



National Assembly for **Wales**  
Cynulliad Cenedlaethol **Cymru**

## **Mental Health Law Reform in Scotland and in England and Wales**

### **Abstract**

This paper contains an overview of the *Mental Health (Care and Treatment) (Scotland) Act (2003)* and provides a brief comparison with recent proposals to amend the *Mental Health Act 1983* for England and Wales.

The paper examines the background to the Scottish Act and outlines its key features. It also includes a bibliography of key mental health sources and details of the “see me” campaign, Scotland’s anti-stigma campaign.

**September 2006**





## **Mental Health Law Reform in Scotland and in England and Wales**

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## Executive Summary

The *Mental Health (Care and Treatment) (Scotland) Act 2003* [the Scottish Act] received Royal Assent on 25 April 2003. It has been in full effect since 1 May 2006.

The Scottish Act represents a significant difference in approach to mental health legislation when compared to the approach taken to date in England and Wales. Key features of the Act are:

- ◆ Guiding principles are included in the Act. These include the principles of reciprocity (compulsory treatment and care in return for safe and appropriate services) and benefit (whereby any intervention under the Act should be likely to produce a benefit to the service user which could not reasonably have been achieved without compulsory intervention).
- ◆ The introduction of advance statements whereby service users can set down their preferences for future care and treatment (if and when required) when well.
- ◆ The right to free, independent advocacy for all service users, regardless of whether they are currently subject to compulsory treatment.
- ◆ Service users are entitled to nominate a named person who will act as their next of kin in all matters relating to their mental health.
- ◆ Sectioning orders and appeals are now heard in the newly formed mental health tribunals rather than in sheriff courts, as had previously been the case.
- ◆ The introduction of community based compulsory treatment orders.
- ◆ New compulsion tests; the significantly impaired judgement test and likely therapeutic benefit test.
- ◆ The right to appeal against being held in excessive security.

The reaction to the Scottish Act has been broadly positive although a number of concerns have been expressed regarding the implementation process.

Meanwhile, in England and Wales, the UK Government has dropped its proposals for a new mental health act and now plans to amend the existing legislation (the *Mental Health Act 1983*). These amendments will include the introduction of community based compulsory treatment orders.

However, in most instances, the proposed amended Act will differ substantially from the Scottish Act. For example, there are no plans to include the right to advocacy, guiding principles, named persons or advance statements in the amended Act.

In addition, the passing into law of the *Government of Wales Act 2006* could have an impact on mental health legislation in Wales if the Assembly Government were to seek framework powers in this area as indicated by the Minister for Health and Social Services in March 2006.

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For all these reasons the Scottish Act provides an interesting case study of a devolved administration adopting a distinctive approach to mental health legislation.

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# Mental Health Law Reform in Scotland and in England and Wales

## 1. Introduction

### 1.1 *Mental Health Legislation*

At any one time as many as 1 in 6 adults in the UK are affected with a mental illness. At some time in their life, 1 in 4 people will seek help for mental health problems.<sup>1</sup> According to the Welsh Health Survey 2003-04, 9 per cent of all adults in Wales reported being treated for a mental illness at the time of the survey.<sup>2</sup> The 2004-05 survey showed the figure remaining static at 9 per cent. Most people who experience mental health problems will never need to be treated compulsorily as they will seek help and care voluntarily.<sup>3</sup>

Mental health legislation sets out the circumstances in which a person with a mental disorder can be treated without their consent and the safeguards that must be provided for them. Mental health law of this kind has existed in the UK since the early 19<sup>th</sup> century.<sup>4</sup>

### 1.2 *The Scottish Mental Health Act*

The *Mental Health (Care and Treatment) (Scotland) Act 2003* [the Scottish Act] received Royal Assent on 25 April 2003.<sup>5</sup> The Scottish Act represents an example of a devolved administration taking a different approach to mental health legislation to that taken so far in England and Wales. The lessons already learnt from the implementation process in Scotland may be pertinent to the process which England and Wales are currently embarking on in amending the *Mental Health Act 1983*.

### 1.3 *Changes to Mental Health Law in England and Wales*

Whilst Scottish mental health services, legal specialists and the Scottish Executive adapt to their new Act, change to mental health legislation is also about to occur in England and Wales. On 23 March 2006, the UK Government announced its decision to shelve plans to introduce a new Mental Health act for England and Wales.<sup>6</sup> Two draft versions of a Mental Health Bill were published in 2002 and 2004. Both draft Bills proved to be controversial and encountered resistance from pressure groups such as MIND.<sup>7</sup> Additionally, the Joint Committee of the two houses of parliament set up to scrutinise the detail of the 2004 draft Bill was critical of some of the UK Government's proposals.<sup>8</sup>

Instead of legislating for a new act, the UK Government now plans to amend existing legislation (the *Mental Health Act 1983*).<sup>9</sup> The amended 1983 Act will be substantially shorter than the Draft Mental Health Bill 2004, but will introduce some features of the draft

<sup>1</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. General Information* p1-4. <http://www.dh.gov.uk/assetRoot/04/13/57/08/04135708.pdf>

<sup>2</sup> National Assembly for Wales. Welsh Health Survey October 2003 – March 2004. 2005.

<http://www.wales.gov.uk/keypubstatisticsforwalesheadline/content/health/2004/hdw20041118-e.htm>

<sup>3</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. General Information* p1-4. <http://www.dh.gov.uk/assetRoot/04/13/57/08/04135708.pdf>

<sup>4</sup> Ibid.

<sup>5</sup> Scottish Executive. 2003. *An Introduction to The Mental Health (Care and Treatment) (Scotland) Act 2003*. Edinburgh: Scottish Executive. (p1) <http://www.scotland.gov.uk/Publications/2003/11/18547/29201>

<sup>6</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. General Information* p1-4. <http://www.dh.gov.uk/assetRoot/04/13/57/08/04135708.pdf>

<sup>7</sup> <http://www.mind.org.uk/News+policy+and+campaigns/Policy/announcementMHB.htm>

<sup>8</sup> House of Commons and House of Lords. 2005. *Joint Committee on Draft Mental Health Bill, Volume 1*. London: The Stationery Office.

<sup>9</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. General Information* p1-4. <http://www.dh.gov.uk/assetRoot/04/13/57/08/04135708.pdf>

Bill into the existing legislation.<sup>10</sup> The changes to the 1983 Act will centre on six key areas; supervised community treatment; definition of mental disorder; criteria for detention; Mental Health Review Tribunal; professional roles; and nearest relative.<sup>11</sup>

Plans to amend the 1983 Act (rather than introduce an altogether new act) have been cautiously welcomed by a number of pressure groups including the Mental Health Alliance which was particularly influential in opposing the draft 2004 Bill.<sup>12</sup> The Chief Executive of the Sainsbury Centre for Mental Health, said; *"The Government's decision to revise its plans for the Mental Health Act provide an important opportunity to bring forward a more workable alternative to its previous proposals. But the devil will be in the detail and some of the new plans are a cause for concern."*<sup>13</sup>

The White Paper, *Better Governance for Wales* (June 2005), outlined plans to enhance the legislative powers of the Assembly. There is potential for the National Assembly for Wales to seek powers to create legislation specifically tailored to its own mental health priorities. In March 2006 Brian Gibbons AM, Minister for Health and Social Services, stated: *"...looking at framework powers would be one of our options once we see the Bill [to amend the 1983 Act]"*.<sup>14</sup>

## 2. Background to the Scottish Mental Health Act 2003

The 2003 Scottish Act replaces the *Mental Health (Scotland) Act 1984*, which is broadly similar to the *Mental Health Act 1983* that applies in England and Wales.<sup>15</sup> The Act represents the most fundamental reform of Scottish mental health law in over forty years.<sup>16</sup>

The Scottish Act was passed following a lengthy legislative process during which the Bill was extensively scrutinised by the Scottish Parliament's committees. About 2,000 amendments were made before the Bill was passed and major changes were made in the Committee stages.<sup>17</sup> This complex and lengthy legislative process encountered criticism from some quarters, including a number of opposition Members of the Scottish Parliament.<sup>18</sup> Furthermore, the Act was developed with participation from service users and carers as well as the statutory and voluntary sectors.<sup>19</sup>

### 2.1 Pressure for Reform

Much of the Scottish Act's principles and features can be traced back to the 2001 report of the Millan Committee: *New Directions*.<sup>20</sup> The Rt. Hon. Bruce Millan, a former Secretary of

<sup>10</sup> Mental Health Act Commission. March 2006. *Mental Health Bill. Policy Briefing for Commissioners*. Issue 12, p1-19.

[http://www.mhac.org.uk/Pages/documents/policy\\_briefings/POLICY%20BRIEFING%20issue%2013%20March%202006.pdf](http://www.mhac.org.uk/Pages/documents/policy_briefings/POLICY%20BRIEFING%20issue%2013%20March%202006.pdf)

<sup>11</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. General Information* p1-4. <http://www.dh.gov.uk/assetRoot/04/13/57/08/04135708.pdf>

<sup>12</sup> Mental Health Alliance. April 2006. *Mental Health Alliance response to the Government's announcement of plans to amend the 1983 Act*. <http://www.mentalhealthalliance.org.uk/resources/documents/Allianceresponse.pdf>

<sup>13</sup> "Comments on the mental health announcement." *Community Care*. 23 March 2006.

<http://www.communitycare.co.uk/Articles/Article.aspx?liArticleID=53353&PrinterFriendly=true>

<sup>14</sup> RoP p31, 23 March 2006. Health and Social Services Committee, Statement by the Minister for Health and Social Services. <http://www.wales.gov.uk/assemblydata/N00000000000000000000000042898.pdf>

<sup>15</sup> PATRICK, H.J., July 2003. *Scottish Act may point way for mental health law reform*, Journal of Mental Health Law, p71-76.

<sup>16</sup> Scottish Executive Social Research. 2005. *Mental Health Law Research: Update and Agenda 2005-07*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47121/0020647.pdf>

<sup>17</sup> Ibid.

<sup>18</sup> Scottish Parliament. Official Reports 2003 - Session 1, 20 March 2003.

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-03/sor0320-01.htm>

<sup>19</sup> GRANT, S Dr., March 2004. *Towards implementation of the Mental Health (Care and Treatment) (Scotland) Act 2003*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47171/0013512.pdf>

<sup>20</sup> Millan Committee. *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984*. Scottish Executive. January 2001.



State for Scotland, led a group of experts who reviewed the 1984 Act and analysed the way forward for mental health legislation in Scotland.<sup>21</sup> Their conclusions (which were reached after lengthy and in-depth consultations with users and carers) form the backbone of the Scottish Act.<sup>22</sup> The Scottish Executive, commenting on the Act, said, "...the Act does contain a range of provisions which will give significant and meaningful effect to the Millan principles."<sup>23</sup>

Alongside the influential *New Directions* report, calls for reform to mental health legislation also came from pressure groups and service users themselves. Scotland has an active service users' movement, who worked alongside the Scottish Association for Mental Health (SAMH)<sup>24</sup> (the equivalent of MIND in England and Wales) in calling for reform for many years before the Scottish Act was passed.<sup>25</sup>

## 2.2 Devolved Scotland

The Scottish Parliament has taken forward a number of policies which diverge from the approach taken by Westminster.<sup>26</sup> The last few years have seen Scotland ban smoking in public places, establish free personal care for the elderly, and ensure that higher education remains free for domicile students studying at higher education institutions in Scotland. The *Mental Health (Care and Treatment) (Scotland) Act 2003* is another example of divergence in policy.<sup>27</sup>

## 3. The Guiding Principles of the Scottish Act

The Scottish Act includes a statement establishing ten guiding principles which should be 'taken into regard' in all decisions relating to the use of compulsory powers under the Act.<sup>28</sup> The statement reflects the principles identified by the Millan Committee.<sup>29</sup> Many in England and Wales support guiding principles, and the joint scrutiny committee on the draft 2004 Bill called for them to be incorporated into English and Welsh legislation.<sup>30</sup> However, the UK Government remains opposed to this.<sup>31</sup> Interestingly, guiding principles are included on the face of the *Mental Capacity Act 2005*.<sup>32</sup>

The guiding principles of the Scottish Act focus on the rights of the service user and his/her carer(s). They are designed to set the tone of the Act and guide its interpretation.<sup>33</sup> The principles are regarded by some as one of the Act's best features and have been lauded by, among others, SAMH and the National Schizophrenia Fellowship (NSF)

<sup>21</sup> PATRICK, HJ., July 2003. *Scottish Act may point way for mental health law reform*, Journal of Mental Health Law, p71-76.

<sup>22</sup> BERESFORD, P., "Scotland the Brave." *Community Care*, 27 January 2005. <http://www.communitycare.co.uk/Articles/2005/01/27/47887/Scotland+The+Brave.html?key=SCOTLAND%20AND%20BRAVE>

<sup>23</sup> Scottish Executive. 2003. *An Introduction to The Mental Health (Care and Treatment) (Scotland) Act 2003*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47063/0013755.pdf>

<sup>24</sup> [www.samh.org.uk](http://www.samh.org.uk)

<sup>25</sup> NEIL, S., SAMH, September 2005. *Implementation of the new Mental Health Act Presentation to Cross Party Group on Mental Health, Scottish Parliament*. <http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/mh-docs/ShonaNeil-SAMHPresentationSep05.pdf>

<sup>26</sup> "Brave new world for parliament", *The Guardian*, 2 November 2005. <http://society.guardian.co.uk/careers/story/0,,1606048,00.html>

<sup>27</sup> Ibid.

<sup>28</sup> PATRICK, HJ., July 2003. *Scottish Act may point way for mental health law reform*, Journal of Mental Health Law, p71-76.

<sup>29</sup> Ibid.

<sup>30</sup> FENNELL, P., 2005. *Protection! Protection! Protection! Déjà vu all over again. The Government Response to the Parliamentary Scrutiny Committee*. Journal of Mental Health Law, 13, 110-122.

<sup>31</sup> Mental Health Alliance. April 2006. *Mental Health Alliance response to the Government's announcement of plans to amend the 1983 Act*. <http://www.mentalhealthalliance.org.uk/resources/documents/Allianceresponse.pdf>

<sup>32</sup> *Mental Capacity Act 2005* (chapter 9). <http://www.opsi.gov.uk/acts/acts2005/20050009.htm>

<sup>33</sup> McDUGALL, S., 2005. *The New Mental Health Act: What's it all about – A Short Introduction*. Edinburgh: Scottish Executive. <http://www.samh.org.uk/assets/files/45.pdf>

Scotland.<sup>34</sup> Although not particularly controversial (as they simply set out accepted good practice) it is unusual to see such principles set out in full in legislation.<sup>35</sup>

### 3.1 *The Principles Themselves*

There are ten guiding principles on the face of the Scottish Act.<sup>36</sup> These are:

- ◆ Non-discrimination
- ◆ Equality
- ◆ Respect for diversity
- ◆ Reciprocity
- ◆ Informal care
- ◆ Participation
- ◆ Respect for carers
- ◆ Least restrictive alternative
- ◆ Benefit
- ◆ Child Welfare

A more detailed outline of the principles can be found in Annex A. Of particular importance and worthy of emphasis is the principle of reciprocity. A service user and member of the Millan Committee said, "*Reciprocity is of course the big principle.*"<sup>37</sup> The Scottish Executive introduction to the Act states that, with regards to reciprocity "*Where society imposes an obligation on an individual to comply with a programme of treatment of care, it should impose a parallel obligation on the health and social care authorities to provide safe and appropriate services...*"<sup>38</sup>

### 3.2 *Having Regard to Guiding Principles*

The Scottish Act requires decision-makers in mental health to 'have regard' to the guiding principles. In practice this means that whilst the guidelines should be considered in every instance, there is potential and freedom to depart from them if appropriate and necessary.<sup>39</sup>

The idea is that guiding principles should operate in a similar way to a code of practice for those whose work comes under the Act (i.e. clinical practitioners, tribunal members, social

<sup>34</sup> Scottish Association for Mental Health (SAMH), May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation*. SAMH Policy and Information – Briefing. 1-4. <http://www.samh.org.uk/assets/files/86.pdf>

<sup>35</sup> PATRICK, H.J., July 2003. *Scottish Act may point way for mental health law reform*, Journal of Mental Health Law, p71-76.

<sup>36</sup> McDOUGALL, S., 2005. *The New Mental Health Act: What's it all about – A Short Introduction*. Edinburgh: Scottish Executive. <http://www.samh.org.uk/assets/files/45.pdf>

<sup>37</sup> MORGAN, G., Highland Users Group. February 2004. *A Users View of the Mental Health Act*. Talk to ADSW Conference and Mental Health Nursing Conference.

<sup>38</sup> Ibid. p2.

<sup>39</sup> FENNELL, P., 2005. *Protection! Protection! Protection! Déjà vu all over again. The Government Response to the Parliamentary Scrutiny Committee*. Journal of Mental Health Law, 13, 110-122



workers etc.).<sup>40</sup> The Scottish Executive comments: "As a general rule, anyone who takes any action under the Act has to take account of the principles."<sup>41</sup>

Although the proposed amended 1983 Act in England and Wales will not include guiding principles there will be a code of practice in which guiding principles will appear.<sup>42</sup>

In Wales, the Adult Mental Health Services Strategy, which was published in 2001, features a set of principles (equity, empowerment, effectiveness and efficiency) which underpin the strategy.<sup>43</sup> These principles are quite similar to some of those contained within the Scottish Act. For example, the equity principle links closely to the Scottish Act's principles of non-discrimination, equality and respect for diversity, whilst the empowerment principle links to Scotland's participation and respect for carers principles.<sup>44</sup>

### 3.3 Significance of Scotland's Principles

Professor Phil Fennell (Cardiff Law School) has placed great importance on the educational and philosophical roles of legislation.<sup>45</sup> He argues; "Law...performs an educational or ideological role, and its tone and language is capable of promoting positive or negative images of mental disorder and mentally disordered people."<sup>46</sup> It is too early to assess whether the language and nature of the Scottish Act (exemplified by the principles) will effect a change in the wider cultural understanding of mental health in Scotland. SAMH has voiced concern that people are pinning their hopes on the principles to foster much needed cultural change in people's attitudes towards mental health. SAMH argues that rhetoric alone is unlikely to change people's attitudes and behaviour. Rather; "significant, concerted, focussed, resourced and concrete action is required to make that kind of difference."<sup>47</sup>

Nonetheless, it is interesting to examine the values implicit within the Scottish Act. Contrasts have been made by some commentators between the focus on patients' rights in the Scottish Act as opposed to the public safety agenda of both the Draft Mental Health Bills<sup>48</sup> (since dropped) and the proposed amended 1983 Act in England and Wales. For example, the Scottish Executive describes the purpose of mental health law as being; "...about securing benefits for, and protecting the rights of, people with mental disorder."<sup>49</sup> The briefing paper on amending the 1983 Act in England and Wales starts; "The objectives of these changes [amendments to the 1983 Act] are to: ensure that patients receive the treatment they need to protect them and the wider public from harm..."<sup>50</sup> A difference of focus is evident in the above statements.

<sup>40</sup> Scottish Association for Mental Health (SAMH), May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation*. SAMH Policy and Information – Briefing. 1-4. <http://www.samh.org.uk/assets/files/86.pdf>

<sup>41</sup> Scottish Executive. 2003. *An Introduction to The Mental Health (Care and Treatment) (Scotland) Act 2003*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47063/0013755.pdf>

<sup>42</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. Implementation* p1-3. <http://www.dh.gov.uk/assetRoot/04/13/57/09/04135709.pdf>

<sup>43</sup> National Assembly for Wales. *Adult Mental Health Services for Wales. Equity, Empowerment, Effectiveness, Efficiency*. Strategy Document. September 2001. <http://www.wales.nhs.uk/sites3/documents/438/adult%2Dhealth%2De%2Epdf>

<sup>44</sup> Ibid.

<sup>45</sup> FENNELL, P., 2005. *Protection! Protection! Protection! Déjà vu all over again. The Government Response to the Parliamentary Scrutiny Committee*. Journal of Mental Health Law, 13, 110-122

<sup>46</sup> Ibid. p117.

<sup>47</sup> NEIL, S., SAMH, September 2005. *Implementation of the new Mental Health Act Presentation to Cross Party Group on Mental Health, Scottish Parliament* <http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/mh-docs/ShonaNeil-SAMHPresentationSep05.pdf>

<sup>48</sup> FENNELL, P., 2005. *Protection! Protection! Protection! Déjà vu all over again. The Government Response to the Parliamentary Scrutiny Committee*. Journal of Mental Health Law, 13, 110-122

<sup>49</sup> Scottish Executive. 2003. *An Introduction to The Mental Health (Care and Treatment) (Scotland) Act 2003*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47063/0013755.pdf>

<sup>50</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. General Information* p1-4. <http://www.dh.gov.uk/assetRoot/04/13/57/08/04135708.pdf>



A service user commented on Scotland's guiding principles; *"The principles that underlie it [the Act] reinforce and make crystal clear the need to respect us and treat us as fellow humans deserving of dignity and respect, entitled to participate and have a say in what happens to us at all points in our treatment."*<sup>51</sup>

## 4. Key Features of the Scottish Act

The Scottish Act introduced a number of changes to previous mental health legislation applicable in Scotland. The most significant features of the Act are outlined below. This is by no means a comprehensive list and is designed purely to introduce readers to the Scottish Act. Further reading sources are detailed in the bibliography (Annex B). Also included as an Annex is an outline of Scotland's anti-stigma campaign on mental health; "see me". This can be found in Annex C.

### 4.1 Advance Statements

The Scottish Act introduced advance statements.<sup>52</sup> These are designed to enable service users to plan preferred care and treatment options to be adopted in the case of future episodes of illness. Advance statements must be made whilst service users are well enough to state future treatment preferences and will only come into force if users become too unwell to make decisions about their treatment themselves. Professionals must have regard to advance statements. This is additional to the duty on doctors and other mental health professionals to have regard to the past and present wishes and feelings of the patient.<sup>53</sup>

#### 4.1.1 Reaction to Advance Statements

Advance statements, in principle, were welcomed by service user groups and pressure groups although doubts were expressed from an early stage about their likely practical usage. A representative of the Highland Users Group commented; *"...we were very pleased to hear about the development of advance statements...the idea that we can have a great influence, when well, on our future treatment is so appealing and reassuring but, when we look at our membership, we find that very few of us have adopted them."*<sup>54</sup> SAMH echoes these concerns, claiming that there has been poor take-up of advance statements.<sup>55</sup>

In England and Wales, there are no plans to include advance statements in the amended 1983 Act, but advance statements will be included in the Code of Practice.

#### 4.1.2 Advance Statements in Practice

Where the tribunal, or a person discharging functions under the Act (such as a doctor or social worker), makes a decision which conflicts with the advance statement, they must record this in writing, stating how the treatment conflicted with the patient's requests, and

<sup>51</sup> MORGAN, G., Highland Users Group. July 2006. *A Users View of the Mental Health Act – 9 Months On. Talk to Royal College of Psychiatrists Annual Conference.*

<sup>52</sup> Scottish Executive. 2005. *The New Mental Health Act: A guide to advance statements.* Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/26350/0012826.pdf>

<sup>53</sup> Scottish Executive. 2003. *An Introduction to The Mental Health (Care and Treatment) (Scotland) Act 2003.* Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47063/0013755.pdf>

<sup>54</sup> MORGAN, G., Highland Users Group. July 2006. *A Users View of the Mental Health Act – 9 Months On. Talk to Royal College of Psychiatrists Annual Conference.*

<sup>55</sup> "New Scottish laws encounter problems." *Community Care*, 15 June 2006.

<http://www.communitycare.co.uk/Articles/2006/06/15/54604/New+Scottish+laws+encounter+problems.html?key=NEW%20AND%20SCOTTISH%20AND%20LAWS%20AND%20ENCOUNTER%20AND%20PROBLEMS>



the reasons behind the treatment decision.<sup>56</sup> Statistics published by the Mental Welfare Commission, examining the first three months of the Act, indicate that it was notified of 10 instances where advance statements were overridden in terms of the Act.<sup>57</sup> As advance statements can be overturned it is important that they are seen to add value to users' care and treatment if they are to become widely used. Some service user groups have expressed scepticism that their advance statements will be respected by relevant professionals.<sup>58</sup> On the other hand, SAMH has argued that the very process of making an advance statement is valuable as it, "...has the potential to be positive and empowering".<sup>59</sup>

## 4.2 Right to Independent Advocacy

The Scottish Act makes provision for free independent advocacy for all service users.<sup>60</sup> According to the Scottish Executive, independent advocacy is one way to enable service users to make their voices stronger and to ensure that they have as much control as possible over their lives and the decisions which affect them.<sup>61</sup> The Scottish Act makes provision for both individual advocacy (where the service user is partnered with a professional or volunteer on a one to one basis) and group advocacy (where service users join independent advocacy groups with people in similar situations to themselves), also known as collective and self advocacy).<sup>62</sup>

This element of the Act is aimed at ensuring that all those with mental illnesses have easy access to advocacy to assist them in any decision making process or tribunal procedure. A duty is placed on each local authority and health board to ensure the provision of independent advocacy services to any person with a mental disorder within their area.<sup>63</sup> Advocacy is available to all those with a mental illness, dementia, learning disability or personality disorder, regardless of whether or not they are currently in hospital or subject to a compulsion order.<sup>64</sup> Non-means tested, free legal aid is available to all those who are treated under the Act to pay for legal representation for tribunal hearings.<sup>65</sup>

### 4.2.1 Implementing the Right to Advocacy

The biggest barrier to full implementation of advocacy for all is the lack of resources. Concern has been voiced regarding the availability of sufficient advocacy services (of a high enough quality) to meet the demand which the new Act creates.<sup>66</sup>

### 4.2.2 Advocacy in England and Wales

<sup>56</sup> Scottish Executive. 2003. *An Introduction to The Mental Health (Care and Treatment) (Scotland) Act 2003*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47063/0013755.pdf>

<sup>57</sup> Scottish Association for Mental Health (SAMH)., May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation*. SAMH Policy and Information – Briefing. 1-4 <http://www.samh.org.uk/assets/files/86.pdf>

<sup>58</sup> Highland Users Group. 2004. *Aspects of the New Mental Health Act*. Inverness: Highland Community Care Forum.

<sup>59</sup> Scottish Association for Mental Health (SAMH)., May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation*. SAMH Policy and Information – Briefing. 1-4 <http://www.samh.org.uk/assets/files/86.pdf>

<sup>60</sup> McDUGALL, S., 2005. *The New Mental Health Act: What's it all about – A Short Introduction*. Edinburgh: Scottish Executive. <http://www.samh.org.uk/assets/files/45.pdf>

<sup>61</sup> Scottish Executive. 2005. *The New Mental Health Act: A guide to independent advocacy*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Publications/2005/12/02144347/43475>

<sup>62</sup> Ibid.

<sup>63</sup> Scottish Executive. 2003. *An Introduction to The Mental Health (Care and Treatment) (Scotland) Act 2003*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47063/0013755.pdf>

<sup>64</sup> Mental Health (Care and Treatment) (Scotland) Act 2003. S259.

<sup>65</sup> McDUGALL, S., 2005. *The New Mental Health Act: What's it all about – A Short Introduction*. Edinburgh: Scottish Executive. <http://www.samh.org.uk/assets/files/45.pdf>

<sup>66</sup> NEIL, S., SAMH, September 2005. *Implementation of the new Mental Health Act Presentation to Cross Party Group on Mental Health, Scottish Parliament*. <http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/mh-docs/ShonaNeil-SAMHPresentationSep05.pdf>



Campaigners in England and Wales have called for independent advocacy to be made a legal right under the amended 1983 Act.<sup>67</sup> The Draft Mental Health Bill 2004 included plans to establish a right to advocacy for people detained under mental health legislation. However, the Government is not planning to include this provision in the amended Act.<sup>68</sup> The Director of Action for Advocacy, responding to the Government's decision to drop the advocacy provision in the amended Act, said; "We are just stunned. What may well have happened here is the worst parts of the draft Bill will find their way into an amended Act and the best parts won't."<sup>69</sup> The Mental Health Alliance has already promised to lobby the Government to include a right to advocacy in the amended Act.<sup>70</sup>

### 4.3 Named Persons

Under the Scottish Act service users can nominate a named person who will act as their next of kin in all matters relating to their mental health.<sup>71</sup> The named person will have to be informed and consulted about aspects of the patient's care should they be treated under the Act.<sup>72</sup> The nominated person can be a friend, carer, family member or fellow service user. The emphasis is on the user choosing someone they can trust.<sup>73</sup> If the user is being treated voluntarily their named person has no rights or powers.<sup>74</sup> If users do not nominate a named person their primary carer or nearest relative will automatically become their named person.<sup>75</sup> The named person and the patient are entitled to act independently of each other and on occasions their views and wishes may conflict.<sup>76</sup>

The proposed amendments to the 1983 Act in England and Wales will not introduce a named person but will continue to operate a system of nearest relative, with some adjustments. In particular, service users will be able to apply to displace their nearest relative but will have to go through the County Court system in order to do so.<sup>77</sup>

### 4.4 Introduction of Mental Health Tribunals

The Scottish Act changes the way in which long-term compulsory treatment orders are applied for and all compulsory orders are appealed against, by introducing mental health tribunals. These replace the old system whereby compulsory orders (and appeals) took place in a Sheriff Court. Tribunals are often held in hospitals themselves or local authority buildings and are designed to be less intimidating and formal than the old system where patients appeared in court.<sup>78</sup> Each tribunal has three members; a legally qualified person, a doctor with experience in mental health and a third person with relevant skills and experience. In some instances the third person is themselves a service user or carer. Decisions are made by majority verdict.<sup>79</sup>

<sup>67</sup> "Where will he receive better care?", *Community Care*, 27 January 2005.

<http://www.communitycare.co.uk/Articles/2005/01/27/47918/Where+Will+He+Receive+Better+Care.html?key=MENTAL+AND+HEALTH+AND+LAW>

<sup>68</sup> "Groups ready to fight after accusing Government of advocacy 'betrayal'." *Community Care*. 13 April 2006.

<http://www.communitycare.co.uk/Articles/Article.aspx?liArticleID=53578&PrinterFriendly=true>

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> Mental Health (Care and Treatment) (Scotland) Act 2003. S250.

<sup>72</sup> Scottish Executive. 2004. *The New Mental Health Act: A guide to named persons*. Edinburgh: Scottish Executive.

<http://www.scotland.gov.uk/Resource/Doc/26350/0012825>

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Scottish Association for Mental Health (SAMH), May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation*. SAMH Policy and Information – Briefing. 1-4. <http://www.samh.org.uk/assets/files/86.pdf>

<sup>76</sup> Scottish Executive. 2003. *An Introduction to The Mental Health (Care and Treatment) (Scotland) Act 2003*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47063/0013755.pdf>

<sup>77</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. Nearest Relatives*. p1-3. <http://www.dh.gov.uk/assetRoot/04/13/54/37/04135437.pdf>

<sup>78</sup> McDOUGALL, S., 2005. *The New Mental Health Act: What's it all about – A Short Introduction*. Edinburgh: Scottish Executive. <http://www.samh.org.uk/assets/files/45.pdf>

<sup>79</sup> Mental Health (Care and Treatment) (Scotland) Act 2003.S21.



SAMH welcomed the tribunals' introduction, praising them as a major improvement on the previous system where decisions were made in Sheriff Courts.<sup>80</sup> The Highland Users Group (HUG) voiced the mixed responses of their members; some found the tribunals a better environment, whilst others saw them as still confrontational and legalistic and hence not dissimilar from the old sheriff court system.<sup>81</sup>

#### 4.5 Community Based Compulsory Treatment Orders

Possibly the most controversial and unpopular feature of the Scottish Act was the introduction of community based Compulsory Treatment Orders.<sup>82</sup> SAMH has been particularly vocal in voicing concern regarding Community Treatment Orders, querying the evidence base for their introduction and raising questions over how they will work in practice.<sup>83</sup> Concern has also been expressed that community based Treatment Orders will result in more people being subject to compulsion.<sup>84</sup> As a briefing paper from HUG said, "There are... a large number of people who feel very strongly that a Community Treatment Order is further erosion of freedom, autonomy and independence on an already oppressed section of the population. They feel that the whole idea is completely unacceptable."<sup>85</sup>

##### 4.5.1 What Community Based Compulsory Treatment Orders Mean

The legislation makes provisions for those living in the community, with serious mental health problems, to be treated compulsorily if an application by a mental health officer (for a community treatment order) is successful.<sup>86</sup> For instance, a Community Treatment Order might stipulate that a patient must accept medical treatment (such as medication), attend appointments with mental health professionals at specific times and remain resident at a particular address.<sup>87</sup> All Compulsory Treatment Orders, including those based in the community must be approved by a tribunal.<sup>88</sup> Of the 257 Compulsory Treatment Orders issued in the first three months of 2006, only 28 were community-based.<sup>89</sup>

##### 4.5.2 Relevance for England and Wales

<sup>80</sup> Scottish Association for Mental Health (SAMH), May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation*. SAMH Policy and Information – Briefing. 1-4. <http://www.samh.org.uk/assets/files/86.pdf>

<sup>81</sup> MORGAN, G., Highland Users Group. July 2006. *A Users View of the Mental Health Act – 9 Months On*. Talk to Royal College of Psychiatrists Annual Conference.

<sup>82</sup> "Where will he receive better care?", *Community Care*, 27 January 2005.

<http://www.communitycare.co.uk/Articles/2005/01/27/47918/Where+Will+He+Receive+Better+Care.html?key=MENTAL+AND+HEALTH+AND+LAW>

<sup>83</sup> NEIL, S., SAMH, September 2005. *Implementation of the new Mental Health Act Presentation to Cross Party Group on Mental Health*, Scottish Parliament. <http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/mh-docs/ShonaNeil-SAMHPresentationSep05.pdf>

<sup>84</sup> "Where will he receive better care?", *Community Care*, 27 January 2005.

<http://www.communitycare.co.uk/Articles/2005/01/27/47918/Where+Will+He+Receive+Better+Care.html?key=MENTAL+AND+HEALTH+AND+LAW>

<sup>85</sup> Highland Users Group. 2003. *The Scottish Mental Health Act: Community Treatment Orders*. Inverness: Highland Community Care Forum.

<sup>86</sup> Scottish Executive. 2003. *An Introduction to The Mental Health (Care and Treatment) (Scotland) Act 2003*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47063/0013755.pdf>

<sup>87</sup> Scottish Association for Mental Health (SAMH), May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation*. SAMH Policy and Information – Briefing. 1-4. <http://www.samh.org.uk/assets/files/86.pdf>

<sup>88</sup> McDOUGALL, S., 2005. *The New Mental Health Act: What's it all about – A Short Introduction*. Edinburgh: Scottish Executive. <http://www.samh.org.uk/assets/files/45.pdf>

<sup>89</sup> "New Scottish laws encounter problems." *Community Care*, 15 June 2006.

<http://www.communitycare.co.uk/Articles/2006/06/15/54604/New+Scottish+laws+encounter+problems.html?key=NEW%20AND%20SCOTTISH%20AND%20LAWS%20AND%20ENCOUNTER%20AND%20PROBLEMS>



This is of particular relevance as the proposed amended 1983 Act will introduce Community Treatment Orders to England and Wales.<sup>90</sup> Community Treatment Orders are controversial in England and Wales with organisations such as MIND and the Mental Health Alliance expressing concern with the Government's proposals.<sup>91</sup>

#### 4.6 Compulsion Tests

The Scottish Act has modified the grounds under which a person can be detained against their will for the purpose of receiving treatment for mental disorders. It has introduced two new tests; the significantly impaired judgement test and the likely therapeutic benefit test.

##### 4.6.1 The Significantly Impaired Judgement Test

Under the Act, compulsion is only permitted if a person's ability to make a decision about medical treatment has been impaired by their mental disorder.<sup>92</sup> Therefore, people who retain full decision-making capacity cannot be made subject to the Act.<sup>93</sup> There is a subtle but important difference between impaired judgement and lack of capacity as tests for compulsory treatment.<sup>94</sup>

*"The [significantly impaired judgement] test says that it should not be possible to take compulsory measures in the life of a person who has a mental illness, if their decision making ability in relation to treatment for that illness is unaffected by the illness. But if the illness has distorted the person's ability to decide on treatment, the person should be given the benefit of medical treatment and support. The test is perhaps less legalistic than the incapacity test."<sup>95</sup>*

##### 4.6.2 The Therapeutic Benefit Test

The therapeutic benefit test is designed to ensure that service users will only be compulsorily treated if there is evidence that they will benefit from the treatment they will receive and that such treatment is available. Therefore, in order for a service user to be made subject to compulsory powers, medical treatment has to be likely to be beneficial.<sup>96</sup>

##### 4.6.3 Criteria for Compulsory Treatment in England and Wales

The Joint Committee on the Draft Mental Health Bill 2004 called for the significantly impaired judgement test to be introduced in England and Wales and for the likely therapeutic benefit test to be retained.<sup>97</sup> This would have brought England and Wales into line with the system operating in Scotland.

<sup>90</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. Supervised Community Treatment* p1-3. <http://www.dh.gov.uk/assetRoot/04/13/54/35/04135435.pdf>

<sup>91</sup> Mental Health Alliance. April 2006. *Mental Health Alliance response to the Government's announcement of plans to amend the 1983 Act.* <http://www.mentalhealthalliance.org.uk/resources/documents/Allianceresponse.pdf>

<sup>92</sup> "Where will he receive better care?", *Community Care*, 27 January 2005.

<http://www.communitycare.co.uk/Articles/2005/01/27/47918/Where+Will+He+Receive+Better+Care.html?key=MENTAL+AND+HEALTH+AND+LAW>

<sup>93</sup> Ibid.

<sup>94</sup> PATRICK, HJ., November 2000 *Reviewing Scottish mental health law: any lessons for England and Wales?* *Journal of Mental Health Law*, p47-156.

<sup>95</sup> Ibid.

<sup>96</sup> "Where will he receive better care?", *Community Care*, 27 January 2005.

<http://www.communitycare.co.uk/Articles/2005/01/27/47918/Where+Will+He+Receive+Better+Care.html?key=MENTAL+AND+HEALTH+AND+LAW>

<sup>97</sup> FENNELL, P., 2005. *Protection! Protection! Protection! Déjà vu all over again. The Government Response to the Parliamentary Scrutiny Committee.* *Journal of Mental Health Law*, 13, 110-122

However, the UK Government rejected this recommendation and is not planning to include either of these compulsion tests in the amended 1983 Act.<sup>98</sup> It argues that an impaired judgement test would mean that some service users, at a grave risk to themselves and/or others, would have to go untreated if they are deemed able to make unimpaired decisions about their treatment.<sup>99</sup>

Criteria for detention in England and Wales will be based on the conditions that; “*treatment and detention is necessary*” and the “*patient has mental disorder of nature or degree that makes hospital treatment appropriate*”, alongside the appropriate treatment test. Under the amended 1983 Act, compulsion will require that appropriate treatment must be available (this will replace the so-called ‘treatability’ test).<sup>100</sup> Such a criterion has the potential to draw in a greater number of service users under the amended Act than the equivalent compulsion tests operable in Scotland and campaigners in England and Wales have warned that the Government’s plans could extend the use of compulsory treatment.<sup>101</sup>

The Mental Health Alliance would rather see the Government impose a therapeutic benefit test, similar to that which exists in Scotland.<sup>102</sup>

#### **4.7 Least Restrictive Option & Excessive Security**

The principles of the Scottish Act require that any use of compulsory measures should be the least restrictive option in the circumstances.<sup>103</sup> The legislation enables patients to appeal against excessive security. For instance, at any one time there are around 40 so-called ‘entrapped patients’ resident in Carstairs State Hospital (the high security psychiatric hospital in Scotland) who are assessed by their care team as not requiring the security level which this hospital provides.<sup>104</sup>

Since 1 May 2006, such patients can appeal under the Act to be moved to a facility with a lower, more appropriate level of security. There is a shortage of medium secure facilities in Scotland and this provision within the Act will put significant pressure on health boards to develop new facilities.<sup>105</sup> Both NSF (Scotland) and SAMH have welcomed the right to appeal against being held in conditions of excessive security.<sup>106</sup>

## **5. Reactions to the Scottish Act**

### **5.1 Reactions from Service Users and Pressure Groups in Scotland**

The response to the Act from service users has been largely positive, although some have expressed scepticism about how the Act will actually improve their day-to-day treatment for mental disorders. A service user said of the Act: “*[with the Act] we had produced something with a good balance between the principles that promote our rights to respect,*

<sup>98</sup> Department of Health. June 2006. *Briefing Sheet – The Mental Health Bill: Plans to amend the Mental Health Act 1983. The Criteria for Detention* p1-5. <http://www.dh.gov.uk/assetRoot/04/13/54/42/04135442.pdf>

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> “Draft Bill dumped but campaigners fear compulsion will still increase.” *Community Care*. 30 March 2006.

<http://www.communitycare.co.uk/Articles/Article.aspx?liArticleID=53391&PrinterFriendly=true>

<sup>102</sup> Mental Health Alliance. April 2006. *Mental Health Alliance response to the Government’s announcement of plans to amend the 1983 Act*. <http://www.mentalhealthalliance.org.uk/resources/documents/Allianceresponse.pdf>

<sup>103</sup> Mental Health (Care and Treatment) (Scotland) Act 2003. S13.

<http://www.opsi.gov.uk/legislation/scotland/acts2003/30013--b.htm#1>

<sup>104</sup> PATRICK, H.J., July 2003. *Scottish Act may point way for mental health law reform*, *Journal of Mental Health Law*, p71-76.

<sup>105</sup> Ibid.

<sup>106</sup> National Schizophrenia Fellowship Scotland. *NSF (SCOTLAND) AND THE NEW MENTAL HEALTH ACT*. 2005. [http://www.nsfscot.org.uk/what\\_we\\_do/mental\\_health\\_act.html?topic\\_id=28](http://www.nsfscot.org.uk/what_we_do/mental_health_act.html?topic_id=28)

*equality and participation in our treatment whilst acknowledging that at times we do need intervention against our will from those who care for us.*<sup>107</sup>

SAMH has been positive about the new Act, although expressing some reservations. It said; *“There is no doubt that the framework of the legislation, and the safeguards it provides, represent a major improvement on previous legislation.”*<sup>108</sup> Similarly, NSF Scotland have welcomed many aspects of the Act and say this view is shared by a wide and diverse range of organisations.<sup>109</sup>

### 5.1.1 Concerns over Implementation

Key stakeholders are watching the implementation process closely to gauge what real change the Act will effect. In particular, take up (and overturning) of advance statements and the workings of the tribunals are being examined. The Mental Welfare Commission in Scotland plays a key role in the monitoring process by working closely with those who are treated under the Act and by publishing relevant statistics.<sup>110</sup>

A number of specific concerns have been raised regarding the implementation of the Act, with SAMH producing a report which voiced concerns over the running of mental health tribunals, resource deficits for independent advocacy, and the use of advance statements.<sup>111</sup> Additionally, NSF Scotland has commented that it is worried that implementation of the Act will be hampered by services being unable to rise to the challenges which the Act's provisions create.<sup>112</sup> There is a widespread concern that lack of resources, in terms of service provision and staff time/capacity, will seriously undermine the Act's implementation.<sup>113</sup>

The implementation process will be vital to the success (or otherwise) of the Act in the long term. The Chief Executive of SAMH said, *“...there is tremendous potential for this Act to make a significant and very positive difference to the lives of people who use mental health services...however, we do fear that there is a real risk that implementation could go badly wrong.”*<sup>114</sup> Lessons which are learnt from the Scottish experience en route to full and effective implementation may well be of relevance to England and Wales as changes are made to mental health law.

<sup>107</sup> MORGAN, G., Highland Users Group. July 2006. *A Users View of the Mental Health Act – 9 Months On. Talk to Royal College of Psychiatrists Annual Conference.*

<sup>108</sup> Scottish Association for Mental Health (SAMH). May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation . SAMH Policy and Information – Briefing. 1-4.* <http://www.samh.org.uk/assets/files/86.pdf>

<sup>109</sup> National Schizophrenia Fellowship Scotland. *NSF (SCOTLAND) AND THE NEW MENTAL HEALTH ACT.* 2005. [http://www.nsfscot.org.uk/what\\_we\\_do/mental\\_health\\_act.html?topic\\_id=28](http://www.nsfscot.org.uk/what_we_do/mental_health_act.html?topic_id=28)

<sup>110</sup> [www.mwscot.org.uk](http://www.mwscot.org.uk)

<sup>111</sup> Scottish Association for Mental Health (SAMH). May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation . SAMH Policy and Information – Briefing. 1-4.* <http://www.samh.org.uk/assets/files/86.pdf>

<sup>112</sup> National Schizophrenia Fellowship Scotland. *NSF (SCOTLAND) AND THE NEW MENTAL HEALTH ACT.* 2005. [http://www.nsfscot.org.uk/what\\_we\\_do/mental\\_health\\_act.html?topic\\_id=28](http://www.nsfscot.org.uk/what_we_do/mental_health_act.html?topic_id=28)

<sup>113</sup> NEIL, S., SAMH, September 2005. *Implementation of the new Mental Health Act Presentation to Cross Party Group on Mental Health, Scottish Parliament* <http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/mh-docs/ShonaNeil-SAMHPresentationSep05.pdf>

<sup>114</sup> NEIL, S., SAMH, September 2005. *Implementation of the new Mental Health Act Presentation to Cross Party Group on Mental Health, Scottish Parliament* <http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/mh-docs/ShonaNeil-SAMHPresentationSep05.pdf>

## 5.2 Reactions from Others

The Act has been championed by many as a progressive piece of legislation which should improve the treatment and rights of those with mental disorders across Scotland. It is increasingly being held up as a case study with international relevance.<sup>115</sup>

Key stakeholders have watched the Scottish Act's passage and implementation closely as the England and Wales legislation is discussed and drawn up: *"Campaigners south of the border have been open about their preference for the Scottish Act and are keen for elements of it to be adopted in England and Wales."*<sup>116</sup> The view has been expressed that the development of the Scottish Act is viewed *"...with a degree of envy.."*<sup>117</sup>

A number of reports, from sources such as the Joint Committee on the Draft Mental Health Bill 2004 and the Mental Health Alliance have called for English and Welsh legislation to incorporate a number of the key areas of the Scottish Act,<sup>118</sup> in particular, advance statements, guiding principles and the advocacy right.<sup>119</sup> The Chief Executive of Hafal<sup>120</sup> (a mental health charity in Wales) went on a fact-finding trip to Scotland to find out more about the Act and to visit Hafal's sister organisation; NSF (Scotland). He said, *"The Scottish Act makes a genuine attempt to offer some reciprocal rights to treatment and care to balance compulsory treatment."*<sup>121</sup>

## 6. The implications of the Scottish Act

### 6.1 Contrasting the Scottish Act with the Proposed Amended 1983 Act (England and Wales)

There are a number of marked and significant points of difference between the Scottish Act and the proposed amended 1983 Act for England and Wales. The most obvious divergences include the provision for advance statements and free advocacy in Scotland (which will not be provided in England and Wales under current proposals) and the inclusion of guiding principles on the face of the Act in Scotland (whereas in England and Wales the principles will be incorporated in the Code of Practice). Additionally, the criteria for detention are markedly different in Scotland as opposed to in England and Wales, as is outlined in Section 4.6. Details of the proposed amendments to the 1983 Act are outlined in briefing sheets provided by the Department of Health. These are available online and links to them can be found in Annex B, the bibliography.

#### 6.1.1 The Philosophies of the Different Acts

Much has been made of the differing philosophies behind the Scottish and English and Welsh legislative changes. This is a contentious area and there is considerable

<sup>115</sup> NEIL, S., SAMH, September 2005. *Implementation of the new Mental Health Act Presentation to Cross Party Group on Mental Health, Scottish Parliament* <http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/mh-docs/ShonaNeil-SAMHPresentationSep05.pdf>

<sup>116</sup> "Where will he receive better care?"; *Community Care*, 27 January 2005.

<http://www.communitycare.co.uk/Articles/2005/01/27/47918/Where+Will+He+Receive+Better+Care.html?key=MENTAL+AND+HEALTH+AND+LAW>

<sup>117</sup> NEIL, S., SAMH, September 2005. *Implementation of the new Mental Health Act Presentation to Cross Party Group on Mental Health, Scottish Parliament* <http://www.scottish.parliament.uk/msp/crossPartyGroups/groups/mh-docs/ShonaNeil-SAMHPresentationSep05.pdf>

<sup>118</sup> FENNELL, P., 2005. *Protection! Protection! Protection! Déjà vu all over again. The Government Response to the Parliamentary Scrutiny Committee*. *Journal of Mental Health Law*, 13, 110-122

<sup>119</sup> Mental Health Alliance. April 2006. *Mental Health Alliance response to the Government's announcement of plans to amend the 1983 Act*. <http://www.mentalhealthalliance.org.uk/resources/documents/Allianceresponse.pdf>

<sup>120</sup> <http://www.hafal.org/english/main.php>

<sup>121</sup> Hafal. *Welsh Charity looks to Scotland*. Press Release.

[http://www.hafal.org/english/main.php?subaction=showfull&id=1088499771&archive=&start\\_from=&ucat=1&](http://www.hafal.org/english/main.php?subaction=showfull&id=1088499771&archive=&start_from=&ucat=1&)



disagreement over what both Acts represent philosophically. However, there is a general consensus that there is an identifiable difference in approach between the two Acts with the former placing substantive value on the rights of the service users themselves, whilst the latter's focus is more centred on public and patient safety.<sup>122</sup>

A leader in the Guardian, commenting on the Government's plans to amend the 1983 Act claimed: "...the main driver of the new Bill is a desire to appease a media-inspired concern over the risks that mental patients pose in the community."<sup>123</sup>

Similarly, an article in the Times on 10 July 2006 commented: "The Government has been promising a new mental health Act since it was elected. But every draft so far has mobilised the mental health charities into concerted opposition. What they want is better treatment, more equitably provided. What the Government appears to want is the right to lock up people with personality disorders in the manner that it held terrorist suspects after 9/11."<sup>124</sup>

By contrast, commentary on the Scottish Act has been rather different. For example, an article in Community Care magazine commented: "the Scottish Bill enjoyed a warmer reception [than the two draft Bills for England and Wales]. For the most part, this has been attributed to the Scottish legislation simply being better."<sup>125</sup>

## 6.2 The Scottish Act as a Case Study and Model

The Scottish Act is a useful case study when examining mental health law domestically and/or internationally. It has been argued that "...the 2003 Act can be regarded as a distinctively Scottish solution to a Scottish problem".<sup>126</sup>

The Act has attracted considerable interest abroad and will continue to do so as the implementation process progresses. The Scottish Act has attracted praise and comment from mental health professionals from as far afield as New Zealand.<sup>127</sup>

### 6.2.1 The Scottish Act's Implementation Process

The implementation of the Scottish Act was delayed by six months in order to give service providers more time to identify facilities and enact change.<sup>128</sup> Most of the Act came into effect on 5 October 2005 (rather than the planned date of April 2005), with the remaining provisions on a right of appeal against excessive security coming into effect on 1 May 2006.<sup>129</sup>

<sup>122</sup> BERESFORD, P., 27 January 2005. "Scotland the Brave." Community Care. <http://www.communitycare.co.uk/Articles/2005/01/27/47887/Scotland+The+Brave.html?key=SCOTLAND%20AND%20BRAVE> AND "No way to treat the mentally ill.": Letter to the Editor. The Sunday Telegraph. 13 July 2003. AND <http://www.mentalhealthalliance.org.uk>

<sup>123</sup> "Leader: Protecting patients and the public." *The Guardian*. 24 March 2006.

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<sup>125</sup> "Where will he receive better care?," Community Care, 27 January 2005.

<http://www.communitycare.co.uk/Articles/2005/01/27/47918/Where+Will+He+Receive+Better+Care.html?key=MENTAL+AND+HEALTH+AND+LAW>

<sup>126</sup> PATRICK, HJ., July 2003. *Scottish Act may point way for mental health law reform*, *Journal of Mental Health Law*, p71-76.

<sup>127</sup> FENNELL, P., 2005. *Protection! Protection! Protection! Déjà vu all over again. The Government Response to the Parliamentary Scrutiny Committee*. *Journal of Mental Health Law*, 13, 110-122

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<sup>129</sup> Scottish Association for Mental Health (SAMH), May 2006. *The Mental Health (Care and Treatment) (Scotland) Act 2003 – Views on Implementation . SAMH Policy and Information – Briefing*. 1-4. <http://www.samh.org.uk/assets/files/86.pdf>

Also of interest is the dedicated programme of mental health law research which has been established by the Scottish Executive to support the implementation of the new legislation.<sup>130</sup> This research programme is designed to play a role in ensuring that adequate and appropriate information is collected to enable the Executive and other agencies to monitor the Act.

### 6.3 *The Future of Mental Health Law in Wales*

The Joint Scrutiny Committee on the Draft Mental Health Bill (2004) identified Welsh mental health services as being significantly less developed than those in England. Brian Gibbons AM, Minister for Health and Social Services, made a statement on mental health in 2005 saying, "...we have a long way to go to modernise and improve adult mental health services across Wales."<sup>131</sup> This statement followed the publication of three separate reports which all suggested that there is considerable work to be done before the goal of having efficient, equitable and empowering mental health services across the whole of Wales can be achieved.<sup>132</sup>

Additionally, Wales' sparsely distributed population and bilingual nature were both noted by the Joint Committee as factors which bring specific challenges to the delivery of mental health services. The Committee argued that the standard of mental health services in Wales must be at least as good as it is now in England before the provisions of the draft Bill could be implemented.<sup>133</sup> Since then the Draft Bill has been shelved but similar issues may emerge with regard to the amended Act.

## 7. Conclusion

This research paper has been designed to provide an accessible outline of the key features of, and background to, the *Mental Health (Care and Treatment) (Scotland) Act 2003*.

In particular it has summarised the guiding principles which appear on the face of the Scottish Act and the features which distinguish the Scottish Act from the proposals to amend the *Mental Health Act 1983* for England and Wales. These include the Scottish Act's provisions for advance statements, named persons, the right to independent advocacy for all mental health service users, and new criteria for compulsory care and treatment (in particular, the significantly impaired judgement and therapeutic benefit tests).

Whilst Scotland beds down its new mental health legislation and tries to ensure that the implementation process goes smoothly, in England and Wales the details of the proposed amended *Mental Health Act 1983* are still being fleshed out. Campaigners in England and Wales are pressing the UK Government to include many of the above provisions from the Scottish Act in the amended *Mental Health Act 1983*.

Additionally, the *Government of Wales Act 2006* will come into effect in May 2007. The enhanced legislative powers which this Act introduces could impact on mental health policy in Wales, should the National Assembly for Wales choose to use legislative powers

<sup>130</sup> Scottish Executive Social Research. 2005. *Mental Health Law Research: Update and Agenda 2005-07*. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Resource/Doc/47121/0020647.pdf>

<sup>131</sup> RoP p69-84, 12 October 2005. Minister for Health and Social Services, Statement on Mental Health. <http://assembly/rop/ROP/Plenary%20Session/2005/October/rop051012fv7.pdf>

<sup>132</sup> As outlined in RoP p69-84, 12 October 2005. Minister for Health and Social Services, Statement on Mental Health.

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in this policy area. If this option is pursued, the Scottish Act may be seen as a useful example of a distinctive approach to mental health law.



## 8. Annex A – Guiding Principles of the Mental Health (Care and Treatment) (Scotland) Act 2003

There are ten guiding principles of the Scottish Act. These are:<sup>134</sup>

1. **Non-discrimination** – People with mental disorder should, wherever possible, retain the same rights and entitlements as those with other health needs.
2. **Equality** – All powers under the Act should be exercised without any direct or indirect discrimination on the grounds of physical disability, age, gender, sexual orientation, language, religion, or national, ethnic or social origin.
3. **Respect for diversity** – Service users should receive care, treatment and support in a manner that accords respect for their individual qualities, abilities and diverse backgrounds and properly takes into account their age, gender, sexual orientation, ethnic group, and social, cultural and religious background.
4. **Reciprocity** – Where society imposes an obligation on an individual to comply with a programme of treatment of care, it should impose a parallel obligation on the health and social care authorities to provide safe and appropriate services, including ongoing care following discharge from compulsion.
5. **Informal care** – Wherever possible, care, treatment and support should be provided to people with mental disorder without the use of compulsory powers.
6. **Participation** – Service users should be fully involved, so far as they are able to be, in all aspects of their assessment, care, treatment and support. Their past and present wishes should be taken into account. They should be provided with all the information and support necessary to enable them to participate fully. Information should be provided in a way which makes it most likely to be understood.
7. **Respect for carers** – Those who provide care to service users on an informal basis should receive respect for their role and experience, receive appropriate information and advice, and have their views and needs taken into account.
8. **Least restrictive alternative** – Service users should be provided with any necessary care, treatment and support both in the least invasive manner and in the least restrictive manner and environment compatible with the delivery of safe and effective care, taking account where appropriate of the safety of others.
9. **Benefit** – Any intervention under the Act should be likely to produce for the service user a benefit that cannot reasonably be achieved other than by the intervention.
10. **Child welfare** – The welfare of a child with mental disorder should be paramount in any interventions imposed on the child under the Act.

<sup>134</sup> This is taken from: McDOUGALL, S., 2005. *The New Mental Health Act: What's it all about – A Short Introduction*. Edinburgh: Scottish Executive. <http://www.samh.org.uk/assets/files/45.pdf>

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<sup>187</sup> [http://www.wales.gov.uk/servlet/HealthAndSocialServicesCommittee?area\\_code=37D6A89F00087B55000012140000000&document\\_code=N000000000000000000000000000000045018&p\\_arch=post&module=dynamicpages&month\\_year=5|2005](http://www.wales.gov.uk/servlet/HealthAndSocialServicesCommittee?area_code=37D6A89F00087B55000012140000000&document_code=N000000000000000000000000000000045018&p_arch=post&module=dynamicpages&month_year=5|2005)

<sup>188</sup> [http://www.wales.gov.uk/servlet/HealthAndSocialServicesCommittee?area\\_code=37D6A89F00087B55000012140000000&document\\_code=N000000000000000000000000000000045018&p\\_arch=post&module=dynamicpages&month\\_year=6|2006](http://www.wales.gov.uk/servlet/HealthAndSocialServicesCommittee?area_code=37D6A89F00087B55000012140000000&document_code=N000000000000000000000000000000045018&p_arch=post&module=dynamicpages&month_year=6|2006)

<sup>189</sup> [http://www.wales.gov.uk/servlet/HealthAndSocialServicesCommittee?area\\_code=37D6A89F00087B55000012140000000&document\\_code=N000000000000000000000000000000045811&p\\_arch=post&module=dynamicpages&month\\_year=10|2004](http://www.wales.gov.uk/servlet/HealthAndSocialServicesCommittee?area_code=37D6A89F00087B55000012140000000&document_code=N000000000000000000000000000000045811&p_arch=post&module=dynamicpages&month_year=10|2004)

<sup>190</sup> <http://www.wales.gov.uk/keypubstatisticsforwales/content/publication/health/2004/sdr82-2004/sdr82-2004.pdf>

<sup>191</sup> <http://www.wales.gov.uk/assemblydata/N000000000000000000000000000000045811.pdf>

<sup>192</sup> <http://www.wales.gov.uk/keypubrecordproceedings/content/hss-050504.htm>



- ◆ Wales Audit Office, October 2005. *Adult mental health services in Wales: A baseline review of service provision*. Cardiff: Wales Audit Office.<sup>194</sup>
- ◆ Welsh Assembly Government, October 2005. *Raising the Standard: The Revised Adult Mental Health National Service Framework and an Action Plan for Wales*.

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<sup>193</sup> <http://assembly/rop/ROP/Plenary%20Session/2005/November/rop051101fv7.pdf>

<sup>194</sup> [http://www.wao.gov.uk/assets/englishdocuments/Adult\\_Mental\\_Health\\_Services\\_Baseline\\_Review.pdf](http://www.wao.gov.uk/assets/englishdocuments/Adult_Mental_Health_Services_Baseline_Review.pdf)



#### **9.4 Further Information**

For further information and to keep up-to-date with latest developments see the web-links below:

Magazines & Journals:

- ◆ British Journal of Psychiatry: <http://bjp.rcpsych.org/>
- ◆ Community Care Magazine: [www.communitycare.co.uk](http://www.communitycare.co.uk)

Relevant Government Departments' Websites in England, Scotland and Wales:

- ◆ UK Department of Health Home Page:  
<http://www.dh.gov.uk/PolicyAndGuidance/HealthAndSocialCareTopics/MentalHealth/fs/en>
- ◆ Scottish Executive Mental Health Home Page:  
<http://www.scotland.gov.uk/Topics/Health/health/mental-health/intro>
- ◆ Welsh Assembly Government Mental Health Home Page:  
<http://new.wales.gov.uk/topics/health/improvement/mental/?lang=en>

## 10. Annex C – Scotland's "see me" Campaign

### 10.1 Background

In 2001, an alliance of five mental health organisations was set up to create a national anti-stigma campaign on mental health in Scotland. The alliance consists of Penumbra, the National Schizophrenia Fellowship (Scotland), the Royal College of Psychiatrists (Scottish division), SAMH and the Highland Users Group (HUG).<sup>195</sup> In the early stages of the alliance's work, they came up with the name 'see me' in a focus group discussion.

When the Scottish Executive launched its National Programme for Improving Mental Health and Well-being in October 2001, initial funding of £400,000 for the 'see me' alliance to run an anti-stigma campaign was announced as a key strand of the programme. Funding from the Scottish Executive has now been guaranteed at £650,000 per annum, set at this level until March 2008.

### 10.2 Methods

#### 10.2.1 Nature of Campaign

The 'see me' campaign has included a range of publicity campaigns, with specific ones aimed at tackling stigma in the work place and among young people. Use has been made of Bill board, television, cinema and radio advertising and each campaign has been assessed for its impact on its target audience. Campaigns are designed which integrate advertising, web, PR and distribution of materials.

Slogans employed in the various campaigns have included "see me...I'm a person not a label." and "see me. I'm a person, just like you". These slogans emphasise 'see me's key message, "People with mental health problems are ordinary people. So, look at the person. See beyond the label."<sup>196</sup>

#### 10.2.2 'see me' Volunteers

Of particular interest is the alliance's reliance on 'see me' media volunteers, individuals who themselves have mental health problems and are willing to speak out in the media about their experiences of stigma. This has been a distinctive element of the campaign as the emphasis is very much on personal stories and individual voices as a method to combat the clichéd and stigmatising generalisations that are often made about people who suffer from a mental disorder. The alliance believes that "personal testimony by those with first-hand experience of stigma is a powerful tool in any campaign to tackle prejudice".<sup>197</sup>

#### 10.2.3 Approach

This is coupled with a creative approach which is actively informed by community development practice and engaging key audiences at every stage. 'see me' proactively works to involve those people whose attitudes towards mental health their anti-stigma campaigns are trying to influence.

<sup>195</sup> "Tackling the attitude problem." *Mental Health Today*. March 2005. p22-25.

<sup>196</sup> [www.seemescotland.org.uk](http://www.seemescotland.org.uk)

<sup>197</sup> [www.seemescotland.org.uk](http://www.seemescotland.org.uk)



The creative process takes the campaign team of four across Scotland and helps 'see me' to encourage broad ownership of the campaign. Additionally, 'see me' place considerable reliance on integrating national and local campaigns to ensure the overall 'see me' message is rooted in communities across Scotland.

#### 10.2.4 Media Monitoring

Additionally, 'see me' has a stigma stopwatch monitoring initiative which serves as a watchdog on coverage of mental health issues in the media.<sup>198</sup> Interested individuals are encouraged to sign up as "see me' stopwatch volunteers' who can notify 'see me' of any inappropriate reporting in the media of mental health. Additionally, they will highlight and praise positive coverage as and when it occurs. 'see me' have also produced guidelines for media professionals in an effort to assist them in writing about mental health in a balanced and fair manner.

### 10.3 Impact

'see me' has devoted resources to assessing the impact of its campaigns. The results of their assessments are a clear indication of the success of the alliance's work. For example, the launch campaign in 2002 reached 84 per cent of all adults in Scotland through outdoor advertising and 71 per cent of all adults through television adverts.<sup>199</sup>

Additionally, in December 2004, the Scottish Executive published its second national survey of public attitudes to mental health, mental well-being and mental health problems, *Well? What do you think?*<sup>200</sup> The survey revealed a significant improvement in attitudes to mental health since the first survey was carried out in 2002. For example, the number of people believing that those with mental health problems are dangerous fell substantially from 32 per cent in 2002 to 15 per cent in 2004.<sup>201</sup>

How much this change in public attitudes can be attributed to "see me" is obviously almost impossible to quantify. However as the Scottish Executive report concluded: "...it seems likely that work of...the 'see me' campaign has helped to reduce some of the stigma surrounding mental ill-health."<sup>202</sup> This view is given credence by the fact that 72% of survey respondents said they were aware of recent promotional activity around stigma and mental health which indicates that 'see me's' messages appear to be reaching the majority of the population.

Further indication of the campaign's success can be seen in the awards which 'see me' has received. These include the prize for best-integrated campaign overall at the Scottish IPA (Institute of Practitioners in Advertising) Effectiveness Awards and two awards from the annual UK Mental Health Media Awards.

### 10.4 Implications/Lessons

The 'see me' campaign has already attracted interest in Wales and is relevant given that the Welsh Assembly Government is about to publish its Mental Health Promotion Action Plan.<sup>203</sup> The first minister, Rhodri Morgan AM, voiced his support for an anti-stigma

<sup>198</sup> "Tackling the attitude problem." *Mental Health Today*. March 2005. p22-25.

<sup>199</sup> [www.seemescotland.org.uk](http://www.seemescotland.org.uk)

<sup>200</sup> Scottish Executive. *Well? What do you think?* December 2004. Edinburgh: Scottish Executive. <http://www.scotland.gov.uk/Publications/2005/01/20506/49641>

<sup>201</sup> "Tackling the attitude problem." *Mental Health Today*. March 2005. p22-25.

<sup>202</sup> "Tackling the attitude problem." *Mental Health Today*. March 2005. p22.

<sup>203</sup> <http://new.wales.gov.uk/topics/health/improvement/mental/?lang=en>



campaign on mental health saying; *“That [when the Draft Mental Health Bill 2004 becomes law] might be the time to have an anti-stigma campaign, which I strongly support.”*<sup>204</sup>

The lessons learnt from the ‘see me’ campaign may be replicated elsewhere. As two of ‘see me’s directors put it: *“The context of “see me” may be uniquely Scottish but the experience of the campaign so far may be of value to others involved in anti-stigma work elsewhere.”*<sup>205</sup> This has been demonstrated by the interest the campaign has attracted worldwide from, among others, Slovenia, New Zealand, USA and Mainland Europe.<sup>206</sup>

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<sup>204</sup> RoP. 25 January 2005. p25-26. Questions to the First Minister.

<http://assembly/rop/ROP/Plenary%20Session/2005/January/rop050125fv7.pdf>

<sup>205</sup> “Tackling the attitude problem.” *Mental Health Today*. March 2005. p22.

<sup>206</sup> [www.seemescotland.org.uk](http://www.seemescotland.org.uk)