Foreword

Over the last six months there have been two significant legislative developments in mental health law. In March, Scotland pressed ahead with its programme of mental heath law reform with the passage of the *Mental Health (Care and Treatment) (Scotland) Act 2003* through the Scottish Parliament. The new Act broadly reflects the recommendations contained in the *Millan* Committee report *New Directions* (2001), and includes a new system of mental health tribunals, improved safeguards for patients receiving compulsory treatment and a range of new orders, including the controversial community treatment orders. The Act is underpinned by a comprehensive set of ethical principles promoting good practice and, with some minor exceptions, has received widespread general approval. We are pleased to be able to provide a timely review of the new Act by Hilary Patrick in this issue of the Journal.

As the current parliamentary session draws to a close south of the border, there continues to be uncertainty over the exact fate of the *Mental Health Bill* for England and Wales published in June 2002. However, considerable consolation can be drawn from the publication of the draft Mental *Incapacity Bill* on the 27th June. The Bill is the culmination of over a decade of lengthy consultation carried out by the Law Commission and Lord Chancellor's Department, and is based on recommendations contained in the consultation paper *Who Decides?* published by the Lord Chancellor's Department in 1997 and the Government's Policy Statement, *Making Decisions*, in 1999. Both papers followed the earlier recommendations and draft Bill published by the Law Commission in 1995.

The new Bill aims to provide a comprehensive legal framework for decision-making on behalf of those who lack the capacity to make decisions for themselves. The Bill contains a number of key principles that aim to ensure incapacitated adults enjoy 'a maximum level of autonomy in the decision making process' and to safeguard the vulnerable from abuse. Some of its more important proposals for change include the abolition of the present Court of Protection, which is to be replaced by a new superior court of record with extended jurisdiction to intervene in decisions about a person's welfare and healthcare as well as financial decisions. Enduring powers of attorney are also to be replaced by a new system of lasting powers of attorney, again, with extended application to welfare and healthcare, as well as financial matters. Over the forthcoming months, the Bill will be scrutinised by a joint committee of both Houses of Parliament, which will hear representations from interested groups. The Committee aims to present a report to the Government later in the year. Unfortunately, due to the timing of the publication of the draft Bill we have not been able to publish detailed comment on its proposals in this issue of the Journal. Space will be set aside for its consideration in the next issue of the Journal, which will be published in December.

Following the renewed focus on mental incapacity laws, it seems appropriate that we lead this issue

of the Journal with two empirical studies that focus on the assessment of mental incapacity, conducted by Dr John Bellhouse, Professor Tony Holland, Isabel Clare, Professor Michael Gunn and Peter Watson. The first study seeks to determine the extent to which informal and formal patients are capable of consenting to admission to hospital. The second study looks at the capacity of patients to consent to medical treatment and the relationship between capacity to consent to treatment, diagnosis and the present legal status. In both contexts, the reliability of the capacity assessments undertaken is explored to see whether capacity can be assessed with a reasonable level of agreement to enable consistent clinical practice. Both the timing of these studies and their findings are of tremendous importance – not least because the Government's plans for a new Mental Health Act to date, have not included making capacity assessment part of the criteria for the use of compulsion. The authors conclude that this is not only a 'missed opportunity' on the part of the Government, but also that such a change would neither be unworkable nor have disastrous consequences.

In June this year, Northumbria University and Eversheds Solicitors jointly hosted the North of England Mental Health Law Conference in Newcastle upon Tyne. The aim of the one day Conference was to address topical legal issues in mental health in the light of the Government's proposed legislative reforms and the Human Rights Act 1998. In this issue, we are pleased to be able to publish a paper delivered at the Conference by Fenella Morris, which focuses on the complex legal framework governing confidentiality and information sharing in a mental health context. The paper considers the nature and extent of the duty of patient confidentiality, the circumstances in which it may be overridden and the rights of access to health information for incapacitated adults and applicants to the Mental Health Review Tribunal.

Since its introduction in the 1959 Mental Health Act, the role of the nearest relative has attracted widespread controversy. Joan Rapaport's article examines the nearest relative from its historical origins to present day function under the provisions of the *Mental Health Act 1983* (MHA). In doing so, she explores the relationship between the nearest relative and the Approved Social Worker and goes on to analyse the problems that have so often been associated with the nearest relative's role. As the Government moves to abolish the nearest relative under its proposed legislative reforms, this article is a useful reminder that without careful and serious consideration of the current problems associated with the role, history may have a tendency to repeat itself.

The common law doctrine of necessity allows treatment to be given to compliant incapacitated patents for their mental disorder, so long as the proposed treatment is considered to be in the best interests of the patient. Nevertheless, many practitioners still feel it necessary to detain incapacitated patients under the MHA 1983 and invoke the safeguards contained in section 58 of the Act when administering ECT. Robert Robinson's comment explores the reasons why ECT is seen as somehow different from other forms of treatment for mental disorder and considers whether recent case law on non-consensual psychiatric treatment of detained patients suggests that powers to administer ECT to incapacitated patients under common law may have to be qualified in light of the Human Rights Act 1998.

In our case review section Oliver Lewis reviews the case of *Edwards v United Kingdom (2002)* which came before the European Court of Human Rights early last year following the homicide of Christopher Edwards in prison custody in 1994. The judgment and the tragic circumstances that surround this case are a stark illustration of the way that a State system may fail not only to protect the life of an individual in its care, but also to conduct an adequate investigation into the

circumstances surrounding the death of that individual. The case is of interest for clarifying the required standards of the procedural aspects of Article 2 of the Convention regarding a State's positive obligation to investigate such homicides and the role of relatives and other secondary victims in the process.

David Hewitt reviews the important decision of *R (on the application of DR) v Mersey Care NHS Trust (2002)*, which joins an increasing number of cases focusing on the renewal of detention under the MHA 1983. The controversial judgment of the Administartive Court confirms that a patient on s17 leave who is receieving treatment at a hospital, such treatment being a significant component of that patient's treatment plan, is able to have their detention renewed even though there is no intention that the patient is to resume 'in-patient' status.

Robert Robinson reviews the Court of Appeal decision in *R (on the application of the Secretary of State for the Home Department) v Mental Health Review Tribunal and PH (2002)*. In this significant case, the Court considered whether the conditional discharge of a restricted patient by a Tribunal to another institution where liability would be restricted, which could include another hospital, amounted to a discharge for the purposes of s73 of the MHA 1983 or whether it amounted to a hospital transfer, in which case the Tribunal had exceeded its powers in making the order. The judgment in *PH* is of particular relevance for Tribunals dealing with cases of restricted patients where the possibility of conditional discharge arises.

Our final review by Anna Harding considers the Court of Appeal judgment in *R (on the application of B) v Ashworth Hospital (2003)* which overturned the previous Administrative Court decision of Sir Richard Tucker on the construction of section 63 of the MHA 1983 and whether it would be lawful to provide compulsory treatment for a disorder which is different to the classified disorder for which a patient was originally detained for treatment. The review pays particular attention to the leading judgment of Dyson J which clarifies that the requirements that Part IV of the MHA must be interpreted by looking at the whole of the Act and that therefore Part IV is only concerned with mental disorders that are treatable and which justify detention for their treatment.

As ever, we are grateful to all the authors for their useful contributions to this issue of the Journal.

Charlotte Emmett

Editor