MENTAL HEALTH
LAW AND PRACTICE
CIVIL AND CRIMINAL ASPECTS

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For information on this book see
It has been said, with some justification, that mental health has been the poor relation of the Health Services over the years. Equally, it could be said that it is the poor relation in the protection of human rights, both in the field of legislation and in court decisions. This is probably a result of a number of factors, but undoubtedly among these is the fact that many suffering from mental illness are not able or competent to complain of abuse or wrongful detention, coupled with the fact that for many years social stigma attached to mental illness which meant that it was not talked about, but was quietly swept under the carpet and hidden away. Sadly much of this stigma still exists.

From the middle of the last century, the rights of mentally ill patients and the obligations of the medical profession and of the State to such patients was governed by the Mental Treatment Act 1945. Several attempts were made to challenge the constitutionality of portions of this Act, but they came to nothing. There were some amendments to the Act, but they did little to improve the lot of a mentally ill patient. It was not until the mid-1990s when two cases were taken against the State under the European Convention on Human Rights and pressure was brought by the European Commission of Human Rights that the legislature finally took action. The Mental Health Act 2001 was passed, which radically changed the legal requirements for involuntary admission of patients to mental hospitals and also provided a system of oversight and regulation of such patients similar to that which had been in force in the United Kingdom for many years. The appalling fact is that for some five years this legislation remained on the statute books without being in force and it was not until 2006 that the Minister for Health and Children made an Order bringing the substantial protections for patients contained in that Act into law. At about the same time the Oireachtas passed the Criminal Law (Insanity) Act, which had existed in the form of a Bill since 2002, and which dealt with patients detained in the Central Mental Hospital through the criminal law system as a separate category.

As a result of these Acts the rights of mentally ill patients, and indeed the obligations of psychiatric hospitals, changed dramatically almost overnight. Systems of regulation were put in place overseen by independent tribunals, patients who were involuntarily detained had legal advisors allocated to them, an up to date statutory test of fitness to plead was introduced, and a defence of diminished responsibility in murder cases became possible. Sudden legal changes such as these almost invariably lead to some initial confusion and differences of interpretation, many of which ultimately have to be clarified by the courts. Since 2006 a number of cases have come before the courts dealing with the application of both Acts to specific circumstances. For a busy psychiatrist or legal practitioner it can be difficult and time-consuming to research these decisions and a comprehensive and up-to-date account of them is of great importance.

This book fills that need. It is both comprehensive and up-to-date. More than that, it explains the new statutory provisions and the recent court interpretations of them in a lucid and readable form using extracts from judgments to illustrate the points rather than merely giving references to the decisions which the reader would have to research for himself. It is a book which should be a constant source of reference and information for both medical and legal practitioners. An important feature is that it also gives much practical advice as to the day to day operation of the Acts and advises medical practitioners as to the duty of care imposed on them by common law in relation to psychiatric patients, particularly when questions of consent arise.

One further category of persons will also benefit greatly. Members of Mental Health Tribunals under the 2001 Act and myself as Chairperson and my colleagues on the Mental Health (Criminal Law) Review Board have had to try to administer many of the provisions of both Acts with little guidance other than the, sometimes far from perfect, wording of the Acts themselves. This work is a source which both advises on the legal implications of our functions
and should help us to avoid the undoubted pitfalls in applying the legislation. For this we will be
grateful to Dr Whelan.

The book is also a reminder, if such be needed, that mentally ill patients are human beings,
with the same basic rights and who are entitled to the same protections and remedies for abuse of
those rights, as everybody else. For making this clear Dr Whelan is also to be congratulated.

MR JUSTICE BRIAN MCCracken
Chairperson
Mental Health (Criminal Law) Review Board
October 2009
PREFACE

This book examines civil and criminal aspects of mental health law in Ireland, concentrating on the Mental Health Act 2001, the Criminal Law (Insanity) Act 2006 and the Scheme of the Mental Capacity Bill 2008. As there have now been more than 30 judgments concerning the recent legislation, it was decided to refer only briefly to the law which applied prior to the commencement of the new Acts. The aim has been to keep the book of manageable length, and concentrate on analysing the current law as much as possible. Parts 2 and 3 of the book concern civil aspects and criminal aspects respectively, but it should be noted that there is some overlap. For example, many of the legal provisions concerning treatment for a mental disorder in Chapter 10 apply to patients detained under the criminal legislation as well as to those detained under the Mental Health Act 2001, and cross-references between different chapters have been inserted as much as possible. I have endeavoured to state the law as of September 10, 2009. It has been possible at editorial stage to include some material on version 2 of the rules and codes of practice on ECT, seclusion and restraint, which were issued in October 2009.

I am grateful to the numerous Irish academics and practitioners who have written extensively in the area of mental health law and whose work is cited in footnotes throughout. Special acknowledgement in this regard is due to the books written by Patricia Casey, Tom Cooney, Ciarán Craven, Mary Donnelly, Harry Kennedy, Mary Keys, Finbarr McAuley, Paul McCutcheon, Tom O’Malley, Anne-Marie O’Neill and Orla O’Neill.

I wish to thank Mr Justice Brian McCracken for his thoughtful foreword, and Liam Fitzgerald of the Mental Health (Criminal Law) Review Board, for his help in arranging this. Many colleagues at U.C.C. were of assistance in various ways and I thank all of them, particularly Mary Donnelly, who volunteered her time for discussion of a number of chapters. David Gwynn Morgan collaborated with me on an earlier paper concerning Mental Health Tribunals, elements of which have been incorporated into this book. I also benefited from discussions with and support from Shane Kilcommins, Ursula Kilkelly, Maeve McDonagh, John Mee, Catherine O’Sullivan and Fidelma White. The research environment at U.C.C. is excellent and I am grateful for the sabbatical leave which enabled me to make substantial progress on this book. The library staff—Helen Mulcahy, David Maguire and Mary Foley—were always helpful and facilitating. Maria Murphy provided invaluable research assistance.

For supply of information and/or fruitful discussion, I wish to thank Bríd Clarke, Gerry Cunningham and Rosemary Smyth of the Mental Health Commission, Noel Doherty of the Wards of Court office, Kerida Naidoo, Gerard Murphy, Niall Nolan, Michael Lynn, William Binchy, Áine Hynes, Mark Felton, Hilda-Clare O’Shea, Finbarr Phelan, Maria Dillon, Roddy Tyrrell, Joan Doran, Keith Walsh, John Neville, Dara Robinson, Peter Connolly, Mairead Quigley, the Mental Health Lawyers Association, John Redican, Kris Gledhill, Anselm Eldergill, Phil Fennell, Suzanne Doyle, Louise Kennefick, Martin Lawlor, Pat O’Dea and Siobhán Barry. The team at Round Hall—Catherine Dolan, Frieda Donohue, Aisling Hanrahan and Kristiina Kojamo—were professional and committed to high standards.

My deepest personal thanks are due to Anne Marie Mullally, to whom this book is dedicated and who provided extraordinary support and encouragement. I am also deeply indebted to the other members of the Whelan and Mullally families (too numerous to mention) and our children, Alice, Hugh and Cathal.

DARIUS WHELAN
November 6, 2009
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