

## Mental Health – The New Law by Phil Fennell

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There are a number of problems facing the writer of a new book on mental health law. One such is whether in publishing in the middle of a time of considerable statutory change occurring in stages over a period of many months it is best to attempt to outline the law as it will be on various significant dates during that period (say in October 2007, October 2008, April 2009, April 2010 and beyond), or to set out the position as it will be once all the significant changes have come into effect. The former option has the advantage of clarity, ease of reference and certainty; however it is less straightforward than might be supposed because important changes have and will continue to come into effect at regular intervals between such dates. Examples would be the recognition of civil partners for the purpose of determining who is the Nearest Relative (December 2007); the need formally to admit a 16/17 year old who is competently refusing admission to psychiatric hospital (January 2008); and the possibility of moving a person from one place of safety to another under S136 (April 2008). Moreover this approach means that large sections of the work would quickly become out of date. The latter option more easily allows an overview of the overall impact of the changes, while having to face a Code of Practice, Mental Health Act Guide and regulations in draft form only and the need regularly to point out which provisions are not yet in force. The problem is magnified because it is not simply changes to the *Mental Health Act 1983* which need to be considered but also the impact of the *Mental Capacity Act 2005* as already in force and as amended probably in April 2009 with the introduction of the deprivation of liberty “safeguards” procedure.

One of the most difficult issues facing health and social care professionals as the various amendments take effect is the question which route to take in respect of a patient and indeed whether there is a true choice at all. Patient safeguards versus a less restrictive alternative; which alternative is the less restrictive anyway; Guardianship under the *Mental Health Act* versus deprivation of liberty under the *Mental Capacity Act*; statutory principles versus Code of Practice principles; the significance of important but inconclusive case law? Such issues can hardly be dealt with by assuming a detailed knowledge of the provisions of the *Mental Capacity Act 2005* as originally enacted, and the question is the extent to which those provisions need to be covered in a book primarily aimed at expounding the law once the amendments introduced by the *Mental Health Act 2007* have come into effect.

Professor Fennell has unequivocally taken the overview approach, for which this reviewer is profoundly grateful. One can end up questioning one’s sanity after any length of time spent exploring the arcane byways of new Part 4A of the *Mental Health Act* or Schedules A1 and 1A to the *Mental Capacity Act*, becoming consumed by the need to rediscover the wood for the trees. Two formerly comprehensible Acts of Parliament have been rendered needlessly complex at a stroke. Are bets being taken on the number of pages of forms that will ultimately be needed to implement the deprivation of liberty “safeguards” procedure alone?

The great strength of Professor Fennell’s book is not just that there is an early chapter summarising in sufficient detail to be useful the impact of the *Mental Health Act 2007*, but that frequently throughout the other chapters elaborating the provisions, there are at the beginning and the end overviews and conclusions, which allow one to ground oneself again.

The book is not an annotated version of the amended *Mental Health Act 1983* but a general outline of mental health law including where relevant the *Mental Capacity Act 2005*, the *Children Act 1989*, the *Domestic Violence Crime and Victims Act 2004* and other legislation. It starts with immediate historical background to the amended legislation, seeing a continuity of reform going back to the 1959 Act. The second chapter then summarises the 2007 Act reforms and their impact, highlighting the interface issues between the MHA and the MCA. These two chapters will prove enduringly useful in reminding the reader of the overall scheme of mental health legislation and its areas of controversy. Thereafter the book is topic based: so “Mental Disorder” and the Availability of Appropriate Treatment; Statutory Powers of Staff; Detention of Mentally Disordered Offenders (a particularly lucid summary); Compulsory Powers in the Community; Consent to treatment; Children; etc. As such the book can be read cover to cover as a comprehensive overview, or dipped into topic by topic, although the subheadings within chapters can be a little misleading or confusing to navigate. There is a consolidated version of the MHA 2007 and MHA 1983 provided, which although adding considerably to the length of the book is necessary with the failure to date of the Government itself to provide a consolidation Act; however the attempt to identify at the end of each Section of the consolidated Act which wording has been amended by which provision of the 2007 Act is largely unsuccessful as the “words prospectively substituted” cannot be identified by use of italics, brackets or other means. The provisions of the 2007 Act amending other legislation, in particular the Deprivation of Liberty “safeguards” procedure are reproduced in a separate Appendix. There is a full table of Cases, and Table of Statutes. The Contents description is much more useful than the Index, which apart from being confusingly laid out contains the somewhat alarming reference to “deprivation” of liberty! Grammatical and typographical errors do seem to plague the book: IMCA for IMHA, RMO for RC. There is a reference to an outline of the renewal of powers of detention which directs the reader to some non-existent paragraphs; also a statement that the role and function of the Mental Health Act Commission will be explored in Chapter 10 when in fact it is not.

The main provisions of the unamended *Mental Capacity Act 2005* are extremely lucidly and helpfully set out in a few short pages, and in enough detail to make sense of the amendments to come and to serve as a background to the issue of which route to take. Perhaps the summary of sections 5 and 6 is a little dense and the very lengthy paragraph 6.33 might be better subdivided, but the reader probably has all that he needs.

This is not a book which sets out merely to outline the changes to existing mental health law but as mentioned describes the law in its entirety as it will be once those changes have taken effect. Those areas of the law remaining largely unaltered are covered in almost as much detail as those which are subject to radical change. It is likely therefore to be particularly useful as a first point of reference for practitioners and as an introduction to the subject for students. As one would expect from Professor Fennell, there is a particular emphasis on the *Human Rights Act 1998* implications of the amendments and on the issue of consent to treatment for mental disorder. The book is especially stimulating in its discussion of what constitutes a true mental disorder as opposed to behaviour deviating from society’s norms, in the context of the removal of the exclusions relating to promiscuity or other immoral conduct and sexual deviancy; equally in dealing with the issue whether the possible lack of involvement of a doctor in the process of renewal of a patient’s detention will be held to be Convention compliant. Will the background qualifications, expertise and training of an Approved Clinician who is not a doctor, satisfy the Winterwerp<sup>1</sup> requirement of objective medical evidence of a true mental disorder? In his discussion of the

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1 *Winterwerp v Netherlands* (1979) 2 EHRR 387

removal of the treatability requirement and its replacement with the “availability of appropriate treatment” test Professor Fennell seems to come down on the side of those who believe that the overall effect of the changes, along with the removal of the exclusions in relation to sexual deviancy etc is real rather than apparent, and will be to “set the legal scene for increased use of mental health legislation to detain people who have not yet committed a crime but who have a personality disorder and pose a risk to self or to others”. While the question of appropriate treatment is fully discussed one would have welcomed a little more space being given to the issue of when treatment might properly be said to be “available”. The statement in the Explanatory Notes that it is not enough that appropriate treatment exists in theory for the patient’s condition does not really take the matter much further. To what extent will, for example, geographical and financial considerations legitimately play a part?

For the Government, the introduction of Supervised Community Treatment and the consequent abolition of Aftercare under Supervision is one of the cornerstones of the amended legislation. For many practitioners, particularly once the Government decided that prior admission under Section 3 or 37 was a condition precedent to being placed on a CTO, the courts in a series of decisions had already created CTOs in all but name by considerably extending the opportunities for renewing a patient’s Section while he was on Section 17 leave, sometimes with minimal hospital contact (certainly as an in-patient.) Professor Fennell covers the case law clearly and succinctly in one of the book’s best chapters dealing logically with compulsory powers in the community: CTOs, and Guardianship as well as extended Section 17 leave. In particular a good point is made about the conditions that must or may be attached to a CTO. It was regarded as a concession extracted from the Government that the ability to attach a condition to a CTO whereby a person was “not to engage in specified conduct” was withdrawn; in fact as Professor Fennell points out the scope of the conditions on personal freedom that remain, being left to the discretion of healthcare professionals, is subject only to an extremely lax “necessary or appropriate test” for treatment or to prevent risk to self or others. The draft revised Code of Practice too hardly seems to limit the scope of the discretionary conditions.

On the other hand, although Professor Fennell points out that a Responsible Clinician granting leave for more than seven days must first consider whether the patient should be made subject instead to a CTO, a discussion of just what such consideration might comprise, and in what circumstances the Responsible Clinician might be vulnerable to challenge if he decided to use extended S17 leave, would have been welcome. The same point might be made about the implications of the use of the barring order to prevent discharge of a patient ordered by the NR: the statutory provision is set out but not the practical consequences. Other areas where a more extended discussion would have been beneficial include the somewhat limited nature of the ability (set out at several points in the text) of a patient to displace his nearest relative: no right to choose who should fulfil the role, merely a right to apply to the Court: but even then the mere fact that the patient’s preferred candidate might be *more* suitable than the statutory incumbent would be insufficient to displace him. Will this be sufficient to ensure compliance with Article 8? Incidentally does the statement in chapter 2 that *R(E) v Bristol City Council*<sup>2</sup> decided that an ASW does not have a duty to consult the NR if the patient objects overstate the effect of the decision? Elsewhere in chapter 4 the judgement is more cautiously discussed but unfortunately the vital last sentence in paragraph 4.29 is incomplete, depriving us of Professor Fennell’s conclusion. Completing this reviewer’s wish list for a second edition would be an elaboration of the Part 4A treatment provisions for CTO patients which are set out but without a great deal of accompanying explanation.

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2 *R (on the application of E) v Bristol City Council* (2005) EWHC 74 (Admin)

As drafted they are difficult to comprehend, and I am not sure that reading the five pages of text that the description occupies in the relevant chapter will cause the scales to fall from many eyes.

The question of deprivation of liberty looms large over the book. The new safeguards procedure itself is very clearly summarised in chapter 6. In addition, Professor Fennell does not shy away from the question whether Guardianship constitutes a deprivation of liberty. He believes that it can, and implies that the MHA procedure, familiar to health and social care professionals (particularly now that it will include a power to take the patient to his place of residence) should be preferred to the complexity of the new “safeguards” procedure notwithstanding the MCA Code of Practice guidance that “decision-makers must never consider guardianship as a way to avoid applying the MCA”. In discussing what constitutes deprivation of liberty Professor Fennell reports the *JE v DE and Surrey County Council*<sup>3</sup> decision of Munby J, which has given rise to so much (? too much) argument, as well as the distillation of current guidance from the Strasbourg case law to be found in the draft addendum to the MCA Code of Practice. It is hard to know how one can go much further to assist professionals on the ground: cases which will always differ on their facts from those in the law reports will have to be approached in the light of general principles and with fingers firmly crossed. The disagreement between Professor Fennell and Richard Jones as to whether giving ECT or strong psychotropic medicine to an incapacitated patient might constitute deprivation of liberty so requiring the *Mental Health Act* to be invoked is very fairly rehearsed. With the advent of S58A covering ECT and the safeguards for incapacitated detained patients and for all child patients this is an issue unlikely to go away.

Professor Fennell states in his preface that the aim of his book is “to explain the new framework of mental health legislation in a way which is accessible not only to professionals but to service users, carers and interested lay readers” (and I would add, students). In this aim he unquestionably succeeds, although health care professionals will need to look elsewhere for more detailed identification of ,and solutions to, those practical problems which will increasingly confront them as the legislative changes are progressively implemented. This reviewer is likely to turn frequently to the book as a first point of reference, and whenever the need arises to fit the pieces of the jigsaw together.

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<sup>3</sup> *JE v DE, Surrey County Council and EW (2006) EWHC 3459 (Fam), FD*