SUMMARY

In June 2002, the Department of Health (England) published the Draft Mental Health Bill (‘the Westminster bill’) covering England and Wales and the Scottish Executive published the Draft Mental Health (Scotland) Bill (‘the Scottish bill’). Comments were invited on each bill.

Both bills include the following two significant provisions:

- long-term compulsory orders must be authorised by a tribunal
- compulsory orders can apply in hospital and the community.

There are plans to review mental health legislation for Northern Ireland in the near future.

BACKGROUND

The bills mark a further stage of development in the reform of the Mental Health Act 1983 (‘the 1983 Act’) and the Mental Health (Scotland) Act 1984 (‘the 1984 Act’).

The Westminster bill is based on the White Paper Reforming the Mental Health Act, published in December 2000. This had followed the Green Paper Reform of the Mental Health Act 1983: Proposals for Consultation, published in November 1999. The Green Paper followed some, but not all, of the recommendations of an expert committee, headed by Professor Genevra Richardson (‘the Richardson committee’), which had been appointed to advise on the review of the 1983 Act.

Similarly, the Scottish bill is based upon the Scottish Executive’s Renewing Mental Health Law – Policy Statement, published in 2001, which followed most of the recommendations of the expert committee appointed to advise on the review of the 1984 Act and chaired by the Rt. Hon Bruce Millan (‘the Millan committee’).

Concern about the proposed reforms has lead to the formation of alliances of mental health organisations and user groups campaigning for improvements to these bills: the Mental Health Alliance in response to the Westminster Bill and the Let’s Get it Right campaign in Scotland.

OVERVIEW OF THE PROPOSALS

Key features of the bills and the response of the Mental Health Foundation (‘the Foundation’) are outlined below. The Foundation’s views are shared by many other organisations working in the mental health field and many users of mental health services, although some organisations and users will have differing views. The Foundation’s full response to the bills is available at www.mentalhealth.org.uk.
Principles

- The Westminster bill states that general principles to guide the decisions made under the Act will be included in the code of practice to the Mental Health Act.

- The Scottish bill does not include general principles. However, the Scottish Executive has indicated that they will be included in the code of practice and is considering how best to give these ‘legislative effect’.

The Foundation considers it is essential that future mental health legislation contain the principles as suggested by the Richardson and Millan committees.

Definition of mental disorder

- The Westminster bill uses a very broad definition of mental disorder, defining it as ‘any disability or disorder of mind or brain which results in an impairment or disturbance of mental functioning’ and it has been proposed that the new Act should not include any exclusions to this term.

- The Scottish bill uses a more narrow definition of mental disorder: mental illness, personality disorder or learning disability. Again, it has been suggested that the new Act should not include any specific exceptions to this term.

The Foundation is concerned that the wide definition of mental disorder in the Westminster bill, coupled with the broad criteria for compulsion, may lead to an increase in the number of people inappropriately made subject to compulsory powers. The Foundation believes that both bills should include specific exceptions to the definition of mental disorder, such as sexual orientation or behaviour, or alcohol or substance misuse alone.

Mental Health Tribunals

- Both bills provide that long-term compulsory powers cannot be used without the authorisation of an independent panel, the Mental Health Tribunal (MHT).

- The Westminster bill provides that the MHT will have members from legal, clinical and general backgrounds. The latter term refers to individuals with knowledge and experience of the provision of mental health services. A medical advisor from an expert panel will also advise the MHT.

- The MHT for Scotland will consist of convenors, medical members and individuals who are qualified ‘by experience or otherwise to deal with matters relating to mental health’.

The Foundation welcomes the introduction of the requirement that long-term compulsory powers must be authorised by an independent body. However, it considers that a convenor/legal chair and two other members with experience of mental health services should form the MHT, which would then receive assistance from a medical expert.

Compulsory treatment in the community

- Both bills provide that the MHT can order that a person be subject to compulsory powers either in hospital or while living in the community. Individuals subject to these compulsory powers can be required to live in a specified place and make themselves available for treatment.
The Foundation is opposed to the introduction of compulsory treatment in the community. It considers that such powers are likely to drive people away from services, will be focused on medication rather than providing people with the care and support that they need and will be disproportionately applied to Black people. The Foundation is particularly concerned that the Westminster conditions for compulsion are so broad that it will be extremely difficult for individuals to show that the conditions are no longer met and that they should be discharged from the compulsory powers.

Provision for people with long-term incapacity

- The Westminster bill introduces safeguards for people being cared for in hospital who lack the capacity to consent to treatment for their mental disorder, but do not resist such treatment. These safeguards include a requirement that a care plan is prepared for such individuals in consultation with them and their nominated person (the replacement of the nearest relative in the 1983 Act), access to a mental health advocate and the right to apply to the MHT to be discharged from detention.

- The Adults with Incapacity (Scotland) Act 2000 (the Incapacity Act) provides safeguards for people who lack capacity and this will include people who need treatment for their mental disorder who do not resist such treatment.

The Foundation considers that the safeguards in the Westminster bill are inadequate. For example, they only apply to people in hospital. The Foundation is concerned that the Scottish bill fails to clarify the circumstances in which individuals without capacity will be treated under the Scottish bill in preference to the Incapacity Act.

IMPLICATIONS

The Foundation considers the Westminster bill to be fundamentally flawed. It fails to focus on the needs of people with mental health problems, ignores the principle of reciprocity and is likely to infringe individuals’ human rights.

While the Foundation believes that the provisions and the drafting of the Scottish Bill are better than the Westminster bill, the Scottish bill also includes a key proposal to which the Foundation is strongly opposed; namely the introduction of compulsory treatment in the community. The Foundation believes that such powers will have a negative impact on mental health services.

The Foundation considers that both Westminster and Scottish mental health legislation should include the following provisions.

- An enforceable right for individuals to have a comprehensive assessment of their mental health needs and to have their needs met with good quality and effective services.

- The right to a trained independent advocate for every person who is subject to, or is being assessed for, compulsion. Adequate resources must be made available to ensure that such services can be provided.

- More stringent safeguards in relation to compulsory treatment provisions. For example, where individuals have made an advance refusal of treatment, this can only be overridden by the MHT or in emergency situations.
Safeguards for people who lack capacity to consent to treatment for their mental disorder. The provisions must set out the circumstances in which the compulsory powers under mental health legislation should be used if it is intended to treat people who lack the capacity to agree to such treatment.

REFERENCES


The Mental Health Foundation (2002) Response to Draft Mental Health (Scotland) Bill London: The Mental Health Foundation.


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