Foreword

Nobody who works in or writes about this area of the law can fail to acknowledge that we are

experiencing a period of explosive change. Since the last issue of the Journal we have seen the

publication of two new draft Bills, which together promise to change the shape of mental health

care and services in the future. On 18th June 2004, the Mental Capacity Bill was published,

reflecting many of the recommendations made by the Joint Parliamentary Scrutiny Committee

appointed last summer to consider the Mental Incapacity Bill 2003. More recently, on the 8th

September, the new Mental Health Bill 2004 was finally published, and will also be subjected to

pre-legislative scrutiny by an expert parliamentary committee which is due to report its findings by

March 2005. Finally, this very week, the draft Code of Practice for the Mental Capacity Bill 2004

was announced by the Department of Constitutional Affairs.

Editing a Journal during this unsettled period is a frustrating affair, and despite our best efforts we

have been overtaken by the events of the past few weeks. Our aim is therefore to look at the draft

Mental Health Bill 2004 and Code of Practice for the Mental Capacity Bill 2004 in the next issue

of the Journal.

We begin this issue of the Journal with an empirical study conducted by Dr Jacqueline Atkinson,

Helen Garner and W. Harper Gilmour at Glasgow University and James Dyer, former Director of

the Mental Welfare Commission for Scotland. They examine the changes introduced by the

Mental Health (Patients in the Community) Act 1995 in Scotland, through the restriction of leave

of absence to 12 months and the introduction of Community Care Orders. The study considers

the relationship of these new measures with the Care Programme Approach and provides

comment on the implications of community based compulsory treatment orders which were

introduced in Scotland by the Mental Health (Care and Treatment)(Scotland) Act 1995.

The answer to the question ‘what is a hospital?’ is not as straight forward as it first appears.

Following the National Health Service and Community Care Act of 1990 and the creation of the

NHS hospital trust, there has developed some uncertainty surrounding the meaning of ‘a hospital’

as defined in the Mental Health Act 1983. David Hewitt looks at the reasons why the definition of

a ‘hospital’ has caused such confusion since the 1990 Act and concludes that the proposed new

Mental Health Act will do little to clarify our understanding, nor will it resolve the uncertainties

surrounding the detention, removal or transfer of patients to and from hospital which exist under

the current and proposed new legal framework.

Dr Tim Exworthy looks at the provisions of the new Mental Capacity Bill 2004 that cover the

making of advance decisions. Under the provisions of the Bill, advance decisions allow a

competent person to make a decision to refuse treatment in the future should they lose capacity

and be unable to make a legally binding decision at that time. However, a person can only make an

advance decision to refuse future treatment under the provisions of the Bill and there is no

provision for a person to express a positive preference for a certain type of treatment. The author

argues that this represents a missed opportunity that would allow clinicians and patients to engage

in a more constructive approach to treatment-planning and for the Government to create a law that

is truly therapeutic in intent and practice.

For many years Lucy Scott-Moncrieff has represented patients who are detained under the Mental

Health Act and has experienced first-hand ‘the lower levels of service that people with psychiatric

problems receive as against people with other medical problems’. In an absorbing personal account,

she discusses the David Bennett inquiry, the infamous Re C case and the compulsory treatment

provisions of the Mental Health Act 1983, and sets out her case for why she considers the National

Health Service is guilty of institutional racism.

In our casenotes section, Joanna Sulek reviews the case of *R (on the application of HP and KP) v*

*London Borough of Islington* [2004] EWHC 7 (Admin) which concerns alleged breaches by the

London Borough Council of Islington of its duties under s47 of the National Health Service and

Community Care Act 1990. As the title of this review suggests, the case highlights the confusion that

may arise between two assessment processes, the CPA assessment and the Community Care

assessment, which although similar, are nevertheless distinct and separate. The case is important,

not only for showing that there is a need for guidance which clearly sets out the duties of local

authorities when carrying out community care assessments, but it also highlights how serious the

consequences can be for the individual when a public body fails to fully appreciate the processes in

which they are legally obliged to engage.

In our book reviews section, Professor William Bingley reviews the third edition of Luke

Clements’ Community Care and the Law, Dr Martin Humphreys looks at the Mental Health Act

Commission’s tenth Biennial Report 2001–2003 and Richard Charlton reviews the second edition of

Assessment of Mental Capacity – Guidance for Doctors and Lawyers.

On a personal note, this is the last issue of the Journal of Mental Health Law I will be editing.

The current Assistant Editor, John Horne, with whom I have worked closely over the years, has

agreed to assume the role of Editor from now on. His extraordinary knowledge of mental health law

and his fastidious attention to detail will mean that the Journal is in very safe hands.

I would like to say that I am immensely proud of this Journal and all that it has achieved over the

years. Since its launch in 1999, it has become a respected and much quoted authority in the mental

health field and has become a source of reference for hundreds of mental health professionals and

academics across the country. It has been a pleasure and a privilege to work with our editorial

board and those who have contributed to the Journal, - amongst them, I consider, are some of the

most inspiring academics and professionals currently researching and practicing mental health law.

Together they have helped to ensure the quality and integrity of the Journal - and will do so, I

hope, for many years to come.

Charlotte Emmett

Editor