

## Mental Health, Incapacity and the Law in Scotland by Hilary Patrick

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A declaration of possible bias needs to be made at the outset of this review. For some years the book's author, Hilary Patrick, has been in effect the 'Scottish correspondent' of this Journal<sup>1</sup>. She has generously made a number of contributions to past issues<sup>2</sup>, on some occasions in response to an editorial request. She also presented (again on request) a paper to the Comparative Mental Health Law Seminar hosted by the Law School at Northumbria University in October 2005<sup>3</sup>. However challenging though it has been, I have tried to approach this book without any preconceptions as to its quality.

Hilary Patrick is an Honorary Fellow in the School of Law at Edinburgh University. She is vice-convenor of the Law Society of Scotland's *Mental Health and Disability Committee*. She was a steering group member of the *Alliance for the Promotion of the Incapable Adults Bill*, and then became a member of the Millan Committee established to review mental health law in Scotland, which reported in 2001 in a publication entitled '*New Directions*'. It is Bruce Millan, the Chair of that Committee, who has written the Book's Foreword. He says of the author: "She combines expertise in the law with a strong commitment to the rights and needs of those suffering from mental disorder" – qualities which are abundantly clear to anyone who reads the book.

Towards the end of the book (in chapter 42) reference is made to a previous "first edition". I found this puzzling until I revisited the publishers' details at the front of the book, where reference is made to the book's predecessor, entitled '*Mental Health, the Law in Scotland*' (Butterworths, 1990) by John Blackie (now professor of law at Strathclyde University) and Hilary Patrick herself. Sixteen years later a second edition was clearly long overdue, not least as a consequence of the two substantial pieces of legislation passed in the last few years – the *Adults with Incapacity (Scotland) Act 2000* and the *Mental Health (Care and Treatment) (Scotland) Act 2003* (referred to within this review as the 2000 Act and the 2003 Act respectively). Not surprisingly, given the book's title, these two significant statutes form the backdrop of much of the book. However the book is so much more than a description and explanation of their provisions. It is divided into 14 Parts with chapters within each Part. A summary of their contents is provided by the author in the Preface. I cannot improve on it, and so reproduce the following (appropriately edited for reasons of space):

*"Part 1 contains a short look at the social and health care background and examines the legal sources of mental health law in Scotland. ... Chapter 2 looks at the main statutes. Chapter 3 looks at key organisations, and Chapter 4 considers ways in which the service user can be empowered in the process..."*

1 It should be added that (a) others from Scotland have also generously contributed, and (b) further contributions from others are of course most welcome.

2 'Reviewing Scottish Mental Health Law: Any Lessons for England and Wales?' JMHl December 2000 @ pp 147 - 156; 'Scottish 'public safety' test for discharge of restricted patients held ECHR compatible' JMHl February 2000 @ pp 43-49; 'Scottish Parliament acts on Mental Health

Law Reform' JMHl August 2003 @ pp 71-76; 'Reflections from Scotland: Difficult Decisions Ahead' JMHl November 2005 @pp 169-173.

3 'Mental Health Law in Scotland: Principled yet Pragmatic?' – paper delivered at the Comparative Mental Health Law Seminar held at Northumbria University on 14th October 2005.

*Part 2 deals with issues of general medical law, such as capacity and consent to treatment, the right to insist on certain forms of treatment, confidentiality and planning for future incapacity. Part 3 deals with the impact of compulsory measures and Part 4 with the role of the new Mental Health Tribunal for Scotland.*

*Part 5 looks at decision-making for people who lack capacity to take medical, welfare or financial decisions, both under the Adults with Incapacity Act, and also under common law...*

*Part 6 looks at community care and people's rights to services. Part 7 looks at the protection of people at risk.*

*Part 8 (by Margaret Ross (Senior Lecturer at the University of Aberdeen and Vice-Chair of the Mental Welfare Commission for Scotland)) considers the impact a mental disorder may have on a person's day to day life, whether it is making contracts, serving on a jury or seeking employment or housing.*

*Part 9 (by Lynn Welsh (Head of Scottish Legal Affairs) and Irene Henery (Legal Assistant at the Disability Rights Commission)) considers protection against unlawful discrimination.*

*Parts 10 and 11 are slightly different. They consider the impact of the law on different groups, including women, people from the minority ethnic communities, people with dementia or learning disabilities, refugees and asylum seekers, children and young people, and in Part 11, carers...*

*The interaction of the mental health and criminal justice systems is extremely complex. Part 12 attempts to set out the rules as clearly as possible.*

*Part 13 looks at the bodies responsible for ensuring standards in health and social care, and Part 14 ... attempts to give some guidance as to what happens when things go wrong..."*

Not surprisingly therefore, the book is a weighty tome (as reflected in its price) – 844 pages of text followed by 175 pages of appendices and index. The breadth of the material covered indicates the author's intention that it should serve as a guide and reference book for easy access by many. Ambitiously, the author says in the Preface:

*"While I hope the book will be of use to lawyers, it is not aimed exclusively at them. Many other people have an interest in these matters. Doctors (including GPs), social workers (particularly mental health officers), independent advocates and welfare rights workers may all find something of interest. The book attempts to avoid legalistic language (although some of the legal provisions it describes are very complex) and I hope it will be of use to users of services, families and carers."*

Such an aim is not without risks. The end result can so easily end up satisfying no-one. The lawyers may want more detail; the other professionals can be misled about the law by over-simplification of those complex provisions referred to in the above quote; service users and families may seek more practical advice. Having read through the entire book – admittedly concentrating more assiduously on some sections than on others – I have no doubt that the author has successfully avoided this happening.

It is true that in a number of places I, as a lawyer, *did* want more analysis of the law, and I am equally sure non-lawyers may criticise some of the contents as being too legalistic, but overall I feel the author has got the balance right, and has written a book extremely accessible to all those groups she had in mind as she wrote. Very conscientiously, the author has 'sign-posted' readers to other sources, be it caselaw, statutory provisions, secondary legislation, extracts from Codes of Practice<sup>4</sup>, other books, articles, guides produced

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<sup>4</sup> Readers from outside Scotland might be surprised to learn that there is a 3 volume Code of Practice for the 2003 Act, and that there are seven Codes under the 2000 Act.

by voluntary organisations etc. etc. She also provides what would appear to be a very useful and comprehensive list of 'Contact details', in particular sources of information, advice and assistance. This is indeed an invaluable guide and reference book for all those with any interest in, and involvement with, services for those suffering from a mental disorder in Scotland.

But it is so much more than a reference book and (surely) a 'must have' book for those working in the mental health field in Scotland. Its contents are of considerable interest to those of us *not* working in Scotland who are keen to know how those north of the border have sought to resolve those numerous issues which have occupied the thinking of so many of us for so long in recent years – not only in England and Wales (E&W) but also no doubt in other jurisdictions. I, for one, confess to possession of patchy knowledge and understanding prior to reading this book. I also acknowledge a hitherto long-held belief (based on that limited knowledge, and fuelled by certain observations of such expert observers as Lord Carlile<sup>5</sup> and Lucy Scott-Moncrieff<sup>6</sup>) that by and large (despite concerns expressed in a previous issue of this Journal by the author<sup>7</sup>) they had got things right in Scotland whilst in E&W we continued to struggle with, and fudge the resolution of, what have seemed irreconcilable problems. For what it is worth, my view now is that such a belief is too simplistic. Much of what is now in statutory form in Scotland seems to me (but maybe not others) appealing – *for example* principles on the face of both Acts, the introduction of a 'named person' as a source of support to the service-user, 'significant impairment of decision-making ability' as a pre-detention criterion, and the wide brief of the Mental Welfare Commission – whilst in other ways Scottish provisions seem problematic – *for example* the lack of a statutory provision equivalent to section 5 *Mental Capacity Act 2005*<sup>8</sup> (E&W) would appear to have led to some uncertainty as to when a Court order is required, and the apparent ease with which the view of a medical decision-maker (appointed by someone before loss of capacity) can be overridden by the medical profession does seem (as the author points out) "logically indefensible".

It is very much to the author's credit that she does not shy away from highlighting any lack of clarity in the law and failings which she perceives in the legal provisions. She is critical of certain errors and omissions in the Codes of Practice; and of the compulsory treatment provisions in Part 16 of the 2003 Act, she says:

*"The drafting of part 16 is extremely complex. Many people will not find it easy to understand these important provisions when reading the Act. The Mental Health (Care and Treatment) Act is committed to principles of openness and accessibility. It is regrettable that the parliamentary draftspeople (sic) appear to have found these principles so difficult"*

Another example of her readiness to criticise where necessary, is her wry observation of the provisions within the 2000 Act which enable a person to apply for removal of his/her nearest relative:

*"The Adults with Incapacity Act says that a person cannot apply for the removal of his or her nearest relative unless at the time of the application the adult is incapable as defined in the Act. As the Act's definition of incapacity is always linked to particular decisions, it is not clear what this means. If it means*

5 Chair of the Joint Parliamentary Scrutiny Committee on the Draft Mental Health Bill 2004. See 'Legislation to law: Rubicon to Styx?' by Alex Carlile, JMHL November 2005 @ pp 107–109.

6 Solicitor (London). See 'A sense of Déjà vu - a preliminary (and immediate) response to the report of the Scrutiny Committee on the draft Mental Health Bill' by Lucy Scott-Moncrieff JMHL May 2005 @ pp 77–82 – in

particular her conclusion that "The Government should consider adopting the Scottish Act; lock, stock and barrel."

7 See 'Reflections from Scotland: Difficult Decisions Ahead' by Hilary Patrick JMHL November 2005 @pp 169–173.

8 Protection from liability for certain acts done in connection with care or treatment of a person lacking capacity to decide for him/herself.

*that someone can make an application only when he or she is unable to do so, it is not, perhaps, one of the more enabling provisions of the Act.”*

As I read through the book, inevitably I found myself comparing Scottish provisions with those pertaining to actual and anticipated provisions in E&W, with my notes leading me to a review of the law rather than a review of the book. To some extent the author encourages such a comparison. She has researched widely with several references to decided cases from the English courts and the European Court of Human Rights (and indeed in a few instances to cases from further afield e.g. Canada and South Africa). Of course I wanted her to say more about several such cases but to do so might well have unbalanced the book. Similarly I found myself being critical of some of her succinct summaries of E&W provisions (e.g. “The legal duty [derived from s. 117 MHA 1983] extends only to patients who have been compulsorily detained in hospital for at least six months”, which is potentially misleading) but the book is firmly about Scotland and is *not* a comparative study with other jurisdictions.

Both the author and the publishers should be given considerable credit for the book’s lay-out. It is structured and presented in a way which invites easy ‘dipping into’. Generous and thoughtful use is made of headings, sub-headings and sub-sub headings, and the footnote referencing (so much of which assists the signposting referred to above) is very accessible. There are a few typographical errors, and in a couple of places an annoying failure to cross-reference – for example the term ‘Assessment Order’ is encountered in chapter 16 but not explained until chapter 45 with no cross-referencing from one chapter to the other – but given the size of the book, these are very minor quibbles indeed.

In summary, it seems to me that Hilary Patrick has written an invaluable book. I am in no position to judge the accuracy of her description of the law but I have no reason to doubt that it is anything but correct. I urge that consideration be given to an early second (or is it a third?) edition (possibly a loose-leaf version incorporating both the major statutes?). In numerous places the author refers to ‘the present’ (May 2006) with the implication that debate is ongoing and change may be afoot, and I have no doubt that in several such places law and/or practice has moved on<sup>9</sup>. For this book to be seen as a reliable and authoritative source on mental health and (in)capacity law in Scotland (as it surely deserves to be) both now and in the future, regular up-dating is essential. It would be a considerable loss to those interested in, and affected by, the law, were this not to take place. Certainly another sixteen years must not be allowed to elapse before this occurs.

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9 In addition of course there is ongoing research into the effects of the legislation which should be of interest to the book’s readership. For example, see (1) ‘Psychiatrists’ views and experiences of the Mental Health (Care and Treatment) (Scotland) Act 2003’ by Christine Carswell et

al, *Psychiatric Bulletin* (2007) Vol. 31 No. 3 pp 83/4, and (2) ‘Before and after: Introduction of the Mental Health (Care and Treatment) (Scotland) Act 2003’ by Helen Smith and Tom White, *Psychiatric Bulletin* (2007) Vol. 31 No. 10 pp 374–376.

