

Safeguarding And Empowering Protected Parties In 2023

Thursday 29 June 2023

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The
Official Solicitor - The Last Resort

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Official Solicitor and Public Trustee

Who's Who?!





Henry Pemberton
First OS



Sir Charles Stewart
First PT

The Role of the Official Solicitor

- The Official Solicitor to the Senior Courts is an independent statutory office holder appointed under the Senior Courts Act 1981. A Civil Servant – as are her staff
- One of her primary functions is to act as **last resort litigation** friend in civil, family and Court of Protection proceedings. This function derives from the long-established duty of the Crown to protect the interests of those who lack capacity to protect themselves either because of minority or because of lack of mental capacity. First Official Solicitor 1871.
- An Arms Length Body of the Ministry of Justice and derives budget from MOJ and income from some cases and role as Public Trustee.
- 4 litigation teams: Civil Litigation, Family (Public & Private Law), Court of Protection Healthcare and Welfare and Court of Protection Property & Affairs. Each team is made up of lawyers and lay case managers, the ratio of which depends upon the work of the team.
- Today looking at OS's role in Court of Protection cases where she is appointed by the court to act as litigation friend for the vulnerable client.

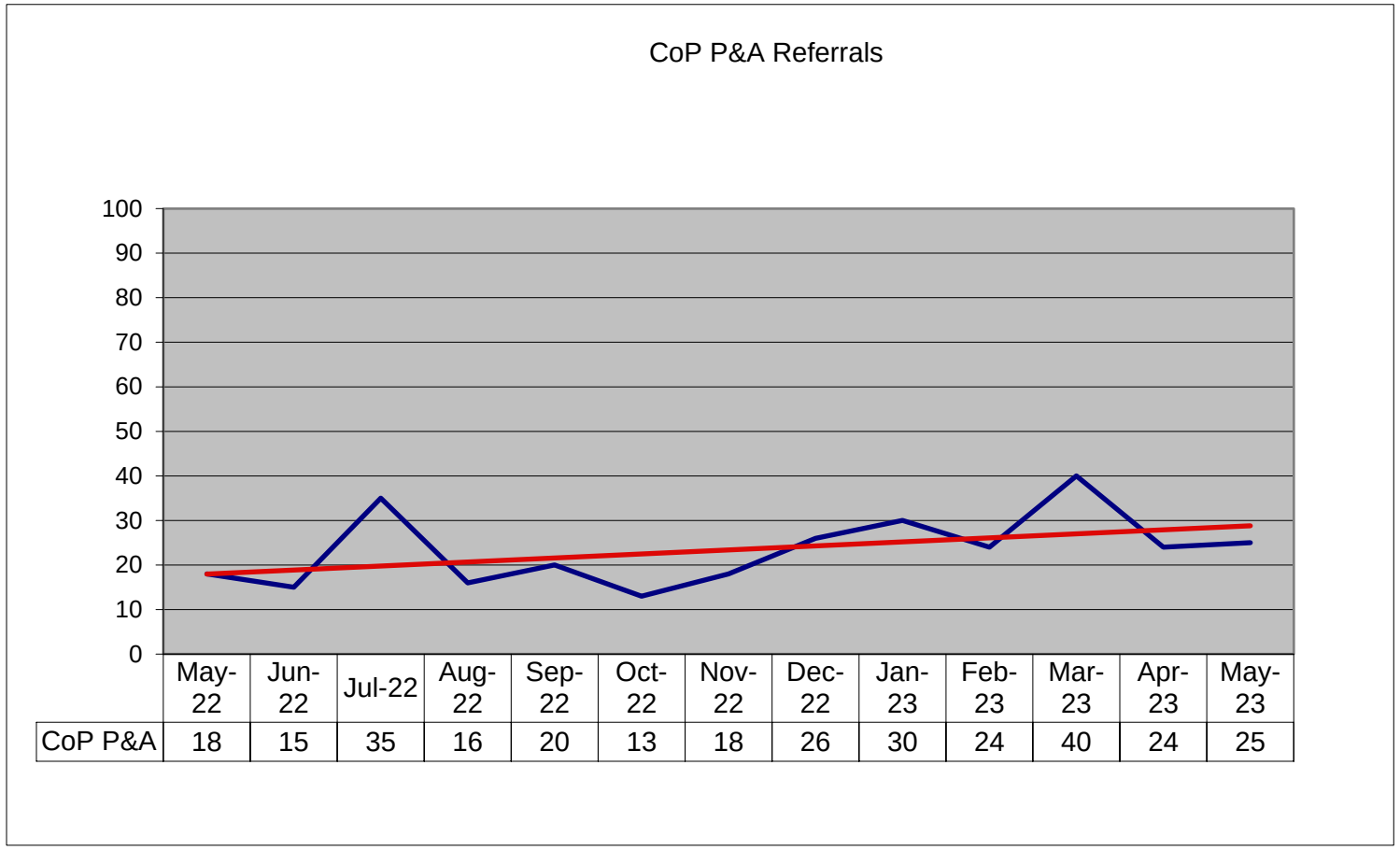
Court of Protection litigation: Property & Affairs (PAA)

- PAA team. Comprises senior lawyer, Elaine Brown, and 5 lawyers. Work conducted in house and charged for.
- Types of applications:
  - execution of a statutory will/codicil,
  - the making of a large gift on behalf of P (or ratification of an unauthorised gift that has already been made),
  - execution of a settlement of assets belonging to P;
  - gratuitous care payments;
  - transactions at an undervalue; and
  - transactions or investments where one of the parties faces a conflict of interest, such as a purchase by or from the attorney/deputy or a proposed purchase of investments on behalf of P aimed at Inheritance Tax efficiency.

Court of Protection: Healthcare & Welfare team (HCW)

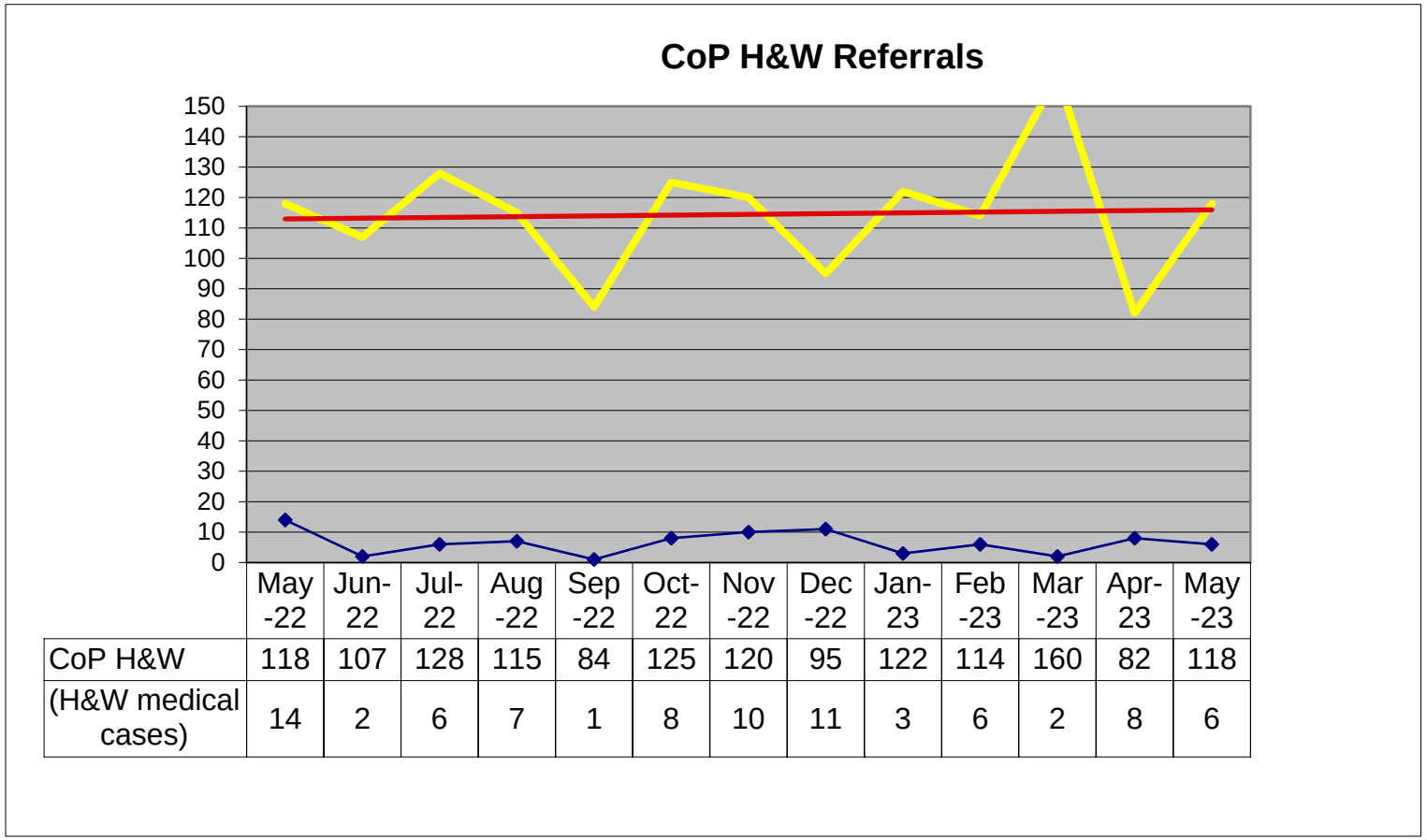
- HCW team. In excess of 30 in team. Janet Ilett as senior lawyer and 8 full time lawyers (one vacant) and 11 non lawyer case managers and a pre acceptance team for investigating funding for the litigation
- Typically, the issues involved may include capacity and best interests regarding:
  - residence;
  - care;
  - contact;
  - Capacity to engage in sexual relations;
  - Capacity to marry;
  - serious medical treatment;
  - challenges to authorisations granted under the Deprivation of Liberty Safeguards.

Property & Affairs Referrals 2022/23



	May-22	Jun-22	Jul-22	Aug-22	Sep-22	Oct-22	Nov-22	Dec-22	Jan-23	Feb-23	Mar-23	Apr-23	May-23
CoP P&A	18	15	35	16	20	13	18	26	30	24	40	24	25

Healthcare & Welfare referrals 2022/23



	May -22	Jun-22	Jul-22	Aug -22	Sep -22	Oct-22	Nov -22	Dec -22	Jan-23	Feb -23	Mar -23	Apr-23	May -23
CoP H&W	118	107	128	115	84	125	120	95	122	114	160	82	118
(H&W medical cases)	14	2	6	7	1	8	10	11	3	6	2	8	6

Invited to act and when she consents to do so

- The Official Solicitor applies the following criteria when deciding whether to act in a case to act within her limited resources:
- **That the proposed client lacks capacity to conduct the proceedings, and**
- **That she, the OS, is litigation friend of last resort. That no one else is willing and suitable to act, and**
- **That there is security for her costs. In PAA, legal aid not available and general rule is that the client (P) pays the costs of all parties. OS consents to act if P has sufficient funds to meet the anticipated costs. In house lawyers.**
- In HCW the costs of external solicitors are met by legal aid, from the client's own funds or by a third party
- https://www.gov.uk/government/publications/appointment-of-the-official-solicitor-in-property-and-affairs-proceedings-practice-note
- https://www.gov.uk/government/publications/appointment-of-the-official-solicitor-in-welfare-proceedings-practice-note

Participation of P in COP proceedings

- Rule 1.2 COP Rules 2017 requires the court in every case to consider whether it should make one, or more, of a number of possible directions for securing P's participation.
- These directions cover a range from the joining of P as a party, securing P's participation by the appointment of an accredited legal representative; securing P's participation by the appointment of a representative (1.2 rep); securing P's participation by giving P the opportunity to address the judge directly or indirectly; and securing P's participation in some other way which meets the overriding objective.
- In considering whether it should make any of these directions, and if so which
  of them, the court is required to have regard to a range of factors to determine the participation and representation needed. Tailored to the circumstances of the individual case
- Practice Direction 1A "Participation of P"
- https://www.judiciary.uk/wp-content/uploads/2022/09/pd-1a-participation-of-p.pdf

Court orders P to be joined as a party

- If the court appoints P to be a party to the proceedings then Rule 1.2 (4) provides that joinder only effective on appointment of a **litigation friend (LF)** or an **accredited legal representative** (**ALR)**
- Role of the litigation friend – **Practice Direction 17A** – to fairly and competently conduct proceedings on behalf of P and has no interest adverse to that of P
- What is an ALR? See the definition in rule 2.1 CopR 2017.
- "accredited legal representative" means a legal representative authorised pursuant to a scheme of accreditation approved by the President to represent persons meeting the definition of "P" in proceedings before the court.
- A scheme of accreditation was set up by the Law Society in 2017 and has been approved by the President and the Law Society issued guidance by way of a practice note
- The Law Society maintains a list of those who have been accredited as ALRs, which is updated monthly, and made available to the CoP judiciary

Practice Direction 1A

- When P lacks capacity to conduct the proceedings and an order that he or she is to be a party is made factors relevant **to the choice between appointing a litigation friend and an accredited legal representative** to represent him or her as a party will include—

- Whether there will be a need for expert or other evidence to be obtained and filed, or other material gathered, on P's behalf;
- The nature and complexity of the case;
- The likely range of issues.

- An accredited legal representative is not intended as a substitute for a litigation friend, but as an alternative in a suitable case (or in the early stages of the case). Para 10 of Practice Direction 1A suggests that there might be some cases where an ALR is appointed in the early stages of the case but that subsequently a litigation friend is needed because- for example- the case is more complex than first appeared

The Law Society's Practice Note 5 December 2019

- The Practice Note is "the Law Society's view of good practice" and it is not binding on the court but it is helpful to note several particular provisions.
- Can only access on line via Law Society website but can be found in LexisNexis COP Practice 2023 at 5.602.
- The Practice Note includes detailed advice on matters such as:
- the role of an Accredited Legal Representative;
- communicating with and taking instructions from the client;
- representing P and ensuring P's effective participation;
- funding of P's legal costs.
- The Practice Note comments that the Practice Directions suggest the court is more likely to appoint an ALR in a case where the issues are relatively defined.

ALR's and Law Society accreditation and Practice Note

- Only extends to welfare proceedings- there is currently no scheme for accreditation in property & affairs proceedings and therefore if P is joined as a party then a litigation friend will have to be appointed
- Don't know of any plan to expand the scheme in the foreseeable future
- The scheme is still very much in its infancy and the current practice note was drafted before the scheme was up and running
- The Law Society is in the process of reviewing the practice note.
- Some judicial comment in ***Re KL (A Minor: Deprivation of Liberty)*** **[2022] EWCOP 24** about when it is (or is not) appropriate to appoint an ALR, in this case HHJ Hilder confirmed that it will 'generally be unlikely' for the court to appoint an ALR in a case concerning a 16 or 17 year old.

ALR'S – is the scheme working?

- Not used to its full potential but seems to be greater awareness over the last 12 months or so and court making more appointments from the ALR scheme
- Some issues:
- **How are they chosen?** In *Re:KF* HHJ Hilder referred to the appointment of an ALR being made by the Court from a database according to a 'turntaking' principle which aims to ensure that all ALRs are given an equal share of appointment opportunities.
- But anecdotal evidence that some applicant local authorities approach ALR's direct to act for P and undertake to pay for first attendance to expedite proceedings
- The practice note gives the Society's view that it is not appropriate for ALRs to accept invitations to act directly from statutory bodies. The only exception to the strict rotation by the court is if the ALR has already done work on P's behalf (eg, been referred to P by a RPR).

ALR'S – is the scheme working?

- **Who agrees costs?** Not an issue in legally aided cases but what if a privately paying P in a welfare case? A LF would agree with the instructed solicitor but what about an ALR?
- If there is a deputy or attorney then they can be asked to agree the hourly rate and the final bill but what if neither exists?
- Option for court to agree the hourly rate on behalf of P and to assess costs at the conclusion of the proceedings?
- **Is it a personal appointment.**
- What if ALR considers a LF is required? Bring this to the attention of the court and if it is determined that a LF is required then the OS (or other LF for that matter) will tend to retain the ALR as solicitor for P as they have already built a relationship and funding will be in place, such as legal aid certificate

Challenges to the OSPT

- Referrals from the court are on the increase and cases more complex
- Limited resources and limit on head count
- One of the OS's acceptance criteria is that she is last resort, that there is no one else willing and suitable to act. The court is willing to consider other suitable LF's such as family members as long as there is no conflict of interest.
- Should wider consideration be given to the appointment of an ALR rather than a LF? Perhaps this is a matter of training for the judges but do need consistency throughout the regions and only act in suitable cases
- Should the State have to fund a litigation friend of last resort?

Intimate relations and the CoP – assessing the implications for care professionals of the judgment in Secretary of State for Justice v A Local Authority & Ors [2021]

Mathieu Culverhouse, Partner and Saoirse de Bont, Senior Associate Solicitor, Irwin Mitchell

irwinmitchell

Secretary of State for Justice v A local authority, C, a CCG, and others [2021] EWCA Civ 1527

First instance decision: care workers would not commit a criminal offence under s39 of the Sexual Offences Act 2003 were they to make practical arrangements for a 27 year old man, C, to visit a sex worker, where he had capacity to consent to sexual relations, but not to make arrangements himself.

The Court of Appeal allowed the Secretary of State's appeal of that decision.

Section 39 of the Sexual Offences Act 2003

39 Care Workers: causing or inciting sexual activity

(1) A person (A) commits an offence if-

a) he intentionally causes or incites another person (B) to engage in an activity,
b) the activity is sexual,
c) B has a mental disorder,
d) A knows or could reasonably be expected to know that B has a mental disorder, and
e) A is involved in B's care in a way that falls within section 42.

Section 42 of the Sexual Offences Act 2003

A person (A) is involved in the care of another person (B) in a way that falls within this section if any of subsections (2) to (4) applies.

(2) If B is accommodated in a care home (or similar)

(3) If B is a patient for whom services are provided by an NHS body or an independent medical facility

(4) If A is whether or not in the course of employment, a provider of care, assistance or services to B in connection with B's mental disorder, and

(for each of the above) A has regular face to face contact with B.

The 2003 Act

It brought about a complete revision of the criminal law relating to sexual offences.

Section 79 adopts the definition of mental disorder found in s1 of the MHA 1983.

Intention was the protection of the vulnerable.

The Decision of Hayden J

Care workers would not commit a criminal offence under s39 of the Sexual Offences Act 2003 were they to make arrangements for a 27 year old man, C, where he had capacity to consent to sexual relations, but not to make arrangements himself.

Hayden J was not invited to make a BI decision, but rather to express a view on the application of s39 of the SOA to a hypothetical set of facts.

After judgment he was invited to make a declaration but declined to do so.

The Grounds of Appeal

1.That Hayden J misinterpreted section 39 by reading into it that the Defendant was intending to repress the autonomy of those with a mental disorder in the sphere of sexual relations.

2.That to sanction the use of a sex worker was contrary to public policy, and

3. The judge erred in concluding that articles 8 and 14 of the European Convention on Human Rights required his favourable interpretation.

Judgment of Lord Burnett LCJ

S15 MCA and declarations about lawful conduct

Lord Burnett LCJ emphasized the general approach of the law is that issues of a person's future conduct, and whether that conduct is criminal or not, are best decided in criminal not civil courts.

For a civil court to depart from that usual pathway required a cogent and exceptional reason – not found to be present in this case.

Judgment of Lord Burnett LCJ

Meaning of “cause or incite” (paragraph 49)

The term “cause or incite” should be given its criminal law ordinary meaning, which should not be restricted by reading into it more than that, which is what the Secretary of State contended was done by Hayden J.

Applying criminal law jurisprudence to the meaning of “cause or incite” establishes that the conduct in question does not need to be the sole cause, indeed all that is required is that its effect is more than negligible.

Judgment of Lord Burnett LCJ

Meaning of “cause or incite” (paragraph 49)

“ The litmus test for causation is that identified in the authorities. Do the acts in question create the circumstances in which something might happen, or do they cause it in a legal sense. Applying the approach of the Supreme Court in Hughes the care workers would be clearly at risk of committing a criminal offence contrary to s39. **By contrast care workers who arrange contact between a mentally disordered person and a spouse or partner aware that sexual activity may take place would more naturally be creating the circumstances for that activity rather than creating it in a legal sense.”**

Judgment of Lord Burnett LCJ

Meaning of “cause or incite” (paragraph 49)

The LCJ referred to the case of *R v Hughes* [2013] UKSC 56 where D was driving (with no insurance or license) but otherwise normally, when an oncoming vehicle swerved across the road and into collision with D causing the death of the oncoming driver.

D was prosecuted for causing the death of another without having a license or insurance.

The Supreme Court referred to the fact that apart from being on the road at the time D had done nothing. Though D had created the opportunity for the accident, the court held that for the offence to be committed D must be shown to have done something other than simply putting his vehicle on the road.

Judgment of Lord Burnett LCJ

The Convention rights - Articles 8 and 14 (paragraph 51)

Right to a private life - art 8

The right not to be discriminated against by reason of disability (mental disorder) - art 14

C and the local authority argued that section 39 of the 2003 Act interferes with C's private life under article 8 of the Convention.

Article 14 argument:

1. C treated differently from a person without a mental disability who can make his own arrangements; or

2. C suffers discrimination by reason of his mental disability by comparison with those without.

Judgment of Lord Burnett LCJ

The Convention rights - Article 8

No positive obligation of the state to recognize a human right to purchase the services of a prostitute or to be provided with such a service by the state (paragraph 59).

As such there was no human right that was breached and thus requirement to consider issues of compatibility.

In any event, s39 of the 2003 Act would satisfy article 8.2 were it necessary to do so.

Judgment of Lord Burnett LCJ

The Convention rights – Article 14

Clear that the effect of section 39 of the 2003 Act places C in a different position from others being looked after by care workers because of his mental disorder.

However, the decisive issue was that of justification. The judgement of the legislature would be accepted unless it was manifestly unreasonable.

The discriminatory effect of section 39 cannot be stigmatised as being manifestly without reasonable foundation. The statutory provision is clearly justified (paragraph 64).

Paragraph 64

"Section 39 of the SOA is concerned with sensitive moral and ethical issues in the field of penal policy. One of its purposes is to throw a cloak of protection around a large number of vulnerable people in society with a view to reducing the risk of harm to them. To the extent that the provision discriminates against a person in C's position by comparison with others in the care of the state (or more broadly) it represents the considered view of Parliament striking balances in these difficult areas."

Lady Justice King

Achieving autonomy for an incapacitated adult lies at the heart of the Mental Capacity Act 2005.

It is not however the role of the Court of Protection to endorse an act which would be unlawful.

"*There are, however, many less extreme and benign situations which day in and day out touch on the lives of people up and down the country; Baker LJ gives the example of a care worker arranging private time for a long married couple which she knows is likely to include sexual activity in those circumstances. Such a case is wholly different from that of C and the question of whether it is appropriate to make a declaration under s15 of the 2005 Act in such cases is something to be left open for argument in the appropriate case*." (paragraph 71)

Lord Justice Baker

The powers invested in the Court of Protection under the Mental Capacity Act 2005 do not include the power to "decide" whether or not a proposed course of action is criminal.

A court has to balance three principles (paragraph 73):

1. The principle of autonomy

2. The principle that vulnerable people in society must be protected and

3. The wider system of law and justice.

"*Where Parliament has expressly decided that certain conduct should be a criminal offence, it is no part of the Court of Protection's role to declare that it is lawful.*"

Lord Justice Baker

Baker LJ, however, emphasizes that the case was a decision on its own facts (paragraph 75)

"*I recognize that there are situations where care workers are asked to assist people for example …. Where a young person wishes to meet people of their own age and make friends … one consequence may be that the incapacitated adult engages in sexual relations****. I envisage that it might be appropriate in those circumstances for the Court of Protection to endorse a care plan under which care workers facilitate or support such contact and to make a declaration under s15 of the MCA that the care plan is both lawful and in P's best interest."***

Legal test for capacity to engage in sexual relations

In the case of *A Local Authority v JB [2021] UKSC 52,* the Supreme Court held that the relevant information that a person must be able to understand, retain and use or weigh, to have capacity to engage in sexual relations may include:

- The sexual nature and character of the act of sexual intercourse, including the mechanics of the act.
- The fact that the other person must be able to consent to the sexual activity and must in fact consent before and throughout the sexual activity.
- The fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent.
- That a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant.
- That there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by taking precautions such as the use of a condom.

Conclusions/thoughts

A care worker arranging sex with sex worker is likely to put the care worker at risk of committing a criminal offence.

Some thing which merely creates the circumstances in which sexual relations happen is not in the legal sense a cause (*R v Hughes*), and therefore would not be a criminal offence.

For example, making arrangements for young people to meet in circumstances when sexual relations may happen are more likely to be seen as lawful.

Where money will change hands then, as both Lord Burnett (at paragraph 34) and Baker LJ (at paragraph 72) identified, P – and potentially also their carers – would be at risk of prosecution for the strict liability offence under s.53A of paying for sexual services of a prostitute who had been exploited.

Conclusions/thoughts ctd.

Developing the case law:

- C's case was determined on its own specific facts
- In other cases, need to consider the specific facts of a case and seek legal advice on whether or not there might be scope to make an application to the COP
- Comments of LJ Baker & LJ King leave the door open for future cases on different facts.
- Could be circumstances where the Court of Protection might endorse a care plan.

**Consider the need for a contingency pot for such applications in personal injury claims.*

Conclusions/thoughts ctd.

Role of a deputy:

- Could the Deputy be caught by section 42 SOA?
- If so, when does help become ‘causing’?
- How much help does P need? Could carers take practical steps to hoist P into position in a bed, prior to P’s sexual partner arriving to visit? Is that just ‘setting the scene’? Or something beyond that?
- Can arrangements be made by someone falling not within s42?

Conclusions/thoughts ctd.

Practical effect on P

- Risks of increased behaviours
- Risks of criminal activity / prosecution
- Care arrangements (including DoL)
- MDT input

Any questions?

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Safeguarding P from financial and relationship abuse

Parishil Patel KC

29 June 2023

Legal Framework

- Care Act 2014
  - s.1: general duty promotion of well-being includes protection from abuse
  - s.42: duty to enquire
  - when
  - scope
  - specific reference to financial abuse

Care Act Guidance

- Chapter 14
- Objectives
  - Establish facts
  - Ascertain P's views and wishes
  - Assess the needs of P for protection, support and redress, and how they might be met
  - Protect from abuse and neglect, in accordance with P's wishes
  - Make decisions as to follow-up action against abuser
  - Enable P to achieve resolution and recovery

Care Act Guidance (2)

- Key is the involvement of P
- Six safeguarding principles
  - Empowerment
  - Prevention
  - Proportionality
  - Protection
  - Partnership
  - Accountability

Form of abuse

- No overarching definition
- View of what constitutes abuse should not be limited
- Self-evidently, it can take many forms and circumstances
- Financial abuse – theft, fraud, misuse of monies and property, misuse of financial instruments
- Relationship abuse – psychological in origin

WU v. BU

- Roberts J [2021] EWCOP 54
  - Application brought by P's daughter
  - Concerns that P had been befriended by stranger over a number of years
  - Financial abuse, coercion and control
  - Stranger was a confidence trickster, with a long and chequered history
  - Complication was that P held very strong wishes

WU v. BU (2)

- Conundrum, judge encapsulated at [88]

"It concerns the future of a woman who has made it very plain to the court that she wishes that future to include a particular individual whom she regards as being the only person at the present time who can offer her the prospect of happiness and companionship as she moves into the latter years of her life. Deprived of this opportunity, she sees her future as empty, bleak and devoid of all that she presently craves. I have no doubt that she regards NC's opposition to the orders being sought by … her family to be part of the united front which they together are presenting to the court in order to enjoy that future together. WU … perceives the risks to her mother to be overwhelming, both in personal and financial terms, if NC is permitted to continue to exercise influence over her … BU is unlikely to understand why she has been denied the happiness which she seeks and which she believes that she deserves."

How P was protected?

- Need for comprehensive and clear assessments
  - Capacity
  - Psychological
- Involvement of local authority and police
- Legal framework for intervention
  - Court of Protection appointing a deputy PA/injunctions
  - No need for the IJ

How was P empowered

- Steps taken for P to receive therapy
  - In coming to terms with the loss of relationship
  - Why court intervention has been necessary
- Enable P to (better) understand the coercion and control
- Wishes unencumbered (as far as is possible)

Meyers

- Hayden J, [2019] EWHC 399 (Fam)
  - Application by LA initially for a declaration that it had discharged its obligations towards Mr. M
  - Mr. M lived with son in his home of 40 years
  - Mr. M was prevented from receiving care services because of the conduct of his son
  - Situation deteriorated life-threatening
  - Mr. M removed from his home to a care home

Meyers (2)

- Mr. M objected vociferously. Assessed as capacitous
- Came before Hayden J. LA's assessment was that although Mr. M was vulnerable, his decision-making was unencumbered
- Judge disagreed. Essence of his vulnerability is his entirely dysfunctional relationship with his son
- Relationship in which the two men have become so enmeshed that their autonomy has been compromised = consequence disabling Mr. M

Meyers (3)

- Order under IJ prevent Mr. M from living with his son
- Not amount to a deprivation of Mr. M's liberty
- A not entirely convincing rationale … however
- Judge needed there to be no objective DoL as Mr. M not of "unsound mind"

LD

- Mostyn J [2023] EWHC 1258 (Fam)
  - Recent example
  - Same broad scenario
  - Concluded that P came within MCA, and that s.48 power could be used to remove him to a care home to safeguard him
  - But considered whether appropriate to use IJ
  - Gap in law

Some conclusions

- First port of call, LA and/or OPG
- Structured and systematic enquiry, involving P
- Measures identified to safeguard should, insofar as possible, align with P's wishes, but …
- Be clear about the legal framework for intervention
- Protection and empowerment

The interface between the Mental Capacity Act and the Mental Health Act:
a clinical and instructed expert perspective

Dr Chris Ince

Consultant Psychiatrist - Cumbria, Northumberland, Tyne & Wear NHS Foundation Trust

National Specialty Advisor – National Autism Team (NHS England)

Director – PsychNE Ltd

or…

Why do psychiatrists prefer the Mental Health Act?

Outline

- Unashamed focus on legislation changes related to people with a learning disability and autistic people
- Summary of prior legislation and policy opinions
- Conceptualisation of scope of current issues
- Proposed changes within draft Mental Health Bill
- Interface (or otherwise) between dMHB and MCA
- Intended and (?) unintended consequences
- Evidence from other jurisdictions and case law examples
- Impact on Public Law practitioners (and doomsday planning)

Madhouses Act (1774)

- Legal framework for the regulation of “madhouses” (insane asylums)
- Options at the time:
  - The individual kept at home
  - The individual placed in a "madhouse“
- “a private house whose proprietor was paid to detain their residents and ran it as a commercial concern with little or no medical involvement”.
- Some of the earliest examples of institutionalised abuse

Mental Treatment Act 1930

- ‘Unsound mind’ rather than ‘insane’
- Admission on voluntary and temporary basis
- Definition of ‘hospital’ rather than asylum
- Self-discharge with 72h notice
- Local Authorities to have power to establish outpatient clinics and provide “aftercare”

Mental Deficiency Act 1913

S.1.—(1) The following section shall be substituted for section one of the Mental Deficiency Act, 1913, in this Act (referred to as " the principal Act ") :—

" 1.—(1) The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act :—

(*a*) Idiots, that is to say, persons in whose case there exists mental defectiveness of such a degree that they are unable to guard themselves against common physical dangers :

(*b*) Imbeciles, that is to say, persons in whose case there exists mental defectiveness which, though not amounting to idiocy, is yet so pronounced that they are incapable of managing themselves or their affairs or, in the case of children, of being taught to do so :

(*c*) Feeble-minded persons, that is to say, persons in whose case there exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that they require care, supervision and control for their own protection or for the protection of others or, in the case of children, that they appear to be permanently incapable by reason of such defectiveness of receiving proper benefit from the instruction in ordinary schools :

(*d*) Moral defectives, that is to say, persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision and control for the protection of others.

" (2) For the purposes of this section, ' mental defectiveness ' means a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury."

Classes of person

Idiots

- That is to say persons in whose case there exists mental defectiveness of such a degree that they are unable to guard themselves against common physical dangers

Imbeciles

- That is to say persons in whose case there exists mental defectiveness which, though not amounting to idiocy is yet so pronounced that they are incapable of managing themselves or their affairs or, in the case of children, of being taught to do so

Feeble-minded persons

- There exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that they require care, supervision and control for their own protection or the protection of others or, in the case of children, that they appear to be permanently incapable by reasons of such defectiveness of receiving proper instruction in ordinary schools

Colonies

- Consequence of MDA 1913
- Designed to separate defectives from the gene pool of the nation
- Segregation by gender
- More expensive than sterilisation! (Brock Committee, 1934)

Wood Committee (1929)

- The majority of the feeble-minded are to be found within a relatively small social group, a group which may be described as the subnormal or social problem group, representing approximately 10 per cent of the whole population

A Text-Book of Mental Deficiency

- With regard to the 80,000 or more idiots and imbeciles in the country... These are... incapable of being employed... their care and support absorbs a large amount of the time, energy, and money of the community... for this reason they are utterly helpless, repulsive in appearance, and revolting in manners...In my opinion it would be an economical and humane procedure were their existence to be painlessly terminated. It is doubtful if public opinion is yet ripe for this, or that we should compulsorily; but I am of the opinion that the time has come when euthanasia should be permitted at the request of a parent or guardian

Tredgold, 1947

National Health Service Act (1946)

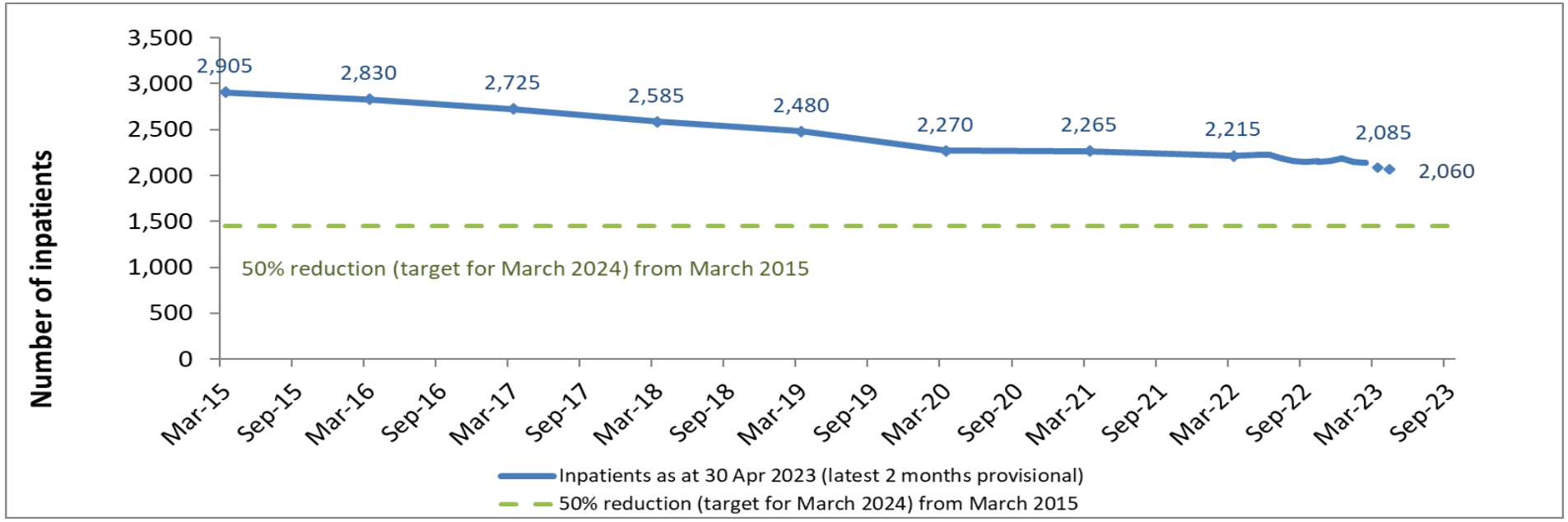
- Failure of therapeutic asylums of the 1800s
- Inherited by NHS after WWII
- Discrediting of eugenics agenda
- Mental defect became a health issue
- Hospital
  - ‘Institution for the reception and treatment of persons suffering from illness or mental defectiveness’
- Formalised amalgamation of legislation in MHA 1959

So where are we now?

- Post-Winterbourne View
  - Introduction of Assuring Transformation
- Post-Whorlton Hall
- Post-Edenfield

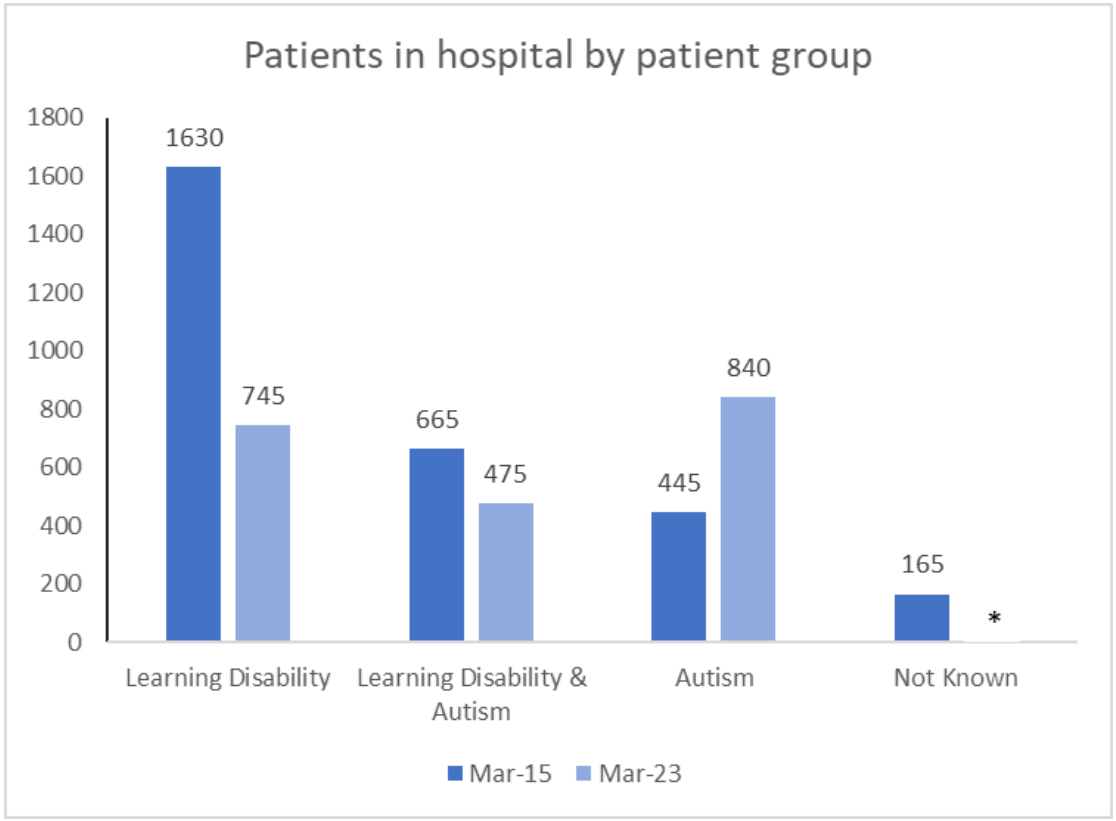
Patients in Hospital (April 2023)

- Based on Assuring Transformation, as of 30 April 2023, there were **2,060** patients in hospital.



- The April 2023 patient count of 2,060 is a decrease of 29% from the March 2015 total of 2,905.
- This does not reach or exceed the aim of a 50% reduction from March 2015 by March 2024.

All Patients



As of 31 March 2023, 9,775 individuals had been discharged from hospital in the lifetime of the programme.

The number of patients in hospital has fallen by **29%** since March 2015 but the change differs significantly by patient group:

So why is this important to Public Law Practitioners?



Guiding Principles

- **Choice and autonomy** – ensuring service users' views and choices are respected
- **Least restriction** – ensuring the MHA powers are used in the least restrictive way;
- **Therapeutic benefit** – ensuring patients are supported to get better, so they can be discharged from the MHA;
- **The person as an individual** – ensuring patients are viewed and treated as individuals.

Draft Mental Health Bill

- Changes to classification of mental disorder
- Changes to caveats for learning disability
- Removes LD and autism from S3 detentions
- LD and autism still within remit of S7 Guardianship
- LD and autism remain in Part 3 MHA
- Change to length of detention orders and renewal periods
- Commissioning and other oversight-type responsibilities (Section 125A onwards)

Clause 1 - Definitions

- “autism” means a lifelong developmental disorder of the mind that affects how people perceive, communicate and interact with others;
- “learning disability” means a state of arrested or incomplete development of the mind which includes significant impairment of intelligence;
- “psychiatric disorder” means mental disorder other than autism or learning disability;.

Clause 1 – Learning Disability ‘caveat’

Currently:

- ‘…that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part’

Proposed:

- For the purposes of this Act, a person’s learning disability has “serious behavioural consequences” if it is associated with abnormally aggressive or seriously irresponsible conduct by the person

Clause 1 continued

Schedule 1 amends the 1983 Act to—

a) prevent people from being detained under section 3 of that Act (admission for treatment) on the basis of autism or learning disability,

and

b) make related changes in relation to the application of that Act to autism and learning disability.

Clause 6 – Appropriate Medical Treatment

1) References to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which, taking into account the nature and degree of the disorder and all other circumstances—
   a) has a reasonable prospect of alleviating, or preventing the worsening of, the disorder or one or more of its symptoms or manifestations, and
   b) is appropriate in the person's case;
2) references to medical treatment, in relation to mental disorder, are references to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations.";

Clause 9: Making treatment decisions

a) Identify and evaluate any alternative forms of medical treatment available for the patient;

b) take such steps as are reasonably practicable to assist and encourage the patient to participate, as fully as possible, in the decision-making process;

c) not rely merely on—

   i. the patient's age or appearance, or

   ii. a condition of the patient's, or an aspect of the patient's behaviour, which might lead others to make unjustified assumptions about what medical treatment might be appropriate for the patient;

d) consider the patient's past and present wishes, feelings, beliefs and values, so far as it is reasonable to regard them as relevant and so far as they are reasonably ascertainable;

e) consider the relevant views of the following, so far as they are reasonably ascertainable

Clause 11: Medicine etc: treatment conflicting with a decision by or on behalf of a patient (s58)

This section applies to the forms of medical treatment for relevant disorder mentioned in subsection (1) where—

a) the patient has capacity to consent to the treatment and has consented to it, or

b) the patient lacks capacity to consent to the treatment and the giving of the treatment would not conflict with—

   i. any valid and applicable advance decision, or

   ii. any decision of a donee or deputy or the Court of Protection

Clause 3 – Grounds for Detention

b) serious harm may be caused to the health or safety of the patient or of another person unless the patient is so detained; and

c) given the nature, degree and likelihood of the harm, and how soon it would occur, the patient ought to be so detained.

Schedule 1 – Re: Guardianship

In Section 7 (Application for Guardianship), in subsection (2), for paragraph

(a) substitute—

“(a) the patient is suffering from—

i. psychiatric disorder,
ii. autism, or
iii. learning disability which has serious behavioural consequences,

of a nature or degree which warrants the patient’s reception into guardianship under this section

Guardianship

- In the first instance, it is concerning that no further restrictions will be placed on the use of detention or guardianship for autistic people. While it is proposed that detention or guardianship will not be available unless a person's learning disability is associated with 'serious behavioural consequences', no such restriction will apply to autistic people. No rationale is given for this omission. The same restriction should apply to autistic people.

Part 3 Detention (not in the provisions)

- Detention terminology retains the over-arching terminology of ‘mental disorder’
- Risks creation of two very differently described Acts, depending on whether the patient has come into a service through a civil or forensic route.
- Risks pushing P into a criminal justice route as a mechanism for achieving detention in hospital
- Inappropriate criminalisation of behaviour that challenge (as a response to trauma or a form of communication)
- Exacerbates vulnerability, marginalisation and inequalities in care

Section 3 vs Part III

- The distinction is a legal distinction, not a measure of risk to the public.
- Patients can be detained under Part III where they have committed an imprisonable offence that suggests no risk of violence (e.g. theft, fraud or criminal damage).
- Conversely, a patient detained under section 3 may pose a high risk to the public without having been tried for or convicted of an offence
- (and yet under the proposed legislation would be ineligible for ongoing detention in hospital under MHA)

Neurodiversity in CJS

- Screening at the pre-court stage is inconsistent and patchy, judges may be more likely to misinterpret the behaviour of someone with a neurodivergent condition.
- The courts process is often complex for neurotypical populations. For neurodivergent populations there are measurable difficulties associated with comprehension, speech language and communication difficulties, sensory sensitivities, and cognitive difficulties, which ultimately leads to decreased engagement, understanding and misrepresentation of intent.
- Reoffending often occurs due to breakdown of engagement with probation or access to health and social care in the community.

Neurodiversity in CJS – Equality Considerations

- High probability that there will be an exacerbation of existing racial inequalities.
- Black people are 40% more likely to access mental health care through the criminal justice system than white people and are almost three times more likely than white people to be detained under Part III.
- Do the proposals risk a greater reduction in the detention rate of white people with learning disabilities and autistic people than for black people with learning disabilities and autistic people?

Neurodiversity (and ABI) in CJS - Statistics

- 5–7% of those referred to Liaison and Diversion Services are autistic
- Within prisons the prevalence of autistic ‘traits’ or ‘indicators’ could be around three times as high (16% and 19% respectively).
- Around a quarter of prisoners are thought to meet the ADHD diagnostic criteria (and there is a significant overlap in neurodivergency
- Headway (a brain injury charity) estimates that around half the prison population have suffered a traumatic brain injury (TBI) - the proportion is higher among women, with domestic violence being a leading cause

DY v A City Council & Anor [2022] EWCOP 51

- Male, early 20s
- Diagnoses Autistic Spectrum Disorder, Generalised Anxiety Disorder, Paedophilia
- 2016 – detained subject to S3 MHA to hospital
- 2017 – deemed to lack capacity to consent to detention and treatment under MCA
- 2017 – pleaded guilty to offences of sexual assault
  - 26 month Youth Rehabilitation Order
  - 5y Sex Offender Registration
  - Concurrent Sexual Harm Prevention Order

Paragraph 14, Schedule A1 MCA

- Mental Health Requirement

1) The relevant person meets the mental health requirement if he is suffering from mental disorder (within the meaning of the Mental Health Act, but disregarding any exclusion for persons with learning disability).
2) An exclusion for persons with learning disability is any provision of the Mental Health Act which provides for a person with learning disability not to be regarded as suffering from mental disorder for one or more purposes of that Act.

Paragraph 15, Schedule A1 MCA

Mental Capacity Qualifying Requirement

- The relevant person meets the mental capacity requirement if he lacks capacity in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purposes of being given the relevant care or treatment”.

Paragraph 16, Schedule A1 MCA

- Best Interests Qualifying Requirement;

1) The relevant person meets the best interests requirement if all of the following conditions are met.
2) the first condition is that the relevant person is, or is to be, a detained resident;
3) the second condition is that it is in the best interests of the relevant person for him to be a detained resident;
4) the third condition is that, in order to prevent harm to the relevant person, it is necessary for him to be a detained resident;
5) the fourth condition is that it is a proportionate response to –
    a. the likelihood of the relevant person suffering harm, and
    b. the seriousness of that harm

for him to be a detained resident.

Assault of Emergency Workers (Offences) Act 2018

Includes….

A person employed for the purposes of providing, or engaged to provide—

i. NHS health services, or

ii. services in the support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public.

[2004] EWHC 2474 (Admin)

- Case of Anthony Hickmott
- Autistic
- Moderate to severe learning disability
- Substantial delay in provision of suitable placement in community

- Recognised range of behaviours that challenge
  - Significant risk of criminalisation

Rooman v Belgium[2019] ECHR 105

- Detention criteria based solely on a person's legal status under the Act would fail to take their risk profiles into account.
- The ECtHR made clear in Rooman v. Belgium that an individualised approach to risk assessment and treatment is required under Article 5(1)(e).
- 'Mere access to health professionals, consultations and the provision of medication cannot suffice for a treatment to be considered appropriate and thus satisfactory under Article 5'

(and thus raises issues regarding the current detention of autistic people and people with a learning disability in 'ATUs')

Rooman v Belgium

- Any detention of mentally ill persons must have a therapeutic purpose, aimed specifically, and in so far as possible, at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness.
- The Court has stressed that, irrespective of the facility in which those persons are placed, they are entitled to be provided with a suitable medical environment accompanied by real therapeutic measures, with a view to preparing them for their eventual release.

Rooman v Belgium

- With regard to Article 5 § 1(e), the deprivation of liberty is ordered, inter alia, on account of the existence of a mental disorder.
- In order to ensure that the link between this deprivation of liberty and the conditions of execution of this measure is preserved, the Court assesses the appropriateness of the institution, including its capacity to provide the patient with the treatment that he or she requires.

Clause 30 – Conditional Discharge
(aka ‘the MM problem’)

- In section 42 (powers of Secretary of State in respect of patients subject to restriction orders), after subsection (2) insert—
- “(2A) Conditions amounting to a deprivation of a patient’s liberty may be imposed under subsection (2) if the Secretary of State is satisfied that those conditions are necessary for the protection of the public from serious harm.”

Does the proposal create a new ‘gap’?

Rooman v. Belgium:

- Detention under Article 5(1)(e) will only be lawful if the detention takes place in a hospital, clinic or other appropriate institution and has a therapeutic purpose. Detaining a person in a community setting who is no longer benefitting from treatment solely for the purposes of protecting the public arguably will risk being unlawful under Article 5(1)(e) and MHA 1983.

Right to review?

Clause 1- Duties on ICBs and LAs

S125E - Registers: Duties relating to commissioning of services etc

An integrated care board must, in exercising its commissioning functions—

a) have regard to the information included in its register under section 125D and any other information obtained by it by virtue of section 125D(3)(c), and

b) seek to ensure that the needs of people with autism or a learning disability can be met without detaining them under Part 2 of this Act.

A local authority must, in exercising its market function—

a) have regard to any information disclosed to it by virtue of section 125D(3)(d), and

b) seek to ensure that the needs of people with autism or a learning disability can be met without detaining them under Part 2 of this Act.

What's not in there… yet…

- Anything regarding improving the interface between the Mental Health Act and the Mental Capacity Act
- Anything to address the artificial differentiation between autism and learning disability in Part 2 and Part 3
- Anything to address emergency holding powers in A&E
- Clarity as to most appropriate tool in each setting (MHA vs MCA)
- Clearer delineation re: acute hospital settings, particularly in reference to CAMHS cases related to bed/placement availability (and the appropriate medical treatment and placement questions)

Medical Treatment – MHA vs MCA

- Is there a need to equalise the treatment of physical and mental health conditions for patients who have the capacity to consent to or refuse treatment?
- Where do we draw the line with ‘organic’ conditions?
- In line with medical law principles, a person who has the capacity to make their own choices regarding treatment should be permitted to refuse mental health treatment.
- Where a person lacks capacity the decision to give mental health treatment should be made in their best interests.
- Should the MHA be brought in line with the MCA?

Deprivation of liberty necessary for life-sustaining treatment or vital act (Mental Capacity (Amendment) Act 2019)

1) If Conditions 1 to 4 are met, D is authorised to take steps which deprive P of liberty.
2) Condition 1 is that the steps—
   a) are wholly or partly for the purpose of giving P life-sustaining treatment or doing any vital act, or
   b) consist wholly or partly of giving P life-sustaining treatment or doing any vital act.
3) A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition.
4) Condition 2 is that the steps are necessary in order to give the life-sustaining treatment or do the vital act.
5) Condition 3 is that D reasonably believes that P lacks capacity to consent to D taking the steps.
6) Condition 4 is that—
   a) subsection (7) applies, or
   b) there is an emergency.

Cost of Discharge

- A report commissioned by DHSC has estimated that the average cost of a home with care and support is close to the cost of inpatient beds, and that there are examples of people for whom a home with care and support is significantly more expensive than indicative inpatient settings.
- This report suggests that the average cost of a home with care and support would be £175,984 per annum
- Based on approximately 2000 patients, this places potential financial burden on Local Authorities of perhaps £500 million

What does the rest of the world tell us?

New Zealand:

- Only common law jurisdiction that has removed intellectual disability from its mental health legislation. Without appropriate care and intervention, the behaviour of many individuals with intellectual disabilities deteriorated such that the legal system was left with no alternative other than to send them to prison.
- Precipitous discharge led to failures in care, neglect, abuse and absence of supervision and risk management (with consequential significant offending)

Intellectual Disability [Compulsory Care and Rehabilitation] Act 2003

- Introduced to meet needs but merely replicated the rights and protections afforded by the parallel mental health legislation
- Unintended secondary consequence of ‘net-widening’, with a consequential increase in detention rates for people with intellectual disabilities
- Erosion of clinical expertise in terms of the availability of psychiatrists, psychologists, nurses, and those from other disciplines who are trained to work with people with intellectual disabilities who have complex mental health and behavioural problems

Doomsday planning

- Potential 1500+ people with learning disabilities and/or autism who will not be eligible for a legal framework under new proposals
- Does the MCA provide an alternative route?
- Is the Court of Protection equipped for 1000 new cases a year?
- What about the issue of inherent jurisdiction?
- Positive obligation on ICBs and LAs to provide routes to avoid Part 2 detention
  - How will this be interpreted in future case law?
  - Relevance of reasonable adjustments may be strengthened

Useful Documents and Links

- The NHS Long Term Plan (2019) sets out the vision for improving the pathway for autistic people Autism spectrum disorder in adults: diagnosis and management (NICE, 2021)
- https://www.england.nhs.uk/publication/autism-diagnosis-and-operational-guidance/ (NHSE, 2023)
- https://www.england.nhs.uk/publication/dynamic-support-register-and-care-education-and-treatment-review-policy-and-guide/ (NHSE, 2023
- https://www.england.nhs.uk/publication/dynamic-support-registers-and-care-education-and-treatment-review-code-of-practice/ (May, 2023)
- NHS England » Reducing long term segregation
- Out of sight – who cares? (CQC, 2020)
- Annex A: DHSC's responses to the Oversight Panel's recommendations - GOV.UK
- Its Not Rocket Science (NDTi, 2021)
- Green Light Toolkit (NDTi, 2023)
- https://www.bsigroup.com/en-GB/standards/pas-6463/

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