REVIEW ARTICLE

Crime and Punishment (Scotland) Act 1997: relevant provisions for people with mental disorders

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The Crime and Punishment (Scotland) Act 1997 was one of the final legislative measures to be passed by Parliament during the lifetime of the previous Government and received Royal Assent in March 1997. It arose from the White Paper entitled "Making the Punishment Fit the Crime" and contained provisions aimed at the protection of the public by largely punitive measures. Not all the provisions have been enacted, for example automatic life sentences for those committing two qualifying offences, such as attempted murder, rape or aggravated assault. However, among those provisions that have been enacted are a number that directly affect people with mental disorders, whether as alleged offenders or as witnesses. It is therefore important that psychiatrists are familiar with these provisions.

Hospital direction (Section 6)

A hospital direction is a new disposal available to the judiciary since 1 January 1998. It can be applied to a person convicted on indictment in the High Court or in the Sheriff Court of an offence punishable by imprisonment. It allows the judge or sheriff to authorise admission to and detention in a specified hospital and, in addition, to pass any sentence of imprisonment which he has the power or duty to impose. This means that for the first time the court has the option of a final disposal of a mentally disordered offender by both hospitalisation and imprisonment. For example, under this provision a person with schizophrenia who has been convicted of assault can be sent to hospital and treated for an acute psychotic relapse but upon recovery will be sent to prison for the remainder of his sentence. If he remains unwell he will stay in hospital. The legal process requires psychiatric reports by two medical practitioners, one approved as having special experience in the diagnosis of treatment of mental disorder. The reports must state that the subject is suffering from a mental disorder of a nature or degree that makes it appropriate for him to receive medical treatment in hospital; that if the mental disorder is a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct or mental impairment as defined by the Mental Health (Scotland) Act 1984, that such treatment is likely to alleviate or prevent deterioration in that condition; and that admission is required for the patient's health or safety or for the protection of others. Both doctors must agree on the same form of mental disorder and a hospital bed must be available in the seven days following disposal by a hospital direction. One doctor must be employed at the specified hospital. This is a similar procedure to that currently required for disposal using a hospital order under the Criminal Procedure (Scotland) Act 1995 (Section 58). Admission to the State Hospital will be required if the patient has "dangerous, violent or criminal propensities requiring treatment under conditions of special security" and "cannot be suitably cared for in a hospital other than a State Hospital". The hospital direction makes the recipient a Secretary of State for Scotland patient. The Secretary of State's permission is therefore required for leave of absence or transfer, and he has the power to take into custody and return the patient to hospital at any time under Section 28 of the Mental Health (Scotland) Act 1984. The patient has the right to appeal as a restricted patient.

The hospital direction, known in England as the hospital and limitation direction, arose from the 1986 working group of Home Office and Department of Health and Social Security officials and was again proposed, using the term hybrid order, in the report of the Department of Health and Home Office Working Group on Psychopathic Disorder (1994). It was designed as a solution to the problem of treating offenders with anti-social personality disorder, termed psychopathic disorder in the Mental Health Act 1983 pertaining to England and Wales. There is considerable debate about the treatability of this condition and the members of the Psychopathic Disorders Working Group, following a commissioned literature review, concluded that there

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Table 1. Crime and Punishment (Scotland) Act 1997: relevant provisions for people with mental disorders

Section	Effect	Medical requirements	Amendment to existing legislation
Hospital direction, Section 6	Restricted hospital order + prison sentence	Two medical recommendations (one approved doctor) for a hospital order plus sheriff/judge's decision to impose a sentence of imprisonment	Section 59a Criminal Procedure (Scotland) Act 1995
Interim hospital order, Section 11	Extended from a maximum of six to 12 months	Two medical recommendations (one approved doctor). Initial maximum period of 12 weeks, then renewable every 28 days by written or oral evidence to the court	Section 53 Criminal Procedure (Scotland) Act 1995
Evidence of vulnerable persons, Section 29	Special provisions for vulnerable persons to give evidence via a commissioner, video-link or behind a screen	Applicable to people detained under certain provisions of the Mental Health Acts or Order; transfer direction; or who appear to the court to suffer from significant impairment of intelligence and social functioning	Section 271 Criminal Procedure (Scotland) Act 1995
Sentence calculation Section 12	Time spent on remand in a psychiatric hospital contributes towards any sentence of imprisonment received	—	Section 210 Criminal Procedure (Scotland) Act 1995

was inadequate evidence to decide if this condition could be successfully treated. Treatability is an initial requirement under the Mental Health Act 1983 for the detention of patients with psychopathic disorder. At times patients with personality disorders have been admitted to special hospitals and found to be unresponsive to treatment. Owing to the risk posed to the community however, Mental Health Review Tribunals have refused to sanction their release. Such decisions have been upheld in the Court of Appeal (*R* v. *Canons Park Mental Health Review tribunal ex parte A.*, 1994) which judged that although a patient must be treatable at the time of admission, this is not pertinent to ongoing detention. The Psychopathic Disorders Working Group attempted to circumvent this problem with the hybrid order which would allow offenders with psychopathic disorder to be sent to hospital and if then found to be untreatable to be transferred to prison. It was hoped this would encourage psychiatrists to attempt to treat these individuals. Eastman (1996) examined the arguments for and against the use of hybrid orders.

In Scotland the term psychopathic disorder does not exist in the Mental Health (Scotland) Act 1984, but the criteria allowing for detention on the grounds of a personality disorder are present: a persistent mental disorder 'manifested only by abnormally aggressive or seriously irresponsible conduct'. Treatment must be likely to alleviate or prevent deterioration in the condition of the patient. In spite of the potential to detain offenders with anti-social personality disorder only 5% of the population in maximum security psychiatric care in Scotland had a primary diagnosis of anti-social personality disorder (Thomson *et al*, 1997) compared with 26.2% in the English special hospitals (Taylor *et al*, 1991). This, in part, is due to differences in psychiatric practice north and south of the border. Importantly, while the hospital direction in Scotland will be implemented for all forms of mental disorder, the equivalent measure in England and Wales will only be used for patients fulfilling the legal category of psychopathic disorder. In the year April 1996 to March 1997 in Scotland 93 patients were made subject to a hospital order and 17 to a hospital order with restrictions on discharge (Mental Welfare Commission for Scotland, 1997). All patients who go to court with a recommendation from two psychiatrists for disposal using a hospital order can potentially be made subject to a hospital direction. Although this legislation was implemented at the start of this year as yet there

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have been no cases in which a hospital direction has been used.

Interim hospital order (Section 53) Criminal Procedure (Scotland) Act 1995 (Section 11)

Section 11 of the Crime and Punishment (Scotland) Act 1997 increases the maximum length of an interim hospital order from six to 12 months. Grounds for use of an interim hospital order remain as before:

(a) that the offender is suffering from a mental disorder within the meaning of the Mental Health (Scotland) Act 1984; and
(b) that there is reason to suppose
    (i) that the mental disorder from which the offender is suffering is such that it may be appropriate for a hospital order to be made in this case; and
    (ii) that, having regard to the dangerous, violent or criminal propensities of the offender, the hospital to be specified in any such hospital order may be a State Hospital.

An interim hospital order can be used to send patients to a local psychiatric hospital as well as the State Hospital. Reports are required from two medical practitioners and a bed must be available within 28 days of making the order. An interim hospital order can be recommended for an initial maximum period of 12 weeks. It is then renewable for further periods of up to 28 days to a maximum of 12 months on the written or oral evidence of the responsible medical officer that the continuation of the order is warranted. Renewals can be made without the offender appearing in court each time. When an interim hospital order ceases the court may deal with the offender in any way in which it could have dealt with him if no such order had been made. The use of an interim hospital order allows a psychiatrist to consider issues such as diagnosis and treatability in depth following a detailed assessment of a patient.

Evidence of vulnerable persons: special provisions (Section 29)

The special provisions to take evidence from children have been extended to include vulnerable adults. These are defined as people found by a court to be suffering from mental disorder within the meaning of the Mental Health (Scotland) Act 1984, the Mental Health Act 1983, or the Mental Health (Northern Ireland) Order 1986; or who are subject to a transfer direction (convicted prisoner transferred to hospital under a mental health act); or who appear to the court to suffer from significant impairment of intelligence and social functioning. The court can take evidence from a vulnerable person via an appointed commissioner; by use of a live television link; or by means of a screen to conceal the accused from sight, although arrangements must be made to ensure that the accused is able to watch and hear as the evidence is given. In contemplating the use of these options the court will consider the possible effect on the vulnerable person if required to give evidence; whether it is likely that he would be better able to give evidence using the special provisions; and his views. Further, the court may take into account where appropriate the nature of the alleged offence; the likely content of the evidence to be given; the relationship if any between the witness and the accused; and where the person is a child, his age and maturity. At times it may be appropriate for a psychiatrist to draw a patient's or the court's attention to these provisions.

Sentence calculation where remand spent in hospital (Section 12)

Time spent detained in hospital while awaiting trial or sentence will be counted when a court imposes a sentence of imprisonment, as it already is for those who spend this period in prison.

Comment

The Crime and Punishment (Scotland) Act 1997 has brought forward some helpful legislation for patients with mental disorders who come into contact with the criminal justice system, such as the special provisions for giving evidence and the extended interim hospital order. The hospital direction however, represents a major shift in the final court disposal of mentally disordered offenders by combining treatment and punishment. While the stage for debate on the wisdom of the introduction of such a measure has passed, we must all be aware of its existence and carefully monitor its use. I believe that no psychiatrist should make a recommendation for a hospital direction, nor is this a legal requirement. It would surely be unethical for psychiatrists to recommend a period of imprisonment. The introduction of the hospital direction was opposed by the Forensic Section of the Scottish Division of the Royal College of Psychiatrists and provides a salutary lesson that not all new legislation for people with mental disorders is necessarily helpful.

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