

# Foreword

As readers of this journal will be all too aware, there has been much activity in the world of mental health law since the last issue of the JMHL was published<sup>1</sup>. For example, in October 2004 the European Court issued its long-awaited judgment in the case of *H.L. v United Kingdom*<sup>2</sup> (the 'Bournewood' case). By the end of the year the Government had provided 'Interim Advice'<sup>3</sup> on the implications of the judgment, to be followed three months later by the promised 'Bournewood' Consultation document<sup>4</sup>. Throughout the winter months the *Draft Mental Health Bill*<sup>5</sup>, published in September 2004, received a most thorough, comprehensive and public scrutiny, and at the end of March, the Joint Parliamentary Scrutiny Committee published the fruits of their extensive labours in a highly critical and concerned report<sup>6</sup>. In the meantime the *Mental Capacity Bill* was making its way through the complex procedures of Parliament before finally receiving the Royal Assent on 7th April<sup>7</sup>, just over 10 years after publication by the Law Commission of its influential Report, '*Mental Capacity*'<sup>8</sup>.

Furthermore the domestic courts have witnessed judicial consideration of a number of issues. For example: Approved social workers have learnt that the number of circumstances in which they are not obliged to consult with the patient's nearest relative is greater than many had previously thought<sup>9</sup>; Mental Health Review Tribunals (MHRTs) have received further advice on the distinction between deprivation of liberty and restriction on liberty when considering the position of a restricted patient<sup>10</sup>; the standard of proof in MHRT hearings has received detailed judicial analysis<sup>11</sup>; the Court of Appeal has declared that the lack of provision within the *Mental Health Act 1983* for MHRT access by (a) the 'incapable' section 2 patient; and (b) the section 2 patient whose detention is extended beyond 28 days<sup>12</sup>, is incompatible with Article 5(4) of the European Convention on Human Rights<sup>13</sup>; the House of Lords has disagreed with the Court of Appeal on the significance of mental disorder classification when determining the lawfulness of compulsory treatment<sup>14</sup>; responsible medical officers have received further judicial encouragement in relation to the use of section 17 leave<sup>15</sup>; and, the Home Secretary has been advised about his responsibilities when contemplating the transfer of a mentally ill prisoner<sup>16</sup>.

Such developments are obviously good news for the editor of a journal devoted to issues in the area of mental health law. There is plenty to write about, to consider and to analyse. However it also has its 'down side'. Firstly how can it all be covered? Secondly how can it be ensured that in a rapidly-changing scene, what is published is up-to-date at the time of publication? So far as the first question is

1 September 2004

2 App No 45508/99 (5/10/04)

3 Department of Health – 10/12/04

4 Department of Health – March 2005

5 Cm 6305-1

6 HL Paper 79-1, HC 95-1

7 *Mental Capacity Act 2005*. The Stationery Office. ISBN 0 10 540905 7

8 Law Com 231, published in February 1995

9 *R (on the appl'n of E) v Bristol City Council* [2005] EWHC 74 (Admin)

10 *R (on the appl'n of G) v MHRT* [2004] EWHC 2193 (Admin); *R (on the appl'n of Secretary of State for the Home Dept.) v MHRT* [2004] EWHC 2194 (Admin)

11 *R (on the appl'n of DJ) v MHRT and R (on the appl'n of AN) v MHRT (and interested parties)* [2005] EWHC 587 (Admin)

12 By application of section 29(4) *Mental Health Act 1983*

13 *R (on the appl'n of MH) v Secretary of State for Health* [2004] EWCA Civ 1690 (soon to be considered on appeal by the House of Lords)

14 *R v Ashworth Hospital Authority (Appellants) and another ex parte B (FC) (Respondent)* [2005] UKHL 20

15 *R (on the appl'n of CS) v MHRT and Managers of Homerton Hospital (East London and the City Mental Health Trust)* [2004] EWHC 2958 (Admin)

16 *R (on the appl'n of D) v Secretary of State for the Home Office (1) National Assembly for Wales (2)* [2004] EWHC 2857 (Admin)

concerned, it is perhaps appropriate to re-state that although we aim to publish topical, thoughtful, analytical and high quality articles of interest to the readership, we do not seek to provide a comprehensive 'news' coverage of all significant developments. Other publications, organisations and specialist solicitors' firms provide that service. The second question can be more problematic, and indeed has been particularly so in the preparation of this issue for publication. As noted above, a lot has happened in recent months, particularly in the period between the date of acceptance of articles for publication and the date of the issue 'going to press'. It has been possible and appropriate to amend some, although not all, articles at the proof-reading stage. Where a query might arise in the reader's mind as to when a particular article was finalised, we have sought to provide the answer in a footnote on its first page. In this way we trust that any confusion will be rapidly resolved.

So, what does this issue contain? We lead with the publication of the Paul Sieghart Memorial Lecture delivered by Brenda Hale for the British Institute of Human Rights on 7th July 2004. We are very grateful to Lady Hale and the Institute for permission to publish this acclaimed<sup>17</sup> consideration of the question '**What can the Human Rights Act do for my mental health?**'. Within this lecture Lady Hale identifies 'those core human rights values in the mental health field', and powerfully states that 'underlying and overriding' all such values is 'respect for the equal dignity and humanity of all people, however great their disorder or disability'. Given the facts that gave rise to the litigation which spanned a seven year period culminating in the Strasbourg decision of October 2004<sup>18</sup>, it seems most appropriate to follow Lady Hale's lecture with '**Making sense of Bournewood**'. This article by two of the lawyers most involved with the Bournewood litigation, Robert Robinson (H.L.'s solicitor) and Lucy Scott-Moncrieff, provides very welcome consideration of the practical implications of the decision, and is of course most timely given the 'Bournewood' Consultation document published by the Department of Health at the end of March.

On 12th November 2004 the Law School of Northumbria University, together with Eversheds (solicitors), hosted the 2nd North East Mental Health Law Conference in Newcastle upon Tyne<sup>19</sup>. We are very pleased to publish three papers arising from (and updated since) the Conference. Denzil Lush, Master of the Court of Protection, very helpfully considers '**The Mental Capacity Act and the new Court of Protection**'. Genevra Richardson (chair of the Expert Committee established in 1998 to consider possible reforms to mental health legislation<sup>20</sup>) tackles the unenviable but much-needed task of comparing and contrasting critical provisions of the proposed mental health and mental capacity legislation in '**Two Bills; Two Agendas**'. Jill Peay (a member of the Expert Committee, and the author of '*Decisions and Dilemmas - working with mental health law*'<sup>21</sup>) in an article entitled '**Decision-making in mental health law: can past experience predict future practice?**' looks at how practitioners make decisions within the existing legal framework and makes a number of observations against the backdrop of both the *Mental Capacity Act 2005* and the *Draft Mental Health Bill 2004*.

In the December 2002 issue of the JMHL, we published a number of 'responses' from individuals and organisations to the *Draft Mental Health Bill 2002*<sup>22</sup>. Following publication of the 2004 Draft Bill, we had intended to repeat this exercise. However we soon appreciated that if we did so we would be in danger of simply replicating a number of submissions made to the Joint Parliamentary Scrutiny Committee,

17 For example, in an address to the Human Rights Lawyers Association on 6th April 2005 Richard Gordon Q.C. described the lecture as 'masterly'.

18 See footnote 2

19 The 3rd North East Mental Health Law Conference will be held in Newcastle upon Tyne in June or July 2006.

20 The Report of the Expert Committee, 'Review of the Mental Health Act 1983', was published by the Department of Health in November 1999.

21 Hart Publishing (2003) – reviewed in the February 2004 issue of the JMHL.

22 Cm 5538-1

submissions which are readily accessible on line. Therefore we abandoned the idea. Instead we confine ourselves to two responses to the draft Bill, one from an individual and the other from an organisation. Mat Kinton, Senior Policy Analyst with the Mental Health Act Commission, but writing in a personal capacity, in a detailed consideration of the Draft Bill's contents, raises the question, '**Mental Health Law for the 21st Century?**'. We are also pleased to publish '**The Law Society's response to the Draft Mental Health Bill**' which we were grateful to receive following a request made to the Society.

As noted above, the Joint Parliamentary Scrutiny Committee reported their findings at the end of March. This followed months of receiving detailed oral and written evidence. All those who care about the future development of mental health law in England and Wales surely owe a considerable debt of gratitude both to those who submitted the evidence, and to the Committee members themselves, for the energy and commitment applied to the debate, not least since many will also have contributed previously at various stages of what has become a very long drawn-out review of the law<sup>23</sup>. The *Draft Mental Health Bill 2004* has been widely criticised but it can certainly be credited with providing the stimulus for many to participate in a wide-ranging public debate about the future direction of mental health law. We are very grateful to Lucy Scott-Moncrieff for providing a preliminary response to the findings of the Scrutiny Committee in her article '**A sense of déjà vu**'. It is also an 'immediate' response – the article was submitted for publication on the day the Committee reported in the hope that it would be published in this issue of the JMHL rather than having to wait for the November issue.

In '**A private function**', David Hewitt, who kindly contributes so regularly to the JMHL, has analysed the Administrative Court's decision in *R (on the application of Mersey Care NHS Trust) v Mental Health Review Tribunal; Ian Stuart Brady (1st Interested Party); Secretary of State for the Home Department (2nd Interested Party)*<sup>24</sup>. This case was concerned with a consideration of how a MHRT should respond to a request from a patient that it conduct its proceedings in public. Readers may well be disappointed that this issue does not carry any other case reviews. Space will be made available to ensure that some of the cases referred to earlier in this Foreword (and maybe others which arise in the interim period) are analysed in the November 2005 issue.

This issue concludes with a review by Simon Foster of the 9th edition of the **Mental Health Act Manual** by **Richard Jones**<sup>25</sup>. The first line of the review states that 'a new edition of the Mental Health Act Manual is always an event'. Since it was published in the autumn of 2004, publication of a further edition of this book is clearly another significant 'activity' which should have been referred to in the opening paragraphs of this Foreword. The book is of course quite invaluable to all who work in, and/or study, this area of law.

As always, we are very grateful to all those who have so generously contributed to this issue of the JMHL.

**John Horne**

Editor

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<sup>23</sup> Starting with the appointment of the Expert Committee in September 1998.

<sup>24</sup> [2004] EWHC (Admin) 1749

<sup>25</sup> Sweet and Maxwell (2004)