

Foreword

In the third week of June, the Law Society and the Royal College of Psychiatrists jointly hosted a very well attended two-day conference on reform of mental health law (day one) and the law relating to mental incapacity (day two), entitled '*Make up your mind*'. What emerged both from the presentations and from questions and comments 'from the floor', was widespread and strong opposition to many of the mental health legislative reform proposals set out in the White Paper of December 2000, and equally widespread and strong support for long-awaited legislation in the field of mental incapacity. The following week the *Draft Mental Health Bill* was published. However a Mental Incapacity Bill would still appear to be some way off. According to the Minister who attended the conference, the Government is committed to reform, and will legislate 'when Parliamentary time allows' – which, if nothing else, is consistent with what the Lord Chancellor himself said in his speech at the November 1999 conference, '*Mental Incapacity: New Millennium – New law?*' hosted by the same two bodies (together with the Mental Health Act Commission).

One week after the *Draft Mental Health Bill* was published, this issue of the Journal went to the printers. As a consequence we have not been able to include within it (with one exception) any detailed comment on the Bill's contents. We aim to make amends in the next issue, due for publication in December 2002. By then of course the twelve week consultation period allowed for by the Government will have passed, but at least at that stage we should have a clearer idea firstly if Parliamentary time is to be found for the Bill's introduction¹ and secondly what the final version of the Bill will contain.

The 'exception' referred to in the previous paragraph is the first article published in this issue. Margaret Clayton, Chairman of the Mental Health Act Commission, has considered the Draft Bill and the Durham University Report on Independent Specialist Advocacy, also published at the end of June. Whilst making it clear that it would be premature to express any views on behalf of the Commission until there has been a proper opportunity to digest the documents' contents and to consult fully with Commissioners, her intention (against the background of the Government's intention to dispense with the MHAC in its present format) is to highlight issues which surround the relationship between the concept of independent specialist advocacy services (as described in the Durham report), the statutory functions of mental health advocates as described in the Draft Bill and what is involved in the Commission's current visiting functions. Her contribution to this issue of the Journal is clearly timely.

Our next article revisits the issue of capacity and treatment. Dr. Gwen Adshead and Dr. Sameer Sarkar contrast the ways that ethics and law address involuntary treatment for physical and mental disorders. They identify different approaches to understanding the capacity to make autonomous decisions. They make reference to a wide range of sources as well as judicial decisions which have emanated from both English and American courts.

¹ Paragraph 1.5 of the Consultation Document published with the Draft Bill states: "The analysis of all the responses we receive will help us to move towards a Bill

ready for introduction when Parliamentary time allows [emphasis added]"

'Compulsory' community care has been the focus of much debate for many years. Conditionally discharged patients are a group who are subject to one form of such care. Sharon Riordan, Dr Helen Smith and Dr. Martin Humphreys have carried out a study in the West Midlands of perceptions of this statutory after-care held firstly by a number of patients subject to it, and secondly by the doctors responsible for their supervision. In their description of the study which we publish in this issue, they break down their findings into good things about supervision, bad things, and recommendations for change. They conclude by suggesting that their findings might assist in the planning and delivery of psychiatric services to other groups of severely mentally ill people.

Those defendants who are charged with murder and are found to have done the act charged, but who are deemed to be unfit to plead or insane at the time of the offence, must be sentenced to a hospital order with an indefinite restriction order attached. In our fourth article, Kevin Kerrigan considers the legal position of such defendants, and concludes that the requirement on the Court to impose such a sentence is likely to violate Article 5 of the European Convention on Human Rights.

In recent years we have seen many changes in the way in which mental health services are organised, delivered and regulated. Professor Anselm Eldergill has provided a descriptive (rather than analytical) guide to the complex legal structure which is now in place. The article is lengthy but for this we make no apology. To understand the structure, we need to be informed about the components of the NHS, the ways in which social care and independent healthcare are provided, and the bodies charged with maintaining quality standards, all of which are covered within the article. Future changes are of course planned, and no doubt future issues of the Journal will need to keep pace with them.

The practice of 're-sectioning' shortly after a Mental Health Review Tribunal decision to discharge, is not common, but it does occur. In our last issue, we included a review by David Hewitt of the Court of Appeal decision in *R v East London & the City Mental Health NHS Trust and Snazell ex parte Von Brandenburg (2001)*², a case which required judicial consideration of the practice. In this issue, Kristina Stern joins David Hewitt to re-visit *Von Brandenburg* in the light of the very recent (28th June 2002) Court of Appeal decision in *R v Ashworth Hospital Authority and others ex parte H*. The authors seek to "place both cases in their true context and to attempt to distil some definitive guidance". It should be noted that in due course there are to be further judicial pronouncements on this issue which poses such dilemmas for medical, social work and legal practitioners. *Von Brandenburg* is likely to come before the House of Lords early in 2003.

We are delighted to include four contributions arising from day two of the conference referred to in the first paragraph on this Foreword. We are grateful to the Law Society and the Royal College of Psychiatrists for their agreement to their inclusion. Peter Kinderman argues that "clinical psychologists have much to offer mental health care and mental health law". Gordon Ashton provides an overview of the limited jurisdiction presently available for the resolution of problems involving those who lack mental incapacity, and makes a plea for the new legislation which has been pending for so long. Dr. Donald Lyons reminds us that legislation has been introduced in Scotland, and summarises the main provisions of the *Adults with Incapacity (Scotland) Act 2000*. Denzil Lush, the Master of the Court of Protection, informs us that in the linked cases of *Masterman-Lister v Jewell and Home Counties Dairies* and *Masterman-Lister v Brutton & Co. (2002)*, Mr. Justice Wright has "handed down....the most important decision so far in English law on the meaning of the word 'patient'".

2 'Detention of a recently-discharged psychiatric patient' David Hewitt, *JMHL* February 2002 pp 50 – 58.

As has become our practice, we end this issue with some case reviews.

David Mylan has considered the Court of Appeal's judgments in *R (on the application of IH) v The Secretary of State for the Home Department (1) and The Secretary of State for Health (2)* (2002), a decision which is certain to prove to be highly significant for restricted patients potentially eligible for a conditional discharge, for those charged with their care, and for those Mental Health Review Tribunals contemplating a conditional discharge direction.

Nicolette Prialux recognises that it is the *Human Rights Act 1998* which has enabled the Administrative Court in *R (on the application of KB) v Mental Health Review Tribunal and others* (2002) to voice strong criticism of the delays faced by too many applicants to the Mental Health Review Tribunal. She concludes her article by considering the *Draft Mental Health Bill's* proposals for a new tribunal, the Mental Health Tribunal, and expresses her doubts that they will be able to manage effectively the increased workload which they will face.

Finally Simon Foster considers the Court of Appeal's decision in *R (on the application of Ann S) v Plymouth City Council and C (interested party)* (2002). This case was concerned with finding the right balance between an incapacitated patient's right to confidentiality and the right of his nearest relative to information to enable her to play her role effectively. The review considers the lead judgment of Hale L.J. in some detail, and welcomes firstly her exploration of the interrelationship between common law and the European Convention, and secondly her recognition of the importance which should be attached to the interest of those with learning disabilities in preserving confidentiality.

As always, we are very grateful to all those who have generously contributed to this issue of the Journal. They have responded with good humour and without complaint to our request that their contributions be as 'up-to-date' as our printing deadline has allowed, and to the tight schedule that we have therefore imposed on them.

John Horne

(Acting Editor)