

Foreword

In the Foreword to the May 2007 issue, I said of the perceived ‘stand-off’ between the House of Lords and the House of Commons in respect of the *Mental Health Bill 2006*, as follows:

“It seems probable that parliamentary ping-pong between the two chambers will continue during the remainder of the parliamentary session, and the final form of the Bill is far from clear.”

I was wrong. As readers will be well aware, the ‘ping-pong’ hardly materialised, and on 19th July 2007, the *Mental Health Act 2007* (‘the 2007 Act’) received the Royal Assent. A process which had started with the appointment of the Expert Committee under Professor Genevra Richardson way back in October 1998¹, was finally concluded.

The 2007 Act amends the *Mental Health Act 1983* (‘MHA 1983’), the *Mental Capacity Act 2005* (‘MCA 2005’) and the *Domestic Violence, Crime and Victims Act 2004*. It brings in very significant changes to legal provisions within the MHA 1983 for the compulsory detention, supervision and treatment of people suffering from mental disorders. The substantial amendment made to the MCA 2005 is intended to meet the concerns of the European Court of Human Rights in the ‘Bournewood’ case, *H.L. v U.K.*². For those engaged in the mental health field, be it as lawyers, doctors, nurses, social workers or in some other professional role, or as service users, carers or family members, there is a great deal to take on board before most of these provisions are implemented on the intended date of October 2008³. Much of the contents of this issue of the JMHL will hopefully assist readers who need to get to grips with the changes ahead.

Speaking of the Code of Practice to the MHA 1983, Lord Bingham in *Munjaz*⁴ said:

“It is guidance, not instruction... but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so...”

Increasingly I am viewing the directive on the inside cover of this Journal that “articles should be a maximum of 5000 words”, as ‘guidance not instruction’ and permitting deviation if there are ‘cogent reasons for doing so’. I hope readers will agree that the subject-matter of the two opening articles in this issue fully justify the permission given to Rowena Daw and Kris Gledhill to exceed the maximum word-limit.

Rowena Daw was Vice-Chair of the *Mental Health Alliance*, that extraordinary (given the range of bodies who found common cause) grouping of organisations which for so long united to oppose so many of the Government proposals to reform mental health law. As such, she was of course very heavily involved in the ongoing debates. She looks back at the lengthy process and considers some of the end-results in ‘**The Mental Health Act 2007 – The Defeat of an Ideal**’, choosing a title for her article which has echoes of one employed by Jill Peay, a member of the Richardson Committee in the opening article of the February 2000 issue of this Journal (‘*Reform of the Mental Health Act 1983: Squandering an Opportunity?*’, an article comparing and contrasting the Expert Committee’s Report with the Government’s subsequent Green Paper⁵).

Compulsory treatment in the community was on the agenda, and as was clear from the words of the then

1 *The Report of the Expert Committee, ‘Review of the Mental Health Act 1983’, was published by the Department of Health in November 1999.*
 2 *HL v United Kingdom (2005) 40 EHRR*
 3 See the Department of Health website. *Some of the provisions have come into effect already, or will come into effect before October 2008 – see Commencement Orders (Nos. 1, 2 and 3) contained in S.I.s Nos. 2156, 2635 and 2798.*

4 *R (on the appl’n of Munjaz) v Mersey Care National Health Service Trust [2005] UKHL 58*

5 *The Government’s Green Paper, ‘Reform of the Mental Health Act 1983’, was published at the same time as the Richardson Committee’s Report – in November 1999.*

relevant Government Minister, not negotiable⁶, from the moment the Expert Committee was appointed. Ten years later provisions for ‘Supervised Community Treatment’ are to come into effect with the ‘damp squib’⁷ which is After-care under Supervision being abandoned. Kris Gledhill, a barrister now lecturing in the Law School at the University of Auckland, New Zealand, employs an international perspective when he closely and critically analyses ‘Community Treatment Orders’. He concludes:

“The legal framework is much less important than resources and good practice: which makes it a real shame that the government made use of smoke and mirrors to create the impression of a problem which was not clearly reflected in the research it relied on and a new solution which merely repackaged what was already there.”

In a short and succinct article, ‘Deprivations of Liberty: Mental Health Act or Mental Capacity Act?’, Richard Jones, the author of the well-respected and very widely used *Mental Health Act Manual*⁸, considers the amendments made by the 2007 Act to the MHA 1983 (in particular the power to be given to the guardian of a mentally incapacitated person to take the person to where he or she does not want to go, using force if necessary), and states – no doubt somewhat controversially, given the long-established view that guardianship cannot be used to deprive a person of their liberty – that “there would appear to be no legal impediment to prevent guardianship being used to justify the deprivation of a patient’s liberty in a care home in preference to the MCA procedure”. The ‘MCA procedure’ to which he refers is of course the ‘Deprivation of Liberty’ procedure introduced to the MCA 2005 by section 50 of the 2007 Act. As editor of this specialist refereed journal, I am of course delighted to host debates on contentious issues of interest to the readership, and if readers wish to submit a response to this, or indeed any other, article, I would be pleased to be contacted.

In June 2007 the Law School at Northumbria University hosted a seminar ‘Children and Mental Health and Human Rights’. One speaker at the seminar was Camilla Parker. As consultant to the Children’s Commissioner for England, Ms Parker had a particular interest in the rights of young people as the parliamentary debates about the *Mental Health Bill 2006* progressed. The Mental Health Alliance’s representations on behalf of this particular group of service users yielded some success, as her article ‘Children and Young People and the Mental Health Act 2007’ makes clear. Within the article Ms. Parker considers the statutory provision for young people against the background of the *United Nations Convention on the Rights of the Child*, and concludes that despite the additional safeguards secured, there is still cause for concern, particularly for those children under 16 considered to lack competence to make decisions for themselves.

The focus of the next article is community care for those suffering from mental ill-health. Jill Stavert, a lecturer at the Centre for Law, Napier University, asks ‘Mental health, community care and human rights in Europe: Still an incomplete picture?’ Her primary concern is that as care increasingly takes place outside institutions, there is an insufficient acknowledgement at national level of socio-economic rights of those with mental illness despite International and European standards set out in various instruments.

In the May 2006 issue of the Journal we published the first of two articles prepared by Kay Wheat, a Reader in Law at Nottingham Law School, on ‘Mental Health in the Workplace’⁹. I am pleased we are publishing the second article in this issue – ‘Mental Health and Discrimination in Employment’. If a narrow definition of mental health law is adopted, this is clearly not an obvious subject area to be considered within the pages

6 Speech by Mr Paul Boateng, then Parliamentary Under Secretary of State for Health, at first plenary meeting of the Committee on 22 October 1998 – reproduced as Appendix C in the Report of the Expert Committee (November 1999).

7 To adopt the description given to ACUS by Professor Phil Fennell (Cardiff Law School) in his presentation ‘Community Treatment Orders: More than Window-dressing?’ delivered at the Mental Health Law Conference

hosted by Central Law Training in London on 1 October 2007.

8 10th edition and First Supplement (2007), Sweet and Maxwell.

9 ‘Mental Health in the Workplace (1) – ‘Stress’ Claims and Workplace Standards and the European Framework Directive on Health and Safety at Work’, JMHL May 2006 @ pp 53–65.

of this Journal. However I have no doubt the subject-matter is of interest to the readership – hence the acceptance of both articles for publication. It was through no fault of the author that we failed to publish the second article in the issue of May 2007.

In the *Casenotes* section, we first look at the case of *YL v Birmingham City Council and others*¹⁰. Ralph Sandland (Associate Professor at the School of Law, Nottingham University) casts a critical eye over this significant House of Lords majority decision in ‘**Human Rights and the provision of Residential Care under the National Assistance Act 1948**’. He does not hesitate to point out the worrying implications of the decision for “thousand of care homes and hundreds of thousands of residents in such homes”.

We then move on to consider ‘**The Re-call of Conditionally Discharged patients [and] – the breadth of the Secretary of State’s discretion**’. This issue came before the Court of Appeal in *R (on the application of MM) v Secretary of State for the Home Department and Five Boroughs NHS Trust*¹¹. Roger Pezzani (Barrister) discusses the decision, concluding that “whilst this is of course an intensely difficult area, involving the balancing of personal liberty and autonomy against real risks to the public, this judgment’s lack of clear reasoning and failure to make any positive statement of principle beyond the obvious, represents a missed opportunity.”

The case of *Seal v Chief Constable of South Wales Police*¹² was another recent case in which the House of Lords reached a majority decision. David Hewitt, Visiting Fellow to the Law School at Northumbria University, expresses no surprise at the decision in ‘**Protection from what? The nullifying effect of section 139**’, but concludes with a statement of regret that proposals to amend s.139 which had been included within the *Draft Mental Health Bill 2004* did not survive the culling of that document and its replacement with the *Mental Health Bill 2006*.

Our final case review has (with respect to the other authors) the most intriguing title within this issue. Natalie Wortley (Senior Lecturer at the Law School, Northumbria University) asks ‘**Hello Doli? ... or is it Goodbye?**’ The principle of *doli incapax* came in for further judicial examination in the recent case of *Director of Public Prosecutions v P*¹³, a case which should be of considerable interest to anyone concerned with children and young people charged with the commission of criminal offences.

We conclude with three *Book Reviews*. Rob Brown (social work trainer) has written about ‘**The Nearest Relative Handbook**’¹⁴ by David Hewitt; William Brereton (Psychiatrist) has considered a New Zealand book, ‘**Psychiatry and the Law**’¹⁵ edited by Warren Brookbanks and Sandy Simpson; and I have contributed an overdue review of ‘**Mental Health, Incapacity and the Law in Scotland**’¹⁶ by Hilary Patrick.

The next issue is due out in May 2008, and, as always, every effort will be made to adhere to that date. Submissions for publication should be made by 1st February 2008 to allow ample time for completion of the refereeing process. In the meantime, many thanks are due to the contributors to this issue. They have had tight deadlines imposed on them, and I am very grateful to them for their readiness to comply not only conscientiously but also with good humour. One person who has never been publicly thanked in previous forewords, is Ann Conway, Administrator with Northumbria Law Press. Mrs. Conway does considerable work ‘behind the scenes’ in respect of each issue, and an expression of sincere gratitude to her is long overdue.

John Horne

Editor

10 [2007] UKHL 27.

11 [2007] EWCA Civ 687.

12 [2007] UKHL 31.

13 [2007] EWHC 946 (Admin.).

14 Jessica Kingsley (2007).

15 LexisNexis (2007).

16 Tottel Publishing (2006).