

The Crime (Sentences) Bill and the Crime and Punishment (Scotland) Bill: provisions for mentally disordered offenders

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The *Crime (Sentences) Bill* [Bill 3 of 1996/97] and the *Crime and Punishment (Scotland) Bill* [Bill 5 of 1996/97] include new provisions for mentally disordered offenders in England, Wales and Scotland. This paper summarises how the courts currently deal with those suffering from mental disorder who commit criminal offences, and describes the proposed new "hybrid order" under which such an offender could receive both a prison sentence and immediate treatment for their mental disorder in hospital.

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I Summary

Clauses 36-39 of the *Crime (Sentences) Bill* introduce a new power for the courts when dealing with mentally disordered offenders in England and Wales. This power, known as a "hospital direction", would enable courts both to sentence offenders suffering from mental disorder (as defined in the *Mental Health Act 1983*) to prison, and at the same time to direct that they should be detained in hospital for medical treatment connected with their disorder. Clauses 5-10 of the *Crime and Punishment (Scotland) Bill* introduce similar provisions for Scotland.

Although the proposals are similar in both jurisdictions, the structure of mental health legislation differs between England and Scotland. For the sake of clarity, this paper is therefore divided into two parts, the first dealing with the English and Welsh provisions and the second with the Scottish.

II England and Wales

A. Introduction

At present, courts have two main choices when dealing with offenders who are suffering from a mental disorder, as defined in the *Mental Health Act 1983*, that is from "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind". They can either decide that the offender is "mad" and therefore in need of treatment, or "bad" and deserve to be punished. In the first case, the offender may be detained in hospital for treatment under the *Mental Health Act 1983*; in the second they will be sent to prison. While it is possible for prisoners to be transferred from prison to hospital for treatment, the courts cannot stipulate this in advance when sentencing an offender to a prison term. The Government is now proposing a new "hybrid order", under which the court could both set a sentence and require the patient to be detained for treatment in a hospital, thus combining the principles of punishment and treatment in one disposal.

B. Current provisions

1. Hospital and restriction orders

Under section 37 of the *Mental Health Act 1983*, a court can send a mentally disordered offender to hospital through a "hospital order" for any offence, apart from one with a fixed penalty (in practice, murder), as long as a number of conditions are met:

- the offender must have been convicted of the offence (or magistrates must be satisfied that s/he was guilty); and
- two doctors, of whom one must be "approved" (ie a specialist in mental health), must state that the individual is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and
- the disorder must be "of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment"; and
- in the case of psychopathic disorder or mental impairment the treatment should be likely to alleviate or prevent a deterioration of the condition; and
- a bed must actually be available in the hospital in question within the next 28 days.

Offenders detained under a hospital order effectively pass out of the penal system into the hospital system and their position is very similar to that of "civil" (non-offender) patients: after six months they must be released unless the authority to detain is renewed; the doctor responsible for their care (their responsible medical officer or RMO) or the hospital managers may discharge them at any point; and if their detention is renewed after six months they may apply to the Mental Health Review Tribunal for their case to be reviewed. The penal system has no further say in their disposal.

"Restriction orders" under section 41 of the 1983 Act, on the other hand, can be imposed on top of an ordinary hospital order by a court, either for a definite period of time or for an unlimited period. While the person is a restricted patient, they cannot be discharged, transferred to another hospital or given leave of absence by the RMO without the Home Secretary's permission. The evidence required for restriction orders is the same as for hospital orders and the court must be satisfied that the restrictions are necessary for the protection of the public. The authority to detain the patient lasts until the restriction order has been lifted, or the Home Secretary has agreed to discharge; there is no need for regular renewal as there is under the civil detention procedures or under a non-restricted hospital order. A patient might therefore be detained indefinitely under a restriction order.

However, a restricted patient still has the right to apply to a Mental Health Review Tribunal to have their detention renewed; they may do this once in the second six months of their first year's detention, and once in any subsequent year of detention. If the Tribunal is satisfied either that the patient is not suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment to the extent that detention in hospital for treatment is appropriate, or that such treatment is not necessary for the health and safety of the patient or the protection of other people, it must order the patient's discharge, either absolutely or with conditions (s.73). The conditions imposed on the patient are at the discretion of the Tribunal, but usually require the patient to live in a particular place, accept supervision and attend for medical treatment (though they cannot be forced to accept treatment). Where the patient is discharged under conditions, then they may be recalled by the Secretary of State at any time; however, where they are discharged absolutely, there is no further provision for recall.

2. Transfer and restriction directions

Under section 47 of the 1983 Act, the Home Secretary may order convicted prisoners to be transferred from prison to hospital if they are suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and if their disorder is of a nature or degree where hospital treatment would be appropriate. Where the prisoner is suffering from psychopathic disorder or mental impairment, then the transfer can only take place if the treatment is likely to alleviate or prevent a deterioration of the condition. Such a transfer

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direction has the same effect as a hospital order and, again, unless the order is subject to restrictions, effectively the person passes from the penal system to the healthcare system. The detention can only last 6 months, unless the conditions for renewal are satisfied, and the RMO or hospital managers may discharge the patient at any time.

However, most transfers under section 47 are also accompanied by restrictions under section 49 of the 1983 Act. Where a patient is transferred in this way under a "restriction direction", then the patient cannot be discharged by the RMO or hospital managers, transferred to another hospital, or granted leave of absence without the permission of the Home Secretary. The authority to detain the patient lasts for as long as the restriction direction is in force; however the restriction direction ceases to have effect once the term of the person's original sentence (including any remission) has expired (s.50). Once the restrictions have lapsed, then the detained patient is in the same position as some-one transferred without restrictions (as described above) and hence can be discharged at any time.

Under sections 42 & 49 of the 1983 Act, the Secretary of State is able to lift the restrictions, discharge the patient from hospital with conditions, or discharge the patient absolutely. If a patient is discharged conditionally, then they can be recalled to hospital at any time while the restriction order is still in force. The RMO of a patient subject to restrictions must submit a report at least every year to the Home Secretary so that the latter is informed about the condition of the patient. If the RMO or any other registered medical practitioner notifies the Home Secretary that the patient no longer needs hospital treatment for their mental disorder, but their original term of sentence is not yet expired, then the Home Secretary can return the person to prison or use powers to release them on licence or discharge them under supervision in the same way as if the person had never been transferred from prison in the first place (s.50).

Under section 70 of the 1983 Act, patients under a restriction direction are also able to apply to the Mental Health Review Tribunal in the same way as those under a restriction order. If the Tribunal is satisfied either that the patient is not suffering from mental disorder to the extent that detention in hospital for treatment is appropriate, or that such treatment is not necessary for the health and safety of the patient or other people, then it must notify the Home Secretary. The Home Secretary then has the option of returning the patient to prison to complete the rest of their sentence, continuing to detain them in hospital (if the tribunal recommends this as preferable to prison) or permitting the tribunal to grant an absolute or conditional discharge (ss 73 & 74).

C. Proposals for change

1. The working group on psychopathic disorder

The idea of a form of "hybrid order" combining a prison sentence and a hospital order was put forward in 1994 by a Home Office working group on psychopathic disorder chaired by Dr. John Reed (the "Reed report").¹ The group's report included a section commenting on the problems arising with both hospital orders and transfer directions for those suffering from psychopathic disorder. Given both the lack of agreement as to what constitutes psychopathic disorder and the lack of evidence as to whether or not it is treatable, the working group felt that it was "illogical and naive" for the courts routinely to send such offenders to hospital under hospital orders on the assumption that they would be successfully treated and would not be discharged until they no longer represented a risk. The psychiatric profession was also increasingly concerned about the indeterminacy of these orders, and felt that transfer from prison to hospital after sentence was more appropriate, "enabl[ing] the courts to impose the appropriate tariff for the offence". At the same time the working group raised the problem of the "uncertainties and complications" which sometimes arose over the transfer from prison to hospital under sections 47 & 49 of the 1983 Act and which could lead to delay in offenders receiving the treatment they needed.

A hybrid order could be seen as a way round both these problems: a specific sentence would be set, appropriate to the offence, but hospital treatment would be immediately available, avoiding the need for administrative action to transfer the prisoner from prison after sentence. The report emphasised that there need be no automatic assumption that the patient would be remitted to prison; if they responded to treatment then they could move through the hospital system and be discharged from hospital either on their release date or possibly earlier. However, if the offender did not respond to treatment, there would then be the option of sending them to prison to serve the remainder of their sentence, instead of continuing to detain them in hospital with little hope of improvement, or of discharging them while still a possible risk to the public.

The working party went on to cite both the advantages and disadvantages they foresaw in such an order. The advantages included:

- consistency with the Government policy that mentally disordered offenders should be treated in the health care system wherever possible;

¹Dept of Health/Home Office, *Report of the Department of Health and Home Office working group on psychopathic disorder*, 1994

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- overcoming psychiatrists' concerns about being left with a potentially dangerous patient for whom further treatment would be useless, but whose discharge could lead to dangers to public safety;
- the possibility that the availability of such an order would lead to greater consistency in placing psychopathically disordered offenders;
- the fact that it reflected the current state of knowledge of psychopathy and would provide a flexible framework for treatment;
- no greater risk to the public than current provisions.

The disadvantages included:

- the lack of certainty in the order which could cause difficulties in hospital treatment;
- the view that it was wrong to treat offenders with psychopathic disorder differently from other mentally disordered offenders, especially given difficulties of diagnosis;
- inconsistency with current sentencing practice whereby an offender convicted of a serious offence who was judged to be dangerous on account of their mental state was likely to receive a life sentence;
- the view that current arrangements for the health and social care of restricted patients after discharge provided effective controls and safeguards.

While some members of the working group raised concerns over both the principles and practicalities of a hybrid order, the great majority concluded that there was "considerable merit" in the idea of such an order and recommended that the proposal be discussed more widely.

2. The Home Office and Department of Health discussion paper

On 3 May 1996, the Home Office and the Department of Health published a joint discussion paper, *Mentally disordered offenders: sentencing and discharge arrangements*, taking up the suggestion of a hybrid order. In addition to the current options of a hospital order or a prison sentence, courts would in future be able to choose to make a "hospital direction", combining both an immediate direction to hospital with a prison sentence. The offender would therefore be sent directly to hospital, where they would remain either until the end of their sentence, or until such time as treatment was no longer needed or was no longer effective. Where treatment was deemed to be no longer necessary or effective, then the offender could be remitted to prison to serve the remainder of their sentence there. The discussion document

envisaged that while in hospital, the same arrangements for review of detention and application to a Mental Health Review Tribunal would apply as for those transferred from prison. Such an order would be different from a hospital order in that the courts could both specify hospital treatment and at the same time ensure that there was a punitive element "to reflect the offender's whole or partial responsibility"; it would also differ from a transfer direction in that the offender could receive treatment in hospital straight away without the need for administrative action to arrange the transfer from prison. In the press notice announcing the discussion paper's publication, Home Office Minister Ann Widdecombe MP summarised the rationale behind the proposals as follows:

"The public has a right to expect to be protected from dangerous offenders. These proposals will increase that protection.

For the first time courts would be able to pass a prison sentence at the same time as directing treatment in hospital. The power would be used in cases where the offender had significant responsibility for the crimes committed, or where the danger posed was not solely related to mental disorder."²

These proposals differ in some important respects from those made by the working party chaired by Dr. Reed. While the latter related solely to psychopathic disorder (with its associated issue of treatability), the discussion paper suggests that a hospital direction should be available for *all* categories of mental disorder covered by the 1983 Act, that is mental illness, mental impairment, psychopathic disorder and severe mental impairment. While acknowledging that questions of "treatability" rarely arise in these other forms of mental disorder, the Government felt it would be inappropriate for the availability of a hybrid order to be dependent on a diagnosis of psychopathic disorder, especially since the borderline between the legal categories of mental disorder are often felt to be unclear and diagnosis may vary from doctor to doctor. The discussion paper goes on to suggest that the courts are well placed to make the necessary judgements about responsibility, rehabilitation and risk, and should be given the freedom to make the most appropriate disposal in individual cases. Another difference between the discussion paper and the Reed report is the former's focus on the need for a *punitive* element in the disposal of a mentally disordered offender; the main rationale behind the Reed report, on the other hand, appears to have been the problem of dealing with psychopathic offenders for whom hospital could not necessarily provide a "cure". Indeed, the Reed report suggested that patients detained under a hospital direction who responded to treatment could be discharged even before their release date, while in the discussion paper the assumption appears to be that such offenders would be remitted to prison to complete their sentence.

²Home Office press notice 130/96, 3 May 1996

3. Interim hospital orders

In addition to the proposals on hospital directions, the discussion paper also suggested that the maximum period for "interim hospital orders" under section 38 of the 1983 Act should be extended from 6 months to 12 months. Under existing provisions, convicted offenders may be sent to hospital by courts under these interim orders, in order to give doctors the opportunity to assess whether a full hospital order would be appropriate. The Reed working group had suggested that the maximum 6 month period should be extended in order to allow for a fuller assessment of offenders' treatment needs, and this proposal was taken up in the discussion paper.³

D. The Bill

The *Crime (Sentences) Bill*⁴ was introduced into the Commons on 24 October 1996. Clauses 36-39 would effect, with some amendments, the proposals for hospital directions and interim hospital orders made in the discussion paper.

Clause 36 of the Bill would insert a new section 45A in the *Mental Health Act 1983*, giving Crown Courts the power to give "hospital directions" and "limitation directions" to convicted offenders. Under a hospital direction, the offender, instead of being detained in prison for the period of their sentence, may instead be detained in hospital; the limitation direction will ensure that all the restrictions set out in section 41 of the 1983 Act also apply so that the offender may not be discharged, transferred to another hospital or given leave of absence by their responsible medical officer without the Home Secretary's permission. This use of two directions (one to send the offender to hospital and one to impose restrictions) mirrors the structure of restricted hospital orders and restricted transfer directions elsewhere in the 1983 Act; however, the combined effect of both orders is the same as that proposed in the discussion paper under the single name "hospital direction".

Section 45B, also inserted by clause 36 of the Bill, then states that a hospital direction would have the same effect as a transfer direction and a limitation direction the same effect as a restriction direction (see above, pp 7-8). In other words, although the offender is being sent straight to a hospital, rather than to prison, once in the hospital they are treated as if they had been transferred from prison, and if treatment is found no longer to be effective they can be remitted back to prison to complete their sentence. All the provisions in the 1983 Act

³Dept of Health/Home Office, *op.cit.* para 10.29

⁴Bill 3 of 1996/97

covering prisoners transferred from prison to hospital under transfer and restriction directions would also apply to prisoners detained in hospital under hospital and limitation directions.

Courts will be able to make hospital and limitation directions in the following circumstances:

- the offender has been convicted in a Crown Court of an offence for which the sentence is not fixed by law (s.45A(1)); and
- the court has considered the possibility of making an hospital order, before deciding instead to impose a sentence of imprisonment (with the exception of offences covered by clause 1 of this Bill, that is second serious sexual or violent offences, where this requirement need not be met); and
- the offender is suffering from psychopathic disorder (s.45A(2)); and
- the mental disorder is of a nature or degree which makes it appropriate for them to be detained in hospital for medical treatment; and
- such treatment is likely to alleviate or prevent a deterioration of their condition.

At least two registered medical practitioners must give evidence to the court on the medical criteria above, and at least one of these practitioners must give this evidence orally before the court (ss 45A(2) & 45A(4)). Moreover, the court must be satisfied that a bed in the hospital named in the direction must be available within the next 28 days (s.45A(5)). If during the following 28 days it becomes impracticable for the patient to be admitted to the named hospital, then the Secretary of State has the power to give instructions for them to be admitted to another appropriate hospital instead (ss 45A(6) & (7)). Existing powers under the 1983 Act to impose interim hospital orders on offenders (to enable an assessment of their condition to be made) and to require information from Health Authorities on the availability of suitable beds also apply to hospital and limitation directions (s.45A(8)). Hospital and limitation directions may also be applied in connection with other sentences of imprisonment imposed on the same or a previous occasion (s.45A(9)).

Although the above amendments to the 1983 Act refer only to psychopathic disorder and not to other forms of mental disorder, ss 45A(10) & (11) would give the Secretary of State the power to make an order extending these provisions to other forms of mental disorder; the order could include such "supplementary, incidental or consequential provisions as appear to the Secretary of State to be necessary or expedient".

Clause 37 would amend the 1983 Act to give the courts the power, in certain circumstances, to specify not only the hospital to which an offender should be sent, but also the unit within the hospital. The clause would apply to restricted hospital orders under sections 37 & 41 of

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the 1983 Act, to hospital and limitation directions under section 45A of the 1983 Act, to restricted transfer directions under sections 47 & 49 of the 1983 Act and to orders for admission to hospital under paragraphs 1 & 2(1)(b) of Schedule 1 to the *Criminal Procedure (Insanity and Fitness to Plead) Act 1991*.

Clause 38 would bring into effect Schedule 3; this Schedule would make amendments to the 1983 Act and to the *Mental Health (Scotland) Act 1984* to enable prisoners who have been conditionally discharged after a restriction direction or restriction order to be transferred between England and Wales, Scotland, Northern Ireland and the Channel Islands and Isle of Man.

Clause 39 makes a number of further amendments to the 1983 Act. Section 38(5) of the 1983 Act would be amended so that the maximum period for interim hospital orders (which enable courts to send offenders to hospital in order to assess whether a full hospital order would be appropriate) would be extended from 6 months to 12 months (clause 39(1)). Restricted patients may not be transferred between different hospitals managed by the same NHS trust or Special Health authority, without the permission of the Home Secretary (clauses 39(2) & (4)).

Financial effects of the Bill

The Bill's explanatory memorandum states that in the first "phase" of hospital directions, when they are available only for those suffering from psychopathic disorder, any additional costs for the NHS "will be contained within existing resources". Before an order is introduced to extend the power to other forms of disorder, an assessment of the costs will be made with the Department of Health. The NHS Trust Federation was reported in the *Health Service Journal* as being concerned about the possible financial impact on the NHS, with an estimate of £48 million a year in additional costs.⁵ The BMA raised similar concerns in its response to the discussion paper, estimating that each place could cost the NHS upwards of £70,000 a year.⁶

⁵"Trusts attack £48m cost of Home Office prison plans", *Health Service Journal*, 27 June 1996 p.10

⁶BMA, letter to Home Office in response to the discussion paper, dated 1 July 1996

E. Comment

1. In Parliament

The proposals have been welcomed by the Labour Party; Jack Straw MP, speaking in the Fourth Day Debate on the Queen's Speech stated that:

"We support other proposals in the Bill, including ... a new and long overdue provision for mentally disordered offenders."⁷

The Liberal Democrats did not make specific reference to this part of the Bill in the debate.

2. Voluntary organisations

A number of organisations representing mentally ill people have expressed concerns over the principle of hospital directions, as set out in the discussion paper. The organisations SANE (Schizophrenia - A National Emergency), MIND (the National Association for Mental Health) and NSF (the National Schizophrenia Fellowship) all raised concerns over the principle of regarding people as "culpable" for actions committed when suffering from psychosis or when unable to exercise ordinary control over their behaviour. SANE, for example, states that "a humane society should not move towards attributing culpability to those who are victims of mental illness",⁸ while NSF suggests that a wider debate is needed on notions of culpability and the need for punishment for offenders who may be mentally ill.⁹ MIND's paper setting out its initial views on the discussion document similarly states that while it does not necessarily follow from the fact that someone suffers from "mental disorder" that they are not responsible for their actions, there may well be cases where this is so.¹⁰ It goes on to express concern that decisions about the defendant's responsibility for their actions will be made by the judge, suggesting that a fairer system would be for such a judgement to be made at the trial and not at the sentencing stage. The Law Commission, for example, had suggested that a new defence of "not guilty on evidence of mental disorder" could be returned where at the time of the act the defendant was suffering from severe mental illness or severe mental

⁷HC Deb 28 October 1996 cc 353-4

⁸SANE, *Summary of SANE's policy on the White Paper proposals on the introduction of hybrid orders*, n.d.

⁹NSF press notice, 3 May 1996

¹⁰MIND, *Mentally disordered offenders: sentencing and discharge arrangements: MIND's views on the joint Home Office and Department of Health discussion paper on a proposed new power for the courts*, n.d.

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handicap.¹¹ Both MIND and NSF go on to suggest a number of alternative ways current provision could be improved: for example through a greater emphasis on prevention through better community support, more emphasis on court diversion schemes and, for those whose dangerous behaviour is not linked with mental disorder, improved care and medical treatment in prison.

SANE, MIND and NSF also express grave concerns over the therapeutic effect on the offender of knowing that once they were "cured" they could be remitted to prison, rather than released. They argue that this is cruel for the patient, is likely to cause difficulties for the professionals working with offenders, and may lead to a "revolving door" scenario where offenders improve in hospital, are remitted to prison, relapse and have to be transferred back to hospital again.¹² MIND also argues that the proposals appear to be based on a misunderstanding of the scope of the powers already in existence. One reason given in the discussion document for the new power is that present powers are insufficiently flexible to cope with cases where the offender is in need of treatment but where it is not certain that such treatment will sufficiently address the risk to the public posed by the defendant. MIND rejects this view, claiming that if what is meant by inadequate protection of the public is a lack of security in psychiatric hospitals, then the new hospital direction will add nothing; if, on the other hand, the discussion document is referring to offenders being a danger after release, then it is MIND's view that restriction orders under sections 37 & 41 of the Act are more than adequate to protect the public. MIND goes on to argue that a few cases where decisions to discharge patients from restriction orders have, with hindsight, been seen to be bad decisions should not be used to give a false impression of the existing powers; in fact a restriction order may be "similar in effect to and no less punitive than a discretionary life sentence". It is suggested that, in practice, offenders under hospital orders often spend longer in hospital than they would have done in prison and may even prefer the prison regime to that in a psychiatric hospital.

SANE further raises the issue of "treatability", stating that it does not subscribe to the argument that psychopathic disorders are "untreatable" and that further research should be directed towards forms of treatment for this condition.

Finally, NSF and MIND raise the practical issue of the availability of suitable hospital places; new legislative provisions are meaningless if the beds presupposed by the legislation are not available. There is certainly regular press coverage of the difficulties experienced by doctors attempting to find in-patient beds for mental health patients; the *Independent*, for example, reported very recently how six mental health patients, five of whom were considered to be

¹¹Law Commission, *Draft Criminal Code Bill*, clause 35(1), Law Com. No 177

¹²SANE & NSF, *op. cit.*; "Horrible hybrids", *Openmind*, Sept/Oct 1996 pp 13-15

dangerous, were turned away in one week by hospitals and clinics in west London.¹³ Surveys from the Royal College of Psychiatrists have demonstrated bed occupancy in excess of 120% in some London inner city areas¹⁴, while in its latest report the Mental Health Act Commission raised concerns over pressure on in-patient beds with occupancy levels of over 100% being reported not only in London and the other main conurbations, but also in Devon, East Anglia and Cheshire.¹⁵ In a number of highly publicised cases in 1995, judges threatened to force the then Health Secretary, Virginia Bottomley, to come to court to explain the lack of suitable beds.¹⁶ A Department of Health report in June 1995¹⁷ also acknowledged problems with access to high security "Special Hospital" beds: because of problems moving patients on to less secure places when appropriate, high security beds are being blocked by those who no longer need them. This in turn blocks admission for new patients in need of the security provided in Special Hospitals. The report went on to announce changes in the structure of the Special Hospital service to encourage closer links and easier transfers between different levels of secure provision.

3. Professional bodies

In response to the discussion paper, the British Medical Association made a number of suggestions and comments on the detail of the proposed hospital directions, but made no objections to the principle behind them. It also supported the view that hospital directions should be available for offenders suffering from categories of mental disorder other than psychopathic disorder, on the grounds that mental illness may be accompanied by unrelated offending behaviour "which is unresponsive to treatment and so requires separate handling of that behaviour".¹⁸ On the negative side, the BMA expressed concern as to the suitability of detaining those who had committed a second serious sexual or violent offence in hospital. It also emphasised the need for adequate funding of hospitals, whether regional secure units, ordinary NHS units or private forensic hospitals, coping with the additional referrals as a result of hospital directions.

¹³"Violent patients turned away by full-up hospitals", *The Independent*, 25 October 1996 p.4

¹⁴Royal College of Psychiatrists, *Monitoring inner London mental illness services*, 19 April 1995

¹⁵Mental Health Act Commission, *Sixth Biennial Report 1993-1995* p.97

¹⁶eg "QC to argue Bottomley's bed case", *The Independent*, 9 February 1995 p.11 & "Bottomley takes on judges over summonses", *The Independent*, 14 February 1995 p.8

¹⁷Dept of Health, *High security psychiatric services: changes in funding and organisation*, June 1995

¹⁸BMA, letter to Home Office in response to the discussion paper, dated 1 July 1996

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The Royal College of Nursing, on the other hand, believes that the principle of hospital directions is in conflict with the therapeutic aims of hospital treatment. In its response to the Bill,¹⁹ it states that where an offence has been committed as the result of mental illness, then the aim should be to treat the offender, focussing on the possibility of a return to living in the community. Returning such a patient to prison would "only undermine the clinical and financial investment that will have been made in the person during their period of inpatient hospital treatment".

4. General comments

According to Baroness Blatch, Minister of State in the Home Office, 182 responses to the discussion paper were received.²⁰ 102 expressed support for the principle of a hospital direction; of these 24 felt that the power should be restricted to those diagnosed as suffering from psychopathic disorder. There was also "broad support" for the extension of interim hospital orders from 6 months to 12 months.

¹⁹RCN, Parliamentary Briefing 30 October 1996

²⁰HL Deb 28 October 1996 cc 9-10WA

III Scotland

A. Introduction

Under current provisions in the *Mental Health (Scotland) Act 1984* and the *Criminal Procedure (Scotland) Act 1995*, there are two main ways in which a court can deal with a convicted defendant suffering from mental disorder. Either the offender may be sent to hospital under a "hospital order" on the grounds that they are unwell and need treatment rather than punishment (s.58 of the 1995 Act), or they may be sent to prison. Once in prison, they may later be transferred to hospital under a "transfer direction" (s.71 of the 1984 Act), but the court is not empowered to specify this when sentencing. Current practice could thus be seen as classifying people as either "mad" or "bad" and sentencing accordingly (although it has also been argued that detention under the 1984 Act is certainly not experienced by patients as a soft option). The *Crime and Punishment (Scotland) Bill*²¹ which received its First Reading on 25 October 1996 would make a new "hybrid" order available to the courts, combining both elements of prison and hospital.

B. Current provisions

1. Hospital and restriction orders

Under section 58 of the 1995 Act, a court may send a mentally disordered offender to hospital for any offence, apart from one with a fixed penalty (in practice, murder), as long as a number of conditions have been met. Firstly, the grounds for compulsory hospital admission set out in section 17(1) of the 1984 Act must be met: two doctors (one of whom must be "approved" as having special experience of mental disorder) must satisfy the court that the offender is suffering from mental disorder of a nature or degree which makes it appropriate for them to receive medical treatment in hospital; where the mental disorder is either mental impairment or "a persistent [disorder] manifested only by abnormally aggressive or seriously irresponsible conduct" then the treatment must be likely to alleviate or prevent a deterioration of the offender's condition; and treatment in hospital must be necessary for the offender's own health and safety or the protection of others. In other words, detention in hospital must be likely to lead to some improvement in the offender's mental condition and not simply consist of containment; it must also be necessary for the protection of either the offender or the public. Secondly, the court must be satisfied that, given all the circumstances of the offence and the character of the offender, the most appropriate way of disposing of the case is by means of a hospital order.

²¹Bill 5 of 1996/97

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Once a hospital order has been made, the offender is treated, with only minor modifications, as if they had been detained in hospital as a "civil" (that is, non-offender) patient, under section 18 of the 1984 Act, and the penal system has no further say in their disposal. The detention only lasts 6 months, unless the authority to detain is renewed, and they can be discharged at any time by their responsible medical officer (RMO), the Mental Welfare Commission or, on appeal, by the sheriff.

However, under section 59 of the 1995 Act and section 62 of the 1984 Act, it is also possible for the court to make a "restriction order" in cases where it appears to the court that the offender might pose a serious danger to the public if released. Offenders detained in hospital under a restriction order may not be transferred to another hospital or given leave of absence by the RMO without the permission of the Home Secretary, and only the Home Secretary or the sheriff, on appeal, may order their discharge. There is no need for their detention to be periodically renewed, as in civil detention: the order remains valid indefinitely until the Secretary of State lifts the restrictions (in which case the offender will continue to be detained as an "ordinary" hospital order patient) or absolute discharge is ordered by the sheriff or the Secretary of State. It is also possible for the Secretary of State or sheriff to order a "conditional discharge"; in this case, the patient, although discharged from hospital, remains liable to recall until given an absolute discharge.

2. Transfer and restriction directions

Where offenders have been sentenced to imprisonment, section 71 of the 1984 Act permits them to be transferred to hospital under a "transfer direction". The criteria for such a transfer are the same as for civil admission under section 17(1) of the 1984 Act (see above p.19), and the decision to make the transfer is at the Secretary of State's discretion. A transfer direction has the same effect as a hospital order and, as with an ordinary hospital order, would lead to the offender passing out of the prison system into the healthcare system. However, most transfer directions are accompanied by "restriction directions" which have the same effect as the restriction orders described above. Moreover, although an offender under a restriction direction still retains the right to appeal to the sheriff, the sheriff does not have the power to order their conditional or absolute discharge. Instead, the sheriff must notify the Secretary of State that, apart from the restriction direction, conditional or absolute discharge would be appropriate. The Secretary of State may then decide to return the offender to prison to complete their sentence or exercise any power to release them on licence or discharge them under supervision as if they had never left prison. Where a conditional discharge would have been recommended, if the restriction direction were not in place, then the Secretary of State also has the option of keeping the offender in hospital if this is seen as preferable to returning them to prison.

C. Proposals for change

1. Hospital directions

The recent Scottish Office White Paper on crime, *Crime and Punishment*,²² includes a section on the powers available to courts when sentencing mentally disordered offenders. Describing the current system of hospital orders and prison sentences as one of "two extremes", it proposes a additional option for those deemed fit to stand trial and found guilty, but who are also sufficiently mentally ill to warrant hospitalisation at the point of sentencing. The White Paper emphasises that where a convicted offender has a genuine and enduring mental illness which can be treated in hospital and is the principal explanation or cause of the offending, then a hospital order will continue to be the most appropriate disposal. However, taking into account the seriousness of the offence, the offender's culpability and the need for public protection, the courts would have the additional option of making a "hospital direction": combining a prison sentence (either determinate or life) with an immediate order to hospital. Such a direction would have the same effect on the offender as the current transfer direction with restrictions (see p.20 above). The White Paper does not spell out precisely when it would expect a hospital direction to be made, but by implication this would be when the offender was deemed to be at least partially responsible for their actions and where therefore the court wished to impose punishment as well as treatment.

A "hybrid order" of this kind, combining prison sentence with direction to hospital, was proposed by a joint Home Office and Department of Health working party in 1994, chaired by Dr. John Reed²³ and brief reference to this proposal is made in the White Paper. However, there are significant differences between the original recommendation and the legislative proposals for both England and Wales²⁴ and Scotland. The working party's recommendations related only to those suffering from "psychopathic disorder", one form of mental disorder defined in the English *Mental Health Act 1983*, but which is not defined in the Scottish legislation. The Reed recommendations were based on concerns over the treatability of psychopathic disorder: there is currently little consensus either on what constitutes the disorder and how, or even if, it can be treated. Since a hospital order is predicated on the assumption that the offender is ill, in need of treatment and may ultimately be cured, hospitals may be unwilling to accept psychopathically disordered patients if it seems unlikely that treatment will lead to a safe discharge. The rationale behind the proposals in *Crime and Punishment*, on the other hand, appears to be primarily that of the need for combining a *punitive* element with a hospital order. This point is reinforced in the White Paper when it makes clear that

²²Cm 3302, June 1996

²³Dept of Health/Home Office, *Report of the Department of Health and Home Office working group on psychopathic disorder*, 1994

²⁴see Part II of this paper

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offenders would either stay in hospital until the end of their sentence, or would be remitted to prison to serve the remainder of their sentence if they responded to treatment.

2. Interim hospital orders

The White Paper also suggests amendments to "interim hospital orders" under section 53 of the 1995 Act. Under this section, a court may send an offender to hospital for up to six months in order for their treatment needs to be assessed and a judgement made as to their suitability for a full hospital order. The proposal in the White Paper is that this maximum period should be extended to 12 months. The Reed working group had made the same suggestion, on the basis that this would allow a fuller assessment of offenders' treatment needs.

D. The Bill

The proposals for a new "hospital direction" and the extension of interim hospital orders are included within the *Crime and Punishment (Scotland) Bill*, which had its First Reading on 25 October 1996.

Clause 5 of the Bill would amend the *Criminal Procedure (Scotland) Act 1995* ("the 1995 Act") by inserting a new section 59A. Under this section, the High Court or a sheriff court would have the power both to impose a sentence of imprisonment on an offender and at the same time authorise their detention in hospital under a "hospital direction". In order for such a direction to be made, two doctors (of whom one must be "approved" as having special experience in mental disorder) must satisfy the court that the conditions for detention in hospital set out in section 17(1) of the *Mental Health Act 1984* are met (see above, p.19); both doctors must agree on the form of mental disorder from which the offender is suffering; and a bed must actually be available in the specified hospital within the next 28 days.

Clause 6 would insert a new section 62A in the *Mental Health Act 1984* ("the 1984 Act"), defining the effects of a hospital direction. Essentially an offender under a hospital direction would be in the same position as a prisoner transferred from prison under a restriction direction (see above p.20): the authority to detain would remain in force until either the offender was remitted to prison, or until their sentence had come to an end; and they could not be transferred to another hospital or granted leave of absence without the permission of the Secretary of State. Once the sentence had come to an end, the hospital direction would also automatically lapse, but it would be possible for the offender to continue to be detained under the civil procedures if the criteria for detention were still met. Offenders under hospital directions would have the same right of appeal to a sheriff as patients under restriction

directions but, as with the latter, the sheriff would only be empowered to make a report to the Secretary of State and not to discharge them from hospital. The Secretary of State would then decide whether to keep them in hospital, remit them to prison, or exercise any power of releasing them on licence or discharging them under supervision which would have been exercisable if the offender had never left prison. This new section also makes provision for cases where it becomes impracticable for the hospital named in the direction to accept the patient within the requisite 28 days; the Secretary of State is empowered to specify an alternative suitable hospital.

Clause 7 removes the current restriction on the use of private hospitals for the detention of mentally ill remand prisoners.

Clause 8 gives a court, in certain circumstances, the power to specify not only the hospital to which the offender should be sent but also a unit within that hospital. This power applies only to disposals in case of insanity under section 57 of the 1995 Act, restricted hospital orders under sections 58 & 59 of the 1995 Act, hospital directions under section 59A of the 1995 Act and restriction directions under section 71 & 72 of the 1984 Act.

Clause 9 amends section 61 of the 1995 Act, to require at least one of the medical practitioners providing evidence as to an offender's mental state to be employed at the hospital where the offender is to sent. This will apply where courts are considering interim hospital orders, hospital orders, or hospital directions, and in cases where there is the possibility that the trial cannot go ahead because of the defendant's insanity.

Clause 10 extends the maximum period for an interim hospital order under section 53 of the 1995 Act from 6 months to 12 months.

Financial effects of the Bill

According to the Bill's explanatory memorandum, the provisions concerning mentally disordered offenders are expected to have a "negligible" financial effect, on the grounds that in virtually all cases offenders would otherwise have been detained in hospital under a hospital order or in custody with the possibility of a later transfer to hospital.

E. Comment

No specific reference to the provisions of the *Crime and Punishment (Scotland) Bill* dealing with mentally disordered offenders was made by Opposition parties during the debate on the Queen's speech. However, Jack Straw MP, speaking for the Labour Party, welcomed the equivalent measures for England and Wales.²⁵ The Scottish Association for Mental Health (SAMH) expressed firm opposition to the principle of combining punishment with treatment, stating that if a person is mentally ill when they committed an offence, then the appropriate response is not retribution but treatment. SAMH went on to call for a comprehensive policy review on the care and treatment of mentally disordered offenders in Scotland, in line with the similar review carried out in 1992 in England.²⁶ At the time of writing, other comments have not been received, although it seems likely that many of the comments on the English and Welsh provisions could also be applied to Scotland.

²⁵HC Deb 28 October 1996 cc 353-4

²⁶Department of Health & Home Office, *Review of health and social services for mentally disordered offenders and others requiring similar services*, Cm 2088, November 1992

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