New community mental health law: the conditional discharge model

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Public interest in reforming community care is periodically reinforced by killings committed by psychiatric patients (Charles, 1997) and by the inquiries that follow (Peay, 1996). It is now undeniable that there is some, limited association between mental illness and violence (Taylor & Monaghan, 1996). Attention has again focused on non-adherence with community treatment (Howlett, 1998), and the need for powers to return patients to hospital (Coonan *et al*, 1998).

Ineffective legislation

Plans for community treatment orders (Royal College of Psychiatrists, 1987, 1993) have been thought to breach the European Convention on Human Rights (Department of Health, 1993). Consequently, the Mental Health (Patients in the Community Act) 1995, implementing 'supervised discharge', grants merely 'a power to convey'. Other policy initiatives, for example, the supervision register (Holloway, 1994) also give professionals increased responsibility, but little assistance. Governmental attempts to deliver community care have been criticised as ineffective and under-resourced (Coid, 1996) and "countertherapeutic" (Eastman, 1995). No one argues that these little used provisions have prevented many suicides or homicides.

The government recently expressed the view that "community care has failed", and announced a "root and branch" review of the Mental Health Act 1983 (Warden, 1998). It is envisaged that some powers of compulsion must be granted to ensure treatment compliance, to protect vulnerable patients, and to restore public confidence.

The extended leave model

General psychiatrists have used extended leave of absence from detention in hospital, under the Mental Health Act, as a way of ensuring treatment compliance in the community (Dyer, 1998). Sensky *et al* (1991) found that extended leave improved adherence, reduced time in hospital and reduced levels of dangerousness to others. The Hallstrom case (1986) established, however, that renewal of detention of patients on leave was illegal. 'Section 17' leave can presently last only for the duration of the order, that is, up to six months in most cases.

Supervision under conditional discharge from a restricted hospital order

The effectiveness of extended leave lies in the power of recall to hospital, also key to conditional discharge from a Mental Health Act restriction order. However, option appraisals for a new order have generally omitted any variant of the conditional discharge system (e.g. Burns *et al*, 1993; Mental Health Act Commission, 1988). A 'restricted hospital order' is imposed by the Crown Court, instead of a simple hospital order, if "it is necessary for the protection of the public from serious harm". Most follow serious criminal offences, and 95% are made without limit of time (Romilly *et al*, 1997). Later, the Mental Health Review Tribunal will usually order conditional discharge, so that the patient remains liable to recall to hospital. Absolute discharge follows typically five years or more of successful community supervision.

Patients on conditional discharge generally receive a high standard of community care from the social supervisor, and the responsible medical officer. Quarterly clinical reports to the Home Office are mandatory. Patients are usually subject to conditions of residence and cooperation with supervision. Conditional discharge under the Mental Health Act 1959 was thought by the Butler committee "the most valuable feature of the system of restriction orders" (Home Office & Department of Health and Social Security, 1975). The Home Office reports low reconviction rates under community supervision (Home Office, 1995). Follow-up studies have found the lowest rate of reoffending among the

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conditionally discharged mentally ill (see Bailey & MacCulloch, 1992). Regional secure units now use conditional discharge for the community forensic psychiatry services envisaged by the Butler committee.

Disadvantages of restriction orders

The Butler committee noted detention "longer than strictly necessary", especially for less serious offences. The 1983 Act empowered the Mental Health Review Tribunal to discharge restricted patients, although this remains unusual at the first hearing (often held in the second year of detention). Despite the support of the responsible medical officer, there is no assurance that a recovered patient will be discharged (Peay, 1989). The responsible medical officer cannot discharge a low-risk, compliant patient, even to make space for a highly dangerous individual in the community! Psychiatrists have long wished, at least in some less serious cases, to be able to initiate conditional discharge.

The community restriction order

This new power would allow both the Crown and Magistrates' courts to make a hospital order with a restriction only on absolute discharge, thereby allowing the responsible medical officer to initiate conditional discharge. The Crown Court can make the order for any mental disorder, but only the Magistrate can for mental illness. The broader group of mentally ill offenders in the Magistrates' court are the primary target of this proposal. A community restriction order is to be made if it is necessary for the protection of the public from significant harm, or in the best interests of the offender. In future all restriction orders should be made without a predetermined time limit, but only with the support of the potential responsible medical officer.

New mechanism of conditional discharge

Patients subject to a community restriction order can be discharged, conditionally, by the same mechanisms leading to discharge from a simple hospital order. However, if the responsible medical officer initiates the process, an important safeguard will be a minimum 28-day planning period before discharge is implemented. A plan, with the support of a potential social supervisor, must be submitted to the Home Office, including conditions of residence and supervision. The Home Office will comment on the plan and may add conditions. The frequency of reporting will be at Home Office discretion except where the order originates in the Crown Court. Application to the Mental Health Review Tribunal will follow the current arrangements, although managers will not have the power to discharge.

The Mental Health Act 1983 allows the Home Secretary to recall a restricted patient to hospital for treatment, on the basis of "objective medical expertise" (Winterwerp *v.* the Netherlands, 1979). Referral to the Mental Health Review Tribunal is automatic. Under the community restriction order, the responsible medical officer can, as soon as appropriate, initiate another conditional discharge.

Powers to impose treatment

A "power to convey for assessment and treatment", available under conditional discharge, is essential for all restriction order patients. As a less restrictive alternative, employed before recall is considered, it will allow assessment in a clinical setting, and discussion with all parties. Crucially, this power must include the compulsory administration of treatment, and, if required, up to 72 hours detention in hospital.

Safeguards for patients and for the public

Any effective community treatment order will raise libertarian concerns. However, the community restriction order can only be imposed following conviction for an imprisonable offence. For minor offences, the hospital order without restriction remains. Vulnerable individuals are provided for by the courts' power to order Mental Health Act guardianship, and in cases of mental impairment and psychopathic disorder only the Crown Court can make any restriction order. As a general protection, where a community restriction order is proposed, any party can refer the case to the Crown Court. Fully restricted hospital orders will only be made, as now, in the Crown Court.

The new power to convey will deliver the right to proper treatment, in the least restrictive setting, for patients unable or unwilling to consent. This is undoubtedly permitted within the European law, as interpreted in landmark cases (further details available from author upon request). Patients under community restriction orders will be extended the protection of the Mental Health Act Commission, and rights to information, to appeal to the Mental Health Review Tribunal, and to free legal representation.

The wider use of conditional discharge will reduce the frequency of illness-related offending. Where a Magistrates' court has cause for concern, the order will offer a safer alternative to a

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simple hospital order. Longer term detention on a fully restricted hospital order will remain available for serious Crown Court cases. The term community restriction order will remind the Court of the possibility of early conditional discharge.

Implementation and resources

The new order cannot be made without the support of the responsible medical officer. However, the profession is likely to prefer a simple and proven system of periodic clinical reporting, to any bureaucratic procedure. The community restriction order will help mentally ill offenders recover in the community, diverting resources from crisis response to planned care. Many hospital admissions will be avoided, with all the costs associated. Only modest funds will be required to cover a slowly expanding case load at the Home Office Mental Health Unit and the Mental Health Review Tribunal, and the slightly extended remit of the Mental Health Act Commission.

Civil community treatment orders – the conditional discharge model

The community restriction order is a good model for non-offender patients with similar needs. As a purpose-designed form of community treatment order to replace extended leave, conditional discharge from (Section 3) treatment orders should be available, but in certain circumstances only, such as a history of relapsing disorder responsive to treatment, non-compliance and a risk of significant harm. The mechanisms would be identical to the community restriction order, except that the Home Office responsibilities should fall to equivalent NHS civil servants, perhaps at regional level.

New and innovative proposals will be key to successful revision of the Mental Health Act. The governmental review must consider the right to proper treatment, through a power such as a conditional discharge based community treatment order, unencumbered by any misconceptions about European law. The use of compulsion can be justified, in each case, by the potential consequences of untreated illness for the patient and for the community.

Discussion

The gulf between parallel, forensic care and local services (Gunn, 1976) requires the development of integrated services for mentally disordered offenders (Department of Health & Home Office, 1992). A community-orientated restriction order system can make this happen. For patients who are not offenders with similar needs, a treatment compliance order based on conditional discharge, can deliver effective community care.

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