

Book Reviews

Mental Health Law Policy and Practice, by Peter Bartlett and Ralph Sandland (2nd edition)

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The publication of the second edition of *Mental Health Law Policy and Practice* marks a significant milestone in the development of mental health legal literature whilst at the same time exemplifying the challenge faced by all those interested in the subject: how do you keep up with the sheer volume of legal activity in this particular area? Fortunately the authors of this authoritative and demanding text do so admirably and the second edition ensures that it will remain pre-eminent.

The first edition published four years ago was 447 pages long: the second has 776 pages. The text of the second edition was sent to the publishers in April 2003 and yet as the authors acknowledge and detail in their preface, there has been an avalanche of important cases and other developments since then: *R v Drew* [2003] UKHL 25; *Munjaz v Mersey Care NHS Trust, S v Airedale NHS Trust and others* [2002] EWCA Civ 1036; *JD v East Berkshire Community NHS Trust* [2003] EWCH Civ 1151 and the draft *Mental Incapacity Bill* to name but a few and that was only between April and August when the preface was written. Since then there have been more developments including cases of the importance of *R v East London and the City Mental Health NHS Trust and another, ex parte von Brandenburg (aka Hanley)* [2003] UKHL 58.

The volume of legal activity in the field of mental health has of course, in part been fuelled by the Human Rights Act 1998, which came into force after the publication of the first edition. A cursory inspection of the NHS Litigation Authority website¹ and its details of the human rights decisions impacting on different aspects of healthcare illustrates very clearly how much more activity there has been in mental health as compared with any other form of healthcare. The other challenge for all authors of seminal texts in this field over the past four years has been what might be termed the eternal imminence of any law making Parliamentary activity in relation to the draft Mental Health Bill of June 2002. The temptation to hang about just a bit longer to see if anything substantive happened must have been fairly great but as the authors rightly conclude there were compelling reasons to “to publish a second edition without further delay”: not least of which is that when the time comes to assess the next edition of the Mental Health Bill, commentators and interested parties will have the advantage of this book and its fundamental quality which is not “to provide snappy answers to snappy questions” but to realise that “simple answers to questions of social regulation” just do not exist. A truth borne out by the five years it has taken so far to think about how to change the Mental Health Act 1983.

¹ www.nhs.uk/docs/HRA

The structure of the second edition remains the same as that of the first: chapter one seeks to conceptualise mental health law, the second addresses problems of definition and the third provides an overview of the contemporary mental health system. Underlying the discussion in these chapters and indeed throughout the book is the authors' belief, restated in this edition that it is almost immoral to "divorce the study of mental health law from the social situation of the people most directly involved." They recognise that at its root, mental health law is about power and the compulsion and forcible treatment of people, the exercise of which appears to be focussed disproportionately on particular groups not least the poor. Their skill is not to suggest that such realities render invalid the mental health therapeutic enterprise but that for its own good we must never stop asking about them. When the Minister of State for Health announcing the establishment of the expert committee to review the Mental Health Act in 1998, said "Non-compliance can no longer be an option when appropriate care in appropriate settings is in place. I have made it clear to the field that this is not negotiable" he was adopting what many would see as an extreme position in relation to the three fundamental questions about compulsory treatment posited by the authors:

- Is the expectation of unswerving adherence to treatment in a professional context perceived by the patient as alienating, reasonable;
- Can the enforcement of treatment be justified if psychiatry is rightly perceived as not being an exact science; and
- Should the patient's view be subordinated to a medical vision of their condition?

The answer to all three is not simple or straightforward and not only should mental health lawyers be appropriately armed at least to recognise their validity and be able to address them but also mental health professionals (many of whom ask themselves and others these questions all the time) and especially, at this time of current or imminent policy, service organisation and legal reform, those with responsibility for devising and making such changes.

The authors, having set the scene then, in the next three chapters follow, as it were, the progress of an individual through the compulsory mental health system: admission to hospital, the process of civil confinement, mental disorder and criminal justice, treatment in hospital and leaving hospital. On the way they tarry over many a juicy issue and amongst these is their discussion in the first of these chapters, of the draft Mental Health Bill published for consultation in 2002.

At page 181 they consider the current debate about the place of capacity in any proposed criteria for compulsion. Whilst reasonably convinced that capacity is a workable gatekeeper for treatment (they refer to the experience of the Province of Ontario, which in 1986 introduced a system where treatment could not be imposed on a competent patient without consent) they are far less convinced about its application to psychiatric confinement. Their argument is complex and detailed and culminates with perhaps the most difficult question that requires an answer: how far would individuals need to understand their psychiatric condition and in particular their dangerousness to themselves or others in order to have capacity to make decisions about confinement? Their concerns about the capacity test lead them to suggest that "if such understandings are required, much of the practical advantage of the capacity standard over the dangerousness one disappears", for, as they argue "all the difficulties of assessment return, and the social control ramifications continue, merely under the guise of a neutral capacity test." Whilst I am not certain that the authors' suggestion that the proponents of the capacity test have not

considered these issues at length is entirely fair, they are absolutely right to lay down this marker. In their discussion of the draft Bill, Bartlett and Sandland focus on the key issues: the definition of mental disorder; the proposed criteria for compulsion; the lack of discretion in implementation and dangerousness. Given the Bill's possible metamorphosis into something slightly different next time round, it was probably sensible not to explore at any length its other aspects but it would be interesting to know what they think about proposals such as those about informal carers rights, the adequacy of the safeguards for informal treatment of patients not capable of consenting, the acquisition of a "right" to a mental health advocate for those subject to compulsion and the near demise of any substantive "lay" involvement in the operation of the Act.

At this time of change there is a temptation to focus on the contemporary and to fail to recognise that not only is "mental health law as old as law itself" but that the questions it seeks to address fundamentally never change and in the main are not susceptible to some final and satisfactory solution. At a more prosaic level whatever happens about the draft Mental Health Bill, the earliest any new Act will be implemented seems to be 2006 and therefore we have at least two more years of the 1983 Act and probably more.

At the core of this book and especially in its middle chapters lies the Mental Health Act and the authors, building on the secure base of the first edition, have comprehensively accommodated the mass of legal activity and especially litigation about the Mental Health Act over the last four years. Their discussion at the outset of the book of the impact of the Human Rights Act is salutary: whilst the Act has clearly had an impact and acknowledging that it is still early days, it is not yet clear if, amongst other things, it is effecting a fundamental cultural change in the judiciary. *R v Broadmoor and MHA Second Opinion Approved Doctor, ex p. Wilkinson* [2002] 1 WLR 419(CA) and *Von Brandenburg* indicate that perhaps it may be, even though the influence of human rights may actually be expressed in the development of common law principles.

The challenge of the Human Rights Act and ingraining it in the mindset of public authorities and those, whose professional responsibilities include acting compatibly with the Act, is possibly a more demanding and immediate task. In a recent report, the Audit Commission² conclude that "three years on, the impact of the Act is in danger of stalling and the initial flurry of activity surrounding its introduction has waned." Rather depressingly the health service comes out amongst the poorest performing public authorities with the level of human rights training remaining unchanged since the previous Audit Commission review in 2002. Whatever the actual level of awareness of the implications of the Human Rights Act amongst those charged with the implementation of the Mental Health Act, in this book there is a discussion of human rights cases that is not only comprehensive but which places them in the broader legal, policy and operational context that is essential if the human rights discourse and its potential to contribute to binding and cementing a diverse society – what Francesca Klug calls "values for a godless age"³ – is to be fully realised in mental health.

Once the journey through the labyrinth of compulsory admission, treatment and discharge is completed, the authors focus their attention on the care and control of mentally disordered people in the community. Premised on the understanding that "community care" comprises two discrete systems: service provision and control and supervision, they have developed their thinking since

2 page 3. Audit Commission (2003) *Human Rights: Improving Public Service Delivery*

3 Klug F. (2003) *Values for a Godless Age*. Penguin.

the first edition and crystallize the essential “paradox that traverses all policy and practice in this area.” In particular they argue that the different if not contradictory definitions of ‘community’ implicit in each is significant. Service provision incorporates notions of social inclusion and sees no difference between the interests of mentally disordered persons and those of the broader community. Control and supervision involves concepts of social exclusion, the perception that the interests of the broader community are in opposition to those of mentally disordered people and that as a consequence the rights of mentally disordered people may be overridden in the public interest. In many ways it is in this arena where some of the more radical proposals for reform of the Mental Health Act are to be found and essential to any competent assessment of such proposals, is a clear and coherent exposition of the relevant law and in particular the legal basis for the provision of services. This is a notoriously complex area of law and a personal acid test is the clarity and coherence with which this topic is addressed; especially the extent to which law is related to policy and practice. Bartlett and Sandland are not the only people who write about this topic but the way in which they expound the rather uneasy relationship between the provision of services and the law and interweave into their discussion the, at times, rather mirage like notion of community control is a delight and left one reader at least with considerably greater understanding. In terms of the future this is one of the more important chapters in the book.

The penultimate topic addressed by *Mental Health Law Policy and Practice* is mental incapacity. In doing so they face two challenges. The topic cannot, they argue, “be omitted because it is in part codified by Part VII of the Mental Health Act and it so heavily overlaps... with the lives of the people with mental health problems; yet at the same time, it also concerns people who are not mentally ill in the conventional sense.” The other difficulty is that the second edition preceded the publication in June 2003 of the draft Mental Incapacity Bill. The impact of the latter is minimised by the fact that the Law Commission’s draft Incapacity Bill that is discussed is so similar to the Government’s proposals. The former requires an explanation of how incapacity fits with mental health law “as understood in the rest of the book”: not difficult of course especially as, amongst other things, the first involvement of the law in mental health, Edward 1st’s 1324 statute giving the King jurisdiction over the persons and property of idiots was essentially about mental capacity and property. The subject gets two chapters and whilst the authors’ fascination with mental healthlaw as a whole is very apparent from the vigour of the discussion maintained throughout, it may not be entirely fanciful to suspect that mental incapacity holds a special interest. The first chapter deals with broad issues and basic concepts and deftly interweaves legal, ethical and clinical aspects of mental capacity in a way that is helpful and enlightening for anyone but especially the relative newcomer. Subsequently the authors consider some specific contexts of mental incapacity including the courts response to the “guardianship gap” and in particular the implications of *In Re TF (An Adult: Residence) [2000] 1 MHLR 120* and what the authors describe as its “expansive” approach to its jurisdiction in this area which looks to them to be remarkably like the re-introduction of the doctrine of *parens patriae* for incapacitated people and personal decision taking. Their subsequent, and on the whole approving, critique of the Law Commission’s proposals to reform the law relating to mental incapacity is helpful, obviously relevant to any consideration of the draft *Mental Incapacity Bill* and underlines the importance of ensuring that whatever emerges dovetails with not only the Mental Health Act but also any future Mental Health Bill.

Mental Health Law Policy and Practice started life because there was a textbook gap for students taking the mental health law module at Nottingham University. Whilst it is primarily but not

exclusively designed for lawyers, it is appropriate that it ends with an exploration of the role of the law in securing people's rights and the contribution that legal advocates can make to that end. The law is without doubt extraordinarily important in ensuring that people with mental health problems are dealt with in a consistent and humane way. The wide variations, regional and otherwise in the application of the Mental Health Act suggest that the degree of control that it can provide has its limitations. Whatever contribution the law can make, it has to be accompanied by other things: amongst which are appropriate services, high professional standards and the development of a coherent ethical approach to the use of compulsion. The Mental Health Act Commission's welcome discussion in its 10th Biennial Report⁴ of the values that should prevail in mental health services, and particularly in those that involve the compulsion of patients marks perhaps the start of a more widespread and long overdue debate about this.

With the second edition the authors have ensured that *Mental Health Law Policy and Practice* remains essential reading for not only those who wish to contribute to that debate but also anyone who wants to understand modern mental health care and in whatever way contribute to its improvement.

William Bingley

Professor of Mental Health Law and Ethics, University of Central Lancashire

⁴ page 55. *Mental Health Act Commission's Tenth Biennial Report 2001–2003*, The Stationery Office. Also see the commentary on the Report by Mat Kinton in this issue of the JMHL.