

# Foreword

The Foreword to the November 2005 issue of the JMHL voiced ‘uncertainty’ about the future of the *Draft Mental Health Bill 2004*<sup>1</sup>. A presumption was made that "the position will be clearer by the time of publication of the May 2006 issue". Well, the future of the 2004 Draft Bill has of course now been resolved - as all readers will know, it has followed the 2002 Draft Bill<sup>2</sup> into the shredder.

Instead the 1983 Act is to be amended, as recommended by (amongst others) David Brindle, public services editor of the Guardian, way back in March 2005<sup>3</sup>. So there is fresh ‘uncertainty’ to concern us - on this occasion, uncertainty about the detail of the proposed amendments. The debate over the direction of mental health law reform which was started with the appointment of the Expert Committee in October 1998<sup>4</sup>, and in which so many people and organisations have participated over the last eight years, is not yet concluded. The Department of Health have helpfully issued ‘Briefing Sheets’<sup>5</sup> which give a flavour of the Government’s intentions and hopes, but as relevant ministers and civil servants will know all too well, it will not be a smooth ride from briefing sheet to legislation. Following publication of the briefing sheets, we made attempts to commission a speedy response from various leading participants in the debate, but they were soon abandoned. All agreed that JMHL readers would prefer commentaries and reflections on the detail of the amendments rather than on what is presently in the public arena. On the presumption (yet another) that the proposed amendments will be published by the time the next issue is being prepared, we give an assurance that they will be considered then.

So far as this issue is concerned, we have decided to publish both articles which clearly sit within the term ‘mental health law’, and others which might be viewed as more on the fringes, but presumed to be on matters of interest to the majority, if not all, the JMHL readership.

We start off with two articles by Austen Garwood-Gowers, or, to be more honest, one article in two parts. Craftily (admittedly on our suggestion and with our encouragement) negotiating his way around our editorial policy of ‘5000 words maximum’ per article, Dr. Garwood-Gowers in **‘Vindicating the right to bodily security of the incapable in research (Parts I and 2)’** casts a knowledgeable, thoughtful, and critical eye over domestic and international provisions regulating research targeted at incapable persons. The trigger for this reflection is of course sections 30 – 34

---

1 Cm 6305-1 (September 2004)

2 Cm 5538-1 (June 2002)

3 As noted in the Foreword to the November 2005 issue.  
See *Society Guardian* 30/3/05

4 *The Report of the Expert Committee ‘Review of the Mental Health Act 1983’ was published by the Department of Health in November 1999.*

5 *Mental Health Bill Briefing Sheets A1 to A8 (April to June 2006) Gateway reference 6420; Bournemouth Briefing Sheet (June 2006) Gateway reference 6794.*

*Mental Capacity Act 2005*, all bracketed within the statute under the heading 'Research'. Dr. Garwood-Gowers does not hesitate to make clear his overriding concerns, concluding his second article as follows:

"... it is important to note that research has long been a rich field for opportunists to pick on the vulnerable like vultures at a carcass. It is certainly no coincidence that most research abuses have been targeted against those typically less well equipped to resist them such as the incapable, poor and illiterate people (particularly in developing countries) and (above all) the animal kingdom."

Claire Bentley, a solicitor, is a member of the Victims' Advisory Panel<sup>6</sup>. As such she is especially well-qualified to consider how the needs of victims of mentally disordered offenders are being addressed by healthcare teams treating such offenders, and by the Mental Health Review Tribunal (MHRT). In '**"A socially excluded group"? – Hearing the voice of victims**', Ms. Bentley, writing in her personal capacity, concentrates on two key objectives in providing more effective support and help for victims as set out in the Government publication, '*Rebuilding Lives – supporting victims of crime*'<sup>7</sup>, namely the provision of information to victims and the giving of a voice to victims. As Ms. Bentley makes abundantly clear, those professionals who work with offenders suffering from mental ill health, and MHRT panels when meeting with such patients, need ("as a matter of some urgency") to become aware of both legislative provisions and official guidance in respect of victims. To assist readers, we have attached to the article two appendices - MHRT guidance (July 2005) and Home Office guidance to clinicians (September 2005).

In '**Provocation: the fall (and rise) of objectivity**', Kevin Kerrigan reviews "the recent turbulent history of the partial defence of provocation". As is clear from the article, in recent years the judiciary have not been speaking with one voice in conveying their views as to whether the "reasonable man referred to in the statute [*Homicide Act 1957*, (section 3)] should be an 'objective' reasonable man or whether he should have some of the 'subjective' characteristics of the accused". The answer to this question is clearly of the utmost importance for the defendant with mental health problems who seeks to rely on provocation as a defence to a charge of murder. As many readers will know, the Law Commission have entered the fray, and Mr. Kerrigan helpfully brings readers' attention to their two reports '*Report on Partial Defences to Murder*' (2004)<sup>8</sup> and '*A New Homicide Act for England and Wales?*' (2005)<sup>9</sup>. It seems improbable that academics amongst the readership will recognise either Mr. Kerrigan's 'Impatient professor' or, sadly, his 'Keen first year law student' – the article takes the form of an exchange between the two.

In our issue of December 2002, Edward Myers analysed the Court of Appeal decision in *Sutherland v Hatton*<sup>10</sup> in an article entitled '*Claiming Damages for Work Place Stress*'. In this issue, Kay Wheat re-visits the topical subject of '**Mental Health in the Workplace**'. In this, the first of two articles, Miss Wheat comprehensively considers '**Stress claims and workplace standards and the European Framework Directive on Health and Safety at Work**'. Her second article, in the next issue, will consider the treatment of mental health of workers against the backdrop of the *Disability Discrimination Act 1995*.

6 Established in accordance with section 55 Domestic Violence, Crime and Victims Act 2004.

7 Cm 6705 (December 2005)

8 Law Com. No 290 (2004) (Cm 6301)

9 Law Com Consultation Paper no 177 (2005)

10 [2002] WL 45314

The Foreword to the November 2005 issue contained an expression of hope that this issue would contain detailed considerations of two highly significant judicial decisions pronounced by the House of Lords in the latter part of 2005. There simply was not time for the preparation of articles on these cases for that issue. The two cases were of course *R (on the application of MH) v Secretary of State for Health (and others)*<sup>11</sup> and *R v Ashworth Hospital Authority (now Mersey Care National Health Service Trust) ex parte Munjaz*<sup>12</sup>. We have duly made amends in this issue. In **'Executive Action and Convention Compliance? A Risk Unrecognised by the House'**, Kris Gledhill provides a critical analysis of the House of Lords decision in the former case, and (with one eye on Tolkien) in **'One Code to rule them all, one code to bind them: the seclusion of detained patients'** Simon Foster painstakingly conveys and comments on their Lordships' judgments in the latter. This issue contains a third case review. Paul Hope in **'Paternalism or Power? – Compulsory treatment under section 58 of the Mental Health Act 1983'** examines "the latest<sup>13</sup> in a series of challenges brought under the Human Rights Act 1998 against compulsory treatment under Part IV of the Mental Health Act 1983", namely the Court of Appeal case, *R (on the application of B) v S and others*<sup>14</sup>.

We end with a couple of book reviews. Mat Kinton would appear to have read every page of the weighty tome which is **'Seminal issues in Mental Health Law'**<sup>15</sup>, "a collection of thirty-five essays, chapters and extracts on civil mental health law from various authors, drawn from a range of sources between 1973 and 2005", edited by Professor Jill Peay. David Hewitt provides a shorter and more light-hearted review of Kris Gledhill's **'Mental Health Tribunals – Essential Cases'**<sup>16</sup>, a seemingly invaluable loose-leaf resource for all those whose work or study requires a detailed knowledge of the MHRT. Both reviewers describe their respective books as "excellent".

Very regrettably, publication of this issue (as with the issue of November 2005) has been delayed. For this we sincerely apologise to the contributors, and of course to all subscribers. We give an assurance that plans are in hand to tackle the root causes. In the meantime we thank all those who have so generously contributed to this issue of the JMHL.

**John Horne**

Editor

---

11 [2005] UKHL 60

12 [2005] UKHL58

13 Since acceptance of the review, there has been a further Court of Appeal decision in this area, *R (on the application of JB) v Haddock and others* [2006] EWCA Civ 961, to which Mr. Hope has helpfully made reference towards the end of his article.

14 [2006] EWCA Civ 28

15 Ashgate (2005)

16 Southside Legal Publishing Limited (2005)