

# 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