

Mental Health Law Briefing

Number 100

MILESTONE BRIEFING! Revising the Mental Health Act

This Briefing marks the 100th Edition of our popular Mental Health Law Briefings. It is perhaps fitting that we mark this milestone with a Briefing on the Government's latest proposals for the revision of the Mental Health Act, itself an important milestone in Mental Health Law.

After seven years of consultation, drafting and redrafting, the Government have now announced that the proposed replacement of the Mental Health Act 1983 with a new Act is to be dropped and instead the 1983 Act will be revised.

The draft Bills previously produced attracted widespread opposition from psychiatrists, mental health and civil liberty groups. Our commentaries had also queried whether the Government would be able to allocate the necessary financial and human resources to make the proposed Bill work in practice. We had questioned the ability to fund the procedures envisaged by the creation of the new Mental Health Tribunal and whether there would be sufficient qualified staff to operate the arrangements proposed, including the need to have detention and care plans sanctioned by the Tribunal.

The previous Bill focused heavily on providing a wide definition of mental disorder to avoid future

suggestions that those suffering from serious personality disorder who caused public disorder and criminal offences were not properly catered for in legislation. We have long held the view that the Bill sought to provide the Government with a scapegoat for any such future cases, namely to blame the failure of psychiatric services properly to address individuals with personality disorders.

We also questioned whether there was the need to repeal an Act which in many aspects had proved to work well for over twenty years. Whilst clearly some aspects require revision, others are well known, fit for purpose and less unwieldy than some of the proposed replacement provisions in the Bill.

Nevertheless, it is clear that there are some aspects of the current Mental Health Act which require revision because of incompatibility with the Human Rights Act 1998, or to address issues of current psychiatric practice.

The Government has not as yet provided draft amendments to the Mental Health Act. However, areas which they have said will be revised are:

1. The nearest relative provision. The European Courts have held that the patient's inability to

choose their nearest relative is a breach of the Human Rights Act. In the absence of a Remedial Order this clearly needs to be significantly amended, and the Government have said that this will be done by allowing the patient and others to apply to the Court to replace the nearest relative. Civil Partners will be included in the definition as we previously pointed out was needed.

2. Community Treatment Orders – the Government has made it plain that the ability to provide compulsory treatment in the community is a major plank of its proposed reforms. That said, there is significant doubt about the efficacy of these and we would question whether they are necessary given the broad interpretation provided by the Courts to the renewal of the detention of patients on long term leave in cases such as ex-parte Barker and Mersey Care. However, the Government have made it plain they will be introducing these, to be known as Supervised Community Treatment. They will apply only to those who have previously been treated and detained in hospital and on the basis of risk to themselves or the public if SCT is not in place.
3. Treatability Test – this has been much criticised and it is clearly part of government policy to ensure that the definition of mental disorder is sufficiently wide to encompass personality disorder. Although in practice the current treatability test often fails to cause the problems that some allege, nevertheless the definition of mental disorder, and even the need to demonstrate treatability, is to be amended by a revised Act.

There will be a new test that will apply to all long term treatment which will require it to be shown that appropriate treatment is available. This was contentious and open to debate when proposed in the Bill: it will be interesting to see how any revision to the Act addresses this point. The meaning of ‘medical treatment’ will be extended to include treatment ‘supervised’ by practitioners.

4. Bournemouth Gap – the Government has already confirmed that legislation will introduce safeguards for individuals who lack capacity and are deprived of their liberty but do not currently benefit from mental health legislation safeguards. This is to be achieved by revision of the Mental Health Act, to bring in amendments to the Mental Capacity Act 2005.
5. Further changes will include:
 - Having an RMO who is not always a psychiatrist
 - Extending the ASW qualification beyond social workers
 - Simplifying the definition of mental disorder.

As yet there is no indication as to when the draft revisions will be available and it is therefore likely to be sometime before the amendments to the Mental Health Act come into force. What is virtually certain is that the proposed changes to the legislation, both before and after enactment, will provide much material for comment and we will seek to address these issues regularly throughout our next 100 briefings!

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Prize Draw

To mark the 100th edition of our Mental Health Law Briefings we invite you to comment on our briefings and let us know whether these have been useful. Please send your comments to marketing@rlb-law.com. We will then have a prize draw for the most useful comments and the winner will receive a bottle of champagne.

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For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7222 7040, or email andrew.parsons@rlb-law.com.

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