

Blackstone's Guide To The Mental Health Act 2007 by Paul Bowen

Published by Oxford University Press (2007), £34.95

ISBN 978 0 19 921711 3

Having spent (far too) many hours trying to make sense of the *Mental Health Act 2007* (MHA 07), the amendments it introduces to the *Mental Health Act 1983* (MHA 83) and the *Mental Capacity Act 2005* (MCA), this guide was much anticipated and welcomed with considerable relief. Does it (could it) live up to such expectations? In short the answer is a most definite 'yes'.

Despite its title, this guide, as noted at the outset by the author, is (and necessarily so) really a guide to the MHA 83 and MCA, as amended by the MHA 07. It is divided into two parts, the first dealing with the MHA 83, as amended, and the second the MCA and amendments introduced to it.

It is expressly stated that the first part, dealing with the MHA 83 amendments, is *not* intended to provide a detailed consideration of those aspects of the MHA 83 that remain largely unaffected by the MHA 07 amendments, but rather is intended to be complementary to other texts in that regard. What it aims to do – and in the reviewer's opinion, it admirably succeeds - is to provide a guide to the effect of the MHA 07 amendments, as and when these come into force. Consequently, although the MHA 83 provisions are dealt with, as necessary, to set the scene and aid understanding of the MHA 07 amendments, the MHA 83, as a whole, is not dealt with in detail.

The same does not, however, apply to the second part, which is a detailed consideration of the MCA, pre and post MHA 07 amendments, as well as consideration of the common law position prior to the MCA coming fully into effect, in relation to medical treatment.

Although separated into two distinct parts, the interface between the two Acts is comprehensively and very helpfully considered in chapter 15.

It is a testament to the skill of the author, that the detailed explanation of the MHA 07 provisions and their effect on both Acts, appears so clear and comprehensible. An impressive feat, as many who have attempted to interpret some of the more complex aspects, will no doubt testify. The complexities are identified by the author, who notes that the impact of the MHA 07 amendments on the MHA 83 means that the MHA 83 "now has the added vice of being exponentially more difficult to understand". Some reassurance to those (including the reviewer) who have grappled at length with some of the trickier provisions.

This is not to suggest that the guide in any way 'ducks' the difficult issues - which must have been very tempting at times. The guide tackles many of these 'head on', particularly with regard to issues relating to children and young persons, potential Human Rights implications, and the interface between the two revised Acts. This guide does not take the easy way out, by simply stating/summarising the provisions, but provides a detailed consideration of the amendments, helpfully comparing and contrasting, for example with the pre-amendment position, and the positions of different groups of patients, to enable a much clearer understanding of the potential impact in a practical and a legal sense.

Interesting submissions are provided as to the author's view of the HRA compatibility of the amendments, and how they may (or may not) work in practice. There is a strong focus on human rights implications throughout. Although this may appear less relevant to those working with the MHA on a

day to day basis, however, this reviewer would echo the sentiment expressed by Sir James Munby in his foreword, in relation to the readers of this guide, when he writes, "I hope they will read it and not merely dip into it".

For the busy practitioner, however, this may be an unaffordable luxury, where so much statutory change has already been, and is gradually to be, introduced, (in practical implementation terms, at least) in a relatively short period. In the reviewer's opinion, such practitioners are also well served by this guide. It is clearly structured and laid out, and broken down into carefully numbered and referenced parts. Detailed summaries of each chapter's contents are set out at the beginning of the chapter, which generally commence with a summary of the 'key features'. Although this inevitably results in some repetition, it enables the reader, at a glance, to note the key points, identify the relevant part of the chapter where the point is dealt with in greater detail, and easily cross-reference to related areas. It also aids understanding, and puts the provisions in context. This is particularly important where the provisions are like a jigsaw puzzle, the whole picture being necessary at the outset, as a guide to a more detailed understanding of the parts and how they fit together.

Another challenge presented by the MHA 07 to any commentator, is how to deal with the phased implementation, and issues of timing. The guide very helpfully includes copies of both the MHA 83 and MCA, clearly showing the position pre-and-post amendment. This is invaluable, not just pending full implementation of the MHA 07, but also to enable the reader at a glance, and without having to cumbersome cross refer to other texts, to identify the changes and thus to better appreciate their potential impact. The guide sets out and analyses the position and interface between the MHA 83 and MCA, both pre-and-post amendment. Again, this is essential for those attempting to understand the position pending full implementation, and to carry out the necessary preparations. Once the MHA 07 is fully implemented, this will still be a very useful guide, not just for the academic and the student, but also for the practitioner, to aid understanding and interpretation, pending clarification (in due course) by the courts.

Chapter 1 introduces the guide, its content and structure. The background to the MHA 07 is summarised, setting the scene and context of the MHA 07. A brief, but interesting, consideration of the history and development of mental health legislation follows. The chapter also introduces key relevant human rights concepts - such issues are a particular focus of the guide throughout.

Chapter 2 provides a helpful overview of the MHA 83 and the amendments introduced. Thus, at glance, a busy practitioner can identify the key changes to the Act as a whole and the overall impact, and is cross-referred to relevant chapters where the particular issues are considered in more detail. A particular strength of this guide is the ease with which the reader is able to identify and locate relevant sections and commentary, and consider them in context.

The amendments to the compulsion criteria, for detention and guardianship are covered in more detail in chapter 3. This considers the amendments introduced to the definition of mental disorder and the removal of the 'treatability' test, to be replaced by the new 'appropriate treatment' test. Helpfully the current provisions are reviewed first, with the amendments then being introduced and their impact considered. This provides a very clear picture of the effect of the changes, both for those who are very familiar with the MHA 83 provisions, and those who may be less so. More on the impact in practical terms of the new 'appropriate treatment test' would have been useful. The chapter concludes with a thoughtful consideration of the 'missed opportunity' (in the author's view) to introduce an 'impaired judgment' requirement into the MHA, which would 'bring the provisions for compulsion under the 1983

Act into line with more contemporary attitudes to respect of patient autonomy' (para.3.111). Interestingly, the author raises the possibility that, at some point in the future, Article 5 ECHR may be interpreted to include such a requirement.

Chapter 4 considers the additional safeguards introduced for patients by the MHA 07. This includes consideration of the Code, nearest relative provisions, the Mental Health Review Tribunal, and new IMHAs (Independent Mental Health Advocates). The additional safeguards for children are also considered.

A very useful description and analysis of the new community treatment provisions (Supervised Community Treatment- SCT) is set out in chapter 5. The relevant treatment provisions applicable to SCT, in the community and on recall/ revocation, are clearly and comprehensively dealt with in chapter 6. SCT is compared to 'existing forms of community treatment': s.17 leave; guardianship; and the supervised discharge provisions it replaces. The chapter concludes with a consideration of the human rights implications of SCT, and its interaction with 'long-term' s.17 leave.

In addition to dealing with the new treatment provisions for patients subject to SCT, chapter 6 unpicks the other amendments relevant to the medical treatment provisions set out in Part IV of the MHA 83. Again, to aid understanding of the amendments and their impact, an overview of the existing provisions is provided. Helpful summaries of the impact of the new provisions, together with very effective cross-referencing, are typical of this guide, and particularly effective in chapter 6, when dealing with the complex new treatment provisions for SCT. The chapter closes with a brief consideration of the interface of the amended MHA provisions with the MCA, which is picked up in more detail in the final chapter of the guide.

The final chapter in part 1 deals with the 'other amendments'. This succinct 'sweep up' includes consideration of victim's rights; offences; transfer to/ from Scotland; the amendments to s.136; and impact on criminal provisions, namely the removal of time limited restrictions, and the extension of the hospital direction. It also includes consideration of the new professional roles, the AMHP (Approved Mental Health Professional) and Responsible Clinician (RC). Consideration of the RC role usefully pulls together the relevant sections of the MHA that will continue to require the involvement of a doctor, and those (notably s.20 renewals) that will not. The section on AMHPs is very brief, and one of the rare occasions when the guide leaves you wanting more. A chapter dealing, in more detail, with these new roles and their practical implications, would have been welcome.

Another aspect which could usefully have been considered in some detail is the amendment to s.18, in relation to guardianship, and the power to take the patient to the place where they are required to reside, rather than just to return them there.

Part 2 provides a very helpful and comprehensive consideration of the MCA now, and post-amendment, (including the MCA, showing the pre-and-post MHA 07 position) and supplementary texts (other than the Code) should not be necessary. This is, however, subject to the caveat that the focus on the MCA is on personal welfare decisions, rather than property and affairs.

Part 2 is introduced in chapter 8. This includes a history of the developments leading up to the MCA, the 'Bournewood' case (of which, of course, the author (as junior counsel for L throughout from the High Court through to Strasbourg) has the benefit of first hand knowledge) and the amendments introduced by the MHA 07. In relation to the new provisions to be introduced to the MCA to 'safeguard' the 'Bournewood patient', the author notes (para. 8.22), that these are 'long., complex, overly bureaucratic

and ironically, may still not comply with the requirements of Articles 5(1) and 5(4).’ Indeed the author further comments (para.8.23), that the amendments ‘will lead to excruciating difficulties for those charged with responsibility for deciding both which detention regime and which treatment regime is appropriate for a person suffering from mental disorder. This complexity becomes increased exponentially for children.’ Fortunately for the reader, the author tackles these difficult issues in the final chapter.

Chapter 9 sets the scene by describing the common law position before the MCA came into force, with a particularly useful section focusing on children. Chapters 10 and 11 go on to focus on care and treatment under the MCA, chapter 10 focusing on such care without detention, and chapter 11, where the person is detained. Chapter 10 is a comprehensive consideration of the relevant MCA provisions, and again, the guide’s structure with ‘key features’ followed by (and cross-referenced with) more detailed consideration, and with frequent summaries, is very effective.

One of the most difficult issues currently facing those charged with care and treatment of those who lack capacity, is that raised by the potential for such care and treatment to constitute a deprivation of liberty, and, where a person is (or may be) so deprived, the lack of an effective legal framework to provide for such a deprivation and extend the necessary safeguards. This is clearly detailed in chapter 11, which outlines the common law position, what is meant by deprivation of liberty, and the position under the MCA, prior to its amendment by the MHA 07. The chapter goes on to consider the amendments introduced by the MHA 07, and the new ‘authorisation’ process. The detail of the complex process of authorisation is considered, commendably clearly, in chapter 12, with a supporting flowchart at appendix 4. Chapter 13 focuses on the representation of the new ‘schedule A1 detainees’.

The Court of Protection, its jurisdiction and the application process is dealt with in chapter 14, which also considers the role of the Public Guardian and Court of Protection Visitors.

In the final chapter, chapter 15, the author does not shirk from considering the most challenging aspects of the MHA 07, namely the interface between the regimes. The position in relation to treatment for mental disorder, both with and without detention, together with treatment for physical problems, and urgent cases, are all considered. The position relating to children is considered, broken down into 16/17 year olds and under 16s. This chapter provides invaluable assistance to those who are - and will be - required to weave their way through this legal labyrinth.

Sir James Munby concludes his foreword by both commending and congratulating the author on “the great service he has done us all”. This reviewer for one is very grateful for the hours and anguish already saved by this guide, which in its short life has become an essential point of reference.

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