

References

- 1 Fazel S, Danesh J. Serious mental disorders in 23 000 prisoners: a systematic review of 62 surveys. *Lancet* 2002; **359**: 545–50.
- 2 Wilson S, Forrester A. Too little too late? The treatment of mentally incapacitated prisoners. *J Forensic Psychiatry* 2002; **13**: 1–8.
- 3 McKenzie N, Sales B. New procedures to cut delays in transfer of mentally ill prisoners to hospital. *Psychiatr Bull* 2008; **32**: 20–2.
- 4 Earthrowl M, O'Grady J, Birmingham L. Providing treatment to prisoners with mental disorders: development of a policy. Selective literature review and expert consultation exercise. *Br J Psychiatry* 2003; **182**: 299–302.
- 5 Curtice M, Sandford J. Article 3 of the Human Rights Act 1998 and the treatment of prisoners. *Adv Psychiatr Treat* 2010; **16**: 105–14.
- 6 Curtice M. The European Convention on Human Rights: an update on Article 3 case law. *Adv Psychiatr Treat* 2010; **16**: 199–206.
- 7 Owen GS, Szmukler G, Richardson G, David AS, Hayward P, Rucker J, et al. Mental capacity and psychiatric in-patients: implications for the new mental health law in England and Wales. *Br J Psychiatry* 2009; **195**: 257–63.
- 8 Forrester A, Chua K, Dove, S, Parrott J. Prison health-care wings: psychiatry's forgotten frontier? *Crim Behav Ment Health* 2010; **20**: 51–61.
- 9 Department for Constitutional Affairs. *Mental Capacity Act 2005 Code of Practice*. TSO (The Stationery Office), 2007.
- 10 HM Inspectorate of Prisons. *Thematic Report by HM Inspectorate of Prisons: The Care of Looked After Children in Custody. A Short Thematic Review*. HMIP, May 2011.
- 11 Marshall M, Lewis S, Lockwood A, Drake R, Jones P, Croudace T. Association between duration of untreated psychosis and outcome in cohorts of first-episode patients: a systematic review. *Arch Gen Psychiatry* 2005; **62**: 975–83.

Compulsory treatment in prison

Commentary on . . . The Mental Capacity Act and mental healthcare in prison[†]

Simon Wilson¹

The Psychiatrist (2012), **36**, 243–244, doi: 10.1192/pb.bp.112.039511

¹Institute of Psychiatry, London, UK
Correspondence to Simon Wilson
(simon.wilson@kcl.ac.uk)

First received 2 Apr 2012, accepted
2 April 2012

Summary It is generally stated that the Mental Health Act 1983 does not apply to prisoners, and this is a useful shorthand to remind those unfamiliar with British prisons that treatment cannot be administered under the Mental Health Act, even to the most severely mentally ill prisoners. However, the legal situation is actually more nuanced given that the Mental Health Act does make provision for prisoners – intending that they be promptly transferred to hospital for treatment. This does not happen in practice for service reasons. It is not clear whether the Mental Capacity Act 2005 applies to those falling through the cracks.

Declaration of interest None.

It is often said that the Mental Health Act 1983 does not apply to prisoners in England and Wales, but that is not strictly true. It is a useful shorthand to remind those new to prison health services that a prison healthcare unit is not a hospital, and that despite containing some of the most severely mentally ill people one is ever likely to see as a psychiatrist in this country, those individuals are not detained for treatment under the Mental Health Act.

Davies & Dimond¹ remind us that the Mental Capacity Act 2005 has some applicability in the prison situation, but that using it effectively requires us to be better clinicians – thinking about ‘best interests’ broadly, consulting those who

know the prisoner well, and weighing up harms and benefits. This is to be welcomed and is an improvement on the common law that preceded it. The authors also, helpfully, remind us how difficult it is for HM Prison Service as an organisation to think about health issues when drawing up documents such as Prison Service Order (PSO) 1600.

The Mental Capacity Act, of course, applies to providing treatment for adults who lack capacity to make treatment decisions and for whom that treatment is in their best interests. It was primarily intended for the treatment of physical disorders, and in those with intellectual impairments and dementia. There will be a group of prisoners, like all other people, to whom this applies. The Act, however, was not intended for the severely mentally ill

[†]See editorial, pp. 241–243, this issue.

who require compulsory treatment for their psychiatric condition, this being covered by the Mental Health Act. It is whether or not the Mental Capacity Act (and before it, the common law in relation to medical treatment and consent) instead might apply, in effect, uniquely to prisoners in this country, in these circumstances, that I wish to address here.

I have previously written about the use of both the common law² and the Mental Capacity Act³ in this situation, but the legal situation remains uncertain and has not, to my knowledge, been tested in the courts in this country. Broadly speaking, in England and Wales, the Mental Health Act 'trumps' the Mental Capacity Act. Those falling within the provisions of the Mental Health Act are to be managed within that framework. Prisoners with 'mental disorder of a nature or degree which makes it appropriate . . . to be detained in a hospital for medical treatment' come within the scope of Sections 47 and 48 of the Mental Health Act 1983 and are to be transferred urgently to hospital for treatment. The Mental Capacity Act, therefore, should not apply to them. In this sense, the Mental Health Act does indeed apply in prison. The trouble is, we have colluded in allowing a system to develop that routinely fails to admit prisoners with severe mental illness to hospital in a prompt fashion – the average waiting time in London prisons being around 100 days.⁴ What do we do to provide treatment to these severely ill patients while they wait? Does the Mental Capacity Act fill this gap, even though they clearly fall within the scope of the Mental Health Act? Custom and practice suggests that it might, but it is not clear to me that this is legally correct.

Davies & Dimond remind us that using the Mental Capacity Act properly will be challenging for prison mental health services, and this is probably to the benefit of our patients. But does using it for prisoners to whom the Mental Health Act applies actually make the situation worse for our patients in the long term? Are we not continuing to collude

with a system that needs a radical overhaul? Are cardiologists writing academic papers about using the Mental Capacity Act to treat prisoners with acute myocardial infarction in prison healthcare wings while a coronary care bed is sought? Should we not instead advocate for our patients to be admitted to hospital the same day, just as they would if they developed a serious medical illness that required hospital treatment? Or, if that is not possible, to make our prisons more therapeutic so that our patients can receive the treatment they require quickly and under the same legal protections as our other patients who happen not to be in prison?

Acknowledgements

I am grateful to George Szmukler and Jill Peay for helpful comments on an earlier draft of this paper.

About the author

Simon Wilson is a consultant forensic psychiatrist at Oxleas NHS Foundation Trust and an honorary senior lecturer in the Department of Forensic and Neurodevelopmental Science, Institute of Psychiatry, London.

References

- 1 Davies S, Dimond C. The Mental Capacity Act and mental healthcare in prison – opportunities and challenges. *Psychiatrist* 2012; **36**: 241–3.
- 2 Wilson S, Forrester A. Too little, too late? The treatment of mentally incapacitated prisoners. *J Forens Psychiatry* 2002; **13**: 1–8.
- 3 Wilson S, Dhar R. Consent to treatment, the Mental Health Act, and the Mental Capacity Act. In *Psychiatry in Prisons: A Comprehensive Handbook* (eds S Wilson, I Cumming). Jessica Kingsley Publishers, 2010.
- 4 Forrester A, Henderson C, Wilson S, Cumming I, Spyrou M, Parrott J. A suitable waiting room? Hospital transfer outcomes and delays from two London prisons. *Psychiatr Bull* 2009; **33**: 409–12.