

Book review

Mental Health Act Manual by Richard Jones (9th edition)

Published by Sweet and Maxwell (2004) £59.00

A new edition of the Mental Health Act Manual is always an event. Richard Jones has long been treated as *the* authority in the field of mental health law; indeed, some mental health professionals need convincing that Jones's commentary does not embody the law (the "Jones says" phenomenon, noted before in these pages¹). Fortunately Jones's views are always well-argued: his interpretation is usually based upon both a thorough knowledge of what the settled law says and, where it is not settled, fierce opinions on what it ought to be. (I return to Jones's opinions later in this review.)

So what is new in the 9th edition? The mixture is much as before: the focus is on the text of the 1983 Act, with a detailed commentary on how it has been interpreted in the decided cases, the 1983 Tribunal Rules and commentary, the Human Rights Act 1998 and commentary, and the Code of Practice, which carries no commentary as such but occasional 'general notes' (which frequently dissent from the guidance given). As far as I can see, every important case since the last edition² has been included, and a large number that I have not encountered before. I am particularly grateful for the excellent updating of the commentary on Part III sentencing, where the caselaw is harder to track down. What is more, having for once read through the whole Manual (albeit at a gallop) I am left awestruck at the clarity of the materials: how Jones manages each time to reduce such complexity of detail to a book which can be so readily understood, without complete mental collapse, is nothing less than astonishing.

I welcome the four annexes which deal with specific contentious issues – medical treatment under common law, medical treatment of children, further powers to restrain and/or detain patients and the legal protection of mentally incapable adults – which have helpfully been extracted from their former positions in the general text. This approach could perhaps be extended to other key parts of the Manual where the 'general notes' have got out of hand: section 3, for example, occupies 3/4 page of text, while the commentary runs to 13 1/2 pages.

1 See the review of the 7th edition of the Manual by Anthony Harbour and Robert Brown at pp 81 - 84 JMHL Feb. 2002

2 8th edition, published by Sweet and Maxwell (2003)

It is a pity that this edition went to press before the European Court of Human Rights delivered its long-delayed judgment in the 'Bournewood' case (*HL v United Kingdom*, October 2004³). Jones's summary of the position at common law and its interaction with the European Convention is in fact largely borne out by how the European Court subsequently viewed the case. Health professionals struggling to implement the recent Department of Health guidance⁴ that people should not be admitted informally 'in circumstances amounting to a deprivation of liberty' would, I am sure, now welcome an authoritative review of the vexed question of when, exactly, someone is 'detained', given the conflicting caselaw⁵. Is it possible to reconcile these authorities with the recent 'discharge to hospital' cases such as *R (Secretary of State for the Home Department) v Mental Health Review Tribunal*⁶, *R (G) v MHRT & Secretary of State for the Home Department*⁷, *R (Secretary of State for the Home Department) v MHRT*⁸? I think we should be told – and I can imagine no-one better than Jones at the telling.

So the Manual is as wonderful and definitive as ever. And yet, I am left with two nagging questions: what is the purpose of the Manual, and who is it written for? With regard to the first question, the obvious answer is that it is primarily a working handbook for professionals in the field. But not all the material is equally accessible. Who, for example, is the target readership of the lengthy and ever-expanding section on the Human Rights Act? It makes fascinating reading for academics and policy-makers, and is doubtless invaluable for counsel preparing an appeal, but is unlikely to be of much use to busy professionals seeking to uphold Convention rights in their everyday practice.

The Manual is long and getting longer (and of course more expensive); in my view the space would be better used if Jones could, for example, reinstate the key pieces of Government guidance, which at one time were included in full but which remain banished to summary notes in the general commentary. It is hard for health professionals, let alone lawyers, to keep up with what guidance is currently in force. If it is apparently possible to include in full the 1995 guidance on supervised discharge, which remains little-used, could we please have the text – or extracts from it – of the key documents on mentally disordered offenders, unfitness to plead, confidentiality, etc.? Jones would be doing us all a great service by restoring this section of the Manual.

I am more troubled by the second question. Veteran Jones-watchers have long been aware that the Manual tends to be written largely with mental health professionals in mind, and this is clearly reflected in the passages in which Jones sets out his personal views. There is nothing wrong with him giving his opinions – he knows the law as thoroughly as anyone and has great clarity of thought (though it would be helpful if he could differentiate more clearly between passages summarising the law and his occasional pieces of kite-flying). The problem is, rather, with the areas in which he chooses to express a dissenting view: these are almost always where it appears that current practice places the statutory authorities at a disadvantage. In the matter of charging for s.117 services, for example, Jones continues to grumble about unfairness years after the matter has been decided definitively by the House of Lords⁹ (see page 430 of this edition).

3 Application no. 45508/99

4 10th December 2004

5 Compare the majority decision of the House of Lords in *R v Bournewood Community and Mental Health NHS Trust ex parte L* [1999] 1 AC 458, following *Ashingdane v UK* (1979) 2 EHRR 387, with *HL v*

UK and earlier cases such as Murray v Ministry of Defence [1988] 2 All ER 521.

6 [2002] EWCA Civ 1868

7 [2004] EWHC 2193 (Admin)

8 [2004] EWHC 2194 (Admin)

This does not mean that Jones is usually wrong: on the contrary, his concerns are frequently vindicated by the courts. For example, one of his familiar themes concerns the duty to consult the nearest relative 'unless it appears (to the ASW) that in the circumstances such consultation is not reasonably practicable...' (s.11(4) MHA). Is the ASW permitted not to consult the nearest relative if he or she is believed to have been harmful to the patient, or where the patient has severed all links with him or her? The Code of Practice states at paragraph 2.16: "Practicability refers to the availability of the nearest relative and not to the appropriateness of informing or consulting the person concerned." Jones takes a characteristically robust line over this guidance. It is "both incorrect and inconsistent with the requirements of the European Convention of Human Rights" (page 81, bottom). "Approved social workers should therefore be advised not to interpret this provision in the manner advocated by the Code of Practice and the Mental Health Act Commission" (page 83, top). As we now know, the courts have finally confirmed the correctness of this approach: see *R (E) v Bristol City Council*⁹.

My concern is, rather, that there are a number of examples in the Manual of decisions which would appear to undermine the patient's rights, upon which Jones makes no comment. Take for example the practice of displacing a nearest relative by interim order, without notice, following *R v Central London County Court ex parte London*¹¹: there is apparently a growing practice of displacing without notice and without providing a return date, putting the nearest relative to the effort of having to make an application in order to assert his or her statutory rights. I once raised concerns about this practice with the county court concerned but was told that it was perfectly lawful under the County Courts Act 1984. The court rather missed the point: surely there is a problem of principle here? If so, Jones says nothing about it. Or take the extension of a section 2 detention pending displacement under s.29(4) MHA. At the time of this edition Jones had access to the first instance judgment in MH¹² which dismissed the claim under Article 5(4), but again, although he provides a detailed summary of Silber J's key points, he makes no comment on them, despite the manifest unfairness which was later picked up by the Court of Appeal¹³.

The most worrying expression of opinion occurs in the preface. Jones complains about "unnecessary" Managers' hearings, which he says "must be confusing to patients", and states that "NHS and independent hospitals should review their protocols to ensure that Managers' hearings are only convened when there is a legal requirement to do so." He gives further advice on the convening of Managers' hearings in his general note to paragraph 23.9 of the Code of Practice: "A Managers' hearing should not take place during the currency of the section if the patient has made a concurrent application to a Mental Health Review Tribunal" (page 725).

Jones surely exceeds his brief here. Managers' hearings are not of course statutory, but part of their general duty of care towards their patients: as paragraph 23.7 of the Code makes clear, Managers may conduct a review of detention at any time at their discretion. Those representing detained patients are perfectly entitled to ask for a hearing in order to test the case for detention, even if a tribunal hearing is imminent; the Managers can always refuse such a request, having carried out a paper review of the position (see paragraph 23.9). Jones is of course entitled to be

9 *R v Manchester City Council ex p. Stennett* [2002] UKHL 34

10 [2005] EWHC 74 (Admin)

11 [1999] 3 All ER 991

12 *R (on the application of MH) v Sec. of State for Health and MHRT* [2004] EWHC 56 (Admin)

13 *R (on the application of MH) v Sec. of State for Health* [2004] EWCA Civ 1690

concerned about the potential waste of clinician time; but the Mental Health Act Manual is surely not the right place for him to give advice on how patients' rights may be restricted?

I do not want to make too much of these concerns. The Manual remains an invaluable resource for patients and their lawyers. But I – and no doubt many other people – would be saddened if Jones continued down the track about which I have expressed concerns above. The danger would be that the Manual would then become in effect an advice handbook for the detaining authority, and not – as now – the definitive text for everyone in the field.

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