THE DRAFT MENTAL HEALTH BILL 2002

The Law Society's Submission to the Health and Social Services Committee of the National Assembly for Wales

September 2002

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Submission to the Health and Social Services Committee of the Welsh Assembly

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Introduction.

1. The President of the Law Society, Mrs Carolyn Kirby, has been invited to give evidence to the Health and Social Services Committee of the Welsh Assembly on 11 September 2002 concerning the draft Mental Health Bill 2002.

2. The Law Society welcomes the opportunity to give its views to the Committee. This document is a summary of the Law Society's principal issues concerning the draft Bill. Attached is a more comprehensive analysis which will constitute the basis of the Law Society's full response to the Government's consultation. Both documents comprise the Society's written submissions to the Committee in advance of Mrs Kirby's attendance on 11 September. The Society will be sending a copy of its final response to the Committee simultaneously with our consultation response to the Government.

The Law Society's interest.

3. The Law Society has long been concerned with the reform of mental health law. The Society's Mental Health and Disability Committee is made up of experts in the field of mental health and disability law, including solicitors, barristers, and legal academics, as well as representatives from the judiciary, psychiatry, and voluntary sector and consumer organisations. The Committee's role is to monitor the application of the current law and to consider effective law reform.

4. Part of the Law Society's role is to press for law reform that serves the public interest through good governance, access to justice, and the furtherance of human rights, equality and diversity.

The Law Society's response.

5. The Law Society is greatly concerned that the central provisions of the draft Bill are legally, morally, and ethically undesirable. Many of the proposals represent an erosion of human rights and the Law Society is concerned that the draft Bill as it stands would not achieve many of the Government's stated policy aims.

6. The Government has made progress in modernising mental health services through the increase in funding and the introduction of the National Service Framework for Mental Health and the National Institute for Mental Health Excellence. However, the Law Society is concerned that these progressive and welcome measures may be jeopardised by the introduction of a Bill that will create draconian powers of compulsion without effective legal and practical safeguards.

7. The draft Bill contains a number of interesting suggestions such as:

   i. The statutory right to independent advocacy
   ii. The recognition of 'Nominated Persons'
   iii. Safeguards for compliant incompetent patients
   iv. A second tier appeals tribunal
   v. Automatic tribunals for all patients subject to compulsion
   vi. A requirement to have a care plan for all compelled patients

8. However, the Law Society is concerned that in these useful suggestions will be lost because of the essential difficulties with the draft Bill's central proposals. In some cases these suggestions do not go far enough in providing effective protections, whilst in others the detail of the proposals in fact represent erosions of rights which are available to people subject to the current legislation.

9. Mental Health Law in particular has been affected by the incorporation of the European Convention on Human Rights through the enactment of the Human Rights Act 1998[1]. With this in mind, the Law Society is concerned that a new Mental Health Act should not only be compliant with the European Convention at the moment, but that a new Act should withstand future challenges in this swiftly developing field of law.

10. The Law Society will ask the Government to reconsider the proposals in the draft Bill by:

    i. Halting the progress of the current draft Bill
    ii. Using parliamentary time to introduce a Mental Incapacity Bill
    iii. Engaging with key stakeholders in meaningful dialogue concerning what would constitute the best legal, clinical, and practical alternative to the draft Bill.

1 The first declaration of incompatibility of the European Convention with domestic law was a mental health case. Additionally there have been a number of important Judicial Review cases concerning issues such as delay in Mental Health Review Tribunals and the effect of mental incapacity in relation to a patient who is detained under the Mental Health Act.

Particular concerns

The Broad Definition of Mental Disorder

11. The Law Society is concerned that the suggested definition of mental disorder is too broad. The Richardson Committee[2] suggested that a single definition of mental disorder should be qualified by a tight set of conditions that would need to be satisfied in order for compulsion to take place.

12. The Law Society considers that the criteria suggested in the draft Bill are too broad and would have the effect, intended or otherwise, of allowing many people to be compelled who, for public policy reasons, it would be undesirable to be subject to mental health law.

13. The Law Society will suggest that the following are included in the criteria for compulsion:

    i. That compulsion is necessary because the person's judgement is impaired [3].

    ii. That compulsion confers a direct health benefit to the person.

Learning Disability

14. The Law Society respects the suggestion contained in the Richardson Report that learning disability (when not accompanied by another mental disorder) should be excluded from a new Mental Health Act. Learning disability is not an illness as such. It requires the benefit of welfare rather than treatment, and would be better served by a comprehensive legislative framework for general decision making. This should be achieved through an Incapacity Act[4].

The Mental Health Tribunal

15. Although the Law Society welcomes many of the draft Bill's suggestions concerning the new tribunal, it has a number of serious and practical concerns. These include:

    i. Concern that the new tribunal will have to apply the same broad definition and criteria that will be used at assessment for compulsion. As a result the tribunal may have a duty to 'rubber stamp' treatment orders.

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2 The Richardson Committee was the committee of experts who examined the need for reform of the Mental Health Act 1983. Their final report was published in November 1999 by the Department of Health, and was entitled "Review of the Mental Health Act 1983, Report of the Expert Committee".

3 This is similar to some of the provisions suggested in the Draft Mental Health Bill (Scotland)

4 The Scottish Parliament have already introduced the Adults with Incapacity Act (Scotland) 2000.

ii. Concern that the current difficulty in recruiting tribunal members will both continue and will be exacerbated given the likely increase in the number of tribunal hearings.

iii. Concern that the lack of tribunal members has already resulted in successful judicial review claims concerning delays due to cancellation[5]. The question of the amount of damages awards in these cases will not be heard by the court until December 2002. The Law Society is concerned that the National Assembly will have to meet any potential costs for future delay claims. As a result the Law Society recommends that, should the recommendations of the draft Bill be introduced, additional monies over and above the Barnett formula allocation will need to be made available. Advice should be sought from the Welsh Mental Health Review Tribunal as to recommended sums.

iv. Although the Law Society welcomes the proposal that patients will routinely have a tribunal after 28 days, the Law Society is concerned that the current practice whereby patients can apply for a hearing within 7 days when detained for assessment should not be eroded.

Principles

16. The Law Society is concerned that there are a number of essential principles that have not been included on the face of the draft Bill. These include:

i. The principle of reciprocity. This means that if the state wishes to subject people with mental disorder to compulsion, then the corollary is that there is a right to assessment of needs and to the provision of services.

ii. Non-discrimination, equality, and diversity. The Law Society is very aware that certain minority groups are disproportionately subject to compulsion, and also that suffering with a mental disorder in itself can lead to discrimination. As such the Law Society regards this principle as vital. The Law Society considers that non-discrimination is of particular importance to the National Assembly given that Section 120 (1) of the Government of Wales Act 1998 concerns equality of opportunity:

> "The Assembly shall make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people."

5 R (on the application of C) v Mental Health Review Tribunal, London South and South West Region [2001] EWCA civ 1110; R (on the application of KB and others) v Mental Health Review Tribunal (2) Secretary of State for Health [2002] EWHC 639 (Admin).

The Law Society considers that such functions would include the provision of health and social services, as well as the operation, administration, and implementation of mental health legislation.

17. The Law Society is concerned that although the draft Bill cites the principle of patient involvement, the proposal contained within the previous White Paper for statutory recognition of 'Advanced Statements' is absent from the draft Bill.

Risk

18. The Law Society is concerned that the draft Bill over emphasises the risk associated with mental disorder, and although there are no direct reference to 'Dangerous and Severe Personality Disorder', the entire proposed legislative structure is predicated on a disproportionate emphasis on risk.

19. The Law Society is concerned that the over emphasis on risk is not supported by evidence. In a recent answer to a parliamentary question in the House of Lords, Lord Falconer of Thoroton said that the number of such people who might constitute a risk is 126 [6].

Aftercare

20. The Law Society is concerned that any new scheme of legislation should contain provisions similar to the current effect of section 117 of the Mental Health Act 1983. The effect of this section, recently approved by the House of Lords[7], is to provide free aftercare for people who have been subject to compulsory treatment. The draft Bill suggests that free compulsory community treatment would replace this provision.

21. The Law Society is concerned that the draft Bill proposals would erode an established right and that the lack of free aftercare would create a perverse incentive for individuals to remain subject to compulsion.

Children and adolescents with mental disorders

22. Following advice from psychiatric colleagues, the Law Society suggests that the provision of children and adolescent mental health services be closely examined. In particular the Government is concerned with the treatment and management of personality disorder and associated risk. We understand that current clinical thinking suggests that the therapeutic treatment of personality disorder is best achieved when working with people at a young age.

6 Hansard [HL] 5088 13 July 2002.

7 R v Manchester City Council, ex parte Stennett and others [2002] UKHL 34.

23. The Law Society has received anecdotal evidence of young people who have been detained under the Mental Health Act 1983 in inappropriate adult psychiatric facilities. We are aware of the scarcity of specialist treatment centres for younger people, and that this is particularly acute in Wales. The Law Society will suggest that, rather than focussing on the detention of people with dangerous and severe personality disorders in later life, a better use of the Government's resources in achieving its stated policy aims would be to divert funding to the treatment and management of personality disorder in children and adolescents.

24. The lack of specialist in-patient provision, or alternatively a geographically dispersed provision, has the potential for challenge on ground of interference with the Article 8 right to family life under the European Convention on Human Rights.

Draft Mental Health Bill 2002.

Submission to the Health and Social Services Committee of the Welsh Assembly

- Part II –

The Law Society's detailed position

Introduction

1. This document represents the Law Society's provisional response to the Draft Mental Health Bill 2002, which was published on 25 June 2002.

2. The Bill contains a number of controversial measures, which are detailed within this document. However, some of the most important elements include:

   i. A broad definition of mental disorder without tight criteria of conditions to be satisfied for compulsion.

   ii. The removal of so called 'exclusions' of categories of people who cannot be compelled under the 1983 Act.

   iii. An emphasis on risk and dangerousness.

   iv. The introduction of community assessment and community treatment.

   v. A new Mental Health Tribunal and Mental Health Appeal Tribunal.

   vi. The abolition of the Mental Health Act Commission.

3. Additionally a number of safeguards, which are either available under the current Mental Health Act 2002, or which have been suggested by commentators and experts, are absent from the proposals.

4. Where there are potentially interesting suggestions in the proposals, these are incomplete in terms of detail, in some cases they may lead to an erosion of currently accepted rights, or these suggestions are peripheral and do not compensate for the difficulties with the draft Bill's core proposals.

5. The Law Society views the draft Mental Health Bill as fundamentally flawed. As such the core proposals of the draft Bill are, in the Society's view, incapable of amendment. The Law Society urges the Government to:

- Temporarily halt any legislative process flowing from the draft Bill.

- Utilise parliamentary time to bring forward a Mental Incapacity Bill in line with its commitment in "Making Decisions"[8], at the earliest available opportunity.

- Reconsider many of the policy initiatives behind the Bill, and revisit the reform of the Mental Health Act with the full involvement of the Law Society and other key stakeholder organisations.

The Law Society's response

6. The Law Society of England and Wales is consulting representatives of the legal profession on the proposals through the Society's internal structures. The Society's Mental Health and Disability Committee is taking the lead on this work, with assistance from the Society's Criminal Law Committee, the Law Reform Board, and colleagues from the Society's Office in Wales.

7. The Law Society's final response will be submitted to the Government by 16 September 2002. The Society's response will be submitted to the Department of Health in concert with the consultation arrangements. Although the draft Bill and the consultation exercise is undertaken by the Department of Health in conjunction with the Home Office, the draft Bill has serious implications for the Lord Chancellor's Department and the Treasury.

8. In particular, it is the Society's view that the proposals concerning mental incapacity are fundamental to effective mental health law. Equally the proposals concerning the Mental Health Tribunal are of significance to the Lord Chancellor's Department.

9. The resource implications for a new tribunal system require robust funding arrangements pertinent to Treasury policy. It is therefore proposed that the response will be submitted to the Secretary of State for Health, the Lord Chancellor, the Home Secretary, and the Chancellor of the Exchequer.

[8] The Lord Chancellor's Department (1999), Making Decisions

10. In the interests of devolved government, the Law Society will also send its response to the Health and Social Services Committee of the National Assembly for Wales. It is the Law Society's view that the implications of some of the proposals contained in the draft Bill may weigh particularly heavily on Wales.

11. The Law Society of England and Wales is not directly concerned with the draft Mental Health Bill for Scotland as this falls within the remit of the Law Society of Scotland. However, the Law Society of England and Wales notes as a matter of principle that, given the six differing legislative schemes in operation concerning mental health[9], the various different systems should not inadvertently set up more or less favourable schemes of compulsion dependent on the particular jurisdiction. Further, we note that the introduction of the Adults with Mental Incapacity Act (Scotland) 2000 and the draft Mental Health Bill for Scotland contains many provisions which the Westminster Government might usefully emulate.

Background

12. Part of the Society's Mental Health and Disability Committee's role is to encourage effective law reform to further the interests of justice for people with mental disorder, with disability and for older people, and to serve the public interest in good governance and proper operation of the law. The Committee has previously contributed to the work of the Richardson Committee[10] and has responded to the White Paper[11] that preceded this draft Bill. The Law Society has long pressed for the reform of the Mental Health Act, and in particular that:

- Mental incapacity legislation should accompany a new Mental Health Act;

- The criteria for detention and compulsion under any new mental health legislation should include a capacity criterion;

- New mental health legislation should not only be compatible with current jurisprudential thinking concerning the European Convention on Human Rights (ECHR), but such legislation should also, as far as possible, anticipate future human rights challenges in what is a rapidly developing field of law.

[9] England and Wales, Scotland, Northern Ireland, Jersey, Guernsey, and the Isle of Man.
[10] Department of Health. November 1999; Review of the Mental Health Act 1983 – Report of the Expert Committee Review of the Mental Health Act 1983 (known as the Richardson Committee)
[11] Department of Health (2000). Reforming the Mental Health Act Cm 5016-I and Cm 5016 - II

13. The Ministerial foreword to the consultation document suggests that the Government has taken the views of key stakeholders into account throughout the process of the reform of mental health law, from the report of the Richardson Committee through to the White Paper in 2000 and on to the publication of the draft Bill.

14. Firstly, it is disappointing to note that many of the practical legal and ethical proposals contained within the report of the Richardson Committee have not progressed into the draft Bill.

15. Secondly, the Law Society met with officials from the Department of Health and the Home Office over an extended period of time between the publication of the White Paper and the draft Bill. We are disappointed to note that many of the suggestions made have not been included in the draft Bill.

Make up your mind conference

16. The Society's Mental Health and Disability Committee held a two-day joint conference with the Royal College of Psychiatrists on 20th and 21st June 2002 on both the reform of the Mental Health Act and mental incapacity law[12]. This conference brought together lawyers, doctors, judges, academics, mental health professionals, users of mental health services, carers and representative organisations. The overwhelming view from speakers and delegates was that the Government's proposals for the reform of the Mental Health Act were ill conceived and should be reconsidered in line with the views of stakeholder organisations. Equally, the conference's view was virtually unanimous in pressing for mental incapacity legislation to be brought forward as an urgent priority at the earliest parliamentary opportunity. These views were expressed in a joint letter to The Times from the current Presidents of the Law Society and the Royal College of Psychiatrists.

Mental Health Alliance

17. In July 2002 the Law Society joined the Mental Health Alliance as an associate member. As such, the Law Society endorses the Alliance's general concerns relating to the draft Bill. This response is designed to compliment the Alliance's views.

18. The Mental Health Alliance is a group of over 50 voluntary, professional, and representative organisations which are united in their opposition to the core proposals of the draft Bill. The Society chose to take this step because of its serious concerns at Government proposals and its considered decision to add the Society's voice to the growing groundswell of united opposition to the Bill.

[12] A full and detailed report of this conference is available on the Law Society's website at www.lawsociety.org.uk.

The consultation process

19. The consultation document explains that:

"The draft Bill does not cover everything that will be in the final Bill we intend to introduce into Parliament"[13].

20. Many vital constituent parts of any draft scheme will be left to an as yet unseen Code of Practice. Examples of these important details are the general principles of the Act and other essential details concerning the proposals contained within the draft Bill.

21. Many of the important matters which require clear elucidation and explanation by Government are not in the draft Bill at all, or are not contained in the draft Bill but appear in the accompanying explanatory notes or the consultation document as broad policy statements.

22. The result of this is that it is extremely difficult to comment on some of the proposals due to the lack of detail. As a result, where the Society's response is silent on a particular issue, this should not be taken as a tacit acceptance of this proposal, but rather that the Society cannot respond without further detailed explanation.

Related policy and consultation documents

23. The Society is fully aware of a number of other areas of policy and consultation that should be 'cross-referenced' with the draft Bill. As well as the broad spectrum of criminal law and penal policy, there are two areas which will be specifically highlighted:

The Leggatt Review of the Tribunal System

24. The Law Society responded in some detail to Sir Andrew Leggatt's report on the Review of the Tribunal System. This document is available in full from the Law Society's Website at www.lawsociety.org.uk.

25. Sir Andrew made detailed mention of the Mental Health Review Tribunal (MHRT) as requiring specific attention. It has been widely recognised that the MHRT has many inherent faults. However, these are not 'legal', but are a result of systematic inadequate resourcing and administration. These criticisms have been borne out by judgements in the Courts earlier this year[14], and in 2001[15].

[13] The Mental Health Bill – Consultation Document Cm 5538 – III (2002) TSO, at page 5.
[14] R (on the application of KB and others) v Mental Health Review Tribunal (2) Secretary of State for Health [2002] EWHC 639 (Admin).
[15] R (On the application of C) v MHRT, London South and South West Region [2001] EWCA civ 1110.

26. As the representative and regulatory body for solicitors, the Law Society has a particular interest in the MHRT. The majority of representatives at MHRTs are solicitors, or their employees. The Society has endorsed Sir Andrew's proposals for the MHRT to be properly resourced, and both to increase its stature as a judicial body and for it to be completely independent of the executive by bringing the MHRT under the auspices of the Lord Chancellor's Department and the Court Service.

27. In addition the Law Society has made it known to officials at the Department of Health that it is vital that proper judicial case management be introduced to deal with matters of delay and proportionality. We still await further action from the Government on these points.

28. It the context of this consultation, the Law Society is concerned (detailed below) that inherent administrative and systemic difficulties in the MHRT are not imported into a new tribunal system.

Independent Specialist Advocacy

29. The Department of Health has commissioned a report from the University of Durham on Independent Specialist Advocacy in England and Wales. The report is separately open for consultation until 30th September 2002. These proposals suggest that independent advocates be available to help compelled patients by means of obtaining information and assisting understanding concerning:

    i. Medical treatment
    ii. Why it is being provided
    iii. Under what authority it is being provided
    iv. What requirements of the Act apply
    v. What rights can be exercised by or on behalf of the patient
    vi. Help to exercise rights.

30. The Law Society will be responding to the consultation on Advocacy in detail.

31. However, the draft Bill contains proposals for the introduction of advocacy schemes. In principle the Law Society supports the suggestion for the provision of independent specialist advocacy as outlined by Di Barnes and her Durham colleagues.

32. This support is contingent on Government implementing the proposals for national standards, an independent agency, proper training and oversight, and the emphasis that specialist independent advocacy is not, nor should it be allowed to stray into, expert legal representation and advice.

33. Legal representation and advice is provided free through public funding, regardless of means or merits, and is a reflection of the vulnerable nature of mentally disordered individuals subjected to detention and compulsion that might otherwise contravene fundamental human and legal rights[16]. The Law Society provides a scheme for the training, selection, accreditation and scrutiny of many mental health lawyers through its Mental Health Review Tribunal Panel, and we look forward to working with Di Barnes and her colleagues at the Department of Health on Independent Specialist Advocacy.

34. The Society would, however, point out that:

i. The statutory right to independent specialist advocacy should be available at an earlier point than that described within the proposals. It is suggested that the right of access to an advocate will be within three working days of becoming subject to detention or compulsion. The Society believes advocacy is most needed by patients at the preliminary stage before an assessment or an order are made, and recommends that the Government consider this proposal.

ii. It is vital that the Government considers how, by whom, and to what standard training of advocates should take place.

iii. The Law Society considers that its endorsement of independent advocacy schemes in no way indicates support for many of the other elements of the draft Bill. Indeed the Law Society considers that such schemes could effectively be introduced on a 'stand alone' basis, without the other legislative provisions of the draft Bill.

iv. Independent advocates should have the power to initiate a 'visit for cause' from the Health Care Inspectorate (which will take over some of the functions of the Mental Health Act Commission). This would be in cases of concern at the standard and the regime of care and treatment to which the patient is subjected, or where the advocate has concerns at the administration or operation of the Act, or where cases of infringement or abuse of rights, or other substantial concerns are suspected.

Format of the consultation exercise

35. Given the nature of the subject matter, the Law Society views it as essential that the Government elicits a broad response. This should include not merely professional and voluntary sector organisations but users of mental health services and their carers.

[16] Megyeri v Germany [1993] 15 EHRR 584

36. However, we are concerned that the complexity of the documents, the need to co-relate three documents, and the style of drafting make it difficult for lay people to understand and respond effectively to the draft Bill. It has been suggested that even the seasoned reader of statutory drafting would find these documents complex.

37. In the consultation document, the Government invites views on eight discrete areas. These points include:

i. Scrutiny of the application of the Act
ii. Protecting children with serious mental disorders
iii. The rights of patients and health workers
iv. The removal of exclusions for treatment
v. Sharing information
vi. Care of Prisoners
vii. Patient correspondence
viii. Single member tribunals

38. However, many of the core provisions of the draft Bill are not contained within these consultation areas. The Law Society's response will, therefore, be a great deal broader than these few specifically identified issues. It is our view, that for any consultation to be viewed with full public confidence, then consultation should be specifically invited on areas such as the broader definition of mental illness, community assessment and community treatment, and wider provisions for decision making and mental incapacity.

The Law Society Response – key issues

Unforeseen consequences

39. Given the sensitive nature of mental health law, and the fundamental questions of personal liberty and autonomy that any reform will engender, the proposals have resulted in concerted criticism from many standpoints.

40. Many of these criticisms have met with the view from the Government that, as such problems are unlikely to arise as Department of Health policy, such circumstances will not occur. The commonly used example is that the broad definition and criteria for compulsion will capture people who are temporarily intoxicated. Here the officials have commented that this would not happen as it is not their policy intent. However, in the Society's view, as the draft Bill stands such unintended consequences might well occur.

41. As a result, and in the interests of clarity, the Law Society will ask the Government to redraft its statutory proposals to take account of all its policy views in the operation of a future Bill. These redrafted proposals would require a further consultation exercise.

Principles

42. Research due to be published shortly has pointed to a lack of understanding of the purpose of mental health law as a major reason for the unsatisfactory operation of the Mental Health Act 1983 among the professionals charged with implementing the provisions of the Act. It is vital that the principles behind the operation of any new scheme of legislation are articulated at an early stage.

43. It is unfortunate, therefore, that only general principles are contained within Part 1 or the draft Bill, leaving the code to articulate fuller principles in the future.

Patient involvement

44. One principle that does appear on the face of the draft Bill is that "Patients are involved in the making of decisions". However, plans for "Advanced Statements" are absent. Advanced Statements were proposed in the Mental Health White Paper, and were intended to reflect an advanced agreement between the patient, the health and social care professional and others to indicate the treatment and terms of treatment that would be undertaken in the future should the patient become so disordered that they required treatment.

45. Advanced Statements therefore go further than the legal recognition of Advanced Directives, which will only recognise the withholding and withdrawal of treatment under certain circumstances.

46. The Law Society suggests that Advanced Statements should be included in a future Bill, as a demonstration of Government's commitment to the principle of patient involvement.

Reciprocity

47. The Law Society suggests to the Government that the principle of reciprocity should be included on the face of the Bill.

48. Reciprocity is defined as:

> "Where society imposes an obligation on an individual to comply with a programme of treatment and care it should impose a parallel obligation on the health and social care authorities to provide appropriate services, including ongoing care following discharge from compulsion"[17].

[17] Department of Health, November 1999; Review of the Mental Health Act 1983 – Report of the Expert Committee Review of the Mental Health Act 1983 (known as the Richardson Committee) at page 23.

49. The corollary of detention or compulsion is that patients who are subject to such powers should have a right to treatment and services.

Commitment to anti-discrimination, equality and diversity

50. Discrimination, equality, and diversity are of paramount importance to the draft Bill in a number of ways.

51. It is widely recognised that there is a disproportionate representation of certain minority groups within the mental health system, and of younger black men in particular. It is accepted that members of these groups are more likely to be compelled to accept treatment, and that this treatment is more likely to be maximum doses of medication. As such, compulsion falls more heavily on these minority groups.

52. Further, being diagnosed with a mental disorder can result in discrimination from society be it explicit or implicit. The Society recommends to the Government that an anti-discrimination principle is placed on the face of the draft Bill.

The Definition of Mental Disorder

53. The draft Bill proposes a single definition of mental disorder as:

"…any disability or disorder of mind or brain which results in an impairment or disturbance of mental functioning"

54. This replaces the three sub categories of mental disorder in the 1983 Act:

i. Mental Illness
ii. Severe Personality Disorder
iii. Serious Mental Impairment

55. Under the 1983 Act the latter two categories are required to be "treatable". A major criticism of the current legislation is that most people with severe personality disorders are not treatable in medico-psychiatric terms and thus can avoid detention.

56. The Richardson Committee suggested the broader definition as a reflection of modern medical thinking, i.e. that many people suffer with a number of different types of mental disorder. However, the Committee's suggestion was that this broader definition should be qualified by a tightly drawn set of criteria.

57. The Government has suggested a far looser set of criteria, which provides a very wide gateway into compulsion. The Law Society suggests that ways of qualifying these criteria would be to include:

i. A capacity criterion (The Scottish draft Bill refers to 'impaired judgement')

ii. That a 'health benefit' should replace a 'treatability' test.

Broad definition and personality disorders

58. Much of the preceding White Paper[18] was devoted to people with "Dangerous and Severe Personality Disorders". It was suggested that the Government was responding to public pressure concerning cases like that of Michael Stone[19] to find a way of removing these most risky and dangerous individuals into institutional settings.

59. This has been widely criticised as being more a matter for the criminal justice system than mental health. In the draft Bill any mention of Dangerous and Severe Personality Disorders has been removed, leaving broad criteria without any of the current exclusions. Many view this as a method of dealing with untreatable psychopaths by predicating an entire Bill on danger and personality disorder. There are concerns that this will have the effect of reinforcing the stigma of mental health problems and the receipt of services. This may well discourage people with mental health problems from seeking help.

60. In the drafting of the draft Bill, people who are judged to be potentially dangerous do not have to satisfy the same criterion as others that the treatment cannot be given unless they are subject to the Act. In effect there will be different rights available dependent on prediction of risk. This itself is likely to lead to incorrect predictions of risk that might result in 'false positives' and 'false negatives'.

61. The Home Office had previously estimated that there are 2,100 to 2,500 people with Dangerous and Severe Personality Disorders in the country. However, in a recent answer to a parliamentary question in the House of Lords, Lord Falconer of Thoroton disclosed that best estimates are in fact that there are 126 such people living in the community, the remainder being already detained in the penal and secure hospital systems[20].

62. In our view the emphasis on risk is misplaced and that the Government should redraft its proposals accordingly.

[18] Department of Health (2000). Reforming the Mental Health Act Cm 5016-I and Cm 5016 - II
[19] Michael Stone was diagnosed with an untreatable severe personality disorder when he committed murder. He had not been detained under the Mental Health Act because his condition was judged to be untreatable.
[20] *Hansard* [HL] col. 5088 23 July 2002.

Learning disabilities and the definitional framework

63. The Richardson Committee suggested that learning disability per se, when not co-existing with another mental disorder, should be removed from any new legislation. It was felt that learning disability would be better dealt with under incapacity legislation, especially as learning disability is not an illness as such. It is better viewed from a welfare rather than a treatment perspective.

64. We suggest that the Government excludes learning disability - when not accompanied by another mental disorder - from the draft Bill.

Removal of exclusions

65. The 1983 Act contains a number of exclusions from compulsion:

"by reason of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs".

66. Consultation is invited on this point, and there have been a number of views on the removal of exclusions. However the Law Society considers it inappropriate to remove the exclusion for sexual deviancy due to concerns that mental health legislation might be used to deal with paedophiles, when in our view such people are better dealt with under the criminal law.

Information sharing

67. The draft Bill proposes a general duty to co-operate in the supply of information in relation to risk management and assessment, and that information sharing protocols be set up. Although in principle information sharing is important, this will need to be balanced with clearly defined boundaries, and methods of redress for those whose privacy may be unreasonably compromised, or where information shared is shown to be inaccurate.

Victims

68. The draft Bill proposes a number of rights for victims of crimes committed by those subject to the Act. It has been suggested by the Home Office that, as well as requirements to inform victims of release and whereabouts, that this will also include a victim's right to make submissions to the tribunal. Further clarification needs to be gained from the Government on the extent of this proposal. The Law Society would view any intention that would result in there being more onerous requirements under the Mental Health Bill than might exist under criminal justice legislation as unreasonable.

Community assessment and treatment

69. The Government has said that both compulsory assessment and treatment will be available in the community under the proposals. Although the Government has stated that they do not expect this to mean treatment against an individual's will in their own home, this has not been indicated in the draft Bill itself.

70. If the intention is to allow the power to 'take and convey' to a clinical setting where treatment will be given, then one concern would be how workable this would be in practice. Examining the use of a similar provision under section 25(a) of the Mental Health (Patients in the Community) Act 1995, it is clear that this power is seldom used.

71. The Law Society recommends that further thought should be given to these proposals.

The Mental Health Tribunal and Mental Health Appeal Tribunal

72. The major structural change that the draft Bill proposes is for all patients (who have not previously been discharged by their Clinical Supervisor) to appear before a tribunal after a 28 day assessment period. If a further 28 day assessment period is required then the Tribunal would consider this. If the assessment is complete, and a period of compulsory treatment is sought, then the Tribunal would approve (or not) a care plan on which a compulsory order would be based. The Tribunal would cease its 'review' function but would now be the body responsible for making the order itself. The Tribunal would then review treatment orders in a similar way to section 3 of the 1983 Act.

73. The draft Bill also sets up a panel of clinical experts who would take over the examination function currently undertaken by the medical member. It also sets up an Appeals Tribunal, which would review decisions of the tribunal below on points of law.

74. Although we broadly welcome this new structure (we have previously given these views in our response to the Leggatt Review), there are a number of points of concern.

75. Firstly there is no indication that the Tribunal will be removed from the auspices of the Department of Health to the Lord Chancellor's Department and the Court Service, as proposed in Leggatt.

76. Further there will be a significant increase in tribunal hearings as all patients will now have to appear before it, and many will go to appeal. The question then arises as to the need to recruit suitably qualified and skilled tribunal members, and for the Tribunal to be properly administered and supported. We also suggest that any new tribunal has a full time President, with full time regional chairs and adequate judicial appointees to enable proper case management in line with the CPR.

77. Recent judicial review cases have indicated that the lack of medical members in particular has meant the cancellation and delay of tribunals which contravene the ECHR. These matters require urgent attention to ensure the proper functioning of the current tribunal, and would be essential for any new tribunal to function properly.

78. In particular the National Assembly for Wales will have to bear any quantum from adverse judgements on delay without recourse to funding from central Government funding. Although the quantum element of these test cases will not be heard until December 2002, there are likely to be two heads of damages:

    i. Damages for delay, although this would have made no substantial difference to the outcome.

    ii. Damages for cases where, had the delay not occurred, then the patient would either have been discharged or would have had lost the chance of discharge.

79. Therefore, the Law Society recommends that adequate and additional monies would need to be made available to Wales over and above the Barnett formula allocation. The Law Society further recommends that the Government should seek the views and recommendations of the Welsh Mental Health Review Tribunal on this issue.

80. The proposals suggest that patients compelled to accept a period of assessment would routinely appear before a tribunal within 28 days, unless otherwise discharged by their Clinical Supervisor. Clause 28 of the draft Bill proposes that patients will have the right to apply to the Tribunal for the discharge from liability to assessment. In order to ensure that such determinations are made 'speedily'[21]. The current policy is to schedule a review hearing for a person detained under section 2 of the Mental Health Act 1983 within 7 days. The Law Society would consider it an erosion of established practice if clause 28 hearings were not held within a similar time frame.

21 Article 5 (4) of the European Convention on Human Rights as incorporated into domestic law by the Human Rights Act 1998 requires that a person deprived of their liberty shall have the lawfulness of their detention decided speedily by a court.

81. The Law Society is also concerned that the Mental Health Act Review Tribunal will have to exercise its judgements based on the same broad definition of mental disorder and associated criteria as are to be used during the assessment procedure. This creates considerable difficulty as the tribunal may have no option than to 'rubber stamp' care plans and treatment orders.

Incapacity

82. Part 5 of the draft Bill puts in place a number of safeguards for the compliant incapacitated patient, or 'Bournewood' patient. We broadly welcome this attempt to close the so-called Bournewood gap. However, one reservation might be a practical point, which is to clarify how the process of safeguards will be triggered. This is a 'soft' point that might be addressed by recommendation on training for clinical staff on assessing capacity.

83. On the broader issue of incapacity, it has always been the Society's view that incapacity legislation should at least accompany mental health legislation, and at best incapacity should be placed at the heart of the criteria for compulsion. As such we have publicly called for the legislative time that is likely to be devoted to mental health legislation to be used instead for incapacity legislation.

The Health Care Inspectorate

84. The consultation paper says that the Government plans to disestablish the Mental Health Act Commission and establish a 'Health Care Inspectorate' as part of the Commission for Health Improvement, and whose main functions would be:

i. Scrutiny of the application of the Act
ii. Collecting information and monitoring the use of the Act
iii. Investigating/visiting for cause
iv. Powers to investigate complaints, refer cases to the tribunal on a point of law, and investigate circumstances of death.

85. The Law Society has concerns that:

i. Not all the functions, such as the general visiting functions of the Commission, are to be transferred to the new Inspectorate.

ii. The focus on the scrutiny of the general use of the Act and mental health generally might become less of a priority within a larger and more generalised Health Inspectorate.

Section 117 of the Mental Health Act, 1983 – statutory after care

86. The consultation asks for views on the provision of care for patients in the community. The language is vague on this point, but it has been suggested that only community care specified in the care plan from which a treatment order will be made will be free. This is far narrower than the current position where all care and treatment in the community under section 117 is free. This position has recently been confirmed in the House of Lords in R v Manchester City Council, ex parte Stennett and others.

87. In terms of reciprocity it is important that the entitlement to services specified within after care, and the provision of after care itself are retained. To not retain the statutory duty to provide free after care for those who have been detained would result in a perverse incentive to patients to remain under compulsory powers.

88. In our view it is of vital importance that a similar provision to the current section 117 requirement should be imported into any new legislation.

Nominated persons

89. The draft Bill provides for the role of nominated person to replace the current provision of Nearest Relative. This is in line with the settlement in JT v UK.[22]

90. Although this is welcomed, concerns would focus around what measures the Government should take urgently to amend the current legislation, given the decision in JT is already 2 years old, and new legislation will not be implemented for some time.

91. It is also vital that the facts of JT are borne in mind (i.e. allegations of abuse by the step father resulting difficulties in the relationship between mother and the patient). As such some guidance should be provided in defining what will be 'unsuitability to perform those functions'.

92. We are also disappointed to note that the rights accorded to nominated persons fall considerably short of those currently available to nearest relatives. In particular, the nominated person only has the right to be informed during the assessment procedure, rather than the Nearest Relative's right to object and to have the patient discharged from treatment in certain circumstances.

[22] 2000 1 FLR 909. In an agreed settlement the UK Government conceded that it was contrary to the ECHR for a detained patient not to have the right to nominate a person of their own choice to undertake the role performed by the 'Nearest Relative' as defined in the Mental Health Act 1983. The Nearest Relative has a special meaning within the Mental Health Act 1983, and the selection is made in descending order within a closed list(s.26 the Mental Health Act, 1983). Concern has been expressed that a local authority has the ability to apply to have a Nearest Relative displaced. In comparison a patient has no equivalent right to object to the identity of their Nearest Relative.

Prisoners

93. The suggestions under the draft Bill concerning prisoners fall into two main categories, those concerning treatment orders and existing difficulties concerning the transfer of restricted patients. Both issues should be viewed against the assumption that the best place for the treatment of people with mental disorder is in hospital (albeit on occasions a secure facility) rather than in prison.

Treatment of prisoners

94. The draft Bill suggests that prisoners who are already under compulsive powers should receive treatment under non-resident treatment orders whilst in prison. This is not only poor practice, there is a real concern that this will breach ECHR law. In Aerts v Belgium[23] the court suggested that defects in the physical environment where treatment took place could be a breach of article 3 and article 8 rights.

Restriction orders

95. Under the current legislation a person who is under a restriction order can only be transferred from prison to a mental hospital, or vice versa, by order of the Home Secretary. We consider that transfer decisions are better taken by an independent judicial tribunal, on the recommendations of expert psychiatric evidence.

Partial Regulatory Impact Assessment

96. Annex A of the Explanatory Notes to the draft Bill contains a four option Partial Regulatory Impact Assessment. The assessment is leading in the way it is formulated, suggesting that option 4 is the preferred option. Interestingly this is the Government's preferred option.

97. Option 2 is to amend the Mental Health Act 1983 to limit the scope for challenges under the ECHR, and is something that the Society has suggested. However, the document is contradictory - "This [option] would partly meet the objective, particularly in relation to the ECHR".

98. Although only partial at this stage, a more rigorous regulatory impact assessment would be desirable, taking account of the full cost implication of the proposals and the compatibility with the ECHR.

99. The partial regulatory impact assessment only applies to impact on the private sector. In our view the Government should consider extensive 'modelling' of the full range of implications raised by the draft Bill in order to engage in further fruitful consultation.

[23] [1988] EHRLR 777