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UNIFORM PRINCIPLES INVOLVED IN MENTAL HEALTH LEGISLATION

Introduction

The advantages to the patient of uniform mental health legislation, which defines the standard use of words and terms throughout the States of the Commonwealth, and clearly distinguishes between provisions for the treatment of patients and those for detention and control for the safety of the patient or of others, would be to lessen still further the stigma which persists in relation to the diagnosis and treatment of mental illness; to remove the fear still all too prevalent that it is possible to be put away wrongfully in a mental hospital by collusion between a doctor and a patient's relatives; and, as a result, to re-establish a firm and trusting relationship between a patient suffering from a psychiatric disorder and his doctor.

Uniform Terminology

There is a need for uniform terminology in mental health legislation. It has been pointed out that, when reference is made to the mentally retarded, the term "intellectually retarded" is sometimes used; sometimes the term is "mentally defective". However, these two terms cannot be equated, because in the South Australian Mental Health Act the term "mentally defective person" also includes one who is "mentally ill". In a recent editorial comment in the Australian Law Journal it was observed that the definition of mental illness could be crucial in determining the scope and purpose of mental institutions. It could also determine restrictions on the liberty of those unable to take care of themselves or likely to behave in socially undesirable ways.

It has also been contended that mental illness, tuberculosis, venereal disease or any other illness cannot be defined by statute and that the finding of a medical practitioner that a person is mentally ill is the only valid criterion of mental illness although it must be always accepted that such a determination is subject to cross-examination on appeal.

A uniform nomenclature would appear to be desirable also in view of the fact that words such as "certified, committed, restricted, recommended" are used in State Acts to describe legal processes which are similar if not identical. Such a uniformity in the use of medical and legal terms throughout Australia would define clearly for the patient, his relatives and society in general, the precise areas in which the law may impose restrictions on the freedom of the individual patient. In this regard, it may be appropriate to adopt, as uniform nomenclature, the terms used by the National Health and Medical Research Council in its recommendation (October 1970) relative to the need for the uniform classification of mental health statistics, i.e. "Voluntary", "Informal", "Recommended" and "Forensic".

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Scope of Legislation

Mental health legislation should be primarily concerned with answering the need for compulsory treatment and control of the best quality for the mentally ill (and handicapped) who lack the insight to seek treatment themselves or when this is necessary for the protection of others. The legislation should not need to cover the much wider range of all the treatment and preventive procedures and facilities of Mental Health Services.

Treatment and Control

The ideal achievement in Mental Health Legislation will be to afford the mentally ill (and the mentally retarded) the maximum advantage that care and treatment can offer, but to guarantee the minimum interference with their rights, dignity and self-respect. At the same time, adequate protection must be given to society as a whole.

With regard to the mentally retarded, first, it is implied that when non-institutional care is desirable and available, it should be given as this will involve the least interference with normal rights and privileges. Second, guardianship of the person may be required in some cases. Third, if deprivation of liberty is imposed, the mentally retarded persons should retain those of his rights which he can exercise satisfactorily, and he should be entitled to be given his freedom as soon as it is desirable for him to do so.

With regard to the mentally ill, simple and prompt procedures for voluntary (informal) admission would promote a more co-operative attitude on the part of the patient and aid early diagnosis. There is thus a need to dispense with cumbersome machinery for admission to a mental hospital. Compulsory treatment, for the sake of the patient's own welfare, should be recognised to be necessary only when the patient lacks insight to seek treatment for himself.

The bulk of any Mental Health Legislation is concerned with the apprehension, examination and detention of persons suspected of mental illness. Such compulsory powers of detention and control can only be justified when they are necessary for the protection of others as well as for the patient's own welfare.

Initial Compulsory Action

Initial compulsory action may be required in a number of situations where both the police and/or medical practitioners may be involved. Each situation would give rise to a number of matters which require consideration. It would be generally accepted that if a member of the Police Force finds in a public place a person, who appears to him to be suffering from mental illness and to be in immediate need of treatment or control, that member of the Police Force should in the interests of that person or for the protection of other persons remove that person to a place of safety. However, it should be encumbent on the apprehending officer to have the person examined as soon as practicable by a medical practitioner. Should this practitioner consider that the person is mentally ill, then the apprehending officer should be required to initiate the action that would

normally be undertaken by the relative. If, on the other hand, the medical practitioner considers that the person's mental illness does not warrant the detention of the patient in a hospital for treatment or for the protection of other persons, then the medical practitioner should inform the police accordingly. In cases of uncertainty, there should be provision for the police to bring the matter before the appropriate civil authority e.g. a magistrate.

The question as to whether the police should have authority to act within a private home or private property if they have reason to suspect that there is a mentally ill person therein is one which is open to argument. It may be necessary to make provision for police intervention in the case of suspected suicidal attempts.

If it is agreed that action can be taken by a police officer in a public place if he suspects a person to be suffering from mental illness and be in immediate need of treatment or control then it seems reasonable that action could also be initiated on the application of a relative, supported by the medical recommendation of a single medical practitioner. In some States it is still necessary except under conditions of emergency for two medical practitioners to provide medical recommendations before compulsory action can be initiated. The requirement for the second medical practitioner to make a recommendation seems an unnecessary and obstructive provision.

Most medical practitioners exercise the highest degree of discretion in the issuing of such medical recommendations. However, it is to be expected that clinical errors will occur. Such clinical errors will be corrected as far as is practicable by immediate examination on admission and confirmation or rejection of the original medical recommendation.

The concept of the Mental Health Welfare Officer as a person authorised to make or cause to be made an application for admission of a mentally ill person should be included. Where community mental health workers are available and where compulsory action is required, it is reasonable to authorise such persons to initiate action. Where they are not available it becomes necessary to instruct police or medical practitioners to initiate action. It is necessary to emphasise that the object of compulsory action at this stage is not detention, but medical assessment. Once medical assessment has been made the question of detention can be resolved.

Present legislative provisions allow compulsory action to be executed by a member of the Police Force and medical examination follows action by the police. A concept which would bear further examination would be statutory provision to enable a medical practitioner to initiate the action and obtain the effective assistance of a member of the Police Force to have a person compulsorily examined by another medical practitioner where the doctor has grounds to believe that this patient may be mentally ill.

Medical practitioners should also be able to send any patient requiring compulsory treatment to any appropriate hospital (general or psychiatric). Such a certificate used should apply for a limited period, no longer than seven days. It could be renewable for a further period of 14 days or less providing a further certificate is completed by an independent medical practitioner.

Protection of Rights

A large proportion of the legislation is given over to the protection of the person who has had the most fundamental right, his personal liberty, taken from him by a compulsory admission. The basic problem which concerns legislators is to provide machinery, which, on the one hand, will offer the individual whose admission is sought an adequate right to be heard and to appeal, and on the other hand, will avoid risking the aggravation of a mental condition by a "full-dress" judicial enquiry.

Uniform mental health legislation should show concern for the civil liberty and human rights of the mentally sick and the mentally retarded. The right to vote and other civil rights should be allowed unless the person is adjudged incapable of managing his own affairs.

Provision for the management of the estate of persons who, by virtue of their mental illness, are incapable of managing their affairs also needs to be made in mental health legislation. It is widely recognised that not all mentally ill persons are incapable of managing their affairs and that their ability to do so is quite unrelated to whether they are receiving treatment compulsorily or otherwise. The legislation should provide a simple process whereby on certification by one medical practitioner that the person is mentally ill and incapable of managing his affairs the estate passes to the control of that statutory body charged with the protection of incompetent persons' affairs. Such a decision should, of course, be appealable but such an appeal would be heard by the Supreme Court on the application of the legal representative of the patient or his next-of-kin. Provision should be made for the statutory body to be informed immediately if the person recovers capacity to manage his own affairs.

Detention and Control

There are two distinct concepts in regard to this matter. One concept is that longer term detention is determined by the nature of the conduct of the patient and not by the mental illness from which he suffers. Detention and control are, therefore, a matter for a judge or magistrate and not for a medical practitioner. The other is that the behaviour is secondary to the mental illness, is a medical matter and the decision to detain should be a medical one appealable to a Tribunal.

Provision for the compulsory detention of the chronically mentally ill resistent to treatment, and persistently socially disruptive is necessary in mental health legislation, but any such decision should be appealable and such an appeal should be heard by a Tribunal capable not only of assessing the psychiatric evidence but also assessing the community responsibility towards disruptive behaviour. An inherent safeguard for the proper exercise of compulsory detention should be its regular review. Statutory review at regular intervals of patients liable to be detained should be provided by legislation.

Detention infers that a person is kept in a certain place and detention under mental health legislation has traditionally meant custodial restriction to mental hospital environs. Present-day psychiatry is by no means restricted to the mental hospital environment and the concept of compulsory action implies compulsory treatment quite distinct from detention in a particular place. Modern mental health legislation, therefore, should be applicable to the mentally ill person and not associated with particular institutions. A person subject to a compulsory order should be able to obtain treatment from private practitioners who may require the patient to remain in private accommodation, i.e. hospital, nursing home or other institution or, indeed, within his own home. Even further, the liability of detention can be used coercively to ensure outpatient treatment with the threat of segregation in an institution. In order to make such provisions effective, procedures must be laid down so that a person liable to detention and not carrying out the conditions set by the medical practitioner are liable to apprehension and segregation in an institution.

If compulsory action follows an application by a relative or authorised person, then that relative or authorised person should have the right to revoke the compulsory action, provided that only if in the opinion of the medical practitioner, in whose care the patient is, the patient is dangerous to himself or others then the revocation is of no effect, but an appeal can be made to a Mental Health Review Tribunal. Statutory provision for examination by a medical practitioner authorised by or on behalf of the patient would provide the safeguard of medical consultation.

The medical practitioner in charge of the treatment of the patient should have statutory authority to discharge from liability to detention at any time during the treatment or supervision of the patient. Provision should also be made for patients to be allowed on leave with or without conditions set by the medical practitioner and for transfer of patients from one institution to another. The question as to whether there should be any restrictions on the discharge of patients admitted is a vexed one but it would appear reasonable to have statutory provision for the restriction on the discharge of certain patients under certain conditions, each restriction to be appealable either to the persons charged with the administration of the Act or to the Mental Health Review Tribunal.

The legislation should confer the necessary authority for the return and re-admission to hospital or place of detention of any person, who, whilst liable to detention under this legislation, either escapes or otherwise absents himself from custody without permission.

The care and treatment of mentally ill persons involved in criminal proceedings involves not only mental health legislation but other legislation such as the Prisons Act, Parole and Probation provisions and Criminal Law in general. As these matters are not the subject of uniform of reciprocal legislation the custody of such mentally ill persons is not subject to uniform mental health legislation.