Justice Committee

Criminal Justice and Licensing (Scotland) Bill

Written submission from SAMH

SAMH

SAMH is Scotland’s leading mental health charity and is dedicated to mental health and wellbeing for all. SAMH provides an independent voice on all matters of relevance to people with mental health and related problems (including homelessness and addictions) provides advice and guidance to a wide range of national bodies and delivers direct support to over 3000 people through 80 services across Scotland.

The SAMH Centre for Research, Influence and Change lobbies for the development of legislation, policy and practice that is based on the real life experiences of people with mental health and related problems and that respects their human rights. The Centre also provides a range of information, training and consultancy on mental health and mental health problems.

SAMH is committed to challenging the stigma and discrimination experienced by people who live with mental health problems. SAMH provides direct line-management to respectme (Scotland’s anti-bullying service) and seeme (Scotland’s anti-stigma campaign).

Comments

SAMH is grateful for the opportunity to provide evidence to the Justice Committee on the Criminal Justice and Licensing (Scotland) Bill. Our interest in the Bill lies specifically in sections 14 and 17 of Part 1 which deal with Community Payback Orders and Presumption Against Short Periods of Imprisonment or Detention respectively, and in Part 7, Mental Disorder and Unfitness for Trial.

Section 14 of Part 1 of the Bill states that where a person is convicted of an offence punishable by imprisonment, the court may, instead of imposing a sentence of imprisonment, impose a community payback order in respect of the offender. These orders can include the imposition of an order requiring mental health treatment. This provision seems to overlap with the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 227R of the Bill acknowledges this and sets out the conditions that must be met in order for a mental health treatment requirement to be imposed. SAMH has long argued that people who have mental health problems should receive treatment rather than being imprisoned, and we hope that this Bill might present a mechanism for this. However, we are unsure about how this system would work in practice and specifically seek clarification about the role of judges. The Bill makes clear that the decision on whether an offender requires mental health treatment should be based on the opinion of medical practitioners. However, it is not clear who would make the decision to seek such opinions: would this rest with the
defence, or would it be triggered by particular circumstances? What role would a judge then have in deciding whether treatment was required, and whether the offender should see a psychologist or other professional? Additionally, how would this option differ from a probation order with a condition of psychiatric treatment, an option that is already available to the court?

We are also unsure how this new system would relate to the existing Mental Health Tribunal, which deals with detentions and orders under the Mental Health (Care and Treatment) (Scotland) Act 2003. Is there a danger that Community Payback Orders would risk setting up a parallel system? Finally and most importantly, the Mental Health (Care and Treatment) (Scotland) Act is based on a set of principles such as reciprocity and least restrictive alternative. These principles underpin the Act and give it much of its credibility. Would mental health treatment ordered under these new Community Payback Orders be based on the same principles? If not, this would seem to create an unfair disparity which would cause SAMH great concern.

We would like to emphasise that at this stage, we are not necessarily against this new system: indeed it may be that it presents an opportunity to divert people from prison if they require support for a mental health problem. However, there are a number of areas where clarity is required before we can properly form an opinion on this area of the Bill.

SAMH welcomes the presumption against short periods of imprisonment or detention and would like to emphasise the benefits to mental health that this change could bring about. People with mental health problems are disproportionately found within the criminal justice system. The final report of the UK Equalities Review\(^1\) states, ‘in such cases the encounter with the criminal justice system can become a trigger for a series of further traumatising disadvantages which are the basis for persistent and damaging inequalities.’

A thematic review of the care and support of prisoners with mental health needs carried out in England and Wales\(^2\) pointed out that the need for mental healthcare in prisons will always remain greater than the capacity, unless mental health and community services outside prison are improved and people are appropriately directed to them: before, instead of, and after custody.

National standards require prison-based social workers to prioritise prisoners who have mental health problems. But those on remand or on short sentences are often not able to access social work services, because of the high demand for these services. As well as the lack of consistent mental health services within prisons, prisoners’ mental health can also be affected by their situation. Loss of social acceptance, of material possessions and separation from family, friends and other social supports can all have an impact. The UK Joint Parliamentary Committee on Human Rights stated in 2004 that “prison actually leads to an acute worsening of mental health problems”\(^3\).

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2. HM Inspectorate of Prisons, *The Mental Health of Prisoners - A Thematic Review of the Care and Support of Prisoners with Mental Health Needs, 2007*
For all of these reasons, SAMH commends the presumption against short-term sentences, and hopes that this will be accompanied by appropriate investment in and signposting to community-based mental health services both for current prisoners and those who in future may be diverted from prison. We are aware that NHS Scotland is due to take on responsibility for healthcare in prisons and we believe that this presents an opportunity to greatly improve the mental health of current and future prisoners.

Turning to part 7 of this Bill, we recognise that the proposals in this section appear to stem in part from the Scottish Law Commission’s 2004 Report on Insanity and Diminished Responsibility. In general we see no difficulties with these changes and welcome the move to a more modern form of language.

However we wish to seek clarification of section 117 in Part 7 of the Bill, which proposes to amend section 51 of the 1995 Act to include the text

“But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct”.

Given that this section of the law would mean that people with one particular type of mental health problem would have criminal responsibility where people with a different type of problem would not, it is important to be clear about the definitions used here. Therefore SAMH would like to see:

- a definition of “abnormally aggressive or seriously irresponsible conduct”; and
- clarification of the process that will be used to identify a personality disorder which is characterised in this way and in particular, who will be responsible for making this decision.

SAMH wishes to offer one final comment which relates to the perceived credibility of people with mental health problems within the criminal justice system. Although this Bill makes some provisions for vulnerable witnesses, it does not address the problem that people with mental health problems are too often assumed to be unreliable witnesses. The Mental Welfare Commission produced an excellent report highlighting this issue in 2008. The report, Justice Denied, set out the experience of a woman with a learning disability who was the victim of repeated assaults. No-one was ever prosecuted for these offences, in part because it was assumed that she was not a credible witness. Experiences like these are all too common for people with both mental health problems and learning disabilities and SAMH believes that this problem must be addressed.

SAMH trusts this evidence is of use and would be pleased to discuss it further with the Committee.