Notes on the Mental Health Act, 1958

by the Honourable F. G. MYERS*

The Mental Health Act, 1958, repealed and replaced the Lunacy Act, 1898, which had stood for sixty years. It deals, not as is often supposed, with the treatment, care and rehabilitation of mentally ill persons, but with their detention and the care of their estates. It has made radical changes in the provisions relating to detention, but virtually none in those dealing with the care and management of the estates of persons detained in mental hospitals. The Act has copied, with little alteration, the provisions of the Lunacy Act, which are archaic, clumsy and inefficient. They are a source of trouble to everyone who has recourse to them and it is a tribute to the skill and patience shown in the Master's Office that they work as well as they do.

The inconvenience associated with these provisions has been accentuated by the omission of the rule-making power contained in the Lunacy Act. That was a wide power and, pursuant to it, rules were made in the year 1900. Experience has shown that they are capable of considerable improvement, as might be expected after sixty-one years, but, except for the part relating to practice and procedure, which can be amended under the Supreme Court and Circuit Courts Act, they are now immutable.

I now turn to the changes which have been made in the provisions relating to the detention of insane persons.

First, there have been commendable changes in terminology. Hospitals for the insane, which were State institutions, are now known as mental hospitals. Licensed houses, which were private hospitals for the insane, have now become authorised hospitals. Reception houses are admission centres and the title of Inspector-General of the Insane has been changed to Director of State Psychiatric Services. The Lunacy Jurisdiction of the Supreme Court is now the Protective Jurisdiction.

Secondly, the Act now applies to mentally ill persons, instead of to insane persons. This is much more than a change in terminology. A mentally ill person is defined as a person who, owing to mental illness requires care, treatment, or control for his own good or in the public interest, and is for the time being incapable of managing himself or his affairs. A mentally ill person must therefore be a person suffering from mental illness, and it is this expression which distinguishes them from insane persons. But what constitutes mental illness? In England the view is taken that mental illness does not include subnormality, that is, arrested or incomplete development of the mind, or psychopathic disorder, that is, a persistent disorder or disability of mind which results in abnormally aggressive or seriously irresponsible conduct, and consequently the Mental Health Act, 1959 (Eng.), defines mental disorder as mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, and then makes the Act applicable to mentally disordered persons.

Since the meaning of the expression "mental illness" is a question for the courts, I offer no suggestion as to its correct interpretation, but it does present difficulties. Does it, for example, include psychopaths, who have no lack of intelligence, the habitual criminal or the homosexual? Would Oscar Wilde be regarded as mentally ill and therefore subject to detention? Does anti-social or abnormal behaviour evidence mental illness? The uncertainty of the definition cannot fail to create fears that persons may be arbitrarily or improperly detained, particularly when one considers that the Mental Health Act has done away with most of the safeguards against improper detention which the Lunacy Act provided.

The Mental Health Act may accurately be said to have made it much easier for a person to be placed in a mental hospital and much harder for him to get out. As far as the law now requires, a person may be placed in a mental hospital and detained there until he dies, without any relative or friend ever being told what happened to him, and without any record to show that he was ever there.

Let me take admission centres first, and let it be supposed that a man is taken there, as he might lawfully be, by a policeman, who believes him to be mentally ill and has found him wandering at large, or committing an offence or apparently about to commit an offence. At the admission centre the patient must be examined by two medical practitioners and, if they disagree, by a third. If two of them recommend that observation and treatment in a mental hospital or authorised hospital is necessary, the superintendent must bring the patient before a magistrate, who is directed to "hold an inquiry". If he is satisfied that the patient is mentally ill, he may direct him to be detained in a mental or authorised hospital as a temporary patient for not more than six months.

Under the Lunacy Act, a patient had to be brought before a magistrate and charged with being insane, and the charge had to be dealt with according to legal principles and procedure. Evidence had to be taken on oath and the witnesses were subject to cross-examination. All the proceedings, including the evidence, had to be recorded. The patient was entitled to be present during the hearing, to call witnesses and to address the magistrate. He was also entitled to be represented by counsel or solicitor. The right to employ counsel or solicitor involved the right to be examined by the patient's own doctors. The recording of the proceedings meant that there was always a record of the patient's admission and the order for his detention. All that has now gone. The law does not require any record to be kept of the patient's admission to the centre or his committal to a hospital. He has no right to see or communicate with anyone. The magistrate is not required to have evidence given on oath, or to record it. The patient has no right to know what information is placed before

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the magistrate, or to call any witnesses or even give evidence or make a statement himself. The order need never be communicated to him and there is no method by which he can challenge it. In short, a man may be taken to an admission centre, kept completely incommunicado and in two days, a common period, find himself locked up in a mental hospital without any knowledge of any thing that has transpired in the meantime. At the admission centre there need be nothing to record the fact that he was ever there.

It is true that the superintendent of the admission centre is required to give to the patient's nearest relative "due notice" of his intention to bring the patient before a magistrate, but even if the person notified wants to help the patient, and even if he gets the notice before the inquiry is held, he has no right to be present at it, or to put evidence before the magistrate, to communicate with the patient, or even to be allowed inside the door of the admission centre.

The Legislature may have wished to avoid the necessity of charging a person with being mentally ill, but it is not easy to see the reason for depriving persons of their liberty and reputation without any prior judicial inquiry, or without affording them the right to defend themselves.

If the patient is ordered to be detained in a mental hospital, his situation is not much better.

Under the Lunacy Act the superintendent of the hospital was required, upon the patient's admission, to enter particulars of the patient and his malady in a Register of Patients and Admission Book and to send to the Colonial Secretary notice of the admission, a copy of the authority for admitting the patient and a statement of the patient's mental and physical condition as found by the superintendent after a personal examination by him. He was also required to notify the Master in Lunacy of the reception of any patient into his hospital. None of these provisions has been repeated in the Mental Health Act. The superintendent is not obliged to record the admission. Nor is he required to have any authority to receive a patient. One of the most remarkable changes made by the Mental Health Act and I venture to say, an unfortunate one, is the removal of the prohibition against the reception into mental hospitals of any persons except those proved to the superintendent in accordance with the Act to be insane. It is now lawful to admit persons to mental hospitals whether they are mentally ill or not.

The Lunacy Act also required the superintendent of every hospital to keep a medical journal and a case book, in which he had to record the mental and bodily condition of every patient on admission, the history of his case and a correct description of all medicines and other treatment prescribed for the patient. If a patient died, his relatives and the Colonial Secretary had to be informed within forty-eight hours. There were official visitors for every hospital, who were obliged to visit their hospitals at least once a month, see every patient, inquire as to the care, treatment and bodily health of the patients, whether any were under restraint or in seclusion, and why, the classification and diet of the patients and the occupations and amusements provided for them. Any letter written by a patient to the official visitors had to be forwarded unopened. The Inspector-General of the Insane had to perform similar duties every six months. Any letter written by a patient to anyone other than the official visitors had to be forwarded to the addressee or to the Inspector-General.

None of these provisions have been repeated. No record of the patient is required to be kept. No person is required to see him and no letter sent by him need be forwarded to any one. It may lawfully be destroyed. No person, not even his nearest relative, is required to be informed that a patient is in the hospital or of anything that happens to him there, even of his death. Thus, as far as the requirements of the law are concerned, a person might be taken to an admission centre and then disappear for ever. There would be no breach of the law, though not one word of the patient's admission to the admission centre or his subsequent detention in a mental hospital was ever recorded anywhere and though no person, relative, or friend, was ever told.

What I have said applies to mental hospitals which, it will be remembered, are State institutions. In them the vast majority of patients are detained. With one exception the position is the same with respect to authorised hospitals. The exception is in s. 11 (7) of the Mental Health Act, which authorises the making of regulations requiring superintendents of authorised hospitals to keep records and furnish information to the Director of Psychiatric Services. Regulations have been made and to the extent they go, furnish the exception mentioned. It is to be observed, however, that the power to make such regulations is restricted to private hospitals, so that not even by regulation can any mental hospital be required to keep any records of its patients or to give information to any one about them.

I turn now to the methods by which a person may be released. First, the superintendent may discharge him. That is simply an administrative power and of no value to a person who claims he is being wrongly detained.

Unless he is a temporary patient, the only other course is an application to the Supreme Court. At the very outset, however, the patient may meet an insuperable obstacle, for the superintendent may lawfully refuse to forward the patient's application to the Court or to any person, so that he can be effectively prevented from even making the application. However, if he does make it, he still has formidable obstacles to overcome. Such an application requires to be supported by strong evidence, both lay and medical, for the Act places on the patient the onus of proving that he is not mentally ill. Very few people, except lawyers, would be capable of presenting such a case even if they had their freedom. Confined in a mental hospital, it would be almost impossible. The patient must therefore employ a solicitor and almost certainly, counsel also. He must have psychiatrists to examine him and give evidence on his behalf. All this is costly. Many patients have not the money to pay for it. But if they have, they have lost control of their estates, for the Act vests the management and control of the property of patients in the Master in the Protective Jurisdiction, and the Act gives him no power to make money available for such a

purpose. Lest it be thought that such a situation is mere theorising, I may say that I have known that exact situation to occur, a patient claiming that he was being improperly detained, having a sufficient estate, and yet unable to make an effective application to the court. In that particular case he asked the Public Solicitor to act for him, but was informed that he did not act in such cases. The difficulties facing a patient wishing to initiate proceedings are well discussed in Crime and Abnormality, by Cecil Binney, at p. 110 et seq.

If the person detained is a temporary patient, he has one other chance, discharge by a Mental Health Tribunal.

The Act sets up Mental Health Tribunals, each consisting of a psychiatrist, a medical practitioner and a barrister or solicitor. If a temporary patient is still detained after a period of six months, the superintendent of the hospital is required to bring the patient before a Mental Health Tribunal, which may order him to be discharged.

Several aspects of this provision should be observed.

In the first place, whether the patient is brought before the tribunal depends entirely on the superintendent. The patient has no right to be brought before it and the tribunal has no right to require it.

Secondly, if no records of patients have been kept, there is nothing to show whether any patient comes within the provision.

Thirdly, the jurisdiction of the tribunal extends to temporary patients only, and the only persons who are classified by the Act as temporary, are patients committed to a mental hospital from an admission centre by the order of a magistrate. The obvious result is to exclude from the tribunal's jurisdiction all other patients, but there is a method of removing even temporary patients from the jurisdiction of a tribunal. Superintendants who have been dissatisfied with the work of tribunals have discharged temporary patients and readmitted them immediately, thus placing them beyond the tribunal's control.

Lastly, there are no rules of any kind which tribunals are bound to follow. The significance of this lack and of the limited class of patients to which the provision applies may best be appreciated by a consideration of the provisions applicable to the Mental Health Tribunal in England.

The tribunal consists of legal, medical and other members, all appointed by the Lord Chancellor. At least three must sit at any hearing, of whom at least one must be a legal member, one a medical member and one neither legal nor medical. Any patient or relative of a patient may apply to the tribunal for the patient's discharge. Unless the applicant expressly asks for an informal determination, the tribunal must give at least seven days' notice of the date, time and place of hearing to the applicant and, if he is also the patient, to the patient's nearest relative. Evidence must be given on oath. The applicant may be represented by solicitor or counsel and may address the tribunal, give evidence, and call and cross-examine witnesses. The decision of the tribunal must be communicated to the applicant within seven days and, if he is not the patient, then to the patient also. If the High Court, on application to it, so requires, the tribunal must state a case for the opinion of the Court on any question of law. It may be compelled to carry out its duties by mandamus and its decision may be quashed by certiorari.

These provisions furnish a useful basis for a consideration of the effectiveness of the local provisions relating to Mental Health Tribunals in protecting the interests and rights of patients.

The aspects to which I have adverted show that it was no exaggeration to say, as I said earlier, that the Mental Health Act has made it, as a matter of law, much easier for a person to be put into a mental hospital and much harder for him to get out. In saying that, I had in mind the person who reaches a hospital via the admission centre. However, the law does not require that patients travel that road. They may be received directly into any mental or authorised hospital and of the changes in the law respecting such admissions, I feel entitled to say that they do give rise to misgivings. I am not, of course, speaking of voluntary patients.

Under the Lunacy Act it was a misdemeanour to receive any person into a hospital for the insane or a licensed house, except on the authority of a court, or on proper medical evidence that he was insane. If a patient was received directly into such a hospital, all the provisions of the Lunacy Act applied to him, the keeping of records, the care of his estate by the Master in Lunacy and so on.

There are no such provisions in the Mental Health Act. Under that Act a person may now be received into a mental or authorised hospital without any evidence at all that he is mentally ill and even though he is known not to be mentally ill. A chronic invalid or a perfectly healthy person may lawfully be admitted to a mental or an authorised hospital. That certainly appears to be undesirable. Moreover, the Mental Health Act does not apply to such persons at all. They have not the protection of even the limited safeguards which apply to mentally ill persons. In addition to the undesirability of housing persons who are not mentally ill in mental hospitals the opportunities for abuse and malpractice are obvious.

It may be said that these circumstances need give no cause for anxiety, because superintendents would not admit persons without proper proof that they were mentally ill, or keep them any longer than might be necessary. Similar reasons might be advanced in support of the removal of the safeguarding provisions which have been referred to earlier, but it is not easy to see why the community should be compelled to rely on the infallibility of administration and diagnosis in preference to a law to guard against error or abuse. It is in any case regrettable that the Act has deprived the Master of both the duty and the power to manage and care for the estates of directly admitted persons, whose property may now be wasted, dissipated or made away with because no person is charged with the duty or given the power to preserve it.

The protection of the law has thus been completely withdrawn from the persons and property of persons admitted directly to State or private mental hospitals.

There is now no such thing as improper admission into such hospitals, because anyone may be admitted. There is no statutory duty to release such persons and no statutory way by which their release can be compelled. Their presence in the hospital need not be recorded and there is no provision for caring for their property.

The Mental Health Act is not an Act which receives much attention from the legal profession and is not an easy statute to understand and appreciate. But as a statute which affects the liberty of the subject, it is deserving of attention, particularly because in dealing with liberty, it necessarily deals with the reputation and happiness of those subjected to its provision and the happiness of their families. There is a general tendency to look upon this statute as a matter for psychiatrists. That is far from the truth. It does not deal with care or treatment, but with liberty and reputation and is therefore a problem for lawyers and the public. There is danger in thinking otherwise.

It is therefore worth understanding and worth discussing and I have written these notes in the hope that they might serve as a stimulus to that end.

Sickness and Injury Insurance

For some time a Committee has been engaged upon an examination of the practicality of establishing a scheme to provide sickness and injury insurance for members of the Association. The Committee's work has reached such a stage that it is hoped that such a scheme will be in operation early next year. The scheme will take the form of a benefit fund administered by a trustee company formed for this purpose, and will provide benefits which, in comparison with the benefits provided by the best sickness and accident cover now available, will with the passage of time become increasingly attractive.

These advantages may be summarised as follows:—

(a) The premiums payable will initially be appreciably lower than commercial rates and it is confidently anticipated that it will be possible to decrease these progressively until the annual premium payable will be approximately half the weekly benefit provided.

(b) The cover which may be taken out will be restricted to the insured's gross income instead of to two-thirds of his nett income, as is the commercial practice.

(c) The terms of the policy will be more liberal than commercial policies.

(d) The fund will be administered with the utmost liberality that is consistent with sound financial management so far as the claims are concerned.

(e) Payments will be made at regular intervals during the period of incapacity, no right being reserved, as is commercial practice, to withhold payment until the incapacity is concluded.

The terms of the trust deed and the conditions of insurance have been settled by the Committee dealing with the matter in consultation with an actuary and instructions have been given to the Council's solicitors to proceed with the formation of the trustee company and the establishment of the fund.

The committee has had negotiations with the Commissioner for Taxation who has indicated that the income of the Fund will be exempt from income tax under Section 23 (ja) of the Income Tax & Social Services Contribution Assessment Act, and that contributions to the fund, which are in effect insurance premiums, will be concessional deductions under Section 82H. The Commonwealth Department of the Treasury has decided, in principle, that exemption will be granted to the fund from the requirements of the Commonwealth Insurance Act pursuant to Section 15. This Act requires the lodging of substantial deposits by any person carrying on insurance business and, unless exemption had been obtained, it would have been impracticable for the Association to set up its own insurance scheme. For the purpose of obtaining this exemption, it has been necessary to restrict membership of the fund to ordinary members of the Association. It can be assumed that the decision in principle to grant exemption was made because the Department of the Treasury was satisfied that the arrangements proposed to be made to set up and manage the fund would result in it being financially sound.

It is intended, until sufficient reserves have been accumulated, that the trustee will take out policies of re-insurance to protect the fund from the contingency of claims in any one year exceeding the monies available to meet them. The proposed trust deed provides that the trustee is regularly to seek the advice of an actuary who will be appointed by the Council as consulting actuary to the fund and he will advise from time to time as to the necessary re-insurance cover and as to what reserves are necessary to maintain the fund in a financially sound position.

As can well be imagined, it will not be practicable to establish the fund as a going concern unless a certain minimum number of persons are prepared to become contributors. This number has not yet been determined by the Council's actuary, but it will be in the vicinity of 100 persons. It is, therefore, earnestly hoped that the scheme will have strong initial support from members of the Association and that those already holding policies which become due for renewal in the near future will bear the proposed scheme in mind in considering whether they will renew their existing policies.

As soon as the scheme is ready for launching, members will be informed by circular.