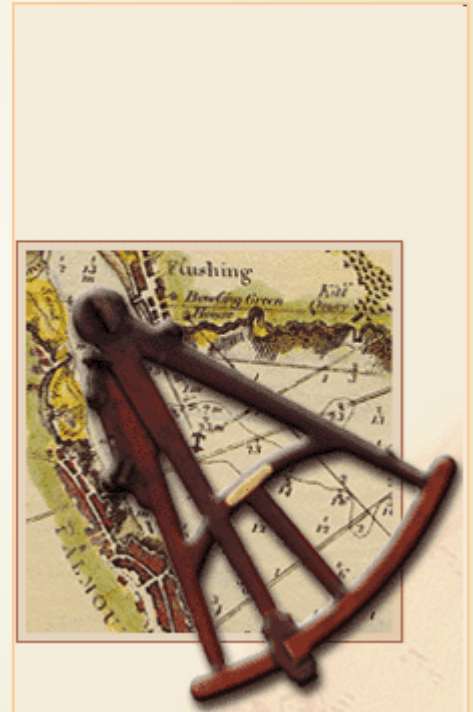
# Pointers (2)

- 10) Reduce the number of incapacitated people
- 11) Reduce the rules and case law (an industry)
- 12) PW Costs: each party bears their own costs. Unfair.
- 13) Encourage greater use of advance decisions.
- 14) Encourage personal welfare LPAs and deputyships
- 15) Legal Representative, not Litigation Friend
- 16) Litigation friend/Official Solicitor waiting list
- 17) Charge for COP9s
- 18) PW orders by the back door/sale of P's home
- 19) LPA dishonesty and mismanagement (security)
- 20) Voting



# Pointers (3)

- 21) LPAs and spousal/partner/children maintenance
- 22) LPAs and quora
- 23) LCJ/LC+HMCTS split
- 24) Legal aid cuts and number of Litigants in Person
- 25) Cost of applications and CoP proceedings.
- 26) Public finances, staff cuts and losses, morale issues
- 27) Loss of courts, over-used courts, moving and merging courts
- 28) Resources (loss of courts, 40% cuts, etc)
- 29) Co-deputyship orders
- 30) **IMPROVE PARTICIPATION!**



# 3 — Mental Health Bill

# Mental Health Bill

- The government has decided not to proceed with the Mental Health Bill in this Parliament.
- That is sensible. Although good in some ways, it is limited in scope, and there is still a huge amount of work to do, in order to ensure that it is 'fit for purpose'.



# Legislative history



Mental Health Act 1983

A significant number of statutory provisions have been inserted into the Mental Health Act 1983 since 1995, almost all of which have increased the powers of courts and tribunals and reduced the rights or safeguards previously granted to citizens, e.g.:

- ▶ Supervision applications;
- ▶ Changes to the AWOL provisions;
- ▶ Community treatment orders;
- ▶ Abolition of the Mental Health Act Commission;
- ▶ Abolition of four limiting categories of mental disorder;
- ▶ Changes to the definition of mental disorder;
- ▶ Changes to statutory definitions;
- ▶ Revocation of a treatability requirement;
- ▶ Introduction of hybrid orders;
- ▶ Revocation of limited-term restriction orders, etc.
- ▶ The recent government review of mental health legislation has recommended the repeal of the nearest relative provisions and is neutral on the powers of hospital managers.



Mental Health Act 1983

# Use of the 1983 Act

- ▶ Since 1987-88, the number of mental health beds in England has fallen by 80% about 100k to 20k.
- ▶ However, the overall rate of involuntary hospitalisations has risen from 50 per 100,000 in 1988 to 94.8 per 100,000 men and 87.9 per 100,000 women.
- ▶ The rate of sections on admission rose from 21.5 per 100,000 in 1984/1985 to 85.0 per 100,000 in 2015/16, an almost four-fold increase (295%) over the 32-year period, and the rate increased in 25 out of those years.
- ▶ Amongst the five broad ethnic groups, known rates of detention for the 'Black or Black British' group (343.5 detentions per 100,000) were over four times those of the White group (74.7 per 100,000).
- ▶ The rate of CTO use for the 'Black or Black British' group (78.9 uses per 100,000) was over ten times the rate for the White group (7.8 uses per 100,000).
- ▶ Detentions in the most deprived areas had the highest rates of detention (160.7 detentions per 100,000). This was more than three and a half times higher than the rate of detention in the least deprived areas (43.5 detentions per 100,000).





Mental Health Act 1983

# Mental Health Tribunals

	1994	2016/17
Section 2 – % patients discharged before and at hearing	52.0%	43.40%
<b>Section 2 – % of hearings resulting in tribunal discharge</b>	<b>18.8%</b>	<b>9.30%</b>
Section 2 – % of applications resulting in tribunal discharge	11.1%	6.60%
Other non-res – % patients discharged before and at hearing	60.0%	34.30%
<b>Other non-res– % of hearings resulting in tribunal discharge</b>	<b>15.6%</b>	<b>6.50%</b>
Other non-res – % of applications resulting in tribunal discharge	6.80%	4.30%
NB1: Withdrawn applications excluded from calculations		
NB2: In 2016/17, 3.4% of CTO hearings resulted in discharge.		

# Weaknesses (1)



## THE FOUR PILLARS

Nearest relative	Replaced by nominated person (watered down)
Mental Health Review Tribunal	Discharge rate now down to around 6%
Mental Health Act Commission	Replaced by largely ineffective CQC in relation to legal protections. It is a quality assurance commission with no legal expertise. A major weakness.
Hospital managers	Future unclear

# Weaknesses



Mental Health Act 1983

- 1) Too limited in scope and ambition. It should have been a generational reform of the law. The present system is 64 years old and in need of root-and-branch reform (Lunacy Act 1890 to Mental Health Act 1959).
- 2) Too little practitioner input, too much academic/policy officer input.
- 3) Either did not appreciate or did not address the fundamental problem that there are now far more detentions under the Mental Capacity Act 2005 than under the Mental Health Act 1983.
- 4) Either did not appreciate or did not address the fact that in many cases care homes have become the new long-stay wards.
- 5) It is doubtful whether the Bill will significantly reduce the percentage of people detained or the percentage of people released, which was a main aim of the review. The change in the statutory criteria recommended by my working group is helpful but only part of the answer.

# Weaknesses



Mental Health Act 1983

- 6) The Bill does not really address the serious over-representation of black citizens in the detained and CTO populations, which was also one of the original main aims. How is that to be achieved?
- 7) The Bill does not address the problem that tribunals effectively no longer have a discretionary discharge power because of the Upper Tribunal's erroneous decision in *Betsi Cadwaladr*. Only in 'exceptional circumstances' 'consistent with the existence of the statutory criteria'.
- 8) The tribunal cannot grant leave or direct transfer.
- 9) The tribunal lacks an effective judicial power to review treatment.
- 10) The Bill has nothing to say about seclusion.
- 11) The Bill has nothing to say about restraint.

# Weaknesses



Mental Health Act 1983

- 12) The Bill leaves the future of hospital managers hanging.
- 13) The Bill waters down the powers of spouses and partners.
- 14) The Bill does not simplify the complicated absence without leave provisions in sections 21-22.
- 15) The Bill does not effectively address the substantial number of mentally ill people now in the prison system or their treatment.
- 16) The Bill does not reintroduce a Mental Health Act Commission, either with or without a discharge power. As I predicted in 2006, the CQC now has no legally qualified members and is totally unqualified to monitor and enforce legal standards.
- 17) The Bill does not address the very obvious problems in the way sections 5(2) and 135 are drafted.
- 18) The Bill does not promote guardianship as a protective alternative for people living in the community.

# Weaknesses



Mental Health Act 1983

- 19) The Bill does not address and simply the complicated children law interface between the Children Act 1989, the MHA 1983, the MCA 2005, wardship and parental rights.
- 20) The Bill does not address or simplify the inter-relationship between the 1983 and 2005 Acts or attempt to fuse the two pieces of legislation.
- 21) The Bill does not address the shortcomings in the Court of Protection and the lessons learnt with regard to the implementation of the Mental Capacity Act 2005.
- 22) The Bill does not resolve the issue of single or multi-disciplinary tribunals or ban remote hearings.
- 23) The Bill does not clarify common law powers.
- 24) Personality disorders remain within the ambit of the Act.
- 25) There are no rehabilitation provisions.

# An opportunity



- ▶ The problems are mainly due to over-reliance on academic input and insufficient experienced practitioner input.
- ▶ The same problem beset the long-drawn-out Mental Health Bill process between 1998 and 2007. That began with a similarly abortive report by Professor Richardson and her committee of academics and policy officers.
- ▶ Legislation should have a practical focus, which can be difficult for academics and policy advisors who have not spent any or much time practising in psychiatric hospitals.
- ▶ What is now needed is either a Royal Commission or a small Commission of experienced MHA practitioners to review the work that has been done and to draft themselves a completely new Bill.