Mental Health: Law and Practice

Second Edition

Professor Philip Fennell
Cardiff Law School, Cardiff University
CONTENTS

Dedication v
Preface vii
Table of Cases xxiii
Table of Statutes xxxiii
Table of Statutory Instruments xli
Table of International and European Legislation xlv
List of Abbreviations xlvii

Chapter 1
Background 1
The Mental Health Act 2007 and the Mental Capacity Act 2005: two different types of mental health legislation 1
Mental health legislation 2
Policy context: mental health law reform 5
Mental health services 5
Debate about mental health law reform 6
The Richardson Committee 9
The Mental Health Bills 2002 and 2004 10
The Mental Health Act 2007 12
Policy context: mental capacity law reform 13
‘The Bournewood Gap’ 14
Conclusion 16
Divergence between England and Wales 16

Chapter 2
Overview of the Mental Health Act 2007 19
Functions of mental health legislation 19
Defining ‘mental disorder’ 20
Providing powers to detain and treat without consent 22
Who may exercise compulsory powers? The statutory roles:
Approved Mental Health Professionals, Responsible Clinicians, Nearest Relatives and Independent Mental Health Advocates 22
Approved Mental Health Professional (‘AMHP’) 22
Responsible Clinician 23
Nearest Relative 23
Independent Mental Health Advocates 24
The criteria for detention in hospital

Human rights
Non-offender patients
Appropriate treatment is available
The Bournewood Gap: deprivation of liberty of mentally incapacitated adults
Offender patients
The criteria which must be met for compulsory powers in the community

Safeguards
Review of compulsory powers by hospital managers
Mental Health Tribunals
Consent to treatment and statutory second opinions
Care Quality Commission
Victims’ rights

Principles and Codes of Practice
Principles
MCA 2005 Principles
Mental Health Act 1983
The principles introduced by the Mental Health Act 2007
The legal status of the Codes: seclusion, and restraint

Children
Transferring patients subject to compulsion across jurisdictions
Offences against mentally disordered people

The UN Convention on the Rights of Persons with Disabilities (CPRD)
Aims of the CPRD
Effect of Ratification of the CPRD and the Optional Protocol
Reservations and Declarations
Article 12, Mental Capacity Legislation, and Substitute Decision-Making
The Functional Approach to Capacity
The Requirements of Article 12 CPRD
Does Article 12 require supported decision-making to replace substitute decision-making in all cases?
Article 14 of the CPRD: A direct challenge to Specialist Mental health legislation?
Article 19 of the CPRD: Independent Living
The Rhetoric of the CPRD: ‘A Paradigm Shift’

Conclusion

Chapter 3
‘Mental Disorder’ and the Availability of Appropriate Treatment

Introduction
The definition of ‘mental disorder’
Treatability and appropriate treatment
The rejection of significantly impaired judgment as a condition of compulsion
The European Convention on Human Rights and detention on grounds of unsoundness of mind 64
Unsoundness of mind 64
A true mental disorder 65
Distinguishing between deviancy from society’s norms and mental disorder 66
The exclusions 67
Dependence on alcohol or drugs 68
Promiscuity, other immoral conduct, or sexual deviancy 69
Clinically recognised mental disorders 71
Bipolar disorder 72
Schizophrenia 73
Anxiety 73
Depression 74
Learning disability 74
Arrested or incomplete development of the mind 74
Significant impairment of intelligence and social functioning 75
Autistic spectrum disorders 76
The requirement that learning disability be associated with abnormally aggressive or seriously irresponsible conduct for long-term detention, guardianship or a CTO, or in relation to the offender provisions of the MHA 1983 77
Personality disorders 81
Mental disorder of a kind or degree warranting confinement 84
Replacing treatability with availability of appropriate treatment 85
Conclusion 90

Chapter 4
Statutory Powers and Responsibilities: the Powers and Duties of Mental Health Staff 91
Overview 91
Approved Mental Health Professionals (‘AMHPs’) 91
Section 12 approved doctors 92
Approved Clinicians (‘ACs’) and Responsible Clinicians (‘RCs’) 92
The impact of the Human Rights Act 1998 93
Section 139 of the Mental Health Act 1983 94
The Approved Mental Health Professional 97
Approval as an AMHP 98
Professional regulation of AMHPs 99
The role of the AMHP 100
The personal responsibility of the AMHP 101
The assessment 103
Informing and consulting the Nearest Relative 104
The power to ‘take and convey’ 106
The power to retake 107
Application for a warrant to enter premises 107
Duty to assess person detained under s 136 107
Powers of entry and inspection 107
Role on making, renewal and revocation of a community treatment order 108
Conflicts of interest 109
Medical recommendations and s 12 approved doctors 109
Approved Clinicians (‘ACs’) and Responsible Clinicians (‘RCs’) 113
Approved Clinicians (‘ACs’) 113
Understanding of the AC and RC Roles 115
Ability to carry out an assessment 115
Leadership & multi-disciplinary team working 115
Treatment 115
Reciprocal recognition of approval in England and Wales 115
Responsible Clinicians (‘RCs’) 116
Power to grant leave of absence to a patient who is liable to be detained (s 17) 116
Supervised Community Treatment (SCT) and the power to initiate a community treatment order (s 17A) 116
Power to recall to hospital from s 17 leave or from a community treatment order (ss 17 and 17E) 116
Power to revoke a community treatment order (s 17F) 117
Power to renew the authority to detain patients detained under ss 3 or 37 (s 20) 117
Power to renew a community treatment order (s 20A) 119
Power to discharge a patient from detention, guardianship or a community treatment order (s 23) 119
Power to prevent discharge by the nearest relative by issuing a ‘barring certificate’ to the managers of the hospital (s 25) 120
Duty to report to the Ministry of Justice on the condition of offender patients subject to restrictions 120
Powers and duties under Parts IV and IVA with relation to the administration of medical treatment 121
Conclusion 121

Chapter 5
Relatives, Independent Mental Health Advocates, and Hospital Managers 123
Introduction 123
The Nearest Relative 123
Independent Mental Health Advocates 123
Hospital Managers 124
The Nearest Relative (‘NR’) 124
Displacing the Nearest Relative 127
The Independent Mental Health Advocate 129
Duties 129
Powers 131
Qualifying patients 132
Duty to provide information about IMHAs 133
Hospital Managers 133
Duties in relation to the receipt of admission documents 135
Duties to give patients information concerning their rights under the Act and to help from advocates (ss 132, 132A and 130D) 138

Duty to notify social services when patient admitted on nearest relative application 139

Responsibilities in relation to Supervised Community Treatment 139

Complaints 140

Patients’ correspondence 140

Transfers of detained and community patients 141

Duties regarding renewal of detention 141

The Managers’ power of discharge and Managers’ Hearings (s 23) 142

Managers’ Panels 142

Principles 145

Hearing procedures 146

The decision 147

Duties to refer cases to MHTs 147

Managers’ duties in relation to children 149

Conclusion 149

Chapter 6
Powers of detention under the Mental Health Act 1983 and the Mental Capacity Act 2005 151

Overview 151

Informal admission 151

The least restrictive alternative 152

Patients who lack capacity to consent to admission 152

Informal admission post-\(HL\ v\ United\ Kingdom\) 154

Patients with capacity who consent 155

Patients who lack capacity to consent to treatment or admission 155

Deprivation of liberty 157

‘In Accordance with a Procedure Prescribed by Law’ 167

Which procedure to use? The interface between the Mental Health Act 1983 and the Mental Capacity Act 2005 170

Eligibility for the \(Bournewood\) safeguards 170

Patients already subject to the Mental Health Act 1983 171

Patients not already subject to the Mental Health Act 1983 or the Mental Capacity Act 2005 171

The Mental Capacity Act 2005 174

Incapacity 175

Best interests 176

A new approach to best interests 176

Section 4 of the Mental Capacity Act 2005 177

The defence in relation to acts of care, treatment and restraint done in the best interests of people who lack mental capacity 177

Advance decisions 178

Lasting powers of attorney 179

The Court of Protection and court appointed deputies 180

The Deprivation of Liberty safeguards 182

Procedures for authorising deprivation of liberty in Sch A1 183
The managing authority 183
The supervisory body: hospitals 183
The supervisory body: care homes 184
Standard authorisations 184
Independent persons 185
Applications 185
Qualifying requirements 187
The age requirement 187
The mental health requirement 188
The mental capacity requirement 188
The best interests requirement 189
Patient Representatives 191
The eligibility requirement 191
The no refusals requirement 192
Issuing the standard authorisation 192
Urgent authorisations 194
Extensions 194
Review by the supervisory body 195
Review by the Court of Protection 196
Monitoring 198
The role of attorneys and deputies in relation to patients subject to the Mental Health Act 1983 201
Powers of compulsory admission under Part II 201
Overview 201
Admission for assessment 202
Emergency admission for assessment 203
Admission for treatment 203
Nature or degree 204
Necessary in the interests of the patient’s health or safety or for the protection of others and the treatment cannot be provided unless he is detained under this section 205
Availability of appropriate treatment 205
When should s 2 be used and when s 3? 206
Application for detention of someone who is already an in-patient 206
The doctor’s (and AC’s) holding power 207
The nurse’s holding power 208
Conclusion 210

Chapter 7
Detention of Mentally Disordered Offenders 213
Outline 213
Background 213
Police powers to remove a mentally disordered person to a place of safety: Mental Health Act 1983, ss 135–136 216
Power to obtain a warrant to enter premises 216
Police power to remove from a public place to a place of safety 219
Place of safety 221
The decision to prosecute 226
## Contents

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The appropriate adult</td>
<td>227</td>
</tr>
<tr>
<td>Consequences of failure to have an appropriate adult present at interview</td>
<td>229</td>
</tr>
<tr>
<td>Assessment of mentally disordered offenders</td>
<td>230</td>
</tr>
<tr>
<td>Remand to hospital</td>
<td>231</td>
</tr>
<tr>
<td>Remand for a psychiatric report under s 35</td>
<td>232</td>
</tr>
<tr>
<td>Remand for treatment under s 36</td>
<td>234</td>
</tr>
<tr>
<td>Interim hospital order under s 38</td>
<td>235</td>
</tr>
<tr>
<td>Mental condition at the time of the offence</td>
<td>236</td>
</tr>
<tr>
<td>The insanity defence</td>
<td>236</td>
</tr>
<tr>
<td>Supervision order</td>
<td>238</td>
</tr>
<tr>
<td>The plea of diminished responsibility</td>
<td>240</td>
</tr>
<tr>
<td>The plea of infanticide</td>
<td>243</td>
</tr>
<tr>
<td>Unfitness to plead</td>
<td>244</td>
</tr>
<tr>
<td>Mental condition at time of sentencing</td>
<td>247</td>
</tr>
<tr>
<td>The hierarchy of sentencing severity</td>
<td>248</td>
</tr>
<tr>
<td>The community order</td>
<td>249</td>
</tr>
<tr>
<td>Powers under a mental health treatment requirement</td>
<td>250</td>
</tr>
<tr>
<td>Breach</td>
<td>250</td>
</tr>
<tr>
<td>The requirement of a medical report prior to imprisonment</td>
<td>251</td>
</tr>
<tr>
<td>The hospital order (MHA 1983, s 37)</td>
<td>252</td>
</tr>
<tr>
<td>Restriction order (MHA 1983, s 41)</td>
<td>255</td>
</tr>
<tr>
<td>Conditional discharge</td>
<td>257</td>
</tr>
<tr>
<td>Guardianship order (MHA 1983, s 37)</td>
<td>257</td>
</tr>
<tr>
<td>Transfer to hospital of sentenced prisoners (ss 47 and 49)</td>
<td>258</td>
</tr>
<tr>
<td>Restriction direction</td>
<td>259</td>
</tr>
<tr>
<td>Transfer of un-sentenced prisoners to hospital (s 48)</td>
<td>260</td>
</tr>
<tr>
<td>Hospital directions and restriction directions (s 45A)</td>
<td>261</td>
</tr>
<tr>
<td>Victims</td>
<td>262</td>
</tr>
<tr>
<td>Conclusion</td>
<td>263</td>
</tr>
</tbody>
</table>

## Chapter 8

### Compulsory Powers in the Community

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overview</td>
<td>267</td>
</tr>
<tr>
<td>The legal and policy framework of community care</td>
<td>268</td>
</tr>
<tr>
<td>Care programme approach</td>
<td>268</td>
</tr>
<tr>
<td>Section 117 of the Mental Health Act 1983</td>
<td>270</td>
</tr>
<tr>
<td>Relevant authorities</td>
<td>271</td>
</tr>
<tr>
<td>Carers’ rights</td>
<td>272</td>
</tr>
<tr>
<td>Compulsory powers in the community</td>
<td>273</td>
</tr>
<tr>
<td>Guardianship</td>
<td>273</td>
</tr>
<tr>
<td>Guardianship orders</td>
<td>274</td>
</tr>
<tr>
<td>Section 17 leave</td>
<td>275</td>
</tr>
<tr>
<td>Supervised community treatment (‘SCT’)</td>
<td>277</td>
</tr>
<tr>
<td>Conditions</td>
<td>279</td>
</tr>
<tr>
<td>Power to recall to hospital from s 17 leave or from a CTO (ss 17 and 17E)</td>
<td>281</td>
</tr>
<tr>
<td>Power to revoke a community treatment order (s 17F)</td>
<td>283</td>
</tr>
</tbody>
</table>
Power to renew a community treatment order (s 20A) 284
Authority to treat community patients 284
Conditionally discharged restricted patients 286
Conclusion 287

Chapter 9
Discharge and review of the lawfulness of detention by Mental Health Tribunals and the courts 291
Overview 291
Mental Health Tribunals (‘MHTs’) 291
The role of the Tribunal 293
Article 5(1) and discharge powers 294
Article 5(4) and review of the lawfulness of detention 294
Scope of the review 295
Habeas corpus 296
Judicial review 297
Speedy review of the lawfulness of detention 301
Burden of proof 302
Standard of proof 303
Congruence between admission and discharge criteria 303
Organisation of the MHT 305
The panel for a hearing 305
Disqualifications 307
Tribunal clerks and tribunal assistants 308
Entitlement to apply for a Tribunal hearing 308
Part II patients 308
Rights of Nearest Relatives (‘NRs’) or patients detained under Part II 310
Automatic references 310
Reference by the Secretary of State for Health 311
Part III patients 313
References by the Secretary of State for Justice 313
Legal aid 314
Powers and duties in relation to discharge of unrestricted patients 314
Duty to discharge s 2 patients 315
Patients detained under ss 3 or 37 315
Patients subject to community treatment orders 316
Guardianship patients 317
Nearest Relative applications 318
Discharge on a future date 318
Recommendations with the power to reconvene 319
Powers with regard to restriction order patients 320
General 320
Absolute discharge 321
Conditional discharge 322
Conditions 324
Power to defer conditional discharge 324
Recommendations 326
Contents

Status of recommendations 327
Patients subject to a restriction direction (including hospital directions 328
with limitation directions)
Role of the MHT 328
Notification of entitlement to absolute discharge 329
Notification of entitlement to conditional discharge 329
Conditionally discharged patients 330
Procedures 331
The Overriding Objective 332
Applications and notice of the Application 333
The responsible authority’s statement 333
Disclosure of information to the applicant, the patient, the
responsible authority and the Secretary of State 337
Parties 340
Notice to other persons interested 341
Notice of the hearing 342
Representation 343
Medical examination of the patient 345
Independent psychiatric report 347
The power to issue directions 347
Evidence 348
Hearing procedure 349
The interview with the patient 352
Rights of the Parties 352
Rights of other parties or persons 353
Subpoenas and Summons 354
Adjournment 354
The MHT decision 356
Effects of a MHT decision 359
Applying for a stay of a MHT decision 360
Conclusion 360

Chapter 10
Consent to Treatment for Mental Disorder 361
Overview 361
ECT 361
Treatment without a prior second opinion 362
Part IVA 362
The Interface between Parts IV and IVA and the Mental Capacity
Act 2005 363
Human rights and treatment without consent 365
Article 3 365
Article 8 366
Part IV 367
Application 367
Medical treatment for mental disorder 368
The concept of authority to treat in Part IV 369
It is appropriate for the treatment to be given 369
Capacity under Part IV 370
Refusal of a patient with capacity not a bar to treatment under s 58 373
The Approved Clinician (‘AC’) or other person in charge of treatment 374
Second opinion procedures 377
Section 57 377
  Interface with the Mental Capacity Act 2005 378
Section 58 378
Role of the Second Opinion Appointed Doctor (‘SOAD’) under s 58 380
Reasons 381
  Interface with the Mental Capacity Act 2005 382
Section 58A 382
Treatment without consent of patients lacking capacity or competence 383
Emergency treatment under s 62 383
  Interface with the Mental Capacity Act 2005 384
Consent and withdrawal of consent to a plan of treatment 385
Section 61: reports on condition of patients who have had treatment following a second opinion 386
Section 62: Emergency Treatment 386
Section 62A: treatment of CTO Patients on recall or revocation 388
Section 63: general power to treat detained patients without consent 388
Seclusion 391
Part IVA: authority to treat in the community 393
  Relevant treatment 393
  Authority to treat under Part IVA 394
  The certificate requirement 394
  Treatment without force of adult patients who lack capacity 396
  Emergency treatment, using force if necessary, of adult and child patients 397
Conclusion 398

Chapter 11
Children 401
Overview 401
  Mental health services for children 402
  The Mental Health Act 2007 403
  Human rights 403
The child’s right to suitable accommodation and care 404
  The section 131A duty to provide an age suitable environment 405
  The section 39 duty to provide information about age suitable hospital provision for child offenders 407
  The section 140 duty on NHS bodies to notify social services about hospital accommodation suitable for children 408
  The section 116 duty to visit and exercise parental responsibility 408
Sections 85 and 86 of the Children Act 1989: the duty to notify social services about child in-patients 408
Contents

Section 11 of the Children Act 2004: the duty to safeguard and promote the child’s welfare 408
The decision to admit a child to hospital 409
16- and 17-year-olds with capacity 409
16- and 17-year-olds without capacity 411
16- or 17-year-olds lacking capacity 412
Children under 16 who are Gillick competent 412
Gillick competence 413
Children under 16 lacking competence 416
‘The zone of parental control’ 416
Parental responsibilities 417
Balancing children’s rights to autonomy and physical integrity and parental control 418
Treatment of children admitted informally by parental consent 419
Treatment of 16- or 17-year-olds admitted under the Mental Capacity Act 2005 421
Treatment of patients subject to Part IV of the Mental Health Act 1983 422
Treatment of 16- and 17-year-old community patients under Part IVA 422
Authority to treat 422
Scope of Part IVA 423
Treatment of community patients under 16 under Part IVA 423
Authority to treat 423
Treatment without force of child community patients who lack competence 424
Emergency treatment, using force if necessary, of child patients 424
Reviewing detention 425
Conclusion 425

Chapter 12
Criminal Offences and Transfer of Patients between Jurisdictions 427
Overview 427
Offences under the Mental Health Act 1983 429
Section 126: forgery and false statements 429
Section 127: ill-treatment of patients 430
Section 128: assisting patients to absent themselves without leave 432
Section 129: Obstruction 432
Offences under Part 1 of the Sexual Offences Act 2003 433
Mental disorder impeding choice 434
Offences by carers 437
Engaging in, or causing or inciting, sexual activity with a person with a mental disorder 438
Cross-border arrangements 438
Scotland 439
Northern Ireland 441
The Channel Islands and the Isle of Man 442
Removal of aliens 443