



Welcome to the July 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: when to appoint welfare deputies, termination and best interests, capacity in the context of sexual relations and birth arrangements, and the interaction between the MHA and the MCA in the community;

(2) In the Property and Affairs Report, fraud and vulnerability; news from the OPG, and deputyship and legal incapacitation;

(3) In the Practice and Procedure Report: Court of Protection fees changes; contingency planning, costs and s.21A applications; mediation in the Court of Protection;

(4) In the Wider Context Report: the Chair of the National Mental Capacity Act Forum reports, a new tool to assist those with mental health/capacity issues to know their rights, older people and the CPS/police; and books for the summer;

(5) In the Scotland Report: establishing undue influence and an update on the Scott review.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

#### Editors

Alex Ruck Keene  
Victoria Butler-Cole QC  
Neil Allen  
Annabel Lee  
Nicola Kohn  
Katie Scott  
Katherine Barnes  
Simon Edwards (P&A)

#### Scottish Contributors

Adrian Ward  
Jill Stavert

The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

## Contents

ENGLAND, WALES AND NORTHERN IRELAND .....	2
National Mental Capacity Forum Third Annual Report .....	2
Sex, dementia and consent.....	3
Getting learning disabled and autistic people out of Assessment and Treatment Units and long stay mental health hospital beds .....	3
Know your rights .....	4
The CQC on the MHA Code of Practice .....	4
Reducing the need for restraint and restrictive intervention.....	4
Social workers and a new Mental Health Act.....	5
Older people, the police and CPS .....	5
Dementia and disability .....	6
Advancing our health: prevention in the 2020s .....	7
Short note: capacity and appealing unfitness to stand trial and its consequences.....	7
Wales and the CRPD .....	9
INTERNATIONAL DEVELOPMENTS.....	9
Vincent Lambert update .....	9
The social and underlying determinants of health in advancing the realisation of the right to mental health.....	10
Deprivation of liberty – an Irish (and CRPD) perspective.....	11
Deprivation of liberty – the Peruvian perspective .....	12
RESEARCH CORNER.....	14
BOOK CORNER.....	14

### ENGLAND, WALES AND NORTHERN IRELAND

#### National Mental Capacity Forum Third Annual Report

Baroness Finlay, Chair of the National Mental Capacity Forum, published on 11 July her 3<sup>rd</sup> annual report. The report details work done over the past year, and the Forum’s priorities for the next year, as follows:

1. *The Code of Practice for the MCA must be revised and updated, using real-life examples from events that have occurred over the past ten years.*

2. *Specific guidance in the Code of Practice must be produced on the new Liberty Protection Safeguards to ensure a timely roll-out of the new assessment processes and associated areas, with evaluation of the effectiveness of the new system when a person is being deprived of liberty.*

3. *The rights and ability of people to form a relationship and show affection, including sexual expression of affection, between consenting adults needs review because assessment of capacity to enter into a sexual relationship is often restrictive and may be seriously impairing the Article 8 rights of some people.*

4. *Supporting people to make their own decisions needs promotion to ensure that the support builds on the strengths and abilities of the individual. The principle of support must not be used as a way to coerce a person into making the decision that others wish them to agree to.*

5. *The term Persistent Vegetative State should be abandoned in favour of Profound Persistent Disorder of Consciousness.*

6. *A specific report needs to be commissioned into the deterioration in culture that occurs in some care settings, particularly how it relates to ongoing training and other aspects of individual staff support provided in these settings.*

## Sex, dementia and consent

On 3 July 2019 The Guardian published an [article](#) by Juliet Rix on “Sex and dementia: the intimate minefield of consent in a care home”. In particular, the article examined the difficult conflict between an adult’s human right to choose their relationships (including the right to make “bad” decisions) and the need to ensure sexual activity is consensual and protect vulnerable people from abuse. Alex is featured in the article, observing that “*the [legal] bar for capacity to consent to sexual relations is deliberately set quite low*”; just because somebody lacks capacity to handle their bank account does not mean they can’t consent to sexual relations. With this in mind, “[m]anagers need to have big shoulders and not be too risk-averse.” He also suggests that it would be helpful for the CPS to publish guidelines clarifying the likelihood of prosecution in the context of a loving relationship where nobody believes there is any problem.

## Getting learning disabled and autistic people out of Assessment and Treatment Units and long stay mental health hospital beds

In May 2019 the team behind the [Rightfullives](#) project were asked by a journalist what sort of changes they would like to make to the inpatient hospital system and the way in which people with learning disabilities and autistic people are supported. Because the journalist was in a hurry, they quickly came up with their Eight Point Plan, but they knew that their ideas on their own were not enough so during May and June they consulted on their plan, and the result of the consultation and their revised Eight Point Plan

can be found [here](#) (on the excellent “My own front door” website, an online magazine and web-resource for self-advocates, families, practitioners and everybody campaigning for the rights of autistic people and people with learning disabilities).

### Know your rights

The British Institute of Human Rights have recently launched an online ‘[Know Your Human Rights](#)’ Tool, aimed – in particular – at people with mental health or mental capacity issues, and those who advocate on their behalf, including formal advocates, families and carers. It aims to give information about how human rights can help individuals have more control over their own life and be treated with dignity and respect. It gives you tips on how individuals can identify whether an issue they have with their care or treatment is a human rights issue, through a step by step online process. It gives suggestions about how individuals can use human rights to overcome these challenges using real life examples.

Although primarily designed for those on the receiving end of services, the tool is also likely to be of real assistance to those who are delivering services and seeking to do so in a human rights compliant fashion. We hope that the BIHR can, in due course, develop equivalent tools expressly designed for such professionals to accompany their excellent [fact-sheets](#) and face-to-face training.

### The CQC on the MHA Code of Practice

The CQC has published a [report](#) into how the Mental Health Code of Practice is being used since its last update in 2015.

Disappointingly, its review found that providers still lacked understanding on how to promote, apply and report on the guiding principles of the Code and were, as a result, failing to support staff sufficiently to enable them to have meaningful and productive conversations with patients.

The CQC, understandably, highlights the recommendations that it makes to those charged with revising the main MCA Code of Practice, and drawing up the new LPS Code (whether separately or as part of one master code).

### Reducing the need for restraint and restrictive intervention

Whilst we await the Joint Committee on Human Rights’ report into its [inquiry](#) into detention of children and young people with learning disabilities and/or autism, the Government has issued [guidance](#) on how to support children and young people with learning disabilities, autistic spectrum conditions and mental health difficulties who are at risk of restrictive intervention.

Almost the most important part of the guidance is this paragraph:

*NHS and local authority commissioners will need to assure themselves that the providers of the services they commission have the necessary knowledge, skills and competencies to support effectively those whose behaviour challenges and have arrangements in place to promote positive behaviour, reduce risk, and eliminate unnecessary or inappropriate use of restraint. This includes assuring themselves that providers of care and/or*

*education services meet the needs of the children and young people concerned; providers are regularly and rigorously reviewed; and that failure to comply with contractual obligations leads to prompt action to safeguard and promote the welfare of children. Settings and those who commission services should ensure that the services they commission are consistent with the advice in this guidance.*

## Social workers and a new Mental Health Act

In May All-Party Parliamentary Group (APPG) on Social Work and the British Association of Social Workers (BASW) launched a new inquiry: Social Workers and a New Mental Health Act. The inquiry was established in response to the Independent Review of the Mental Health Act 1983, published in December 2018 and chaired by Sir Simon Wessely. The APPG proposed to look at the role that social workers play in upholding these principles and how that role could be enhanced in new legislation. The report following that inquiry has now been published and sets out 9 recommendations designed to

*address the importance of supporting the social work profession in upholding the values of the social model and as professionals at the heart of successful integration. These recommendations have been chosen for their potential to be included in new legislation, but their successful implementation would have a much wider impact.*

## Older people, the police and CPS

Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services and Her Majesty's Crown

Prosecution Service Inspectorate have published a report entitled "The Poor Relation," examining the police and CPS response to crimes against older people. As the foreword notes:

*Crime against older people isn't well understood, despite the vulnerability of older people and the importance that society attaches to looking after people in their old age. There has been little police analysis of the problem, including the links to disability hate crime and domestic abuse. We found that police forces had only a superficial understanding of the problems, although all had recognised that fraud was an increasingly common concern for older victims.*

*No single national group or body exists to co-ordinate the work of criminal justice agencies to monitor and improve the response to crimes against older people (in the same way as there are, for example, joint policing and CPS working groups). This affects the understanding and grip on crimes against older people nationally. For example, we were concerned to find that the number of crimes against older people referred by the police to the CPS has declined for two consecutive years, but there has been no co-ordinated action to find out why and what should be done.*

### **The police and the CPS need to work together better**

*The police alone cannot solve these problems. For example, we believe they can find better ways of working with the CPS. A significant first step would be to agree a simple joint definition for what we mean when we talk about 'crimes against*



older people'. This could recognise that old age does not itself make someone more vulnerable, but that when older people do become the victims of crime they are more likely to require extra support.

We believe the police can bring more focus and co-ordination to crimes against older people by developing a strategy to outline what steps the police service needs to take to address some of the current challenges, and to prepare for the future.

In this way, more focus can be brought to the problem and the links with, for example, domestic abuse can be understood better. This should also help to improve the response to vulnerable older people when they are victims of crime, matching the work we have seen in other areas of vulnerability such as child and domestic abuse.

For an increasingly ageing population with a disproportionate amount of complex needs, we believe that this approach is now necessary to kickstart the change we need.

### **We have concerns about adult safeguarding arrangements**

In this inspection, for the first time, we assessed adult safeguarding arrangements. Our findings are of grave concern.

Adult safeguarding was described to us as the 'poor relation' of safeguarding arrangements, with inconsistent local partnership work to consider what protections or support might need to be put in place for vulnerable adults. Forces told us of a focus on children over adults,

and we found a lack of understanding of what their duties were under the Care Act 2014 regarding adults at risk.

We found that from national policy and training, through to safeguarding practice in forces, much work is needed to make sure that older people – and adults at risk more generally – receive a consistently good service, and that the police work effectively with others.

## **Dementia and disability**

The All Party Parliamentary Group on Dementia has published a new [report](#), "Hidden no more: Dementia and Disability." The report expressly seeks to frame itself by reference to

*the social model of disability which views people as being disabled primarily by barriers in society, not by their impairment or difference. The social model, on which the CRPD is founded, suggests that there are a number of factors which create or contribute to the challenges, exclusion and discrimination faced by people with dementia. These factors are the social arrangements, behaviours, norms and practices in wider society. It is these environmental factors and personal attitudes that need to be addressed in order to tackle disability in society, and not the individual impairments related to dementia. Both the CRPD and the Equality Act use the language of 'impairment', not 'diagnosis', because of the prejudice, stigma and discrimination that medical diagnoses can generate (especially in psychiatry).*

The APPG challenges the mainstream biomedical model of disability, which (in contrast to the social model) views disability as a product of an impairment

*or difference in the individual. The biomedical model looks at what is 'wrong' with the person, rather than what they might need to have independence, choice and control. Respondents to the inquiry also highlighted the 'medicalised language' which is often used in relation to dementia. This language can perpetuate the idea of something being 'wrong' with the person, and neglect the role that public services and society have in enabling people with dementia to live well. '*

The APPG noted that

*Our research revealed a very important finding: 81% of respondents to our online survey confirmed that they see dementia as a disability and that it should be identified as such. This was confirmed by the majority of people in our focus groups and those who provided us with written evidence. However, it was clear that many respondents were still defining disability in terms of the individual's challenges, rather than a wider social challenge. This indicates that the biomedical model of understanding disability is probably more common than a social model of understanding disability.*

The APPG report set out recommendations in order to change the way government, the public and organisations think about dementia, detailing how social change and inclusion can become a reality for people with dementia in six key areas of daily life: employment, social protection, social care, transport, housing and community life. The report highlights the need for particular changes in the field of employment where people with dementia are at significant risk.

## Advancing our health: prevention in the 2020s

Almost the last thing done by the Government under the May regime was to publish a [consultation](#) on preventative measures to secure the health of the public in the 2020s. For present purposes, of most relevance and interest are the discussions of the steps that can be taken in relation to dementia, and also the steps recognising the social determinants of mental ill-health.

## Short note: capacity and appealing unfitness to stand trial and its consequences

In *R v Roberts* [2019] EWCA Crim 1270, the Court of Appeal (Criminal Division) considered what to do where a person found unfit to be tried under s.4 of the Criminal Procedure (Insanity) Act 1964 and (under s.4A) to have committed the acts underpinning the prosecution sought, themselves, to appeal against the finding that they had committed the acts. Somewhat surprisingly, it appears that this question had not been the subject of full judicial consideration before, and the Court of Appeal therefore set out guidance for the future:

*38 [...] once a finding of unfitness has been made and where there is a subsequent determination by the jury that the accused did the act or omission charged, it is the duty of the person appointed by the court to present the defence case to consider, as a matter of professional obligation, whether an appeal might properly lie against either determination or, indeed, against the ultimate disposal [...] It is a matter for that person to assess whether there are*

*properly arguable grounds. In making such assessment the appointed person may have such regard, if any, as thought appropriate to the "instructions" of the accused. That will be a matter of judgment in each case. But those "instructions" will not bind the representative: just because they emanate from a person adjudged to be unfit to participate in the trial process.*

*39. If the appointed person considers that there is no arguable ground of appeal and declines to settle a Notice of Appeal, it follows that there can be no valid appeal. The accused will not be competent (in terms of mental fitness) to pursue an appeal in person: nor will the accused be competent (in terms of mental fitness) to instruct fresh counsel or solicitors to pursue an appeal on his or her behalf.*

*40. However we do not think that it would be best practice for the Criminal Appeal Office, acting administratively, simply to reject such an application at the outset without there being any judicial consideration as to whether it is in the interests of justice for a person to be appointed to put the case for the applicant. We think that the better course would be first to check with the appointed representative in the Crown Court that no arguable grounds of appeal were identified as available; and then to refer the papers to the Single Judge to review the papers and consider, under s.31B of the 1968 Act, whether to give any procedural direction that such a person be appointed. If the Single Judge can find in the papers nothing to suggest properly arguable grounds then no such direction will be given and the application will be rejected by the Single Judge: and there can thereafter be no right of renewal to the Full Court. In so rejecting the*

*application, the Single Judge will be finding that the application is to be rejected on the ground that it is ineffective by reason of lack of mental capacity on the part of the applicant to pursue it; but the Single Judge will no doubt in any event give such reasons as the Single Judge thinks fit with regard to the grounds actually sought to be advanced, in indicating that they in any event lack arguable merits sufficient to justify appointing a person to put the case. If, on the other hand, the Single Judge considers on the papers that there potentially may be arguable grounds (notwithstanding that the appointed representative in the Crown Court has identified none) then we think it a legitimate exercise of the powers available that the Single Judge be entitled to direct that fresh counsel be appointed to consider whether there are viable grounds of appeal and, if there are, to settle them and then present the case on behalf of the accused in the Court of Appeal: first before the Single Judge – preferably the same Single Judge - on the papers and then (if, and only if, leave to appeal is granted or the application is referred) before the Full Court. If fresh counsel, on the other hand, is so appointed but concludes (in common with the appointed representative in the Crown Court below) that there are no viable grounds to be advanced, then the matter is again to be referred back to the Single Judge, who will then doubtless reject the application.*

*41. It may be that there could be a case where an applicant claims subsequently to have recovered mental capacity, such that he may say that an appeal can properly be pursued either by new counsel instructed by the applicant or by the applicant in person. That will not be*



*accepted in the absence of appropriate fresh (ordinarily psychiatric) evidence. If, however, such evidence is lodged in support of the application for permission to appeal, along with the appropriate formal application for leave to adduce such evidence and any necessary application for an extension of time, then again the papers are likewise to be referred to the Single Judge: who will then consider whether it is in the interests of justice for a person to be appointed to put the case for the applicant and to give the appropriate procedural direction under s.31B.*

The Court of Appeal identified a number of further procedural issues (including in relation to legal aid), and that *"since a number of these matters [...] are not currently the subject of the Criminal Procedure Rules, it may be that the Criminal Procedure Rules Committee would wish to consider whether to introduce any new rules to cover the position."*

## Wales and the CRPD

On 11 June 2019 the Welsh Deputy Minister and Chief Whip, Jane Hutt, made a statement to the National Assembly for Wales entitled "An Update on Advancing Equality and Human Rights in Wales". As part of this statement she explained that consideration was being given to the implementation of the United Nations Convention on the Rights of Persons with Disabilities:

*We're also commissioning research to explore wider options, including how we might incorporate UN conventions, including the convention on the rights of disabled people, into Welsh law. We will take an inclusive approach with regard to*

*different aspects of equality and human rights, drawing on all available evidence, including the data from the annual population survey on ethnicity, disability status, marital status and religion that's been released this morning on the StatsWales website. And I expect this work to be complete by the end of 2020."*

## INTERNATIONAL DEVELOPMENTS

### Vincent Lambert update

Vincent Lambert, a former nurse who was in a persistent vegetative state for over a decade, died on 11 July 2019 after doctors decided to end life-sustaining treatment following a lengthy legal battle.

Mr Lambert had been seriously injured in an accident in 2008 which had left him a quadriplegic, with severe brain damage. The question of whether his life-sustaining treatment should be withdrawn was the subject of a long-running legal battle between his devoutly Catholic parents, who sought to keep him alive, and his wife and some of his siblings, who argued that life-sustaining treatment should be withdrawn which is what they believed would be in accordance with his wishes. The case having been taken to the Grand Chamber of the European Court of Human Rights in 2015, a French court decided in early 2019 that doctors could withdraw life-sustaining treatment. This decision was upheld in April 2019 by France's State Council, and the process of stopping the treatment began on 3 May 2019. However, hours later a further court order was obtained by Mr Lambert's parents requiring the treatment to be re-inserted on the basis that the final decision should await the conclusion of the

complaint made by his parents against France to the UNCRPD Committee. This decision was subject to a further appeal to which earlier this month reversed the decision ordering that life sustaining treatment could be withdrawn. We do not know at this stage whether the CRPD Committee will continue to consider the complaint, or whether it will deem it inadmissible now that he has died.

### The social and underlying determinants of health in advancing the realisation of the right to mental health

In an important [report](#) published on 24 June 2019, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health outlines important opportunities and challenges associated with a human rights-based approach to actions on the determinants needed for mental health promotion. He argues that good mental health and well-being cannot be defined by the absence of a mental health condition, but must be defined instead by the social, psychosocial, political, economic and physical environment that enables individuals and populations to live a life of dignity, with full enjoyment of their rights and in the equitable pursuit of their potential.

The Special Rapporteur highlights the need for and States' obligations to create and sustain enabling environments that incorporate a rights-based approach to mental health, and which value social connection and respect through non-violent and healthy relationships at the individual and societal levels, promoting a life of dignity and well-being for all persons throughout their lifetimes.

The report is considerably more nuanced than some of the other reports that have been published recently in this context. As the Special Rapporteur notes:

*10. Terminology in the sphere of mental health is a contested terrain. There is a need to accept different terms according to how people define their own experiences of mental health. "Mental health" itself can signal a biomedical tradition for explaining and understanding lived experiences, psychic or emotional distress, trauma, voice hearing or disability. The Special Rapporteur acknowledges this contested area and the importance of the health sector and the medical model when used appropriately. He challenges stakeholders to reflect on how biomedical dominance has led to overmedicalization in the health sector, particularly in mental health, diverting resources away from a rights-based approach to the promotion of mental health. The Special Rapporteur welcomes a diversity in terminology, which can promote different approaches to mental health that are equally important.*

The following passages from the report bear setting out in full:

*48. Acceptable and high-quality therapeutic relationships (those between providers and users of services) must be based on mutual respect and trust. The Special Rapporteur regrets that trends in modern mental health legislation and clinical practices worldwide have allowed the proliferation of non-consensual measures. Coercion is widely used in mental health-care services, and there is evidence that the prevalence of coercive*

*measures in mental health-care services is growing. These tendencies risk eroding trust in mental health services, damaging the image and reputation of mental health service providers and, most importantly, continue to raise serious concerns about systemic human rights violations in the field of mental health care.*

*49. Current mental health policies have been affected to a large extent by the asymmetry of power and biases because of the dominance of the biomedical model and biomedical stakeholders with the resources and power to support meaningful transformation in global mental health is the need to close the "treatment gap". The Special Rapporteur is concerned that this message may further the excessive use of diagnostic categories and expand the medical model to diagnose pathologies and provide individual treatment modalities that lead to excessive medicalization. The message diverts policies and practices from embracing two powerful modern approaches: a public health approach and a human rights-based approach.*

*50. Any effective engagement with violence as a determinant of mental health therefore needs to address the role of mental health services in perpetuating violent and paternalistic practices, which have reinforced the myth that individuals with certain diagnoses are at high risk of perpetuating violence and posing a threat to the public. There is no scientific evidence to support this myth, which is instrumentalized by discriminatory mental health laws that deprive people of liberty and their autonomy.*

*51. Regrettably, many parts of mental health-care systems, such as residential institutions and psychiatric hospitals, too often themselves breed cultures of violence, stigmatization and helplessness. The models that have reinforced the legacy of discrimination, coercion and overmedicalization in mental health care should be abandoned. Efforts should be refocused towards non-coercive alternatives that respect the rights of persons with a lived experience of mental health conditions and mental health-care services. Such alternatives should address holistic well-being, and place individuals and their definition of their experiences, and their decisions, at the centre.*

### Deprivation of liberty – an Irish (and CRPD) perspective

The Department of Health has published the public consultation report on its legislative proposal "to meet our obligations under Art. 14 of the UNCRPD [by which] legislation is required to provide procedural safeguards to ensure that people who cannot consent to their care arrangements in relevant facilities are not unlawfully deprived of their liberty." With masterly understatement, the Department notes that "a number of complex policy and legal issues remain to be resolved." The two key points to note are:

- (1) The breadth and mutual incompatibility of so many of the responses (echoing consultations undertaken elsewhere);
- (2) The Centre for Disability Law and Policy at the NUI Galway, which has been very influential in shaping the thinking of the CRPD Committee in relation to legal capacity, proposes (at 1.111) that the definition of

deprivation of liberty "*must be broad and must include all situations in which a person has not provided free and informed consent to be in the relevant setting, or where the decision to place the person in such a setting is not made in accordance with the person's will and preferences, or where the person's will and preferences are unknown.*"

Intriguingly, the emphasised sentence is more nuanced than the approach taken in the recent [report](#) by the Special Rapporteur on the Rights of Disabilities, who focused solely on the question of whether the person has given free and informed consent. It chimes with the approach that Alex has been [urging](#) of a broader definition of the concept of "valid consent" to circumstances of confinement; an approach [endorsed](#) by the Joint Committee on Human Rights, not taken up in the Mental Capacity (Amendment) Act 2019, but still very much open for judicial consideration before the courts of England & Wales.

### Deprivation of liberty – the Peruvian perspective

A recent Peruvian Constitutional Court decision has grappled in fascinating fashion with both domestic deprivation of liberty and the implications of Article 14 CRPD in the context of a habeas corpus suit filed on behalf of Juan José, a man with a chronic organic cerebral psychotic syndrome, and "profound mental retardation" (the Court's terms). He lived with his mother, who was also his legal guardian (under the substitute decision making regime that has subsequently been repealed), who had in effect caged him in his room.

We are very grateful to [Renata Anahí Bregaglio Lazarte](#) and [Renato Antonio Constantino Caycho](#) for their summary translation of the judgment (available here in [Spanish](#)).

#### 1. The court's references to and analysis of international standards on personal liberty:

The court reviewed a number of standards in International Human Rights law relating to the right to liberty. The court began by analysing Article 14 CRPD, and the Committee's interpretation of that article. The court observed that the Committee's guidelines on the application of Article 14 do not allow for the restriction of liberty on the grounds of disability, even when there is a possible danger to the person or to other. The ruling then referred to the UNHCR's position, as well as the positions of the UN Special Rapporteurs on the Rights of Persons with Disabilities, Torture, Discrimination against Women, and Health. The court considered that the Rapporteurs adopted a position similar to that of the CRPD Committee, in the sense that they adopted the view that there was an absolute prohibition of the deprivation of liberty of persons with disabilities in international human rights law. However, the court also referred to the position of the Human Rights Committee and the Sub-Committee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the European Court of Human Rights, to the effect that there was a standard allowing for exceptions in cases of danger to oneself or others.

Having reviewed these standards, the court held that there was no consensus in international human rights law regarding the deprivation of liberty of persons with disabilities, or the

interpretation of Article 14 CRPD. The court therefore considered that, while it was clear that disability *per se* could be the only reason used to deprive someone of their liberty, the standard was unclear when disability was used as a motive in conjunction with guaranteeing the safety of the person or others.

Although at the time of the judgment there was no law regulating mental health in Peru (this had changed since), the court identified that Peruvian norms seemed to aim towards a community mental health system. Consequently, the court held that the general rule in Peru was that persons with disabilities could not be deprived of liberty on the basis of disability (real or perceived) alone. The court, however, found that it was possible to restrict personal liberty in exceptional cases, when doing so would guarantee the security of the person or others. The court held that the decision had to be taken following the necessary procedural and substantive guarantees (which were not specified), and must be used as a last resort. Furthermore, the court held that the State should move to progressively eliminate forms of treatment that require a restriction of liberties and move towards a full community-based mental health system.

## **2. The Court's reasons for considering that placing metal bars in the man's room was a deprivation of liberty.**

The mother had placed Juan José in a bedroom, in which she placed two cage doors: one in the entrance to the patio, and one in the room's door to the rest of the house. As a result, her son was trapped in a space of some 10m.<sup>2</sup>

The court took the social model of disability as a premise for its analysis of Juan José's circumstances. The court held that habeas corpus suits protect freedom of movement throughout the State's territory (*stricto sensu*), and freedom to move in and out of specific places (*lato sensu*). The court then evaluated Juan José's living conditions, mentioning the following:

1. The room he was held in was poorly lit and poorly ventilated, and the windows also had metal bars in their openings and Juan José was often left home alone, locked in the room;
2. The current status quo is that he spent most of his time in the room, while his mother was at work. Although she argued that the cage doors were security measures designed to protect her, the court rejected this argument on the basis that Juan José had full legal capacity under Peruvian law as it now stood. Any concerns regarding his security should have been addressed during a supported decision-making process, without infringing his rights and dignity. With regards to personal integrity, the Court holds that any security measure should – once again – have respected his rights, will and preferences.

## **3. The court's final decision**

The court held that Juan José's right to personal liberty had been violated, and ordered his mother to remove all metal bars and cell-like doors from Juan José's room. It held that the judge should convert the interdiction process into a supported decision making process, in the context of which



appropriate security measures should be established. Likewise, the court held that Juan José's parents should take measures to ensure adequate health and living conditions for their child. Finally, the court held that – given the nature of the case – the court in charge of executing this decision should keep them informed, so as to monitor compliance with their ruling.

### RESEARCH CORNER

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle.

This month, we highlight the fascinating and important special issue of the Journal of Ethics in Mental Health on “disordering social inclusion,” with a whole host of articles looking at the complexities of ‘mad studies,’ including the law’s place in ‘Mad’ movements and the role of user/refuser perspectives in law.

failing to review this properly is because it is never on his desk in Chambers, doing the rounds continuously amongst colleagues who need to get a quick and reliable answer to one of the inordinately complicated questions that always seem to arise in the context of the law of the NHS. It is a book that does LAG, and the authors, proud, and our one request is that consideration is given to regular updates/editions so as to ensure that it retains its – rightly – authoritative status.

*Safeguarding Adults and the Law: An A-Z of Law and Practice* (Jessica Kingsley Publishers, 2019, third edition, £26-33.40). If there is a subject to rival NHS law for complexity, it is safeguarding. This book, thankfully now in its third edition, provides an extremely clear and helpful reference guide to issues that arise in the context of safeguarding under the Care Act 2014. Arranged in an A-Z format, and not designed, in fairness, to be read through rather than mined for specific information, the juxtaposition of entries stands as a reminder of the number of practical, legal and ethical dilemmas that are encompassed under the one simple term ‘safeguarding.’

### BOOK CORNER

Alex has been failing to get through the pile of books that he has been sent for review,<sup>1</sup> but of these, we should highlight in particular by way of mini-review:

*NHS Law and Practice*, by David Lock QC and Hannah Gibbs (Legal Action Group, 2018, £70-£100.10). One of the reasons that Alex has been

---

<sup>1</sup> He is always happy to accept books for review in the field of mental health and mental capacity law (broadly defined).

---

## Editors and Contributors

**Alex Ruck Keene: [alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)**

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk). To view full CV click [here](#).

**Victoria Butler-Cole QC: [vb@39essex.com](mailto:vb@39essex.com)**

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).

**Neil Allen: [neil.allen@39essex.com](mailto:neil.allen@39essex.com)**

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click [here](#).

**Annabel Lee: [annabel.lee@39essex.com](mailto:annabel.lee@39essex.com)**

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click [here](#).

**Nicola Kohn: [nicola.kohn@39essex.com](mailto:nicola.kohn@39essex.com)**

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click [here](#).

---

## Editors and Contributors



**Katie Scott:** [katie.scott@39essex.com](mailto:katie.scott@39essex.com)

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



**Katherine Barnes:** [Katherine.barnes@39essex.com](mailto:Katherine.barnes@39essex.com)

Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: To view full CV click [here](#).



**Simon Edwards:** [simon.edwards@39essex.com](mailto:simon.edwards@39essex.com)

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



**Adrian Ward:** [adw@tcyoung.co.uk](mailto:adw@tcyoung.co.uk)

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



**Jill Stavert:** [j.stavert@napier.ac.uk](mailto:j.stavert@napier.ac.uk)

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

## Conferences

### Conferences at which editors/contributors are speaking

#### Liberty Protection Safeguards: Implementation of the Mental Capacity (Amendment) Act 2019

Alex is chairing and speaking at a conference about the LPS on Monday 23 September in London, alongside speakers including Tim Spencer-Lane. The conference is also be held on 5 December in Manchester. For more information and to book, see [here](#).

#### Clinically Assisted Nutrition and Hydration Supporting Decision Making: Ensuring Best Practice

Alex speaking at a conference about this, focusing on the application of the BMA/RCP guidance, in London on 14 October. For more information and to book, see [here](#).

### Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

---

We are taking a break over summer, and our next edition will be out in September. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: [marketing@39essex.com](mailto:marketing@39essex.com).

**Michael Kaplan**  
Senior Clerk  
[michael.kaplan@39essex.com](mailto:michael.kaplan@39essex.com)

**Sheraton Doyle**  
Senior Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

**Peter Campbell**  
Senior Practice Manager  
[peter.campbell@39essex.com](mailto:peter.campbell@39essex.com)



Chambers UK Bar  
Court of Protection:  
Health & Welfare  
*Leading Set*



The Legal 500 UK  
Court of Protection and  
Community Care  
*Top Tier Set*

[clerks@39essex.com](mailto:clerks@39essex.com) • [DX: London/Chancery Lane 298](https://www.39essex.com) • [39essex.com](https://www.39essex.com)

**LONDON**  
81 Chancery Lane,  
London WC2A 1DD  
Tel: +44 (0)20 7832 1111  
Fax: +44 (0)20 7353 3978

**MANCHESTER**  
82 King Street,  
Manchester M2 4WQ  
Tel: +44 (0)16 1870 0333  
Fax: +44 (0)20 7353 3978

**SINGAPORE**  
Maxwell Chambers,  
#02-16 32, Maxwell Road  
Singapore 069115  
Tel: +(65) 6634 1336

**KUALA LUMPUR**  
#02-9, Bangunan Sulaiman,  
Jalan Sultan Hishamuddin  
50000 Kuala Lumpur,  
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

[For all our mental capacity resources, click here](#)