

Values plurality: the elephant in the room of risk

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2024: County Court review of Non-Custodial Supervision Order

- 53 year old male
- 2016: assault charge; unfit → Non-Custodial Supervision Order supervised by Disability services
- Diagnoses:
 - Severe P.D.
 - Methamphetamine Use Disorder
 - ABI
 - Disorganised Schizophrenia (later)
- Challenging trajectory under Order :
 - prolonged periods in prison
 - ongoing offending : Magistrates level, including setting fires to small bins



Judge removes the NCSO
despite ongoing risk

*“It is fair to conclude that he will remain at **high risk** of offending, but that the **gravity** of such offending is unlikely to be high...”*



THRESHOLD FOR
TAKING THE
PRECAUTION
(continuing the
Supervision Order)
NOT REACHED



MAGNITUDE OF RISK of
harm



THRESHOLD FOR
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THRESHOLD FOR
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(continuing the
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NOT REACHED



Nature and
consequences
of the harm(s)
being
considered

MAGNITUDE OF RISK
of harm



THRESHOLD FOR
TAKING THE
PRECAUTION
(continuing the
Supervision Order)
NOT REACHED





IN CONTRAST...

IN CONTRAST...

THRESHOLD FOR
TAKING THE
PRECAUTION **CROSSED**
(e.g. Continuing
Detention Order)

Likelihood of
the harm



Nature and
consequences
of the harm(s)



MAGNITUDE OF
RISK of harm

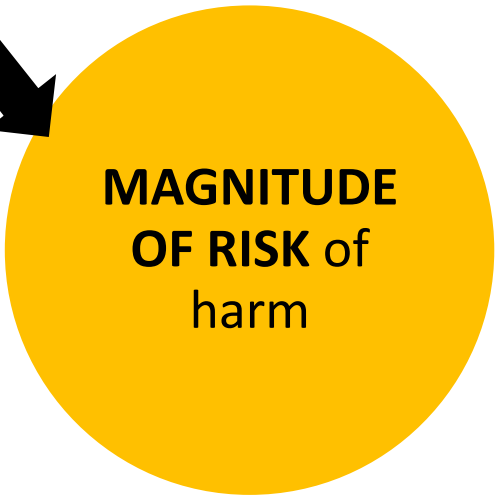
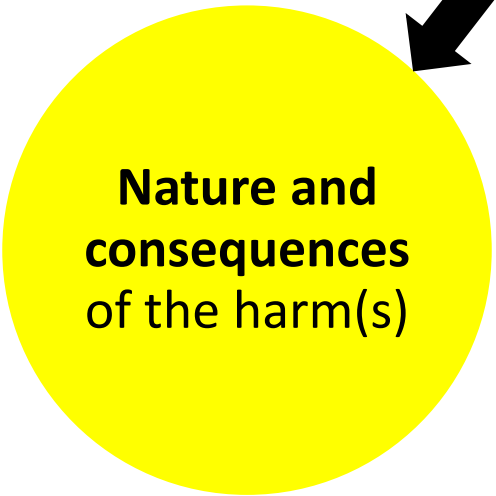
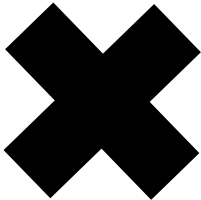




**THRESHOLD
FOR TAKING THE
PRECAUTION**



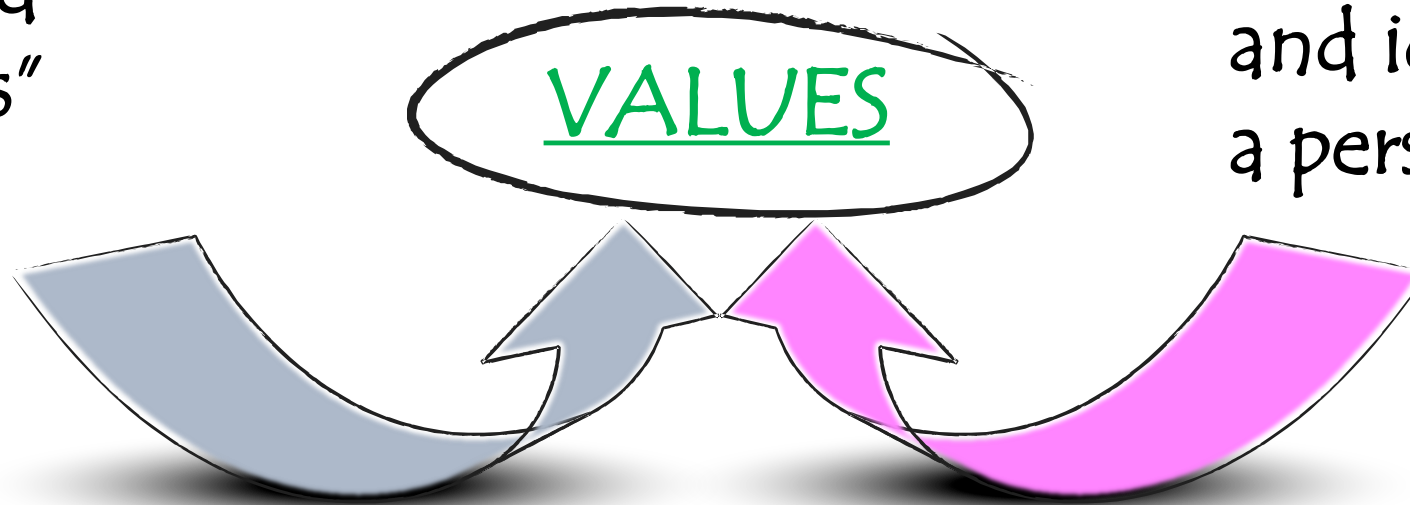
Appraisals that cannot be made by reference to 'evidence' alone: they are **'values-based'**



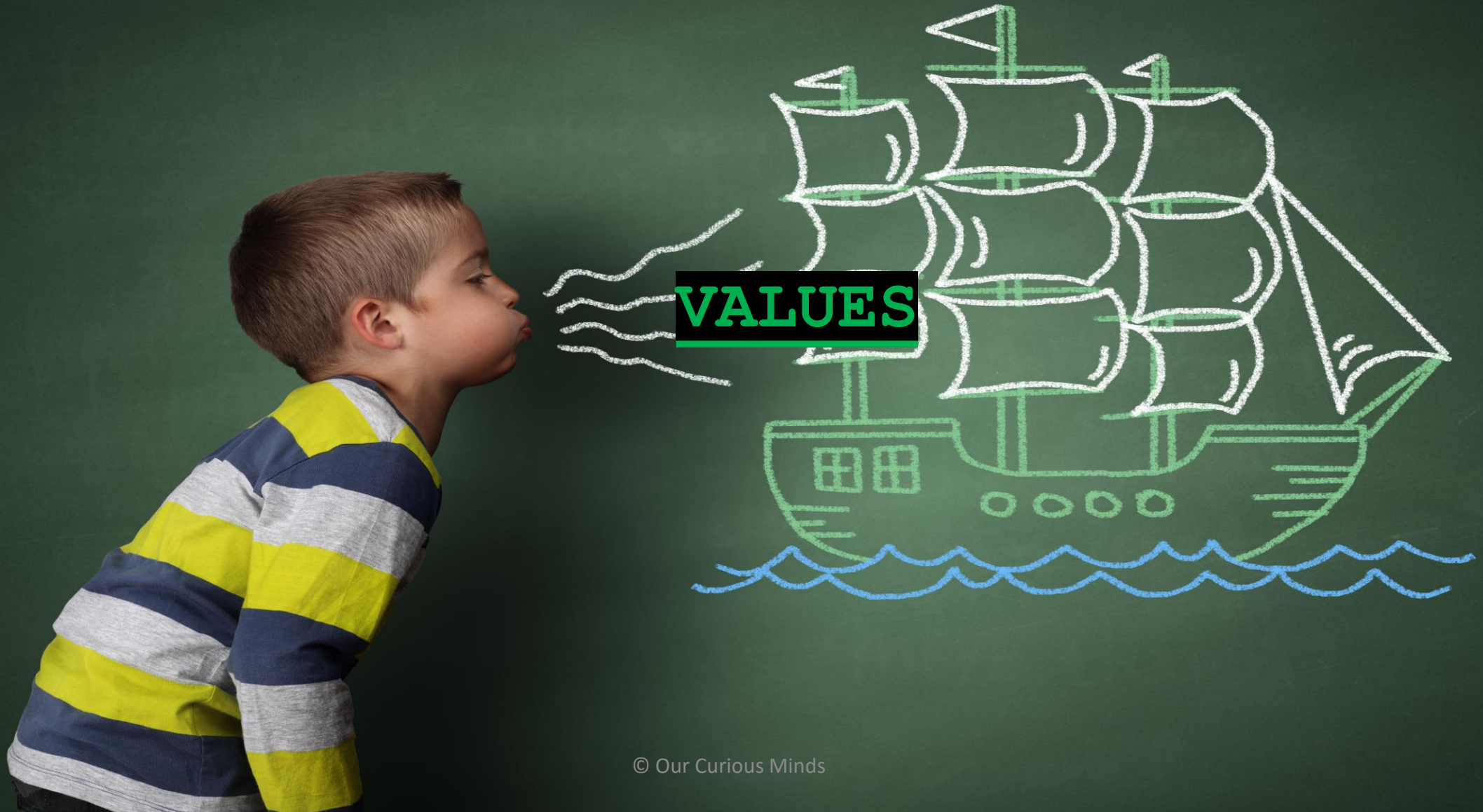
What is meant by 'values' ?

"Preferences,
concerns and
expectations"
(Fulford, 2012)

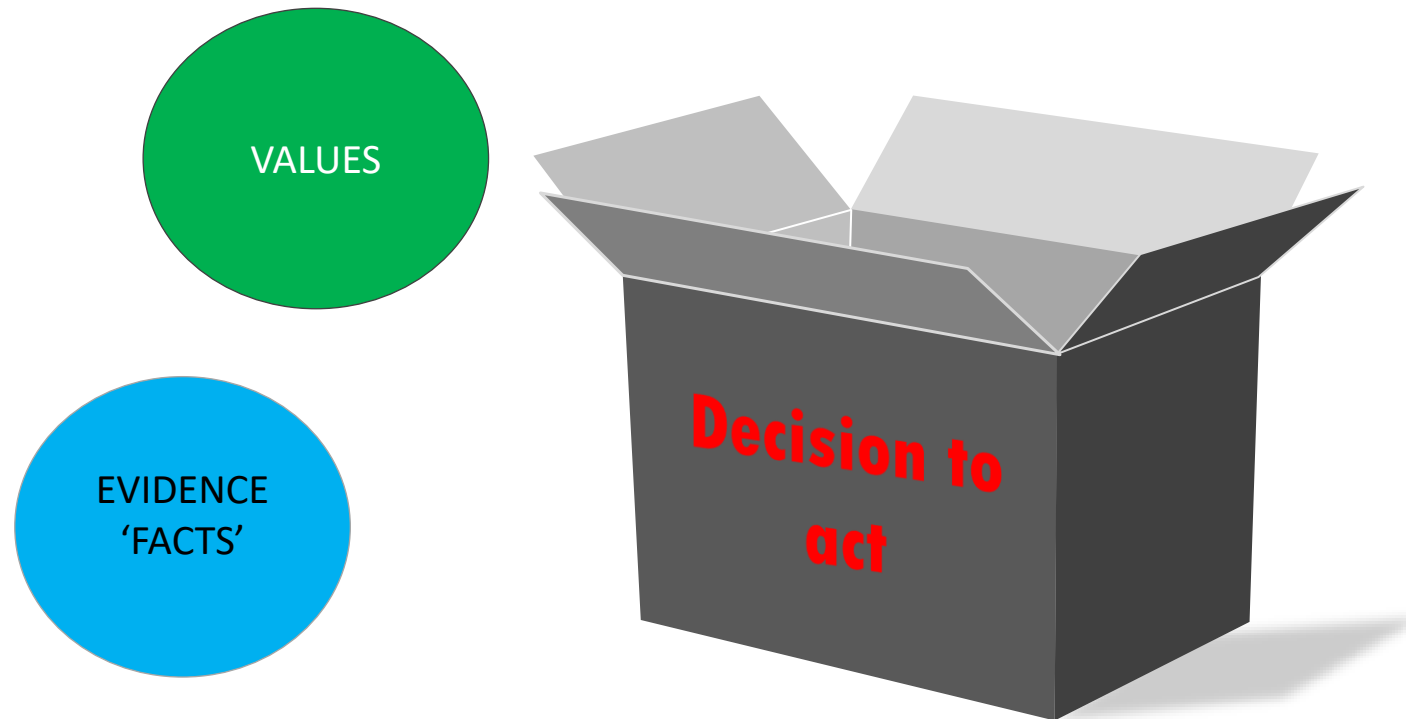
Important,
enduring beliefs
and ideals held by
a person or group



Emotionally charged—have energy and direction



Why do 'values' matter so much ?



*“Values provide the **weighting** by which facts form the basis of actions”*
(Fulford & Benington, 2005)

Overt discourse

**UNDERLYING
VALUES**

*Paradoxically: often not noticed
(background not foreground)*



Overt criteria in
legislation

**UNDERLYING
VALUES**

*Paradoxically: often not noticed
(background not foreground)*



MHWA (Vic): “**serious** deterioration in the person's mental or physical health; or (ii) **serious harm** to the person or to another person”

MHA (NSW): “care, treatment or control of the person is necessary:
(a) for the person's own protection from **serious harm**,
or (b) for the protection of others from **serious harm**”

VALUE-LADEN WORDS

**UNDERLYING
VALUES**

Crimes (Mental Impairment and Unfitness to be Tried) Act (Vic): "*the **safety** of the person subject to the order or members of the public will be **seriously** endangered*"

VALUE-LADEN WORDS

**UNDERLYING
VALUES**

Criminal Code (Cwth): “the Court is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an **unacceptable** risk of committing a serious Part 5.3 offence if the offender is released into the community”

VALUE-LADEN WORDS

**UNDERLYING
VALUES**



**Effective working
with Values**

Comfort
with
plurality



Effective working
with Values



- Forensis :
 - “of or pertaining to the market or *forum*”
- In an ‘Open Society’ we are embedded in a **public forum of ideas and values**
- As professionals we both provide and are ourselves subject to checks and balances...

The value of values plurality regarding scope / seriousness of harms and 'correct' thresholds...



differences of values the healthy norm within any system in an Open Society



diverse values a valuable resource IF made overt



genuinely listen to diverse narratives with humility



aim to understand other perspectives not jumping to 'persuade'



Two Feet
Principle

Comfort with
plurality



Effective working
with Values



*“The two feet principle is that all decisions whether overtly value-laden or not, are based on the two feet of values **and evidence**”* Fulford, K. W. M.



**All of this in no way reduces
the need to base
opinion on robust evidence
(to the extent possible)**

Trade-offs

Two Feet Principle

Comfort with plurality



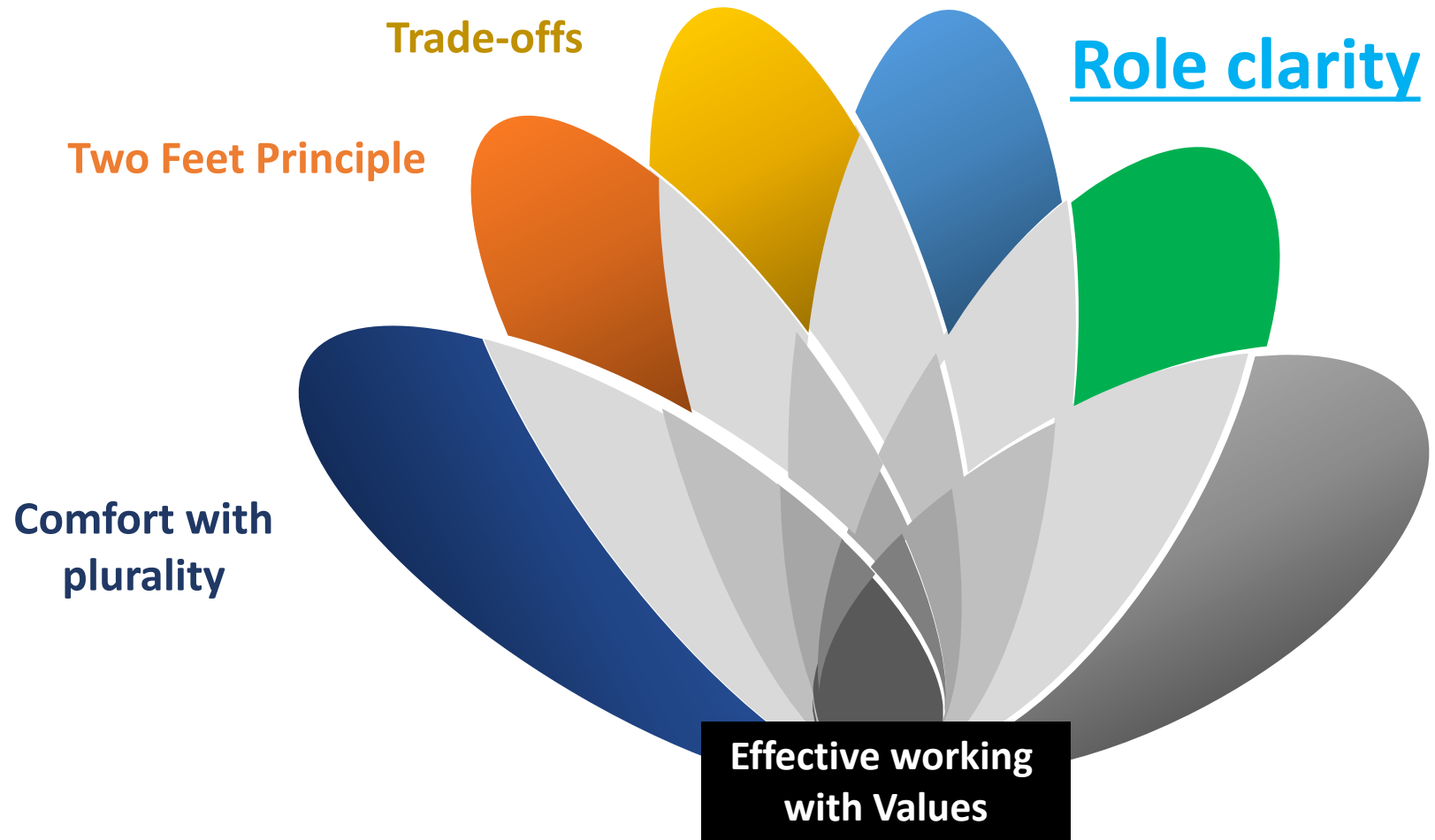
Effective working
with Values

Skill is about **trade-offs not clairvoyance** :

“In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)...”



<i>Wrongs Act</i>	PROS (on the one hand...)	CONS (on the other hand...)
TAKE PRECAUTIONS AGAINST SIGNIFICANT FORSEEABLE RISK OF HARM e.g Certify under MHA	REDUCED PROBABILITY AND/OR SERIOUSNESS OF THE HARM	‘BURDEN’ OF TAKING PRECAUTIONS
ENGAGE IN ACTION THAT CREATES SIGNIFICANT FORSEEABLE RISK OF HARM e.g. discharge from CTO	‘SOCIAL UTILITY’ OF THE ACTION	INCREASED PROBABILITY AND/OR SERIOUSNESS OF HARM

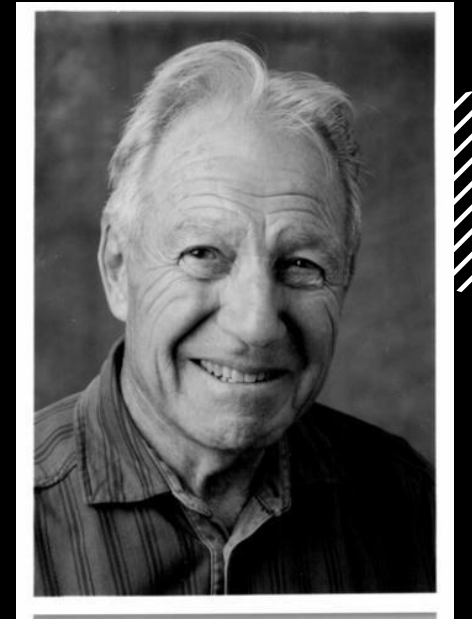


A longstanding conundrum...

“Scientists and policy-makers are uncertain how scientific facts are to be integrated with social values...scientists are uncertain whether their contributions should be restricted to presenting the facts, thereby leaving the policy judgment entirely to the political decision-makers...”

Jurimetrics Journal

Vol. 17, No. 4 (Summer 1977), pp. 253-269 (American Bar Association)



SCIENCE, VALUES, AND HUMAN JUDGMENT*

**Kenneth R. Hammond and
Leonard Adelman†**

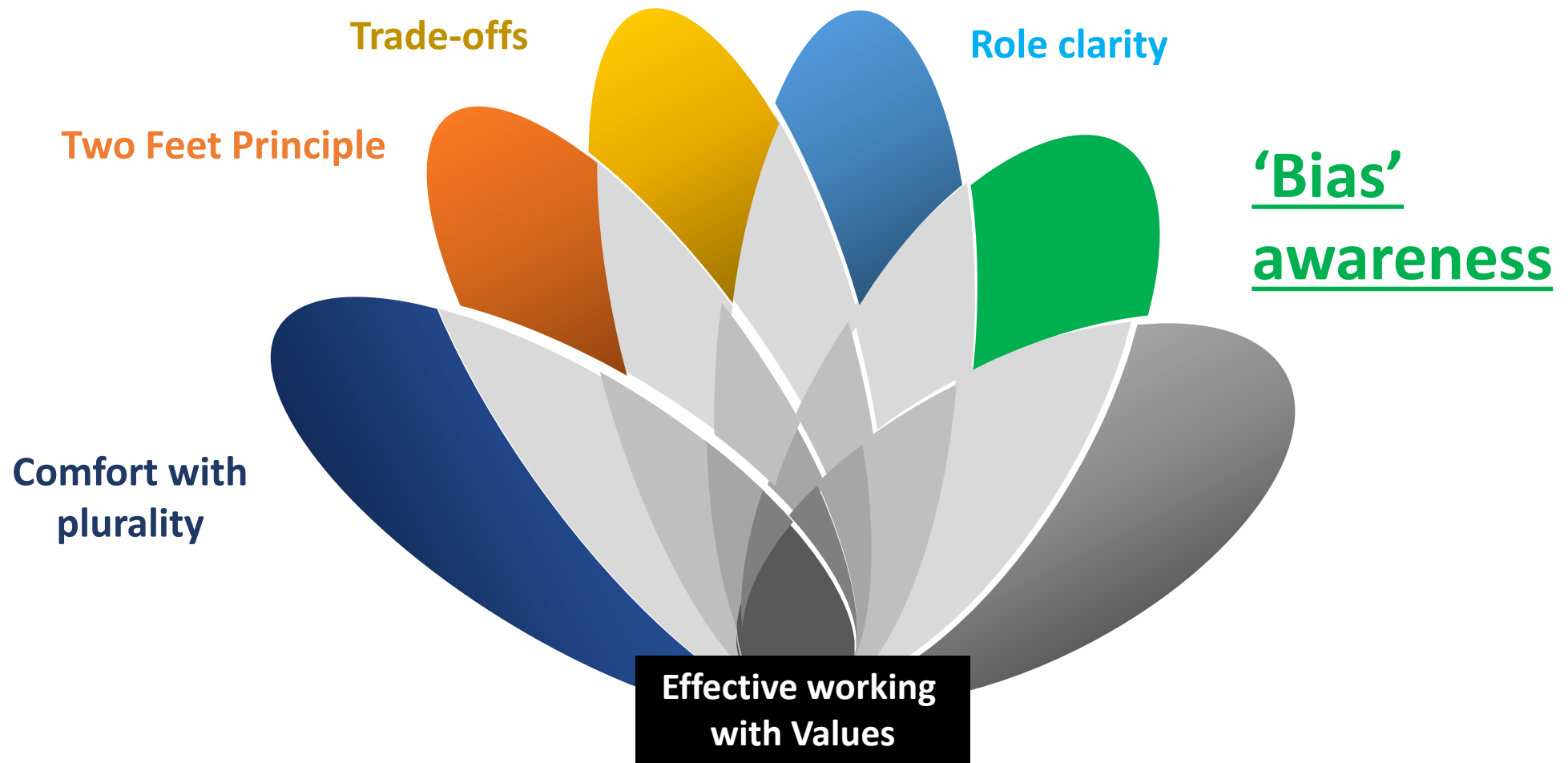
**Integration of Facts and Values Requires the
Scientific Study of Human Judgment**

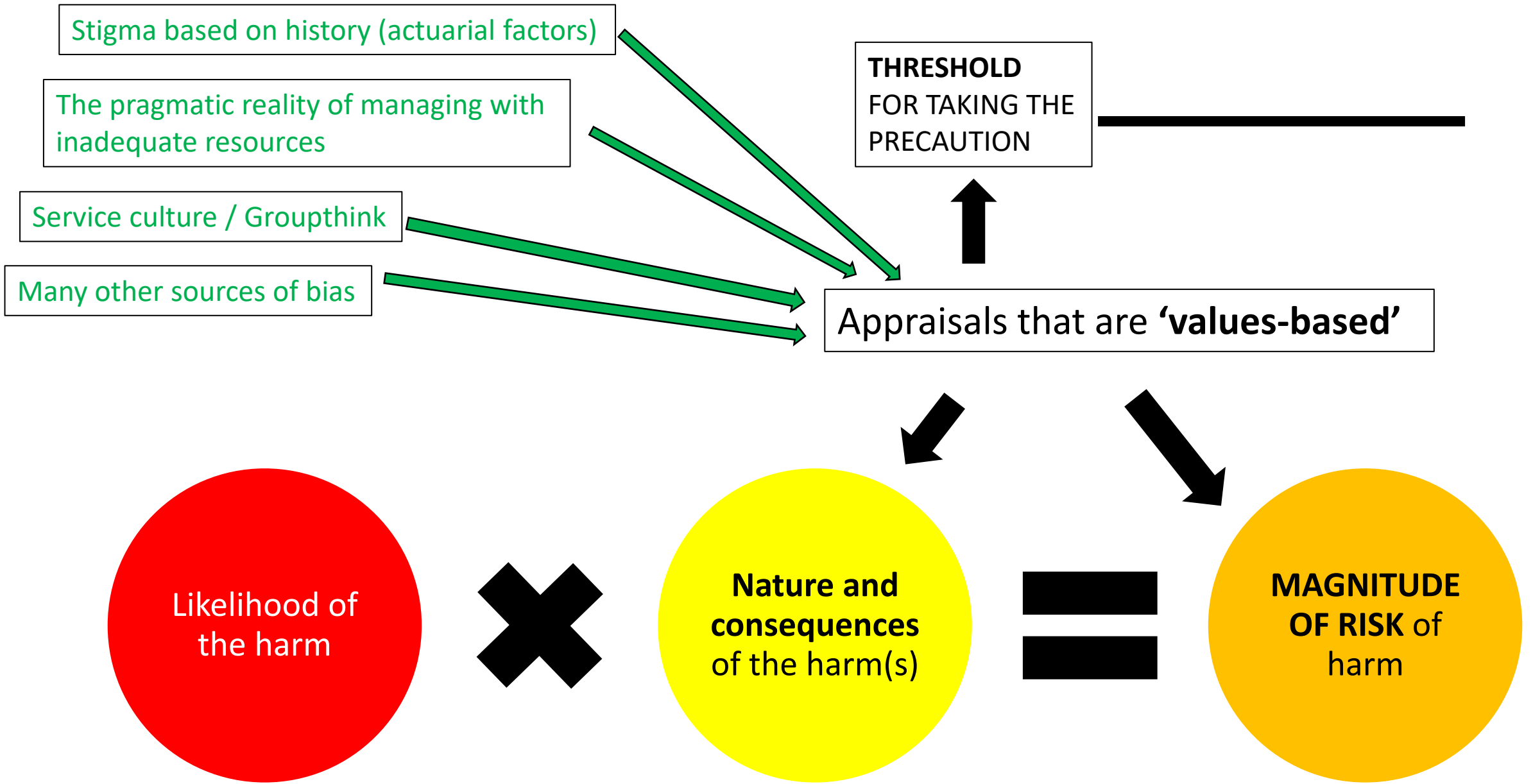


A role conundrum

- *Should mental health experts directly advise courts on whether Supervision Orders should be made / continued / varied...*







Stigma based on history (actuarial factors)

The pragmatic reality of managing with inadequate resources

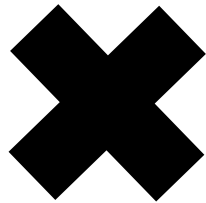
Service culture / Groupthink

Many other sources of bias

**THRESHOLD
FOR TAKING THE
PRECAUTION**

Appraisals that are 'values-based'

Likelihood of the harm

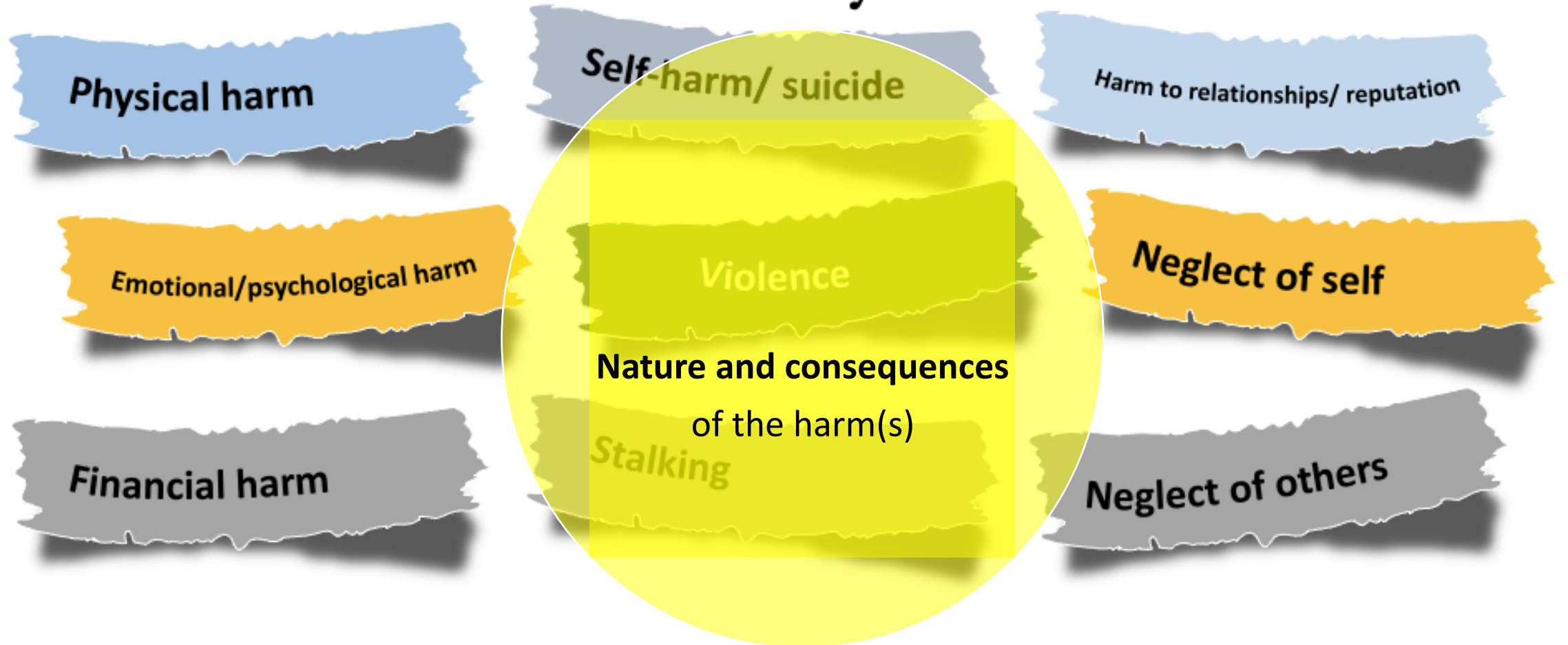


Nature and consequences of the harm(s)



MAGNITUDE OF RISK of harm

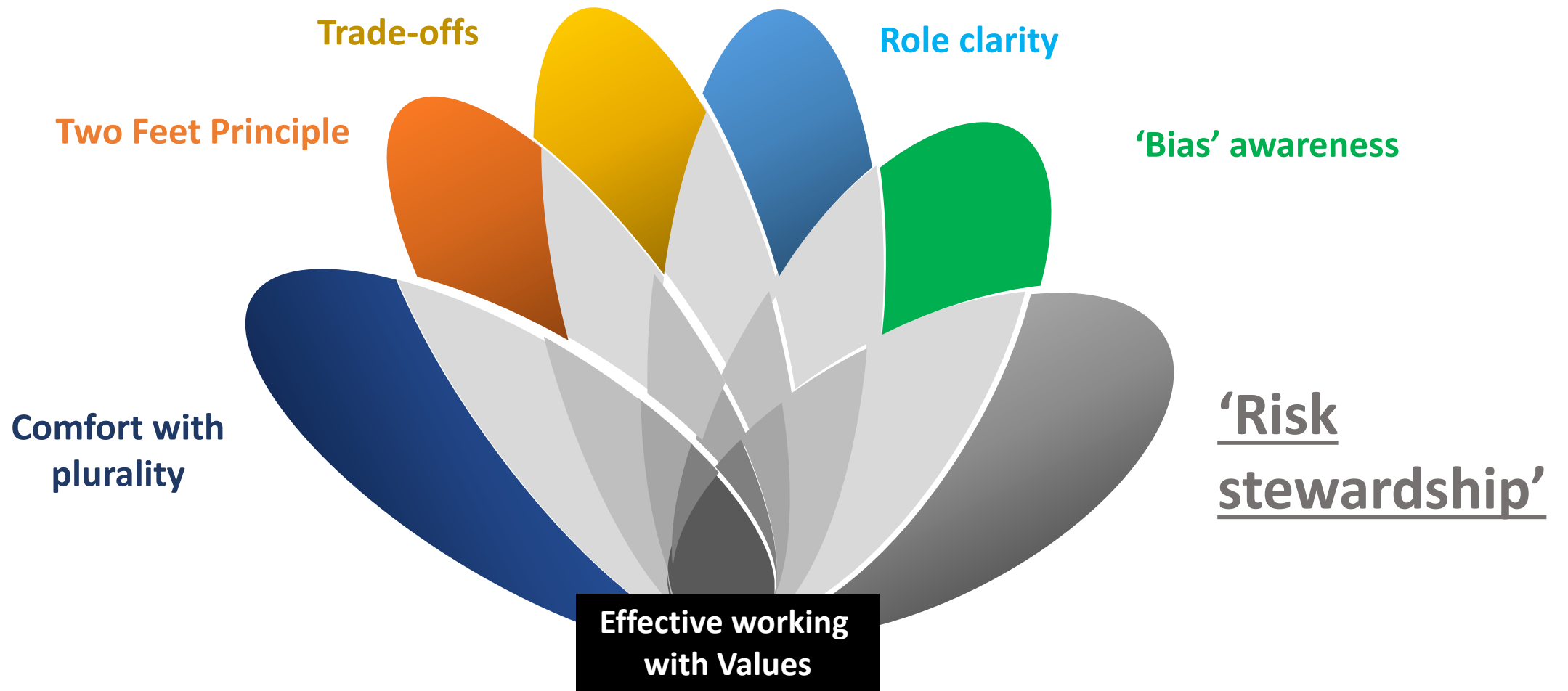
BROAD understanding of harms: 2014 Guidance from the NSW Chief Psychiatrist regarding '**serious harm**' criterion for involuntary treatment:



NARROWED

understanding of harms:





THE PAST



THE FUTURE

“TRAUMA”

BAD STUFF FROM THE PAST

‘TRAUMA

STEWARDSHIP’ : An

Everyday Guide to

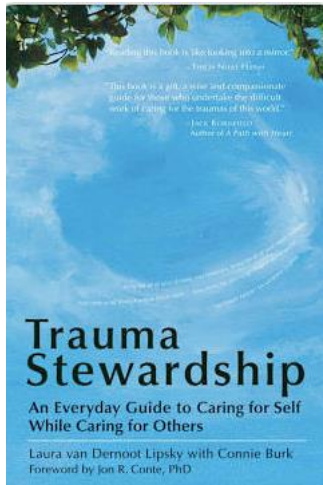
Caring for

Self While Caring for

Others’

Laura van Dernoot

Lipsky, 2018



STEWARDSHIP: *“the careful and responsible management of something entrusted to one’s care”*

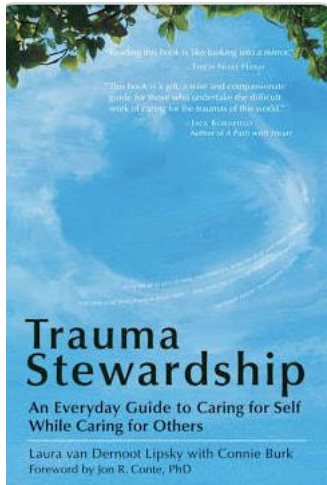
“TRAUMA”

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STEWARDSHIP’ : An Everyday Guide to Caring for Self While Caring for Others’

Laura van Dernoot Lipsky, 2018



STEWARDSHIP: *“the careful and responsible management of something entrusted to one’s care”*

“RISK”

UNCERTAINTY ABOUT POSSIBLE BAD STUFF IN THE FUTURE

‘RISK STEWARDSHIP’ : *a useful way of thinking about the work we all do*

