MINUTES

SPECIAL COMMITTEE ON JUDICIARY - A

July 28 and 29, 1977
Room 529, State House

Members Present

Senator Elwaine Pomeroy, Chairman
Senator Don Allegrucci
Senator Paul Burke
Senator James Francisco
Representative Doug Baker
Representative Ward Ferguson
Representative Robert Frey
Representative Joe Hoagland
Representative Neal Whitaker

Staff Present

Paul Purcell, Kansas Legislative Research Department
Art Griggs, Revisor of Statutes Office

July 28
Morning Session

Chairman Pomeroy called the meeting to order at 10:00 a.m. and directed the Committee's attention to Proposal No. 31.

Proposal No. 31 - Mental Illness Statutes

Staff reviewed two memoranda, copies of which are in Committee notebooks.

The first conferee was Mr. Steve Robison, an attorney with the District Attorney's office of the 18th Judicial District. He stated that the withdrawal of the M'Naghten Rule would be a mistake. He said that the Irresistible Impulse Rule and the ALI Tests were non-rules and ambiguous. With regard to the insanity plea, he said there is an unreasonable burden of proof on the prosecutor in Kansas. Only the defendant has access to the evidence and the prosecutor is not even allowed to conduct interviews. Proving anyone sane beyond a reasonable doubt is anomalous and this is what prosecutors are presently required to do. He feels that the burden of proof needs to be changed. In addition, he stated that expert witnesses (psychiatrists generally) should not be allowed to give opinion testimony on whether the defendant knew, on the day of the crime, what he was doing and whether he could distinguish right from wrong. He said that this opinion testimony merely confuses the jury. The evidence code needs to be changed to allow the expert to give only a sketch of the defendant to the jury, but not opinion. With regard to the doctrine of diminished responsibility he said that the defendant can present evidence, impossible for the prosecutor to rebut, that he did not have the intellectual or mental capacity to commit the crime charged so there could be no premeditation and never any malice. The problem with psychiatry is that it is so imprecise that any two psychiatrists could examine the same person and give different opinions, diagnoses and prognoses regarding that person's mental condition. He stated that the insanity defense is a contrived defense because a defendant must be sane at the time of trial in order to stand trial. Without the insanity plea the defendant would go home free. With the plea he goes to the state security hospital at Larned. With regard to the hearing on the proposed discharge of an involuntary patient committed because of an acquittal on the ground that he or she was insane at the time of the commission of the alleged crime, the issue is what is the burden of proof. In the Shaddy case no determination was made on the issue; Mr. Robison believes the burden should be statutorily allocated to the defense.

The next conferee was Mr. Wendell Harms, a Vista attorney in Topeka with the Patients' Rights Center, Inc. His concern is with the voluntary commitment and discharge of juveniles under K.S.A. 59-2905 and 59-2907. He stated that the procedure was voluntary in name only. The Patients' Right Center endorses H.B. 2462. However, that bill does not address problems with discharge arising out of K.S.A. 59-2907. Those problems and the problems addressed by H.B. 2462 need to be dealt with as if they were two aspects of a single problem. He recommended that third party petitions be eliminated and the juvenile to be committed be required to apply in his or her own right. He would favor the Legislature's listing specific factors for the judge to consider in determining whether the request for commitment was really voluntary. He cited age, intelligence, maturity and understanding of the juvenile as possible specific factors. He does not endorse the setting of an arbitrary age limit under which juveniles could still be "voluntarily" committed by an adult, nor does he believe this problem should be dealt with through administrative policy of a state agency rather than by the Legislature. He said that the present procedure amounts to a deprivation of liberty in most cases. He recommended an article on this issue at 36 Maryland Law Review 153 (1976).

Afternoon Session

Proposal No. 31 Continued

Erwin Janssen, M.D., and William D. Trussell, Ph.D., both from the Menninger Foundation, were the next conferees. Dr. Trussell noted that he was present to give his personal opinion and that his views were not to be construed as necessarily reflective of the views of the Menninger Foundation. He outlined three questions to be considered if any change was likely to be made in the present procedure for the voluntary commitment of juveniles: whether due process hearings on a regular basis would be too expensive; whether there should be a minimum age limit below which due process would be inapplicable; whether and how any change would apply to children brought to mental institutions from out of state. He feels that the present law is workable and that a juvenile who is wronged can have redress in juvenile court. If the law is changed, however, he recommends that the due process hearings and other procedures occur in juvenile court where the interest and welfare of the juvenile is paramount. He stated that H.B. 2462 would apply to Menninger's and any other private institution where juveniles are committed under K.S.A. 59-2905. Dr. Janssen questioned the beneficence of a change in procedure which, while affording due process in all cases, would nevertheless deprive a certain number of juveniles of help at the time it is most needed. Dr. Trussell said that progress in treatment can be inhibited if the juvenile knows he can institute legal proceeding for discharge or request judicial review of the legality of his or her commitment.

Ms. Joan Upshaw, a professional social worker representing the Advocates of Freedom in Mental Health, said that "dangerousness," as a criterion for involuntary commitment must be defined to refer to the likelihood that the person to be committed would physically injure himself, herself or others. She believes that the present law is adequate to accomplish the hospitalization of dangerous persons and that the rights under current law need to be protected from erosion. She recommends strengthening those rights presently given by statute.

Mr. Ira Kirkendoll, Public Defender of Shawnee County, was the next conferee. He pointed out that there is no statutory procedure for release of persons found not competent to stand trial. There is also no automatic review procedure for the criminally committed as there is for the civilly committed. He is not in favor of a bifurcated hearing in cases where the insanity defense is raised. He believes that the ALI Test deals with insanity more meaningfully than does M'Naghten. He said that, as a practical matter and because of M'Naghten, juries are not disposed to finding some one not guilty because of insanity and, as a result, the insanity defense is seldom raised at a jury trial.

Mr. Doug Hinchcliff, a Topeka attorney who had been Donald Nemechek's defense counsel, stated that the selection of expert psychiatric witnesses needs to be removed from the adversary process. He recommends that an independent panel select a number of independent psychiatrists who will test a defendant and issue a report to the court which can be used by either the State or the defendant. He also recommends the creation of a special team of defense lawyers, autonomous from the local community, which would try highly emotional cases.

Donald B. Rinsley, M.D., of the Topeka Veterans Administration Hospital and the Menninger Foundation, stated that the 48-hour period between the filing of the petition for involuntary civil commitments and the judicial hearing on the petition was too short and should be extended to ten days. He recommends repealing the present law that prohibits a physician from administering to an involuntary patient, within 48 hours of a hearing, any medication which has an effect upon the patient's mind. He said that the Kansas statute which requires a court, when ruling on the commitment of an out of state or nonresident person, to follow the statutes governing civil commitments in that person's state of legal residence needs to be revised to mandate original legislative intent. He feels that Kansas statutes should expressly preclude the use of habeas corpus to terminate a civil commitment. He emphasized that a preponderance of the evidence standard rather than the reasonable doubt standard should be used in any judicial determination of mental illness. He believes that the concepts of dangerousness and violence need to be distinguished by statute. Finally, he noted that Kansas law should be revised to allow for the involuntary civil commitment of persons suffering from serious mental disorder and in need of treatment but who are not mentally ill under present law.

July 29

Morning Session

Proposal No. 31 Continued

Judge Mary Schowengerdt, Associate District Judge for the Third Judicial District, discussed the statutory definition of mental illness, the 90-day review procedure and the voluntary commitment of minors and incapacitated persons. Regarding the definition of mental illness, she stated that state statute now defines, for commitment purposes, a mentally retarded person as a mentally ill person. She believes this is illogical and oppressive of the mentally retarded. The definition of mental illness needs to be redrafted so that it is clear, concise and readable. As it is now defined, the term mental illness is highly susceptible to constitutional attack on grounds of overbreadth and vagueness. An extremely subjective term that needs definition is "dangerousness." Concerning the 90-day review procedure, she said that the statute is vague, lacks procedural guidelines, and can be interpreted to require only a desk transaction by the court or an actual hearing with examination and cross-examination. She feels that the Legislature can either provide more specificity as to the procedure to be employed by the court or else make judicial review automatic every six months and declare that it is to be a full hearing on the merits. On the issue of voluntary commitment of minors and incapacitated persons, Judge Schowengerdt said that the juvenile code is the appropriate context in which to address the rights of minors in compulsory hospital situations. Rights of incapacitated persons can be protected by requiring the guardian to petition the court for authority to effectuate a compulsory placement.

Dr. Alan Megibow, Clinical Director of Psychiatric Services at Stormont-Vail Hospital in Topeka, addressed the rights of voluntary patients. He said that voluntary patients have to sign a burdensome number of forms as a practical result of the current statutory scheme and he questioned whether all the current provisions applicable to voluntary patients are necessary. He said that "treatment facility" is defined in such a way that it would not apply merely to the psychiatric division of a general hospital but to the entire hospital, resulting in due process problems. Current law is unclear as to who can really sign emergency admission forms and it is highly impractical for a doctor to become the petitioner. He noted that a ridiculous procedure now exists between the hospital and police to cover emergency admissions. Dr. Steve Shelton, from Memorial Hospital in Topeka, said that there is no current provision for emergency psychiatric treatment and this negates a patient's right to such treatment.

Dr. Herbert Modlin, representing the Kansas Psychiatric Society, discussed the definition of dangerousness, the issue of competency to stand trial and the insanity defense. He said that the Society was opposed to any categorical statement as to what the term dangerousness means because making prognoses where such a statement exists is virtually impossible. He described the present system afforded persons found incompetent to stand trial as little more than the imposition of a life sentence without the benefit of a trial by jury. The Society suggests appointing a guardian who would exercise personality functions for the incompetent. He said this was not too extreme a legal fiction to be adopted. Concerning the insanity plea, he stated that a successful insanity plea is rare under M'Naghten because the jury members always have a feeling that the defendant should get some punishment. He said that the Society advocates a bifurcated trial system when the insanity defense is raised by the defendant.

The next conferee was Mr. Ken Carpenter, a Topeka attorney at law. He said that the Legislature should deal with the entire area of mental health in one article putting all the definitions in a single section and using terms psychiatrists use. He explained that any such change could be patterned after the Maryland statutes. He believes that due process guarantees are not afforded in the guardian-conservatorship area. With regard to the insanity defense, he thinks that M'Naghten should be abandoned and that the defense should be an affirmative defense. He recommends a bifurcated system for this area. He also noted that the state security hospital at Larned needs improvement.

Afternoon Session

Proposal No. 31 Continued

Mr. Charles Hamm, General Counsel, Social and Rehabilitation Services, questioned whether it was truly the intent of the Legislature to deprive a person of mental treatment unless the person were a danger to himself, herself or others. He discussed a 1976 article by Darold A. Treffert, M.D., the U.S. Supreme Court case which held that a state could not deprive a non-dangerous sick person, not receiving treatment, of his liberty, and a 1972 American Psychiatric Association position statement on involuntary hospitalization of the mentally ill.

R. A. Haines, M.D., Director of Mental Health and Retardation Services, said that the hearing for convalescent leave or discharge allowed under K.S.A. 1976 Supp. 22-3428 places the staff that recommended the leave or discharge in an awkward position. The person's return to the state security hospital is tantamount to questioning the staff's professional ability in addition to requiring them to continue treating a person they believe to be no danger to himself, herself or others. He stated that the staff at the state security hospital favors the bifurcated hearing.

Proposal No. 36 - Initiative and Referendum

The scheduled conferee from Common Cause was not present.

The minutes of the June 27 and 28 meeting were approved.

After Committee discussion the Chairman adjourned the meeting at 4:00 p.m.

Prepared by Paul Purcell

Approved by Committee on:

Aug 25, 1977
(Date)