

**MENTAL HEALTH SERVICES -
LAW AND PRACTICE**

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MENTAL HEALTH SERVICES – LAW AND PRACTICE

by

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PREFACE

Mental health legislation is like a fashion where ideas grow strong, then wane, and then re-emerge. Characteristically, one of those ideas is "legalism" where the law is used to wrap the patient in a network of substantive and procedural protections against unjustified loss of liberty and compulsory treatment. The counterpoint of legalism which gains periodic credence is "welfarism" where legal safeguards are replaced with professional discretion which is seen as allowing speedy access to treatment and care, unencumbered by a panoply of bureaucracy and procedures.

I was privileged to be one of those who took an active part in the slow process of law reform which resulted in the Mental Health (Amendment) Act 1982 and consolidating legislation in 1983. There was, at the time, a feeling that the new law would help break the cycle in mental health legislation because it was based upon a careful balance of principles: an understanding that mental illness was not a myth but a real medical and social problem which required treatment and sensitive care for highly vulnerable people; and a similar understanding that where the law was used to deprive a human being of his or her liberty and autonomy, there must be some fair legal process, providing a genuine review of the case.

To suggest that the 1983 Act returns us to the "legalism" of the Lunacy Laws is a gross oversimplification. The Act is firmly based upon the "welfarist" principles established in the 1959 Act: wherever possible admission to hospital should be on an informal basis using the well-tested analogy of the admission of physically ill patients to general hospitals; the legal procedures for compulsory admission still rest in the hands of caring professionals—doctors and social workers—and the nearest relative. Even the review procedure remains with a Mental Health Review Tribunal composed mainly of the professionals themselves.

Where the new Act modified the compulsory admission procedures inherited from the 1959 Act it did so in conformity with modern therapeutic principles: the importance of "treatability" and most "appropriate" care setting; and, after long term detention, it introduced a legally enforceable right to "aftercare".

The Act was born of humanistic concepts, not only of care and compassion represented by "welfarism", but also by the recognition of

a framework of human rights for patients. Notably much of the impetus for the new Act was created by a series of cases before the European Commission and Court of Human Rights.

Properly understood in this way there should be no inherent conflict between welfarism and the new legalism. Both have as their guiding principle the importance of treating the patient as a human being who has a natural expectation that his medical and social needs will be met in a modern welfare state; and a similar expectation that becoming a patient (whether on an informal or compulsory basis) will not result in an automatic diminution of the rights and protections the law affords to everyone else.

The most difficult part of the careful balancing process which led to the 1983 Act was consent to treatment of patients who were in hospital. Never before had this charged issue been tackled by mental health legislation in the United Kingdom. So charged, in fact, that the evolution of the final package of measures (now to be found in Part IV of the 1983 Act) was hammered out in a series of "shuttle-diplomacy" meetings at Alexander Fleming House (DHSS) where alternative contingents of MIND and the Royal College of Psychiatrists were seen by Ministers and officials. The Act even formed a new body (the Mental Health Act Commission) to implement and monitor the new package which was comprised of members of all the caring professions, together with lawyers—a reflection of the substantial consensus that the Act sought to achieve.

Any marriage between "legalism" and "welfarism" can be uncomfortable for protagonists of each philosophy, and already there are signs that the legal philosophy which was influential in the 1983 Act is beginning a period of descendency of influence. Only a serious review of the operation of the new law by researchers, practitioners, patients and their families will shed light on whether the balance was properly struck. But contemporary historical assessments of the 1983 Act should bear in mind that too much cannot be expected of any law. Sound mental health legislation is necessary for a vital mental health system, but it is not a sufficient condition. Patients can seriously suffer even if enveloped in a tight legal framework. The law also can have only a limited function in mandating sufficient resources or ensuring high professional standards. As such the law is no substitute for political will to tackle the poverty of policy and resources which have rendered mental health a Cinderella service.

The Mental Health Act 1983 cannot claim to have meaningfully transformed the quality of life for patients on the back wards of institutions. But it can claim to have helped to redress the balance so that individual rights are better respected, affording a measure of self respect and dignity for mentally ill and mentally handicapped people—an achievement not to be undervalued.

Mental Health Services has been published by Shaw and Sons since 1949, recording the fashions in mental health legislation beginning with the Lunacy Act of 1890 and the Mental Deficiency Act of 1913. This latest edition also seeks to break the mould and this is reflected in the new title – *Mental Health Services: Law and Practice*. The book is entirely re-written attempting comprehensively to review all of the law which surrounds the provision of mental health services.

The runup to the Mental Health Act 1983 saw for the first time in Britain the extensive use of the courts to arbitrate some of the ambiguities in the Act; and indeed to correct some of the injustices which arose from some abusive professional practices and antiquated attitudes towards mentally ill and mentally handicapped people. Hence the amount of caselaw reviewed in these pages is far greater than ever before. The flood of cases has continued beyond the enactment of 1983 and these are recorded as faithfully as possible as of July 1985.

This text is also published for the first time in looseleaf form so that it can be regularly updated. This reflects not only the belief that mental health legislation will find new fashions but also that there are still many areas of law that will be construed by the courts and explained by the Mental Health Act Commission in ways which will require lawyers and mental health professionals alike to be kept abreast of the evolving law and practice. As a lawyer myself, I wrote the book as an aid to my profession—both academic and practitioner. But it is the mental health professionals, families and patients themselves who have the greatest need for a detailed explanation of the mental health services, and the text follows the Shaws' tradition of writing also with these groups in mind. Any thoughts about current or future updating of this text would be most gratefully received.

Mentally ill and mentally handicapped people are the most vulnerable portion of our population, requiring the greatest need for compassion and care. The major hope, therefore, for this text is that it will contribute to the knowledge and understanding of those dedicating themselves to meeting those needs.

The first part of the book is devoted to a general introduction to the subject of the history of the world. It is divided into two main sections: the first section deals with the pre-historic period, and the second section deals with the historic period. The pre-historic period is divided into three sub-sections: the Stone Age, the Bronze Age, and the Iron Age. The historic period is divided into two sub-sections: the ancient world and the modern world. The ancient world is divided into three sub-sections: the Greek world, the Roman world, and the Byzantine world. The modern world is divided into two sub-sections: the Middle Ages and the Renaissance.

The second part of the book is devoted to a detailed study of the history of the world. It is divided into two main sections: the first section deals with the pre-historic period, and the second section deals with the historic period. The pre-historic period is divided into three sub-sections: the Stone Age, the Bronze Age, and the Iron Age. The historic period is divided into two sub-sections: the ancient world and the modern world. The ancient world is divided into three sub-sections: the Greek world, the Roman world, and the Byzantine world. The modern world is divided into two sub-sections: the Middle Ages and the Renaissance.

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ACKNOWLEDGEMENTS

I originally came to these shores as a Fulbright Fellow and was fortunate enough to have two supervisors—Margot Jefferys and Louis Blom-Cooper—who have remained my closest advisors and friends. My enthusiasm for mental health and advocacy for patients' rights was nourished by my days as Legal Director of MIND (National Association of Mental Health) where the abiding spirit was to unashamedly roll up our sleeves and fight unequivocally for the rights of mentally ill and mentally handicapped people. I owe a deep and lasting debt to the original Legal and Welfare Rights Team at MIND—Tony Smythe, Ron Lacey and Tessa Jowell, with continuous support from Council members, Lady Bingley and Professor Derek Russell Davis, to name but a few. Even some of those at the other side of the table such as Secretary of State David Ennals, were part of the general Legal and Welfare Rights ideals at MIND. David Ennals is now chairman of MIND and Chris Heginbotham is Director. MIND, and particularly the current Legal Department led by William Bingley, has proved an invaluable source of ideas and information for all aspects of the text. I want warmly to thank William, Lydia Sinclair and Hazel Burke for all their help.

I wrote this text over nearly three years mainly while at the Oxford University, Centre for Criminological Research. I am ever indebted to Roger Hood (Director) and Andrew Ashworth (Acting Director and close adviser on 'knotty' legal problems while I was there) for making it possible for me to have a fellowship to the Centre to work on this and other texts, and to the Secretary of the Centre, Carol McCall. Thanks also to my colleagues at the Centre, particularly mental health scholars like Joanna Shapland and Jill Peay.

The task in writing this text seemed to span many jobs, passions and activities, most notably during my time as Secretary General of the National Council for Civil Liberties, and I want to acknowledge. NCCL's help in this endeavour.

There were many late nights at the Bodleian Law Library, the King's Fund Library and the Oxford Regional Health Authority Library, and I thank all of the staff for their courteous help throughout.

Much of the expertise on this subject lies with official bodies concerned with the subject. I was corrected many times by officials in the DHSS, Home Office, Court of Protection and Mental Health

Review Tribunals who very kindly read over much of the manuscript, and by many of my friends on the Mental Health Act Commission—Lord Colville, Peter Jefferys, Rolf Olsen, David Sullivan, Edith Morgan and Bob Bluglass.

I received help with various chapters in the book, *inter alia*, from Clive Unsworth, Peter Newell, Don Tyler and Peter Skegg.

I want to warmly thank Gordon Morris at Shaw and Sons who encouraged me throughout and contributed substantially to the new design and organisation of the text. I was originally approached to do this book by the author of the previous edition, A. H. Edwards, who sadly passed away. I badly missed his wise counsel in writing the text.

There is an ancient truism for many authors which certainly applies in this case: "I deplore writing but love to have written". None has suffered from the agony of the late nights and weekends nor the joy in its completion like my wife Jean, and sons Bryn and Kieran. None can take more credit for joining with me in thinking about the content than Jean, to whom this work is lovingly dedicated.

I have now temporarily left Britain for a new challenge at the Harvard University School of Public Health where I will be working on the World Health Organisation/Harvard University International Collaborative Center on Health Law with Professor William Curran.

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REVIEW OF CONTENTS

The text is divided into eight parts. *Part I* is concerned with the "Structure of Mental Health Services". *Chapter 1* ("An Historical Review of Mental Health Legislation") is not intended to comprehensively survey the historical landscape. Rather, the chapter uses a development of ideas in earlier legislation to offer a more sensitive insight into contemporary law. As such the chapter can provide a useful grounding for students of the 1983 Act.

The mental health services are integrally a part of the National Health Service and *Chapter 2* provides an overview of the structure and organisation of the NHS. The discussion of "joint funding" arrangements will be of particular interest to mental health professionals who recognise a need for services to span the artificial boundaries between the health and social service. *Chapter 3* examines the various institutions where mental patients are treated and cared for – special and local hospitals, and regional secure units.

"Local Authority Services and Functions" are reviewed in *Chapter 4*—social services, housing and education. The assessment of social services seeks to show that local authorities have ample powers and duties to provide mental health services. Approved social workers may well wish to become stronger advocates of their clients' rights to services, and this chapter will be a help.

Chapter 5 looks at the ever-growing independent sector in the provision of mental health services. An increasing number of patients are being cared for in mental nursing homes, private hospitals and residential care homes. The Registered Homes Act 1984 provides a comprehensive regulatory framework for these establishments which is explained in this chapter.

Part II is concerned with the "Personnel in the Mental Health Services". The importance of the Hospital Managers' functions (*Chapter 6*) have long been ignored in mental health texts, even though managers have an important statutory and administrative role to play. *Chapter 6* also looks at the various definitions and functions in the Act relating to doctors and nurses.

Chapter 7 ("The Approved Social Worker") is one of the most important and carefully constructed chapters. The commitment of

Approved Social Workers to patients' rights and to the care of patients in the "most appropriate" or least restrictive care setting is crucial. This chapter seeks not only to provide a firm grounding in the law, but it provides ideas about the philosophical and practical objectives of the social work profession towards mentally ill and mentally handicapped people. A summary table at the end of the chapter provides an overview of all the various functions and duties of the social services with references where these are discussed more fully in the text.

Nearest relatives continue to have functions in relation to the compulsory admission and discharge of patients under the Mental Health Act, which are described in *Chapter 8*.

Parts III and IV are concerned, respectively, with admission to hospital civilly and through the jurisdiction of the criminal courts. *Chapter 9* looks not only at the statutory definition of mental disorder, but also at psychiatric diagnosis and standards under the European Convention of Human Rights. *Chapter 10* is concerned with informal admission and holding powers. *Chapter 11* is a major section of the book as it sets out in detail the provisions for compulsory admission to hospital under Part II of the Act.

The organisation of *Part IV* is chronological looking at the interface between the criminal law and the mental health services. *Chapter 12* examines the fundamental question of how mentally disordered offenders can be diverted from the criminal justice to the mental health system. The power of the police who find mentally disordered people in a public place is examined. So too are the responsibilities of the police for special care questioning during interrogation of vulnerable people. The following chapters look at the response of the law when mental disorder is discovered: *Chapter 13*—at the time of the offence (the insanity defence, diminished responsibility and infanticide); *Chapter 14*—after the time of the trial (transfer to hospital of unsentenced prisoners, unfitness to plead, and remands to hospital and interim hospital orders); *Chapter 15*—at the time of sentencing (hospital orders with and without restrictions, and psychiatric probation orders); *Chapter 16*—post-sentence (transfer to hospital of prisoners).

Part V is concerned with discharge from hospital and guardianship and removal and return of patients. *Chapter 17* examines discharge from hospital, *inter alia*, by the responsible medical officer and hospital managers, and the current status of the writ of *habeus corpus* and other forms of judicial review. *Chapter 18* looks at Mental Health Review Tribunals, including the increasing number of court decisions which concern their procedures. *Chapter 19* looks at removal and return of patients in the United Kingdom and the repatriation of prisoners.

Part VI is concerned with the two major aspects of a patient in hospital—the therapeutic relationship (including treatment and confidentiality) and restraint (including search and protection of staff from liability for their acts). Surprisingly few texts have ever devoted much space to these important subjects, probably because they were thought to be matters of professional judgement not subject to legal control. There is, however, a great deal of law which provides a framework for these activities which are examined in some depth in *Chapters 20 and 21*. Not only is the Mental Health Act of relevance here, but there is also a wealth of legal provision provided in common law.

Part VII is entitled “Rights of the Patient”, which is probably a misnomer because the subject matters covered are concerned with the protection of, and restrictions on, “rights” as much as anything else. *Chapter 22* entitled “Protection of the Patient” looks at the new Mental Health Act Commission which is derived from the old Commission in Lunacy, but for which there is high expectation for improving the quality of the life of patients; it also looks at complaints procedures, inquiries, and default powers. *Chapter 23* primarily examines the functions of the Court of Protection, but also looks at other financial affairs of patients, such as benefits, and the ability to enter into contracts and partnerships, or act tortiously or to make wills. *Chapter 24* is more aptly titled “Rights and Disabilities of Patients” and contains a long list of provisions which affect the rights of mentally disordered people: voting, jury service, marriage, divorce, parents and children, litigation, correspondence, employment and driving licences.

Part VIII contains only *Chapter 25* which examines criminal offences committed by, against or in relation to mentally disordered people.

As with previous texts published by Shaws the Appendices are replete with valuable information for the scholar and practitioner to have in one handy place. All of the most relevant statutes are reprinted in full in *Appendix A*, particularly the Mental Health Act 1983 as amended until July 1985; the relevant statutory instruments are to be found in *Appendix B*, particularly the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, and Mental Health Review Tribunal Rules; *Appendix C* has relevant Departmental Circulars; and *Appendix D* has the relevant statutory forms which are available from the publishers. Finally *Appendix E* provides a summary of major procedural requirements for compulsory admission to hospital including time limits which should be a valuable quick reference source for the busy practitioner.

The first of these is the fact that the United States is a young nation, and that its history is still in the making. The second is the fact that the United States is a large nation, and that its history is still in the making. The third is the fact that the United States is a free nation, and that its history is still in the making.

The fourth is the fact that the United States is a democratic nation, and that its history is still in the making. The fifth is the fact that the United States is a nation of immigrants, and that its history is still in the making. The sixth is the fact that the United States is a nation of pioneers, and that its history is still in the making.

The seventh is the fact that the United States is a nation of heroes, and that its history is still in the making. The eighth is the fact that the United States is a nation of visionaries, and that its history is still in the making.

The ninth is the fact that the United States is a nation of dreamers, and that its history is still in the making. The tenth is the fact that the United States is a nation of doers, and that its history is still in the making. The eleventh is the fact that the United States is a nation of leaders, and that its history is still in the making.

SUMMARY OF CONTENTS

PART I

THE STRUCTURE OF THE MENTAL HEALTH SERVICES

Chapter 1	AN HISTORICAL REVIEW OF MENTAL HEALTH LEGISLATION	
	A. Early History	1.01
	B. Principles of Contemporary Legislation	1.08
Chapter 2	THE ORGANISATION OF THE NATIONAL HEALTH SERVICE	
	A. Background	2.01
	B. The Secretary of State for Health and the Secretary of State for Wales	2.03
	C. Health Authorities	2.06
	D. Special Health Authorities	2.11
	E. National Health Service Trusts	2.12
	F. Professional Advisory Machinery	2.14
	G. Co-operation between Health Authorities and Local Authorities	2.15
	H. Community Health Councils	2.20
Chapter 3	HOSPITAL AND SPECIAL HOSPITAL SERVICES	
	A. Hospital Within the Meaning of the Mental Health Act	3.02
	B. Special Hospitals	3.04
	C. Regional Secure Units	3.14
Chapter 4	LOCAL AUTHORITY SERVICES AND FUNCTIONS	
	A. Social Services	4.02
	B. Housing	4.11
	C. Education	4.18
Chapter 5	INDEPENDENT SECTOR CARE AND TREATMENT	
	A. Mental Nursing Homes	5.02
	B. Residential Care Homes	5.10
	C. Registered Homes Tribunals	5.16

PART II

PERSONNEL IN THE MENTAL HEALTH SERVICES

Chapter 6	MANAGEMENT, MEDICAL AND NURSING STAFF	
	A. Management	6.01
	B. Medical Practitioners	6.14
	C. Nursing Staff	6.18

Chapter 7	THE APPROVED SOCIAL WORKER	
	A. Background	7.01
	B. Source of Authority	7.04
	C. Statutory Functions	7.10
	D. Implications for Social Work Practice	7.26
	E. Summary of Statutory Duties and Functions of Social Workers and Social Services Authorities	7.27
Chapter 8	THE ROLE OF THE FAMILY	
	A. Definition and Functions	8.01
	B. Appointment of the County Court of an Acting Nearest Relative	8.05

PART III

ADMISSION TO HOSPITAL AND GUARDIANSHIP

Chapter 9	THE DEFINITION OF MENTAL DISORDER	
	A. Statutory Definitions	9.01
	B. Psychiatric Diagnoses	9.07
	C. "Unsoundness of Mind" Under The European Convention on Human Rights	9.09
Chapter 10	INFORMAL ADMISSION TO HOSPITAL AND HOLDING POWERS	
	A. Informal Admission to Hospital	10.01
	B. Application in Respect of Patients Already in Hospital	10.03
Chapter 11	COMPULSORY ADMISSION TO HOSPITAL AND GUARDIANSHIP UNDER PART II	
	A. Procedure for Hospital Admission	11.01
	B. Guardianship	11.07
	C. General Provisions as to Applications and Medical Recommendations	11.10
	D. Position of Patients Subject to Detention, Guardianship or After-care Under Supervision	11.13

PART IV

PATIENTS CONCERNED IN CRIMINAL PROCEEDINGS

Chapter 12	POWERS OF THE POLICE AND THE DECISION TO PROSECUTE	
	A. Powers of the Police	12.02
	B. The Decision to Prosecute	12.04
Chapter 13	MENTAL DISORDER AT THE TIME OF THE OFFENCE	
	A. The Insanity Defence	13.02
	B. Diminished Responsibility	13.06
	C. Infanticide	13.10

Chapter 14	MENTAL DISORDER AT THE TIME OF THE TRIAL	
	A. Transfer to Hospital of Unsented Prisoners	14.02
	B. Unfitness to Plead	14.05
	C. Remands to Hospital and Interim Hospital Orders	14.14
Chapter 15	MENTAL DISORDER AT THE TIME OF SENTENCING	
	A. Hospital Order	15.02
	B. Hospital Order with Restriction on Discharge	15.11
	C. Guardianship Order	15.22
	D. Medical Evidence	15.23
	E. Psychiatric Treatment as a Condition of Probation	15.24
Chapter 16	TRANSFER TO HOSPITAL OF PERSONS SERVING SENTENCES OF IMPRISONMENT	16.01

PART V**DISCHARGE AND REMOVAL**

Chapter 17	DISCHARGE FROM HOSPITAL AND GUARDIANSHIP	
	A. Patents Subject to Part II of the Act	17.01
	B. Patents Subject to Part III of the Act	17.05
	C. Judicial Review	17.07
Chapter 18	MENTAL HEALTH REVIEW TRIBUNALS	
	A. Structure and Administration	18.01
	B. Applications and References	18.03
	C. Powers in Respect of Unrestricted Patients	18.07
	D. Powers in Respect of Restricted Patients	18.12
	E. Procedures	18.19
Chapter 19	REMOVAL AND RETURN OF PATIENTS AND REPATRIATION OF PRISONERS	19.01

PART VI**TREATMENT AND RESTRAINT**

Chapter 20	THE THERAPEUTIC RELATIONSHIP: TREATMENT AND CONFIDENTIALITY	
	A. Treatment for Mental Disorder	20.02
	B. Consent to Treatment Under the Common Law	20.10
	C. Consent to Treatment Under Part IV of The Mental Health Act	20.17
	D. Right to Treatment Under the European Convention On Human Rights	20.29
	E. Confidentiality	20.30

Chapter 21 POWERS OF RESTRAINT AND THE PROTECTION OF STAFF

A. Liability for Unlawful Restraint	...	...	...	...	21.02
B. Consent as a Justification for the use of Restraint	...	...	...	...	21.05
C. Prevention of Harm as a Justification for Restraint	...	...	...	...	21.08
D. Powers of Restraint Under The Mental Health Act 1983	...	...	...	...	21.12
E. Search of Patients and their Property	...	...	...	...	21.19
F. Protection of Staff	...	...	...	...	21.25

PART VII

THE RIGHTS OF THE PATIENT

Chapter 22 PROTECTION OF THE PATIENT

A. The Mental Health Act Commission	...	...	...	...	22.02
B. Complaints Procedures	...	...	...	...	22.15
C. Inquiries and Default Powers	...	...	...	...	22.18
D. Monitoring Services	...	...	...	...	22.22
E. Advocacy	...	...	...	...	22.24

Chapter 23 THE PATIENT'S PROPERTY AND FINANCIAL AFFAIRS

A. Management of the Property and Affairs of Patients by The Court of Protection	...	...	...	...	23.01
B. Alternative Methods of Managing a Patient's Property and Affairs	...	...	...	...	23.14
C. Money for Hospital Patients	...	...	...	...	23.18
D. Contracts, Agency, Wills and Partnerships	...	...	...	...	23.26

Chapter 24 RIGHTS AND DISABILITIES OF PATIENTS

A. The Franchise	...	...	...	...	24.02
B. Elected Officials and Jurors	...	...	...	...	24.07
C. Marriage	...	...	...	...	24.10
D. Divorce	...	...	...	...	24.14
E. Children	...	...	...	...	24.16
F. Litigation	...	...	...	...	24.24
G. Correspondence of Patients	...	...	...	...	24.30
H. Employment	...	...	...	...	24.37
I. Driving Licences	...	...	...	...	24.39
J. Personal Community Charge	...	...	...	...	24.43
K. Access to Medical Records	...	...	...	...	24.44

PART VIII

MISCELLANEOUS

Chapter 25 OFFENCES

A. Offences under Part IX of the Act	...	...	...	...	25.02
B. Sexual Offences	...	...	...	...	25.06
C. Miscellaneous	...	...	...	...	25.12

APPENDIX A

STATUTES

	PAGE
Sexual Offences Act 1956 (Extracts)	A 3
Mental Health Act 1959 (Unrepealed provisions)	A 7
Sexual Offences Act 1967 (Sec. 1)	A 11
Criminal Procedure (Insanity) Act 1964	A 13
Criminal Appeal Act 1968 (Extracts)	A 18
Representation of the People Act 1983 (Sec. 7)	A 34
Mental Health Act 1983	A 37
Registered Homes Act 1984	A 166
Public Trustee and Administration of Funds Act 1986	A 203
Enduring Powers of Attorney Act 1985	A 211
Criminal Procedure (Insanity and Unfitness to Plead) Act 1991	A 229

APPENDIX B

STATUTORY INSTRUMENTS

	PAGE
1983 No. 891 The Mental Health (Nurses) Order 1983	B 7
No. 892 The Mental Health Act Commission (Establishment and Constitution) Order 1983	B 8
No. 893 The Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983	B 10
No. 894 The Mental Health Act Commission Regulations 1983	B 57
No. 942 The Mental Health Review Tribunal Rules 1983	B 60
1984 No. 1578 The Nursing Homes and Mental Nursing Homes Regulations 1984	B 79
1987 No. 1612 The Enduring Powers of Attorney (Prescribed Form) Regulations 1987	B 159
1994 No. 3046 The Court of Protection Rules 1994	B 171
No. 3047 The Court of Protection (Enduring Power of Attorney) Rules 1994	B 205
1996 No. 294 The Mental Health (After-care under Supervision) Regulations 1996	B 225
No. 488 The Authorities for the Ashworth, Broadmoor and Rampton Hospitals (Establishment and Constitution) Order 1966	B 244
No. 489 The Ashworth, Broadmoor and Rampton Hospital Authorities (Functions and Membership) Regulations 1996	B 247
No. 490 The Special Hospitals Service Authority (Abolition) Order 1996	B 259

APPENDIX C

DEPARTMENTAL CIRCULARS

	PAGE
DHSS Circular LAC(86)15	C 15
MHAC Circular – September 1984	C 21
NHS Management Executive HSG(E3)45	C 33
Department of Health and Welsh Office	C 37
H.O. Circular 93/1991	C 125
Department of Health Circular LAC(93)10	C 135
NHS Management Executive HSG(94)5	C 159
NHS Executive HSG(94)27	C 169

APPENDIX CA
PRACTICE NOTES

issued by the Mental Health Act Commission

	PAGE
Practice Note 1	CA 3
Practice Note 2	CA 7
Practice Note 3	CA 11

APPENDIX D

FORMS AND RECORDS REQUIRED UNDER THE MENTAL HEALTH ACT
1983 AND THE REGISTERED HOMES ACT 1984

APPENDIX E

SUMMARY OF PROCEDURAL REQUIREMENTS
in respect of
COMPULSORY ADMISSION TO HOSPITAL AND GUARDIANSHIP

DETAILED TABLE OF CONTENTS

	PAGE
AUTHOR'S PREFACE	v
ACKNOWLEDGEMENTS	ix
REVIEW OF CONTENTS	xi
SUMMARY OF CONTENTS	xv
DETAILED TABLE OF CONTENTS	xxi
TABLE OF STATUTES	lvii
TABLE OF STATUTORY INSTRUMENTS	lxxiii
TABLE OF CASES	lxxxix

PARAGRAPH

PART I

THE STRUCTURE OF THE MENTAL HEALTH SERVICES

Chapter 1. AN HISTORICAL REVIEW OF MENTAL HEALTH LEGISLATION

A. EARLY HISTORY

Introduction	1.01
The Poor Insane	1.02
<i>The Pauper Lunatic</i>	1.02.1
<i>Vagrancy: The Dangerous Lunatic</i>	1.02.2
Criminal Insanity	1.03
<i>Criminal Lunacy: An Overview</i>	1.03.1
<i>Acquitted by reason of Insanity</i>	1.03.2
<i>Insanity on Arraignment</i>	1.03.3
County Asylums for Paupers and Criminals	1.04
The Non-Pauper Insane	1.05
<i>The Private Madhouse</i>	1.05.1
<i>The Early Habeas Corpus Cases</i>	1.05.2
<i>The Metropolitan Commissioners</i>	1.05.3
<i>The Lunatics Act 1845</i>	1.05.4
The Advent of Legalism	1.06
<i>Introduction</i>	1.06.1
<i>The Lunacy Act 1890</i>	1.06.2
<i>The Mental Treatment Act 1930</i>	1.06.3
Mental Deficiency Legislation	1.07
<i>The Idiots Act 1886</i>	1.07.1

DETAILED TABLE OF CONTENTS

	PARAGRAPH
<i>Segregation of "Defectives" from Society</i>	1.07.2
<i>Legal machinery for care and detention of "mental defectives"</i>	1.07.3
<i>Transfer of responsibility for supervision and protection of "defectives" from Local Authorities to the Health Service</i>	1.07.4
<i>The medicalisation of subnormality</i>	1.07.5
B. PRINCIPLES OF CONTEMPORARY LEGISLATION	
The Royal Commission leading to the Mental Health Act 1959	1.08
<i>The Assimilation of Psychiatry with General Medicine</i>	1.08.1
<i>Care without Compulsion</i>	1.08.2
<i>Equivalence in Status</i>	1.08.3
<i>No "Designation" of Hospitals</i>	1.08.4
<i>The Mental Health Act 1959</i>	1.08.5
The Process of Reform of the 1959 Act	1.09
<i>Public Enquiries</i>	1.09.1
<i>Proposals for Reform</i>	1.09.2
The European Convention of Human Rights	1.10
The Mental Health (Amendment) Act 1982	1.11
<i>The Right to Services</i>	1.11.1
<i>Setting Limits on the Exercise of Compulsory Powers</i>	1.11.2
<i>Maintaining the Civil and Social Status of Patients</i> ...	1.11.3
The Mental Health Act 1983	1.12
Chapter 2. THE ORGANISATION OF THE NATIONAL HEALTH SERVICE	
A. BACKGROUND	
Introduction	2.01
<i>The Royal Commission on the National Health Service 1979</i>	2.01.1
<i>"Patients First"</i>	2.01.2
Current Legislation	2.02
B. THE SECRETARY OF STATE FOR SOCIAL SERVICES AND THE SECRETARY OF STATE FOR WALES	
Introduction	2.03
Services	2.04
<i>Duties as to Services</i>	2.04.1
<i>Powers as to Services</i>	2.04.2
<i>Charges as to Services</i>	2.04.3
Miscellaneous Functions relating to Mental Health	2.05
C.—REGIONAL HEALTH AUTHORITIES	
Introduction	2.06

DETAILED TABLE OF CONTENTS:**xxiii**

	PARAGRAPH
Membership	2.07
Conduct of Meetings	2.08
Functions	2.09
Consultant's Contracts	2.10

D. DISTRICT HEALTH AUTHORITIES

Introduction	2.11
Membership	2.12
Conduct of Meetings	2.13
Functions	2.14
Management Arrangements within Districts	2.15

E. SPECIAL HEALTH AUTHORITIES

Establishment	2.16
----------------------	------

F. FAMILY PRACTITIONER COMMITTEES

Establishment	2.17
----------------------	------

G. DELEGATION OF AUTHORITY

Introduction	2.18
Approval of Medical Practitioners under section 12 of the Mental Health Act 1983	2.19

H. PROFESSIONAL ADVISORY MACHINERY

Standing and Local Advisory Committees	2.20
-----------------------------------------------	------

**J. CO-OPERATION BETWEEN HEALTH
AUTHORITIES AND LOCAL AUTHORITIES**

Introduction	2.21
Coterminosity	2.22
Joint Consultation and Planning	2.23
<i>Establishment and functions of joint consultative committees</i>	2.23.1
<i>Duties and powers of Secretary of State</i>	2.23.2
<i>Joint care planning teams</i>	2.23.3
Joint Financing of Community Services	2.24
<i>Power to make payments towards expenditure on community services</i>	2.24.1
<i>Services provided by voluntary organisations</i>	2.24.2
<i>Power of Secretary of State to make payments towards expenditure on community services in Wales</i>	2.24.3

	PARAGRAPH
Care in the Community: Transfer of Resources from Health Authorities to Local Authorities	2.25
Exchange of Goods and Services	2.26
K. COMMUNITY HEALTH COUNCILS	
Establishing Authority	2.27
Membership	2.28
Staffing	2.29
Functions	2.30
<i>Representation of local interests</i>	2.30.1
<i>Advising on the operation of the Health Service</i>	2.30.2
<i>Consultation</i>	2.30.3
<i>Information to be furnished by District Health Authorities and Family Practitioner Committees</i>	2.30.4
<i>Visits to Health Services Premises</i>	2.30.5
<i>Complaints</i>	2.30.6
<i>Attendance at Meetings of District Health Authorities and Family Practitioner Committees</i>	2.30.7
Conduct of Meetings	2.31
Chapter 3. HOSPITAL AND SPECIAL HOSPITAL SERVICES	
Introduction	3.01
A. HOSPITAL WITHIN THE MEANING OF THE MENTAL HEALTH ACT	
Definitions of Hospital	3.02
<i>Definition of Hospital for the purposes of Compulsory Admission</i>	3.02.1
<i>Hospital under No Duty to Admit Mentally Disordered Persons</i>	3.03
<i>Where the Managers have no power to refuse admission</i>	3.03.1
B. SPECIAL HOSPITALS	
Definition of Special Hospital	3.04
<i>"For persons subject to detention"</i>	3.04.1
<i>"Special Security"</i>	3.04.2
<i>"Dangerous, violent or criminal propensities"</i>	3.04.3
Management	3.05
<i>The Secretary of State</i>	3.05.1
<i>Delegation of Management Functions</i>	3.05.2
The Four Special Hospitals	3.06
<i>Broadmoor Hospital</i>	3.06.1
<i>Rampton Hospital and the Eastdale Unit</i>	3.06.2
<i>Moss Side Hospital</i>	3.06.3
<i>Park Lane Hospital</i>	3.06.4

DETAILED TABLE OF CONTENTS**XXV**

	PARAGRAPH
Admission and Discharge	3.07
Transfers	3.08
<i>Difficulty in effecting transfer to local National Health Service Hospital</i>	3.08.1
Application of Mental Health Act to Special Hospital Patients	3.09
Travelling Expenses of Visitors to Patients	3.10
Application of the Official Secrets Act	3.11
Investigation of Complaints	3.12
Special Hospitals Research Unit	3.13

C. REGIONAL SECURE UNITS

Background	3.14
Management	3.15

Chapter 4. **LOCAL AUTHORITY SERVICES AND FUNCTIONS**

Introduction	4.01
---------------------	------

A. SOCIAL SERVICES

Introduction	4.02
Legislative Structure	4.03
Organisation of Social Services	4.04
<i>Definition of Local Social Services Authority</i>	4.04.1
<i>Social Services Committee</i>	4.04.2
<i>The Director of Social Services</i>	4.04.3
Accommodation provided under Section 21(1) of the National Assistance Act 1948 (Part III Accommodation)	4.05
<i>Management of Part III Accommodation</i>	4.05.1
<i>The Local Authority which has the power to provide Part III accommodation</i>	4.05.2
Welfare Services provided under Section 29(1) of the National Assistance Act 1948	4.06
<i>Use of Voluntary Organisation</i>	4.06.1
Prevention of Illness, Care and After-care provided under the National Health Service Act 1977	4.07
After Care Services under the Mental Health Act 1983	4.08
<i>Entitlement to services</i>	4.08.1
<i>Patients "liable to be detained"</i>	4.08.2
<i>Duration of Duty</i>	4.08.3
<i>Authority responsible for providing after-care services</i>	4.08.4
<i>Enforcement of duties</i>	4.08.5

DETAILED TABLE OF CONTENTS

	PARAGRAPH
Powers of Entry and Inspection	4.09
<i>By Approved Social Worker</i>	4.09.1
<i>By a Duly Authorised Officer of the Secretary of State</i>	4.09.2
<i>By a person authorised by a Local Authority</i>	4.09.3
Miscellaneous Functions of Local Social Services Authorities	4.10
<i>Approved Social Workers</i>	4.10.1
<i>Welfare of Certain Hospital Patients</i>	4.10.2
B. HOUSING	
Introduction	4.11
General Housing Obligations	4.12
<i>Definition of Local Authority</i>	4.12.1
<i>Review of Housing Needs</i>	4.12.2
<i>Provision of Accommodation and accompanying services</i>	4.12.3
<i>Enforcement of Duties and Investigation of Complaints</i>	4.12.4
Homeless Persons	4.13
<i>Homelessness and Threatened Homelessness</i>	4.13.1
<i>Priority Need</i>	4.13.2
<i>Intentional Homelessness</i>	4.13.3
<i>Inquiries into possible Homelessness</i>	4.13.4
<i>Housing Authority Duties</i>	4.13.5
<i>Local Connections</i>	4.13.6
<i>Co-operation between Authorities</i>	4.13.7
Application of Homeless Persons provisions to Mentally	
Disordered Persons	4.14
<i>Homelessness</i>	4.14.1
<i>Threatened with homelessness</i>	4.14.2
<i>Intentional Homelessness</i>	4.14.3
<i>Incapacity to manage affairs</i>	4.14.4
<i>Priority Need</i>	4.14.5
<i>Local Connections</i>	4.14.6
<i>Protection of Personal Property</i>	4.14.7
The Housing Corporation	4.15
Housing Associations	4.16
<i>Promotion and Assistance of Housing Associations by</i>	
<i>Local Authorities</i>	4.16.1
<i>Financial Assistance</i>	4.16.2
<i>"Joint Funding" Arrangements</i>	4.16.3
Planning Permission	4.17
<i>Restrictions on Development on "Green Belt" Land</i>	4.17.1
C. EDUCATION	
Background	4.18

DETAILED TABLE OF CONTENTS

xxvii

	PARAGRAPH
<i>Transfer of Responsibilities to Local Education Authorities</i>	4.18.1
<i>Classification of Children</i>	4.18.2
<i>Integration of Handicapped Children in Ordinary Schools</i>	4.18.3
<i>The Warnock Report</i>	4.18.4
Implementation of the Warnock Report	4.19
Legislative Structure	4.20
Statutory Duty to provide education to all children of school age	4.21
<i>Education up to the age of nineteen</i>	4.21.1
Special Education Provision	4.22
<i>Meaning of Special Educational Needs</i>	4.22.1
<i>Duty of Governors</i>	4.22.2
Identification and Assessment of Children with Special Needs	4.23
<i>Identification of Special Needs</i>	4.23.1
<i>Duties of District Health Authority: Referral for advice to Voluntary Organisation</i>	4.23.2
<i>Assessment of Special Needs of Children under Age Two</i>	4.23.3
<i>Assessment of Special Needs of Children aged Two and Older</i>	4.23.4
<i>Parental Requests for Assessments</i>	4.23.5
<i>Examinations for the purpose of Assessment</i>	4.23.6
Statement of Special Needs	4.24
<i>Duty to make and maintain a Statement</i>	4.24.1
<i>Appeals against Statements</i>	4.24.2
Examination in aid of the exercise of the Secretary of State's powers	4.25
Parental Rights and Responsibilities	4.26
<i>Duty of parent to ensure that child receives education</i>	4.26.1
<i>Parental Involvement</i>	4.26.2
Special Schools	4.27
<i>Withdrawal from Special School</i>	4.27.1
<i>Closing of Special Schools</i>	4.27.2
Independent Schools	4.28
Integration of Handicapped Children in Ordinary Schools	4.29
Place of Education	4.30
<i>Education in Hospital</i>	4.30.1
<i>Education otherwise than at School</i>	4.30.2
Review of Local Authority's or Governor's Discretion ...	4.31
<i>Secretary of State's Power to prevent unreasonable exercise of functions</i>	4.31.1
<i>Default Powers</i>	4.32.2

	PARAGRAPH
Chapter 5. INDEPENDENT SECTOR CARE AND TREATMENT	
Introduction	5.01
<i>Dual Registration</i>	5.01.1
A. MENTAL NURSING HOMES	
Definition	5.02
<i>For the purposes of Part II or III of the Mental Health Act 1983</i>	5.02.1
Registration	5.03
<i>Requirement for registration</i>	5.03.1
<i>Refusal of Registration</i>	5.03.2
<i>Additional registration conditions</i>	5.03.3
<i>Cancellation of Registration</i>	5.03.4
<i>Urgent procedure for cancellation of registration</i>	5.03.5
Prohibition of holding out premises as a Mental Nursing Home	5.04
Regulations	5.05
<i>As to conduct of mental nursing homes</i>	5.05.1
<i>Supplementary regulations</i>	5.05.2
Review Process	5.06
<i>Notice of conditions, or refusal of registration</i>	5.06.1
<i>Right to make representations</i>	5.06.1
<i>Appeal</i>	5.06.3
Inspection of Mental Nursing Homes and Visiting Patients	5.07
<i>Inspection of homes and records</i>	5.07.1
<i>Interviewing patients</i>	5.07.2
<i>Frequency of visiting</i>	5.07.3
<i>Obstruction</i>	5.07.4
Effect of cancellation or death on registration	5.08
Ancillary provisions of the Mental Health Act 1983	5.09
B. RESIDENTIAL CARE HOMES	
Definition	5.10
Registration	5.11
<i>Requirement of registration</i>	5.11.1
<i>Registration procedure</i>	5.11.2
<i>Refusal of registration</i>	5.11.3
<i>Conditions of registration</i>	5.11.4
<i>Inspection of registers</i>	5.11.4
<i>Cancellation of registration</i>	5.11.6
<i>Urgent procedure for cancellation of registration</i>	5.11.7
Review Process	5.12
<i>Notice of conditions, or refusal, of registration</i>	5.12.1

DETAILED TABLE OF CONTENTS

xxix

	PARAGRAPH
<i>Right to make representations</i>	5.12.2
<i>Appeals</i>	5.12.3
Regulations as to conduct of Residential Care Homes ...	5.13
Inspection of Homes	5.14
<i>Persons authorised by the Secretary of State</i>	5.14.1
<i>Persons authorised by the local social services Authority</i>	5.14.2
<i>Inspection of records</i>	5.14.3
<i>Regulating the times when homes must be inspected</i>	5.14.4
Offences:	5.15
<i>Penalties</i>	5.15.1
<i>Defences</i>	5.15.2

C. REGISTERED HOMES TRIBUNALS

Constitution	5.16
<i>Constitution for appeals relating to mental nursing homes</i>	5.16.1
Procedure	5.17

PART II

PERSONNEL IN THE MENTAL HEALTH SERVICES

Chapter 6. **MANAGEMENT, MEDICAL AND NURSING STAFF**

A. MANAGEMENT

Definition of "the Managers"	6.01
Concept of Management	6.02
Admission and Transferr	6.03
Scrutiny of documents	6.04
<i>Access by patient to his admission forms</i>	6.04.1
<i>Mental Health Act Commission</i>	6.04.2
Rectification of documents	6.05
<i>"Incorrect or defective" documents</i>	6.05.1
<i>Insufficient medical recommendation</i>	6.05.2
Continuing Detention, Discharge and the Managers Hearing	6.06
Duty to inform Detained Patients	6.07
Duty to inform Nearest Relative of Discharge	6.08
Reference to Tribunal	6.09
Correspondence	6.10
Record Keeping and Reports	6.11

DETAILED TABLE OF CONTENTS

	PARAGRAPH
General Management Functions	6.12
Service of Documents	6.13
B. MEDICAL PRACTITIONERS	
The General Medical Council	6.14
Registration of Medical Practitioners	6.15
Royal College of Psychiatrists	6.16
Statutory Definitions and Functions	6.17
<i>Responsible Medical Officer</i>	6.17.1
<i>Nominated Medical Attendant</i>	6.17.2
<i>Appropriate Medical Officer</i>	6.17.3
<i>Registered Medical Practitioner in charge of treatment</i>	6.17.4
<i>Approved Medical Practitioner</i>	6.17.5
C. NURSING STAFF	
The United Kingdom Central Council and the National Boards	6.18
Register of Nurses	6.19
<i>Removal from and restoration to the Register</i>	6.19.1
Statutory Functions	6.20

Chapter 7. THE APPROVED SOCIAL WORKER

A. BACKGROUND

From Overseer of the Poor to Duly Authorised Officer	7.01
From Duly Authorised Officer to Mental Welfare Officer	7.02
From Mental Welfare Officer to Approved Social Worker	7.03
<i>Brady's Case</i>	7.03.1
<i>Proposals for an Approved Social Worker</i>	7.03.2

B. SOURCE OF AUTHORITY

Definition of Approved Social Worker	7.04
Approval and Re-approval	7.05
<i>Background</i>	7.05.1
<i>Directions of the Secretary of State</i>	7.05.2
<i>Approval</i>	7.05.3
<i>Transitional Approval</i>	7.05.4
<i>Movement of ASW to another authority</i>	7.05.5
Training	7.06
Eligibility for Assessment	7.07

DETAILED TABLE OF CONTENTS

xxxii

	PARAGRAPH
Content of the Assessment and Procedures	7.08
Transitional Arrangements	7.09
C. STATUTORY FUNCTIONS	
Introduction	7.10
Applications under Part II	7.11
Duty to inform or consult Nearest Relative	7.12
The "Liberty Interest" and monitoring the statutory procedure	7.13
Duty to make application	7.14
<i>Territorial limitation</i>	7.14.1
<i>Satisfaction as to the statutory criteria</i>	7.14.2
<i>Personal and independent responsibility</i>	7.14.3
<i>Evidence to be taken into account</i>	7.14.4
<i>"Canvassing" Opinions</i>	7.14.5
<i>Implications of a decision not to make an application</i>	7.14.6
Power to make application	7.15
Duty to interview before making application	7.16
<i>"Most appropriate way of providing care"</i>	7.16.1
Duty of Social Services Authority to direct ASW to consider making an application	7.17
Social Reports	7.18
Displacement of Nearest Relative	7.19
Displacement of Guardian	7.20
Application by Approved Social Worker based in a Hospital	7.21
Restraint or Trespass before an application is duly completed	7.22
Conveyance to Hospital after an application is duly completed	7.23
Reports for Tribunals	7.24
<i>Disclosure of Report to Patient</i>	7.24.1
After-care and other local authority services and miscellaneous functions	7.25
D. IMPLICATIONS FOR SOCIAL WORK PRACTICE	
The Compulsory Admission Decision	7.26
Conclusion	7.27
E. SUMMARY OF STATUTORY DUTIES AND FUNCTIONS OF SOCIAL WORKERS AND SOCIAL SERVICES AUTHORITIES	

Chapter 8.	THE ROLE OF THE FAMILY	PARAGRAPH
	A. DEFINITION AND FUNCTIONS	
	Background	8.01
	Definition of "Relative" and "Nearest Relative"	8.02
	The Functions of Nearest Relatives	8.03
	Authorising another person to act as Nearest Relative ...	8.04
	B. APPOINTMENT BY THE COUNTY COURT OF AN ACTING NEAREST RELATIVE	
	Application for Appointment of Acting Nearest Relative	8.05
	Functions of the Acting Nearest Relative	8.06
	"Unreasonable" Objection to the making of an Application	8.07
	Discharge, Variation and Expiration of Order	8.08
	Procedure on Application to the County Court	8.09
	PART III	
	ADMISSION TO HOSPITAL AND GUARDIANSHIP	
Chapter 9.	THE DEFINITION OF MENTAL DISORDER	
	A. STATUTORY DEFINITIONS	
	Mental Disorder	9.01
	Mental Illness	9.02
	Severe Mental Impairment and Mental Impairment	9.03
	<i>Comparison with 1959 Act</i>	9.03.1
	<i>Mental Handicap still included in 1983 Act</i>	9.03.2
	Derivation of "mental impairment"	9.03.3
	Psychopathic Disorder	9.04
	<i>Commentary</i>	9.04.1
	Abnormally Aggressive or Seriously Irresponsible Conduct	9.05
	Classification and Reclassification	9.06
	B. PSYCHIATRIC DIAGNOSES	
	Mental Illness	9.07
	Mental Handicap	9.08
	C. "UN SOUNDNESS OF MIND" UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS	
	Article 5(1)	9.09
	<i>"In accordance with a procedure prescribed by law"</i>	9.09.1
	<i>"Lawful detention of a person of unsound mind"</i> ...	9.09.2

DETAILED TABLE OF CONTENTS

	PARAGRAPH
<i>Procedures</i>	11.06.2
<i>Medical Recommendations</i>	11.06.3
<i>Conveyance, admission and detention</i>	11.06.4
<i>Renewal of Authority to detain: The "Viability" Criterion</i>	11.06.5
<i>Form of mental disorder and reclassification</i>	11.06.6
<i>Discharge</i>	11.06.7
B. GUARDIANSHIP	
Guardianship Applications	11.07
<i>Introduction</i>	11.07.1
<i>Grounds</i>	11.07.2
<i>Procedures</i>	11.07.3
<i>Medical Recommendations</i>	11.07.4
<i>Effect</i>	11.07.5
<i>Duration</i>	11.07.6
<i>Discharge</i>	11.07.7
Regulations as to Guardianship	11.08
Transfer of Guardianship	11.09
C. GENERAL PROVISIONS AS TO APPLICATIONS AND MEDICAL RECOMMENDATIONS	
Medical Recommendations	11.10
Applications	11.11
Rectification of Applications and Recommendations	11.12
D. POSITION OF PATIENTS SUBJECT TO DETENTION OR GUARDIANSHIP	
Leave of Absence from Hospital	11.13
Absence Without Leave	11.14
Patients Absent from Hospital in England and Wales ...	11.15
Special Provisions as to Patients Absent Without Leave	11.16
Special Provisions as to Patients Sentenced to Imprisonment	11.17
Transfer of Patients	11.18
<i>Transfers between hospitals under different managers</i>	11.18.1
<i>Transfers between hospitals under the same managers</i>	11.18.2
<i>Transfers from hospital into guardianship</i>	11.18.3
<i>Transfer between guardians</i>	11.18.4
<i>Transfer from guardianship to hospital</i>	11.18.5

DETAILED TABLE OF CONTENTS

XXXV

PART IV

PARAGRAPH

PATIENTS CONCERNED IN CRIMINAL PROCEEDINGS

Chapter 12	POWERS OF THE POLICE AND THE DECISION TO PROSECUTE	
	Introduction	12.01
	A. POWERS OF THE POLICE	
	Mentally Disordered Person Found in a Public Place	12.02
	<i>"A place to which the public have access"</i>	12.02.1
	<i>"Appears to be suffering from mental disorder and to be in immediate need of care or control"</i>	12.02.2
	<i>"Place of safety"</i>	12.02.3
	<i>Powers of removal and detention</i>	12.02.4
	<i>Medical examination and social work interview</i>	12.02.5
	<i>Hospital managers have no duty to admit</i>	12.02.6
	<i>Comment</i>	12.02.7
	Assistance from the Police to Retake Patients or to Remove them to a Place of Safety	12.03
	<i>Warrant to enter premises</i>	12.03.1
	<i>Retaking patients</i>	12.03.2
	B. THE DECISION TO PROSECUTE	
	The Decision to take a Mentally Disordered Person into Police Custody and to Prosecute	12.04
	<i>Criteria for deciding whether prosecution is in the public's interest</i>	12.04.1
	Interrogation of Mentally Disordered People in Police Custody	12.05
	<i>Maximum periods of detention</i>	12.05.1
	<i>Right to have someone informed when arrested</i>	12.05.2
	<i>Confessions...</i>	12.05.3
	<i>Home Office guidelines</i>	12.05.4
Chapter 13.	MENTAL DISORDER AT THE TIME OF THE OFFENCE	
	Introduction	13.01
	A. THE INSANITY DEFENCE	
	Insanity distinguished from Non-Insane Automatism	13.02
	The Special Verdict	13.03
	The M'Naghten Rules	13.04
	<i>"Disease of the Mind"</i>	13.04.1
	<i>"Defect of Reason"</i>	13.04.2
	<i>"The Nature and Quality of the Act"</i>	13.04.3
	<i>"Did not know he was doing what was wrong"</i>	13.04.4

DETAILED TABLE OF CONTENTS

	PARAGRAPH
<i>What medical evidence is necessary to prove insanity under the rules?</i>	13.04.5
<i>Criticism of the M'Naghten Rules</i>	13.04.6
The Mandatory Disposal	13.05
<i>Commentary</i>	13.05.1
<i>Entitlement to apply to a Mental Health Review Tribunal</i>	13.05.2
B. DIMINISHED RESPONSIBILITY	
Introduction	13.06
“Abnormality of mind”	13.07
“ <i>Substantially impaired his mental responsibility</i> ”	13.07.1
Sentencing	13.08
The proposal for Abolition of Mandatory Life Sentence for Murder	13.09
C. INFANTICIDE	
The Infanticide Act 1938	13.10
Chapter 14. MENTAL DISORDER AT THE TIME OF THE TRIAL	
Introduction	14.01
A. TRANSFER TO HOSPITAL OF UNSENTENCED PRISONERS	
The Basic Provisions	14.02
<i>Grounds and Procedures</i>	14.02.1
<i>Effect of Transfer Direction</i>	14.02.2
Duration of Transfer Direction	14.03
<i>Persons detained in Prison or remand centre</i>	14.03.1
<i>Persons remanded by the Magistrates' Court</i>	14.03.2
<i>Civil Prisoners and persons detained under the Immigration Act 1971</i>	14.03.3
Proposals for Reform	14.04
B. UNFITNESS TO PLEAD	
Terminology	14.05
Who can raise the Issue of Disability	14.06
<i>Burden of Proof</i>	14.06.1
The Substantive Test to be applied	14.07
Postponement of the Issue of Disability	14.08
Determination by a Jury	14.09
Appeal	14.10

DETAILED TABLE OF CONTENTS

xxxvii

PARAGRAPH

Effect of a Finding of Disability	14.11
Remit for Trial	14.12
Proposals for Reform	14.13

C. REMANDS TO HOSPITAL AND INTERIM HOSPITAL ORDERS

Remand to Hospital for Report	14.14
<i>To whom does a Remand for Report apply?</i>	14.14.1
<i>Grounds and Procedures</i>	14.14.2
<i>Duration of Remand for Report</i>	14.14.3
<i>Effect of Remand for Report</i>	14.14.4
Remand to Hospital for Treatment	14.15
<i>To whom does a Remand for Treatment apply?</i>	14.15.1
<i>Grounds and Procedures</i>	14.15.2
<i>Duration of Remand for Treatment</i>	14.15.3
<i>Effect of Remand for Treatment</i>	14.15.4
Interim Hospital Orders	14.16
<i>To whom does an Interim Hospital Order apply?</i>	14.16.1
<i>Grounds and Procedures</i>	14.16.2
<i>Duration of Interim Hospital Order</i>	14.16.3
<i>Effect of Interim Hospital Order</i>	14.16.4

Chapter 15. MENTAL DISORDER AT THE TIME OF SENTENCING

Introduction	15.01
---------------------	--------------

A. HOSPITAL ORDER

No causal connection between the Mental Disorder and the Offence	15.02
Preference for a Hospital Order over a Sentence of Imprisonment	15.03
Who can be made the subject of a Hospital Order	15.04
Magistrates' power to make a Hospital Order without recording a conviction	15.05
<i>When defendant is incompetent to consent to summary trial</i>	15.05.1
<i>When defendant elects a jury trial</i>	15.05.2
<i>Appeal</i>	15.05.3
Grounds and Procedures for making a Hospital Order	15.06
Admission to a Hospital within twenty-eight days of the order	15.07
Difficulties in finding a Hospital Bed	15.08
Information on Availability of Hospital Places	15.09
Effect of Hospital Order	15.10

B. HOSPITAL ORDER WITH RESTRICTION ON DISCHARGE

Background: X v The United Kingdom	15.11
Grounds for making a Restriction Order	15.12
Duration of the Restriction Order	15.13
Power of Magistrates' Court to commit to Crown Court for making of Restriction Order	15.14
<i>Committal in custody</i>	15.14.1
<i>Committal to Hospital</i>	15.14.2
Effect of a Restriction Order	15.15
Powers of the Home Secretary over Restricted Patients	15.16
<i>Removal of Restrictions</i>	15.16.1
<i>Absolute Discharge...</i>	15.16.2
<i>Conditional Discharge and Recall</i>	15.16.3
The Exercise of the Home Secretary's Powers	15.17
The Mental Health Review Tribunal	15.18
The Responsible Medical Officer	15.19
The Advisory Board on Restricted Patients	15.20
Detention during Her Majesty's pleasure	15.21

C. GUARDIANSHIP ORDER

Making Guardianship Orders	15.22
<i>Who can be the subject of a Guardianship Order</i>	15.22.1
<i>Criteria and procedures</i>	15.22.2
<i>Willingness of guardian</i>	15.22.3
<i>Effect of Guardianship Order</i>	15.22.4

D. MEDICAL EVIDENCE

General requirements	15.23
-----------------------------	-------

E. PSYCHIATRIC TREATMENT AS A CONDITION OF PROBATION

Probation Orders in general	15.24
Probation Order with a condition of Psychiatric Treatment	15.25

Chapter 16. **TRANSFER TO HOSPITAL OF PERSONS SERVING SENTENCES OF IMPRISONMENT**

Background	16.01
Criteria and Procedures	16.02
Effect of Transfer Direction	16.03

DETAILED TABLE OF CONTENTS

	PARAGRAPH
<i>Restriction Order or Restriction Direction</i>	18.04.5
<i>Guardianship Order</i>	18.04.6
<i>Hospital Order patients who can apply within the first six months of the order</i>	18.04.7
<i>Withdrawal of Application</i>	18.04.8
Automatic references	18.05
References by the Secretary of State at his discretion ...	18.06
 C. POWERS IN RESPECT OF UNRESTRICTED PATIENTS	
Introduction	18.07
Discharge	18.08
<i>Admission for assessment (s.2)</i>	18.08.1
<i>Admission for treatment (s.3) or hospital order patients (s.37)</i>	18.08.2
<i>Guardianship patients (s.7 or 37)</i>	18.08.3
Delayed Discharge	18.09
Recommendation for Transfer or Leave of Absence	18.10
Reclassification	18.11
 D. POWERS IN RESPECT OF RESTRICTED PATIENTS	
Introduction	18.12
Conditional Discharge	18.13
Conditional Discharge	18.14
<i>Deferred direction for conditional discharge</i>	18.14.1
Reclassification	18.15
Recommendations for Transfer, Leave of Absence and the Removal of Restrictions	18.16
Patients subject to a Restriction Direction	18.17
<i>Absolute discharge of sentenced prisoners</i>	18.17.1
<i>Conditional discharge of sentenced prisoners who have been transferred to hospital</i>	18.17.2
<i>Discharge of unsentenced prisoners who have been transferred to hospital</i>	18.17.3
<i>Reclassification</i>	18.17.4
<i>Advising the Home Secretary</i>	18.17.5
Conditionally Discharged Patients	18.18
<i>Change of conditions</i>	18.18.1
<i>Cessation of restriction order or direction</i>	18.18.2
<i>Reclassification</i>	18.18.3

E. PROCEDURES

Introduction	18.19
Application and Notice	18.20
Representation and Finance	18.21
Information for the Tribunal	18.22
<i>The responsible authority's statement</i>	18.22.1
<i>The Home Secretary's statement</i>	18.22.2
<i>Statement relating to conditionally discharged patients</i>	18.22.3
<i>Further documents received by the tribunal and distributed under Rule 2</i>	18.22.4
<i>Disclosure of information</i>	18.22.5
Conduct of the Proceedings	18.23
<i>A speedy and just determination</i>	18.23.1
Decision	18.24
Case Stated	18.25
<i>Tribunal which proceeds on opinion of medical member</i>	18.25.1
Assessment Applications	18.26

Chapter 19. **REMOVAL AND RETURN OF PATIENTS AND REPATRIATION OF PRISONERS**

Introduction	19.01
Removal of Patients to Scotland	19.02
Removal To and From Northern Ireland	19.03
<i>Removal of patients to Northern Ireland</i>	19.03.1
<i>Removal to England and Wales of patients from Northern Ireland</i>	19.03.2
Removal to and from the Channel Islands and Isle of Man	19.04
<i>Removal of patients to the Channel Islands and Isle of Man</i>	19.04.1
<i>Removal to England and Wales of offenders found insane in the Channel Islands and Isle of Man</i>	19.04.2
<i>Patients removed from the Channel Islands or Isle of Man</i>	19.04.3
Removal of Alien Patients	19.05
Return of Patients Absent Without Leave	19.06
<i>Patients absent from hospital in Northern Ireland</i>	19.06.1
<i>Patients absent from hospital in England and Wales</i>	19.06.2
<i>Patients absent from hospital in the Channel Islands and the Isle of Man</i>	19.06.3
Repatriation of Prisoners	19.07
<i>Consent of the prisoner is required</i>	19.07.1

PART VI

TREATMENT AND RESTRAINT

Chapter 20.	THE THERAPEUTIC RELATIONSHIP: TREATMENT AND CONFIDENTIALITY	
	Introduction	20.01
	A. TREATMENT FOR MENTAL DISORDER	
	Definition of "Medical Treatment"	20.02
	Milieu Therapy	20.03
	Psychotherapy	20.04
	Drug Treatment (Chemotherapy)	20.05
	<i>Phenothiazines</i>	20.05.1
	<i>Minor tranquillisers</i>	20.05.2
	<i>Antidepressants</i>	20.05.3
	Electroconvulsive Therapy (ECT)	20.06
	Psychosurgery	20.07
	Behaviour Modification	20.08
	Sterilisation	20.09
	B. CONSENT TO TREATMENT UNDER THE COMMON LAW	
	Applicability of Common Law Principles to Mentally Disordered Persons	20.10
	Trespass to the Person: The Basic Principles	20.11
	Information	20.12
	<i>Duty of disclosure</i>	20.12.1
	<i>Further guidance as to disclosure of information</i>	20.12.2
	Competency	20.13
	<i>Children aged 16 or older</i>	20.13.1
	<i>The court can override the decision of a parent where it is in the child's best interests</i>	20.13.2
	<i>Can a parent's decision be overridden without the intervention of a court?</i>	20.13.3
	<i>Mentally disordered persons</i>	20.13.4
	Voluntariness	20.14
	Specificity	20.15
	Necessity: Treatment in the Absence of Consent	20.16
	<i>Treating a permanently incompetent patient</i>	20.16.1

DETAILED TABLE OF CONTENTS

PARAGRAPH

**C. CONSENT TO TREATMENT UNDER PART IV
OF THE MENTAL HEALTH ACT**

Background	20.17
Patients to whom Part IV Applies	20.18
What Forms of Treatment are governed by Part IV?	20.19
<i>Treatment must be for mental disorder</i>	20.19.1
<i>Treatment must be under the direction of the RMO</i>	20.19.2
<i>It must be "medical treatment" and not "restraint"</i>	20.19.3
Treatment Requiring Consent AND a Second Opinion (Section 57)	20.20
<i>To whom does section 57 apply?</i>	20.20.1
<i>Treatments which give rise to special concern</i>	20.20.2
<i>Procedure for giving treatment under section 57</i>	20.20.3
<i>Commentary</i>	20.20.4
<i>Code of practice</i>	20.20.5
Treatment Requiring Consent OR a Second Opinion (Section 58)	20.21
<i>Treatments to which section 58 applies</i>	20.21.1
<i>The "three months" rule</i>	20.21.2
<i>Procedure for giving treatment under section 58</i>	20.21.3
<i>Commentary</i>	20.21.4
Appointment of Doctors and Others to Certify Consent and give Second opinions	20.22
Visiting Patients and Inspection of Records	20.23
Plans of Treatment	20.24
Withdrawal of Consent	20.25
<i>Withdrawal of consent to medication</i>	20.25.1
Review of Treatment	20.26
Urgent Treatment	20.27
Treatment Not Requiring Consent	20.28

**D. RIGHT TO TREATMENT UNDER THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

Article 5(1) Protects Only the Right to Liberty and Not the Right to Treatment	20.29
------------------------------------------------------------------------------------------	-------

E. CONFIDENTIALITY

Professional Responsibility	20.30
<i>Background</i>	20.30.1
<i>Definition of "confidence"</i>	20.30.2
<i>Extended confidence</i>	20.30.3

DETAILED TABLE OF CONTENTS

	PARAGRAPH
Ownership of Medical Records	20.31
The Law of Confidence	20.32
<i>Background</i>	20.32.1
<i>Relationships in which information becomes impressed with the obligation of confidence</i>	20.32.2
<i>The parties to a confidential relationship</i>	20.32.3
<i>Is negligent disclosure of information actionable?</i>	20.32.4
<i>The information must be secret</i>	20.32.5
<i>Where it is in the public interest to disclose information</i>	20.32.6
<i>Disclosure required by statute or by Court Order</i>	20.32.7
<i>Privilege</i>	20.32.8
<i>Remedies</i>	20.32.9
Proposals for Reform of the Law of Confidence	20.33
Personal Information held on Computer: The Data Protection Act 1984	20.34
<i>Introduction</i>	20.34.1
<i>Registration</i>	20.34.2
<i>Data Protection Principles</i>	20.34.3
<i>Rights of Appeal</i>	20.34.4
<i>Rights of data subjects including rights of access to personal data</i>	20.34.5
<i>Exemptions: Health and Social Work</i>	20.34.6

Chapter 21. POWERS OF RESTRAINT AND THE PROTECTION OF STAFF

Introduction	21.01
A. LIABILITY FOR UNLAWFUL RESTRAINT	
Trespass to the Person	21.02
<i>Battery and Assault</i>	21.02.1
<i>False Imprisonment</i>	21.02.2
<i>Direct Action</i>	21.02.3
<i>Knowledge of the Restraint</i>	21.02.4
Criminal Offences	21.03
<i>Offences under Mental Health legislation</i>	21.03.1
Negligence	21.04
<i>Duty of care owed by those signing an application or medical recommendation</i>	21.04.1
<i>Duty to prevent dangerous acts of detained patient</i>	21.04.2

B. CONSENT AS A JUSTIFICATION FOR THE USE OF RESTRAINT

The Elements of Effective Consent	21.05
<i>Consent must be to the actual act performed</i>	21.05.1

DETAILED TABLE OF CONTENTS

	PARAGRAPH
<i>Consent must be given voluntarily</i>	21.05.2
<i>Consent may be withdrawn</i>	21.05.3
The Incompetent Patient: Justification for Restraint in the	
Absence of Consent	21.06
<i>The doctrine of necessity</i>	21.06.1
Where Consent is not a defence: Abetting Suicide or Mercy	
Killing... ..	21.07
 C. PREVENTION OF HARM AS A JUSTIFICATION FOR RESTRAINT	
Prevention of Crime	21.08
<i>Possession of an unauthorised offensive weapon</i>	21.08.1
<i>"Reasonable in the circumstances"</i>	21.08.2
<i>The making of "fine" judgements is not necessary</i>	21.08.3
<i>Suicide is not a crime</i>	21.08.4
<i>An insane person cannot commit a crime</i>	21.08.5
Prevention of a Breach of the Peace	21.09
Self-Defence	21.10
Restraining a Dangerous Mentally Ill Person	21.11
<i>Interaction between statute and common law</i>	21.11.1
 D. POWERS OF RESTRAINT UNDER THE MENTAL HEALTH ACT 1983	
Introduction	21.12
Restraint BEFORE an Application under Part II is Duly Completed	21.13
<i>Gaining access to the patient for interview or examination</i>	21.13.1
<i>Trespass may not be committed for the purpose of interview or examination</i>	21.13.2
<i>When an application is deemed to be duly completed</i>	21.13.3
<i>Licence to proceed from the gate to the door of a dwellinghouse</i>	21.13.4
<i>Other methods of gaining access to the patient for interview or examination</i>	21.13.5
Obstruction of person seeking to interview or examine	21.13.6
Restraint AFTER an Application under Part II is Duly Completed	21.14
<i>Custody and conveyance to hospital</i>	21.14.1
<i>No power to trespass for the purpose of conveying a person to hospital</i>	21.14.2
Restraint following Admission to Hospital	21.15
<i>Constraint of a detained patient within the premises of the hospital</i>	21.15.1

DETAILED TABLE OF CONTENTS

	PARAGRAPH
Warrant to Search for and Remove Patients	21.16
<i>Neglected Persons (s.135(1))</i>	21.16.1
<i>Patients liable to be taken or retaken (s.135(2))</i>	21.16.2
<i>Distinction between warrant issued under section 135(1) and (2)</i>	21.16.3
Custody, Conveyance and Detention	21.17
Retaking Patients Escaping from Custody	21.18
<i>Time limit for retaking patients</i>	21.18.1
<i>Inducing or assisting in an escape</i>	21.18.2
 E. SEARCH OF PATIENTS AND THEIR PROPERTY	
General Inspection of a Patients' Room	21.19
Search for Dangerous Articles	21.20
Search for Stolen Property	21.21
Search for an Offensive Weapon	21.22
Summary	21.23
Power to Search Detained Patients	21.24
 F. PROTECTION OF STAFF	
Substantive Protection against Litigation	21.25
<i>Mistake of fact: Performing an act without actual authority</i>	21.25.1
<i>Mistake of Law</i>	21.25.2
Procedural Protection against Litigation	21.26
<i>The burden of proof</i>	21.26.1
<i>Proceedings instituted without leave are a nullity</i>	21.26.2
Where Section 139 does not apply	21.27
Appeals	21.28
Acts done in pursuance of the Statute	21.29
<i>Acts expressly or impliedly provided for in the statute</i>	21.29.1
<i>Decisions taken by staff collectively</i>	21.29.2
Application of Section 139 to Informal Patients	21.30
Judicial Review	21.31
Vicarious liability of Secretary of State or Health Authority	21.32
Access to the Courts under Article 6 of The European Convention on Human Rights	21.33

DETAILED TABLE OF CONTENTS

	PARAGRAPH
Power to Visit and Interview Patients and to Require the Production of Records	22.12
<i>Access to patients and their records by members of the Commission carrying out the duty to protect detained patients</i>	22.12.1
<i>Access to patients and their records extends to members of the Commission and other persons appointed by the Commission for the purposes of certifying consent to treatment or giving a second opinion</i>	22.12.2
Records to be kept for five years after patient leaves hospital	22.12.3
Obstruction	22.12.4
Payment of Persons Appointed by the Commission	22.13
Code of Practice	22.14
<i>Scope and content of the Code</i>	22.14.1
<i>Treatments which give rise to special concern</i>	22.14.2
<i>Consultation required before preparing or altering the Code</i>	22.14.3
<i>Negative resolution of Parliament</i>	22.14.4
B. COMPLAINTS PROCEDURES	
Introduction	22.15
Health Service Complaints Procedure	22.16
<i>Background</i>	22.16.1
<i>Who can make a complaint?</i>	22.16.2
<i>How complaints (other than those relating to clinical judgement) are investigated</i>	22.16.4
<i>How complaints relating to the exercise of clinical judgement are investigated</i>	22.16.5
<i>Complaints that may involve criminal proceedings</i>	22.16.6
The Health Service Commissioners	22.17
<i>Bodies and matters subject to investigation</i>	22.17.1
<i>Matters not subject to investigation</i>	22.17.2
<i>Making a complaint</i>	22.17.3
<i>Procedure on investigation</i>	22.17.4
<i>Reports</i>	22.17.5
C. INQUIRIES AND DEFAULT POWERS	
Investigation of Serious Complaints	22.18
<i>Informal investigations</i>	22.18.1
<i>Independent inquiry established by a Health Authority</i>	22.18.2
Formal Inquiries established by the Secretary of State	22.19
<i>In connection with the Mental Health Act</i>	22.19.1
<i>In connection with the National Health Service Act</i>	22.19.2
Default Powers of the Secretary of State	22.20

DETAILED TABLE OF CONTENTS**xlix**

PARAGRAPH

<i>Local Social Services Authority in default</i>	22.20.1
<i>Health Authority in default</i>	22.20.2
Individual Enforcement of Statutory Duties	22.21
<i>Inadequacy of resources</i>	22.21.1

D. MONITORING SERVICES

Development Team for Mentally Handicapped People ...	22.22
Health Advisory Service	22.23

Chapter 23. **THE PATIENT'S PROPERTY AND FINANCIAL AFFAIRS****A. MANAGEMENT OF THE PROPERTY AND AFFAIRS
OF PATIENTS BY THE COURT OF PROTECTION**

Background	23.01
<i>The Percy Commission and the 1959 Act</i>	23.01.1
<i>Principles established under the European Convention of Human Rights</i>	23.01.2
Exercise of Jurisdiction under Part VII	23.02
<i>Nominated Judges</i>	23.02.1
<i>Court of Protection</i>	23.02.2
<i>The Master</i>	23.02.3
<i>Nominated Officers</i>	23.02.4
Invoking the Jurisdiction of the Court	23.03
<i>Inability to manage property and affairs</i>	23.03.1
<i>Mental disorder</i>	23.03.2
<i>Medical evidence</i>	23.03.3
<i>Minors</i>	23.03.4
General Functions of the Court	23.04
<i>Disclosure of information</i>	23.04.1
Powers of the Court	23.05
<i>The execution of wills</i>	23.05.1
Receivership	23.06
<i>Powers and duties of receiver</i>	23.06.1
<i>Criteria for appointment of receiver</i>	23.06.2
<i>Who can be appointed as receiver?</i>	23.06.3
<i>Where there is difficulty in finding a receiver</i>	23.06.4
<i>Security and accounts</i>	23.06.5
<i>Discharge</i>	23.06.6
Court's Power in Cases of Emergency	23.07
<i>Receiver ad interim</i>	23.07.1
Exercise of Jurisdiction without Appointing a Receiver ("Short Procedure")	23.08

DETAILED TABLE OF CONTENTS

	PARAGRAPH
Vesting of Stock in a Foreign Curator	23.09
Preservation of Interests in Property	23.10
Proceedings of the Court of Protection	23.11
<i>Exercise of Jurisdiction</i>	23.11.1
<i>General powers of the Court with respect to proceedings</i>	23.11.2
<i>Appeals</i>	23.11.3
The Lord Chancellor's Visitors	23.12
<i>Functions of Visitors</i>	23.12.1
Reciprocal Arrangements in relation to Scotland and Northern Ireland	23.13
B. ALTERNATIVE METHODS OF MANAGING A PATIENT'S PROPERTY AND AFFAIRS	
Introduction	23.14
Appointeeship	23.15
Pay, Pensions, etc. of Mentally Disordered Persons	23.16
Protection of Movable Property	23.17
C. MONEY FOR HOSPITAL PATIENTS	
Introduction	23.18
Reduction in State Benefits	23.19
Personal Allowance	23.20
Pocket Money	23.21
Further Reduction below the Standard Personal Allowance	23.22
Reward Payments	23.23
Ability of Patients to handle cash	23.24
Resettlement Benefit	23.25
D. CONTRACTS, AGENCY, WILLS AND PARTNERSHIPS	
Contract	23.26
<i>Liability</i>	23.26.1
<i>Necessaries</i>	23.26.2
<i>Deeds</i>	23.26.3
<i>Effect of being under the jurisdiction of the Court of Protection</i>	23.26.4
Agency and Power of Attorney	23.27
<i>Mental capacity needed to create and sustain a power of attorney</i>	23.27.1

DETAILED TABLE OF CONTENTS

li

	PARAGRAPH
<i>Proposals for reform: enduring power of attorney</i> ...	23.27.2
Wills	23.28
Partnership	23.29
Auctions... ..	23.30
Tort	23.31
Chapter 24. RIGHTS AND DISABILITIES OF PATIENTS	
Introduction	24.01
A. THE FRANCHISE	
Background	24.02
<i>Anomalies under the old legislation</i>	24.02.1
<i>The "Voting Rights" cases</i>	24.02.2
Those Entitled to Vote	24.03
Incapacity by Virtue of Mental Disorder	24.04
Registration of Detained Mental Patients	24.05
Registration of Voluntary Mental Patients	24.06
<i>Scope of Section 7 and definitions</i>	24.06.1
<i>Notification to patients</i>	24.06.2
<i>Patient's declaration</i>	24.06.3
<i>Attestation</i>	24.06.4
<i>Cancellation of declaration</i>	24.06.5
<i>Local elections</i>	24.06.6
<i>Postal Vote</i>	24.06.7
<i>Observations</i>	24.06.8
B. ELECTED OFFICIALS AND JURORS	
Disqualification of Candidates for Office	24.07
<i>Members of Parliament</i>	24.07.1
<i>Local councillor</i>	24.07.2
Removal from office of a Member of Parliament	24.08
Jury Service	24.09
C. MARRIAGE	
Capacity to enter into a marriage	24.10
Prevention of a Marriage	24.11
Place of Marriage	24.12
<i>Background</i>	24.12.1
<i>Marriages of house-bound or detained persons</i>	24.12.2

DETAILED TABLE OF CONTENTS

	PARAGRAPH
Voidable Marriage	24.13
<i>Lack of Consent</i>	24.13.1
<i>Mental disorder</i>	24.13.2
D. DIVORCE	
Grounds for Divorce	24.14
<i>Adultery</i>	24.14.1
<i>Behaviour</i>	24.14.2
<i>Desertion</i>	24.14.3
<i>Living apart for two years</i>	24.14.4
<i>Living apart for five years</i>	24.14.5
Patients under the jurisdiction of the Court of Protection ...	24.15
<i>Practice and procedure</i>	24.15.1
E. MATRIMONIAL PROCEEDINGS IN THE MAGISTRATES' COURTS	
Financial Provision	24.16
F. PARENTS AND CHILDREN	
Parent under the Jurisdiction of the Court of Protection	24.17
Voluntary Care	24.18
Assumption of Parental Rights by Local Authority	24.19
Place of Safety Provisions	24.20
Care Proceedings	24.21
<i>Social enquiry reports</i>	24.21.1
<i>Orders which a juvenile court can make</i>	24.21.2
<i>Mentally disordered minors in the care of a local authority</i>	24.21.3
Guardianship of Minors	24.22
Wardship	24.23
G. LITIGATION	
Patients under the Jurisdiction of the Court of Protection	24.24
The High Court	24.25
<i>Person under disability – the “patient”</i>	24.25.1
<i>A “patient” must act by his next friend or guardian ad litem</i>	24.25.2
<i>Mental disorder of plaintiff or defendant after proceedings begun</i>	24.25.3
<i>Powers and appointments of the next friend or guardian ad litem</i>	24.25.4
The County Court	24.26
<i>Appointment of next friend and his liability for costs</i>	24.26.1
<i>Appointment of guardian ad litem</i>	24.26.2

DETAILED TABLE OF CONTENTS

liii

PARAGRAPH

Actions against persons acting in pursuance of the Mental Health Act 24.27

Matrimonial Proceedings 24.28

Limitation of Actions 24.29

Extension of limitation period in case of disability ... 24.29.1

Disability 24.29.2

Successive disabilities 24.29.3

H. CORRESPONDENCE OF PATIENTS

To whom does Section 134 apply 24.30

Informal patients 24.30.1

Patients detained in local hospitals 24.30.2

Out-going Post 24.31

Addressee requests that correspondence should be withheld (s.134(1)(a)) 24.31.1

Correspondence likely to cause distress or danger (s.134(1)(b)) 24.31.2

In-coming Post 24.32

“Privileged” Correspondence 24.33

Power to Open and Inspect Post 24.34

The Functions of Hospital Managers 24.35

Review Procedures 24.36

Duty to record the inspection of post 24.36.1

Notice required when post is withheld 24.36.2

Review of decisions to withhold postal packets 24.36.3

I. EMPLOYMENT

Non-Discrimination: The Disablement Quota 24.37

Dismissal of Mentally Disordered Persons from Employment 24.38

Incapacity 24.38.1

Failure to disclose history of mental illness 24.38.2

J. DRIVING LICENCES

Application by a Disabled Driver 24.39

Information as to Disabilities 24.40

Revocation of Licence for Unfitness 24.41

Appeal against Refusal or Revocation of Licence 24.42

DETAILED TABLE OF CONTENTS

iv

PAGE

APPENDIX A

STATUTES

Sexual Offences Act 1956 (Extracts)	A.3
Mental Health Act 1959 (Sec. 8, 9, 127 and 128)	A.7
Sexual Offences Act 1967 (Sec.1)	A.11
Criminal Procedure (Insanity) Act 1964	A.13
Criminal Appeal Act 1968 (Extracts)	A.18
Representation of the People Act 1983 (Sec.7)	A.34
Mental Health Act 1983	A.37
Registered Homes Act 1984	A.166

APPENDIX B

STATUTORY INSTRUMENTS

PAGE

1981 No.727. The Rampton Hospital Review Board (Establishment and Constitution) Order 1981	B.3
No.728. The Rampton Hospital Review Board (Functions and Membership) Regulations 1981	B.4
1983 No.891. The Mental Health (Nurses) Order 1983	B.7
No.892. The Mental Health Act Commission (Establishment and Constitution) Order 1983	B.8
No.893. The Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983	B.10
No.894. The Mental Health Act Commission Regulations 1983. ...	B.57
No.942. The Mental Health Review Tribunal Rules 1983	B.60
1984 No.1578. The Nursing Homes and Mental Nursing Homes Regulations 1984	B.79
No.2035 The Court of Protection Rules 1984	B.90

APPENDIX C

DEPARTMENTAL CIRCULARS

DHSS Circular 13/74. Replacement of National Assistance Act Schemes by Arrangements	C3
DHS Circular 19/74. Services for the mentally disordered under the Health Services and Public Health Act 1968: Replacement of Schemes by Arrangements	C9
DHSS Circular LAC(83)7. Mental Health (Amendment) Act 1982: Mental Health Act 1983: Approved Social Workers	C14
DHSS Circular (84)17. Mental Health Act 1983: Approved Social Workers	C18

DETAILED TABLE OF CONTENTS

	PAGE
APPENDIX D	
FORMS AND RECORDS REQUIRED UNDER THE MENTAL HEALTH ACT 1983 AND THE REGISTERED HOMES ACT 1984	D1.
APPENDIX E	
SUMMARY OF PROCEDURAL REQUIREMENTS	
In respect of Compulsory Admission to Hospital and Guardianship	E.2

TABLE OF STATUTES

	PARAGRAPH
Access to Medical Records Act 1988	20.31, 24.38A
Administration of Justice Act 1960	
s. 12(1)(b)	8.09, 18.23, 23.11.2
Bail Act 1976	1.12
s. 3(6)	14.14
(6a)	14.14.1
Child Care Act 1980	5.11.1, 5.16
s. 2	24.18
(3)	24.18
s. 3	8.02, 24.21.3
(6)	24.19
s. 10	8.02
s. 21(2)	24.19
Children Act 1975	
s. 85	20.13.3
s. 86	20.13.3
Sch. 1	8.02
Children and Young Persons Act 1933	
s. 1	25.03.4
s. 34(2)	12.05.2
s. 40	24.20
s. 56(1)	15.04
s. 107(11)	15.07
Children and Young Persons Act 1969	11.07.2
s. 1	24.21
(2)	24.21
(3)	24.21.2
s. 7(8)	15.04
s. 9(1)	24.21.1
s. 12(4)	24.21.2
(5)	24.21.2
s. 28(1)	24.20
Children's Homes Act 1982	5.11.1, 5.16
Chronically Sick and Disabled Persons Act 1970	
s. 1	4.04.1
s. 2	4.02, 4.04.1, 4.06
s. 3(1)	4.12.2
s. 18	4.04.1
Community Health Council's (Access to Information) Act 1988	2.31

	PARAGRAPH
Contempt of Court Act 1981	18.23A
County Asylums Act 1808	1.04, 7.01
County Asylums Act 1828	1.04
Courts Act 1971	
s. 56	13.05
Sch. 11	13.05
Criminal Appeal Act 1968	
s.12	13.05
s.15	14.10
Sch. 5	13.05
Criminal Attempts Act 1981	
s. 1(1)	13.10
Criminal Justice Act 1948	1.03.1
Criminal Justice Act 1967	
s. 67	14.16.3
Criminal Justice Act 1972	
s. 28(1)	25.13
(5)	25.13
Criminal Justice Act 1982	
s. 65(2)	15.24
s. 66(3)	15.24
Sch. 11	15.24
Criminal Justice Act 1988	14.16.5
Criminal Law Act 1967	
s. 2	21.08
7	21.09
s. 3(1)	21.08, 21.20
Criminal Lunatics Act 1800	1.03.1, 1.03.2, 1.03.3, 1.04
s. 2	1.05.1
Criminal Lunatics Act 1884	14.01
Criminal Procedure (Insanity) Act 1964	1.03.1, 1.03.3, 14.01
s. 1	13.03
s. 4	14.01, 14.05
(1)	14.06, 14.07
(2)	14.08
(3)	14.08
(4)	14.09
(5)	14.11, 14.12
s. 5	13.05, 14.11, 18.04
(1)	3.03.1, 18.04.7, 18.05
(4)	14.12
s. 6	13.03
Sch. 1	3.03.1, 14.11
para. 1	13.05
Data Protection Act 1984	
s. 1	20.34.1
(6)	20.34.2
s. 2	20.34.3
s. 3	20.34.1
s. 4	20.34.2
s. 5(1)	20.34.2
(2)	20.34.2
(4)	20.34.2
s. 7	20.34.3

	PARAGRAPH
Data Protection Act 1984—contd	
s. 10	20.34.3
s. 11	20.34.3
s. 13	20.34.4
s. 20	20.34.5
s. 21(4)	20.34.5
s. 22	20.34.5
s. 23	20.34.5
s. 24	20.34.5
s. 27	20.34.6
s. 28	20.34.6
s. 29(1)	20.34.6
(2)	20.34.6
Sch. 1, Part I	20.34.3
Disabled Persons (Employment) Act 1944	24.37
s. 7	24.37
s. 9	24.37
Disabled Persons (Services, Consultation and Representation) Act 1986	22.24
s. 1	22.25.1
s. 2	22.25.2
s. 3	22.26
s. 5	22.26.1
s. 6	22.26.1
s. 7	22.26.2
Disabled Persons (Employment) Act 1958	
s. 2	24.37
s. 3	2.24.1
Domestic Proceedings and Magistrates' Court Act 1978	
s. 2	24.16
s. 3	24.16
s. 8	24.16
Education Act 1944	
s. 8	4.21
(1)	4.21.1
(2)	4.22
s. 9(5)	4.27
s. 33(3)	4.27
s. 35	4.21.1
s. 36	4.26.1
s. 57	4.18.1
s. 68	4.31.1
s. 76	4.26.2
s. 99(1)	4.31.2
s. 114	4.21.1
(1)	4.21.1, 4.28
Education (No. 2) Act 1968	
s. 3(3)	4.31.1, 4.31.2
Education Act 1976	
s. 10	4.183
Education Act 1980	4.24.2
s. 34(1)	4.28
Sch. 2, Part II	4.24.2
Education Act 1981	
s. 1(1)	4.22.1
(2)	4.22.1
(3)	4.22

Education Act 1981— <i>contd</i>	PARAGRAPH
s. 2(2)	4.29
(3)	4.29
(5)	4.22.2
(7)	4.29
s. 3	4.30.2
s. 4	4.19
(2)	4.23.1
s. 5	4.19
(3)	4.23.4
(5)	4.23.4
(6)	4.23.4
(7)	4.23.4
(8)	4.23.4
(9)	4.23.4
s. 6	4.19, 4.23.3
(2)	4.23.3
s. 7	4.19
(1)	4.24.1
(2)	4.24.1
(3)	4.24.1
(4)	4.24.1
(5)	4.24.1
(6)	4.24.1
(7)	4.24.1
(8)	4.24.1
(9)	4.24.1
(11)	4.24.1
s. 8(1)	4.24.2
(2)	4.24.2
(3)	4.24.2
s. 8(4)	4.24.2
(6)	4.19, 4.24.2
(7)	4.24.2
s. 9(1)	4.23.5
(2)	4.23.5
(5)	4.19
s. 10(1)	4.23.2
(2)	4.23.2
s. 11(1)	4.27
(2)	4.27.1
(3)	4.28
s. 12(1)	4.27
(3)	4.27
s. 13	4.28
s. 14	4.27.2
s. 17	4.26.1
s. 18	4.25
s. 20	4.29
(3)	4.19
Sch. 1, Part I	4.23.6
Part II	4.24.1
Sch. 11	4.20
Education (Handicapped Children) Act 1970	
s. 1	4.18.1
Education (Miscellaneous Provisions) Act 1948	
s. 3	4.21

	PARAGRAPH
Education (Miscellaneous Provisions) Act 1953	
s. 6	4.28
Education (School Leaving Dates) Act 1976	
s. 3(3)	4.21.1
Employment Protection (Consolidation) Act 1978	24.38.1
s. 57(1)	24.38.1
(4)	24.38.1
Enduring Powers of Attorney Act 1985	23.02.5, 23.27A
s. 2(1)	23.27a.2
(2)	23.27A.2
(11)	23.27A.6
(12)	23.27A.6
s. 3(4)	23.27A.3
s. 4(1)	23.27A.4
(2)	23.27A.4
(3)	23.27A.4
(6)	23.27A.6
s. 5	23.27A.4
s. 6	23.27A.4
(2)	23.27A.6
s. 7	23.27A.5
(1)	23.27A.6
s. 8	23.27A.5
(3)	23.27A.6
(4)	23.27A.6
Family Law Reform Act 1969	
s. 1	20.13.1
s. 8	20.13.1
Financial Services Act 1986	23.05
Firearms Act 1968	
s. 25	25.13
s. 21	25.13
Sch. 6, Part I	25.13
Forgery and Counterfeiting Act 1981	
s. 9	25.02
Green Belt (London and Home Counties) Act 1938	4.17.1
Guardianship of Minors Act 1971	
s. 1	24.22
s. 5	24.22
Health Service Joint Consultative Committees (Access to Information) Act 1986	2.23.1, 22.24
Health Services Act 1980	2.02
s. 1	2.02
(7)	2.06, 2.11, 2.16, 2.18.2.20, 2.23.1, 2.23.2, 2.27
s. 25(4)	2.20, 2.26
Sch. 1, para. 28(a)	2.06, 2.11
para. 31	2.16
para. 33	2.18
para. 34	2.18
para. 39	2.20
para. 40	2.27
para. 41(a)	2.23.1
(c)	2.23.2
para. 77	21.27
para. 78	2.12

	PARAGRAPH
Health Services Act 1980—contd	
Sch. 7	2.20, 2.26
Health Services and Public Health Act 1968	
s. 12	24.39
(1)	7.02
s. 44(1)	4.05.1
s. 45(1)	4.04.1
s. 66(1)	3.10
Health and Social Security Act 1984	
s. 5	2.17
(2)	2.17
Sch. 3, para. 2	2.18
para. 3	2.23, 2.23.1
para. 12	2.17
Health and Social Services and Social Security Adjudications Act 1983	2.25
s. 1	2.24.1, 2.24.2
s. 12	2.23.2
Sch. 5, para. 2(a)	2.23.2
Sch. 10	2.06, 2.11
Homicide Act 1957	
s. 2(2)	13.06, 13.07
Hospital Complaints Procedure Act 1985	22.16.2, 22.16.11
Housing Act 1957	
ss. 171-176	4.12.4
Housing Act 1980	
s. 152	4.12.2
Sch. 25, para. 22	4.12.2
Housing Act 1985	
s. 1	4.12.1
s. 8(1)	4.12.2
(2)	4.12.2
s. 9(1)	4.12.3
s. 10	4.12.3
s. 11	4.12.3
s. 12	4.12.3
Part III	4.13, 4.13.5, 4.14
s. 58	4.13.1, 4.14.1
(4)	4.14.2
s. 59	4.13.2
(1)	4.14.5
s. 60	4.13.3
s. 62	4.13.4
s. 63	4.13.5
s. 64	4.13.4
s. 65	4.13.5
s. 67	4.13.6
s. 70	4.14.7
s. 75	4.13.5
Housing and Planning Act 1986	4.13.5
Housing Associations Act 1985	4.16
Part II	4.16.2
Part III	4.15
Idiots Act 1886	1.07.1
Immigration Act 1971	14.02, 14.03.2
s. 2(1)	19.05

	PARAGRAPH
Infanticide Act 1938	13.10
s. 1	13.10
Insane Prisoners Act 1840	1.03.1
Juries Act 1974	
s. 1	24.09
Sch. 1, Part I, Group D	24.09
Legal Aid Act 1974	1.11.2
s.1-5	18.21
Legal Aid Act 1988	18.21
Limitation Act 1980	24.29.1, 24.29.2
s. 28(1)	24.29.1
(2)	24.29.1
(3)	24.29.3
(4)	24.29.1
(5)	24.29.1
(6)	24.29.1
s. 38(2)	24.29.2
(3)	24.29.2
Local Authority Social Services Act 1970	4.04.1
s. 1	4.04.1
s. 2(1)	4.04.2
s. 3(1)	4.04.2
(2)	4.04.2
s. 3A	4.04.2
s. 4(1)	4.04.2
s. 5	4.04.2
s. 6(1)	4.04.2
(2)	4.04.2
(5)	4.04.2
s. 7(1)	4.04.2
Sch. 1	4.03
Local Government Act 1972	
s. 100	4.04.4
s. 193(2)	4.12.4
s. 195(1)	4.04.1
(6)	4.02, 4.04.1, 4.05, 4.05.1, 4.05.2, 4.06, 4.06.1
Sch. 22, para. 18	4.12.4
Sch. 23, para. 2(1)	4.02, 4.05, 4.05.1
(2)	4.05.2
(3)	4.05.1
(4)	4.02, 4.06
(5)	4.06.1
(6)	4.04.1
para. 9(1)	4.05
para. 15(3)	4.04.1
Local Government (Access to Information) Act 1985	4.04.4, 22.24
Local Government Finance Act 1988	24.43
Local Government, Planning and Land Act 1980	
s. 183(1)	4.04.2
Lunacy Act 1890	1.06.1, 1.06.2, 1.07.1, 1.07.3, 1.08, 7.01, 18.04, 23.01
s. 20	7.14.2
Lunacy Regulation Act 1862	23.01
s. 12	23.01
Lunatics Act 1845	1.05.4, 1.08.1, 7.01

	PARAGRAPH
Madhouse Act 1828	1.05.3
Magistrates' Court Act 1980	
s. 5	14.03.2
s. 10(3)	14.14
s. 18-20	15.05.1
s. 30	14.14
s. 38	15.4.1
s. 142	15.07
Marriage Act 1949	
s. 16(2)	24.11
Marriage Act 1983	
s. 1(1)	24.12.2
(3)	24.12.2
Marriage (Registrar – General's Licence) Act 1970	
s. 5	24.11
Matrimonial Causes Act 1973	
s. 1	24.14
(2)	8.02, 24.14, 24.16
s. 2(4)	24.14.3
s. 12(c)	24.13.2
(d)	24.13.2
s. 13(1)	24.13.2
(2)	24.13.2
s. 16	24.13.2
Medical Act 1858	6.14
Medical Act 1963	
s. 1	6.14
(1)	6.14
s. 4	6.15
s. 5-9	6.14
s. 10	6.15
s. 17	6.15
s. 18	6.15
s. 36	6.14
s. 37	6.14
s. 38	6.14
s. 40	6.14
s. 42	6.14
s. 43	6.14
s. 46	6.15
s. 47	6.15
(1)	6.15
s. 48	6.15
s. 49	6.15
s. 53	6.15
Sch. 1	6.14
Sch. 4	6.14
Mental Deficiency Act 1913	1.06.2, 1.07.2, 1.07.3, 1.07.4, 1.08, 7.01
s. 6	18.04
s. 8(1)	18.04
s. 9	18.04
Mental Deficiency Act 1927	1.07.4
Mental Deficiency Act 1938	1.08
Mental Health Act 1959	1.03.1, 1.07.5, 1.08, 1.08.5, 1.09, 1.11.2
s. 5	21.30

Mental Health Act 1959—contd

	PARAGRAPH
s. 6	7.02
s. 8	1.12, 4.05
(1)	4.05
(2)	4.06
(4)	4.07
s. 9	1.12, 4.05
s. 26	11.01
s. 29	7.03.1, 21.13.2
s. 65	15.11
s. 66(6)	15.18
s. 73(2)	14.03.1
s. 77(4)	14.03.2
s. 94(2)	23.01.1
s. 97	3.04
s. 98	3.05.2
s. 99	3.04.3
s. 127(1)	25.07
s. 128	1.12, 4.05, 21.03.1, 21.27, 25.01, 25.10.1, 25.10.2, 25.11
(1)	25.10.1, 25.10.2
(2)	25.10.1
(3)	25.10.2
(5)	25.10.1
s. 134	24.30.1
s. 136	7.01
s. 141	1.11.3, 3.04.3, 10.02.4, 12.02, 21.31, 21.33
(2)	21.26.2
s. 149	23.06.3
Sch. 7	23.06.3
Mental Health Act 1983	1.12, 2.05
s. 1	3.06
(1)	9.01
(2)	2.04.1, 9.01, 9.03, 9.04, 25.07
(3)	9.01
s. 2	6.03, 6.17.1, 7.11, 7.15, 7.28, 8.03, 9.01, 9.03.2, 10.03, 10.04, 11.01, 11.04, 11.04.2, 11.04.4, 11.05, 11.06.1, 11.14, 17.02.1, 17.02.3, 18.04, 18.04.1, 18.08.1, 24.12.2
(1)	11.05.1
(3)	11.05.3
(4)	11.05.4
s. 3	4.08.1, 6.03, 6.09, 6.17.1, 7.11, 7.15, 7.28, 8.03, 9.01, 9.03.1, 9.03.2, 10.04, 11.01, 11.06, 11.06.1, 11.06.5, 11.06.6, 11.14, 17.02.1, 17.02.3, 18.04, 18.04.2, 18.05, 18.08.2
(1)	11.06.1
(2)	15.06
(3)	11.06.3
s. 4	6.03, 6.05.1, 6.13, 6.17.1, 7.03.1, 7.11, 7.15, 7.18, 7.22, 7.28, 8.03, 9.01, 10.03, 11.01, 11.04.4, 11.11, 11.14, 17.02.1, 18.03, 20.10, 24.12.2
(1)	11.04.1, 11.04.2
(2)	11.04.1, 11.04.2
(3)	21.13.3
(4)	6.05.1, 10.03, 11.04.4
(5)	11.04.1, 21.13.1
s. 5	10.02.4, 10.03, 10.04, 18.03, 24.12.2
(1)	7.11, 10.03
(2)	6.03, 6.13, 6.17.4, 10.04, 10.05, 11.14, 20.18
(3)	6.17.4, 10.04

Mental Health 1983—*contd*

	PARAGRAPH
s. 5(4)	6.13, 6.20, 10.05, 11.14, 20.18, 21.04.2
(5)	6.13, 10.05
(6)	10.03, 10.04, 10.05
(7)	10.05
s. 6	7.11
(1)	6.03, 6.19.1, 7.23, 7.28, 11.01, 11.04.3, 11.04.7, 11.05.4, 11.06.4, 21.12, 21.13.3, 21.14.1, 21.17, 21.29
(2)	3.03, 6.03, 6.06, 21.12, 21.15, 21.15.1
(3)	6.04, 7.11
s. 7	4.10.2, 7.11, 7.28, 8.03, 18.04.3, 18.08.3
(1)	11.07.2
(2)	11.07.2
(3)	11.07.4
(4)	11.07.3
(5)	11.03.3
s. 8	7.11, 7.28
(1)	11.07.4, 11.07.5
(2)	11.07.3
(3)	7.11, 11.07.3
(4)	11.12
s. 9	11.08
(2)	6.17.1
s. 10	7.28
(1)	6.19, 11.09
(2)	6.19, 11.09
(3)	7.20, 7.28, 11.09
s. 11	7.28
(1)	7.11, 7.15, 8.03, 11.01, 11.05.2, 11.06.2, 11.07.3, 11.11
(2)	6.03, 6.13, 6.19, 7.11, 7.13, 11.04.1, 11.05.2, 11.06.2, 11.07.3, 11.11, 15.07
(3)	6.19, 7.12, 7.28, 8.03, 11.05.2
(4)	7.12, 7.14.4, 7.18, 7.28, 8.03, 11.06.2, 11.07.3, 11.18.5
(5)	11.04.1, 11.05.2, 11.06.2, 11.07.3, 11.11, 21.13.1
(6)	6.05, 6.055.2, 9.06, 11.07.2
(7)	11.05.3, 11.06.3, 11.07.4
s. 12	2.19, 6.05.2, 6.17.5, 6.19.1, 7.01, 11.04.4, 11.05.3, 11.07.4, 11.08, 11.10, 11.18.4
(1)	6.05.1, 6.05.2, 11.04.4, 11.05.3, 11.06.3, 11.07.4, 11.10
(2)	6.05.1, 6.05.2, 6.17.5, 6.19.1, 11.05.3, 11.06.3, 11.07.4, 11.10
(3)	6.05.1, 7.21, 11.10
(4)	6.05.1, 11.06.6, 11.10
(5)	6.05.1, 11.04.2, 11.07.4, 11.10
(6)	6.05.1, 11.10
(7)	11.07.4, 11.10
s. 13	7.14, 7.15, 11.04.1
(1)	7.14.2, 7.14.3, 7.14.4, 7.16.1, 7.28, 8.03, 21.13.1
(2)	7.14.3, 7.16, 7.25, 7.28, 11.06.2, 11.07.3, 21.13.1
(3)	7.15, 7.28
(4)	7.16.1, 7.28, 21.13.1
(5)	7.14.4, 7.15
s. 14	6.19, 7.10, 7.18, 7.28
s. 15	6.05, 6.17.5, 7.11, 7.28, 11.12, 17.07.1
(1)	6.05.1, 6.05.2
(2)	6.05.1, 6.05.2
(3)	6.05.1, 6.05.2, 6.17.5

Mental Health Act 1983—*contd*

	PARAGRAPH
s. 15(4)	... 6.05.1
s. 16 ...	6.17.3, 9.06, 11.06.5, 11.06.6, 11.07.6, 18.04
(1)	... 11.06.6
(2)	... 11.06.6
(3)	... 6.20, 11.06.6
(4)	... 11.06.6
(5)	... 6.17.3, 11.07.6, 19.01
s. 17 ...	4.08.2, 6.17.1, 11.13, 15.10, 15.15
(1)	... 4.08.2
(2)	... 11.13
(3)	... 4.08.2, 11.13
(4)	... 11.13
(5)	... 4.08.2, 11.13, 15.15
s. 18 ...	7.28, 11.01, 11.13, 11.14, 11.15, 12.03.2, 15.15, 21.12, 21.15.1, 21.18
(1)	... 11.14, 21.15, 21.18
(2)	... 11.14
(3)	... 11.07.5, 11.14, 11.17, 21.18
(4)	... 4.13.3, 11.07.5, 11.14, 15.15, 21.18.1
(5)	... 11.14
(6)	... 11.14
s. 19 ...	6.09, 11.09, 11.18, 15.10, 15.15, 18.04
(1)	... 11.09, 11.18
(2)	... 3.08, 11.18.1, 11.18.3, 11.18.4, 11.18.5, 18.04
(3)	... 6.03, 11.18.2
(4)	... 3.08, 11.18
s. 20 ...	6.09, 6.13, 6.17.1, 7.28, 20.21.2
(1)	... 11.06.4, 11.07.6
(2)	... 11.06.5, 11.07.6, 18.04, 18.04.2, 18.04.3
(3)	... 6.06, 6.20, 11.06.5, 11.06.6, 17.02.1
(4)	... 11.06.5
(5)	... 6.20, 7.28
(6)	... 11.07.6, 17.02.1
(7)	... 11.07.6
s. 20(9)	... 11.06.5, 11.06.6
(10)	... 11.07.6
s. 21 ...	11.07.5, 11.13, 11.16, 21.18.1
(1)	... 11.14, 11.16, 11.17
(2)	... 11.16
(3)	... 11.16
s. 22(1)	... 11.17
(2)	... 11.14, 11.17
s. 23 ...	6.07, 6.13, 8.05, 11.03, 11.05.6, 11.06.7, 15.10, 15.15, 17.01
(1)	... 6.17.1
(2)	... 3.03, 6.06, 6.17.1, 7.12, 7.18, 8.03, 11.04.6, 11.05.2, 11.07.7, 14.02.1, 15.10, 17.02.1, 17.03.3, 17.03, 17.05
(3)	... 17.02.2, 17.04
(4)	... 6.06, 11.07.7, 17.02.1, 17.03
s. 24 ...	... 25.05
(1)	... 6.04.1, 8.03, 17.04
(2)	... 6.04.1, 8.03, 17.04
(3)	... 17.02.2, 17.04
(4)	... 17.02.2, 17.04
s. 25 ...	6.07, 6.13, 6.17.1, 8.03, 8.07, 11.06.7
(1)	... 8.03, 17.02.3
(2)	... 8.03, 17.02.3
s. 26 ...	... 4.10.2, 8.07
(1)	... 8.02

Mental Health Act 1983—*contd*

	PARAGRAPH
s. 26(2)	8.02
(3)	8.02
(4)	8.02, 8.08
(5)	8.02, 8.04
(6)	8.02
(7)	8.02
s. 27	8.02, 24.21.3
s. 28	8.02
(1)	8.02
(3)	8.02
s. 29	7.12, 7.15, 7.19, 7.28, 8.03, 8.07, 8.09, 11.06.2, 18.04
(1)	8.03, 8.05
(2)	8.03, 8.05
(3)	8.02, 11.06.2, 11.07.3, 17.02.3, 17.03
(4)	8.05
(5)	8.05, 8.08
(6)	8.06
s. 30	8.05
(1)	8.08
(2)	8.08
(3)	8.08
(4)	8.08
(5)	8.08
s. 31	8.09
s. 33	11.03
(2)	8.02
s. 34(1)	6.17.1
(2)	3.02.1
(3)	11.07.3, 11.08, 18.01
s. 35	1.12, 14.14, 15.14.1, 18.03, 19.02, 20.18, 24.12.2, 24.29.2
(1)	14.14.1, 14.14.4, 21.16.1
(2)	14.14.1
(3)	14.14.2
(4)	3.03, 14.14.2
(5)	14.14.3
(6)	14.14.3
(7)	14.14.3
(8)	14.14.3
(9)	14.14.4
s. 36	1.12, 9.01, 14.14, 14.15.1, 15.14.1, 18.03, 19.02, 24.12.2
(1)	14.15.1, 14.15.2
(2)	14.15.1
(3)	3.03, 14.15.2
(4)	14.15.3
(5)	14.15.3
(6)	14.15.3
(7)	14.15.3
(8)	14.15.4
s. 37	4.08.1, 4.10.2, 7.28, 9.01, 9.03.1, 11.14, 13.05, 17.05, 18.04, 18.04.4, 18.04.6, 18.08.2, 18.08.3
(1)	15.04, 15.06, 15.22, 15.22.1
(2)	15.06, 15.07, 15.22, 15.22.2
(3)	15.02, 15.05, 15.05.1, 15.22.1
(4)	3.03, 15.06, 15.07, 15.08, 15.14.2, 20.18
(5)	15.07, 15.14.2
(6)	15.22.3
(7)	15.22.2

Mental Health Act 1983—contd

	PARAGRAPH
s. 37(8)	15.06
s. 38	1.12, 14.14, 15.14.1, 18.03, 19.02
(1)	14.16.2
(3)	14.16.2
(4)	3.03, 14.16.2, 14.16.4
(5)	14.16.3
(7)	14.16.4
s. 39	6.03, 15.09
s. 40(1)	6.06, 7.28, 15.10, 15.14.2, 21.15.1, 21.27
(2)	7.28, 15.22.4
(3)	14.14, 14.16.4
(4)	3.03, 6.17.1, 15.22.4, 17.05, 17.06, 18.04, 18.04.4, 18.04.6, 18.06, 21.18
(5)	15.10, 15.22.4
s. 41	12.04.1, 13.05, 15.11, 17.07.2, 18.04
(1)	15.12, 15.13, 15.16.1
(2)	15.12, 15.23
(3)	15.15, 17.06
(4)	15.10
s. 41(5)	15.13, 15.16.1, 18.04, 18.04.4, 18.04.7
(6)	15.19
s. 42	12.05.1, 13.05.2, 15.11
(2)	4.08.2, 15.16.2, 17.06, 18.04, 20.18
(3)	1.12, 4.08.2, 15.16.3, 18.04
(4)	15.16.3
(5)	15.16.3
s. 43	14.03.2, 15.14.1
(2)	15.14.1
(3)	15.14.1
(4)	15.14.1
s. 44	15.14.2
(3)	15.14.2
s. 45(1)	15.05.3
(2)	15.05.3
s. 46	15.21, 24.43
(3)	18.04, 18.04.7
s. 47	3.03.1, 4.08.1, 7.28, 24.43
(1)	16.02
(2)	16.02
(3)	16.03, 18.04, 18.04.7
(4)	16.02
(5)	16.02, 19.02
s. 48	3.03.1, 4.08.1, 7.28, 9.01, 14.01, 14.02, 14.02.1, 24.43
(2)	14.02
(3)	14.02.1, 14.02.2, 18.04, 18.04.7
s. 49	3.03.1
(1)	16.03
(2)	16.03
(3)	16.03
s. 50	3.03.1
(1)	16.03, 18.17.5
(3)	16.03, 18.17.5
(4)	16.03
s. 51	3.03.1, 14.03.1, 14.03.2
(1)	14.03.1
(2)	14.03.1
(3)	14.03.1, 18.17.5

Mental Health Act 1983—*contd*

	PARAGRAPH
s. 51(4)	14.03.1
(5)	14.03.1, 15.14.2
(6)	14.03.1, 15.14.2
(7)	15.14.2
s. 52	3.03.1, 14.03.2
(1)	14.03.2
(2)	14.03.2
(3)	14.03.2
(4)	14.03.2
(5)	14.03.2
(6)	14.03.2
(7)	14.03.2
s. 53	3.03.1, 14.03.3
s. 54(1)	6.17.5, 14.02.1, 14.14.2, 14.15.2, 14.16.2, 15.06, 15.22.2, 15.23, 16.02
(2)	15.23
(3)	15.23
s. 55(1)	6.17.1, 14.14.2, 14.15.2, 14.16.2, 15.07
(5)	3.02.1
s. 56	11.05.5, 11.07.5, 12.05.2, 20.13.4
(1)	4.08.2, 11.13, 12.05.2, 14.14.4, 14.15.4, 20.18, 20.20.1
(2)	20.20.1
s. 57	20.07, 20.20.1–20.20.5, 20.24, 21.07, 21.30
(2)	7.28, 20.20.3, 20.20.5, 20.22
(3)	6.20, 7.28
s. 58	20.05, 20.06, 20.21.1–20.21.4
(1)	20.25.1
(2)	20.21.1
(3)	20.21.3
(4)	6.20, 7.28
s. 60(1)	20.25.1
s. 61(1)	20.26
(2)	20.26
s. 62	20.20.3, 20.21.3, 20.27, 21.25.2
(2)	20.25, 20.26, 20.27
(3)	20.27
s. 63	20.09, 20.19, 20.28
s. 64(1)	6.17.1, 20.19
(2)	20.20.3, 20.21.3
s. 65(1)	18.01
(2)	18.01, 18.01.1
(3)	18.01
s. 66	11.03, 15.10
(1)	6.07, 8.03, 8.06, 11.06.6, 11.06.7, 11.07.7, 11.18.5, 17.02.3, 18.04, 18.04.1, 18.04.2, 18.04.3, 18.04.4, 18.04.6, 18.08.2, 19.03.2, 19.04.3
(2)	6.07, 8.03, 8.06, 11.05.6, 11.06.6, 11.06.7, 11.07.7, 17.02.3, 18.04, 18.04.1, 18.04.2, 18.04.3, 18.04.4, 18.04.6, 19.03.2, 19.04.3
s. 67(1)	18.06
s. 68(1)	6.09, 11.18.5, 18.04
(2)	6.09, 18.04
(3)	6.04.1, 15.14.2
(4)	6.09
(5)	6.09, 18.04.8
s. 69(1)	8.03, 18.04, 18.04.6
(2)	13.05.2, 18.04, 18.04.4, 18.04.7, 19.03.2, 19.04.3
s. 70	13.05.2, 15.15, 18.04, 18.04.5

Mental Health Act 1983—*contd*

	PARAGRAPH
s. 71 ...	... 15.15
(1) ...	... 13.05.2, 18.06
(2) ...	... 18.04
(5) ...	... 13.05.2, 18.04
(6) ...	... 18.04.8
s. 72(1) ...	... 17.02.3, 18.08.1, 18.08.2, 18.13, 18.13.1, 18.16
(2) ...	... 11.06.6, 18.08.2, 18.17.1
(3) ...	... 15.18, 18.09, 18.10, 18.16
(4) ...	... 18.08.3
(5) ...	... 9.06, 11.06.6, 18.11, 18.15, 18.17.4, 18.18.3
(6) ...	... 18.15
(7) ...	... 15.18, 18.16
s. 73 ...	... 4.08.2, 15.11, 15.15, 18.13.1, 20.18
(1) ...	... 13.04.1, 15.19, 17.06, 18.13, 18.13.1
(2) ...	... 17.06, 18.13.1, 18.14
(3) ...	... 17.06
(4) ...	... 18.14
(5) ...	... 18.14
(7) ...	... 18.14.1, 18.17.2
s. 74 ...	... 4.08.2, 14.03.1, 20.18
(1) ...	... 17.06, 18.17.1, 18.17.2
(2) ...	... 17.06, 18.17.1, 18.17.2
(3) ...	... 18.17.1, 18.17.2
(4) ...	... 18.17.3
(6) ...	... 18.17.2
s. 75(1) ...	... 15.16.3, 18.04, 18.04.5
(2) ...	... 15.16.3, 18.04, 18.04.5, 18.13
(3) ...	... 18.18.1, 18.18.2
s. 76(1) ...	... 12.05.3
(2) ...	... 12.05.3
s. 77(1) ...	... 12.05.3
(2) ...	... 18.04, 18.04.8
(3) ...	... 12.05.3
s. 78 ...	... 18.01.1
(8) ...	... 18.15, 18.25
s. 79(1) ...	... 13.05.2
(6) ...	... 3.02.1
s. 80-92	... 2.05
s. 80-85	... 19.01
s. 80 ...	... 19.02
(1) ...	... 19.02
(2) ...	... 19.02
(3) ...	... 19.02
(4) ...	... 19.02
(5) ...	... 19.02
(6) ...	... 19.02
(7) ...	... 19.02
s. 81(1) ...	... 19.03.1
(2) ...	... 19.03.1
(3) ...	... 19.03.1
(4) ...	... 19.03.1
(5) ...	... 19.03.1
s. 82 ...	... 19.01, 19.03.2
(1) ...	... 19.03.2
(2) ...	... 18.04, 19.03.2
(3) ...	... 19.03.2
(4) ...	... 19.03.2

Mental Health Act 1983—*contd*

	PARAGRAPH
s. 82(7)	19.03.2
s. 83	19.04.1
s. 84 ... ..	... 19.01
(1)	19.04.2
(3)	19.04.2
s. 85 ... ..	... 19.01
(1)	19.04.3
(2)	18.04, 19.04.3
(3)	19.04.3
s. 86	19.01, 19.05
(2) ... ..	... 19.05
s. 87 ... ..	... 19.01
s. 88	11.15, 19.01
(1)	19.06.2
(4)	11.15, 19.06.2
s. 89	19.01, 24.29.2
(1)	19.06.3
(2)	19.06.3
s. 90 ... ..	... 19.01
s. 91(1)	19.01, 23.28
s. 92(1) ... ..	... 3.02.1
s. 93(1)	23.02.1, 23.04
(2)	23.02.2, 23.02.3
(3)	23.02.3
s. 94 ... ..	... 24.25.1
(1)	23.02.1, 23.02.4
(2)	9.01, 9.03.2, 23.03
s. 95	23.05, 23.06.1
(1)	23.04, 23.04.1
(2) ... ..	... 23.04
s. 96	23.06.1, 23.07
(1) ... ..	... 23.02.5, 23.05, 23.05.1, 23.11.2A, 23.13, 23.29, 24.15, 24.24, 24.25.1, 24.26.1
(2) ... ..	... 23.05
(3) ... ..	... 23.05
(4)	23.05.1
s. 97	23.05.1
(1)	23.05.1
(3)	23.05.1
s. 98	23.02.5, 23.03, 23.07, 23.13
s. 99(1)	23.02.5, 23.06, 23.06.3
(2) ... ..	... 23.06.1
s. 100	23.02.5, 23.09
(1) ... ..	... 23.09
(2) ... ..	... 23.09
s. 101 ... ..	... 23.10
(1) ... ..	... 23.10
(2) ... ..	... 23.10
(3) ... ..	... 23.10
(4) ... ..	... 23.10
s. 101(1) ... ..	... 23.12
(2) ... ..	... 23.12
(4) ... ..	... 23.12
s. 103(1)	23.12.1, 23.27A.7
(2)	23.12.1
(3)	23.12.1
(4)	23.12.1

Mental Health Act 1983—*contd*

	PARAGRAPH
s. 103(5)	23.12.1
(6)	23.12.1
(7)	23.12.1
(8)	23.12.1
(9)	23.12.1
s. 104(1)	23.02.5, 23.11.2, 23.27A.7
(2)	23.11.2
(3)	23.11.2
(4)	23.11.2
s. 105(1)	23.11.3, 23.27A.7
(2)	23.11.3
s. 106(2)	23.11, 23.27A.7
s. 107(1)	23.06.5
(2)	23.06.5
s. 108(1)	23.11
(2)	23.11
s. 110 ...	23.13
(1)	23.13
(2)	23.13
(3)	23.13
(4)	23.13
s. 112 ...	23.05.1
s. 113 ...	23.07
s. 114 ...	1.12, 4.03, 4.10.1, 7.05.1, 7.15, 7.28, 21.27
(1)	7.04
(2)	7.04
(3)	7.04
s. 115 ...	4.03, 4.09.1, 7.10, 7.15, 7.22, 7.25, 25.05
s. 116 ...	4.10.2, 7.25, 7.28, 21.27, 24.21.3
s. 117 ...	1.11.1, 4.03, 4.08, 4.08.2, 4.08.5, 7.24, 7.25, 7.28, 11.06.5, 21.27, 22.25.2
s. 118–121	2.05
s. 118 ...	6.07, 20.20.5, 20.22, 20.23
(1)	20.27
(2)	20.20.5
s. 119(2)	20.23
s. 120 ...	6.07
(1)	6.04.2, 6.12, 7.13, 22.16.11
(4)	6.04.2, 25.05
s. 121 ...	12.05.1
(2)	7.13, 20.20.3, 20.20.5, 20.21.3, 20.22, 20.26
(3)	20.20.3, 20.21.3, 20.22
(4)	10.02.3
(7)	24.36.2, 24.36.3
(8)	24.36.2, 24.36.3
s. 122 ...	2.05, 23.21
(1)	23.21
(2)	23.21
s. 123 ...	3.03.1, 3.04.3, 6.03
(1)	3.08, 11.18.2
(2)	3.08, 11.18.2
(3)	3.08
s. 124 ...	2.05
(1)	4.08.5
s. 125 ...	2.05, 5.09
s. 126 ...	5.09, 21.13.1, 25.01, 25.02
(1)	25.02

Mental Health Act 1983—*contd*

	PARAGRAPH
s. 126(2)	25.02
(4)	25.02
(5)	25.02
s. 127	7.28, 21.03.1, 25.01, 25.11
(1)	7.25, 25.03.1
(2)	7.25, 11.07.5, 25.03.2, 25.03.3
(3)	25.03.5
(4)	21.27, 25.03.5
s. 128	21.03.1, 25.01, 25.05
(1)	25.04.1
(2)	21.18.2, 25.04.2
(3)	25.04.2
(4)	25.04.4
s. 129	7.28, 8.03, 11.07.5, 17.04, 21.13.6, 25.01
(1)	4.09.1, 20.23, 25.05
(2)	25.05
(3)	4.09.1
s. 130	4.03, 4.09.1, 7.25, 7.28, 21.13.6, 25.02, 25.03.5, 25.04.4, 25.05
s. 131	10.01, 21.30
(1)	10.02.1, 10.02.2
(2)	10.02.2
s. 132	6.07, 7.28, 18.05
(1)	6.07
(2)	6.07
(3)	6.07
(4)	6.07, 8.03
s. 133	7.28, 8.03
(1)	6.08
(2)	6.08
s. 134	3.02.1, 3.09, 6.07, 21.15.1, 24.30, 24.35
(1)	6.10, 24.30.2, 24.31, 24.31.1, 24.31.2, 24.33, 24.34, 24.36.1, 24.36.2, 24.36.3
(2)	6.10, 24.32, 24.34, 24.36.1, 24.36.2, 24.36.3
(3)	24.33
(4)	6.10, 24.36.1, 24.36.3
(5)	6.10
s. 134(6)	6.10, 24.36.2, 24.36.3
(7)	24.35
(9)	3.02.1, 24.31
s. 135	7.10, 12.02.2, 12.03.1, 18.03, 20.18
(1)	7.16, 7.22, 7.28, 11.01, 12.03.1, 17.01, 21.12, 21.13.5, 21.16.1, 21.16.3, 21.17
(2)	11.01, 12.02.4, 12.03.1, 21.12, 21.16.2, 21.16.3
(3)	21.16.1
(4)	12.03.1, 21.16.1, 21.16.2
(5)	21.16.1
(6)	12.02.3, 21.16.1
s. 136	7.01, 7.25, 7.28, 11.01, 12.02, 12.02.3, 12.02.6, 12.02.7, 17.01, 18.03, 20.18, 21.17, 21.29, 24.12.2, 24.33
(1)	12.02, 12.02.4
(2)	12.02, 12.02.4, 12.02.5
s. 137	11.01, 15.10, 21.12, 21.17, 25.03.3, 25.04.2
(1)	21.14.1, 21.17
(2)	21.17
(3)	21.17
s. 138	7.28, 11.01, 11.15, 12.03.2, 19.06.2, 21.12, 21.15.1, 21.18.1
(1)	7.23, 21.14.1, 21.15, 21.18

Mental Health Act 1983—*contd*

	PARAGRAPH
s. 138(2)	21.18.1
(3)	12.02
(4)	21.18.1
(5)	21.18.1
(6)	21.18.1
s. 139	1.11.3, 3.04.3, 3.05.1, 5.09, 7.13, 7.14.3, 10.02.4, 12.02, 20.10, 21.02.2, 21.25, 21.25.1, 21.25.2, 21.26.2, 21.27, 21.29, 21.29.1, 21.29.2, 21.30, 21.31, 21.32, 23.12.1, 24.25.2, 24.27, 25.03.5
(1)	21.25, 21.32, 21.33
(2)	21.26
(3)	21.27, 25.03.5
(4)	3.05.1
(5)	21.26
s. 140	11.04.5
s. 141	21.25, 21.25.2, 21.29.1, 21.29.2, 21.30, 24.08
(1)	21.32, 24.08
(2)	21.25, 24.08
(3)	24.08
(4)	24.08
(5)	24.08
(6)	24.08
s. 142(1)	23.16
s. 145(1)	1.12, 2.16, 3.02, 3.04, 3.05.1, 4.04.1, 5.02, 6.01, 6.17.1, 6.20, 7.04, 18.01, 18.13.1, 18.13.2, 20.19.3, 24.02.2, 25.03.3
(2)	25.02, 25.03.5, 25.04.4
s. 148	1.12, 4.03, 4.07, 7.09, 24.09, 24.29.2
s. 149(2)	1.12
(3)	1.12, 14.14
Sch. 1, Part I	
para. 1	6.17.1, 11.13, 17.04
para. 2	3.03, 6.17.1, 11.14, 15.10, 15.22.4, 17.05, 18.04, 18.04.4, 18.04.6, 21.18, 24.43
para. 3	18.04
para. 4	21.18
para. 6	6.17.1, 18.04, 18.04.4, 18.04.6
para. 8	3.03, 6.17.1, 15.10, 15.22.4, 17.05
para. 9	15.10, 15.22.4, 18.04, 18.04.4, 18.04.6
Part II	
para. 2	6.17.1, 11.13, 11.14, 17.04, 17.06
para. 3	6.17.1, 11.13
para. 7	6.17.1, 17.06
Sch. 2	18.01.1
para. 1	18.02.1, 18.02.2, 18.02.3
para. 3	18.02.1
para. 4	18.01, 18.02.1
para. 6	18.02.1
Sch. 3	23.07
Sch. 4	
para. 18(b)	13.05
para. 27	4.03
para. 37	24.09
para. 47(e)	4.07
para. 55	24.29.2
Sch. 5	
para. 2	1.12
para. 4	1.12
(1)	7.09

	PARAGRAPH
Mental Health Act 1983—<i>contd</i>	
Sch. 5, para. 4(2)	7.09
para. 31(2)	18.04
para. 33	18.04
para. 34	18.04
Mental Health (Amendment) Act 1982	1.11, 1.11.1, 1.11.2, 1.11.3, 3.03
s. 34	1.12, 14.14.1
s. 61	7.04
s. 62	1.12
s. 65(1)	24.09, 25.07, 25.09
Sch. 2, para. 1	10.01
Sch. 3	
para. 29	25.07
para. 33	13.05
para. 34	25.07, 25.09
para. 48	24.09
Mental Health (Amendment) (Scotland) Act 1983	
s. 39(2)	19.02
Sch. 2, para. 1	19.02
Mental Health (Scotland) Act 1960	
s. 31	19.02
s. 73(2)	18.04
s. 76	19.02
s. 111(1)	19.02
Mental Treatment Act 1930	1.06, 1.06.3, 1.08, 7.01, 18.04
Murder (Abolition of Death Penalty) Act 1965	
s. 1(1)	15.04
National Assistance Act 1948	
s. 21	4.05, 4.07
(1)	4.02, 4.05, 4.16.3
(2)	4.05
(4)	4.05.1
(8)	4.05
s. 24	4.05.2
(5)	4.05.2
(6)	4.05.2
s. 26(1)	4.05.1
(2)	4.05.1
(5)	4.05.1, 4.09.3
s. 29	4.06, 4.06.1, 4.07
(1)	4.02, 4.06
(4)	4.06
s. 30(1)	4.06.1
s. 32(3)	4.05.2
s. 33(1)	4.04.1
s. 48	23.17
s. 49	23.06.3
s. 64(1)	4.06
National Assistance Amendment Act 1959	
s. 1(1)	4.05.2
National Health Service Act 1946	1.07.4, 1.08.4, 2.01
National Health Service Act 1977	2.01, 2.05, 2.20
s. 1(1)	2.04.1
(2)	2.04.3
s. 2	2.04.2
s. 3(1)	2.04.1, 3.04.3

National Health Service Act 1977— <i>contd</i>				PARAGRAPH
s. 4	...	...	...	2.04.1, 3.04, 3.04.1, 3.04.2, 3.04.3, 3.07, 6.03
s. 6(3)	...	...	...	2.20
s. 8(1)(a)	...	...	...	2.06, 2.11
(1A)	...	...	...	2.06, 2.11
(3)(a)	...	...	...	2.06, 2.11
s. 10	...	...	...	2.17
s. 11	...	...	...	3.05.2
(1)	...	...	...	2.16
(3)	...	...	...	2.16
(4)	...	...	...	2.16
s. 12	...	...	...	2.06, 2.11, 2.16
s. 13	...	...	...	2.18
s. 14	...	...	...	2.18
s. 15(1)	...	...	...	2.17
s. 17	...	...	...	2.18, 20.23, 22.16.1a
s. 18(1)	...	...	...	2.18
(2)	...	...	...	2.18
s. 19	...	...	...	2.20
(4)	...	...	...	2.20
s. 20(1)	...	...	...	2.27
(3)	...	...	...	2.30.1
s. 21	...	...	...	7.02, 7.15
(1)	...	...	...	2.05, 4.02, 4.07, 4.16.3
s. 22	...	...	...	2.23
(2)	...	...	...	2.23.1
(3A)	...	...	...	2.23.2
(4)	...	...	...	2.23.2
(5)	...	...	...	2.23.2
s. 23	...	...	...	2.26
s. 26	...	...	...	2.26
s. 28	...	...	...	2.26
s. 28A	...	...	...	2.24.1
(2)	...	...	...	2.24.1
(3)	...	...	...	2.24.1
(4)	...	...	...	2.24.1
(5)	...	...	...	2.24.1
(7)	...	...	...	2.24.1
(8)	...	...	...	2.24.1
(9)	...	...	...	2.24.2
s. 28B	...	...	...	2.24.3
s. 84	...	...	...	2.05
s. 85	...	...	...	2.05
s. 86	...	...	...	2.05
s. 121	...	...	...	2.04.3
s. 128(1)	...	...	...	2.04.1, 3.02, 3.04, 4.04.1, 4.07, 21.27
s. 129(a)	...	...	...	4.05, 4.07
(b)	...	...	...	4.07
Sch. 5, Part I	...	...	...	2.07, 2.12
Part II	...	...	...	2.17
Part III	...	...	...	2.06, 2.11, 2.16
Sch. 6, para 1(1)	...	...	...	2.20
Sch. 7, para. 1	...	...	...	2.30.1
Sch. 8, para. 2	...	...	...	4.05
(1)	...	...	...	2.05, 4.02, 4.07, 7.01, 7.15

	PARAGRAPH
National Health Service Act 1977—contd	
Sch. 14,	
para. 15(2)	3.04
Sch. 15,	
para. 24(1)	4.05
(3)	4.07
Sch. 16	4.07
National Health Service Reorganisation Act 1973	
s. 14(1)	2.16
s. 15(1)	2.16
s. 40	3.04
s. 57(1)	4.05.2
Sch. 2	2.16
Sch. 4, para. 45	4.05.2
National Health Service (Scotland) Act 1978	
	19.08
Nurses, Midwives and Health Visitors Act 1979	
s. 1	6.18
s. 2	6.18
s. 5	6.18
s. 6	6.18
Official Secrets 1911	
	3.11
Official Secrets Act 1921	
	3.11
Parliamentary Commissioner Act 1967	
	3.12.2
Partnership Act 1890	
s. 35(1)	23.29
Police and Criminal Evidence Act 1984	
s. 57	12.05.2
s. 66	12.05.3, 12.05.4
s. 67	12.05.3, 12.05.4
s. 76	12.05.3, 12.06
s. 78	12.05.3, 12.06
Poor Law Amendment Act 1834	
	1.02.1, 7.01
Poor Relief Act 1601	
	1.02.1
Post Office Act 1953	
s. 56	24.31
s. 87(1)	24.31
Powers of Attorney Act 1971	
s. 5(1)	23.27.1
(2)	23.27.1
Powers of Criminal Courts Act 1973	
s. 2(1)	15.24
(3)	15.24
(5)	15.24
(6)	15.24
s. 3(1)	15.25
(2)	15.25
(3)	15.25
(5)	15.25
(6)	15.25
(7)	15.25
s. 4A	15.24
s. 4B	15.24
Sch. 1, para. 4	15.25
para. 4A	15.25

	PARAGRAPH
Prerogativa Regis, Statute de, 1339	
St. I, c. 9	23.01
c. 10	23.01
Prevention of Crime Act 1953	
s. 1	21.08.1
Prosecution of Offences Act 1985	12.04.1, 13.05, 14.10
Public Bodies (Admission to Meetings) Act 1960	2.08, 2.31
Public Health Act 1968	
s. 44(2)	4.05.1
Public Trustee and Administration of Funds Act 1986	23.02.5, A203
Registered Homes Act 1984	
s. 1(1)	5.10, 5.11.1
(2)	5.10
(3)	5.01.1, 5.11.1
(4)	5.11.1
(5)	5.01.1, 5.11.1
(6)	5.11.1
(7)	5.11.1
s. 2	5.11.1
s. 3	5.11.1
s. 4	5.01.1, 5.11.1
s. 5(1)	5.11.2
(2)	5.11.2
(3)	5.11.4
(4)	5.11.4
(5)	5.11.4
(6)	5.11.4
s. 7	5.11.5
s. 8	5.11.2
s. 9	5.11.3
s. 10	5.11.6
s. 11	4.05.1, 5.12.3
(1)	5.11.7
(2)	5.11.7
(3)	5.11.7
(4)	5.11.7
s. 12	5.12.2
(1)	5.12.1
(2)	5.12.1
(3)	5.12.1
(4)	5.12.1
(5)	5.12.1
s. 13(1)	5.12.2
(4)	5.12.2
(5)	5.12.2
s. 14	5.12.2
s. 15(1)	5.12.3
(2)	5.12.3
(3)	5.12.3
(4)	5.12.3
(5)	5.12.3
(6)	5.12.3
(7)	5.12.3
s. 16	5.05.1
(1)	5.13
(2)	5.13

Registered Homes Act 1984—*contd*

	PARAGRAPH
s. 17 ...	4.09.2
(1) ...	5.14.1
(2) ...	5.14.2
(3) ...	5.14.3
(4) ...	5.14.4
(5) ...	5.14.1, 5.14.2
(6) ...	5.14.4
s. 18(1) ...	5.15.2
(2) ...	5.15.2
s. 20(1) ...	5.10, 5.11.2
s. 22(1) ...	5.02
(2) ...	5.02
s. 23(1) ...	5.03.1
(2) ...	5.01.1, 5.03.1
(3) ...	5.02.1, 5.03.1
(4) ...	5.03.1
(5) ...	3.02.1, 5.02.1
(6) ...	5.03.1
s. 24 ...	5.04
(2) ...	5.04
s. 25 ...	5.03.1, 5.03.2
(1) ...	5.03.2
(2) ...	5.03.2
(3) ...	5.03.2
(4) ...	5.03.2
s. 26 ...	5.05.1, 5.13
s. 27 ...	5.05.1, 5.05.2, 5.13
(b) ...	5.07.1
s. 28 ...	5.08
(a) ...	5.03.4
(b)-(e) ...	5.03.4
s. 29(1) ...	5.03.3
(2) ...	5.03.3
(4) ...	5.03.3
s. 30 ...	5.06.1, 5.06.3
(1) ...	5.03.5
(2) ...	5.03.5
(3) ...	5.03.5
s. 31 ...	5.06.1, 5.06.2
(1) ...	5.06.1
(2) ...	5.06.1
(3) ...	5.06.1
(4) ...	5.06.1
s. 32(1) ...	5.06.2
(4) ...	5.06.2
(5) ...	5.06.2
s. 33 ...	5.06.2
s. 34 ...	5.06.2
(1) ...	5.06.3
(2) ...	5.06.3
(3) ...	5.06.3
(4) ...	5.06.3
(5) ...	5.06.3
(6) ...	5.06.3
(7) ...	5.06.3
s. 35(1) ...	5.07.1, 5.07.3
(2) ...	5.07.2

	PARAGRAPH
Registered Homes Act 1984— <i>contd</i>	
s. 35(3)	5.07.3
(5)	5.07.4
(6)	5.07.4
s. 36	5.08
(1)	5.08
(2)	5.08
(3)	5.08
s. 37	5.03.1
s. 38	5.09
s. 40	5.16
s. 41	5.16
s. 42	5.16.1
(4)	5.16.1
s. 46(2)	5.03.1
s. 47(1)	5.11.6
(2)	5.03.1
(3)	5.03.1
s. 48	5.03.3, 5.11.6
s. 49	5.05.1, 5.13
s. 50	5.04
s. 51(1)	5.14.4
(2)	5.07.4
s. 53(2)	5.07.4
s. 54	5.06.1, 5.12.1
s. 55	5.11.2
s. 56	5.05.1, 5.13
s. 57	5.02.1
Sch. 1, para. 10	5.02.1
Sch. 4, Part I... ..	4.05.1
Repatriation of Prisoners Act 1984	
s. 1	19.07.1
Representation of the People Act 1949	
s. 4(3)	24.02.1, 24.02.2
Representation of the People Act 1983	
s. 1(1)	24.03
s. 3	24.03
(2)	24.03
s. 7	10.01, 24.02.2, 24.06.1, 24.06.8
(1)	24.05
(2)	24.06.1, 24.06.3
(3)	24.06.1, 24.06.3
(4)	24.06.3
(5)	24.06.5
(6)	24.06.5
(9)	24.06.6
s. 19(1)	24.06.7
s. 20(2)	24.06.7
s. 202(1)	24.03
Road Traffic Act 1972	
s. 87(1)	24.39
(2)	24.39
(3)	24.39
(5)	24.41
(5A)	24.41
(6)	24.39
s. 87A	24.40

	PARAGRAPH
Road Traffic Act 1972— <i>contd</i>	
s. 87A(5)	24.40
s. 90(1)	24.42
s. 92(1)	24.40
(2)	24.40
Road Traffic Act 1974	
s. 13(1)	24.39, 24.40
Sch. 3, para. 2(1)	24.39, 24.40
(4)	24.41
(5)	24.41
para. 3	24.40
para. 7(1)	24.40
(2)	24.40
Sales of Goods Act 1979	
s. 3(2)	23.26.2
Sexual Offences Act 1956	
s. 7	25.07, 25.10.1
s. 9	25.08.1
s. 21	25.08.2
(3)	25.08.2
s. 27	25.08.3
s. 29	25.08.4
s. 38	8.02
s. 43	25.08.4
s. 45	25.07
s. 47	25.10.1
Sexual Offences Act 1967	
s. 1(1)	25.09
(3)	25.07, 25.09
(3A)	25.07, 25.09
(4)	25.10.1
Statute de Prerogative Regis 1339 <i>see</i> Prerogative Regis, de Statute, 1339	
Suicide Act 1961	
s. 1	21.07
s. 2(1)	21.07
Supreme Court Act 1981	
s. 4(1)	24.23
s. 36	23.11.2
s. 89	23.02.3
Town and Country Planning Act 1971	4.17
s. 22	4.17
(3)	4.17
s. 36	4.17.1
(1)	4.17
(8)	4.17
s. 242(1)	4.17
(3)	4.17
s. 245(1)	4.17
(3)	4.17
(4)	4.17
(7)	4.17
Sch. 9	4.17, 4.17.1
Trial of Lunatics Act 1883	1.03.2
s. 2(1)	13.03
Tribunal and Inquiries Act 1971	18.01.2
Vagrancy Act 1713	1.02.2
Vagrancy Act 1744	1.02.2, 1.04, 1.05.1, 7.01

TABLE OF STATUTORY INSTRUMENTS

		PARAGRAPH
1946	No. 1258	Disabled Persons (Standard Percentage) Order 1946 24.37
1948	No. 1445	National Assistance (Powers of Inspection) Regulations 1948 4.09.2
1959	No. 365	Handicapped Pupils and Special Schools Regulations 1959 4.18.2
1963	No. 1991	National Assistance (Powers of Inspection) Amendment Regulations 1963 4.09.2
1965	No. 1776	Rules of the Supreme Court 18.25, 24.24-24.26
1972	No. 444	Raising of the School Leaving Age Order 1972 4.21.1
1973	No. 1624	Welsh Health Technical Services Organisation (Establishment and Constitution) Order 1973 2.16
	No. 2217	National Health Service (Community Health Councils) Regulations 1973 2.31
1974	No. 160	National Health Service (General Medical and Pharmaceutical Services) Regulations 1974 2.17
	No. 420	Town and Country Planning Appeals (Determination of Appointed Persons) (Inquiries Procedure) Rules 1974 4.17
1975	No. 555	Social Security (Hospital In-Patients) Regulations 1975 23.19, 23.22, 23.25
1977	No. 289	Town and Country Planning General Development Order 1977 4.17
	No. 344	Matrimonial Causes Rules 1977 24.15.1
1978	No. 474	Probation Orders (Variation of Statutory Limits) Order 1978 15.24
1980	No. 1160	Companies (Directors' Report) (Employment of Disabled Persons) Regulations 1980 24.36.3
	No. 1946	Town and Country Planning General Development Amendment Order 1980 4.17
1981	No. 101	National Health Service (Standing Advisory Committees) Regulations 1981 2.20
	No. 245	Town and Country Planning General Development (Amendment) (No 2) Order 1981 4.17
	No. 597	National Health Service (Standing Advisory Committees) Order 1981 2.20
	No. 630	Education (School Information) Regulations 1981 ... 4.20
	No. 727	Rampton Hospital Review Board (Establishment and Constitution) Order 1981 (<i>now revoked</i>) 3.05.2
	No. 952	Motor Vehicles (Driving Licences) Regulations 1981 24.39
	No. 1569	Town and Country Planning General Development (Amendment) (No 2) Order 1981 4.17
	No. 1687	County Court Rules 1981 8.09, 11.09, 24.24-24.26.2
	No. 1711	Education Act 1981 (Commencement No. 1) Order 1981 4.19

			PARAGRAPH
1981	No. 1838	National Health Service (Constitution of District Health Authorities) Order 1981	2.02, 2.12
1982	No. 152	Health Service Commissioner for England (London Post-Graduate Teaching Hospitals) Order 1982	2.16
	No. 276	National Health Service (Appointment of Consultants) Regulations 1982	2.10
	No. 288	Health Services Act 1980 (Consequential Amendments) Order 1982	2.08, 2.16
	No. 314	Authorities for London Post-Graduate Teaching Hospitals (Establishment and Constitution) Order 1982	2.16
	No. 315	Authorities for London Post-Graduate Teaching Hospitals Regulations 1982	2.16
	No. 423	Motor Vehicles (Driving Licences) (Amendment) (No. 3) Regulations 1982	24.39
	No. 863	National Health Service (Charges to Overseas Visitors) (No. 2) Regulations 1982	2.04.3
	No. 1857	Criminal Justice Act 1982 (Commencement No. 1) Order 1982	15.24
1983	No. 7	Education Act 1981 (Commencement No. 2) Order 1983	4.19
	No. 29	Education (Special Education Needs) Regulations 1983	4.20, 4.23.4, 4.24.1
	No. 41	Education (School Information) (Amendment) Regulation 1983	4.20
	No. 315	National Health Service (Regional and District Health Authorities: Membership and Procedure) Regulations 1983	3.05.2A
	No. 435	Representation of the People Regulations 1983	24.06.1, 26.06.3
	No. 667	Nurses, Midwives and Health Visitors (Parts of Register) Order 1983	6.19
	No. 873	Nurses, Midwives and Health Visitors Rules Approval Order 1983	6.18
	No. 887	Nurses, Midwives and Health Visitors (Professional Conduct) Rules 1983 Approval Order 1983	6.20
	No. 891	Mental Health (Nurses) Order 1983	10.05, B7
	No. 892	The Mental Health Act Commission (Establishment and Constitution) Order 1983	B8
	No. 893	Mental Health (Hospital, Guardianship & Consent to Treatment) Regulations 1983	B10
		reg. 2(1)	6.17.3, 11.08, 19.01
		reg. 3	10.05
		reg. 3(1)	6.13
		(2)	6.13
		(3)	6.13, 8.03
		(4)	6.04
		(5)	6.13
		(6)	6.11
		reg. 4	7.11, 7.28
		(1)	6.03, 6.05.2, 6.17.5, 10.04, 10.05, 11.02, 11.04.1, 11.05.2, 11.05.3, 11.06.2, 11.06.3
		(2)	6.05, 6.05.2
		(3)	6.03, 6.11
		(4)	6.11
		(5)	10.05
		reg. 5	7.11, 7.28
		(1)	11.07.3, 11.07.4
		reg. 6	6.11
		reg. 7	3.08, 11.18.2

TABLE OF STATUTORY INSTRUMENTS

lxxxv

1983	No. 893— <i>contd</i>	PARAGRAPH
	reg. 7(1)	11.18.1
	(2)	6.03, 6.11
	(3)	6.11, 11.18.3
	(5)	6.03
	reg. 8	11.18.5
	(2)	11.09, 11.18.4
	reg. 9	3.08, 11.18
	reg. 10(1)	6.06, 6.11, 11.06.5
	(3)	6.06
	reg. 11	19.01
	(2)	19.01
	(3)	6.11, 19.01
	(4)	6.11, 19.01
	reg. 12	11.08
	(a)	6.17.2
	(b)	6.17.2
	reg. 13	11.08
	reg. 14	8.04
	(1)	8.04
	(2)	8.04
	(3)	8.04
	reg. 15(1)	8.03
	(2)	8.03
	(3)	6.11, 8.03
	reg. 16	20.08, 20.20.2
	(2)	20.20.3, 20.21.1, 20.21.3
	reg. 17	6.10
	(1)	24.36.1
	(2)	24.36.1
	(3)	24.36.2
	reg. 18	6.10
	(1)	24.36.3
	(2)	24.36.3
	(3)	24.36.3
	Sch. 1	7.11
No. 894	Mental Health Act Commission Regulations 1983	2.05, B57
No. 942	Mental Health Review Tribunal Rules 1983	B60
	r. 2	18.21
	(1)	7.24, 18.01, 18.20
	r. 3(1)	18.20
	r. 4(1)	18.20
	r. 5	18.02.1
	r. 6	7.24, 7.24.1, 7.25, 7.28, 18.22.4
	(1)	18.22.1
	(2)	18.22.2
	(4)	18.22.5
	r. 7	18.20
	r. 8(2)	18.01
	(3)	18.02.1
	r. 10(1)	18.21
	(4)	18.20
	r. 11	18.02.2
	(5)	18.25
	r. 12	7.24.1, 18.22.4, 18.22.5
	(1)	18.22.5, 18.23
	(3)	18.22.5
	r. 13	1.10, 18.02.1, 18.23.1

1983	No. 942— <i>contd</i>	PARAGRAPH
	r. 14(1)	18.21
	r. 16	18.20A.1
	r. 19(1)	18.04.8
	r. 20	18.20
	r. 21(1)	18.23
	(2)	18.23
	(4)	18.23
	r. 22(5)	18.23
	r. 23(1)	18.24
	(2)	18.24
	r. 24(1)	18.09, 18.14.1, 18.24
	(1)	18.10
	r. 25(1)	18.14.1
	r. 30	18.26
	r. 31	18.26
	r. 32	18.26
	r. 33	18.26
	Sch. 1	7.24, 7.25, 7.28
	Part A	18.22.1
	Part B	18.22.1
	Part C	18.22.3
	Part D	18.22.3
1984	No. 692 Rampton Hospital Review Board (Establishment and Constitution) Amendment Order 1984 (<i>revoked</i>)	3.05.2
	No. 693 Rampton Hospital Review Board (Functions and Membership) Amendment Regulations 1984 (<i>revoked</i>)	3.05.2
	No. 994 National Health Service (Appointment of Consultants) Amendment Regulations 1984	2.10
	No. 1303 Social Security (Severe Disablement Allowance) Regulation 1984	23.21
	No. 1345 Residential Care Homes Regulations 1984	5.01, 5.07.3, 5.13
	No. 1346 Registered Homes Tribunals Rules 1984	5.17
	No. 1357 Mental Health Act 1983 Commencement Order 1984	14.14
	No. 1578 Nursing Homes and Mental Nursing Homes Regulations 1984	5.01, 5.05.1, B79
	No. 2035 Court of Protection Rules 1984	23.06–23.12, B90
1985	No. 301 Family Practitioner Committees (Establishment) Order 1985	2.17
	No. 302 Family Practitioners Committees (Specified Date) Order 1985	2.17
	No. 304 National Health Service (Community Health Councils) Regulations 1985	2.27, 2.28, 2.29, 2.30.3
	No. 305 National Health Service (Joint Consultative Committees) Order 1985	2.23.1
	No. 1067 National Health Service (Regional and District Health Authorities Membership and Procedure) Amendment Regulations 1985	3.05.2A
1986	No. 127 Court of Protection (Enduring Powers of Attorney) Rules 1986	23.27A.1, B139
	No. 456 Nursing Homes and Mental Nursing Homes (Amendment) Regulations 1986	5.01
	No. 457 Residential Care Homes (Amendment) Regulation 1986	5.01
	No. 963 Rampton Hospital Board (Establishment and Constitution) Order 1986 (<i>now revoked</i>)	3.05.2
	No. 964 Rampton Hospital Board (Functions and Membership) Regulations 1986 (<i>now revoked</i>)	3.05.2

TABLE OF STATUTORY INSTRUMENTS

lxxxvii

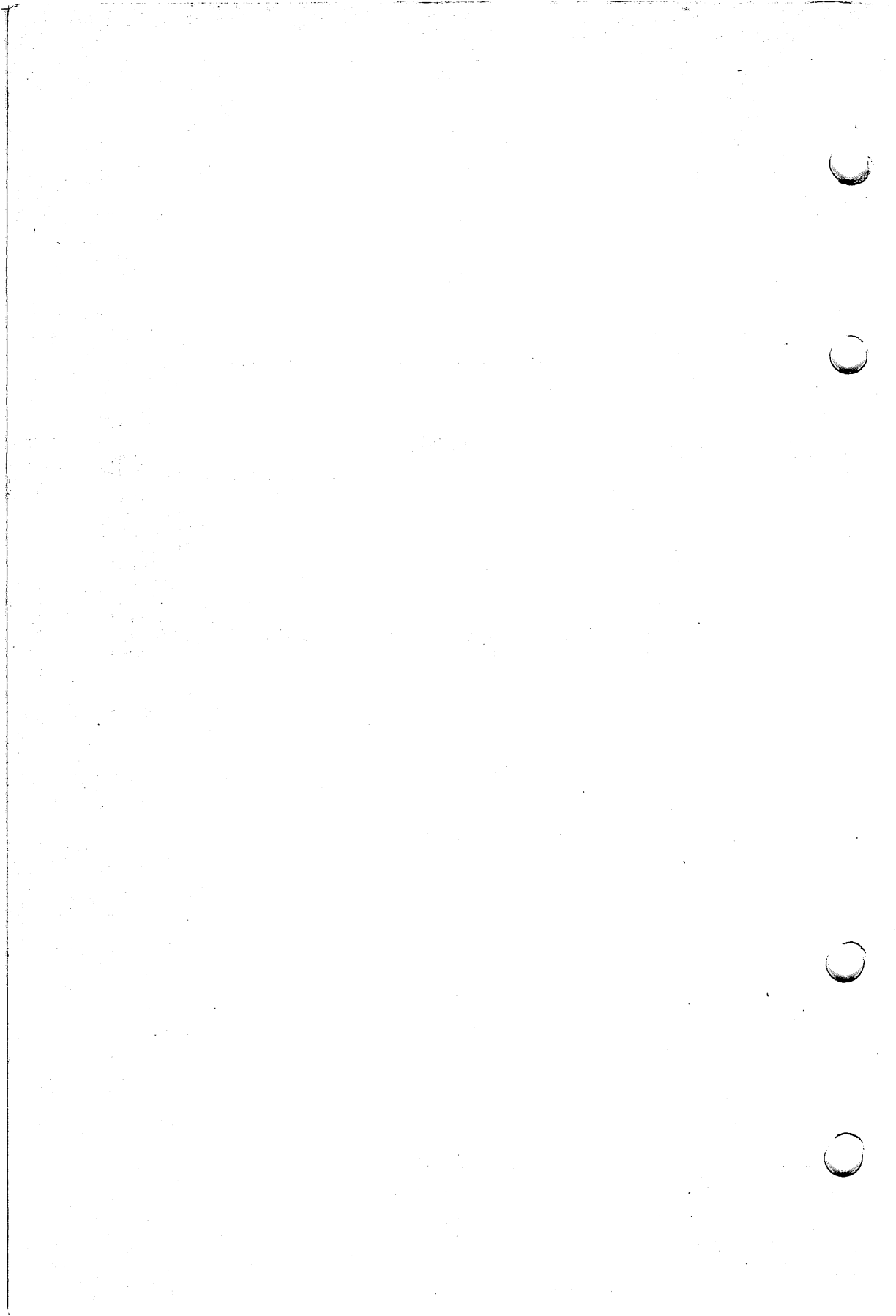
		PARAGRAPH
1986	No. 2004	Broadmoor Hospital Board (Establishment and Constitution) Order 1986 (<i>now revoked</i>) 3.05.2
	No. 2005	Broadmoor Hospital Board (Functions and Membership) Regulations 1986 (<i>now revoked</i>) 3.05.2
	No. 2006	Moss Side and Park Lane Hospitals Board (Establishment and Constitution) Order 1986 (<i>now revoked</i>) 3.05.2
	No. 2007	Moss Side and Park Lane Hospitals Board (Functions and Membership) Regulations 1986 (<i>now revoked</i>) 3.05.2
1987	No. 31	Social Security (Hospital In-Patients) Amendment Regulations 1987 23.19
	No. 1612	Enduring Powers of Attorney (Prescribed Form) Regulations 23.27A.1, B 159
	No. 2024	Non-Contentious Probate Rules 1987 23.28A
1988	No. 1191	Nursing Homes and Mental Nursing Homes (Amendment) Regulations 1988 5.01
	No. 1192	Residential Care Homes (Amendment) Regulations 1988 5.01, 5.07.3
1989	No. 340	Legal Advice and Assistance Regulations 1989 18.21
	No. 431	Financial Services Act (Miscellaneous Exemptions) Order 1989 23.05
	No. 442	The Personal Community Charge (Exemptions) Order 1989 24.43
	No. 947	The Boards for Special Hospitals (Abolition) Order 1989 3.05.2, B165
	No. 948	The Special Hospitals Service Authority (Establishment and Constitution) Order 1989 2.16, 3.05.2A, B167
	No. 949	The Special Hospitals Service Authority (Functions and Membership) Regulations 1989 3.05.2A, B168
	No. 1455	Nurses, Midwives and Health Visitors (Parts of the Register) Amendment (No. 2) Order 1989 6.19
	No. 1611	The Special Hospitals Service Authority (Functions and Membership) Amendment Regulations 1989 B168, B170
1990	No. 1330	Family Health Service Authorities (Membership and Procedure) Regulations 1990 2.17
	No. 1331	Regional and District Health Authorities (Membership and Procedure) Regulations 1990 2.08, 2.12
	No. 2164	Nursing Homes and Mental Nursing Homes (Amendment) Regulations 1990 5.01
	No. 2580	Police and Criminal Evidence Act 1984 (Codes of Practice) (No. 2) Order 1990 12.05.4
1991	No. 554	National Health Service Functions (Directions to Authorities and Administrative Arrangements) Regulations 1991 2.09, 2.18, 2.19, 5.03.1, 6.17.5, 18.14A.2
	No. 1247	Family Proceedings Rules 1991 24.13.2
	No. 1505	Children (Secure Accommodation) Regulations 1991 24.16A.2
	No. 2034	Children (Secure Accommodation) (No. 2) Regulations 1991 24.16A.2
	No. 2502	Residential Care Homes (Amendment) Regulations 1991 5.01
	No. 2532	Nursing Homes and Mental Nursing Homes (Amendment) Regulations 1991 5.01
1992	No. 2007	Residential Care Homes (Amendment) Regulations 1992 5.01
	No. 2241	Residential Care Homes (Amendment) (No. 2) Regulations 1992 5.01
1993	No. 893	Nurses, Midwives and Health Visitors (Professional Conduct) Rules 1993 Approval Order 1993 6.18
1993	No. 2155	Mental Health (Nurses) Amendment Order 1993 10.05, B.7

TABLE OF STATUTORY INSTRUMENTS

		PARAGRAPH	
	No. 2156	Mental Health (Hospital, Guardianship and Consent to Treatment) Amendment Regulations 1993	B.33
1994	No. 680	National Health Service (District Health Authorities) Order 1994	2.11
	No. 681	National Health Service (Determination of Districts) Order 1994	2.11
	No. 683	National Health Service (Determination of Regions) Order 1994	2.06
	No. 684	National Health Service (Regional Health Authorities) Order 1994	2.06

TABLE OF EUROPEAN CONVENTIONS

	PARAGRAPH
European Convention on Human Rights	
Article 3	20.29
Article 5(1)	9.09-9.2, 13.04.1, 15.11, 15.19, 20.29
(2)	15.63
(4)	5.11, 18.21
Article 6(1)	21.33, 23.01.2
Article 8	24.34, 25.12
Article 12	24.12.1
Article 14	18.04.7
Article 18	20.29
Article 28	3.12A
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	20.29B



CONSOLIDATED TABLE OF CASES
(incorporating Supplements Nos. 1 to 12 inclusive)

A

	PARAGRAPH
A. v. The United Kingdom: European Commission of Human Rights, App. No. 6840/74; Report of the Commission 16 July 1980	3.12A, 20.08A
A and B v Dumfries and Galloway Electoral Registration Office [1963] (2) S.L.T. Sh. Ct. Rep. 25	24.02.3
Abbott-Hull v. Lancashire County Council (1989) Decision No. 98. Registered Homes Tribunal	5.11.7
Ackroyds (London) Ltd. v. Islington Plastics Ltd [1962] R.P.C. 97	20.32.2
Airedale N.H.S. Trust v. Bland [1993] 2 W.L.R. 316; [1993] 1 All E.R. 821	20.15B.1
Airey v. Republic of Ireland (1979), European Court of Human Rights, Judgment given, October 9, 1979	18.21
Akbarati v. Brent London Borough Council, Abdulla v. Shropshire County Council; Shabpar v. Barnet London Borough Council, Shah (Jitendra) v. Barnet London Borough Council; Barnet London Borough Council v. Shah [1983] 2 A.C. 309; [1983] 2 W.L.R.16; (1983) 127 S.J. 36; [1983] 1 All E.R. 226; (1983) 81 L.G.R. 305; (1983) 133 New L.J. 61, H.L.	8.02
Albert v. Lavin [1981] 3 W.L.R. 955; (1981) 125 S.J. 860 [1981] 3 All E.R. 878; [1982] A.C. 546; (1982) 74 Cr. App. R. 150, H.; <i>affirming</i> [1981] 2 W.L.R. 1070; (1981) 125 S.J. 860; [1981] 1 All E.R. 628, [1981] C.L.R. 238, C.A., <i>affirming</i> (1980) 125 S.J. 114; (1980) 72 Cr. App. R. 178, D.C.	21.09
Albert (Prince) v. Strange (1849) 1 Mac. & G. 25; (1849) 18 L.J.CL. 120	20.32.1
Alexander Machinery (Dudley) Ltd. v. Crabtree [1974] I.C.R. 120	18.24.1
Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2) <i>see</i> Crompton (Alfred) Amusements Machines Ltd. v. Customs and Excise Commissioners (No. 2)	
Anderson v. Burrows M.D. (1830) 4 C. & P. 210	21.13.2
Anon (1856) 2 K. & J. 441	23.29
Anon, <i>Re</i> (1881) 18 Ch. D. 26	23.12.1
Arberry v. Ashe (1828) 1 Hag, E.C.C. 214	23.28
Archer v. Cutler [1980] 1 N.Z.L.R. 386	23.26.1
Argyll (Duchess) v. Argyll (Duke) [1967] Ch. 302; [1965] 2 W.L.R. 790; [1965] 1 All E.R. 611	20.32.3
Ashingdane v. Secretary of State for Social Services and others; Court of Appeal Feb 18, 1980 (unreported)	3.04.3; 21.25; 21.26.2; 21.29.2
Ashingdane v. the United Kingdom: European Commission of Human Rights Report adopted May 12, 1983; European Court of Human Rights, Judgment given May 28, 1985	1.10; 9.09.2; 15.16.3; 20.29; 21.33
Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.	15.16.3

	PARAGRAPH
Att.-Gen. v. Associated Newspapers Group [1989] 1 W.L.R. 322; [1989] 1 All E.R. 604, D.C.	18.23A
Att.-Gen. v. B.B.C. (1980), [1981] A.C. 303; [1980] 3 W.L.R. 309; 124 S.J. 444; [1980] 3 All E.R. 161, H.L.	18.23A
Att.-Gen. v. Cape (Jonathan) Ltd; Att.-Gen. v. Times Newspapers [1976] Q.B. 752; [1975] 3 W.L.R. 606; 119 S.J. 696; [1975] 3 All E.R. 484	20.32.2
Att.-Gen. v. Guardian Newspapers (No. 2) (1987) [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; (1988) 132 S.J. 1496; [1988] 3 All E.R. 545, H.L.	20.32.1
Att.-Gen. v. West Riding County Council [1907] A.C. 29, H.L.	4.31.2
Att.-Gen. (South Australia) v. Brown [1960] A.C. 432; [1960] 2 W.L.R. 588; 104 S.J. 268; [1960] 1 All E.R. 734; 44 Cr. App. R. 100, P.C., reversing (1959) 33 A.L.J.R. 89	13.04.5
Austen v. Graham (1854) 8 Moo. P.C.C. 493	23.28

B

B. v. the United Kingdom (1981) European Commission of Human Rights App. no. 6870/75; Report adopted October 7, 1981	3.06.1, 20.29A
B. Re, Liverpool County Court, November 29, 1985 (unpublished)	8.07
B. (A Minor), Re [1981] 1 W.L.R. 1421; (1981) 125 S.J. 608; [1982] L.G.R. 107, C.A.	24.23
B. (A Minor), Re [1987] 2 W.L.R. Re 1213; [1987] 2 All E.R. 206, H.L.	20.09, 20.16.2
B. (A Minor), Re (1991) <i>The Times</i> , May 27, 1991; <i>The Guardian</i> , May 21, 1991	20.15A.2
B (A Minor) (Wardship: Medical Treatment), Re (1981) [1990] 3 All E.R. 927; [1981] 1 W.L.R. 1421	20.15B.1
B (A Minor) (Wardship: Sterilisation) Re [1988] A.C. 199; [1987] 2 W.L.R. 1213; 131 S.J. 625; [1987] 2 All E.R. 206; [1987] 2 F.L.R. 314, H.L.	20.09, 20.15B.2, 20.16
B (Court of Protection) Re [1987] 1 W.L.R. 552; [1987] 2 All E.R. 475; 131 S.J. 658; [1987] 2 F.L.R. 155; 17 Fam. Law 242	23.11.2A
B. (A) v. B. (L.) (Mental Health Patient) [1980] 1 W.L.R. 116; (1979) 124 S.J. 16; (1979) 78 L.G.R.1, <i>sub nom.</i> B. v. B. (Mental Health Patient) [1979] 3 All E.R. 494, C.A.	8.07, 8.09
Baker v. Ellison [1914] 2 K.B. 762, D.C.	25.05
Bank v. Comptoir etc., de Mulhouse [1925] A.C. 112	24.25.3
Banks v., Goodfellow (1870) L.R. 5 Q.B. 549	23.28
Barber, Re (1888) 39 Ch.D. 187	23.02.1
Barclay-Maguire v. United Kingdom (1981) European Commission of Human Rights App. no. 9117/80; Decision as to admissibility, December 9, 1981, (Case Withdrawn)	1.10, 18.23.1
Barnsley v. Marsh [1947] K.B. 672; [1947] L.J.R. 995; 177 L.T. 573; 63 T.L.R. 399; 111 J.P. 363; 91 S.J. 561; (1947) 1 All E.R. 874, D.C.	15.05
Beales v. Beales [1972] Fam. 210; [1972] 2 W.L.R. 972, 116 S.J. 196; [1972] 2 All E.R. 667	24.14.4
Beauchamp (Earl) v. Madresfield (1872) L.R.8 C.P. 245	24.03
Beausoleil v. La Communauté des Soeurs de la Charité de la Providence (1964) 53 D.L.R. (2d.) 65	21.05.2
Beavan, Re [1912] 1 Ch. 196	23.26.2
Bennett v. Bennett [1969] 1 W.L.R. 430; 113 S.J. 284; [1969] 1 All E.R. 539	24.13.2
Beverley's Case (1603) 4 Co. Rep. 1236, 127a-128a, 76 Eng. Rep. 1118, 1125-26, K.B.	20.16.2
Birkin v. Wing (1890) 63 L.T. 80	23.26.1

	PARAGRAPH
Birmingham Corporation v. Minister of Housing and Local Government and Habib Uuah; Same v. Same and Khan [1964] 1 Q.B. 178; [1963] 3 W.L.R. 937; 128 J.P. 33; 107 S.J. 812; [1963] 3 All E.R. 668; 15 P. & C.R. 404; 61 L.G.R. 623 [1963] R.V.R. 712, D.C.	4.17
Black v. Forsey (1988) <i>The Times</i> , May 31, 1988, H.L.	21.11.2
Bliss v. South East Thames Regional Health Authority [1987] I.C.R. 700	20.32.9
Blyth v. Bloomsbury Health Authority (1987), <i>The Times</i> , February 11, 1987, C.A.	20.12.2
Bohrmann, Caesar and Watmough (Estate of) v. Bohrmann [1938] 1 All E.R. 271	23.28
Bolam v. Friern Hospital Management Committee [1957] 1 W.L.R. 582; 101 S.J. 357; [1952] 2 All E.R. 118	20.12.1, 20.12.2, 20.16B, 20.16B.3
Bone v. Mental Health Tribunal [1985] 3 All E.R. 330; <i>The Times</i> , February 20, 1985	18.24.1, 18.25
Boughton v. Knight (1873) 3 P.&D. 64	23.28
Bradbury v. Enfield London Borough Council [1967] 1 W.L.R. 1311; 111 S.J. 701; 65 L.G.R. 115; <i>sub nom.</i> Bradbury v. London Borough of Enfield 132 J.P. 15; [1967] 3 All E.R. 434, C.A.; <i>reversing sub nom.</i> Bradbury v. London Borough of Enfield (1967) <i>The Times</i> , August 1, 1967	4.31.2
Bratty v. Att.-Gen. (Northern Ireland) [1963] A.C. 386; [1961] 3 W.L.R. 965; 105 S.J. 865; [1961] 3 All E.R. 523; 46 Cr. App. R.I., H.L.	13.02, 13.04.1
Brazil v. Chief Constable of Surrey (1983) 127 S.J. 712, [1983] 3 All E.R. 537; [1983] Crim. L.R. 483, D.C.	21.11
British Steel Corporation v. Granada Television Ltd. [1980] 3 W.L.R. 774; (1980) 124 S.J. 812; [1981] 1 All E.R. 417; [1982] A.C. 1096, H.L.; affirming (1980) 124 S.J. 376; (1980) <i>The Times</i> , May 8, 1980, C.A.; affirming (1980) <i>The Times</i> , April 13, 1980	20.32.7, 20.32.8
Brookshaw v. Hopkins (1790) Lofft. 235; 98 E.R. 627	21.11
Brown v. Jodrell [1827] M. & M.	23.26.1
Brown v. United States (1921) 256 U.S. 335; 41 S. Ct. 501	21.08.3; 21.10
Bryan v. Mott (1975) 119 S.J. 743; (1975) 62 Cr. App. R. 71; [1976] Crim. L.R. 64, D.C.	21.08.4
Buckland v. Buckland (orse. Camilleri) [1968] P. 296; [1967] 2 W.L.R. 1506; 111 S.J. 456; [1967] 2 All E.R. 300, <i>sub nom.</i> Buckland v. Buckland (orse. Camillevi) and Billotti (1965) 109 S.J. 212; [1965] C.L.Y. 1315	21.05.2

C

C <i>Re</i> (1983) <i>sub nom.</i> Re S.D. [1983] W.W.R. 618	20.15B.1
C (A Minor) <i>Re</i> (1989) <i>The Times</i> , April 21, 1989, C.A.	24.23
C (A Minor) (Wardship: Medical Treatment) <i>Re</i> [1990] Fam. 26; [1989] 3 W.L.R. 240; [1989] 2 All E.R. 782; (1989) 133 S.J. 876; C.A.	20.15B.1
C (A Minor) (Wardship: Medical Treatment) (No. 2), [1990] Fam. 39; [1989] 3 W.L.R. 252; 2 All E.R. 791, C.A.	20.15B.1
C <i>Re</i> [1991] 3 All E.R. 866; [1991] Fam. Law 521; [1992] 1 F.L.R. 51, (1991) 8 B.M.L.R.	23.04
C & G Homes Ltd v. Secretary of State for Health [1991] 2 W.L.R. 715, C.A.	4.17.2
C.M.G., <i>Re</i> [1970] 1 Ch. 574; [1970] 3 W.L.R. 80; 114 S.J. 399; [1970] 2 All E.R. 740	23.05
C.W.H.T. <i>Re</i> [1978] Ch. 67; [1977] 3 W.L.R. 880; (1977) 121 S.J. 776; [1978] 1 All E.R. 210	23.05
Campbell v. Secretary of State for the Home Department, <i>see</i> Secretary of State for the Home Department v. Oxford Regional Mental Health Review Tribunal	

	PARAGRAPH
Carter v. Commissioner of Police of the Metropolis [1975] 1 W.L.R. 507; 119 S.J. 237 [1975] 2 All E.R. 33, C.A.	12.02, 21.26.1
Cathcart, <i>Re</i> [1893] 1 Ch. 466	23.11.3
Cathcart, <i>Re</i> [1902] W.N. 80	23.11.3
Chandler v. Surrey County Council (Industrial Tribunal Case No. 22760/77)	24.38.1
Chantrey Martin (a Firm) v. Martin [1953] 2 Q.B. 286; [1953] 3 W.L.R. 459, 97 S.J. 539; [1953] 2 All E.R. 691; 46 R. & I.T. 516, C.A.	20.32.7
Chatterton v. Gerson [1981] Q.B. 432; [1980] 3 W.L.R. 1003; (1980) 124 S.J. 855 [1981] 1 All E.R. 257	20.12, 20.12.1, 20.12.2, 20.20.3, 21.05
Cleare v. Cleare (1869) L.R.1 P. & D. 655	23.28
Cockcroft v. Smith (1705) (1708) 2 Salk, 642; 91E. R541	21.08.3
Colah, <i>Re</i> (The Parsee Merchant's Case) 3 Daly 529, 537-30; II Abb. Pr. (n. s.) 209, 219-22 (N.Y.C.P. 1871)	20.16.2
Cole v. Harris (1945) K.B. 474, C.A.	4.17
Cole v. Turner (1705) 6 Med. Rep. 149	21.02.1
Collins v. United Kingdom (1982) European Court of Human Rights App. no. 9729/82 (withdrawn)	1.10, 18.21
Conway v. Hotten [1976] 2 All E.R. 213; (1976) 63 Cr. App. R. 11; [1976] Crim. L.R. 25, D.C.	12.05.1
Cranleigh Precision Engineering Ltd. v. Bryant [1965] 1 W.L.R. 1293; 109 S.J. 830; [1964] 3 All E.R. 289; [1966] R.P.C. 81	20.32.3
Council of Civil Service Unions v. Minister for Civil Service [1985] A.C. 374	3.08.1
Crompton (Alfred) Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2) [1974] A.C. 405; [1973] 3 W.L.R. 268; 117 S.J. 602; [1973] 2 All E.R. 1169, H.L.; <i>affirming on different grounds</i> [1972] 2 Q.B. 102; [1972] 2 W.L.R. 835; 116 S.J. 198; [1972] 2 All E.R. 353, C.A., <i>reversing</i> (1971) 115 S.J. 587, <i>The Times</i> , July 16, 1971	20.32.7
Cull v. Butler [1932] 1 B.M.J. 1195	20.12
Cummings v. Birkenhead Corporation [1972] Ch. 12; [1971] 2 W.L.R. 1458; 115 S.J. 365; [1971] 2 All E.R. 881; 69 L.G.R. 444, C.A.; <i>affirming</i> [1970] 3 W.L.R. 971; [1970] 3 All E.R. 302; 69 L.G.R. 47; <i>sub nom.</i> Cummings v. Birkenhead Corporation (1970) 114 S.J. 786	4.31.1
Cutler v. Wandsworth Stadium Ltd [1949] A.C. 398; [1949] 1 All E.R. 544, H.L.	18.23A

D

D. (A Minor) (Wardship: Sterilisation), <i>Re</i> [1976] Fam. 185; [1976] 2 W.L.R. 279; (1975) 119 S.J. 696; [1976] 1 All E.R. 326	20.15B.2, 24.23
D. (J.), <i>Re</i> [1982] Ch. 237; [1982] 2 W.L.R. 373; (1982) 126 S.J. 85; [1982] 2 All E.R. 37	23.04, 23.05.1, 23.11.3
D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171; [1977] 2 W.L.R. 201; 121 S.J. 119; [1977] 1 All E.R. 589; 76 L.G.R. 5, H.L.	20.32.7
D.M.L. <i>Re</i> [1965] Ch. 1133; [1965] 3 W.L.R. 740; [1965] 2 All E.R. 129	23.04
Dane v. Kirkwall (1838) 8 C. & P. 679	23.26.1
D'Arcy v. Prison Commissioners [1956] Crim. L.R. 56; [1955] <i>The Times</i> , November 15, 1955	21.04.2
Davey, dead., <i>Re</i> [1981] 1 W.L.R. 164; (1980) 124 S.J. 810; [1980] 3 All E.R. 342	23.05.1
Dawson v. Spain-Gower (1988) October 18, 1988, C.A. (Transcript Association)	24.29.2

	PARAGRAPH
De Falco v. Crawley Borough Council; Silvestri v. Crawley Borough Council [1980] Q.B. 460; [1980] 2 W.L.R. 664; (1979) 124 S.J. 82; (1979) 78 L.G.R. 180; (1980) J.P.L. 392; <i>sub nom.</i> De Falco and Silvestri v. Crawley Borough Council [1980] 1 All E.R. 913; [1980] 1 C.M.L.R. 437, C.A. ...	4.13
De Freville v. Dill [1927] W.N. 133; (1927) 96 L.J.K.B. 1056 ...	21.02.3, 21.04.1
Devlin v. Armstrong [1972] N.I. 13, C.A. ...	21.10
Din v. Wandsworth London Borough Council [1983] 1 A.C. 657; [1981] 3 W.L.R. 918; [1981] 125 S.J. 828; [1981] 3 All E.R. 881; [1982] 1 H.L.R. 73; (1980) L.G.R. 113, H.L.; <i>reversing The Times</i> June 30, 1981, C.A. ...	4.13.1
D.P.P. v. Majewski [1976] 2 W.L.R. 623; 120 S.J. 299; [1976] 2 All. E.R. 142; (1976) 62 Cr. App. R. 262; [1976] Crim. L.R. 374, H.L. <i>affirming sub nom.</i> R. v. Majewski [1975] 3 W.L.R. 401, 119 S.J. 560; [1975] 3 All E.R. 296; [1975] Crim. L.R. 570, C.A. ...	13.02
Doe d Rochester (Bishop) v. Bridges (1831) 1B. & Ad. 847 ...	22.21
Don Pasquale (A Firm) v. Customs and Excise Commissioners [1990] 1 W.L.R. 1108; [1990] S.T.C. 556, C.A. ...	18.24.1
Draper v. United Kingdom [1981] 24 Decisions and Reports p. 72, European Commissioner of Human Rights ...	24.12.1
Drew v. Nunn (1878) 4 Q.B.D. 661 ...	23.27.1
D'Souza v. Director of Public Prosecutions [1992] 1 W.L.R. 1073; [1992] 4 All E.R. 545; 96 Cr. App. R. 278; 10 B.M.L.R. 139 ...	12.03.2, 21.18
Duchess of Argyll v. Duke of Argyll <i>see</i> Argyll (Duchess) v. Argyll (Duke)	
Dudgeon v. United Kingdom [1981] 4 E.H.R.R. 1449 ...	24.12.4
Durham v. Durham (1885) 10 P.D. 80 ...	24.10
Dyson v. Kerrier District Council [1980] 1 W.L.R. 1205; (1980) 124 S.J. 497; [1980] 3 All E.R. 313; [1980] 78 L.G.R. 603, C.A.; leave to appeal to H.L. refused [1980] 1 W.L.R. 1441 ...	4.13.3

E

E. <i>Re</i> (1990), Ward J, September 21, 1990, cited in <i>Re R (A minor)</i> (1991), q.v. ...	20.15A.2
E. (A Minor) <i>Re</i> , [1991] 2 F.L.R. 585; [1992] Fam. Law 15: (1991) 7 B.M.L.R. 117. <i>The Times</i> , February 22, 1991 ...	20.15B.2, 20.16.1
E. (Mental Health Patient) <i>Re</i> [1985] 1 W.L.R. 245 <i>reversing</i> [1984] 1 All. E.R. 309 ...	23.04.1
E. (S.A.) (A minor) (Wardship), <i>Re</i> [1984] 1 W.L.R. 156; 128 S.J. 80; [1984] 1 All E.R. 289; [1984] L.G.R. 257, H.L. ...	24.23
E.G. <i>Re</i> [1914] 1 Ch. 927 ...	23.06.1
East Lindsey District Council v. Daubney [1977] I.C.R. 566; (1977) 12 I.T.R. 359; [1977] I.R.L.R. 181, E.A.T. ...	24.38.1
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Elliot v. Ince (1857) 7 De G.M. & G. 475 ...	23.26.3
Ellis v. Home Office [1953] 2 Q.B. 135; [1953] 3 W.L.R. 105, 97 S.J. 436; [1953] 2 All E.R. 149, C.A. ...	21.04.2
Eve, <i>Re</i> [1986] 2 S.C. R. 388; 31 D.L.R. (4th) 1 ...	20.16.1, 20.16.2
Everett v. Griffiths [1921] A.C. 631, H.L. ...	21.04.1

F

	PARAGRAPH
F. Re (1989) [1990] 2 A.C.1. C.A.	20.16.2, 20.16.4
F. v. West Berkshire Health Authority (1989) [1990] 2 A.C. 1; [1989] 2 W.L.R. 938; [1989] 2 All E.R. 545; (1989) 133 S.J. 785; [1989] 2 F.L.R. 376; [1989] Fam. Law 390, H.L.	20.15B.2, 20.16, 20.16.1, 20.16.3
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Furber v. Kratter (1988), <i>The Times</i> , July 21, 1985; <i>The Independent</i> , August 9, 1988, CO/559/88 (Transcript Marten Walsh Cherer) ...	21.02.2, 21.25, 21.32

G

G.F. (Mental Patient: Medical Treatment) Re [1992] 1 F.L.R. 293; [1992] Fam. Law 63	20.16.1
Garlick v. Oldham Metropolitan Borough Council and related appeals [1993] 2 All E.R. 65	4.14.4
G-U (A Minor) (Wardship) Re [1984] F.L.R. 811; (1984) 14 Fam. Law 248	20.15B
Gaumont British Distributors Ltd. v. Henry [1939] 2 K.B. 711	25.04.1
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Geddis v. Bann Reservoir Proprietors (1873) 3 App. Cas. 430	21.04.2
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Gold v. Haringey Health Authority [1987] 3 W.L.R. 649; [1987] 2 All E.R. 888; 17 Fam. Law 417; 137 New L.J. 541; 84 L.S. Gaz. 1812, C.A.	20.09, 20.12.2
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Goodrich v. Goodrich [1971] 1 W.L.R. 1142; 115 S.J. 303; [1971] 2 All E.R. 1340	24.14.1
Grady, Re (1981) 426 A2d 467	20.16.1
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Greensalade v. Dare (1855) 20 Beav. 284	23.26.1

H

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H. (Mental Patient: Diagnosis) <i>Re</i> [1993] 9 B.M.L.R. 71; [1993] 1 F.L.R. 28; [1993] Fam. Law 131; [1992] 2 F.C.R. 707	20.16.1
Hague v. Deputy Governor of Parkhurst Prison and others; Weldon v. Home Office. <i>See</i> R. v. Deputy Governor of Parkhurst Prison, <i>ex parte</i> Hague; Weldon v. Home Office	
Hall v. Manchester Corporation (1915) 84 L.J. Ch. 732	4.12.4
Hall v. Semple (1862) 3 F. & F. 337	21.04.1
Hall v. Warren (1804) 9 Ves. Jun. 605	23.26.1, 23.26.3
Halton Borough Council v. Hollett [1988] E.A.T./559/87, 26 September 1988	24.38.1
Halushka v. University of Saskatchewan (1965) 53 D.L.R. (2d) 436	20.12
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Harnett v. Bond [1925] A.C. 669, H.L.	21.02.2, 21.02.3
Harnett v. Fisher [1927] A.C. 573 <i>affirming</i> [1927] 1 K.B. 402, 96 L.J.K.B. 55; 135 L.T. 724; 42 T.L.R. 745; 70 S.J. 917	7.13, 21.04.1, 21.04.2
Harrison v. Bush (1855) S.E. & B. 344	2.03
Harrison v. Cornwall County Council (1991) 11 B.M.L.R. 75; 90 L.G.R. 81; (1992) 156 L.G. Rev. 703	5.10
Harrod v. Harrod (1854) 1K. & J.4	24.10
Hart v. O'Connor [1985] A.C. 1000; [1985] 3 W.L.R. 214; (1985) 129 S.J. 484; [1985] 2 All E.R. 880	23.26.1
Harward v. Hackney Union and Frost (1898) 14 T.L.R. 306, (1898) 62 J.P. 227	7.14.2
Harwood v. Baker (1840) 3 Moore P.C. 282	23.28
Hatcher v. Black (1954) <i>The Times</i> , July 2, 1954	20.12.2
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Herring v. Boyle (1834) 1 Cr. M. & R. 377	21.02.4
Herring v. Templeman (1973) 117 S.J. 793; [1973] 3 All E.R. 569; (1973) 72 L.G.R. 162, C.A.; <i>affirming</i> (1973) 117 S.J. 223; [1973] 2 All E.R. 581; 71 L.G.R. 295	4.31.1
Hill v. Baxter [1958] 1 Q.B. 277; [1958] 2 W.L.R. 76; 122 J.P. 134; 102 S.J. 53; [1958] 1 All E.R. 193; 56 L.G.R. 117; 42 Cr. App. R.51, Dr.	13.04.1
Hills & Potter [1983] 3 All E.R. 716 (1983) <i>The Times</i> , May 23, 1983	20.12.1
Hinchcliffe v. Sheldon [1955] 1 W.L.R. 1207; 120 J.P. 13; 99 S.J. 797; [1955] 3 All E.R. 406, D.C.	25.05
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Hopp v. Lepp (1980) 112 D.L.R. (3d.) 67	20.12.2
Hotson v. East Berkshire Area Health Authority [1987] A.C. 750; [1987] 3 W.L.R. 232; 131 S.J. 975; [1987] 2 All E.R. 909; 84 L.S. Gaz. 2365, H.L.	20.12.2

I

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Imperial Loan Co. v. Stone [1892] 1 Q.B. 599	23.26.1
Initial Services Ltd. v. Putterill [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032; 111 S.J. 541; [1967] 3 All E.R. 145; 2 K.I.R. 863, C.A. Petition for leave to appeal to the House of Lords dismissed	20.32.6
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J

J. (A Minor), <i>Re</i> (1984) <i>The Times</i> , January 23, 1984	24.23
J. (A Minor) (Wardship), <i>Re</i> (1988) 18 Fam. Law 91; [1988] 1 F.L.R. 65	24.23
J. (A Minor) (Wardship: Medical Treatment) <i>Re</i> [1991] Fam. 33; [1991] 2 W.L.R. 140; [1990] 3 All E.R. 930; [1991] 1 F.L.R. 366, C.A.	20.15B.1
J. (A Minor) (Wardship: Medical treatment) (1992) [1993] Fam. 15; [1992] 3 W.L.R. 507; [1992] 4 All E.R. 614	20.15B.1
J. v. C. (1990) 5 B.M.L.R. 100	20.15B.2, 20.16.1
J. v. S. [1894] 3 Ch. 72	23.29
J.B. <i>Re</i> [1967] Ch. 247	23.04
Jackson v. Indiana (1972) 406 U.S. 715	14.13
James v. Mayor and Burgesses of the London Borough of Havering (Transcript Association) 12 February 1992, C.A. Farquharson, L.J.	21.25
Jane, <i>Re</i> (Australia) 85 A.L.R. 409 22 December 1988	20.09
Jenkins v. Morris (1880) 14 Ch. D. 674	23.26.1
Johnson v. Wellesley Hospital (1970) 17 D.L.R. (3d.) 139	20.13.3
Jones, <i>Re</i> CO/102/91 (Transcript: Marten Walsh Cherer), 8 March 1991, Rose J	18.24
Jones and Jones v. Lloyd [1981] Crim. L.R. 340, D.C.	21.13.5

K

K., <i>Re</i> ; F., <i>Re</i> [1988] 2 W.L.R. 781; [1988] 1 All E.R. 358 [1988] Fam. Law 203	23.27A.2
K., W. and H. (Minors) <i>Re</i> [1993] 1 F.C.R. 40 (Transcript: Carter Walsh)	20.15A.2
K. v. Mersey Mental Health Review Tribunal and the Secretary of State for the Home Department. (<i>affirming sub nom.</i> R. v. Mental Health Review Tribunal, <i>ex parte</i> Kay) (1989) <i>The Times</i> , June 15 1989; <i>The Independent</i> , June 8, 1989, C.A.	18.13.1
Kaimowitz v. Michigan (1973) 42 U.S.L.W. 2063	21.05.2
Kay v. Ayrshire and Arran Health Board [1987] 2 All E.R. 417, H.L.	20.12.2
Kay (James) v. United Kingdom: European Commission of Human Rights. App. No. 17821/91; Decision 7 July 1993	15.16.3
Kirkham v. Chief Constable of the Greater Manchester Police [1990] 2 Q.B. 283; [1990] 2 W.L.R. 987; 134 S.J. 758; [1990] 3 All E.R. 246, C.A.	21.04.2
Knight and others v. Home Office [1990] 3 All E.R. 237	21.04.2
Kynaston v. Secretary of State for Home Affairs (1981) 73 Cr. App. R. 281; [1982] Crim. L.R. 117; [1982] J.S.W.L. 104, C.A.	9.01, 15.19, 17.07.2, 18.13, 21.25, 21.31

	PARAGRAPH
Kynaston v. the United Kingdom (1981) European Commission of Human Rights (App. no. 9480/81)	1.10

L

L. (W.J.G.), <i>Re</i> [1966] Ch. 135; [1966] 2 W.L.R. 233; 110 S.J. 74; <i>sub nom.</i> W.J.G.L., <i>Re</i> [1965] 3 All E.R. 865	23.04, 23.05, 23.27A.3
L.H.B., <i>Re</i> [1935] Ch. 643	24.17
Latter v. Braddell (1881) 50 L.J.Q.B. 448; 44 L.T. 369	21.05.2
Leigh v. Gladstone (1909) 26 T.L.R. 139	20.11
Lewis (John) & Co. v. Times [1952] A.C. 676; [1952] 1 W.L.R. 1132; 116 J.P. 275; 96 S.J. 342; [1952] 1 All E.R. 1203, H.L.; <i>reversing sub nom.</i> Tims v. Lewis (John) & Co. [1951] 2 K.B. 459; [1951] 1 W.L.R. 719, 115 J.P. 265; [1951] 1 All E.R. 814; 1 C.L.C. 6154 C.A.	21.21
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Lincoln Corporation v. Parker [1974] 1 W.L.R. 713; [1974] 2 All E.R. 949; (1973) 72 L.G.R. 441; <i>sub nom.</i> Lincoln County Borough Council v. Parker (1973) 118 S.J. 258, D.C.	21.04.2
London and Globe Finance Corporation Ltd., <i>Re</i> [1903] 1 Ch. 728	25.02
Love v. Wiltshire County Council (1988) Decision No. 88, Registered Homes Tribunal	5.11.6

M

M (A Minor) (Wardship: Sterilisation) <i>Re</i> [1988] 2 F.L.R. 497; 18 Fam. Law 434	20.09
M. v. Lambeth London Borough Council (1984) <i>The Times</i> , March 27, 1984	24.23
M'Adam v. Walker (1813) 1 Dow 148 H.L.	23.26.1
McCorath (Infants), <i>Re</i> [1983] 1 Ch. 143	24.18
McDougall v. Sefton Area Health Authority (1987) High Court Liverpool, Q.B.D., April 9, 1987	10.04
Mahon v. Air New Zealand Ltd [1984] AC 808; [1984] 3 W.L.R. 884; 128 S.J. 752 [1984] 3 All E.R. 201	18.25.1
Manches v. Trimborn (1946) 115 L.J.K.B. 305	23.26.1
Manson, <i>Re</i> (1852) 21 L.J. Ch. 249	24.24
Marshall, <i>Re</i> [1920] 1 Ch. 284	23.6.4
M'Naghten's Case (1843) 10 Cl. & Fin. 200; 4 State Tr. N.S. 847; 1 Car. & Kir. 130; 8 E.R. 718	1.03.2, 13.04
Marshall v. Curry [1933] 3 D.L.R. 260	20.16
Mason v. Mason [1972] Fam. 302; [1972] 3 W.L.R. 405, 116 S.J. 485; [1972] 3 All E.R. 315	24.14.4
Matthews v. Baxter (1873) L.R.8 Ex. 132	23.26.1
Maynard v. West Midlands Regional Health Authority (1983) 133 New L.J. 641; (1983) <i>The Times</i> , May 9, 1983, H.L.	20.12.1
Meade v. Haringey London Borough Council [1979] I.C.R. 494; [1979] 1 W.L.R. 637; (1979) 123 S.J. 216; [1979] 2 All E.R. 1016; (1979) 77 L.G.R. 577, C.A.	21.29.2, 2.2.21
Mee v. Cruickshank (1902) 20 Cox 210; 86 L.T. 708	21.02.2
Meering v. Graham-White Aviation Co. (1919) 122 T.L.R. 44	21.02.4

	PARAGRAPH
Michael v. Molesworth [1950] 2 B.M.J. 171	20.12
Middleweek v. Chief Constable of Merseyside (1984) [1990] 3 W.L.R. 481; [1990] 3 All E.R. 662 <i>The Times</i> , August 1, 1985	21.02, 21.25
Molton v. Camroux (1849) 4 Ex. 17, <i>affirming</i> (1848) 2 Ex. 487	23.26.1
Moore v. Commissioner of Metropolitan Police [1968] 1 Q.B. 26; [1967] 3 W.L.R. 572; [1967] 2 All E.R. 827; Moore v. Metropolitan Police Commissioner (1967) 111 S.J. 355, C.A.; Petition for leave to appeal to the House of Lords dismissed [1967] 1 W.L.R. 1192, H.L.	21.28, 23.11.3
Morris v. Beardmore [1981] A.C. 466; [1980] 3 W.L.R. 283; (1980) 124 S.J. 512; [1980] 2 All E.R. 753; (1980) 71 Cr. App. R. 256; [1980] R.T.R. 321; 123 S.J. 300; [1979] 3 All E.R. 290; [1979] Crim. L.R. 394, D.C.	21.13.3, 21.14.2
Morris v. Marsden [1952] 1 All E.R. 925	23.31
Mulloy v. Hop Sang [1935] 1 W.W.R. 714 (Alta. S. Ct. App. Div)	20.11, 20.16
Murray v. McMurchy [1949] Z.D. L.R. 442	20.16
Mustad v. Dosen [1964] 1 W.L.R. 109n; [1963] R.P.C. 41; <i>sub nom.</i> Mustad (O.) & San v. Allcock (S.) & Co. and Dosen [1963] 3 All E.R. 416, H.L.	20.32.5

N

N., <i>dec'd Re</i> [1977] 1 W.L.R. 676; (1977) 121 S.J. 305; [1977] 2 All E.R. 687, C.A.	23.06.6
N. v. S. (1983) Croydon Crown Court, January 1, 1983 (unpublished)	8.07
Neale v. Del Soto [1945] K.B. 144	4.17
Nichols and Freeman v. Binns (1858) 1 SW. & Tr. 239	23.28
Nottley, <i>Re</i> (1938) 3 Jur. (O.S.) 719	24.24

O

Oakes, <i>Re</i> (1845) 8 Law Rep. 122 (Mass. 1845)	20.16.2
O'Brien v. Prudential Assurance Co. Ltd. [1979] I.R.L.R. 140, E.A.T.	24.38.2
O'Connor v. Donaldson (1975) 422 U.S. 563 (1975)	20.29
O'Malley-Williams v. Board of Governors of the National Hospital for Nervous Diseases [1975] I.B.M.J. 635	20.12.2
Owen v. Coventry Health Authority (1986) Court of Appeal, 19 December 1986 (unpublished)	6.21
Owen v. de Beauvoir (1847) 16 M. & M. 547	24.19.1
Owing's Case, Rebeca. (1827) 1 Bland's Ch. 290, 294	20.16.2

P

P. (A Minor) <i>Re</i> [1986] 1 F.L.R. 272; 80 L.G.R. 301	20.15A.2
P. (A Minor) (Wardship: Sterilisation) <i>Re</i> [1989] 1 F.L.R. 182; 19 Fam. Law 102	20.09
Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; 112 S.J. 171; [1968] 1 All E.R. 694, H.L.	15.16.3, 21.29.2, 22.21

	PARAGRAPH
Palmer (Sigismund) v. R.; Irving (Derrick) v. R. [1971] A.C. 814; [1971] 2 W.L.R. 831; <i>sub nom.</i> Palmer v. R.; Irving v. R. 115 S.J. 264; <i>sub nom.</i> Palmer v. R. [1971] 1 All E.R. 1077; 55 Cr. App. R. 223, P.C	21.10
Parham v. J.R. (1979) 442 U.S. 584	10.02.2
Park, <i>In the Estate of</i> , Park v. Park [1954] P. 112; [1953] 3 W.L.R. 1012; 97 S.J. 830; [1953] 2 All E.R. 1411, C.A.; <i>affirming</i> [1953] 3 W.L.R. 307; 97 S.J. 491; [1953] 2 All E.R. 408	24.10
Parmley v. Parmley and Yule [1945] 4 D.L.R. 81	20.16
Partington v. London Borough of Wandsworth (1989) <i>The Independent</i> , 8 November 1989	21.04.2
Passmore v. Oswaldtwistle U.D.C. [1898] A.C. 387	4.31.2
Penrose v. Mansfield (1971) 115 S.J. 309; <i>The Times</i> , March 19, 1971, C.A.; <i>affirming</i> (1970) <i>The Times</i> , October 8, 1970	24.29.2
Perkins v. Bath District Health Authority; R. v. Wessex Mental Health Review Tribunal <i>ex parte</i> Wiltshire County Council (1989) 4 B.M.L.R. 145; <i>The Times</i> , August 29, 1989, C.A.	8.05, 18.08.1, 18.09
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Pickering v. Liverpool Daily Post and Echo Newspapers [1991] 2 A.C. 370; [1991] 2 W.L.R. 513; [1991] 1 All E.R. 622; 135 S.J. (LB) 166; [1991] 2 Med. L.R. 240, H.L.	18.23A, 23.11.2
Platt, <i>Re</i> (1887) 36 Ch. D. 410	23.02.1
Portsmouth (Countess of) v. Portsmouth (Earl of) (1828) 1 Hag. Ecc. 355	24.13.1
Pountney v. Griffiths [1975] 3 W.L.R. 140; 119 S.J. 493; [1975] 2 All E.R. 881; [1975] Crim. L.R. 702, H.L.; <i>affirming sub nom.</i> R. v. Bracknell Justices, <i>exp. Griffiths</i> [1975] 2 W.L.R. 291; 119 S.J. 114; [1975] 1 All E.R. 900 DC	21.15.1, 21.24, 21.26.2, 21.29, 21.29.1, 21.30
Poyser and Mills Arbitration, <i>Re</i> [1964] 2 Q.B. 467; [1963] 1 All E.R. 612	18.24.1
Prince Albert v. Strange <i>see</i> Albert (Prince) v. Strange	
Puhlhofer v. Hillingdon London Borough Council. <i>See</i> R. v. Hillingdon London Borough Council, <i>ex parte</i> Puhlhofer	
Purnell v. Roche [1927] 2 Ch. 142	24.19.1
Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1960] A.C. 260; [1959] 3 W.L.R. 346; 123 J.P. 429; 103 S.J. 633; [1959] 3 All E.R. 1; 10 P. & C.R. 319; 58 L.G.R.L. H.L.; <i>reversing</i> [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; 122 J.P. 182; 102 S.J. 175; [1958] 1 All E.R. 625; 56 L.G.R. 171; 9 P. & C.R. 204, C.A.	21.29.1

Q

Queen v. Pinder, <i>ex parte</i> Greenwood (1855) 24 L.J.Q.B. 148	21.11
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R

R (A Minor) <i>Re</i> [1992] Fam. 11; [1991] 3 W.L.R. 592; [1991] 4 All E.R. 177; [1992] 1 F.L.R. 190; [1992] 3 Med. L.R. 342; [1992] Fam. Law 67, C.A. <i>The Times</i> , July 31, 1991	20.15A, 20.15A.2, 20.15B
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R. v. Brown (1841) <i>Car. & M.</i> 314	21.17
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R. v. Burles [1970] 2 <i>Q.B.</i> 191; [1970] 2 <i>W.L.R.</i> 597; (1969) 114 <i>S.J.</i> 86; [1970] 1 <i>All E.R.</i> 642; <i>sub nom.</i> R. v. Burles (David John) (1969) 54 <i>Cr. App. R.</i> 196, C.A.	14.07, 14.08
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R. v. Castro (1985) 81 <i>Cr. App. R.</i> 212; 7 <i>Cr. App. R.</i> (S) 68; [1985] <i>Crim. L.R.</i> 527, C.A.	15.03.1
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R. v. Central Criminal Court, <i>ex parte</i> Porter [1992] Crim. L.R. 121, C.O./1456/91 (Transcript: Marten Walsh Cherer) 7 August 1991, Q.B.D. ...	14.14.1
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R. v. Charlson [1955] 1 W.L.R. 317; 119 J.P. 283; 99 S.J. 221; [1955] 1 All E.R. 859; 39 Cr. App. R. 37 ...	13.04.1
R. v. Chief Constable of Devon and Cornwall <i>ex parte</i> Central Electricity Generating Board [1981] 3 W.L.R. 867; [1981] 3 All E.R. 826; [1982] Q.B. 458 ...	21.09
R. v. Clarke (1762) 3 Burr. 1383; <i>English Reports</i> , vol. 97, p. 875 ...	1.05.2
R. v. Clarke (1972) Crim. L.R. 584; (1972) 56 Cr. App. R. 225 ...	13.02, 13.04.2
R. v. Clarke (Dawn) (1975) 61 Cr. App. R. 320; [1975] Crim. L.R. 595, C.A. ...	15.08
R. v. Codere (1916) 12 Cr. App. R. 21 ...	13.04.3
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R. v. Cox [1991] Crim. L. Rev. 276 (Transcript: Marten Walsh Cherer) ...	12.05.03, 12.05. 4
R. v. Cox (1992) 12 B.M.L.R. 38 ...	20.15B.1
R. v. Criminal Injuries Compensation Board, <i>ex parte</i> Lawton [1972] 1 W.L.R. 1589; 116 S.J. 901; [1972] 3 All E.R. 582; [1972] Crim. L.R. 702, D.C. ...	21.18.2, 25.04.2
R. v. Crozier [1991] Crim. L. Rev. 138 (Transcript: Marten Walsh Cherer) 11 April 1990 ...	20.32.1, 20.32.2
R. v. Davies, Leeds Crown Court, August 11, 1981 (unpublished) ...	3.04.3
R. v. Deputy Governor of Parkhurst Prison, <i>ex parte</i> Hague; Weldon v. Home Office (1991) [1992] 1 A.C. 58; [1991] 3 W.L.R. 340; [1991] 3 All E.R. 733; 136 S.J. (LB) 102; [1992] C.O.D. 69; [1993] 5 Admin. L.R. 425, H.L. ...	21.02.2
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R. v. Dutton (1988) 11 November 1988, C.C.A. ...	12.05.3, 12.05.4
R. v. Ealing District Health Authority, <i>ex parte</i> Fox [1993] 1 W.L.R. 373; 11 B.M.L.R. 59 ...	4.08.5, 18.14A.2
R. v. Ealing London Borough Council, <i>ex parte</i> Sidhu (1982) 80 L.G.R. 534; [1983] H.L.R. 41, 45, D.C. ...	4.13.1
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R. v. Ethical Committee of St. Mary's Hospital, <i>ex parte</i> Harricott (1988) 18 Fam. Law 165; <i>The Times</i> , October 27, 1987 ...	22.21.2
R. v. Fell [1975] Crim. L.R. 349, C.A. ...	25.03.4
R. v. Fenton (Martin Charles) (1975) 119 S.J. 695; (1975) 61 Cr. App. R. 261; [1975] Crim. L.R. 712, C.A. ...	13.07
R. v. Findlay (1985) 1 A.C. 318 ...	16.04
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R. v. Hall (J.H.) (1988) 86 Cr. App. R. 159, C.A.	25.07, 25.09
R. v. Hallstrom, <i>ex parte</i> W.; R. v. Gardner, <i>ex parte</i> L. [1986] Q.B. 1090, [1986] 2 W.L.R. 883; 130 S.J. 204; [1986] 2 All E.R. 306; 83 L.S. Gaz. 786	11.06.1, 11.06.5A, 11.13.2
R. v. Hallstrom and another, <i>ex parte</i> Waldron [1986] Q.B. 824; [1985] 3 W.L.R. 1090; [1985] 3 All E.R. 775; (1985) 129 S.J. 892, C.A.	18.07
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R. v. Harvey and Ryan [1971] Crim. L.R. 664, C.A.	15.03
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R. v. Hayles [1969] 1 Q.B. 364; [1968] 3 W.L.R. 1106; 112 S.J. 860; [1969] 1 All E.R. 34; <i>sub nom.</i> R. v. Hayles (Fritz Ernest), 53 Cr. App. R. 36, C.A.	25.03.4
R. v. Haynes (1981) 3 Cr. App. R. (s.) 330	15.13
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R. v. Hennessy [1989] 1 W.L.R. 287; [1989] 2 All E.R. 9, C.C.A.	13.02, 13.04.1
R. v. H.M. Coroner for Birmingham, <i>ex parte</i> Secretary of State for the Home Department (1991) 155 J.P. 107	21.04.2
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R. v. Hillingdon London Borough Council, <i>ex parte</i> Islam; <i>Re</i> Islam (Taffazzul) [1981] 3 W.L.R. 942 [1981] 3 All E.R. 901	4.13.3
R. v. Hillingdon London Borough Council, <i>ex parte</i> Puhlhofer [1986] A.C. 484; [1986] 2 W.L.R. 259; 130 S.J. 143; [1986] 1 All E.R. 467; 18 H.L.R. 158; [1988] 1 F.L.R. 22; 16 Fam. Law 218; 136 New L.J. 140; 83 L.S. Gaz. 785, H.L.	4.13
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R. v. Hillingdon London Borough Council, <i>ex parte</i> Streeting [1980] 1 W.L.R. 1430; (1980) 124 S.J. 514; 3 All E.R. 417; (1980) 79 L.G.R. 167; (1980) 10 Fam. Law 249, C.A.; <i>affirming</i> [1981] 1 W.L.R. 1425, (1980) 124 S.J. 274; [1980] 3 All E.R. 413, D.C.	4.13.6
R. v. Holmes (1979) 1 Cr. App. R. (S.) 233; [1979] Crim. L.R. 52, Bodmin Crown Court	25.03.4
R. v. Hoof [1980] 2 Cr. App. R. (S.) 299	15.25
R. v. Horan [1974] Crim. L.R. 438, C.A.	15.03
R. v. Howard (1975) Judgment given July 4, 1975	15.08
R. v. Howell (1981) 125 S.J. 462; [1982] Q.B. 416; [1981] 3 All E.R. 383; [1981] 3 W.L.R. 501; (1981) 73 Cr. App. R. 31; [1981] Crim. L.R. 697, C.A.	21.09
R. v. Hudson [1966] 1 Q.B. 448; [1965] 2 W.L.R. 604; 129 J.P. 193; 109 S.J. 49; [1965] 1 All E.R. 721; 49 Cr. App. R. 69, C.C.A.	25.07

	PARAGRAPH
R. v. Hull Prison Board of Visitors, <i>ex parte</i> , St. Germain <i>see</i> R. v. Board of Visitors of Hull Prison <i>ex parte</i> St. Germain	
R. v. Humberside County Council, <i>ex parte</i> Bogdal [1991] C.O.D. 66; (1992) 11 B.M.L.R. 46	5.11.3
R. v. Inner London Education Authority, <i>ex parte</i> F. (1988), <i>The Times</i> , November 28, 1988. Q.B. D: Lloyd L.J. and Auld J.	11.18.1
R. v. Isitt [1978] R.T.R. 211; (1977) 67 Cr. App. R. 44; (1978) Crim. L.R. 159, C.A.	13.04.1
R. v. James [1961] Crim. L.R. 842, C.C.A.	15.03
R. v. James (1965) 109 S.J. 173; [1965] Crim. L.R. 252, C.C.A.	15.25
R. v. Jennion [1962] 1 W.L.R. 317; 106 S.J. 224; [1962] 1 All E.R. 689; 46 Cr. App. R. 212, C.C.A.	13.06
R. v. Jones (David Llewellyn) (1976) <i>The Times</i> , November 20, 1976, C.A.	15.03, 15.08
R. v. Julien [1969] 1 W.L.R. 839; 133 J.P. 489; [1969] 2 All E.R. 856; <i>sub nom.</i> R. v. Julien (Thomas), 113 S.J. 342; 53 Cr. App. R. 407, C.A.	21.10
R. v. Kane (1965) 129 J.P. 170; [1965] 1 All E.R. 705	12.02.1
R. v. Keegan (1982) J.P. 695	3.03
R. v. Kemp [1957] 1 Q.B. 399; [1956] 3 W.L.R. 724; 120 J.P. 457; 100 S.J. 768; [1956] 3 All E.R. 249; 40 Cr. App. R. 121	13.02, 13.04.1
R. v. King [1983] 1 W.L.R. 411; [1983] 1 All E.R. 929; 127 S.J. 88; 77 Cr. App. R. 1; Crim. L.R. 326, C.A.	20.32.B
R. v. Kirklees Metropolitan Council, <i>ex parte</i> Cawley: (1993) 15 BMLR 6, C.A. <i>affirming</i> (1992) 8 B.M.L.R. 110	10.02.1, 10.02.2, 20.16.2
R. v. Knowsley Borough Council, <i>ex parte</i> Bowen, Q.B.D. C.O./44/91. (Transcript: Marten Walsh Cherer) 4 June 1992	4.13.3
R. v. Kooken (1982) 74 Cr. App. R. 30, C.A.	13.06
R. v. Kopsch (1925) 19 Cr. App. R. 50	13.04.5
R. v. Kyslant (Lord) [1932] 1 K.B. 442	25.02
R. v. Lambeth London Borough and the West Lambeth Community Health Council, <i>ex parte</i> Amrita Parker (1983) <i>The Times</i> March 1, 1983	2.28
R. v. Lewis (1990) 11 Cr. App. R. (S) 577; [1990] Crim. L.R. 348, C.A.	13.10
R. v. Lincola (Kesteven) Magistrates' Court, <i>ex parte</i> , O'Connor [1983] 1 W.L.R. 335; (1983) 147 J.P. 97; (1983) 127 S.J. 121; [1983] 1 All E.R. 901; [1983] Crim. L.R. 621, D.C.	15.05.1
R. v. Liverpool City Council <i>ex parte</i> Liverpool Taxi Fleet Operators' Associations [1975] 1 W.L.R. 701; 1 All E.R. 379	2.08
R. v. Lloyd [1967] 1 Q.B. 175; [1966] 2 W.L.R. 13; 130 J.P. 118; 109 S.J. 955; [1966] 1 All E.R. 107n; 50 Cr. App. R. 61; [1965] C.L.Y. 857	13.07.1
R. v. London Borough of Brent, <i>ex parte</i> Omar, (1991) 23 H.L.R. 446, Q.B.D.	4.13.5
R. v. London Borough of Lewisham, <i>ex parte</i> Dolan (1992) 25 H.L.R. 68, Q.B.D.	4.13.5
R. v. Lord Kyslant <i>see</i> R. v. Kyslant (Lord)	
R. v. McBride [1972] Crim. L.R. 322, C.A.	15.02
R. v. McCarthy [1967] 1 Q.B. 68; [1966] 2 W.L.R. 555; 110 S.J. 211; <i>sub nom.</i> R. v. McCarthy, 103 J.P. 157; [1966] 1 All E.R. 447; 50 Cr. App. R. 109, C.C.A.	14.06
R. v. McDonald [1991] Crim. L. Rev. 122; <i>The Times</i> , August 29, 1990	20.32.8
R. v. McGovern (1990) 92 Crim. App. Rep. 228	12.05.3
R. v. McFarlane (Brian Wilfred Alan) (1975) 60 Cr. App. R. 320; [1977] Crim. L.R. 49, C.A.	3.03, 15.03, 15.12
R. v. McInnes [1971] 1 W.L.R. 1600; 115 S.J. 655; [1971] 3 All E.R. 295 <i>sub nom.</i> R. v. McInnes (Walter), 55 Cr. App. R. 551, C.A.	21.10
R. v. M'Naughton (1843) 10 C.L. & F. 200; 8 E.R. 718	1.03.3
R. v. Managers of South Western Hospital, <i>ex parte</i> Mulcahy (1992) 12 B.M.L.R. 151	6.05.1, 7.16
R. v. Marquis [1974] 1 W.L.R. 1087; 118 S.J. 531; [1974] 2 All E.R. 1216; [1974] Crim. L.R. 556; <i>sub nom.</i> R. v. Marquis (Yvonne) 59 Cr. App. R. 228, C.A.	15.24

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R. v. Marsden (Practice Note) [1968] 1 W.L.R. 785; (1968) 132 J.P. 347; 112 S.J. 331; [1968] 2 All E.R. 341; <i>sub nom.</i> R. v. Marsden (June) 52 Cr. App. R. 301, C.A.	15.07
R. v. Maurantonio (1967) 65 D.L.R. (2d) 674	20.12
R. v. Medical Appeal Tribunal, <i>ex parte</i> Gilmore [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; 101 S.J. 248; <i>sub nom.</i> <i>Re</i> Gilmore's Application [1957] 1 All E.R. 796, C.A.	21.31
R. v. Mental Health Act Commission, <i>ex parte</i> W. (1988) <i>The Times</i> , May 27, 1988, <i>sub nom.</i> R. v. Mental Health Act Commission, <i>ex parte</i> X (1988) 9 B.M.L.R. 77 D.C. 9.01, 20.19.1, 20.20.2, 20.20.3, 20.20.3A, 22.14A, 22.14B	
R. v. Mental Health Review Tribunal, <i>ex parte</i> Clatworthy [1985] 3 All E.R. 699	9.01, 18.24, 18.25, 18.13.2
R. v. Mental Health Review Tribunal, <i>ex parte</i> Cleeland (1989) CO/819/88. Popplewell J. Appeal dismissed by Court of Appeal (Transcript Association) 28 June 1989	18.20A
R. v. Mental Health Review Tribunal, <i>ex parte</i> Cooper (1990) CO/786/89 (Transcript: Marten Walsh Cherer) 14 Feb. 1990, Rose J.	18.07
R. v. Mental Health Review Tribunal, <i>ex parte</i> Kay (1988) <i>The Times</i> , May 25, 1988, D.C.	18.13.1
R. v. Mental Health Review Tribunal, <i>ex parte</i> Pickering [1986] 1 All E.R. 99	18.24.1
R. v. Mental Health Review Tribunal, <i>ex parte</i> Secretary of State [1986] 1 W.L.R. 1180, C.A.	18.14A.1, 18.20
R. v. Mental Health Review Tribunal, <i>ex parte</i> Secretary of State for the Home Department (1987) <i>The Times</i> , March 25, 1987	18.20A, 18.20A.1
R. v. Mersey Mental Health Review Tribunal, <i>ex parte</i> Dillon (1987) <i>The Times</i> , April 13, 1987	9.04.2, 18.13.2
R. v. Merseyside Mental Health Review Tribunal, <i>ex parte</i> K. [1990] 1 All E.R. 694	15.16.3, 18.13, 18.13.1
R. v. Miller (A.R.) [1986] 1 W.L.R. 1191; [1986] 3 All E.R. 119; 130 S.J. 612; 83 Cr. App. R. 192; [1986] Crim. L.R. 548; 83 L.S. Gaz. 1995, C.A.	12.05.3
R. v. Morris (1961) 2 Q.B. 237; [1961] 2 W.L.R. 986; 105 S.J. 445; [1961] 2 All E.R. 672; 45 Cr. App. R. 185, C.C.A.	13.08, 15.03
R. v. Moss (1990) 91 Cr. App. Rep. 371	12.05.3
R. v. Nadolski (1970) Judgment May 8, 1970; reported in <i>A Human Condition</i> (1977; vol. 2), pp. 182-3	15.12
R. v. Newington (1990) <i>The Times</i> , February 27, 1990; <i>The Independent</i> , March 21, 1990, C.A.	25.03.3, 25.03.4
R. v. Nicolls (1973) Judgment given April 16, 1973 (not reported)	15.03
R. v. Nicholls [1981] 3 Cr. App. R. (S) 388	15.25
R. v. North West Thames Regional Health Authority, <i>ex parte</i> Nerva, <i>The Times</i> , October 20, 1983	2.14, 2.18
R. v. Nottingham Mental Health Review Tribunal, <i>ex parte</i> Secretary of State for the Home Department; R. v. Trent Mental Health Review Tribunal, <i>ex parte</i> Secretary of State for the Home Department (1988), <i>The Times</i> , October 12, 1988, C.A.	18.20A.1
R. v. Officer [1976] Crim. L.R. 698; (1976) <i>The Times</i> , February 20, 1976, C.A.	3.03, 15.08
R. v. Oxford Regional Mental Health Review Tribunal and Campbell, <i>ex parte</i> Secretary of State for the Home Department. <i>See</i> Secretary of State for the Home Department v. Oxford Regional Mental Health Review Tribunal	
R. v. Parker (1990) <i>The Guardian</i> , February 8, 1990	15.25
R. v. Parole Board, <i>ex parte</i> Bradley [1991] 1 W.L.R. 134; [1990] 3 All E.R. 828; [1990] C.O.D. 375, D.C.	16.04
R. v. Partridge [1982] Crim. L.R. 319, D.C.	13.08
R. v. Pelham (1846) 2 Cox C.C. 17	25.03.3
R. v. Podola [1960] 1 Q.B. 325; [1959] 3 W.L.R. 718; 103 S.J. 856; [1959] 3 All E.R. 418; 43 Cr. App. R. 220, C.C.A.	14.06.1, 14.07, 14.10

TABLE OF CASES

CV

	PARAGRAPH
R. v. Poole (1989) 11 Cr. App. R. (S.) 382; [1990] Crim. L.R. 67 C.A.	... 13.08
R. v. Powell [1963] Crim. L.R. 511; 113 L.J. 643, C.C.A.	... 21.08.4
R. v. Prager [1972] 1 W.L.R. 260; (1971) 116 S.J. 158; [1972] 1 All E.R. 1114; <i>sub nom.</i> R. v. Prager (Nicholas Anthony) (1971) 56 Cr. App. R. 151, C.A.	... 12.05.3
R. v. Pritchard (1836) 7 C. & P. 303	... 1.03.3, 14.07
R. v. Quick; R. v. Paddison [1973] Q.B. 910; [1973] 3 W.L.R. 26; [1973] 3 All E.R. 347; <i>sub nom.</i> R. v. Paddison; R. v. Quick, 117 S.J. 371; <i>sub nom.</i> R. v. Quick (William George Henry); R. v. Paddison (William), 57 Cr. App. R. 722; <i>sub nom.</i> R. v. Quick [1973] Crim. L.R. 434, C.A.	... 13.02, 13.04.1
R. v. Rampton Institution Board of Control, <i>sub nom.</i> Barker [1957] Crim. L.R. 403, D.C.	... 17.07.2
R. v. Ramsgate Justices, <i>ex parte</i> Kuzmarket (1984) <i>The Times</i> , May 15, 1984	15.05.2
R. v. Robbins [1988] Crim. L.R. 744, C.C.A.	... 25.07, 25.09
R. v. Roberts [1954] 2 Q.B. 329; [1953] 3 W.L.R. 178, 117 J.P. 341; 97 S.J. 455, [1953] 2 All E.R. 340; 37 Cr. App. R. 86	... 14.08
R. v. Robertson [1968] 1 W.L.R. 1767 (1968) 133 J.P. 5; 112 S.J. 799; [1968] 3 All E.R. 557; <i>sub nom.</i> R. v. Robertson (Eric John), 52 Cr. App. R. 690, C.A.	... 14.06.1, 14.07
R. v. Rosinski (1824) 1 Lewin 11, 1 Mound 19	... 20.12
R. v. Royse [1981] Crim. L.R. 426; (1981) 3 Cr. App. R. (S.) 58, C.A.	... 15.12
R. v. Runighian [1977] Crim. L.R. 36, Warwick Crown Court	... 10.02.4, 21.30
R. v. St. Leonard's Shoreditch (Inhabitants) (1865) L.R. 1 Q.B. 21	... 11.07.3, 15.09
R. v. Sainsbury (1990) 11 Cr. App. R. (S) 533; [1990] Crim. L.R. 348	... 13.10
R. v. Sanders (1991) 93 Cr. App. R. 246; [1991] Cr. L.R. 781; <i>The Times</i> , April 26 1991, C.A.	... 13.07
R. v. Secretary of State for the Home Department, <i>ex parte</i> Brind [1990] 2 W.L.R. 787; [1990] 1 All E.R. 469	... 18.13.1
R. v. Secretary of State for the Home Department, <i>ex parte</i> Didlick (1993) 16 B.M.L.R. 71, <i>The Times</i> , March 30, 1993; <i>The Independent</i> , 9 April 1993 C.O./0525/92. (Transcript: Marten Walsh Cherer)	... 15.13, 15.16, 15.16.3
R. v. Secretary of State for the Home Department, <i>ex parte</i> Hinchcliffe (1974) (Unreported) Q.B.D. May 24 and June 21, 1974	... 17.07.2
R. v. Secretary of State for the Home Department, <i>ex parte</i> K [1990] 3 W.L.R. 755; [1990] 3 All E.R. 562; (1990) 134 S.J. 1106, C.A.	... 15.16.3, 18.13, 18.13.1
R. v. Secretary of State for the Home Department, <i>ex parte</i> Khawaja [1983] 2 W.L.R. 321; (1982) 127 S.J. 137; [1983] 1 All E.R. 765, H.L.; <i>affirming sub nom.</i> R. v. Secretary of State for the Home Department, <i>ex parte</i> Khawaja [1982] 1 W.L.R. 625; (1982) 126, S.J. 294; [1982] 2 All E.R. 523, C.A.	... 17.07.2
R. v. Secretary of State for the Home Department, <i>ex parte</i> McAvoy [1984] 1 W.L.R. 1408; [1984] 3 All E.R. 317; (1984) 128 S.J. 646	... 3.08.1
R. v. Secretary of State for the Home Department, <i>ex parte</i> Medway (1977) Unreported Q.B.D. June 3, 1977	... 15.19, 17.07.2
R. v. Secretary of State for the Home Department, <i>ex parte</i> Powell (1978) Unre- ported Q.B.D. December 21, 1978	... 15.19, 15.20, 17.07.2, 21.31
R. v. Secretary of State for the Home Department, the Special Hospitals Service Authority and the Department of Health, <i>ex parte</i> Picketing. (1990) Tran- script: Association of Official Shorthandwriters, 25 May 1990	... 3.08.1
R. v. Secretary of State for the Home Department, <i>ex parte</i> Stroud (1992) <i>The Times</i> , August 19, 1992, C.O./388/92 (Transcript: Marten Walsh Cherer)	... 16.04, 18.17.1
R. v. Secretary of State for the Home Department, <i>ex parte</i> T and other applicants. [1994] 1 All E.R. 794	... 16.04
R. v. Secretary of State for Social Services, West Midlands R.H.A. and Birming- ham A.H.A. (Treasury), <i>ex parte</i> Hinks (1979) 123 S.J. 436; [1979] <i>The Guardian</i> , January 25, 1979	... 22.20.1
R. v. Seers [1985] Crim. L. Rev. 315	... 13.07

	PARAGRAPH
R. v. Senior [1899] 1 Q.B. 283	25.03.4
R. v. Sharp (1957) 41 Cr. App. R. 86	14.07
R. v. Sheppard [1981] A.C. 394; [1980] 3 W.L.R. 960; (1980) 124 S.J. 864; [1980] 3 All E.R. 899; (1980) 72 Cr. App. R. 82; [1981] Crim. L.R. 171; H.L.; <i>reversing</i> (1980) 70 Cr. App. R. 210, C.A.	25.03.4
R. v. Slough Juvenile Court, <i>ex parte</i> Royal Berkshire County Council [1984] 2 W.L.R. 45	24.23
R. v. Smith (1974) July 30 1974, reported in <i>Current Sentencing Practice</i> para F2.4(b)	15.06, 15.12
R. v. Smith (K.A.) [1983] Crim. L. 739	13.10
R. v. South East Thames Mental Health Review Tribunal, <i>ex parte</i> Ryan (1987) Q.B.D. CO/98/87 30 June 1987	18.13.2, 18.24.1
R. v. Speake (1957) 41 Cr. App. R. 222, C.C.A.	13.08
R. v. Spencer; R. v. Smalls [1986] 3 W.L.R. 348; 130 S.J. 572; [1986] 2 All E.R. 928; 83 Cr. App. R. 277; 136 New L.J. 733, H.L.	12.06
R. v. Sullivan [1984] A.C. 156; [1983] 3 W.L.R. 123; (1984) 148 J.P. 207; (1983) 127 S.J. 460; [1983] 2 All E.R. 673; [1984] 77 Cr. App. R. 176; [1983] Crim. L.R. 740, H.L.; <i>affirming</i> [1983] 2 W.L.R. 392; [1983] 1 All E.R. 577; [1983] Crim. L.R. 257; (1983) 133 New L.J. 203, C.A.	1.03.2, 13.02, 13.03, 13.04, 13.04.1, 13.04.3
R. v. Sutcliffe (1982), <i>The Times</i> , May 26, 1982	13.06
R. v. Tandy [1988] Crim. L.R. 308; <i>The Times</i> , December 23, 1987, C.A.	13.07
R. v. Terry [1961] 2 Q.B. 314; [1961] 2 W.L.R. 961; 105 S.J. 445; [1961] 2 All E.R. 569; 45 Cr. App. R. 180, C.C.A.	13.06, 13.07
R. v. Thornley (1981) 72 Cr. App. R. 302; [1981] Crim. L.R. 637, C.A.	21.13.5
R. v. Toland (Michael Henry) (1973) 58 Cr. App. R. 453; [1974] Crim. L.R. 196, C.A.	15.12
R. v. Tower Hamlets L.B.C. <i>ex parte</i> Begum. [1993] 1 All E.R. 447	4.14.4
R. v. Trent Mental Health Review Tribunal, <i>ex parte</i> Ryan C.O./445/91 (Transcript: Marten Walsh Cherer) 4 October, 1991, Q.B.D. Nolan, L.J.	18.07, 18.24
R. v. Trent Regional Health Authority <i>ex parte</i> Somaratne C.O. 2224/93. Judgment of 9 November 1993	6.17.5
R. v. True (1922) 16 Cr. App. R. 164	13.04
R. v. Turlington (1761) 2 Burr. 1115; <i>English Reports</i> , vol. 97, p. 741	1.05.2, 17.07.2
R. v. Vinagre (1979) 79 Cr. App. R. 104, C.A.	13.06
R. v. Waltham Forest London Borough Council, <i>ex parte</i> Vale (1985)	4.05.2
R. v. Waveney District Council, <i>ex parte</i> Bowers [1983] Q.B. 238; [1982] 3 W.L.R. 661; (1982) 126 S.J. 657; [1982] 3 All E.R. 727; (1982) 80 L.G.R. 721; [1983] M.L.R. 118; (1982) 79 L.S. Gaz. 1413, C.A.; <i>reversing</i> (1982) 79 L.S. Gaz. 922	4.13.1, 4.13.2, 4.14.5
R. v. Webb [1969] 2 Q.B. 278; [1969] 2 W.L.R. 1088; 133 J.P. 437; 113 S.J. 304; [1969] 2 All E.R. 626; <i>sub nom.</i> R. v. Webb (Colin John) 53 Cr. App. R. 360, C.A.	14.08
R. v. Wessex Mental Health Review Tribunal, <i>ex parte</i> Wiltshire County Council. <i>See</i> Perkins v. Bath District Health Authority	
R. v. Winchester Crown Court, <i>ex parte</i> Lewington [1982] 1 W.L.R. 1277; (1982) 126 S.J. 608; (1982) 4 Cr. App. R. (S.) 224; [1982] Crim. L.R. 664, D.C.	15.05.3
R. v. Windle [1952] 2 Q.B. 826; [1952] I.T.L.R. 1344; 116 J.P. 365; 96 S.J. 379; [1952] 2 All E.R.1; 36 Cr. App. R. 85, C.C.A.	13.04, 13.04.4
R. v. Woolland (1967) 51 Cr. App. R. 65; [1967] Crim. L.R. 65, C.A.	15.03
Rabey (1980) 15 C.R. (3d.) 225	13.02
Rabey v. the Queen [1980] 2 S.C.R. 513	13.04.1
Reed v. Wastio [1972] Crim. L.R. 221; <i>The Times</i> , February 10, 1972	21.08.3
Reed v. United Kingdom [1982] European Court of Human Rights 25 Decisions and Reports, p. 5	24.34
Reibl v. Hughes (1980) 114 D.L.R. (3d.) 1	20.12, 20.12.1, 20.12.2

	PARAGRAPH
Rice v. Connolly [1966] 2 Q.B. 414; [1966] 3 W.L.R. 17; 130 J.P. 322, 110 S.J. 371; [1966] 2 All E.R. 649, D.C.	25.05
Richardson v. London County Council [1957] 1 W.L.R. 751, 121 J.P. 355; 101 S.J. 429; [1957] 2 All E.R. 330, C.A.	21.25.2
Richmond v. Branson & Son [1914] 1 Ch. 968	24.25.3
Robinson v. Balmain New Ferry Co. [1910] A.C. 295	21.05.3
Rogers v. Cullen [1982] 1 W.L.R. 729; (1982) 126 S.J. 344; [1982] 2 All E.R. 570; (1982) 75 Cr. App. R. 102; (1982) 4 Cr. App. R. (S) 170, H.L.; <i>affirming</i> (1982) 74, Cr. App. R. 37	15.24
Rose v. R. [1961] A.C. 496; [1961] 2 W.L.R. 506; 105 S.J. 253; [1961] 1 All E.R. 859; 45 Cr. App. R. 102, P.C.	13.07

S

S. (F.G.) (Mental Health Patient), <i>Re</i> [1973] 1 W.L.R. 178, <i>sub nom</i> S. (F.G.) <i>Re</i> (1972) 117 S.J. 90	23.05, 24.25.1
S. v. G. [1981] J.S.W.L. 174	8.07
S.G. (a patient) <i>Re</i> [1986] 2 S.C.R. 388, 31 D.L.R. 4th 1	20.16.1
Sabitini, <i>Re</i> (1969) 114 S.J. 35	23.28
Sainsbury (J.) Ltd. v. Secretary of State for the Environment and Colchester Borough Council [1978] J.P.L. 379	4.17
Saltman Engineering Co. Ferotel and Monarch Engineering co. (Mitcham) v. Campbell Engineering Co. (1948) 65 R.P.C. 203; [1963] 3 All E.R. 413, C.A.	20.32.1, 20.32.5
Samuel v. Robinson (1846) 7 L.T.D. 301, N.P.	23.30
Science Research Council v. Nassé; Leyland Cars v. Vyas; [1980] A.C. 1028; [1979] I.C.R. 921; [1979] 3 W.L.R. 762; (1979) 123 S.J. 768; (1979) 3 All E.R. 673; <i>sub nom.</i> Nassé v. Science Research Council; Vegas v. Leyland-Cards; [1979] I.R.L.R. 465; H.L.; <i>affirming</i> [1979] Q.B. 144; [1978] 3 W.L.R. 754; [1978] 3 All E.R. 1196; (1978) 13 I.T.R. 367, <i>sub nom.</i> [1978] 1 I.R.L.R. 352; (1978) 122 S.J. 593, C.A.; <i>reversing</i> [1978] I.C.R. 777; (1978) 122 S.J. 316; [1978] I.R.L.R. 201	20.32.7
Scott v. Scott (1913) A.C. 417	18.23A
Scott v. Walkem (1862) 3 F. & F. 327; 176 E.R. 147	21.11
Seager v. Copyden Ltd. [1967] 1 W.L.R. 923; 111 S.J. 335; [1967] 2 All E.R. 415; 2 K.I.R. 828; [1967] F.S.R. 211; [1967] R.P.C. 349; C.A.; <i>reversing</i> [1967] R.P.C. 349. Petition for leave to appeal to the House of Lords dismissed	20.32.4
Seager Hunt, <i>Re</i> [1906] 2 Ch. 295	23.04
Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1976] 3 W.L.R. 641; 120 S.J. 735; <i>sub nom.</i> Secretary of State for Education and Science v. Metropolitan Borough of Tameside Metropolitan Borough Council, <i>ex parte</i> Secretary of State for Education and Science, 120 S.J. 539, C.A.	4.31.1
Secretary of State for the Home Department v. Mental Health Review Tribunal for the Mersey Regional Health Authority; Same v. Mental Health Review Tribunal for Wales [1986] 1 W.L.R. 1170; 130 S.J. 697; [1986] 3 All E.R. 233; 83 L.S. Gaz. 3001	18.14.1, 18.14A.3

Secretary of State for the Home Department v. Oxford Regional Mental Health Review Tribunal [1988] 1 A.C. 120; *sub nom.* R. v. Oxford Regional Mental Health Tribunal, *ex parte* Secretary of State for the Home Department; R. v. Yorkshire Mental Health Review Tribunal, *ex parte* Same [1987] 3 W.L.R. 522; [1987] 131 S.J. 1086; [1987] 3 All E.R. 8; (1987) 137 New L.J. 735; (1987) 84 L.S. Gaz. 2690, H.L.; *affirming* [1986] 1 W.L.R. 1180; (1986) 130 S.J. 505; [1986] 3 All E.R. 239; (1986) 83 L.S. Gaz. 1559 C.A. ... 4.08.5, 18.14A, 18.14A.1, 18.20

Selby v. Jackson (1844) 6 Beav. 192 ... 23.26.2

Shackleton v. Swift [1913] 2 K.B. 304 ... 21.25.1

Shoosmith, *Re* [1938] 2 K.B. 637; [1938] 3 All E.R. 186, C.A. ... 21.28

Shuttleworth, *Re* (1846) 9 Q.B. 651 ... 21.11.1

Sidaway v. Bethlem Royal Hospital Governors and Others [1985] A.C. 871; [1985] 2 W.L.R. 480; 129 S.J. 154; [1985] 1 All E.R. 643, H.L., *affirming* [1984] Q.B. 498 [1984] 2 W.L.R. 778; [1984] 1 All E.R. 1018; 128 S.J. 301; 81 L.S. Gaz. 899, C.A. ... 20.12, 20.12.1, 20.12.2

Silver v. the United Kingdom (1983) European Court of Human Rights, Judgment given March 25, 1983 ... 24.34

Sinclair v. Broughton (1882) 47 L.J. 170 ... 21.11

Slade v. Guscott (1981) unreported. July 28, 1981, C.A. ... 21.13.5

Smee v. Smee (1879) 5 P.D. 84 ... 23.28

Smith v. Auckland Hospital Board [1965] N.Z. L.R. 191 ... 20.11, 20.12.2

Smith v. Tebbitt (1867) 1 P.&D. 398 ... 23.28

Smith and Others v. Jackson, Electoral Registration Officer of the Clitheroe Constituency, (1981) Warrington Crown Court Judgment given September 16, 1981 ... 1.11, 24.02.2

Snook v. Mannion [1982] Crim. L.R. 601; [1982] R.T.R. 321, D.C. ... 21.13.4

Sodeman v. R. [1936] W.N. 190; [1936] 2 All E.R. 1138 ... 13.02, 13.04.5

Somerset County Council v. Kingscott [1975] 1 W.L.R. 283; (1974) 119 S.J. 134; [1975] 1 All E.R. 326; (1974) 73 L.G.R. 125; (1974) 5 Fam. Law 121; [1975] Crim. L.R. 33, D.C. ... 21.04.2

Sotherden v. Sotherden [1940] p. 73; [1940] 1 All E.R. 252, C.A. ... 24.14.3

Southwark London Borough Council v. Williams, Southwark London Borough Council v. Anderson [1971] Ch. 734; [1971] 2 W.L.R. 467; [1971] 2 All E.R. 175; 69 L.G.R. 145, C.A. ... 22.21

State v. Volschenk (1968) 2 PH, H283(D) (South African Case) ... 21.05.2

Steeple v. Derbyshire County Council [1981] J.P.L. 582 ... 4.17

Stowe v. Jolliffe (1874) LR.9 C.P. 750 ... 24.03

Swallow v. L.C.C. [1916] 1 K.B. 224, D.C. ... 25.05

Symm v. Fraser (1863) 3 F. & F. 859; 176 E.R. 391 ... 21.11

T

T., *Re* (1987) *The Times*, May 26, 1987 ... 20.09

T., *Re* T. v. T. (1987), [1988] Fam. 52; [1988] 2 W.L.R. 189; [1988] 1 All E.R. 613; 131 S.J. 1286; 18 Fam. Law 126; [1988] 1 F.L.R. 400; *The Times*, July 11, 1987 ... 20.09, 20.16, 20.16.2

T.B., *Re* [1967] Ch. 247; [1967] 2 W.L.R. 15; 110 S.J. 977; [1966] 3 All E.R. 509 ... 23.27A.3

Tarasoff v. Regents of the University of California (1976) 17 Cal. 3d. 452; 551 P2d. 334; 131 Cal Rptr, (Tarasoff II), *vacating* (1974) 13 Cal. 3d. 117; 529 P2d. 553; 18 Cal. Rptr 129 (Tarasoff I) ... 20.32.1, 20.32.6

	PARAGRAPH
Tarnesby v. Kensington, Chelsea and Westminster Area Health Authority (Teaching) (1981) 125 S.J. 464; [1981] I.C.R. 615; [1981] I.R.L.R. 369, H.L.; <i>affirming</i> [1980] I.C.R. 475; (1980) 124 S.J. 377, C.A.; <i>affirming</i> (1978) 123 S.J. 49	6.15
Taylorplan Catering (Scotland) v. McInally [1980] I.R.L.R. 53, E.A.T.	24.38.1
Taylor's Central Garages (Exeter) v. Roper [1951] W.N. 383; 115 J.P. 445; <i>sub nom.</i> Roper v. Taylor's Central Garages (Exeter) [1951] 2 T.L.R. 284, D.C.	25.04.1
Thake v. Maurice [1986] Q.B. 664; [1986] 2 W.K.R. 337; [1986] 1 All E.R. 479; 136 New L.J. 92; 83 L.S. Gaz. 123, C.A.; <i>affirming</i> [1985] 2 W.L.R. 215; 129, S.J. 86; [1984] 2 All E.R. 513; 82 L.S. Gaz. 871, D.C.	20.12.2
Thompson v. Schmidt (1891) 56 J.P. 212	7.14.2
Thornton v. Kirklees Metropolitan Borough Council [1979] Q.B. 626; [1979] 3 W.L.R. 1; (1979) 77 L.G.R. 417; <i>sub nom.</i> Thornton v. Kirklees Metropolitan District Council (1979) 123 S.J. 825; [1979] 2 All E.R. 349; [1979] J.P.L. 459, C.A.	22.21
Thurlow v. Thurlow [1976] Fam. 32; [1975] 3 W.L.R. 161; 119 S.J. 406; [1975] 2 All E.R. 979; 5 Fam. Law 188	24.14.2
Thynne, Wilson and Gunnell v. United Kingdom (1990) 13 E.H.R.R. 666	16.04
Townley v. Rushworth (1963) 107 S.J. 1004; 62 L.G.R. 95; [1964] Crim. L.R. 590, D.C.	7.22, 21.13.2, 21.13.3, 21.14.2
Townsend, <i>Re</i> [1908] 1 Ch. 201	24.25.2

V

Van der Leer v. The Netherlands: European Court of Human Rights (No. 12/1988/156/210 (1990) <i>The Times</i> , March 2, 1990 ...	9.09.1, 9.09.3, 9.09.4, 15.16.3, 18.23.1
----------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------

W

W (a Minor) (Medical treatment) [1992] 4 All E.R. 627; 9 B.M.L.R. 22	20.15A.1
W. v. Egdel [1990] Ch. 359; [1990] 2 W.L.R. 471; [1990] 1 All E.R. 835; (1990) 134 S.J. 286, C.A.; <i>affirming</i> [1989] 2 W.L.R. 689; [1989] 1 All E.R. 1089; (1989) 133 S.J. 570	18.23B, 20.32.1, 20.32.2, 20.32.6, 20.32.8, 20.32.9
W. v. L. [1974] Q.B. 711; [1973] 3 W.L.R. 859; 117 S.J. 775; 72 L.G.R. 36; 4 Fam. Law 134; <i>sub nom.</i> W. v. L. (Mental Health Patient) [1973] 3 All E.R. 884, C.A.	8.07, 9.02
W. (E.E.M.) <i>Re</i> [1971] 1 Ch. 123; [1970] 3 W.L.R. 87, 114 S.J. 549 <i>sub nom.</i> <i>W. Re</i> [1970] 2 All E.R. 502	23.02.1, 23.04, 24.15
W.L.W., <i>Re</i> [1972] Ch. 456; [1972] 2 W.L.R. 1207; 116 S.J. 415; [1972] 2 All E.R. 433	23.06.6, 23.12.1
Waldron, <i>Re</i> [1986] Q.B. 824; [1985] 3 W.L.R. 1090; [1985] 3 All E.R. 775; 129 S.J. 892; 83 L.S. Gaz. 199, C.A.	21.25.2, 21.31
Walker, <i>Re</i> [1905] 1 Ch. 160	23.26.4, 23.28
Walton v. Queen, The [1977] 3 W.L.R. 902; [1977] 121 S.J. 728; [1978] 1 All E.R. 542; [1978] A.C. 788; (1977) 66 Cr. App. R. 25; [1977] Crim. L.R. 747, P.C.	13.06
Warner v. Riddiford (1858) 4 C.B. (N.S.) 180	21.02.2, 21.05.2

	PARAGRAPH
Warwickshire County Council v. McSweeney (unreported, December 8 1988, Roch J.)	5.03.3
Waters v. Taylor (1813) 2 Bes. & B. 299	23.29
Watt v. Minister of Local Government and Planning [1951] 2 K.B. 779; [1951] 2 T.L.R. 503; 95 S.J. 578; 2 P. & C.R. 131; 49 L.G. R. 738; <i>sub nom.</i> Havant and Waterloo Urban District Council Compulsory Purchase Order (No. 4), 1950, Watson's Application, 115 J.P. 519; [1951] 2 All E.R. 664	4.12.2
Watt v. Kesteven County Council [1955] 1 Q.B. 408; [1955] 2 W.L.R. 499; 119 J.P. 220; 99 S.J. 149; [1955] 1 All E.R. 473; 53 L.G.R. 254, C.A.; <i>affirming</i> [1954] 3 W.L.R. 729; 119 J.P. 37; 98 S.J. 806; [1954] 3 All E.R. 441; 52 L.G.R. 539; [1954] C.L.Y. 1094	4.31.2
Weberlist, In re (1974) 260 N.Y.S. 2d 783	20.15B.1
Weeks v. The United Kingdom (1987) European Court of Human Rights Judgment given March 2, 1987	15.11
Weld-Blundell v. Stephens [1920] A.C. 956	20.32.4, 20.32.6
Weldon v. Home Office [1990] 3 W.L.R. 465; [1990] 3 All E.R. 672	21.02.2
Welham v. D.P.P. [1961] A.C. 103; [1960] 2 W.L.R. 669; 124 J.P. 280; 104 S.J. 308; [1960] 1 all E.R. 805; 44 Cr. App. R. 124; H.L.; <i>affirming sub nom.</i> R. v. Welham [1960] 2 Q.B. 445; [1960] 2 W.L.R. 333; 124 J.P. 156; 104 S.J. 108, C.C.A.	25.02
Wellesley v. Wellesley (1828) 2 Bli. N.S. 124, 4 E.R. 1078	20.15B.2
Wells v. Surrey A.H.A. (1978) <i>The Times</i> , July 29, 1978	20.12
White <i>et al.</i> v. Turner <i>et al.</i> (1981) 120 D.L.R. (3d.) 269	20.15
Whitehouse v. Board of Control [1960] 1 W.L.R. 1093, 104, S.J. 824; [1960] 3 All E.R. 182n., H.L.	21.28
Whitehouse v. Jordan [1981] 1 W.L.R. 246; (1980) 125 S.J. 167; [1981] 1 All E.R. 267, H.L.; <i>affirming</i> [1980] 1 All E.R. 650	20:12.1
Wild and Others v. Electoral Registration Officer for Warrington and Another (1976) Judgment given June 15, 1976, Warrington County Court	1.11.3, 24.02.2
Wilsher v. Essex Area Health Authority [1988] 2 W.L.R. 557; [1988] 1 All E.R. 871, H.L.	20.12.2
Winch v. Jones; Same v. Hayward [1986] Q.B. 296; [1985] 3 W.L.R. 729; 129 S.J. 669; [1985] 3 All E.R. 97, C.A.	21.25, 21.26.1
Winterwerp v. Netherlands, The (1979) European Commission on Human Rights. App. No. 6301/73, Report adopted December 15, 1977; European Court of Human Rights, Judgment given October 24, 1979, 2 E.H.R.R. 387	9.01, 9.09.1, 9.09.2, 15.11, 15.16.3, 15.19, 18.13, 18.13.1, 18.21, 20.29, 23.01.2
Wood & Ealing London Borough Council [1967] Ch. 364; [1966] 3 W.L.R. 1209; 110 S.J. 944; 65 L.G.R. 282; <i>sub nom.</i> Wood v. London Borough of Ealing 130 J.P. 22; [1966] 3 All E.R. 514	4.31.2
Wookey v. Wookey; <i>Re S</i> (a minor) (1991), <i>The Times</i> , April 2, 1991, C.A.	24.29A
Wrexham v. Huddleston (1734) 1 Swan 514	23.29
Wright v. Proud (1806) 13 Bes. 136	23.26.2
Wyatt v. Hillington London Borough Council (1978) 122 S.J. 349; (1978) 76 L.G.R. 727, C.A.	22.21
Wyatt v. Wilson (1820) cited in Prince Albert v. Strange (1849)	20.32.1

X

X. <i>Re</i> (1987) <i>The Times</i> , June 4, 1987	20.09
X. v. Belgium (1974) European Commission of Human Rights App. No. 6859/74	18.21
X. v. United Kingdom (1981) European Commission of Human Rights Report adopted, July 16, 1980; European Court of Human Rights, Judgment given, November 5, 1981	1.10, 1.11, 7.25A.5, 9.01, 9.09.3, 15.11, 15.16.3, 18.12

TABLE OF CASES

cx*i*

	PARAGRAPH
X. v. Y. [1988] 2 All E.R. 648, Rose J ... ..	... 20.32.1
X and Y v. the United Kingdom (1985) European Court of Human Rights, Judgment given March 26, 1985 ... ..	... 25.12

Y

Yachuk v. Oliver Blais Co. Ltd. [1949] A.C. 386; 65, T.L.R. 300; 93 S.J. 356; [1949] 2 All E.R. 150, P.C. ... ..	... 23.31
Yonge v. Toynbee [1910] 1 K.B. 215	23.27.1, 23.29, 24.25.2

