

Quiet Revolution in Scotland

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Change is part of life. Some changes are much discussed or even feared, with predictions that they will bring an end to the world as we know it. They seldom do. Contrary to these generalizations, however, there have been two major changes in Scotland in the past couple of years, arriving at the same time only by chance, as they are not linked in any way. They are both likely to have significant effects on our society. However, public reaction, so far, has been slight. The first change, confused in the minds of some as being a form of independence, which it is not, is the establishment of a devolved Scottish parliament whose arrival was greeted with nationalistic pride and emotion. The second was the adoption of the European Convention on Human Rights,¹ largely unnoticed by the public. Both these changes have had, even at this early stage, effects on the work of forensic psychiatrists in Scotland, and this report highlights some of these effects.

The Scottish parliament was established in 1999, sitting in Edinburgh and broadly dealing with Scottish matters, through the devolution of power from Westminster, with the latter still controlling national policy and all international matters. If the boundaries between what is devolved to the new parliament and what is not seem blurred, it is because they are.

As far as mental health matters are concerned, both countries are completely revising the mental health law, and we have been following with interest, and with some anxiety, the proposals from Westminster for major changes to the role of secure psychiatric services for mentally disordered offenders in England and Wales. Our parliament has produced very different legislative proposals for us. They are less extreme and were produced from a comprehensive consulta-

tion exercise, with the responses of interested groups being invited during the drafting of the proposals and, whenever possible, incorporated at that stage. This is easier to do in a small country of only five million people. The legislation, which is currently being drafted, may, however, not include some of the more attractive parts of the proposals, and we are beginning to wonder what form the final version will take. For example, in the original proposals, patients detained in a hospital would have the right to appeal for transfer to less secure conditions. Government in Scotland has been alarmed at this because of concerns about possible costs. Our services have tiered levels of security, with many patients starting their period of treatment at the most secure level and progressing thereafter. Perhaps surprisingly, it is at the lower levels of security that facilities are lacking, and our government's reluctance about this provision is disappointing.

Unrelated to this review of legislation is the very first legislation to appear from the new parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act, 1999.² This has recently been discussed by Crichton *et al.*³ The background to this short piece of legislation was the case of Noel Ruddle,⁴ who, in Glasgow in 1992, after being charged with murder, was convicted of the lesser crime of culpable homicide, the charge having been reduced on the grounds of diminished responsibility. He was indefinitely committed to the State Hospital, Carstairs—Scotland's only maximum security hospital. He showed features of psychotic mental illness at the time of his committal, but these symptoms soon resolved, and the diagnosis became one of psychopathic personality disorder. In due course, he appealed against his continued detention. After lengthy and detailed expert evidence, the judge, who has sole discretion in these cases, decided that although Noel Ruddle had psychopathic personality disorder, he was receiving no treatment, and no treatment was

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available to which his condition would be likely to respond. In view of this, there was no alternative but to order his immediate discharge, even though he was considered to pose a risk to public safety. Similar successful appeals were prevented by the introduction of the new Act, which requires the continued detention of a patient if such detention is necessary to protect the public from serious harm. The patient does not have to receive medical treatment to justify ongoing detention. Our concern is that hospitals could, as a result, become places solely of detention—neither a healthy nor a safe state of affairs for institutions with therapy as a core function.

The European Convention on Human Rights (ECHR) has also led to changes that will affect forensic psychiatry. In Scotland and the United Kingdom, either parliamentary or common law controls the behavior of individuals in the interest of other individuals or the wider community. Although as a nation we spoke of our rights as individuals, these rights were not recorded. A new act of parliament² has recently codified those rights. The impact of this change will be considerable but will also probably be cumulative rather than immediate. Aspects of mental health legislation and criminal justice legislation will be changed completely. Furthermore, even though the act itself is a fairly concise and short document, at this early stage it appears that, in common with the U.S. Bill of Rights, it gives scope for extensive judicial interpretation and debate.

This legislation had its origins about half a century ago when the Council of Europe drafted a European Convention on Human Rights and adopted it in 1950. The Convention came into force in 1953 and has been ratified by 41 member states of the Council of Europe. From 1966, British citizens could bring cases to the European Court of Human Rights in Strasbourg, France. The process for bringing cases was a very slow one. From October 2000, legislation in the United Kingdom allowed convention rights to be enforced in domestic courts. Convention rights include the right to life (Article 2), freedom from torture and inhuman or degrading treatment or punishment (Article 3), the right to liberty and security of person (Article 5), the right to a fair and public trial within a reasonable time (Article 6), freedom from retrospective criminal penalties (Article 7), the right to respect for private and family life (Article 8), and freedom of thought, conscience, and religion (Article 9). Additional rights have been established

under protocols added since 1950—notably Protocol 6, the right not to be subjected to the death penalty. Certain rights, such as the prohibitions of slavery and torture, are absolute and cannot be infringed. Others, such as freedom of speech and religion, are qualified.

The consequences of this legislation for the people of Scotland are not yet known. Prior to its introduction here, opinions were expressed that it would allow lawyers to make even more money and that it would allow private citizens who were so minded to pursue endless claims. There is no indication that either has happened, at least so far, but in the mental health and criminal justice fields there have been some significant procedural changes introduced to ensure compliance with ECHR and avoid possible challenges in the future. For example, politicians have been removed from decisions about the release of prisoners serving indeterminate sentences—in effect, life sentences. Previously, the release of a prisoner with a life sentence could be authorized only by the Secretary of State or First Minister, with the agreement of the Judiciary and the Parole Board, but since June 2001, judges, who in Scotland are nonpolitical appointees, have decided the tariff period—that is, the period to be served in prison to satisfy the needs of punishment and general deterrence before there can be any possibility of release on license. After the tariff period has been served, a tribunal of the Parole Board, who are also independent, may order the release of the prisoner after considering solely the issue of whether there is a continuing risk to the public. The tribunal has no regard to punishment issues or to political considerations. The prisoner is present at the tribunal when his or her case is heard, is legally represented, and can call witnesses in his or her behalf. Similar changes have been proposed for patients detained in secure mental hospitals, who at present can also be released only by the First Minister; but if the legislation is accepted, patients also will be dealt with by independent tribunal.

These changes have been welcomed within the professions and there has been no public opposition to them. They have a direct bearing on the recent release on parole of the two young men in England who were convicted when they were children of the murder of a young child, James Bulger.⁵ In the extreme emotional outpouring that followed news of their release, there has been no link in the media, even in the quality press, between ECHR principles

and their release. There has been a similar case recently in Scotland. A young woman, while still a child, had murdered another girl and had been sentenced to life imprisonment.⁶ Her release by the Scottish Parole Board prompted critical but ill-informed press comments.

Other imminent developments as part of the striving for ECHR compatibility in anticipation of challenges rather than in response to them will bring an end to "slopping out" in Scottish prisons. In a recent case (June 2001) a prisoner held in a cell without a toilet in a remand prison in Glasgow successfully appealed that this was in contravention of his human rights. A judge ordered the prison to move him to a cell where he had continuous access to a toilet and that this move must take place within three days.

We must remember that this is only the beginning. The Scottish parliament was born in 1999 and ECHR compliance arrived the following year. What the next few years will bring in legislation and broad policy remains to be seen. There is always tension

between the rights of the individual and those of society. Medicine typically tends toward the former, while legislation favors the latter.

We will have to wait a while longer to find where, within these very new arrangements, the balance will be reached in Scotland.

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