MENTAL HEALTH AND THE CRIMINAL LAW

A BRIEF INTRODUCTION

The Mental Health Act

Mental Disorder is defined in s1(2) of the Mental Health Act (MHA), as amended by the Mental Health Act 2007, as being *any disorder or disability of the mind.* The criminal courts' powers under Part Three of the Act and in particular sections 35, 36, 37 and 38 (MHA) arise when a defendant is actually or probably, as the case may be, suffering from a mental disorder.

Mental disorder is a condition of the mind, however a disorder of the brain which causes a mental disorder will come within its definition. The Code to the MHA states (para 3.6) *Difference should not be confused with disorder* and in practice disorder is taken to mean a condition recognised and classified in the World Health Organisation's International Classification of Diseases (the current version number 10 (1992) is being revised, a new version is due in 2015) and, or, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM V is due to be published in 2013).

Excluded from the definition of mental disorder in the MHA is learning disability, *a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning,* section 1 (4), *unless that disability is associated with abnormally aggressive or seriously irresponsible conduct.* The Code suggests that this exclusion does not apply to those who had matured normally, but who as a result of an accident, illness or injury, suffer from intellectual disorder (Code para 34.4).

Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind and is also excluded from the definition of mental disorder, section 1(3).

Many mentally disordered defendants will have been "sectioned" at some stage. A "section" is a compulsory admission under either section 2 (s4 in an emergency), or s3.

Section 2 MHA provides for the admission and detention of a patient for up to 28 days for assessment; where the patient's health and safety is at risk, or to protect others. Written recommendations from two medical practitioners, one of whom must be a specialist in the diagnosis and treatment of mental disorder (s12 MHA), are required unless it is an emergency (s4), in which case only one recommendation

is needed but the detention is limited to 72 hours. A s4 detention can be converted into a s2 admission on provision of a second report within 72 hours.

Section 3 MHA allows for detention for treatment. As with s2, two written "recommendations" are required. The initial period of admission is for up to six months although this can be extended.

Those admitted under sections 2, 3 and 4 can apply to a tribunal for their discharge.

Remand for reports

s35 MHA both the Crown Court and Magistrates' Courts may remand a defendant to a specified hospital for a report on his mental condition, when satisfied on written or oral evidence, that (s35 (3)(a)) there is reason to suspect that the Defendant is suffering from a mental disorder, and (b) it would be impracticable for the report to be prepared while the defendant was on bail. In the Magistrates' Court, the power applies where the offence is punishable with imprisonment and the Defendant is convicted, or the court is satisfied he did the act or made the omission charged, or he consents. In the Crown Court it applies to any imprisonable offence, other than one where the sentence is fixed by law, but there is no requirement that the defendant has been convicted or arraigned.

Arrangements must be made to admit the defendant to hospital within seven days of the remand, and pending admission he may be detained in a "place of safety" (s55(1) defines a place of safety as *any police station, prison or remand centre, or any hospital the manager of which are willing temporarily to receive him*).

Each remand is for not longer than 28 days, with an overall limit of 12 weeks.

Those remanded for assessment cannot be treated without their consent (s56 (3(a)) unless they are also sectioned under sections 2 or 3.

The author of a s35 report must be approved under s12(2) MHA as *having special experience in the diagnosis or treatment of mental disorder.*

Where a report is provided to the court under s35 (or sections 36,37, 38, 45A or 51) other than by the defendant a copy shall be provided to the him or his representative (s54 (3)).

Remand for treatment

s36 MHA when satisfied on written or oral evidence from two medical practitioners, that a Defendant is suffering from a mental disorder *of a nature and degree which*

makes it appropriate for him to be detained in a hospital for medical treatment the Crown Court may send him to a specified hospital. As with s35, this power applies to those awaiting trial or sentence, provided the offence is imprisonable. The overall time that can be spent on a remand for treatment is 12 weeks with reviews every 28 days.

See also section 48 for the power of the Secretary of State to transfer an un-sentenced prisoner to hospital.

A Defendant remanded under either section 35 or 36 may obtain his own report with a view to applying to the court to end the remand (s35(8) and s36(7)).

Hospital Orders

s37 MHA where following conviction by the Crown Court of an imprisonable offence, other than one where the penalty is fixed by law (though this does not apply to some mandatory sentences, third strike burglars for example) a hospital order can be made provided that:

(i) the court is satisfied by evidence from two medical practitioners, one of whom must be approved by the Secretary of State (s54), that (a) the offender is suffering from a mental disorder, (b) it is appropriate for him to be detained in a hospital for treatment, (c) treatment is available,

(ii) the circumstances of the offence, the character of the offender and the other available ways of dealing with him make it the most suitable disposal and

(iii) a place in hospital is available within 28 days.

When making a hospital order the court can also make a compensation or confiscation order.

A Magistrates' Court may make a hospital order where the Defendant is convicted of an imprisonable offence or (s37 (3)) is charged with an imprisonable offence, and the court is satisfied that he did the act or made the omission alleged.

Hospitals may discharge the patient (formerly the Defendant) at any time and detention cannot be renewed after six months unless medical criteria exist. Patients are treated broadly as if admitted under section 3 above (s40 (4)), but may not apply to a tribunal for discharge within the first six months of their admission. The sentencing court has no residual power under this section over the patient.

Guardianship Orders

s 37 MHA allows the court to make a guardianship order where those who do not require hospital treatment will receive "care and protection". However, it is a little

used provision, between 1997 and 2004 there were an average of ten such orders made per year.

Interim Hospital orders

s38 MHA following conviction by the Crown or Magistrates' Court, an interim order may be made provided the offender would otherwise qualify for a full order. The order can last for up to 12 months, the initial order for a maximum of 12 weeks, renewed thereafter a month at a time. At any time during the currency of the interim order, a full order can be made. If the interim order is not renewed, because for example the offender is not actually disordered or is not suitable for treatment, or because he is now better, the court has a free hand in how to deal with the offender.

Restriction orders

s41 MHA these can only be made in the Crown Court. Magistrates' Courts may commit an offender with a view that a restriction order is made (s43 (1)). The first condition is that the offender receives a hospital order. Then when *having regard to the nature of the offence, the antecedence of the offender and the risk of his committing further offences is set at large…it is necessary for the protection of the public from serious harm* the court may make a restriction order. As with a s37 order, two doctors will provide evidence but one of them will have to give that evidence orally.

The restrictions can last indefinitely, as the purpose is not to punish, but to ensure that the patient is not released until it is safe to do so. The gravity of the offence is not the most important consideration and s41 orders have been upheld where the offences would not have warranted substantial prison sentences. A patient may be conditionally discharged but may be recalled to hospital at any time. Both the Secretary of State and a tribunal may discharge a patient, and the latter must if the criteria for detention no longer exist.

It should always be borne in mind that a s41 order remains in force indefinitely until it is discharged. While there may be situations where there is no alternative but to make a restriction order, it remains a decision for the judge based on the material available. The court should not impose a restriction to mark the gravity of the offence or as a means of punishment, it "simply" qualifies a s37 Hospital Order. However in cases of violence and serious sexual offences where there is a history of mental disorder *there must be compelling reasons to explain why a restriction order should not be made* (*R-v-Gardner* (1967) 51 Cr App R 187 and *R-v-Birch* (1989) 11 Cr App R (S) 202).

Hospital orders with, or without restrictions are sentences for the purposes of s50 Criminal Appeal Act 1968 and so a Defendant may appeal to the Court of Appeal.

Hybrid Orders

s45A MHA although rarely used, the Crown Court may make a hospital order with a restriction, and pass a prison sentence at the same time. The purpose, according to Home Office Circular 52/1997 is to *give the courts greater flexibility in dealing with cases where they conclude that a prison sentence is the appropriate disposal in spite of evidence that the offender is mentally disordered.* Where treatment is no longer beneficial the patient may be transferred to prison.

Police Powers

s 136 MHA
If a constable finds a person in a place to which the public have access, who appears to be suffering from a mental disorder and, is in need of immediate care and control; if he thinks it is in the interests of that person, or for the protection of others, he may remove that person to a place of safety for not more than 72 hours so that he may be examined by a doctor and interviewed by a mental health professional and any necessary arrangements for their treatment and care can be made.

At the Police Station

It may not always be clear that a detained person is mentally distressed or disordered, and there is often a natural reluctance to ask direct questions. However it is important to try and establish whether or not your client is unwell. At page 15 is an extract from MIND's *Achieving justice for victims and witnesses with mental distress*, the mental health toolkit for Prosecutors. Although aimed at witnesses is can be applied to a consultation with a detained person at the Police Station.

Richard Harwin RMN, a Mental Health and Learning Disabilities Liaison Officer with the Metropolitan Police offers the following advice to Defence Solicitors attending a client in the Police Station who is unwell:

- Give consistent and clear explanations, explaining who you are and the purpose of you being there - they are quite likely to be confused and they may not realise who they are speaking to.
- Avoid making the assumption they have been through the process before.
- Ask short, simple questions sensitively - the person is likely to know more about their mental health than anyone else.
- Let the person express themselves if they are feeling distressed.
- Be transparent and honest with them.
- Try to avoid noise and crowds and be cautious about physical contact.

The standard for the treatment of those detained in Police custody is set out in Code C to the PACE Code of Practice. The following are of particular relevance to those who are or may be mentally ill.

PACE Code C, para 1.4

If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable, in the absence of clear evidence to dispel that suspicion, the person shall be treated as such for the purposes of this Code.

PACE Code C, para 1.7 (b)

"appropriate adult" means, in the case of a:
...
(b) person who is mentally disordered or mentally vulnerable: See Note 1D

4. (iv) a relative, guardian or other person responsible for their care or custody;
5. (v) someone experienced in dealing with mentally disordered or mentally vulnerable people but who is not a police officer or employed by the police;
6. (vi) failing these, some other responsible adult aged 18 or over who is not a police officer or employed by the police.

PACE Code C, para 9.5

The custody officer must make sure a detainee receives appropriate clinical attention as soon as reasonably practicable if the person:
...
(c) appears to be suffering from a mental disorder...

9.5A This applies even if the detainee makes no request for clinical attention and whether or not they have already received clinical attention elsewhere. If the need for attention appears urgent, e.g. when indicated as in *Annex H,* the nearest available health care professional or an ambulance must be called immediately.

PACE Code C, note 1G

'Mentally vulnerable' applies to any detainee who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies. 'Mental disorder' is defined in the Mental Health Act 1983, section 1(2) as 'mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind'. When the custody officer has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and an appropriate adult called.

Government Policy

Home Office Circular 66/90 page two:

It is government policy that, wherever possible, mentally disordered persons should receive care and treatment from the health and social services. Where there is sufficient evidence, in accordance with the principles of the Code for Crown Prosecutors, to show that a mentally disordered person has committed an offence, careful consideration should be given to whether prosecution is required by the public interest. It is desirable that alternatives to prosecution, such as cautioning by the police, and/or admission to hospital, if the person's mental condition requires hospital treatment, or support in the community, should be considered first before deciding that prosecution is necessary. The government recognises that this policy can be effective only if the courts and criminal justice agencies have access to health and social services. This requires consultation and co-operation, and this circular aims to provide guidance on the establishment of a satisfactory working relationship between courts, criminal justice agencies and health and social services.

The Crown Prosecution Service

Post Charge

The CPS Code for Prosecutors requires the CPS to consider the effect proceedings will have against a person with mental health difficulties, and to consider if it is the public interest to prosecute:

4.17 A prosecution is less likely to be required if:
...
j) the suspect is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. Prosecutors apply Home Office guidelines about how to deal with mentally disordered offenders and must balance a suspect's mental or physical ill health with the need to safeguard the public or those providing care services to such persons...

Mentally Disordered Offenders is a part of the legal guidance issued by the CPS and sets out the prosecution service's policy in dealing with mentally disordered offenders; it augments the *Code for Prosecutors*. A prosecution may not be appropriate unless it is in the public interest because of the seriousness of the alleged offence or the likelihood of re-offending. Prosecutors need information and evidence about the mental condition of an individual at an early stage, to ensure that the case is reviewed in accordance with the tests set out in the Code for Prosecutors. The implications of a report which states the strain of proceedings, may lead to *a considerable worsening of the defendant's mental health, the implications of the*

(medical) *report should be considered very carefully… Where the prosecutor is satisfied that the probable effect on the defendant's health outweighs the public interest considerations in favour of a prosecution, the case should be discontinued and full reasons recorded on the file.*

Fitness to Plead

It may be the case that the defendant is unable, because he does not have "sufficient intellect", to meaningfully participate in the proceedings. He may not be able to give instructions or fully understand what is going on and this may amount to *a bar to his being tried* (s4 Criminal Procedure (Insanity) Act 1964). If on the evidence of two medical practitioners, at least one of whom is approved, a judge is satisfied, (on the balance of probabilities if it is contended for by the Defence) that the defendant is unfit, there will be no trial but a jury will have to decide on the normal burden and standard of proof, that the Defendant did the act or made the omission charged. If the jury is not persuaded on the evidence the Defendant will be acquitted.

However if the jury is satisfied, that the Defendant did the act etc he will be dealt with in one of three ways (s 5):

an absolute discharge,
a supervision order, or
a hospital order, with or without a restriction.

A supervision order provides a "framework for treatment". It lasts for not more than two years and may include requirements which require the person to submit to treatment to improve their mental condition. There is no sanction for breaching the order.

A hospital order has the same meaning as that in the MHA, although the offence does not have to be punishable by imprisonment and there is no requirement that a bed is available within 28 days. However the court may be precluded from making an order if there is no appropriate treatment notwithstanding the offence was serious. If a restriction order is imposed, and prior to being discharged by the hospital or a tribunal the person becomes fit, he may be returned to court to be tried (s5A(4)). Between 1976 and 1988, 25% of those unfit and subject to a restricted hospital order were returned for trial. Of those, 6% were acquitted.

This procedure is only available in the Crown Court although Magistrates may proceed under s 37(3) MHA to achieve a similar result.

Insanity

The law on insanity is not based on a modern understanding of mental illness, rather a test which dates back to the middle of the 19th century, the "M'Naghten Rules". The burden is on the Defendant to prove, on a balance of probabilities, that at the time of the offence, either (i) because of a disease of the mind, he did not know the nature and quality of his act, or (ii) if he did know the nature and quality of his act, he did not know that what he did was wrong. Unlike fitness to plead, the

trial continues with a jury who have heard evidence from two medical practitioners, at least one of whom must be approved (s1 Criminal Procedure (Insanity and Unfitness to Plead) Act 1991). The jury may return a "special verdict" of not guilty by reason of insanity (s 2 Trial of Lunatics Act 1883).

The courts powers to deal with the accused are the same as they are when dealing with an unfit defendant (s5 (1) Criminal Procedure (Insanity) Act 1964), with the proviso that there is no power to return an accused for trial.

At trial

Paragraph III.30 of the Practice Direction (Criminal Proceedings: Consolidation) sets out the ways in which the courts procedure may be adapted to assist Defendants suffering from a mental disorder. It applies particularly to trials where *all possible steps should be taken to assist a vulnerable defendant to understand and participate in* (the) *proceedings*, III.30.3, so as to ensure that the defendant has a fair trial. Measures that may be taken include; not sitting in the dock, taking regular breaks, conducting the trial in simple, clear, language and ensuring that if cross-examined short and clear questions are asked.

Transfer of remand prisoners to hospital

The incidence of mental health problems amongst those involved in the criminal justice system is high. The prevalence of psychosis, personality disorder and depression amongst sentenced prisoners, is many times higher than in the general population.

Prisoners have the same right to health care as those at liberty (*Brooks-v-Home Office* 1992 2 FLR 33). If a prisoner, on remand or serving a sentence, is suffering from a mental disorder of a *nature and degree which makes it appropriate for him to be detained in hospital for medical treatment and that ... treatment is available* (s47 (1) MHA), the Secretary of State may, if satisfied, having read two medical reports, and having regard to the public interest (s47 (1) (c)), direct that the person be transferred to hospital. The transfer must take place within 14 days of the direction, but there is no limit on how much time may elapse between the issue of the person's health becoming an issue, the reports being written and the direction being made; in other words delays are not uncommon in a prisoner being moved to hospital for treatment. Convicted prisoners may be transferred with or without restrictions, although restrictions are often imposed particularly where the prisoner is nearing his release date. The effect of a transfer can be that a person remains detained, albeit not in prison, beyond the date they otherwise would be released by. Remand prisoners are also included in this power to transfer (s48 MHA), but they cannot be discharged by a tribunal. In the Crown Court the transfer lasts until the court

disposes of the case (s51 (2) MHA), although the patient/prisoner may be transferred back to prison.

It remains to be seen if, where an unconvinced prisoner is found to be sufficiently unwell to justify a transfer but there is a significant delay, this state of affairs could be compatible with Article 3, European Convention on Human Rights, particularly in the light of *R(ex parte S)-v-Home Office and others* [2011] EWHC 2120 (Admin). See also *Aerts-v-Belgium* (2000) (61/1997/845/1051) where a breach of Article 5 was found following detention in a non-therapeutic environment (prison).

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SOURCES/RESOURCES

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Mental Health Manual, 13th edition, Richard Jones, Sweet and Maxwell, 2010

Mental Health and Crime, Jill Peay, Routledge, 2011

Asking about mental distress

In some cases victims and witnesses may not disclose a mental health condition, but something in their behaviour may indicate they are experiencing distress.

- Does the witness appear distressed, disturbed or distracted?
- Are they talking incoherently or laughing incongruously?
- Do they appear to be having illogical thought processes?
- Do they seem over-excited, euphoric, irritable or aggressive?
- Do they appear dazed, withdrawn or shut down?
- Are they fidgety, restless or jumpy?
- Do they keep repeating themselves or obsessing?
- Do they appear to be taking information in?
- Do they seem to be responding to experiences, sensations or people not observable by others?

ACTION

- If you observe any of these indicators and suspect a person may be experiencing distress, do not make any assumptions but ask the person first.
- It is best to be honest, open and sensitive, asking questions about how the person feels and what might help, such as:

'You appear to be experiencing some discomfort, is anything in particular causing you to feel like this?'

'You appear to be distressed by this situation, is there anything that might help reduce your anxiety?'

'You seem to be behaving a little oddly, is anything troubling you at the moment? Is there any way I can help?'

'Do you have anything you would like to tell us about how you are feeling at the moment?'

CAUTION

If you ask a direct question about mental health, be careful not to put the witness in a position where they would have to lie if they did not wish to disclose their condition:

"I need to ask if you are experiencing any kind of mental distress or have a mental health condition. If you want to tell me, say yes. If you either haven't or you don't want me to know, say 'no comment'."