Scottish Mental Health Law Review

Forensic Proposals

Introduction

The Scottish Mental Health Law Review is currently consulting on a number of its proposals for change. We are working on the basis that the intended benefits of these reforms should apply equally to people in the forensic system. We would like to hear if there are any of our proposals that people do not think should apply to people in the forensic system and people's reasons for feeling this way.

The consultation document did not have any specific proposals on the forensic aspects within the Review's remit. We explained that we had commissioned specific work on where criminal and mental health legislation meet, and what changes may be needed from a human rights perspective. This work was commissioned from David Leighton, an Advocate specialising in mental health law. This discussion paper now sets down our initials thoughts drawing heavily from David's work. But it also reflects other information gathered by the Review so far, as well as the findings of the Rome and Barron Reviews. It outlines the areas where we consider change may be needed and the ideas we have. We want to hear your feedback on the need for these changes and alternatives to what is proposed. We also want to hear about any unintended consequences of our proposals and about anything else you think needs changed.

We are aware that the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) sets out an expectation that people with disabilities 'enjoy legal capacity on an equal basis with others in all aspects of life' (Article 12). Some commentators have proposed that this requires the abolition of criminal defences which are based solely on the grounds of mental disability. In our discussion with international experts, it has been conceded that this is an area that is underdeveloped in human rights law. We think it remains appropriate and justifiable to keep the option of a different judicial route with different disposals for those who have offended who have a mental disorder, if the consequences of that disorder have implications for either the person's culpability or the appropriate disposal.

It seems to us then that implementation of the UNCRPD should aim to make sure that any limitations imposed on people within this separate system result in equal treatment, having regard also to the State's duty of reasonable accommodation (CRPD Article 5). The proposals discussed here look at the forensic orders and their criteria from this perspective. By 'forensic orders' we mean orders imposed by criminal courts that relate to those with mental disorders who have offended or the transfer of prisoners from prison to the mental health estate.

Proposals

Where no proposal or ideas are suggested for any specific order or criterion, we are not presently considering any change. Therefore, as well as any comments on the proposals and ideas below, we welcome any comments on additional areas for change.

Pre-trial/at trial

1. Intermediaries for accused

The UNCRPD Committee has issued guidelines on Article 14 of the Convention. This is the right to liberty and security of persons with disabilities. These guidelines say that criminal defences based solely on the grounds of mental disability breach Article 14. The Committee states that this is because they deprive the accused of equal right to due process. Certainly, we know that the Rome and Barron Reviews heard from people in the forensic system who had been found unfit to plead, but who felt they could have participated in a trial if they had had better support.

At the moment, a person with a mental disorder is entitled to an appropriate adult on being interviewed by the police, but there is no formal scheme of support beyond this. We are committed to the development of support for decision making across all the areas where people's rights may be affected (see Chapter 3 of our Consultation).

As part of this, we want to see the introduction of intermediaries for the accused and witnesses in criminal proceedings, as can already happen in England and Northern

Ireland. This would support people who have communication difficulties. This proposal aligns with the conclusions reached by both the Rome and Barron reviews.

We appreciate that intermediaries are not yet used at all in our justice systems although they have been the subject of discussion. These discussions should be accelerated and should certainly include provision for accused persons.

Pre-sentence

2. Changes to the pre-sentencing orders

The court can enquire into the mental state of an accused person through assessment or treatment orders before the court process is brought to an end (e.g. by conviction or acquittal).

The court can similarly make investigations after conviction by remanding the accused for further enquiry or through an interim compulsion order.

We have been concerned to hear of people being remanded to prison while awaiting the appropriate mental health provision. In some situations, the judge may feel they have no option but to remand the person, if they cannot be safely cared for otherwise, and no psychiatric bed is available. However, prison can be hugely traumatic for a person who is mentally unwell, and often lacks suitable support. It is also not possible to administer psychiatric medication without consent in prison.

In our view, remanding a mentally unwell person to prison should be seen as a failure to respect their human rights, and the range of remedies set out in Chapters 2 and 8 of our consultation should apply. These may include a power for the court to require that appropriate medical provision is found for any remanded prisoner. Also, where the issue is a structural one caused by lack of appropriate provision to meet the human rights obligations of the State, more systemic remedies should be available to require the State to address these problems within a reasonable timeframe.

Sentencing

3. Supervision and treatment order: removal

A supervision and treatment order can only be imposed after a partial acquittal (i.e. a finding that a person is unfit to stand trial or not guilty by reason of mental disorder). This order cannot be made if it would be appropriate to impose a compulsion order. As such, this is clearly to be seen as a lesser intervention than a compulsion order. The orders are very rarely used.

We are interested in views on the continued need for the order at the moment. However, we also think that if our proposals in section 4.4. go ahead, this order may have a renewed purpose. (See section 4.4. below).

4. Criteria for forensic orders – overarching drive towards standardisation

The criteria for diverting an individual who has offended into the mental health system are largely the same as those for a civil mental health order, with the exception that it is not necessary to establish that the person has a significant impairment of decision-making ability (SIDMA). In terms of the effects of the order, these are also broadly equivalent, although recorded matters are not available for patients subject to compulsion orders. (There are significant differences for Restricted patients, which we discuss later).

It is undesirable to create or perpetuate differences between these regimes, except where those differences can be justified. The Millan Committee originally proposed having the same criteria. We consider that the time is now right to review the degree to which we can achieve greater standardisation between the regimes. We need to examine the existing differences to ensure they remain justified in terms of current human rights law with a view to removing or minimising them.

There remain questions as to how well criteria are being applied in practice and we have heard concerns that those who have offended may not be being appropriately diagnosed and diverted. Courts and prosecutors may not have sufficient information available to them. Defence lawyers may not have sufficient awareness, of or exposure, to such cases to become familiar with these. The accused may be unwilling to disclose aspects of their mental health. Delayed, partial or staged

disclosure of such information can be an impact of trauma the individual has experienced. We have not made any specific proposals regarding these, but are interested in views on whether there are legal changes which may address them.

4.1. Criterion: mental disorder

We are consulting generally on the continued use of 'mental disorder' within our mental health and capacity laws. There is an argument that any order that can result in a deprivation of liberty has to rely on a diagnostic element, to comply with Article 5(1)(e) of the ECHR. The converse is also true. If a person is going to be detained, they should be detained in an appropriate establishment. This means if a person is going to be detained in a psychiatric hospital, they should have a mental disorder.

At the moment the mental disorder diagnostic criterion is fairly significant in a criminal justice context as there is no SIDMA test.

Our wider proposals may create a tension if applied in this area due to the historical requirement for 'mental disorder' to justify interference in rights. We explore some possible tensions below and are interested in views on this.

4.2. Criterion: SIDMA (or ADM)

A current difference between civil and forensic orders is the absence of a Significantly Impaired Decision-Making Ability (SIDMA) test. The Millan Committee had felt that the criteria for compulsion should be the same between these two sets of orders. However, the Scottish Government did not extend the SIDMA test to forensic patients in the final legislation. UNCRPD has since increased our focus on a person's autonomy and the need not to discriminate, and so we need to consider if there remains a justification for this difference.

The SIDMA test is currently used to justify intervention in the absence of the person's ability to consent. This test has been subject to some criticism and views are sought in the consultation on whether it should remain or not. Chapter 6 of our Consultation proposes a new test of Autonomous Decision Making (ADM), which could replace SIDMA as a justification for non-consensual treatment for mental disorder.

The continuing absence of any test of impairment of decision-making ability from the forensic criteria is likely to be problematic, particularly as the compulsion order may in some cases last significantly longer than any conventional criminal disposal.

However, the consequences of extending SIDMA or an ADM test to forensic patients need to be considered. A particular concern (which lies behind SIDMA not being part of the test at the moment) is that this could mean that a person who is acutely unwell but is able to make treatment decisions might not be able to access the mental health system, and would be placed or remain in prison instead.

There are a number of ways we could approach this:

1. We could keep things are they are. This would mean that the criteria for a compulsion order do not make any reference to decision-making ability.
2. We could make the provisions for a compulsion order the same as for a community treatment order, but allow transfers for treatment or hospital directions to take place without a requirement of impaired decision making.
3. We could look towards the changes made in Northern Ireland. Their Mental Capacity Act contains powers for involuntary admissions of forensic patients to hospital. However, treatment decisions need to be based on capacity to consent.
4. We could provide that prisoners could be treated as voluntary in-patients if this was appropriate to meet their needs.

We provisionally favour the second approach. If compulsion orders only last as long as the equivalent civil order can be justified, it reduces the risk that a person with a mental disorder may be disadvantaged by being transferred out of the prison system into the mental health system.

We are interested to hear what people think about whether SIDMA (or a similar requirement like ADM) ought to be added to the criteria for forensic orders. What consequences might there be to this? Should it be extended generally or just to a limited set of orders or circumstances?

4.3. Criterion: danger to self

While generally working towards greater standardisation between civil and forensic criteria, there is one area where we are seeking people's views on introducing a difference. This concerns the criterion around risk. Part of the test for the existing forensic orders is that, without medical treatment, there is a risk to the health, safety or welfare of the individual who has offended, or to the safety of any other person. The order can be made purely on the basis of assessed risk to the individual who has offended, even if they pose no risk to others. We would not want to prevent a patient receiving the appropriate medical care, but equally the imposition of an order from a criminal court, when the patient is not a risk to others, may not be appropriate. The criminal law does not typically act to prevent an individual from harming themselves.

We are interested in people's views on removing this element of the test for compulsion orders. What difficulties may arise? (We are not considering this for transfer for treatment or hospital directions – which we think more legitimately can relate to danger to self).

4.4. Criterion: severity

We propose that the criteria for forensic orders should require that the offence is one punishable by imprisonment. Currently, a compulsion order can only be made in relation to a conviction for an offence punishable by imprisonment. Given the common law basis of much of Scots law – where any offence can result in imprisonment - this does not amount to much of a restriction. Moreover, these only restrict the post-conviction disposals, other disposals are not so limited.

If a forensic order can deprive the individual who has offended of their liberty then we think that it should only properly be imposed after a finding in relation to a criminal act that would be punishable by imprisonment. Currently this applies in respect of people who are convicted, but not people who are found unfit to plead or acquitted by reason of mental disorder. Under s57 of the CPSA, these people can be given an order depriving them of their liberty even if they could not be imprisoned if convicted for the offence. We are not sure how this distinction can be justified and are

considering whether the same requirement should apply that they have been charged with an imprisonable offence.

If this change were to be made, this could be a justification for retaining supervision and treatment orders as an alternative. (See section 3 above).

5. Criteria for restriction orders

We propose that restriction orders be retained and do not propose any change of substance of the test for these. However, the wording of the criteria for these orders dates from the Mental Health (Scotland) Act 1960 and so could benefit from being expressed in more modern terms. Also, the requirement to consider the risk, as a result of a person's mental disorder, of them committing offences 'if set at large' is not sufficiently clear. Is the test if the individual who has offended is in the community with no supervision or supports, or is the test if the individual who has offended is in the community with a compulsion order in place, given the court is necessarily imposing a compulsion order on the individual who has offended when applying the test?

There is no comparable civil order to a compulsion order and restriction order (CORO) and nor are we proposing one. Despite some differences, the nearest comparator appears to be a prisoner subject to an Order for Lifelong Restriction (OLR). Among the differences is the element of a punishment part in an OLR which must be served before the person can be considered for release. We want to hear more however about the differences in the tests and procedures for imposing an OLR and a CORO. Those for the OLR are more highly regulated. Given the serious consequences of both disposals, we think a greater degree of regulation may be appropriate in relation to the imposition of restriction orders.

We are considering whether to limit the power to impose a restriction order to the High Court.

Ongoing management of people under forensic orders

6. Standardisation of effect

In the same way that we are inclined towards standardisation of entry criteria in each of the civil or forensic regimes, we want to look to standardise the effect of civil and forensic orders under the new system we propose. We are looking to minimise differences that do exist and avoid creating unnecessary differences in the proposals we are making elsewhere.

One justification for continued difference is that forensic patients will have committed a criminal act. This can range from the most serious to very minor offences. However, the risks posed by, and the clinical needs of, clinical and civil patients may be the same. It can often be a matter of chance whether a patient comes in to hospital subject to a compulsory treatment order or a compulsion order.

We need to consider whether the consequences of a mental health disposal can be out of proportion to the offence. We have heard that some offenders believe that highlighting a mental disorder may result in a loss of their liberty for a substantial time. The Barron Review heard from people progressing through inpatient forensic settings who felt that had they been subject to a criminal justice disposal they would have been handed a determinate sentence, served it and been released. This perception that an individual who has offended in the forensic mental health system can end up being detained for longer than if they had they been sent to prison is concerning from a UNCRPD compliance perspective.

We see the scope currently for disproportionality between offence and consequences – particularly at the less serious end of the spectrum. Mental health disposals are largely risk based so if a patient continues to pose a risk, they continue to be detained. This is the way mental health law operates in Scotland at the moment. In the criminal justice system that sort of indeterminate risk-based detention is reserved for the most serious or dangerous offending (i.e. life sentence and Order of Lifelong Restriction prisoners). Of course, the converse can also be true. Someone on a compulsion order may have committed a very serious act and regain their liberty in fairly short order if the risk that they pose is deemed low enough.

Our concerns around disproportionality centre on the possibility of lengthy and indefinite detention under a compulsion order (with or without restrictions), regardless of the severity of the index offence.

One possibility would be to time limit compulsion orders (as is the case for hospital directions) – so that, after a certain amount of time, the patient converts to civil detention or freedom. With restriction orders, there could be time related options for the additional restrictions. These could be applied in relation to the severity of the offence in the same way that is applied for criminal sentences. This could still allow for the equivalent of an indeterminate order where justified, as well as orders that stipulate a set time, or extended time. We have heard that a form of limiting term was used in the past in Scotland, but there were problems accessing the appropriate resources to sustain it. So we welcome people's thoughts on the need and implications of reintroducing this now.

Finally, like the Barron review before us, we consider there is a need for greater systematic data collection to proactively identify the way in which the forensic system may be disproportionately impacting those within it. This is both in terms of comparisons with individuals who have offended in the prison system, but also when comparing different groups within the forensic system, e.g. people with learning disability.

7. "Serious Harm" Test

Section 193(2) of the Mental Health (Care and Treatment) (Scotland) Act 2003 sets out the 'serious harm' test. In short, its effect is to prevent substantive consideration of the case of a patient who has a mental disorder if "as a result of the patient's mental disorder, it is necessary, in order to protect any other person from serious harm, for the patient to be detained in hospital, whether or not for medical treatment". If the "serious harm" test in this context is met then the Mental Health Tribunal for Scotland has to make no order.

This test was introduced by emergency legislation in 1999. It was a legislative fix intended only to apply to a very limited number of untreatable highly dangerous patients. It continues however to be applied in a number of cases and in more expansive ways than intended. This is despite guidance in its use set down by the

court in B (2010 SC 472). The Millan Committee recommended it not be carried over into our current legislation. It said that, if it had to be retained as a transitional measure for a small group of high risk patients, it should be drawn in precise terms to ensure that it did not extend beyond this group. Parliament, however, decided to retain the test.

In Rooman v Belgium (2019), the European Court of Human Rights strongly suggested that treatability should be a requirement for detention in terms of Article 5(1)(e). As such, we are concerned that the arguments accepted in the Reid case (Reid v UK 2003 ECHR 94) for retaining this provision would not be accepted today. Our system is currently set up on the basis that patients are treatable. Our hospitals are founded on making patients better, not merely keeping them somewhere. The availability of hospital directions should mean that people who present a danger even after recovery from any treatable mental disorder can be given a criminal justice disposal but still receive appropriate mental health care.

However, there may be fears that the abolition of the test may result in the release of seriously dangerous patients into the community.

We believe that the test is being applied beyond its intended application, and should be done away with, or significantly restricted. Various approaches have been suggested, including:

- Straightforward abolition
- Abolition for any patients sentenced after the change in the law
- Restricting the test to patients at the State Hospital
- Allowing for a case to be referred back to a court for resentencing if it becomes clear that a compulsion order is not appropriate if, for example, it is established that there is no treatable mental disorder.

We are interested in views on these, or possible alternatives.

8. Restricted Patients

A key way in which forensic orders differ from civil orders is the role that Scottish Ministers have in the ongoing management of restricted patients. The Millan

Committee originally recommended ending the Ministerial role in relation to restricted patients.

The 2003 Act did reduce the role of Scottish Ministers to some extent. The responsibility for discharge decisions was given to the Mental Health Tribunal. However, Scottish Ministers retain significant roles in respect of restricted patients. They are responsible for approving suspensions of detention and transfers. They have the power to recall and vary the conditions under which someone has been conditionally discharged. Scottish Ministers also have a duty to refer people's cases to the Tribunal if they are satisfied that the detention criteria no longer apply or the order needs to be varied.

We are looking at whether a human rights based approach supports Ministers taking decisions in relation to individual offenders other than in cases of recall and conditional discharge. We have received no evidence that Ministers do anything other than take their responsibilities seriously and discharge them with integrity. However, there always remains the risk that their decision making will be influenced by political considerations or public pressure in a way an independent or judicial body would not.

We welcome views on whether the Mental Health Tribunal should have a role in the recall of conditionally discharged restricted patients, and how such a role would work alongside the role of Scottish Ministers. In Section 7.1 below we ask for views on our proposal that the Mental Health Tribunal should be given the power to vary conditions of conditional discharge.

We welcome people's views on keeping or further reducing the current role of Scottish Ministers in the ongoing management of people's progression through the forensic system. This includes suggestions for which bodies should more appropriately take any of these roles on.

8.1. Conditional discharge: power to vary

In 2009, the court considered decisions the Mental Health Tribunal had made in the cases of NG & PF (2009 SC 510). The court concluded that the Mental Health Tribunal does not have the power to vary the conditions on which they have conditionally discharged a restricted patient. It was clear that, if a patient has been conditionally discharged, any variation to their conditions can only be done by

Scottish Ministers (under section 200). There is then an appeal available to the Mental Health Tribunal in relation to any change.

We think that the Mental Health Tribunal should have the power to vary the conditions in respect of which a patient has been conditionally discharged. It seems to us to be appropriate that a judicial body has that power. We welcome people's views on this. We are interested to hear views on whether this power should sit alongside the existing power of Scottish Ministers or whether all decisions on variations should go through the Mental Health Tribunal.

8.2. Conditional discharge: deprivation of liberty

In 2008, the Supreme Court considered the case of the Secretary of State v MM (2018 UKSC 60). It decided that a patient could not be conditionally discharged when the conditions of discharge amounted to a deprivation of liberty. There is an argument that this case ought not to be followed in Scotland as it relies at least in part upon the specific statutory scheme of the (English) 1983 Act. However, there remain unanswered concerns that, if tested in court, the Mental Health Tribunal in Scotland may also not be able to discharge a patient into conditions that amount to a deprivation of liberty. It is not helpful to have doubt or confusion about the position.

We think that there are circumstances where being able to do this may be appropriate and ECHR compliant, if legislated for (e.g. to allow discharge to an intensive community care placement from hospital). We think the Mental Health Tribunal should have the power to conditionally discharge a patient into conditions that amount to a deprivation of liberty if it considers that appropriate and a number of conditions are met. Critically, the Tribunal must be aware and make explicit that they are discharging the person into a legislative scheme which meets the requirements for lawful deprivation of liberty. There must also be regular reviews with the Tribunal given sufficient powers to alter the conditions.

9. Cross-border transfers

We know that the differences in current legislation across UK jurisdictions already makes cross border transfers between forensic systems difficult. We acknowledge that any increased divergence between legislative frameworks, which our own proposals may result in, has the potential to further exacerbate this. We would like

to know if this would result in any practical problems. We do not propose to refrain from change to avoid additional difficulty in this area but it is worth keeping it in mind in the changes we propose. Cross-border dialogue is important and must continue.

10. Duty on Scottish Ministers

We know that there are people who find themselves "stuck between two stools" in terms of not being seen as suitable for prison by the prison authorities and not being seen as suitable for hospital by the hospital authorities. Scottish Ministers would be responsible for prisoners both in prison and if transferred. We are considering a duty on the Scottish Ministers to ensure that people are accommodated in a place which is safe and appropriate for their needs. This may also require more flexibility in the test for transfer for treatment directions in section 136.

Mental Health Tribunal for Scotland powers

Section 8 above has already considered whether the Mental Health Tribunal should have a role in the recall of restricted patients. In this section, we set out some further proposals for changes to the powers of the Mental Health Tribunal.

11. Recorded matters

Recorded matters are one of the two main differences between a compulsion order and a compulsory treatment order. (The other is the absence of a SIDMA test for a compulsion order). In our main consultation paper, we have set down our proposals for strengthening the Mental Health Tribunal's power to grant 'recorded matters'. This would allow the Tribunal to require relevant bodies to provide such care and support as is required to avoid the need for an individual's compulsion, or ensure that any necessary compulsion respects the human rights of the patient.

We feel that recorded matters in this strengthened form should also be allowed for forensic orders.

12. Appeals against conditions of excessive security

The Barron Review recommended that the right to make an application to the Mental Health Tribunal against conditions of excessive security should be extended to people in low secure units. The Scottish Government has committed to giving this 'thorough consideration', while also wishing to take account of any recommendations made by our Review. In Chapter 8 of our main consultation document we agree that these appeal provisions need to cover people in low secure settings. We are proposing that all patients subject to compulsion should have the right to appeal against being subjected to unjustified restrictions.

We also propose that such appeals should extend beyond the right to move to a less restrictive care or treatment setting. We propose that people should also have the right to challenge the level of restrictions in place within an appropriate setting.

We intend these proposals to cover people under either forensic or civil orders, and welcome any views on this.

In 2015, amendments were made to excessive security appeal provisions. One introduced the need for any appeal to be supported by a medical report by an approved medical practitioner. This was proposed by the Scottish Government to ensure that the appeals could operate effectively. We are questioning whether an individual's right to make an application against excessive security appeals should continue to be linked to a medical professional's opinion in this way.

We are keen to hear people's thoughts on removing the limitation to these appeals. This includes any unintended consequences we would need to address.

Voting rights

Advocacy groups who responded to the Barron Review called for an end to the lack of voting rights for people in the forensic mental health system. We welcome any views people have on this.