

Foreword

The report of the Joint Parliamentary Scrutiny Committee on the *Draft Mental Health Bill 2004* was published just prior to the publication of the May 2005 issue of the JMHL. Indeed readers may recall that Lucy Scott-Moncrieff generously found the time to provide within that issue a personal, preliminary and speedy response to their findings¹.

In July 2005 the Government responded to the Committee's report². Some of the Committee's recommendations were accepted wholly or in part, but the Government indicated its disagreement with various parts of the report. The Introduction to the response concluded as follows:

'Plans to introduce the Mental Health Bill into Parliament in this session were announced in the Queen's Speech. We are now redrafting the Bill to take account of changes to be made following consideration of the Committee's report. We are also looking at a number of other issues, mainly technical ones, that have arisen.'

As this issue of the JMHL goes to press, no Bill has been introduced. Press reports indicated that it had been shelved³, but there has been no official announcement confirming this. On the contrary, Department of Health activities such as their consultation on the race equality impact assessment on the Bill⁴, would suggest a continuing intention to proceed. Presumably the position will be clearer by the time of publication of the May 2006 issue.

In the meantime, this issue of the JMHL provides an opportunity for further reflection on the Government's response to the Scrutiny Committee's Report, and on provisions within the 2004 Draft Bill.

We begin with a thought-provoking comment by Alex Carlile, the chair of the Scrutiny Committee. In '**Legislation to Law: Rubicon or Styx?**', Lord Carlile Q.C. explains the work of the Committee before focusing on three areas which gave its members 'especial pause for thought'. He provides a brief comment on the Government's response, before concluding with an expression of hope that when the time comes for Parliament to debate the subject, the work of the Committee will be looked at with 'analytical determination'. Few will disagree with his plea that 'the opportunity must not be wasted'.

Phil Fennell was the specialist legal advisor to the Scrutiny Committee. As such he was ideally placed to hear the evidence presented, and to observe the Committee's analysis of it. In his article '**Protection! Protection! Déjà vu all over again**', he pays tribute to the Committee's work, and in the course of his careful reflection on aspects of the Government's response, he expresses considerable concern about what he describes as 'the Government's grudging approach' to the Committee's recommendations. Early in the article, Professor Fennell helpfully looks back over the various stages of 'reform', commencing with the appointment of the Expert Committee in 1998⁵.

There can be little doubt that the various nearest relative 'provisions' within the *Mental Health Act 1983* have given rise to growing concern over the years. The *Human Rights Act 1998* has enabled the Courts to rectify some of the resulting injustices⁶, but imaginative judicial interpretation has not always been possible⁷. It is not surprising that one area on which for some time there would appear to

1 'A sense of "Déjà Vu"' pp 77 - 82, JMHL May 2005.

2 Cm 6624 (July 2005).

3 *The Independent* on Sunday 30/10/05; the *Guardian* 31/10/05

4 Gateway ref. no. 5796 - the consultation was open until 25/11/05.

5 *The Report of the Expert Committee 'Review of the*

Mental Health Act 1983' was published by the Department of Health in November 1999.

6 For example, *R (on the appl'n of SSG) v Liverpool City Council* (1) *Secretary of State for Health* (2) and *LS (interested party)* (Admin. Court) (22/10/02)

7 For example, *R (on the appl'n of M) v Secretary of State for Health* [2003] EWHC 1094 (Admin)

have been consensus⁸ over the need for change, has been these provisions. So the ‘nearest relative’ is to disappear, and instead statute is to create the ‘nominated person’. Victoria Yeates in her article **‘Death of the Nearest Relative?...’** expands on the Scrutiny Committee’s concerns about this creation, and powerfully argues that the nominated person provisions as presently drafted ‘represent a significant erosion of the rights of families’. Ms. Yeates contends that ‘enlightened mental health legislation should achieve a balance between respect for patient autonomy and empowering those who know and care for them, to bring mental health professionals to the negotiating table to achieve the most appropriate outcome’, and by implication she invites readers to conclude that the Bill’s provisions will not have that result.

Writing in the *Guardian* in March 2005, David Brindle, their public services editor, submitted that the forthcoming general election offered an opportunity for reflection on mental health law reform, and ‘in the event of another Labour victory, quiet burial of the big-bang approach to reform’⁹. Instead he suggested that ‘new ministers should take a deep breath, revisit the 1983 *Mental Health Act* and consider how it could be modified further to meet their main objectives’. David Hewitt, writing in the *Times* in the same month¹⁰, did not make the same suggestion, but he did pursue a comparable theme, and within this issue of the *JMHL* he has expanded upon it. Mr. Hewitt (recently appointed as a Visiting Fellow to Northumbria University’s Law School) suggests that in making its current proposals, the Government has held up **‘An Inconvenient Mirror’**, and he asks **‘Do we already have the next Mental Health Act?’**. He looks at the changes which have been made to the 1983 Act over the last twenty years by Parliament and the Courts, and he concludes that they may have ‘brought us rather close to the *Draft Mental Health Bill*’, adding that ‘that will be an uncomfortable thought for many people’.

In the May 2005 issue, Denzil Lush, the Master of the Court of Protection, described how the *Mental Capacity Act 2005* will change the role of that court¹¹. With the Act coming into effect in April 2007, it is highly appropriate that within this issue we are able to publish two further articles about the Act. Penny Letts was specialist advisor to the Joint Parliamentary Scrutiny Committee on the *Draft Mental Incapacity Bill*, and therefore (like Professor Fennell in respect of the *Draft Mental Health Bill*) is very well qualified to write about **‘The Mental Capacity Act 2005: the Statutory Principles and Best Interests Test’**. Ms. Letts provides invaluable guidance to the five statutory principles intended to underline the Act’s provisions, before going on to consider in greater depth the principle of acting in the best interests of an incapacitated person. Phil Fennell generously makes a second contribution to this issue with his consideration of **‘The Mental Capacity Act 2005, the Mental Health Act 1983 and the Common Law’**. He re-visits what he calls the ‘interface’ question – ‘When may the common law or, after 2007 the 2005 *Mental Capacity Act*, be used to admit to institutional care and treat without consent, and when will use of the *Mental Health Act* be required?’. He suggests that ‘in determining how to bridge what has become known as the ‘Bournewood Gap’, it is not only the decision in *HL v United Kingdom*¹² which needs to be considered but also the decision of the European Court in the summer of 2005 in *Storck v Germany*¹³.

Those who read the article by Ms. Scott-Moncrieff referred to in the opening paragraph of this Foreword, may recall her firm conclusion that ‘the Government should seriously consider adopting the Scottish Act; lock, stock and barrel’. She was referring of course to the *Mental Health (Care and Treatment) (Scotland) Act 2003*. Hilary Patrick was a member of the Millan Committee¹⁴, and so she

8 For example, paragraph 12.18 of the Expert Committee’s Report called for ‘the new Act to make provision for the identification of a ‘nominated person’.

9 *Society Guardian* 30/3/05

10 *Times Law*, 29/3/05

11 *The Mental Capacity Act and the new Court of Protection* *JMHL* May 2005, pp 31-40

12 Application no. 45508/99. ECtHR judgment 5/10/04

13 Application no. 61603/00. ECtHR judgment 16/6/05

14 *The Millan Committee’s report ‘New Directions’ was published by the Scottish Executive in January 2001.*

has been close to developments in Scotland for some time. Whilst acknowledging that Scotland 'leads the way in mental health and social care reform in the UK', Ms. Patrick shares within this issue of the JMHL, '**Reflections from Scotland**', and in so doing she identifies '**Difficult decisions ahead**'. In particular she considers problems with the *Adults with Incapacity (Scotland) Act 2000*, before expressing other concerns in relation to vulnerable adults.

Litigation within the world of mental health law continues unabated. Perhaps of most significance in the period since the last issue was published, have been the pronouncements from the House of Lords in two particular cases – in both instances allowing appeals from the Court of Appeal. On 13th October, in *R v Ashworth Hospital Authority (now Mersey Care National Health Service Trust) ex parte Munjaz*¹⁵, their Lordships (by a majority) reasserted that the provisions of the Code of Practice are guidance not instruction, and that Ashworth HSH was entitled to have a seclusion policy which deviated from the Code's provisions in relation to seclusion, provided it was compatible with the European Convention on Human Rights ... and they concluded that it was so compatible. A week later in *R (on the application of MH) v Secretary of State for Health (and others)*¹⁶, their Lordships unanimously quashed the declarations of incompatibility which had been made in the lower court in respect of 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. Time has not allowed for a detailed analysis of these decision within this issue (but hopefully this can be rectified in the next issue), but an earlier decision by the House of Lords on the relevance of mental disorder classification – *R (on the application of B) v Ashworth Hospital Authority*¹⁷ – is subjected to critical analysis by Kris Gledhill in '**The House of Lords and the Unimportance of Classification: A Retrograde Step**'.

Two other cases – both of considerable practical significance for practitioners – are covered within this issue. In '**Hospital' treatment further defined**', Susan Thompson and Stuart Marchant review the judgment of Mr. Justice Pritchard in the case of *R (on the application of CS) v MHRT and Managers of Homerton Hospital (East London and the City Mental Health Trust)*¹⁸, whilst in '**The Balancing Act**', Helen Kingston considers the consequences (particularly for approved social workers) of Mr. Justice Bennett's decision in *R (on the application of E) v Bristol City Council*¹⁹.

The issue concludes with one book review. Professor Herschel Prins has been at the forefront of the debate about the plight of offenders with mental health problems for many years. The first edition of his book '**Offenders, Deviants or Patients?**' was first published 25 years ago. Dr. Celia Taylor, a consultant forensic psychiatrist, welcomes the third edition which was published in 2005²⁰, finding it to be 'an extremely perceptive book'.

As always, we are very grateful to all those who have so generously contributed to this issue of the JMHL. I must apologise both to them and to all subscribers, that there has been a delay in its publication. Every effort will be made to minimise the risk of a similar delay with the May 2006 issue.

John Horne

Editor

15 [2005] UKHL 58

16 [2005] UKHL 60

17 [2005] UKHL 20

18 [2004] EWHC 2958 (Admin)

19 [2005] EWHC 74 (Admin)

20 Taylor & Francis Ltd (2005)