



SCOTTISH EXECUTIVE

**Health Department
Public Health Division**

**St Andrew's House
Regent Road
Edinburgh EH1 3DG**

**Telephone: 0131-244 2192
Fax: 0131-244 2606
James.Brown@scotland.gsi.gov.uk
<http://www.scotland.gov.uk>**

27 June 2002

Dear Colleague

MENTAL HEALTH (SCOTLAND) BILL

I am pleased to enclose a draft copy of the forthcoming Mental Health (Scotland) Bill. This Bill is due to be introduced in the Scottish Parliament in September. Work is continuing in relation to the Bill and it is likely that there will be differences between this draft and the Bill as introduced. In particular, the attached draft is incomplete in some areas. Nevertheless, we felt it was helpful to let interested parties have sight of the current draft of the Bill, in advance of the forthcoming Parliamentary consideration of the legislation.

The draft Bill follows on from the Executive's Policy Statement, Renewing Mental Health Law, which was published in October 2001, and which responded to the comprehensive review carried out by the Millan Committee, as set out in their Report "New Directions". The draft Bill and these earlier documents can all be obtained on our Mental Health Law website - www.scotland.gov.uk/health/mentalhealthlaw. There are a number of areas where policy has developed from that set out in the Policy Statement. These are set out in more detail in Appendix A. An outline of the content of the draft Bill and a glossary are at Appendices B and C respectively. Explanatory notes and a Policy Memorandum will be published with the Bill when it is introduced in September.

If you wish to comment on the draft Bill at this stage, please do not hesitate to do so. The Executive will take account of comments received in considering whether to lodge amendments to the Bill during Stage 2 of the Parliamentary process. Before then, of course, the Parliamentary Committee considering the Bill is likely to call for evidence after the Bill is introduced.

SMA02306



If you have any comments or questions, please do not hesitate to contact us at the undernoted address:

Luke McGarty
Mental Health Bill Team
Scottish Executive
Room 3E (North)
St Andrew's House
Regent Road
EDINBURGH
EH1 3DG

Tel: 0131-244 2681

E-mail: mentalhealthlawmailbox@scotland.gsi.gov.uk.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J T Brown', written in a cursive style.

J T BROWN

SMA02306



MENTAL HEALTH (SCOTLAND) BILL DEVELOPMENTS IN POLICY SINCE THE POLICY STATEMENT

Definition of mental disorder

(Chapter 2, paragraphs 20-22)

The draft Bill reflects the Millan Committee's recommendation that mental disorder should be defined as including mental illness, learning disability and personality disorder. The Committee also recommended retention, in an updated form, of specific exclusions from the definition: relating to substance misuse, sexual orientation or behaviour, and anti-social or imprudent behaviour. It remains policy that these factors would not, on their own, constitute mental disorder, and this reflects general clinical understanding. It may be that it is no longer appropriate to specify such exceptions in legislation, on the basis that it creates confusion about whether other conditions are included, and about the situation of people whose mental disorder is complicated by the excepted factors. The Executive has not reached a final view on this and, in the meantime, has omitted specific exceptions from the current draft Bill.

Criteria for Mental Health Disposals for Offenders

(Chapter 3, paragraphs 4-8)

The Millan Committee recommended that there should be 6 criteria to be satisfied before a long-term compulsory order could be made. These were:

- The presence of mental disorder;
- Treatment is available which will benefit the patient;
- A significant risk of harm to the patient or to others if treatment is not delivered;
- The treatment is the least restrictive alternative;
- The treatment cannot be provided by agreement with the patient; and
- The person's judgement is impaired.

These recommendations will be implemented in the criteria for civil compulsion. However, the Executive does not believe that they are entirely appropriate for patients who receive a mental health disposal from a criminal court.

The first 3 criteria remain appropriate and will also be applied to criminal cases. However, criteria of least restrictive alternative, lack of consent and impaired judgement relate to the fact that a civil order is made to overcome the patient's refusal to accept necessary treatment. In contrast, a criminal disposal is made to allow the offender to be dealt with in a way that meets the interests of justice. It is therefore proposed, for criminal cases, to add to the first 3 civil criteria considerations that the order is necessary and appropriate. This broadly reflects the current legal position for the group.

Informal Patients

(Chapter 4, paragraphs 2-7)

The Millan Committee drew attention to the situation of patients who have not been detained under the Mental Health (Scotland) Act 1984, and who have not consented to the treatment they receive. In some cases, this may be because they are incapable of consenting and, in others, patients may feel they have been pressurised into accepting treatment that they do not want. The Committee did not, however, propose any new legislative safeguards specifically to address this situation.

The Executive considers that legislative safeguards may be justified, even where patients are not subject to any restrictive measures imposed under the Bill. We are developing proposals for the Bill which protect patients' rights, but without creating burdensome bureaucratic procedures for the great majority of patients who are treated informally.

Protection for acts done by staff

(Chapter 5, paragraph 13)

The Millan Committee recommended that there should continue to be a provision in a new Mental Health (Scotland) Act which protects any person from liability in civil or criminal proceedings for acts purporting to be done in pursuance of the Act, unless done in bad faith or without reasonable care.

The policy statement accepted this recommendation. However, on further consideration, the Executive feels that there is a range of problems with the existing provision. It is not clear what effect it has, since it is normally necessary for there to be bad faith or lack of reasonable care before there is any civil or criminal liability. To the extent that the existing provision does have legal effect, it can be seen as discriminatory against people with mental health problems. We have therefore not included equivalent provision in the draft Bill, but will consider further whether there is any benefit in some form of limited defence.

Powers of the Mental Welfare Commission

(Chapter 6, paragraphs 11-12)

The Millan Committee recommended that the Mental Welfare Commission should continue to have the power to discharge patients from compulsory orders. The policy statement sought views on whether such a power should be retained. During our consultation on the issue, there was a large majority in favour of retention of the Commission's power, and we intend that the Commission should have a power to discharge patients, alongside a power to refer cases to the Tribunal.

State Hospital criteria for admission and self-harming behaviour

(Chapter 7, paragraphs 28-29)

The policy statement said that it would not be desirable to specify self-harm as a potential ground for admission to the State Hospital, and that the State Hospital should retain its focus on patients who present a danger to others. Following further consultation where concern was expressed that some vulnerable patients might be denied access to the State Hospital, the amended criteria as set out in the Bill will not specify self-harm as a ground for admission while not ruling it out in an exceptional case.

The intention is that admission to the State Hospital is possible if the patient suffers from a mental disorder of such a nature or degree that he or she

- requires treatment under conditions of special security, and

SMA02306



- cannot be suitably cared for in a hospital other than the State Hospital.

Appeals on Levels of Security

(Chapter 7, paragraphs 51-54)

The Millan Committee recommended that patients should have a legal right to appeal against the levels of security at which they were held. The policy statement pointed out that there were practical difficulties with this recommendation, which required further consideration, alongside alternative proposals such as administrative arrangements to review difficult cases. This remains the position. However, the Executive has recently consulted on the recommendations of a committee reviewing the governance of the State Hospital, which made a number of far-reaching proposals concerning the management of services for mentally disordered offenders. Such organisational changes could have a significant bearing on the position of patients who may be “entrapped” and the Executive will be giving consideration to the responses to that consultation before deciding whether any further legal changes are appropriate.

The Mental Health (Public Safety and Appeals) (Scotland) Act 1999

(Chapter 7, paragraphs 55-65)

The Mental Health (Public Safety and Appeals) (Scotland) Act 1999 introduced a new test, to be applied by Scottish Ministers and the sheriff, in determining whether a restricted patient should be discharged. In effect, a restricted patient cannot be discharged if suffering from a mental disorder, the effect of which is that it is necessary, to protect the public from serious harm, that the patient continues to be detained in hospital, whether for treatment or not.

The Millan Committee considered that this provision should be repealed, on the basis that it would no longer be necessary under the new legislation, although the Committee accepted that there could be difficulties with patients already in the system before the law was changed.

Since the policy statement was published, an appeal has been heard by the Judicial Committee of the Privy Council, concerning whether the provisions were compatible with the European Convention on Human Rights. The Privy Council unanimously upheld the 1999 Act as being compliant with the Convention.

The effect of the reforms being introduced by the Mental Health and Criminal Justice Bills should be greatly to reduce the likelihood of the situation that led to the 1999 Act recurring. However it cannot be guaranteed, and the Executive believes it is right that offenders given a mental health disposal who are still mentally disordered and highly dangerous should continue to be detained. The Bill will retain the effect of the 1999 Act for both current and future restricted patients.

Security

The Bill will include provisions concerning safety and security in hospitals and the interception of communications. These provisions are designed to introduce a regulatory mechanism for these activities.



CONTENT OF THE DRAFT BILL AND COMPARISON WITH 1984 ACT

[NB: references to Chapters are to the Policy Statement- Renewing Mental Health Law. Numbers in brackets are section numbers of the 1984 Act]

Part 1. Mental Welfare Commission (Chapter 6)

Replaces Part II of the 1984 Act (2-6). The Mental Welfare Commission has an enhanced role in the new Bill: it retains its duty to visit patients, has a power to make inquiries and has a general duty to monitor the operation of the new Act, and to promote best practice with regard to such operation.

Work is continuing on the following:

- the implications of the Bill for the Commission's functions under section 9 of the Adults with Incapacity (Scotland) Act 2000
- the Commission's powers to discharge patients and to make referrals to the Tribunal
- the Commission's powers to make inquiries into the situation of individuals who appear to be at risk of neglect or abuse
- the regulation of the exercise by the Commission of powers of interview, examination etc.

Part 2. Mental Health Tribunal for Scotland (Chapter 3, paras 72-91)

New provision. The tribunal takes over the role of the sheriff court in the 1984 Act. This part of the Bill and the accompanying schedule provide for the constitution of the new tribunal and set out the framework for tribunal hearings. The draft Bill enables regulations to make further provision about the functions of the tribunal, and for the practice and procedure of the tribunal to be set out in rules.

It is intended to include provision for appeals to be made from the Tribunal to the sheriff principal and the Court of Session.

Part 3. Local Authority and Health Board Duties (Chapter 4, paras 21-23)

Replaces Part III of the 1984 Act (7-11). This Part deals with the appointment of mental health officers (9) and the provision of services, including care and support, training and education (7, 8, and 11).

Part 4. Compulsory Treatment (Chapter 3)

Replaces Part V of the 1984 Act (17-59). The provisions for detention for periods of 28 days or less in the 1984 Act are being re-enacted with amendments reflecting the Millan recommendations. The provisions for long-term compulsory treatment are significantly different from the 1984 Act: the new compulsory treatment orders cover both hospital and community-based treatment and require to be approved by the new tribunal. This Part is divided into the following chapters:

Chapter 1. Emergency detention (24) and nurse's holding power (25).

Chapter 2. Short term detention (26), 3 day extension thereof (26A) and 5 day extension (21 (3B)).



Chapter 3. Compulsory Treatment Orders replace long-term detention (18) and community care orders (35A). This chapter deals with the pre-application procedures (18-19), the application itself (19-22), review and renewal (30), and revocation and variation (35D, 35I).

Chapter 4. Miscellaneous. Leave of absence and absence without leave provisions. (27, 28, 31, 31A, 31B, 32)

Further work is taking place on a number of issues, including:

- provisions replacing s117 of the 1984 Act (access to persons at risk)
- the care plan
- the duties of service providers to people subject to compulsory treatment orders
- procedures in the event of non-compliance with a community-based order
- interim orders allowing detention prior to the Tribunal's final determination of an application for a compulsory treatment order
- the tribunal's duty to review orders at least once every 2 years
- transfers of patients and patients absent without leave.

Part 5. Mentally Disordered Persons: Criminal Proceedings (Chapter 7)

Replaces Part VI of the 1984 Act (60-76). See the attached glossary of orders for an explanation of how the new criminal orders relate to the old ones. This part replaces a number of the orders set out in Part VI of the Criminal Procedure (Scotland) Act 1995 (CPSA).

The current draft only implements some of the provisions regarding mentally disordered offenders. It sets out the procedure for obtaining such orders and certain of the effects of being subject to a restriction order. Further provisions are being prepared setting out:

- the effect of being made subject to a compulsion order without a restriction order, which will be broadly comparable with the effects of a civil compulsory treatment order
- provisions for hospital directions (Chapter 7, paragraphs 26-27)
- consequential amendments of provisions for persons found insane in bar of trial or acquitted by reason of insanity
- establishing a new emergency detention power for unconvicted persons suffering from mental disorder (Chapter 7 paras 8-13).

Part 6. Treatment (Chapter 3, paras 92-110)

Replaces Part X of the 1984 Act (96-103). This part makes provision for medical treatment and special safeguards for particular treatments. Part 6 also defines the "designated medical practitioners" who shall confirm consent or give second opinions.

Further work is being undertaken on the issue of the authority to treat without consent people on compulsory treatment orders, particularly those based in the community. It is intended to provide for additional safeguards to apply where children are being treated (chapter 3, paragraphs 107-108). We are considering the extent to which this Part may require amendment following the decision to withdraw provision regarding neurosurgery for mental disorder from regulations under Part 5 of the Adults with Incapacity (Scotland) Act 2000.

Part 7. Patient representation

New provisions on advocacy (Chapter 3, paras 24-28) and on the ‘named person’ (Chapter 3 paras 44-55), replacing the ‘nearest relative’ (53)

Part 8. Miscellaneous

Replaces much of Part XI of the 1984 Act (110-119). Part 8 includes the Code of Practice (119), and contains a number of provisions regarding patients' rights including updated provision on assisting patients with communication difficulties (118), correspondence of patients (115-116).

Part 9. General

Replaces Part XI of the 1984 Act (120-130, Schedules). Part 9 includes provisions relating to the making of orders, regulations and rules (124), and the interpretation section (1 & 125).

Other incomplete areas

Principles (Chapter 2, paras 2-4)

The Millan Committee suggested a set of general principles which might apply to the exercise of powers under the Bill. We are considering how best to give these legislative effect.

Offences (Chapter 5, paras 8-32)

Replaces Part XI of the 1984 Act (104-109), dealing with sexual offences (sections 106 and 107), ill-treatment of patients (105) and obstruction (109). The policy statement indicated an intention to update these provisions in the 1984 Act. However, since then, the decision of the High Court in Lord Advocate's Ref No 1 of 2001 has given important guidance as to the scope of common law sex offences, including those against mentally disordered people. This raises issues as to the justification for and extent of statutory sex offences in this area, and we are considering the implications.

Advance statements (Chapter 4, paras 33-38)

It is intended to make provisions creating new rights for patients to make advance statements which must be taken into account when any restrictive measures are being sought under the Bill.

Assessment of the need for specialist mental health services (Chapter 4, paras 9-20)

We are considering how best to ensure that service users and carers can trigger an assessment when the service user's mental health deteriorates.

Informal patients

The Executive's intention to legislate is set out in Appendix A on developments in policy since the policy statement was published.

Provisions of the 1984 Act which are not being replaced

Guardianship (36-52) has been superseded by the Adults with Incapacity (Scotland) Act 2000. Part IV of the 1984 Act concerning private hospitals has been superseded by the Regulation of Care (Scotland) Act 2001. Part VIII, concerning the State Hospital, has already largely been repealed and



will not be replaced. Part IX concerning the protection of property of patients is largely superseded by the Adults with Incapacity (Scotland) Act 2000.

SMA02306



GLOSSARY

| Mental Health Bill | Nearest Comparison in 1984 Act or Criminal Procedure (Scotland) Act 1995 (CPSA) |
|---|---|
| Nurses holding power; two hours plus one hour for the doctor to examine the patient. | 25. The nurses may hold the patient for up to two hours or until a doctor arrives, whichever is the sooner. |
| Emergency detention; 72 hours. Much the same as the 1984 Act. | 24 |
| Short-term detention; 28 days. Much the same as the 1984 Act. | 26 |
| Short-term detention: first extension; 3 days, as in the 1984 Act. | 26A |
| Short-term detention: further extension; 5 days. As in the 1984 Act. | 21 (3B) |
| Compulsory Treatment Order; two six monthly periods followed by annual renewal. Tribunal review every two years. | New provision replacing 18 (long-term detention) and 35A (community care orders) allowing long-term treatment in hospital and/or the community. |
| Police Place of Safety Order; 24 hours | Similar to 118 but the time period reduced from 72 hours to 24 hours. |
| Assessment Order: to remand an accused person suspected of suffering from mental disorder to hospital for assessment | Replace the following: 52 CPSA (remand order), 70, 73 (transfer direction), 71 (transfer direction) |
| Treatment Order: to remand an accused person who is known to suffer from mental disorder to hospital for treatment. | |
| Interim Compulsion Order: allows an offender to be assessed in hospital prior to sentencing, particularly relevant for high risk offenders. | 53 CPSA (Interim hospital order) |
| Compulsion Order: on conviction the court may sentence the offender to receive compulsory treatment. | 58 CPSA (Hospital order) |
| Restriction Order: granted in conjunction with a compulsion order - for those who require additional scrutiny as they progress through the mental health system. | 59 CPSA (Restriction order) |
| Hospital Direction: on conviction the court may sentence the offender to a prison term but with a requirement to commence that term in hospital. Includes a restriction direction (equivalent to a restriction order). | 59A CPSA (Hospital direction) |
| Transfer for Treatment Directions: enables convicted prisoners to move from prison to hospital. May include a restriction direction. | 71 (Transfer direction) |

