

Foreword

Only one issue of the JMHL was published in 2008. This is extremely regrettable because, since the launch of the Journal in February 1999, the aim has been to publish two issues per year. This is the second occasion over the ten years of the Journal's life on which we have failed in our objective. A letter of apology and explanation has been sent to our subscribers.

When I took on the editorship in September 2004, I determined to aim for publications every May and November. However, as regular readers will know, too often I have had to conclude Forewords with an apology for the lateness of the issue. To reflect the present reality of the fluidity of the publication dates, we have therefore decided to aim for *Spring* and *Autumn* issues each year. Every effort will be made to adhere to these seasons.

This *Spring* 2009 issue leads off with the second part¹ of Anselm Eldergill's consideration of mental health law in the Republic of Ireland – '**The Best is the Enemy of the Good: the Mental Health Act 2001 (Part 2)**'. As I've stated on previous occasions, the JMHL's Editorial Board is very keen to publish articles about other jurisdictions, and these two contributions from Professor Eldergill (Visiting Professor to the Law School at Northumbria University) are very welcome.

The month of April sees the implementation of the much-anticipated Deprivation of Liberty safeguards², more than four years after the European Court of Human Rights ruled against the Government³, and more than eleven years since the *Bournemouth* litigation was first embarked upon⁴. As Best Interest Assessors and Mental Health Assessors get to grips with their new roles and responsibilities, no doubt one question dominates their training sessions – '**Restricting Movement or Depriving Liberty?**' Neil Allen (Barrister and Teaching Fellow at Manchester University) provides some timely assistance when he addresses this very question within his article.

Welcome amendments made by the *Mental Health Act 2007* to the *Mental Health Act 1983* have enabled the possibility of a lawful transfer of someone from one place of safety to another, following the application of powers contained within sections 135(1) and 136⁵. Clearly this will assist where an inappropriate place of safety has been chosen at the outset. The 'new' Code of Practice to the MHA 1983 makes clear what has been recognised for some time, namely that "a police station should be used as a place of safety only on an exceptional basis"⁶. But what is the reality? Maria Docking, Senior Research Officer for the Independent Police Complaints Commission, addresses this question in her summary of the recent IPCC research into '**The use of section 136 to detain people in police custody**'. The findings of the research give considerable cause for concern – hopefully local trusts and other NHS providers will recognise, as Ms. Docking urges, that they "should look at ways to address the situation as a matter of urgency".

As no doubt many readers of this Journal will be fully aware, the case of *Tarasoff v Regents of University of California* (1976)⁷ has been at the forefront of the debate about medical confidentiality for many years.

1 Part 1, 'The Best is the Enemy of the Good: The Mental Health Act 2001', can be found at pp 21–37 JMHL May 2008

2 Section 50 Mental Health Act 2007; Section 4A & Schedule A1 Mental Capacity Act 2005.

3 *HL v UK*, ECtHR, (4th October 2004) 40 E.H.R.R. 761

4 The 'first instance' decision was in the High Court by Owen J. on 9th October 1997.

5 See section 135 (3A) and section 136 (3)

6 Paragraph 10.21 Code of Practice (Mental Health Act 1983) (2008)

7 (1976) 551 P2d 334

Michael Thomas, a solicitor based in Auckland, New Zealand, courageously revisits the decision in **'Expanded Liability for Psychiatrists: Tarasoff Gone Crazy'**. His article aims to enlighten all of us (not only those psychiatrists for whom he states his paper is intended!) on developments of the *Tarasoff* doctrine both in the United States and the United Kingdom.

On previous occasions the JMHL has contained articles about Homicide Inquiries, both generally⁸ and in relation to specific inquiries⁹. I am pleased that this issue contains another article on the subject. In **'Learning Lessons: Using Inquiries for Change'**, Gillian Downham and Richard Lingham use their considerable experience as members of Inquiry Panels, to consider the controversial issue of the Panel's role (if any) post-publication of the Inquiry Report. They put forward a set of principles to be applied to the post-Inquiry stage "which may be applicable to other types of independent inquiry in the health and social care sector".

The final article is by Laura Davidson, Barrister. In **'Nearest Relative Consultation and the Avoidant Approved Mental Health Professional'**, Dr. Davison considers three recent cases arising out of alleged failures to comply with various provisions relating to nearest relatives within the *Mental Health Act 1983*. These provisions will surely be the subject of more litigation in the years ahead, and so no doubt will be subjected to further scrutiny in the Casenotes section of future issues of the Journal.

On this occasion, the Casenotes section highlights three cases.

- Kris Gledhill (Senior Lecturer, University of Auckland Law School) has speedily and generously considered the first case of the Upper Tribunal's Administrative Appeals Chamber, *Dorset Healthcare NHS Foundation Trust v MH* (2009)¹⁰, in **'The First Flight of the Fledgling: the Upper Tribunal's Substantive Debut'**.
- In **'Between a Rock and a Hard Place'**, Paul McKeown (Solicitor/Tutor, Law School, Northumbria University) analyses the House of Lords decision in *Lewisham LBC v Malcolm* (2008)¹¹, a housing case which, given the issues which arose in the case, will be of considerable interest to readers of the Journal.
- Section 136 is considered once more in this issue. In **'"She took no reasoning": Enticing Someone into a Public Place'**, David Hewitt (Visiting Fellow to the Law School at Northumbria University) looks at the criminal law case of *McMillan v Crown Prosecution Service* (2008)¹², and strongly suggests that it has implications for the use of section 136.

There are no book reviews in this issue – however we shall make amends in the *Autumn* issue, as there are a number of books published in recent months which deserve consideration.

As always, I am very grateful to each of the contributors to this issue of the JMHL.

John Horne

Editor

8 See 'Reforming Inquiries following Homicides' by Anselm Eldergill, JMHL October 1999 @ pp 111 – 136, and 'Qualitative Analysis of Recommendations in 79 Inquiries after Homicide committed by Persons with Mental Illness' by Melissa McGrath and Professor Femi Oyeboode, JMHL December 2002 @ pp 262–282

9 See 'The Michael Stone Inquiry – A Reflection' by Robert Francis QC, JMHL May 2007 @ pp 41–49

10 [2009] UKUT 4 (AAC)

11 [2008] UKHL 43

12 [2008] EWHC 1457 (Admin)