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 unfamiliar with British prison health services 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.

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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 law and the Mental Capacity Act 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.

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