



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

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; reproductive rights and the courts; capacity to consent to sexual relations; and one option in practice.

(2) In the Property and Affairs Report: an attorney as witness; barristers as deputies and a range of new guidance from the OPG;

(3) In the Practice and Procedure Report: the need to move with speed in international abduction cases; executive dysfunction and litigation capacity, and a guest article on meeting the judge;

(4) In the Wider Context Report: new capacity guidance; a fresh perspective on scamming the Irish *Cheshire West* and the CRPD and life-sustaining treatment.

(5) In the Scotland Report: two judgments in the same case relating to anonymity and the 'rule of physical presence' in the context of the Mental Health Tribunal;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our [capacity assessment guide](#)), and as promised, an updated version of our [best interests guide](#) is now out.

We trust we are also allowed to with some pride that no fewer than 5 of the editors have recently been appointed or reappointed to the Equality and Human Rights Commission panel of counsel, along with 3 other members of Chambers: see [here](#).

#### 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.

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### ENGLAND, WALES AND NORTHERN IRELAND

#### New capacity guidance

The British Psychological Society has produced two useful guides to assist clinicians. One is a more general capacity guide entitled, 'What makes a good assessment of capacity?' (May 2019). The other is more specific, entitled 'Capacity to consent to sexual relations' (May 2019). Both are recommended reading.

The general guidance covers the relevant provisions of the MCA 2005 and case law. One particular area of interest is the role of psychometric testing in the assessing of capacity. The general guidance provides:

*4.22 Psychometric inventories can be a useful part of a psychologist's professional repertoire and many will consider them when conducting MCA assessments. It is important to state there is no psychometric inventory designed to measure capacity within the meaning of the Act and it therefore follows that an individual's capacity cannot be determined based on test results alone.*

*4.23 However, psychometric inventories can provide useful, informative data which assists the practitioner to come to an opinion regarding one or more elements of an individual's ability to meet the individual requirements of the functional test... Executive functioning is difficult to formally assess. However,*

*tests can indicate ability to plan, organise, follow instructions, adhere to and switch between rules as well as initiate and inhibit responses.*

*4.24 Psychometric inventories may also be used as part of the assessment regarding the first arm of the capacity test i.e. the existence of an impairment in the functioning of the mind or brain and to what extent. The clearest example here is a current assessment of intellectual functioning as part of determining the presence (or otherwise) of a globalised learning disability. (emphasis in original)*

The appendices are also particularly helpful. Appendix B provides clinicians with guidance on increasing and maximising a person's capacity with useful practicable steps identified for different scenarios. And worked case examples can be found in appendix C.

The guide on assessing capacity as to sexual relations is especially helpful to practitioners working in this area. It covers relevant provisions in both the MCA 2005 and criminal law, including forced marriages, and provides summaries of case law. It goes on to analyse, with examples, the following scenarios:

1. The person has capacity (but there may be a need to manage the risks around unwise decisions).
2. The individual has the capacity to consent to the relationship in question, but may lack capacity to make decisions in other areas that restrict their ability to participate in a sexual relationship.
3. The individual may need support to gain the required knowledge and consider relevant issues.
4. The individual lacks the capacity to consent to sexual relations.

Chapter 4 is particularly useful with guidance on supporting sexual functioning in clinical practice in terms of education, sex aids, dating agencies, social networking, pornography, and commercial sex workers. In a tricky area of law, this professional guidance will be most welcome.

### Delays in transforming care

The BBC [reports](#) that the Transforming Care Agenda target has been missed, leaving at least 2260 people with learning disabilities or autism in long-stay hospitals. The NHS England achieved a 19% reduction in patient numbers from 2805 in 2016, missing the 50% target of 1300-1700. The report also notes the increase in children with learning disabilities being sent to assessment and treatment units, from 110 in March 2015 to 240 in March 2019.

### New dementia centre

Exciting developments lie ahead with a new £20 million Care Research & Technology [Centre](#) at Imperial College London which will open on 1 June 2019 and aims to provide insights into how dementia develops and to develop technologies to create dementia-friendly 'Healthy Homes'. This will range from artificial intelligence and robotics to sleep monitoring to enable people to live safely and independently in their own homes for longer.

The technology will be assessed and evaluated by people living with dementia, and their carers,

to ensure it is both practical and needed and here are some examples of what the centre will look to develop:

- Sensors to track vital signs such as heart rate, blood pressure and body temperature key information such as gait, brain activity, and sleep that have previously been hard to measure in the home.
- Artificial intelligence that will automatically integrate all this patient information and flag any changes – eg a change in walking pattern that might suggest a patient is at risk of a fall, or an elevated temperature that could suggest an infection.
- Technology that allows researchers and medical teams to that tracks a patient's memory and cognitive function.
- Methods of tracking sleep quality.
- Quick, simple at-home tests for common infections.
- Robotic devices that interact with patients living with dementia.

We presume that all of these developments will take place in the context of an awareness of the legal framework – above all capacity, consent and the potential for (benign) deprivation of liberty.

### Prevention, recognition and management of conflict in the medical setting

In an important [article](#) recently published in the Archives of disease in childhood, a distinguished group of doctors and medical mediators set out guidance as to achieving consensus in the context of decisions about paediatric treatment.

Their guidance also contains insights of equal applicability to the context of treatment decisions in relation to adults lacking capacity to consent to or refuse medical treatment. Although the article should be read in its entirety by all those concerned with such decisions, its key points for hospitals are to:

- Avoid giving inappropriate expectations.
- Use palliative care teams early, not just for end of life care, but when treatment options are being discussed.
- Recognise that parents will be under severe stress and offer psychosocial support especially those with children with complex needs or conditions which are life changing or life limiting.
- Equally support practitioners by the bedside who may be caught up in the conflict.
- Assign Lead Clinician role to ensure continuity of information and understanding.
- Develop skills within your service to recognise the development of conflict.
- External expert advice may be helpful, including ethical and legal services and consideration of early involvement of mediation services.

### Scamming – a fresh perspective

In an exhibition on between 15 May and 2 June at One Paved Court, a gallery in Richmond, London, the artist Julie Derbyshire presents a new body of photographic work alongside her fabricated objects that inspired it. Informed by personal experience, *Possession* is the

culmination of the artist's research into the social and legal implications of scamming and its impact on elderly victims, bringing a new voice to this increasingly disturbing issue. For more details, see [here](#).

### Joint Committee on Human Rights – Youth detention report

On 18 April 2019 the Joint Committee on Human Rights published a report entitled “Youth detention: solitary confinement and restraint”. It considers the c.2,500 children detained by the state in England and Wales for care, treatment or welfare reasons, as well as those in custody because of criminal convictions. The report points out that despite the wide range of reasons for detention, in practice many of the challenges faced apply across the board due to the exceptional vulnerability of the children in question.

The report applies international human rights frameworks to youth detention, focusing mostly on the right of children not to be subject to inhuman or degrading treatment (Article 3 ECHR). It also recognises the relevance in this context of the right to life (Article 2), the right to liberty and security (Article 5) and the right to respect for private and family life (Article 8).

The report makes for sobering reading and calls on the Government to take urgent action to prevent breaches of children's rights. It points out that while restraint might seem to solve an immediate problem in custody or hospital, it causes harm in the short term and the longer term: it harms children, it harms staff, it undermines the objectives of detention, and contributes to a vicious circle of problems that

can continue into the future including inhibiting life chances into adulthood.

### Relevance of unincorporated international conventions to determining ECHR breach

In *R (SC) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615 the Court of Appeal had to consider the status of unincorporated international conventions, in a judgment which is of relevance for the operation of the CRPD before UK courts.

In arguing that provisions of the Welfare Reform and Work Act 2016 which imposed a limit of two on the number of children in respect of whom child tax credit could be claimed were incompatible with Article 8 and Article 12 ECHR, as well as Article 14 read with Protocol 1 Article 1 and Article 8, the appellants sought to rely on the UN Convention on the Rights of the Child ('UNCRC'). As part of his analysis Leggatt LJ (with whom Patten LJ and Nicola Davies LJ agreed) set out the circumstances in which unincorporated conventions (which, of course, include the UN Convention on the Rights of Persons with Disabilities) are relevant to determining whether there has been a breach of s.6 of the Human Rights Act 1998 ("the HRA"). In this regard he made four observations (see paragraphs 112-116).

First: it is not permissible for the court to treat a finding that the UK has breached its obligations under an international convention as supporting a conclusion that a difference in treatment created by legislation is not justified and therefore incompatible with Article 14. There is no legal precedent for such an approach. Rather, the ECtHR has regard to international

instruments: (1) to seek to achieve an interpretation of the ECHR which is consistent with rules of international law and, (2) as evidence of internationally accepted common values.

Second: it may be necessary to take account of international instruments in determining how the issue of justification under the ECHR should be approached. In particular, there is precedent which shows that, in assessing whether interference with article 8 rights is justified in a matter concerning a child, regard should be had to the principle embodied in article 3(1) of the UNCRC that the best interests of the child must be a primary consideration.

Third: it may potentially be relevant to take account of international treaties when making a proportionality assessment under Article 14 ECHR. However, whether an international convention is in fact relevant will depend on whether it is sufficiently linked to the prohibited ground of discrimination relied on. One way in which an international convention may be relevant is by demonstrating an international consensus as to the importance of prohibiting discrimination on a particular ground. This matters because it may affect the weight of the reasons required to justify a difference in treatment based on that ground.

Fourth: it was “difficult to see” how rules of procedure outlined by international instruments were of assistance. This is because it is well established that the duty of a public authority under s.6 of the HRA to act compatibly with ECHR rights is one of result, not of process: *R (Begum) v Denbigh High School Governors* [2006] UKHL 15.

## All (or at least part go) for the Northern Ireland MCA

Confounding the expectations of those who had thought that the stalemate in Stormont meant there was no possibility that [MCA \(NI\) 2016](#) would ever be brought into force, the Departments of Health there has announced that those parts of the Bill providing for the authorisation of deprivation of liberty will come into force on 1 October 2019. These provisions, placed in their context in this very useful article [here](#), allow for authorisation by a panel of the detention of those aged 16 and above with impaired capacity in circumstances amounting to a deprivation of liberty in a particular place in which appropriate care or treatment is available for them. The Northern Ireland legislation takes the same approach to the definition of liberty as is contained in the MCA 2005, i.e. tying it directly to Article 5 ECHR, so Northern Ireland will be on the same journey (including in relation to those aged 16/17) as England & Wales regarding the scope of the concept. Unlike in England & Wales, but as with the Jersey system described [here](#) (very similar, incidentally, to that in Gibraltar, the right of review is to a reconstituted Mental Health Review Tribunal.

At one level, it is rather depressing that a bold legislative scheme designed to fuse mental capacity and mental health legislation is only being brought into force, so far, to address the *Cheshire West* gap. At another, the fact that any part of the Act is coming into force at all is of real significance, not least, parochially, for purposes of starting to assess whether the confidence tests set out for the future of mental health law in England & Wales in the independent MHA review are met (see [here](#) at 224ff).

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## INTERNATIONAL DEVELOPMENTS

### The Irish *Cheshire West*?

The Supreme Court in Ireland heard last week the case of *AC*, which has the promise of being the Irish answer to *Cheshire West*. It will be of considerable interest to see how that court grapples with the issues, including the applicability of the *Ferreira* judgment which has been prayed in aid before it. From the submissions of the Irish Human Rights and Equality Commission (available [here](#)), it would also appear that the CRPD is going to get a look in, and another domestic court is going to have to decide whether to grapple with the frank clash between Article 5 ECHR and the interpretation of Article 14 CRPD given by the Committee on the Rights of Persons with Disabilities.

### The CRPD and life-sustaining treatment

The CRPD Committee has agreed to accept an individual complaint against France involving the case of Vincent Lambert. Readers will recall that the Grand Chamber of the European Court of Human Rights had concluded in 2015 that it was lawful for life-sustaining treatment to be withdrawn from him, and endorsed a decision-making model bearing considerable resemblance to that contained in the MCA 2005. More recently, on 30 April 2019, the ECtHR [refused](#) an application for interim measures brought by members of Mr Lambert's family that it should stay the execution of the authorities' decision to authorise the withdrawal of his treatment and also that it should prohibit his removal from France.

The CRPD Committee has asked French Government to ensure that no steps are taken to

implement withdrawal of CANH pending completion of consideration of the complaint. The French Health Minister Agnes Buzyn is [reported](#) to have responded thus:

*We are not legally bound by this committee, but of course we will take into account what the UN says, and we will respond [...] All the legal appeals have been exhausted and all judicial bodies, both national and European, confirm that the medical team in charge of his case has the right to halt (Lambert's) care."*

Not least as considerable reliance was placed upon the case by the Supreme Court in reaching its conclusion in *NHS Trust v Y* that applications to court were not required where there was agreement as to whether life-sustaining treatment should be maintained, it will be of no little interest to see how the CRPD Committee approaches the matter. It will, in particular, be of interest to see whether it holds true to the model of the 'best interpretation' of will and preferences that it has advocated in relation to hard cases where it is not possible to glean the person's views directly, or whether it takes the course of action being urged upon it by those members of Mr Lambert's family who have brought the complaint, namely to declare that clinically assisted nutrition or hydration can never be lawful. Readers may possibly be interested to note that the Committee appears to have retreated from this latter absolutist position after having advanced it in its draft concluding observations upon the compliance of the United Kingdom with the CRPD: see the discussion [here](#).

## 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.

Fish, R., & Morgan, H. (2019). [“Moving on” through the locked ward system for women with intellectual disabilities.](#) *Journal of Applied Research in Intellectual Disabilities*: an article drawing on accounts from women with intellectual disabilities detained under the Mental Health Act (E&W) 1983 and staff at an National Health Service secure setting in England to explore how “moving on” is defined and perceived.

Dowling, S., Williams, V., Webb, J., Gall, M., & Worrall, D. (2019). [Managing relational autonomy in interactions: People with intellectual disabilities.](#) *Journal of Applied Research in Intellectual Disabilities*: an article is about interactions that occur when someone with intellectual disabilities is engaged in everyday activities with a personal assistant or a support worker.

Rashed, M. A. (2018, August). [In defense of madness: the problem of disability.](#) In *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* (Vol. 44, No. 2, pp. 150-174): an article developing two bulwarks against the tendency to assume too readily the view that madness is inherently disabling, which also includes a discussion of the application of the social model of disability to madness.



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## 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](#).

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## 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

#### Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see [here](#).

#### Local Authorities & Mediation: Two Reports on Mediation in SEND and Court of Protection

Katie Scott is speaking about the soon to be launched Court of Protection mediation scheme at the launch event of 'Local Authorities & Mediation - Mediation in SEND and Court of Protection Reports' on 4 June 2018 at Garden Court Chambers, in central London, on Tuesday, 4 June 2019, from 2.30pm to 5pm, followed by a drinks reception. 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.

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Our next edition will be out in June. 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)



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[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

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