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## Some Recent Publications

Although sited within the 'Book Reviews' section of the Journal, this article does *not* contain detailed reviews of the books to which it refers. It is simply a means of informing readers of *some*<sup>1</sup> recent publications which may be of interest. In-depth reviews of any one of the books referred to may be included in future issues.

It seems appropriate to end this issue of the JMHL with this round-up of some recent publications. After all, the issue opens with the text of Brenda Hale's keynote address at the conference held in Manchester in October 2009<sup>2</sup>, organised by the Approved Mental Health Professionals Association (North West and North Wales)) and Cardiff Law School, within which reference is made to several publications about mental health law which have emerged since Lady Hale first starting teaching mental health law in 1971. Within the last year or so a number of publications have appeared. They include:

### **'Mental Health Act Manual', Richard Jones (12th ed.) (2009)**<sup>3</sup>

Lady Hale makes reference to this celebrated work, and clearly it warrants inclusion within this article because the publication of a new edition deserves to be widely acknowledged and welcomed. Over the 25 years of the life of the Manual there cannot have been a lawyer working in the mental health law field in England and Wales who has not had cause to be very grateful to Richard Jones. Indeed there will be very many social workers, psychiatrists, tribunal members, students and others who will also have benefited enormously from accessing its contents. As all who work in, or study, this field of law know, it has really become essential reading; indeed it has become 'invaluable' as acknowledged by Lady Hale within her address. What distinguishes the 12th edition from its immediate predecessor?

Part 6 of the Manual is new. Headed '*Deprivations of liberty – Mental Health Act 1983 or Mental Capacity Act 2005?*', this section considerably aims to assist the practitioner in shedding light on "the opacity of some of the crucial provisions that are to be found in both the 1983 and the 2005 Acts" (to quote from the Preface), and is therefore most welcome. In addition, as always Jones applies recent case-law throughout, particularly in updating his well-known annotations to the 1983 Mental Health Act ('MHA'). Other significant changes are inclusion of: 1. The *First-tier Tribunal (Health, Education and Social Care Chamber) Rules 2008* (irritatingly missing from the 11th edition (because of inconvenient publication dates)), together with associated Practice Directions (not only the now well-established PD. in respect of information and reports to be submitted in mental health cases, but also the PD. in respect of child, vulnerable and sensitive witnesses); 2. The *Mental Health Act 1983 (Independent Mental Health Advocates) (England) Regulations 2008*, timely given the arrival of IMHAs in hospitals as from 1st April 2009; 3. The *Mental Health Act 1983 Approved Clinician (General) Directions 2008*, replacing the Directions contained within the 11th edition; 4. The amendments made to sections 120 and 121 MHA by the *Health and Social Care Act 2008* which resulted in the abolition of the Mental Health Act Commission, or rather its absorption by the Care Quality Commission. The Manual runs to 1088 pages, and it is no surprise that Jones, as with the 11th edition, has not been able to make space for the Welsh

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1 No attempt has been made to be comprehensive in the article's coverage. No conclusions should be drawn from any failure to refer to any particular publication.

2 'Taking Stock: The Mental Health & Mental Capacity reforms: the first year.' 9th October 2009

3 Published by Sweet & Maxwell (£69)

Code of Practice or Welsh secondary legislation. This will continue to frustrate his Welsh readership, although they will derive some comfort from his assertion that "... the Welsh materials do not differ substantially from their English equivalents". They will be intrigued to note (if they have not previously appreciated the fact) that "... approved mental health professionals in Wales have one advantage over their English counterparts. While the former can section their spouses..., the latter cannot..." (Preface).

It is of course the annotations to the 1983 Act for which the Manual is best known. It is these that get bandied about between professionals. "*But Jones says...*" frequently precedes searching questions from the floor at training events up and down the country (and no doubt in Wales as well). Concern has been expressed by some<sup>4</sup> that the less knowledgeable sometimes find it difficult to distinguish between the judicially-confirmed legal position and a Jones submission. It is the job of those who teach to ensure that the distinction is understood. That said, it is noteworthy that not infrequently Jones submissions do tally with conclusions subsequently reached by the Courts or/and the Government – for example his interpretation of 'practicable' in section 11(4)<sup>5</sup>, and his view on the 'Section 2 or section 3?' debate<sup>6</sup>. There is already an example of this in the 12th edition. On page 359 Jones asks a question not asked in the 11th edition, namely "Does an application to the tribunal by a s.3 patient lapse on the patient being made subject to a community treatment order (CTO)?" Within the next 30 lines he presents an argument that it does not. On 1st October 2009 (i.e. long after submission of the edition to the publishers) Judge Rowland in the Upper Tribunal<sup>7</sup> reached the same (to some, surprising) conclusion.

### 'Mental Health law in England and Wales – A Guide for Mental Health Professionals', Paul Barber, Robert Brown and Debbie Martin (2009)<sup>8</sup>

In recent years lawyers and law students have been particularly well served by various texts as they have aimed to get to grips with the complexities of mental health law. For some time they have had access to the *Manual* and to excellent books by Eldergill<sup>9</sup> and Bartlett & Sandland<sup>10</sup>, and more recently they have had the *Mental Health Act 2007* amendments to the 1983 Act impressively and clearly explained in books by Bowen<sup>11</sup> and Fennell<sup>12</sup>. Such books are also intended for those with an interest in the subject, albeit not as lawyers<sup>13</sup>, but some do not require or welcome such detail, and for them this book surely fills a long awaited gap.

Written by very experienced trainers (a lawyer, the Director of the AMHP training course in S.W.

4 For example, see the review of the 7th edition by Anthony Harbour and Robert Brown in the JMHL February 2002 (pp 81–84). A similar, albeit implied, concern was expressed in the review of the 9th edition by Simon Foster in the JMHL May 2005 pp 96–99.

5 See the 'submission' on page 81 of the 9th edition, and the subsequent judgment of Bennett J. in *R (on the appl'n of E) v Bristol City Council* [2005] EWHC 74 (Admin)

6 Compare the 'submission' set out on, say, pp 25–26 of the 9th edition, with paragraphs 4.26 and 4.27 of the revised Code of Practice (2008)

7 *AA v Cheshire and Wirral Partnership NHS Foundation Trust* [2009] UKUT 195 (AAC)

8 Published by Learning Matters (£29).

9 'Mental Health Review Tribunals – Law and Practice', Anselm Eldergill (Sweet & Maxwell) (1998). Reviewed in

the JMHL February 1999 (pp 83–84)

10 'Mental Health Law – Policy and Practice', Peter Bartlett & Ralph Sandland (Oxford University Press) (3rd ed.) (2007). The second edition was reviewed in the JMHL February 2004 (pp 86–90).

11 'Blackstone's Guide to the Mental Health Act 2007', Paul Bowen (2007). Reviewed in the JMHL May 2008 (pp 116–119).

12 'Mental Health: The New Law', Phil Fennell (Jordans) (2007). Reviewed in the JMHL May 2008 (pp 112–115).

13 An example of a recent publication of particular interest to Approved Mental Health Professionals is 'The Nearest Relative Handbook', David Hewitt (Jessica Kingsley Publishers) (2nd ed.) (2009). The first edition was reviewed in the JMHL (pp 243–246).

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England, and a practising AMHP) *'Mental Health law in England and Wales'* clearly explains how the MHA 1983 (as amended) applies in practice. In 136 pages of text, and contained within 18 chapters, the authors have skilfully set out comprehensively the range of provisions (making considerable use of tables to assist with the explanations), ending each chapter with a summary of 'Key Points'. The MHA 1983 (as amended) is reproduced, as are the *Mental Health (Regulations) 2008* (for both England (including the all important prescribed forms) and Wales), the *First-tier Tribunal Rules* (but no Practice Directions – presumably because they were not available at the time of publication?), extracts from regulations covering transfers to/from Scotland, a summary of the *Human Rights Act 1998* and the European Convention on Human Rights, summaries of key cases ranging from *Winterwerp*<sup>14</sup> to *JE/DE*<sup>15</sup>, and (of particular relevance to those “whose involvement with mental health services straddle Offa’s Dyke” (to quote once more from the Preface to the Manual by Richard Jones)) a conversion chart for forms used in Wales and England.

For many years the Law School at Northumbria University has run a short (nine weeks) Mental Health Law option on its Legal Practice Course<sup>16</sup>. In 2009 *'Mental Health law in England and Wales'* was the chosen textbook for the course. Students found it to be readable, accessible and informative. Their experience suggests the book does indeed fill a gap in the market.

[It should be noted that *Learning Matters*, the publishers, have also published a series of books in a Post-Qualifying Social Work Practice series – *'The Approved Mental Health Professional's Guide to Mental Health Law'*, Robert Brown, (2nd ed.) (2009)<sup>17</sup>, *'The Mental Capacity Act 2005 – A Guide for Practice'*, Robert Brown, Paul Barber, and Debbie Martin (2nd ed.) (2009), and *'The Approved Mental Health Professional's Guide to Psychiatry and Medication'*, Robert Brown, Gwen Adshead and Alan Pollard (2nd ed.) (2009)]

### ***'Children with Mental Disorder and the Law', Anthony Harbour (2008)***<sup>18</sup>

In his Preface to this book, Anthony Harbour quotes the Richardson Committee (1999) as stating:

“... the law relating to the treatment of children suffering from mental disorder is in need of clarification. The current multiplicity of legal provisions creates a climate of uncertainty, professionals are unsure of their authority and of the legal and ethical entitlements of the children in their care.”<sup>19</sup>

Recognising that since 1999 “there has been little clarification, with a climate of uncertainty remaining”, Harbour provides much needed guidance to practitioners. As a solicitor who specialises (both through casework and teaching) in health and social services law, he is highly qualified to write such a book. He regularly lectures about the legal position pertaining to children and young people suffering from mental disorders, and for some years he has been the lead trainer for section 12 training for child and adolescent psychiatrists organised by the Royal College of Psychiatrists.

*'Children with Mental Disorder and the Law'* is a short book with examples liberally and helpfully utilised to illustrate various points made. Despite the author's statement that he has not written “a legal textbook,

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14 *Winterwerp v Netherlands* (1979) 2 EHRR 387

15 *JE v DE and Surrey CC* [2006] EWHC 3459 (Fam)

16 A course undertaken by prospective trainee solicitors.

17 The first edition was reviewed in the JMHL May 2007 (pp 123–125)

18 Published by Jessica Kingsley Publishers (£25)

19 'Review of the Mental Health Act 1983: Report of the Expert Committee' (Department of Health) (1999) (para. 13.1)

rather a book aimed at practitioners who need to ensure that their practice is both lawful and conforms to good practice”, it appears to be both a comprehensive summary of the law and a practical guide to practitioners. Although published before most of the amendments made by the MHA 2007 to the MHA 1983 took effect, the book makes reference throughout to the changes to the legal provisions which were imminent. Its appendices contain: (1) Very helpful sign-posting to further reading; (2) An extract from *Local Authority Guidance Circular (99) 29* (covering Care Plans and Care Proceedings under the *Children Act 1989*); (3) Chapter 39 of the *draft* revised MHA Code of Practice; and (4) Chapter 12 of the MCA Code of Practice, ‘*How does the Act apply to Children and Young People?*’. One can only sympathise with the author that chapter 36 of the revised MHA Code of Practice (‘*Children and young people under the age of 18 yrs*’) had not been finalised by the date of publication of his book, and that therefore Appendix 3 needed to be replaced so soon after publication. Hopefully an early 2nd edition will appear to rectify the situation. In the meantime, no doubt practitioners working in the field of child and adolescent mental health services, and those lawyers charged with advising them, will find this book quite invaluable. The law in this area is complex – expert guidance is needed.

### **‘Mental Health Tribunals – Law, Practice and Procedure’, Jonathan Butler (2009)<sup>20</sup>**

Monday 3rd November 2008 not only saw the coming into effect of most of the MHA2007 amendments to the MHA 1983, but also the birth of the new tribunal system, the First-tier Tribunals and the Upper Tribunal. The Mental Health Review Tribunal became the First-tier Tribunal (Health, Education and Social Care Chamber) Mental Health. New Tribunal Rules appeared, as did a specific Practice Direction in relation to information and reports to be supplied to the Tribunal. The publication of this book by a barrister and part-time Mental Health Tribunal Judge was therefore very timely and to be widely welcomed.

The author’s hope is that the book will be “of use to the entire spectrum of participants (from whichever perspective) who participate in Mental Health Tribunals”. No doubt his hope will be realised. Within his Preface, Butler makes the point that the book on which many (including myself) relied in the past, ‘*Mental Health: Tribunal Procedure*’ by Gostin and Fennell (2nd ed. 1992), is now out of print, and so by implication there is no other work “exclusively on Mental Health Tribunals” to which participants can turn (somewhat surprisingly the author makes no mention of the comprehensive ‘*Mental Health Review Tribunals – Law and Practice*’<sup>21</sup> by Anselm Eldergill, although (a) this scholarly book is not ‘exclusively’ about tribunals, and (b) much of it is also of course now well out-of-date).

The book is divided into ‘Parts’, and in so doing aims (appropriately in my opinion) to cover as succinctly as possible all relevant areas (i.e. including, for example, criteria, powers and duties, ‘other’ discharge routes, etc.) but no doubt it is those parts which focus on constitutional and procedural matters in respect of the MHT which will be most appreciated by its readership. Similarly Chapter 14 on ‘Remedies’ will be particularly welcomed both by legal representatives for patients and those advising responsible authorities, aggrieved by a MHT decision.

Part F is entitled ‘Statutory Materials (including Tribunal Rules and Practice Direction)’. Amongst the helpful materials included, lawyers will be grateful to find considerable guidance on procedural issues should a decision be made to pursue a matter in the Upper Tribunal or (exceptionally now that the Upper Tribunal has been established) in the Administrative Division of the High Court by means of judicial review.

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<sup>20</sup> Published by Jordans (£52)

<sup>21</sup> See n. 9 above.

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**‘Advising Mentally Disordered Offenders – A Practical Guide’, Carolyn Taylor and Julia Krish (with Dr. Frank Farnham) (2nd ed.) (2010)<sup>22</sup>**

As is now widely recognised, the criminal justice system is frequented by many (actual or alleged) offenders suffering from mental disorders<sup>23</sup>. Given the wide-ranging legislative changes there have been in the ten years which have elapsed since publication of this Guide’s first edition<sup>24</sup>, publication of this second edition is really very overdue. The authors state:

“This second edition of the book has been expanded to cover representation of mentally disordered offenders not only in the police station and magistrates’ courts, but also the youth court and Crown Court..... It is aimed at all practitioners involved in this area of work and provides a comprehensive analysis of the law and procedures, from arrest until disposal at the Crown Court. It is also intended to help clarify the role of those practitioners and enable them to perform it effectively.”

The Contents page confirms this. Chapter 1 concentrates on ‘medical and legal definitions’, and thereafter the authors take their readers through the police station, and then into the Magistrates Court and the Crown Court. They consider such matters as police station procedures (including the role of the appropriate adult), summary trial, discontinuance, bail, fitness to plead, plea, defences (such as insanity, provocation, diminished responsibility, duress, and automatism), expert evidence/reports, and the whole range of prison, hospital and community sentences. The final third of the book (i.e. 73 of the 220 pages) is devoted to a variety of material which the busy practitioner will be delighted to find in one place.

Inevitably there was yet another piece of criminal justice legislation working its way through the parliamentary process as this book was being finalised – *The Coroners and Justice Act 2009*. At the time of publication, no date had been fixed for the coming into effect of those provisions directly relevant to the subject matter of the book. The authors helpfully provide (both in the text and in Appendix 11) some indication of these provisions (which will change the defences of diminished responsibility and provocation, and the law on infanticide), but of course readers will need to look elsewhere for detailed guidance.

For many years a personal concern of mine has been a perceived tendency for practising lawyers to specialise in either mental health law or criminal law, but rarely in both. In view of this it seems to me that there is a considerable need for both groups of practitioners to at least acquire some expertise in the area less familiar to them. This book acts as a very useful (and in my opinion, necessary) bridge between the two, and will certainly assist criminal lawyers to recognise and apply legal provisions of especial relevance to those of their clients with mental disorders, something which of course must be very warmly welcomed.

**‘Assessment of Mental Capacity – A Practical Guide for Doctors and Lawyers’ (General Editor: Penny Letts) (3rd ed.) (2010)<sup>25</sup>**

As with the first two editions of this book<sup>26</sup>, this is a joint venture of the British Medical Association and the Law Society, with the latter taking on the mantle of publisher. Under the editorship of Penny Letts (whose involvement can be traced back through both the previous editions (1995; 2004)) the two organisations, three barristers and the BMA ethics manager have combined to provide post-Mental

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22 Published by the Law Society (£39.95)

23 In their Preface the authors acknowledge that: “Despite the development of mental health assessment teams attending police stations, mental health diversion schemes at magistrates’ courts, and pilot mental health courts, a large number of people with mental health difficulties still

find themselves within the criminal justice system.”

24 Reviewed in the JMHL December 2000 (pp 210–211)

25 Published by the Law Society (£39.95)

26 The second edition was reviewed in the JMHL September 2004 (pp 174–177)

*Capacity Act 2005* ('MCA') guidance to professionals working with people who lack, or may lack, the capacity to make some decisions on their own behalf. As with the book on offenders referred to above, this up-date is long overdue, and will prove to be a welcome addition to the bookshelves of not only doctors and lawyers, but also those social workers, psychologists, nurses, occupational therapists and others whose work requires them to assess capacity and make 'best interests' decisions.

Appropriately, early within the book, the fundamentals of the MCA are explained – the principles, the tests for determining lack of capacity, and the factors to be taken into account when arriving at a 'best interests' decision. Recognising that the MCA capacity tests are 'for the purposes of this Act' (i.e. for personal welfare decisions, healthcare decisions and financial decisions taken on behalf of people who either permanently or temporarily lack capacity to make those decisions for themselves) the book then devotes many pages in considering the tests that have been developed over the years for determining capacity for certain specific purposes e.g. to make a will, to make a gift, to litigate, to enter into a contract, to marry, to vote etc., and in so doing considers the approach which might be taken to established tests in the light of the MCA. The final 'Part' (of four) is headed 'Practical Aspects of the Assessment of Capacity', and is broken down into two sub-parts – 'Practical guidelines for doctors' and 'Practical guidelines for lawyers' – which, if taken on board by those for whom they are intended, should go some way to improving what can sometimes be poor communication between the legal and medical professions on capacity issues.

As with all the books referred to within this article, the book concludes with helpful appendices. So in the last 85 pages we find: Extracts from the MCA and its Code of Practice; guidance about the Court of Protection; the Court's Practice Direction in relation to serious medical treatment; a summary of the role of the Official Solicitor ('OS'); the OS's Certificate as to capacity to conduct proceedings; the Court's Form COP3 'Assessment of Capacity' and accompanying Guidance Notes; a sample letter to a GP requesting evidence of testamentary capacity; a list of addresses and contact details of numerous organisations; and finally, in Appendix J, such a comprehensive list of 'Further Reading' that in referring the JMHL readership to other publications about the law in respect of mental capacity, I need do no more than refer to that list.

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We have indeed moved on a very long way since Brenda Hale first started teaching mental health law in 1971. As can be seen from this article, and indeed from this issue of the Journal, those of us interested in mental health law (and mental capacity law) in England and Wales, in whatever role, are now extraordinarily well supplied with numerous sources of expert advice and opinion (including of course the JMHL itself), and there is more to come. As Lady Hale's article indicates, in the months ahead we can expect to see the publication of *Gostin on Mental Health Law*<sup>27</sup> and the next edition of her own book, *Mental Health Law*<sup>28</sup>, and of course there may be others. We are indeed very fortunate.

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27 To be published by Shaw & Sons Ltd. (publication date not known)

28 To be published by Sweet & Maxwell in June 2010.



