Definition of Mental Disorder and Exclusions

Current Law

In the 1983 Act, mental disorder is sub-divided into four categories:

- mental illness;
- mental impairment;
- severe mental impairment; and
- psychopathic disorder.

The category of mental illness is the diagnosis identified in the overwhelming majority of formal admissions under the 1983 Act and is not defined. In 2001 roughly 98 per cent of people detained for treatment under section 3 were categorised as mentally ill. The absence of a definition, along with guidance from the Courts, has enabled a practical and developmental use of the category to ensure that when patients are described as mentally ill it is in line with developing practice.

In relation to learning disability, the definitions in the current Act for mental impairment and severe mental impairment include the requirement for the person to have "abnormally aggressive or seriously irresponsible conduct" in addition to having a learning disability.

The 1983 Act also excludes certain behaviours from being seen in themselves as mental disorders. These are promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs.

2004 Draft Mental Health Bill

The Draft Mental Health Bill defines mental disorder as “an impairment of, or a disturbance in, the functioning of the mind or brain resulting from any disability or disorder of the mind or brain”.

The Draft Mental Health Bill has no exclusions.

Alliance position

The Alliance accepts a broad definition of mental disorder but only alongside strict conditions for compulsion

The Alliance agrees in principle with the replacement of the 1983 definition of mental disorder by a broad definition in the 2004 Draft Bill. The new definition is said to focus on

the effect (the presence of psychological dysfunction) rather than the cause (disability or disorder). The Alliance, however, doubts that the redrafting achieves this aim.

The broad definition of mental disorder would include neurological and other causes of brain dysfunction including intellectual impairment, head injury, multiple sclerosis, learning disabilities, people on the autistic spectrum and people with drug and alcohol dependence. Whilst it is clear that this definition would not result in any inappropriate exclusion it undoubtedly gives the potential for serious over-inclusion. This appears to be in conflict with the principle of least restrictive alternative. We believe that the broad definition of mental disorder in the Draft Bill would only be satisfactory if combined with extremely tight conditions and limitations, including exclusions conditions.

As the Bar Council stated in their evidence to the Joint Committee:
"*The 'first 'relevant condition' includes a definition of mental disorder that is very broad, potentially including those with addictions and learning disabilities. A broad definition is justifiable only if suitable exclusions and other strict threshold criteria are also in place; this was the basis upon which the Richardson Committee proposed a broad definition of mental disorder*."[1]

The Bill must include an exclusion clause

It is vital that such a broad definition of mental disorder sets some clear boundaries (as is the case in the 1983 Act and the law of other countries including Scotland, New Zealand and Australia) through a series of exclusions. Exclusions ensure that practitioners carefully consider the basis for compulsory treatment. If there is an underlying mental health diagnosis the person is covered by the Act. It is unhelpful and inappropriate for people who do not have an underlying mental health diagnosis to have their needs confused with those of people who do have an underlying diagnosis.

This is supported by the UN's *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* which requires that: *"No person or authority shall classify a person as having, or otherwise indicate that a person has a mental illness except for purposes directly relating to mental illness or the consequences of mental illness."*[2]

As Alcohol Concern has put it:
"*We would recommend that it is made explicit that intoxication alone should not be viewed as a mental disorder; it was clearly not the intention that being drunk and being reckless should bring an individual under the scope of the Mental Health Act."*

"In addition, the Bill should make it clear that intoxication, although not a mental disorder in itself, should not be a reason to deny an individual assessment under the Act if there is suspicion of other mental disorder. It is important that individuals who are experiencing mental disorder and are posing an acute risk to themselves or others, do not fall through the net of the Act simply because they are intoxicated."[3]

Having decided that clinicians have misunderstood the 1983 Act as a bar to the detention of persons with problems of substance misuse, the Government does not favour

[1] Bar Council, *Report of the Joint Committee on the Draft Mental Health Bill: Volume II,* Nov 2004. Ev. 176 para 11.2.
[2] Principle 4 (5), *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* Adopted by General Assembly resolution 46/119 of 17 December 1991
[3] Alcohol Concern, *Report of the Joint Committee on the Draft Mental Health Bill, Volume III*, Nov 2004. Ev.1056, para 1.2-1.3.

exclusions in the new Draft Bill. The Alliance believes that this rationale is spurious.

Existing law does not prohibit treatment of a mentally disordered person who also has other behavioural issues.[4] If the current law was merely misunderstood, the problem could and should be addressed by information and training, and if necessary by a rewording of the 1983 Act.

For instance:

A person shall not be deemed to be suffering from mental disorder for the purposes of the Act solely on the grounds of his:

- *dependence upon, or use of, alcohol or drugs;*
- *sexual behaviour or orientation; or*
- *commission, or likely commission, of illegal or disorderly acts, although the presence of one or more above grounds does not exclude the possibility of concurrent or underlying mental disorder within the Act.*[5]

Besides, the Mental Health Act Commission points out that there is no evidence that the law is a problem:

"*The Government justification for its proposal to set aside exclusions is that the excluding clause has been widely misunderstood by clinicians as a bar to the detention of persons with drug or alcohol problems under the current law, even in the face of a coexisting mental disorder. We are not aware of strong evidence that the law is the real problem here: it is quite possible that mental health services seek to turn away such persons, or divert them to addiction services, but this may be more to do with practical resource limitations than mistaken ideas about the limit of mental health powers*."[6]

The exclusions should make clear that:

- a diagnosis of substance or alcohol abuse or sexual behaviour does not preclude an additional diagnosis of mental disorder, even if the primary diagnosis is the former.
- a person shall not be considered as suffering from mental disorder solely on the grounds of the commission, or likely commission, of illegal or disorderly acts

The impact of a broad definition without exclusions could be the over-inclusion of people who do not suffer from a mental disorder, in particular those who have issues of behaviour or conduct. Some service providers have pointed out that, while it may seem unacceptable in principle to put under compulsion a person with drug or alcohol dependence, at least it will ensure that s/he receives treatment and it will assist in the development of these services as a whole. However, legislation should not be used as a lever to improve service provision, nor should people be subject to social control and loss of liberty to get the help they need. Furthermore, the use of compulsory powers over recalcitrant drug or alcohol users will be more likely to backfire than to succeed, as cooperation is a key component of behavioural change. There could also be a confusing overlap between the powers proposed in the Draft Bill and drug treatment and testing

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[4] W (a patient) v Secretary of State for Scotland (Times April 21 1999) made clear that, "*the provisions meant that a person could not be detained by virtue of a sexual deviancy that was unrelated to a mental disorder; but detention was not prevented where the disorder manifested itself in deviate sexual behaviour*".

[5] Adapted from the Mental Health Act Commission's recommendation, *Report of the Joint Committee on the Draft Mental Health Bill: Volume II,* Nov 2004. Ev.19, para 2.5.

[6] Mental Health Act Commission, *Report of the Joint Committee on the Draft Mental Health Bill: Volume II,* Nov 2004. Ev.18, para 2.4.

orders (DTTOs). For this group there is no substitute for targeted and well-resourced voluntary programmes.

Recommendations of the Joint Committee on the Draft Mental Health Bill 2004

The Joint Committee agreed with the Alliance's position on the need for exclusions: *"[W]e also accept the view of the Mental Health Alliance that if exemptions are seen to be misused, that is a matter which should be rectified through training and carefully worded codes of practice...We conclude that a broad definition of mental disorder in the draft Bill must be accompanied by explicit and specific exclusions which safeguard against the legislation being used inappropriately as a means of social control*"[7]

They also supported the Alliance's concerns about the use of mental health legislation for substance misuse. *"We recommend that a specific exclusion on the grounds of substance misuse alone (including dependence on alcohol or drugs) be inserted into the Bill.*"[8]

The impact of the definition on people with learning difficulties needs to be examined

The impact of the wide definition is of particular concern for people with learning difficulties. Under the 1983 Act a person with a mental impairment ('being a state of arrested or incomplete development of mind') is only included if their impairment is associated with abnormally aggressive or seriously irresponsible conduct.

In the view of the Royal College of Psychiatrists this issue may also need to be addressed through the exclusion clauses. The College proposes that people with a learning disability should only be liable to compulsion under the Act if they have a mental disorder in addition to their learning disability. This could be achieved by adding to the list of exclusions, "[solely on the grounds of] impairment of intelligence". It is Government policy, as set out in '*Valuing People'* that people with learning disability should access services in the same way as anyone else, and this proposal would achieve that aim.[9]

If the 'impairment of intelligence' exclusion is not included, then the definition of mental disorder in the draft Bill would include almost all people with learning disability, who would then be liable to compulsion at any time they decline medical treatment (including education and training). Leaving aside the serious ethical issues, this would lead to the inappropriate detention of more people with learning disability, and the growth of institutional care. This would not be in keeping with the aims of *'Valuing People'*.

In addition to these exclusions from the definition of mental disorder, other strict threshold criteria are needed in order to make the broad definition of mental disorder acceptable. These are discussed in the following chapter.

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[7] *Report of the Joint Committee on the Draft Mental Health* Bill, 2005. Volume I, p.40.
[8] *Report of the Joint Committee on the Draft Mental Health* Bill, 2005. Volume I, p.40.
[9] *Valuing People: A New Strategy for Learning Disability for the 21st Century*, DH, March 2001, p.63.