

EDITORIAL

We are delighted to present the first issue of the International Journal of Mental Health and Capacity Law. As indicated by our Editor-in-Chief, Kris Gledhill, this re-invigorated journal continues the tradition of the well-respected Journal of Mental Health Law. Indeed, the articles in this issue emphasise the impact of mental health and mental capacity law, policy and related rights on individuals with mental disorder and the implications for practitioners as well as presenting some comparative jurisdictional approaches to the various issues.

In the intervening years since the last edition of the Journal of Mental Health Law, European Convention on Human Rights (ECHR) law has continued to be developed by the European Court of Human Rights and many states have ratified the UN Convention on the Rights of Persons with Disabilities (CRPD). The effect of this is being felt in several jurisdictions in terms of law, policy and practice, as well as in ongoing national and international debate.

Reinforcing the truly international focus of the journal going forward, we are very fortunate to be able to commence this issue with an article by Professor Rosalind Croucher AM, President of the Australian Law Reform Commission and Adjunct Professor at Macquarie University, Sydney, Australia. Her article, entitled “Seismic shifts — reconfiguring ‘capacity’ in law and the challenges of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities”, considers the very real potential for the right to equal recognition before the law, identified in Article 12 CRPD and radically interpreted by the UN Committee on the Rights of Persons with Disabilities in its General Comment No 1 (2014)¹, to revolutionise how the right to exercise legal capacity is interpreted and given effect in all jurisdictions by challenging existing perceptions of how legal capacity is interpreted to ensure that all persons have a genuinely equal right to make decisions that affect their lives.

Amongst other things, the aforementioned UN Committee on the Rights of Persons with Disabilities General Comment rejects ‘best interests’ assessments in the context of the exercise of legal capacity. The second article, “With and without ‘best interests’: the Mental Capacity Act 2005, the Adults with Incapacity (Scotland) Act 2000 and constructing decisions” is therefore very pertinent to this. In this article, Alex Ruck Keene and Adrian Ward provide a practitioners’ view of whether the use of the term ‘best interests’ in the Mental Capacity Act 2005 in England and Wales, and its absence from the Adults with Incapacity (Scotland) Act 2000, actually makes a material difference to how actions are taken, or decisions are made, in relation to individuals deemed to lack capacity.

The following two articles focus on the rights of psychiatric patients. In “When is a voluntary patient not a voluntary patient?”, Hope Davidson argues that when it comes to the treatment and detention of voluntary psychiatric patients the Irish courts are out of step with the jurisprudence of the European Court of Human Rights. She also considers the recommendations of the Expert Group on the Irish Review of

¹UN Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) *Article 12: Equal Recognition before the Law*, CRPD/C/GC/1, adopted 11 April 2014.

the Mental Health Act 2001 in this respect. In “Can use of the Mental Health Act be the ‘Least Restrictive Option’ for Psychiatric In-patients?”, Beth Ranjit then considers whether, in England and Wales, the Mental Capacity Act 2005, as is often thought, actually offers a less restrictive option to the Mental Health Act 1983, particularly insofar as cooperative patients without capacity or reluctant patients with capacity are concerned.

A 2010 special issue of the Journal of Mental Health Law explored the viability of fused capacity and mental health legislation and this has now become a reality in Northern Ireland. It therefore seems appropriate to complete this issue with Colin Harper, Gavin Davidson and Roy McClelland’s article “No longer ‘anomalous, confusing and unjust’: the Mental Capacity Act (Northern Ireland) 2016”, in which the authors discuss the development and content of this innovative piece of legislation, the origins of which can be found in the 2002 Bamford Review. It is also interesting to note the extent to which the legislation has been informed by Article 12 UNCRPD, but also the potential tensions that exist between the requirements of this treaty and those of the ECHR given that Northern Ireland, like other jurisdictions within the UK, must comply with both.

Finally, I would like to thank and acknowledge the considerable support and input provided by the rest of our international and multi-disciplinary editorial team for this first issue - Simon Burrows, Dr Piers Gooding and Dr Giles Newton Howes - as well as the overall guidance provided by Kris Gledhill as Editor-in-Chief.

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