Foreword

Yet again, and not without some considerable embarrassment, I find myself apologising for the lateness of an issue. The 'autumn' issue has become a 'winter' issue (indeed a late winter issue). Many apologies are due to all subscribers and contributors. I am relieved to say however that no such apology will need to accompany the next issue. The 20th issue is to be the promised 'special' issue devoted to consideration of one matter, namely the viability and appropriateness of '*A model law fusing incapacity and mental health legislation*' (the title of the issue). Its lengthy gestation period is nearly complete, and publication is expected within weeks of publication (in March 2010) of this *Winter 2009* issue.

So far as this issue is concerned, I am delighted that once more[1] Brenda Hale has authorised the Journal to print the text of a conference speech she has delivered. It opens this issue. On 9th October 2009 Lady Hale addressed a conference in Manchester organised by the Approved Mental Health Professionals Association (North West and Wales) and Cardiff Law School, entitled '*Taking Stock: The Mental Health and Mental Capacity reforms: the first year*'. In **'Taking Stock'**, Lady Hale reflects on the development of, and "upheavals in", mental health and mental capacity law in recent times, commencing her reflection in 1971 when she first started teaching mental health law as an academic at Manchester University. We are very grateful both to her and the conference organisers.

April 2009 witnessed the most recent of the upheavals – the introduction of the Deprivation of Liberty Safeguards[2]. That same month the Law Society (with the support of the Royal College of Psychiatrists) hosted a conference in London, '*The Mental Health Act 2007 six months on: Issues and challenges*'. Roger Hargreaves, independent social care consultant and trainer, and the 'lead' for the British Association of Social Workers in the parliamentary considerations of the Draft Mental Health Bill 2006, addressed the conference, asking the question **'The Deprivation of Liberty Safeguards – essential protection or bureaucratic monster?'**. With several months experience of the DoLS in practice to draw upon, Mr. Hargreaves has kindly updated his answer to the question, lamenting the shortcomings of the new procedures and making clear his consequent grave concerns.

In the Spring 2009 issue we were pleased to revisit the controversial area of Homicide Inquiries[3]. Within this issue Lucy Scott-Moncrieff (solicitor) and Ed Marsden (Managing Director of a consultancy specialising in the management and conduct of investigations, reviews and inquiries in public sector organisations) explore the issue of anonymity in such Inquiries. In **'Publicity v privacy; finding the balance'** they consider **'When and how to publish reports of mental health homicide independent investigations'.** The authors draw heavily on the experience of the litigated Michael Stone Inquiry Report[4], explore the competing demands of Articles 8 and 10 of the European Convention on Human Rights, and provide helpful guidance to authors of future Homicide Inquiry Reports.

1 *'What can the Human Rights Act do for my mental health?' was published in the JMHL May 2005 (pp 7–16); 'The Human Rights Act and Mental Health Law: Has it helped?' was published in the JMHL May 2007 (pp 7–18)*

2 *Schedules A1 & 1A Mental Capacity Act 2005*

3 *'Learning Lessons: Using Inquiries for Change', Gillian Downham and Richard Lingham, JMHL Spring 2009 (pp 57–69)*

4 *Considered in 'The Michael Stone Inquiry – A Reflection', Robert Francis QC, JMHL May 2007 (pp 41–49)*

In the Introduction to their book *'Community Care and the Law'* (2007)[5], Luke Clements and Pauline Thompson bemoan the fact that:

"Community care law remains a hotchpotch of conflicting statutes, which have been enacted over a period of 50 years; each statute reflects the different philosophical attitudes of its time. Community care law is in much the same state as was the law relating to children in the 1980s. The law was in a mess; there were no unifying principles underlying the statutes; there were many different procedures for essentially similar problems ..... A great deal of this confusion and nonsense was swept away by the *Children Act 1989*, which repealed many statutes, in full or in part, and replaced them with a unified procedure underscored by a set of widely accepted basic principles. It takes no great genius to realise that community care law is crying out for similar treatment."

The Law Commission are now facing this challenge. As a Law Commission lawyer, Tim Spencer-Lane is ideally placed to summarise the nature and extent of the Commission's task, and this he does in **'Lost in a Legal Maze: Community Care Law and People with Mental Health Problems. The Law Commission's Review of Adult Social Care Law'.** Since this article was accepted for publication, the Consultation Paper to which the article refers in its conclusion has been published, and a period of consultation now follows[6].

We then move onto two articles about 'capacity'. Professor Ajit Shah (University of Central Lancashire) and colleagues report on the results of **'A Pilot Study of the Early Experience of Consultant Psychiatrists in the Implementation of the Mental Capacity Act 2005: Local Policy and Training, Assessment of Capacity and Determination of Best Interests'.** Neil Allen (Barrister and Clinical Teaching Fellow at the University of Manchester) attempts to answer the question he set himself at the October conference organised by the Approved Mental Health Professionals Association (North West and Wales) and Cardiff Law School referred to above, namely **'Is Capacity "In Sight"?'**. Once more we are grateful to the conference organisers for raising no objection to publication.

Developments in the Courts have prompted the next two articles. In **'Policing Care in the House of Lords'** Professor Ralph Sandland (Nottingham University) considers two decisions of the House of Lords on 21st January 2009: *R (on the application of Wright) v Secretary of State for Health* (2009)[7] and *Trent Strategic Health Authority v Jain* (2009)[8]. As Professor Sandland states: "The issue was the same in each case: Is a system which removes the right of a person to work in or to operate a care home, or to provide care services to a person in their own home, without giving that person any meaningful ability to defend or challenge the allegation against them, acceptable in the era of human rights?". In **'First do no harm. Second save life?'** Neil Allen provides a second article for this issue. He considers the House of Lords deliberation of the case of *Savage v South Essex Partnership NHS Foundation Trust* (2009)[9] (the appeal from the Court of Appeal decision[10] which he reviewed for the JMHL in May 2008[11]), before moving on to an exploration of the High Court decision in *Rabone v Pennine Care NHS Trust* (2009)[12]. The link between the cases is a hospital patient's suicide; Carol Savage was a detained patient whereas Melanie Rabone was

5 *Published by Legal Action Group (4th ed.) (2007)*

6 *'Adult Social Care', The Law Commission Consultation Paper No. 192. The period of consultation closes on 1st July 2010.*

7 *[2009] UKHL 3*

8 *[2009] UKHL 4*

9 *[2008] UKHL 74*

10 *[2007] EWCA Civ 1375*

11 *'Protecting the suicidal patient', Neil Allen, May 2008 (pp 93–100)*

12 *[2009] EWHC 1827 (QB)*

informal. The House of Lords and the High Court respectively grappled with the circumstances in which a failure to avert death might result in a conclusion that the ECHR Article 2 right to life has been violated.

In the Casenotes section, David Hewitt (Solicitor and Visiting Fellow, Law School, Northumbria University) generously reviews two cases. In **'Hospital Orders: Detention in a Place of Safety pending Transfer'**, the decision of the Court of Appeal in *R (DB) v Nottinghamshire Healthcare NHS Trust* (2008)[13] that a hospital order will cease to have effect if its subject is not admitted to hospital within 28 days, is analysed. In **'Now not so unexacting? The Section 139 threshold re-defined'**, Dr. Hewitt reports on the High Court's re-visiting in *Johnston v The Chief Constable of Merseyside Police* (2009)[14] of the test for the granting of leave for the bringing of civil proceedings as a consequence of an act purporting to be done under the *Mental Health Act 1983*.

Under the heading 'Book reviews', readers are invited to consider reviews of **'Coercion and Consent. Monitoring the Mental Health Act 2007 – 2009'** (the former Mental Health Act Commission's 13th and final Biennial report), **'Mental Illness, Medicine and Law'** (a compendium of essays published as a volume of Ashgate's *International Library of Medicine, Ethics and Law*), and **'A Tendency to laugh and sing: Some notes on mental health law'** (Northumbria Law Press's publication of a number of essays and articles by David Hewitt over recent years). I myself conclude the issue with a 'round-up' of **'Some recent publications'**.

As always sincere thanks are due to those who have so generously contributed to this issue of the JMHL, and also to the anonymous referees whose conscientious input is so critical to the quality of each issue.

John Horne

Editor

13 *[2008] EWCA Civ 1354*

14 *[2009] EWHC 2969 (QB)*