Professor Anselm Eldergill
medicolegal @email.com

Honorary Professor of Mental Capacity Law, University College London; Member of the United Nations Expert Committee on Capacity and Access to Justice.

29 May 2023

Mental Health Legislative Reform

I chaired the DHSC's and MOJ's Working Group on Patient Safeguards, Mental Health Tribunals and the Hospital Managers as part of the independent review chaired by Professor Simon Wessely. Most of this working group's recommendations were accepted by the department.

This short note sets out my perspective about where the reform process stands in relation to the Mental Health Bill and the Mental Capacity (Amendment) Act 2019 (the LPS scheme).

LPS Scheme

The postponement of the LPS scheme is on balance a positive development given the weaknesses in the legislation. The new scheme is not notably simpler or more practical than the existing standard authorisation scheme which has the benefit of now being familiar and could easily be extended to support living accommodation and simplified by regulations.

The LPS scheme does not satisfactorily address the problem that tens of thousands of people are unlawfully detained in care homes and supported living accommodation because of a shortage of assessors and insufficient local authority resources. Indeed, it actually tries to legitimise this by providing that such detentions are lawful without a proper legal authorisation. This is the very approach that the ECHR said was unlawful in 2004, in the *Bournewood* case. In addition to that problem, drafting deficiencies raise important issues for professionals in relation to their legal liability.

Mental Health Bill

Turning to the Mental Health Bill, there is much to be said for a fresh start, which Parliament appeared to favour. The problems are manifold:

1) The current Bill is limited in scope and ambition. It was supposed to be a generational reform of the law. The present system is 64 years old and in need of root-and-branch reform (The 1983 Act was a consolidating Act based on amendments to the 1959 Act made by the Mental Health (Amendment) Act 1982).

2) The Wessely Reviewers somehow completely failed to see the elephant standing in front of them. They either did not appreciate or did not address the fundamental problem that there are now far more detentions under the Mental Capacity Act 2005 than under the Mental Health Act 1983 because the 1983 Act only permits detention in hospital. Care homes are the new long-stay wards:

    - The number of mental illness and learning disability beds has been reduced by 82,000 from a level of 100,543 in 1987/88. Conversely, the number of care home beds has increased by 95,000 from 1988, to 458,000.

- The number of new detentions under the Mental Health Act 1983 in 2018/19 was 49,988 while the number of applications for detention under the Mental Capacity Act 2005 was over 171,000.[1]

3) It must be doubtful whether the Bill will significantly reduce the percentage of people detained or the percentage of people released, which was a main aim of the review. When I commenced practice in 1985 the tribunal discharge rate was 25%; it is now around 6%. The change in the statutory criteria recommended by my working group is helpful but only part of the answer.

4) The Bill does not really address the over-representation of black citizens in the detained population, which was also one of the original main aims.

5) The Bill does not address the problem that tribunals effectively no longer have a discretionary discharge power because of the Upper Tribunal's erroneous decision in the *Betsi Cadwaladr* case. That needs to be reversed.

6) The Bill has nothing to say about seclusion.

7) The Bill has nothing to say about restraint.

8) The Bill leaves the future of hospital managers hanging.

9) The Bill waters down the powers of spouses and partners.

10) The Bill does not simplify the complicated absence without leave provisions in sections 21-22.

11) The Bill does not effectively address the substantial number of mentally ill people now in the prison system or their non-consensual treatment within the prison system.

12) The Bill does not reintroduce a Mental Health Act Commission. As I predicted in 2006 when the Department of Health consulted me, the CQC now has no legally qualified members and is totally unqualified to monitor and enforce legal standards.

13) The Bill does not address the very obvious problems in the way the short-term powers (sections 5, 135 and 136) are drafted.

14) The Bill does not promote guardianship as a protective alternative for people living in the community.

15) The Bill does not address or simplify the complicated inter-relationship between the 1983 and 2005 Acts or attempt to fuse the two pieces of legislation.

16) The Bill does not address the shortcomings in the Court of Protection and the lessons learnt with regard to the implementation of the Mental Capacity Act 2005.

The future

The problems with the legislation and the Bill are, in my view, mainly due to over-reliance on academic input and insufficient experienced practitioner input. The same problem beset the long-drawn-out Mental Health Bill process between 1998 and 2007. That began with a similarly abortive report by Professor Genevra Richardson and her committee of academics and policy officers. Legislation should have a practical focus, which can be difficult for academics and policy advisors who have not spent much time practising in psychiatric hospitals. What is now needed is a small Commission of experienced MHA practitioners to review the work that has been done and to draft themselves a completely new Bill.

[1] See Eldergill A, Assisted Decision-Making (Capacity) Act 2015, *Dublin* Solicitors Bar Association, 17 June 2022, Dublin, Republic of Ireland.

Extensive consultation has already taken place which will save a great deal of time. Since LPS has been postponed to the next Parliament, it may make sense to put a new Mental Health Act back until then. The revised Bill/Mental Health Act can either replace LPS with more workable arrangements and a fused scheme or make the necessary amendments to LPS within a Mental Health Bill.