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The International Journal of Mental Health and Capacity Law is a peer reviewed open access journal devoted to the intersection between law, mental health and mental capacity. It builds on the well-reputed Journal of Mental Health Law, with a revised name to reflect its wider focus. It also follows the desire of its predecessor to combine academic articles and commentary with material that is designed to be used by practitioners – lawyers, and medical or social work professionals – in these nuanced areas.

The Editors are keen to receive academic articles, both shorter ones of around 5000 words and longer ones of up to 12,000 words; and practice points, case notes and reports of research of around 5000 words. Submissions should be made via the Journal's website - http://journals.northumbria.ac.uk/index.php/IJMHMCL/index - and comply with the directions given there as to process. Manuscripts should comply either with the Oxford University Standard for Citation of Legal Authorities (http://www.law.ox.ac.uk/publications/oscola.php) or the APA Referencing Style Guide. If you use footnotes, we encourage short footnotes.

Submissions must be original, properly reference any third party material and comply with any copyright limitations. Any possible conflicts of interest must be identified. If an article reflects original research involving human participants, a statement is required that relevant ethical requirements have been met, including an indication as to which body gave ethical approval for the research and the relevant reference number.

All submissions will be peer-reviewed by a double blind peer review process before being accepted for publication; naturally, there will be a process whereby an article may be accepted subject to minor or more major amendments being made. We will endeavour to provide feedback as to why any rejected submission has been rejected.

Contents

Page

Editorial

Articles

Review

Articles and pieces in this issue have been edited by:
Kris Gledhill, Piers Gooding, Giles Newton-Howes, Kevin Stone, Penny Weller and Darius Whelan

EDITORIAL

This second part of the 2022 volume of the International Journal of Mental Health and Capacity Law has a focus on criminal matters in its two research articles: but, consistently with the breadth of coverage we wish to encourage, they are very different aspects of criminal law, written from different perspectives. In the first article, Catherine Weeks and Trever Broughton examine the new offence introduced by the UK Parliament to deal with assaults on emergency workers: their conclusion is that, at least in its early years, it has not achieved its objective. The second article, by Daryl Yang, examines sentencing in Singapore from the context of what should be happening in light of the Convention on the Rights of Persons with Disabilities.

In addition, there are reviews of three books. Alex Ruck Keene explains why he finds *International Perspectives on End-of-Life Law Report*, edited by Ben White and Lindsay Wilmott to be "essential" reading for those interested in the topic. He also reviews a book that could be seen as linked, *The Right to be Protected from Committing Suicide*, by Jonathan Herring, which Alex explains will be placed onto the reading list for his course on Law at the End of Life, being a "stimulating, important and nuanced contribution" to the topic. Herring's book is reviewed jointly with Anna Nilsson's *Compulsory Mental Health Interventions and the CRPD*, which analyses whether the prohibition of detention based on disability in Article 14 of the CRPD can be reconciled with such detention when medical treatment or protection from suicide or self-harm or harm to others is deemed necessary and the person cannot make a decision about that treatment, even with support. I have also read Nilsson's book and am happy to recommend it. The literature review of the competing positions of those who argue that compulsion in psychiatry must end because it breaches fundamental rights in a discriminatory fashion, and those who suggest that this would be antithetical to rights, is excellent. She then applies a proportionality framework to seek to negotiate a solution between these apparently irreconcilable positions: that makes an important contribution to the debate in this area.

As always, I'd like to express my thanks to authors and those who provide assistance to keep this journal as a wholly open access publication. The editorial team welcome contributions from all perspectives, whether in the form of research articles, notes about developments in statutes, policies or jurisprudence, accounts of research in progress, reviews of books, or any other output that might be of interest to readers.

Kris Gledhill

ASSAULTS ON EMERGENCY WORKERS (OFFENCES) ACT 2018: EFFECTIVE DETERRENT OR EMPTY GESTURE?

CATHERINE WEEKS, TREVOR BROUGHTON*

ABSTRACT

In 2018, following a significant increase in violence against NHS staff and others serving the public, the UK Parliament passed a piece of legislation which included the creation of a new offence category, 'Assault against an Emergency Worker'. The intention was to codify the aggravating nature of assaults against emergency workers as a reflection of the moral outrage such behaviour should attract. However, the actual implementation of this law has been criticised as adding very little to the lofty promises of promoting a "zero tolerance" culture. In this paper we review the new legal framework and attempt to highlight potential effects arising from its implementation.

Keywords: Emergency workers; assault; common assault; occupational violence

I. BACKGROUND

> *"It should go without saying that NHS staff should have the right to work without being assaulted. Unfortunately, physical attacks are an increasingly common occurrence in today's overstretched and overstressed service."* [1]

In a 2017 Staff Survey 15% of NHS employees reported experiencing violence from patients, their relatives or the public in the preceding 12 months, the highest recorded figure for five years and a rise of 9.7% in two years.[2] It was this data that prompted Health Secretary Matt Hancock to launch the "first ever NHS Violence Reduction Strategy" in October 2018, which aimed to "protect the NHS workforce against deliberate violence and aggression from patients, their families and the public, and to ensure offenders are punished quickly and effectively".[2]

A linchpin in this plan was the introduction of the Assaults on Emergency Workers (Offences) Act 2018 (c.23), which was passed on 13th November 2018. This new legislation saw the maximum prison sentence for an offence of common assault or battery against an emergency worker (broadly including police officers, prison officers, fire services, rescue services and persons "employed for the purposes of providing, or engaged to provide NHS health services", including paramedics, nurses, support workers and doctors working "whose general activities in doing so involve face to face interaction with individuals receiving the services") double from six months to a year as outlined in guidelines provided by the Sentencing Council.[3] Furthermore, it legislated that in more severe offences the fact that it was committed against an emergency worker would be considered an aggravating factor, meriting an increased sentence within the maximum for the offence.[4] The guidance to the Crown Prosecution Service (CPS) accompanying the introduction of the 2018 Act made it clear that police

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and prosecutors should cease charging the existing offences of 'common assault', 'battery', 'assaulting a police officer in the execution of their duty' (an offence which previously attracted a maximum six months custodial sentence[5]), and other existing similar offences where the complainant was an emergency worker.[6]

The NHS Violence Reduction Strategy also included plans for the Care Quality Commission (CQC) to scrutinise violence as part of their inspection regime, identifying trusts that needed further support. This data had previously been collected and published by NHS Protect before the process was discontinued in 2017.

While outlining the objectives of the 2018 Act the Minister of State at the Ministry of Justice set out the following underlying principle:

> *"An assault on any individual or citizen in our society is a terrible thing, but an assault on an emergency worker is an assault on us all…an attack on them is an attack on us and on the state, and it should be punished more severely than an attack simply on an individual victim".* [6]

This paper explores the initial trends in conviction rates within the first year under this new legislation and attempts to understand whether the stated objectives are being realised, particularly in comparison to prosecutions under the frequently used former category of 'common assault'.

II. METHODOLOGY

Data was obtained from the Ministry of Justice directly via a Freedom of Information Request for the 2018/19 calendar year and included information on 'outcomes-by-offence' for the requested time period. Publicly accessible data published by the Ministry of Justice for the period of 2016 to 2017 was also reviewed.

All of the published reports on the CQC website[7] between 1st January 2019 and 31st December 2019 were searched for the following keywords: *Violence, Assault, RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations), Attack, Injury, Injured, Injuries.*

Data was analysed using the tools available in Microsoft Excel and descriptive statistical analysis performed alongside inferential statistical analysis where appropriate.

III. RESULTS

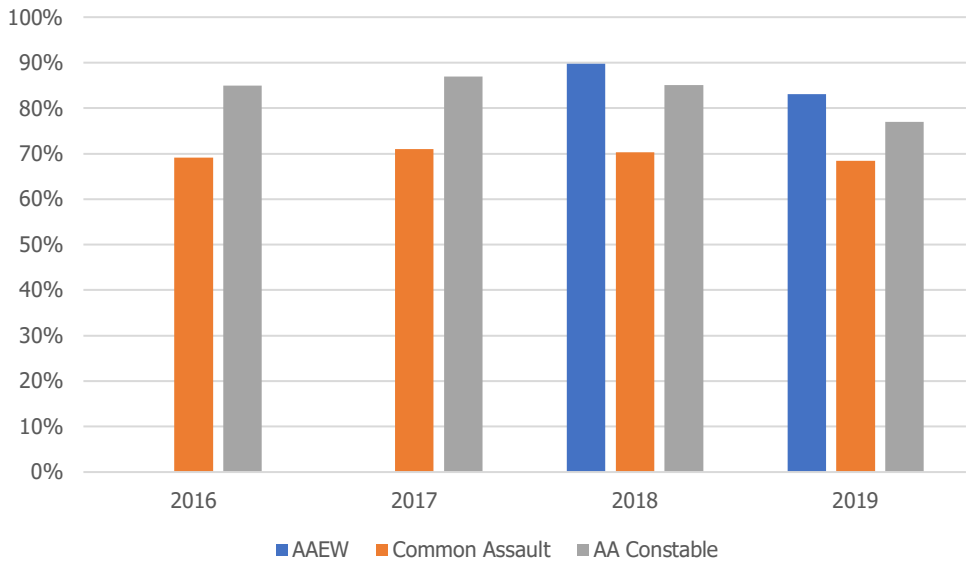
A. Use of conviction categories

Based on Ministry of Justice data, the uptake of convictions under the 2018 legislation was swift. Bearing in mind that the legislation was enacted in November of that year, the data for the rest of 2018 indicated that 352 cases were proceeded against resulting in 316 convictions (Table 1). During the 2019 calendar year there were a total of 9,350 convictions from 11,257 cases. The use of the conviction of 'assault against a constable' fell by almost half during this period of time, from 14,819 in 2018 to 7,778

in 2019, while numbers of 'common assault' convictions also fell by 20% (56,306 in 2018 to 45,319 in 2019).

Table 1: Number of cases proceeded against in each conviction category (and number of resulting convictions)				
	Pre-introduction of AAEW Act		**Post-introduction of AAEW Act**	
	2016	**2017**	**2018**	**2019**
Assault Against Emergency Worker			352 (316)	11,257 (9,350)
Common Assault	73,286 (50,700)	64,209 (45,591)	56,306 (39,573)	45,319 (31,006)
Assault Against Constable	13,813 (11,738)	13,756 (11,968)	14,819 (12,602)	7,778 (5,984)

Figure 1: Percentage of convictions in each category



Total number of convictions per year from all three categories:
2016 *n*= 62,438; 2017 *n*=57,559; 2018 *n*= 52,491; 2019 *n*=46,340

B. Conviction rates

The rate of conviction under the new legislation was high; in 2018 89.8% of 'assault against an emergency worker' prosecutions resulted in convictions, and 83.1% in 2019. This is in comparison to a conviction rate of 70.3% for 'common assault' in 2018 and 68.4% in 2019 (*Figure 1*). The total number of convictions in all three categories has fallen since 2016 (62,438 in 2016 to 46,340 in 2019) (*Figure 1*).

C. Sentencing

For the purposes of analysis sentence types have been grouped into 'community sentence', 'suspended sentence', 'immediate custodial sentence' and 'fine'. A broad comparison of data for 2018 and 2019 can be viewed in Figure 2.

Ministry of Justice data indicates that 'immediate custodial sentences' were used more liberally following the introduction of the new legislation, with 28% of 'assault against an emergency worker' convictions receiving a custodial sentence compared to 17% of 'common assault' convictions in 2018. The rate of custodial sentences for 'assault against an emergency worker' fell to 19% in 2019, marginally higher than the 16% handed down for 'common assault' in the same year.

The average length of custodial sentence was comparable for the two categories: 2.6 months for 'assault against an emergency worker' and 2.9 months for 'common assault' in 2019.

Community sentences remained the predominant form of disposal for both categories, however rates were higher for 'common assault' convictions: 51% and 53% in 2018 and 2019 respectfully, compared to 39% and 45% for 'assault against an emergency worker' in the same years.

In contrast the use of financial penalties was higher for convictions under the new legislation, 24% in 2019 compared to 19% for 'common assault' in the same year. The category of 'assault of a constable' showed very different trends with regards to sentencing; fines were used in the majority of cases (73% in 2019) with much lower rates of community sentences (down to 18% in 2019) and few custodial sentences (6% in 2019).

Table 2: Comparison of financial penalties per conviction category (2019)			
	Assault Against Emergency Worker	**Common Assault**	**Assault Constable**
Total Number of Fines (*n=)*	1,876	4,979	3,564
Average Fine (£)	181	231	182
	Number of penalties given per category (%)		
Up to £25	6 (0.32)	22 (0.44)	52 (1.46)
£25 – 50	157 (8.37)	477 (9.58)	503 (14.11)
£50 – 100	549 (29.26)	1,074 (21.57)	984 (27.61)
£100 – 150	432 (23.03)	934 (18.76)	652 (18.29)
£150 – 200	238 (12.69)	735 (14.76)	237 (6.65)
£200 – 250	112 (5.97)	326 (6.55)	679 (19.05)
£250 – 300	123 (6.56)	394 (7.91)	100 (2.81)
£300 – 500	196 (10.45)	649 (13.03)	266 (7.46)
£500 – 750	39 (2.08)	210 (4.22)	51 (1.43)
£750 – 1000	18 (0.96)	97 (1.95)	19 (0.53)
£1000 – 2500	5 (0.27)	53 (1.06)	18 (0.51)
£2500 – 5000	1 (0.05)	6 (0.12)	1 (0.03)
£5000 - 10000	0 (0.00)	1 (0.20)	0 (0.00)
Over £10000	0 (0.00)	1 (0.20)	2 (0.06)

D. Fines

On average, individuals convicted of 'common assault' received higher financial penalties than those convicted under the new legislation. In 2018 the average fine

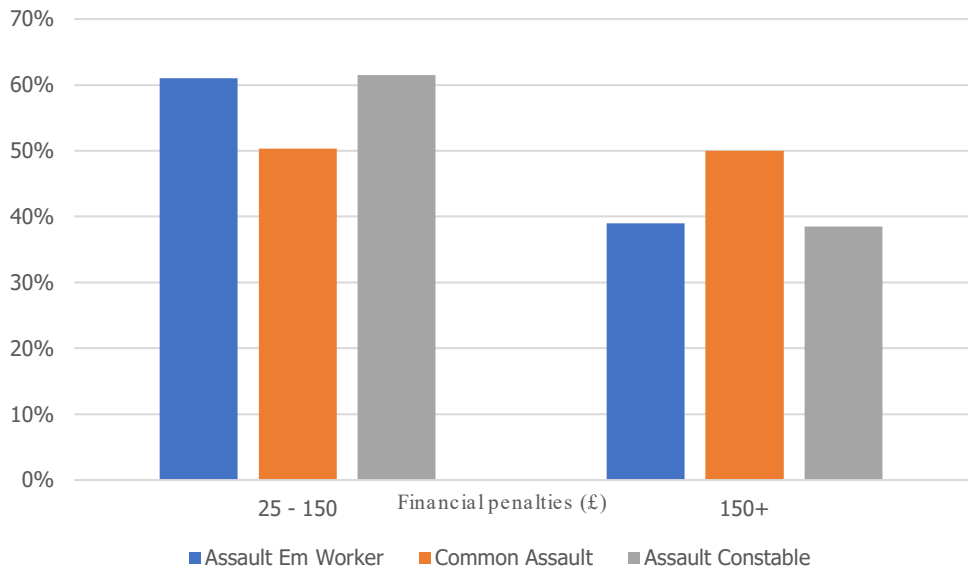
handed down in convictions of 'assault against an emergency worker' was £166, over £50 less than the average for 'common assault' in the same year (£221). This trend was repeated in 2019 (total average difference of £52.50) *(Table 2)*.

The highest proportion of fines for 'assault against an emergency worker' in 2019 were in the range of £50-150 (52.3%), compared to only 40.3% of individuals convicted of 'common assault' who received the same penalty. However, 28.7% of those sentenced for 'common assault' were handed down larger fines of over £250 (1.6% given fines of £1000 to £5000 plus) compared to only 20.3% of those sentenced for 'assault against an emergency worker' (with 0.3% given these maximum penalties). Only 12.9% of those convicted of 'assault of a constable' received penalties within this higher range, with 15.6% receiving fines within the lowest range of £25 to £50.

The grouping of financial penalties was further reduced to reflect relative 'low' penalties (range of £25 - £150) and 'high' penalties (over £150) in order to provide a broader comparison (*Figure 3).* 39% of those sentenced for 'assault against an emergency worker' received a 'high penalty, compared to 50% of those sentenced for 'common assault'.

A chi-square test of independence was performed to examine the relationship between conviction category and size of financial penalty handed down ('low' versus 'high' penalties). The relationship between these was significant (X^2 (1, N=10,419) = 126.75, p = 0.00004), demonstrating a correlation between conviction categories and financial penalties.

Figure 3: Comparison of financial penalties across conviction categories



Total number of financial penalties given per conviction category (2019):
Assault Em Worker n= 1,876; Common Assault n=4,979; Assault Constable n= 3,564
Significant relationship between the two variables, X^2 (1, N=10,419) = 126.75, p = 0.00004

E. Care Quality Commission Oversight

There was a total of 64 reports published on the CQC website[7] during 2019. Across all the reports covering that timeframe there were no references to assault, six mentions of RIDDOR, and 185 reports surrounding keywords related to injury. In relation to the latter, all reports around injuries related to either needle-stick injuries, workplace-based injuries or protective measures related to radiation exposure. Notably there were no reports that made any mention of patient-on-staff assaults. The scrutiny around RIDDOR related primarily to having policies and procedures in place governing the reporting of injuries, rather than reporting on the injuries themselves.

IV. DISCUSSION

The observation that emergency workers are particularly vulnerable to being assaulted whilst undertaking duties is not new and it is, in fact, seen as becoming an increasing problem. There is justifiable concern from many corners that assaults on individuals in the caring professions are becoming increasingly commonplace, however a proliferation of statements around "Zero Tolerance" has yet to lead to a tangible reduction in violence. As with any policy position, lofty ambition is only as good as its implementation and the organisational will behind it.

In this respect, codifying specific criminal offences to harness this level of moral outrage is an understandable societal impulse, and in the past has led to the implementation of legislation to criminalise assaults against police officers as well as airline cabin crew. The 2018 NHS Violence Reduction Strategy and associated Assaults on Emergency Workers (Offences) Act appear to follow in this vein.

Data from the first year following implementation of the Assaults on Emergency Workers (Offences) Act 2018 shows that sentencing for these offences has remained as lenient as the equivalent offence category of 'common assault'. The overall rate of conviction has fallen consistently since 2016 across all categories. While individuals charged with 'assault against an emergency worker' may be more likely to receive a conviction, they are less likely to receive an immediate custodial sentence, and those that do are equivalent in length or marginally shorter than sentences for 'common assault'. Financial penalties are also notably lower for those convicted of 'assault against an emergency worker' than 'common assault', a finding which has proved to be statistically significant. The role of the CQC in scrutinising violence as part of their inspection regime also appears to have been lost, with no reporting on this area since this direction was given in 2018.

These results provide preliminary evidence that the objectives outlined in the Assaults on Emergency Workers (Offences) Act 2018 have yet to be realised. The "clear legislative intent that assaults on public servants doing their work as part of the emergency services should be sentenced more severely than hitherto"[6] is not reflected in the lower levels of custodial sentences and reduced financial penalties under the new conviction compared to those previously used. There will, of course, be cases where the new legislation is applied as intended; while passing sentence during an early case at the start of 2019,[8] the Judge observed "that the officer had been in

uniform and it was apparent that he was only doing what he was duty-bound to do". The defendant was sentenced to four months' imprisonment which was upheld by the Court of Appeal, who noted that "it is perfectly clear that Parliament intended the sentencing regime for such offences to be more severe [than sentences in alternative assault categories]".[8]

However, the success of individual cases such as this is not reflected in the wider picture, with the average length of custodial sentences under the new legislation remaining equivalent to those under 'common assault'. The same pattern is reflected in the severity of fines handed down for a conviction of 'assault against an emergency worker', which were on average substantially lower than those for other assault categories. This could lead some to the bleak interpretation that a conviction under the new legislation is in fact more 'cost effective' than a conviction under one of the previously used categories, despite the fact that it was explicitly designed to demonstrate the opposite.

While we cannot state with any certainty why the aims of the 2018 legislation have not yet been realised, a number of hypothesis can be considered. Firstly, one possible problem may have been the initial use of draft sentencing guidelines under the 2018 Act,[9] which were comprehensive but comparatively more complex when viewed alongside the sentencing guidelines for 'common assault'.[4] While the suggested starting point for the offences with the highest level of harm and culpability was an eight month custodial sentence, the category range went as low as 26 weeks and there was no recommended minimum tariff given. Information regarding the use of financial penalties was given but not incorporated into the guidance for starting points. In comparison, sentencing guidelines for a conviction of 'common assault' focused largely on the use of community orders and fines. While flexibility in sentencing may be beneficial in some cases, it is possible that this contributed to disparities and a more lenient use of the legislation than was originally suggested by its proponents.

In May 2021 revised guidelines were published which give specific guidance for sentencing offences of assault on emergency workers.[10] These new guidelines appear to simplify the process of sentencing under the new act by citing the assault of an emergency worker as an aggravating factor in assault offences and allowing for increased sentences in such cases (up to the maximum of a 12 month custodial sentence as outlined in the original legislation); having determined the category of the basic offence of assault the court is then encouraged to apply an appropriate uplift to the sentence in accordance with the level of culpability and harm demonstrated i.e. increase in length of custodial sentence or penalty or consideration of a more severe type of sentence.[3] The Sentencing Council stated their hope that this would "bring a consistent approach to sentencing assault offences and assist sentencers in making a balanced assessment of the seriousness of those offences and imposing appropriate and proportionate sentences".[10] It remains to be seen whether or not this clarity is reflected in a more consistent approach to sentencing under the new act.

Secondly if offenders are tried in a Magistrates' Court sentencing powers will not allow for the deliverance of the maximum 12 months custodial sentence. This means that a case would need to be referred to and heard in Crown Court. As a summary offence

assault, and by extension 'assault against an emergency worker', would be heard in Magistrates Court and only committed to Crown Court for sentencing after a trial if the case required satisfied the criteria of greater harm culpability and seriousness of the offence. The new sentencing guidelines published in 2021 do make reference to this, recognising that "Magistrates may find that, although the appropriate sentence for the basic offence would be within their powers, the appropriate increase for the aggravated offence [of an assault on an emergency worker] would result in a sentence in excess of the Magistrate's powers. If so, they must commit for sentence to the Crown Court".[3]

Thirdly with regard to the aim of harsher sentences acting as a deterrent, in many cases assaults against emergency workers take place in the context of the assailant being intoxicated, under severe stress or suffering from some form of mental impairment. As a result, the defendant is generally unable to think rationally at the time of their offence, and therefore unable to weigh up the potential consequences of a more severe outcome for their actions. These factors may also play a role in sentencing; the presence of a mental illness or disability is generally viewed as a mitigating factor[11] and guidelines produced in 2020 outline the considerations that need to be made when assessing the culpability of and determining the sentence for an offender with a mental disorder.[12] In contrast English and Welsh sentencing guidelines mandate alcohol and drug intoxication as an aggravating factor, however research suggests that the context of the offence and offender demographics appear to influence the way in which intoxication affects the final sentence.[13] These confounding factors are likely to an ongoing impact on sentencing under the new act.

V. CONCLUSION

On the whole there is no reason to believe that the implementation of this new legislation has acted as any form of deterrent for violence towards emergency workers, as was previously hoped. In fact, some reports have suggested that the problem has worsened throughout the last 12 months coinciding with the COVID-19 pandemic, as assaults on emergency workers rose 24% in the four weeks to 7th June 2020, compared with the same period in 2019.[14]

In 2005 Scotland implemented similar legislation[15] with the aim of "protecting emergency workers from the threat of assault".[16] Despite these efforts, statistics published in October 2020 showed a 6% rise in incidents in Scotland compared to the previous year, with a total rise of 16% over the past decade, painting a bleak future for prospects in England and Wales under the equivalent 2018 Act.

Following a manifesto promise to consult on tougher sentences, and with ministers "determined to recognise the debt of gratitude the public feels towards emergency workers [following the pandemic]",[17] the government launched a new consultation in July 2019 on whether the maximum penalty for a conviction against an emergency worker should be doubled to a two year custodial sentence. As yet there has been no decision regarding these legislative changes.

At the launch of this new consultation the current Home Secretary, Priti Patel said:

> *"This consultation sends a clear and simple message to the vile thugs who assault our emergency workers – you will not get away with such appalling behaviour and you will be subject to the force of the law."* [17]

While this principle may be admirable and the sentiment emotive, it has yet to be seen if equivalent changes made to the same law two years ago can be implemented effectively. The data gathered thus far would suggest this has yet to be achieved, and inquiries into why this is the case should come as a matter of priority. The problem of violence against NHS and emergency workers requires a more complex and considered solution; reviewing the implementation of current legislation may provide more benefit during this time of unprecedented pressure for our public services, as opposed to the headline-grabbing response of once again indiscriminately raising sentencing thresholds.

References

1. Cowper, A. The Health Service Journal. Violence against NHS staff: a special report by HSJ and Unison. 2017. Available from: Violence against NHS staff: a special report by HSJ and Unison | Health Service Journal Guides
2. Department of Health & Social Care. Stronger protection from violence for NHS staff. 2018 Oct 31. Available from: https://www.gov.uk/government/news/stronger-protection-from-violence-for-nhs-staff
3. Sentencing Council. Common assault/Racially or religiously aggravated common assault/Common assault no emergency worker (Assaults on Emergency Workers (Offences) Act 2018, s.1, Crime and Disorder Act 1998, s.29, Criminal Justice Act 1988, s.39) Sentencing Guidelines. Available from: Common assault / Racially or religiously aggravated common assault/ Common assault on emergency worker – Sentencing (sentencingcouncil.org.uk)
4. Assaults on Emergency Workers (Offences) Act 2018, c. 23 Available from: https://www.legislation.gov.uk/ukpga/2018/23/introduction/enacted
5. Assault on a police constable in the execution of his duty (Police Act 1996, s89) Sentencing Guidelines. Available from: https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-on-a-police-constable-in-execution-of-his-duty/
6. Crown Prosecution Service. Legal Guidance, Assaults on Emergency Workers (Offences) Act 2018. Available from: https://www.cps.gov.uk/legal-guidance/assaults-emergency-workers-offences-act-2018
7. Care Quality Commission. Publications. Available from: https://www.cqc.org.uk/publications
8. Court of Appeal R v McGarrick (2019) EWCA Crim 530. Available from: https://www.bailii.org/ew/cases/EWCA/Crim/2019/530.html
9. Sentencing Council. Assaults on Emergency Workers (Offences) Act 2018, s., Sentencing Guidelines. Available from: https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/assault-on-emergency-worker-for-consultation-only/
10. Sentencing Council. New guidelines for sentencing common assault and attempted murder. Press Release. Published 2021 May 27. Available from:

https://www.sentencingcouncil.org.uk/news/item/new-guidelines-for-sentencing-common-assault-and-attempted-murder-published/
11. Sentencing Council. Aggravating and mitigating factors, taken from Sentencing Guidelines Council Guideline Overarching Principles: Seriousness. Available from: https://www.sentencingcouncil.org.uk/explanatory-material/magistrates-court/item/aggravating-and-mitigating-factors/
12. Sentencing Council. Sentencing offenders with mental disorders, developmental disorders, or neurological impairments (effective 2020 October 01). Available from: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/
13. Lightowlers, C. Intoxication and Sentencing; A review of policy, practice and research. Sentencing Academy. 2022 January. Available from https://sentencingacademy.org.uk/wp-content/uploads/2022/01/Intoxication-and-Sentencing.pdf
14. Grierson, J. Plan to double maximum sentence for attacks on 999 emergency workers. The Guardian [Internet]. 2020 Jul 13. Available from: https://www.theguardian.com/society/2020/jul/13/double-jail-sentences-attacks-emergency-workers-ministers-england-wales
15. Emergency Workers (Scotland) Act 2005 asp 2. Available from: https://www.legislation.gov.uk/asp/2005/2/contents
16. Mulholland, H. New law protects emergency workers from assault. The Guardian [Internet]. 2005 May 09. Available from: https://www.theguardian.com/society/2005/may/09/nhsstaff.politics
17. Ministry of Justice. Consultation launched on doubling maximum sentence for assaulting an emergency worker. GOV.UK 2020 Jul 13. Available from: https://www.gov.uk/government/news/consultation-launched-on-doubling-maximum-sentence-for-assaulting-an-emergency-worker

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CRIMINAL SENTENCING IN THE CRPD ERA: LESSONS FROM SINGAPORE

DARYL WJ YANG*

I. INTRODUCTION

On 27 April 2022, Singapore executed Nagaenthran K. Dharmalingam, a 33-year-old Malaysian who was convicted of trafficking 42.72 grams of heroin. His execution was carried out despite calls from United Nations (UN) human rights experts, including the Special Rapporteur on the Rights of Persons with Disabilities, for the government to commute his death sentence inter alia on the basis that Nagaenthran did not have access to procedural accommodations for his disability during his interrogation and death sentences should not be carried out on persons with serious psychosocial and intellectual disabilities.[1]

Nagaenthran's execution has put Singapore's criminal legal system, particularly in respect of its treatment of offenders with intellectual and psychosocial disabilities, under international scrutiny. In particular, those opposed to Nagaenthran's execution have argued that Singapore acted in breach of international human rights law by executing a man who is intellectually disabled. Several months after the execution, the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) issued its concluding observations on Singapore's first periodic review under the UN Convention on the Rights of Persons with Disabilities (CRPD) and urged Singapore to "abolish the death penalty for persons with intellectual disabilities, persons with psychosocial disabilities and autistic persons, including for crimes not involving intentional killing".[2] According to the CRPD Committee, the prohibition against imposing the death penalty on persons with intellectual or psychosocial disability is "grounded on the disproportionate and discriminatory denial of fair trial guarantees and procedural accommodations".[3]

On the other hand, in the Court of Appeal had held that Nagaenthran's various psychosocial conditions were *not* relevant in respect of his mental responsibility for the offence. The court rejected the argument that Nagaenthran's borderline intelligence, severe alcohol use disorder and severe attention deficit hyperactivity disorder substantially impaired his mental responsibility; instead, the Court of Appeal held that "this was the working of a *criminal mind*, weighing the risks and

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[1] 'Singapore: UN Experts Urge Halt to Execution of Drug Offender with Disabilities' (*OHCHR*) <https://www.ohchr.org/en/press-releases/2021/11/singapore-un-experts-urge-halt-execution-drug-offender-disabilities> accessed 12 March 2023.

[2] Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Singapore 2022 [CRPD/C/SGP/CO/1].

[3] Committee on the Rights of Persons with Disabilities, Comments on the draft General Comment No. 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights < https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/CRPD.docx> accessed 1 May 2023.

countervailing benefits associated with the criminal conduct in question".[4] Had the court made the opposite factual finding, Nagaenthran could have availed himself of the statutory exception to the death penalty under the Misuse of Drugs Act 1973 (MDA), which requires the court to sentence a person to imprisonment for life instead of imposing the death penalty if the offender was suffering from such "abnormality of mind" as substantially impaired their mental responsibility for their acts and omissions in relation to the offence.[5]

Strikingly, given the court's factual finding, Nagaenthran could still have been executed even if Singapore had implemented the CRPD Committee's recommendation to abolish the death penalty for persons with intellectual disabilities, persons with psychosocial disabilities and autistic persons. This is because the issue ultimately boils down to whether the offender is considered to be sufficiently disabled to be exempted from the death penalty. For example, though the Supreme Court of the United States (SCOTUS) has banned the use of the death penalty on intellectually disabled offenders on the basis that it violates the Eighth Amendment of the United States (US) Constitution as a matter of *law*, whether a specific offender may be executed ultimately depends on whether the court determines them to be intellectually disabled as a matter of *fact*.[6]

In this regard, notwithstanding that the CRPD was not considered by nor binding on the Singapore court because of its adherence to a dualist approach towards international law,[7] its reasoning as to the relationship between Nagaenthran's disabilities and his criminal culpability may arguably be consistent with the CRPD. Article 12(2) of the CRPD states that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. According to the CRPD Committee, this means that a disabled person should not be assumed to lack legal agency – and concomitantly, responsibility for exercising such agency – on the basis of their

[4] *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 (*Nagaenthran (CA)*) at [38] and [41].

[5] Section 33B of the MDA provides that a person who is convicted of an offence punishable with death under the statute shall be sentenced to imprisonment for life if he or she was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his or her mental responsibility for his or her acts and omissions in relation to the offence.

[6] Ian Freckelton QC, 'Offenders with Intellectual and Developmental Disabilities: Sentencing Challenges after the Abolition of Execution in the United States' (2016) 23 Psychiatry, Psychology and Law 321; Mina Mukherjee and Alexander Westphal, 'Shifting Diagnostic Systems for Defining Intellectual Disability in Death Penalty Cases: Hall vs. Florida' (2015) 45 Journal of Autism and Developmental Disorders 2277; Paul S Appelbaum, 'Hall v. Florida: Defining Intellectual Disability in the Shadow of the Death Penalty' (2014) 65 Psychiatric Services 1186.

[7] *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] 2 SLR 211 at [57] ("[T]here is no basis for holding that… the Convention on the Rights of Persons with Disabilities ("CRPD") have the force of law in Singapore absent the adoption of these principles and provisions into the domestic legislative framework. This is so because ours is a dualist regime... While the CRPD was ratified by Singapore on 18 July 2013… we reiterate that under the Westminster system of government, the Executive, which has the authority to sign treaties, may commit the State to such treaties without obtaining prior legislative approval. If treaties were self-executing, this would allow the Executive to usurp the legislative power of Parliament…").

disability.[8] Indeed, Michael Perlin has called for reforms to the criminal process in light of the CRPD to eliminate the influence of sanism, which perpetuates stigmatising assumptions about persons with intellectual or psychosocial disabilities and undermines the dignity of such persons involved in the criminal process.[9] For instance, sanism may result in criminal sentencing decisions that are based on the mere fact that the offender is disabled without any consideration as to whether that disability justifies differential treatment.

The CRPD Committee has not explicitly addressed how criminal sentencing – and the determination of the criminal culpability of an offender with intellectual or psychosocial disability – ought to be carried out in light of the principles of the CRPD, in particular Articles 12 and 14.[10] This issue has also not been ventilated in the literature either. On one hand, scholarship on the criminal sentencing of offenders with intellectual and psychosocial disabilities have not fully engaged with how the CRPD should shape sentencing practices.[11] On the other hand, scholarship examining the CRPD in the context of criminal justice has largely focused on two other aspects of the criminal legal system: first, whether the CRPD demands the abolition of capacity-specific defences such as insanity or unsoundness of mind as well as the forced treatment of accused persons who plead such defences;[12] and second, whether mental health

[8] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) Article 12: Equal recognition before the law CRPD/C/GC/1, 2014, 1.

[9] Michael L Perlin, 'Understanding the Intersection between International Human Rights and Mental Disability Law: The Role of Dignity' in Bruce Arrigo and Heather Bersot (eds), *The Routledge Handbook of International Crime and Justice Studies* (1st edn, Routledge 2013); Michael L Perlin, *A Prescription for Dignity: Rethinking Criminal Justice and Mental Disability Law* (Ashgate Publishing Limited 2013); Michael L Perlin, '"There Must Be Some Way Out of Here": Why the Convention on the Rights of Persons With Disabilities Is Potentially the Best Weapon in the Fight Against Sanism' (2013) 20 Psychiatry, Psychology and Law 462.

[10] Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law (n 8); Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities 2015.

[11] Syeda Hashmi, Deborah Richards and J Paul Fedoroff, 'A Descriptive Analysis of Sentencing Decisions by the Canadian Criminal Justice System of People with Intellectual Disabilities Convicted with Sexual Offences' (2021) 78 International Journal of Law and Psychiatry 101730; Michael Mullan, 'How Should Mental Illness Be Relevant to Sentencing' (2018) 88 Mississippi Law Journal 255; Perlin, *A Prescription for Dignity* (n 9) 193–215; Eunice Chua, 'Sentencing Mentally Disordered Offenders: Lessons from the US and Singapore' (2011) 23 Singapore Academy of Law Journal 434; Judith Cockram, 'Justice or Differential Treatment? Sentencing of Offenders with an Intellectual Disability' (2005) 30 Journal of Intellectual & Developmental Disability 3.

[12] Tina Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23 Griffith Law Review 434; Piers Gooding and Charles O'Mahony, 'Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons with Disabilities: Comparing Reform in England, Wales, Northern Ireland and Australia' (2016) 44 International Journal of Law, Crime and Justice 122; Anna Arstein-Kerslake and others, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (2017) 17 Human Rights Law Review 399; Michael L Perlin, 'God Said to Abraham/Kill Me a Son: Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence' (2017) 54 American Criminal Law Review 477; Meron Wondemaghen, 'Testing Equality: Insanity, Treatment Refusal and the CRPD' (2018) 25 Psychiatry, Psychology and Law 174; Donna Marie McNamara, 'The Insanity Defence, Indefinite Detention and the UN Convention on the Rights of Persons

courts and court diversion are compatible with the CRPD.[13]

Drawing on criminal sentencing jurisprudence in Singapore, this Article addresses two key questions on this issue: first, should the fact that an offender has an intellectual or psychosocial disability be a relevant consideration in the criminal sentencing process; and second, if it is a relevant consideration, how should it be taken into account in determining the appropriate sentence? While the Singapore courts were not informed or guided by the CRPD in developing the sentencing framework for offenders with intellectual and psychosocial disabilities, this Article suggests that Singapore's approach – including in Nagaenthran's case – is consistent with the principles underpinning the CRPD by adopting a multifactorial approach to the relevance of an offender's disability and attending carefully to their state of mind rather than the mere fact of their disability. Notably, in *Public Prosecutor v ASR* (*PP v ASR*),[14] the Court of Appeal laid out a two-step sentencing framework for determining how a young offender with intellectual disability should be sentenced. Singapore's criminal sentencing jurisprudence thus offers useful insight into how sentencing courts should deal with offenders with intellectual and psychosocial disabilities in light of the CRPD in respect of whether and how such disability should be taken into account in determining the appropriate sentence.

Ultimately, this Article highlights that compliance with the CRPD in the criminal sentencing process is necessary but insufficient to realise the purpose of the CRPD, set out at Article 1, to "promote respect for [the] inherent dignity" of persons with disabilities. As Linda Steele notes, the CRPD may be of limited utility in reimagining and reforming the criminal legal system because it "reflects an ambivalence towards criminal law and criminal justice… exemplified by the focus on inequality along the lines of disability and its focus on disability institutions rather than additionally considering mainstream institutions of confinement such as prisons."[15] Heeding Simone Rowe and Leanne Dowse's call for greater engagement between the fields of critical disability studies and penal abolitionism,[16] the Article ends by reflecting on how disability justice – and the realisation of the CRPD's purpose to promote respect for the inherent dignity of disabled persons – demands a radical reimagination of criminal justice and our understanding of criminal responsibility and culpability.

The next section discusses the principles enshrined in the CRPD as they relate to the criminal legal system. Section III traces the development of Singapore's approach to

with Disabilities' (2018) 41 Dublin University Law Journal 143.

[13] Michael L Perlin, '"There Are No Trials Inside the Gates of Eden": Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence' in Bernadette Mcsherry and Ian Freckelton (eds), *Coercive Care: Rights, Law and Policy* (Routlege 2013); Priscilla Ferrazzi, Terry Krupa and Rosemary Lysaght, 'Mental Health Courts, Court Diversion, and Canada's Obligations under the United Nations Convention on the Rights of Persons with Disabilities' (2013) 32 Canadian Journal of Community Mental Health 43; Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge/Taylor & Francis Group 2020).

[14] [2019] 1 SLR 941; [2019] SGCA 16.

[15] Steele (n 13) 63.

[16] Simone Rowe and Leanne Dowse, 'Enabling Penal Abolitionism: The Need for Reciprocal Dialogue between Critical Disability Studies and Penal Abolitionism', *The Routledge International Handbook of Penal Abolition* (Routledge 2021).

the criminal sentencing of offenders with intellectual or psychosocial disabilities, in particular the sentencing framework established in *PP v ASR*. Drawing on Singapore's experience, Section IV identifies the key features of a criminal sentencing process that is consistent with the CRPD and considers the CRPD's limits in realising disability justice in the criminal legal system. Section V concludes.

II. THE CRPD AND THE CRIMINAL LEGAL SYSTEM

In December 2006, the United Nations General Assembly adopted the CRPD which the then UN Secretary-General Kofi Annan hailed as the "dawn of a new era" for the world's largest minority.[17] Article 1 of the CRPD sets out its purpose to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their *inherent dignity*." This idea of the inherent dignity of disabled persons is central to the CRPD.[18] Paragraph 8 of the Preamble to the CRPD recognises that discrimination against any person on the basis of disability is a violation of the *inherent dignity and worth* of the human person. According to Michael Perlin, the CRPD has "significant and robust connections" with therapeutic jurisprudence, particularly in the criminal context, as both stress the concept of dignity in the legal process.[19]

Informed by this concept of the inherent dignity of disabled persons, the CRPD propagates the human rights model of disability which "encompasses the values for disability policy that acknowledges the human dignity of disabled persons."[20] Put simply, the human rights model of disability prohibits the denial or restriction of the human rights of a disabled person on the basis of the existence of an impairment.[21] The CRPD thus seeks to overcome the medical model of disability, which regards disability as "an impairment that needs to be treated, cured, fixed or at least rehabilitated".[22] Under the medical model, many governments have justified the denial or restriction of the human rights of disabled persons on the basis of their disability; for example, disabled persons have been deprived of the right to make decisions about their lives – be it their health, education or even housing – on the basis that they lack the ability to do so.

Article 12(1) of the CRPD confronts this pernicious problem by expressly enshrining the right of disabled persons to equal recognition before the law. As a corollary, Article 12(2) obliges state parties to recognise the disabled person's legal capacity on an equal basis with others in all aspects of life. This would include in the criminal context.

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[17] Lauding disability convention as 'dawn of a new era,' UN urges speedy ratification, UN NEWS (2006), https://news.un.org/en/story/2006/12/203222-lauding-disability-convention-dawn-new-era-un-urges-speedy-ratification (last visited Oct 22, 2021).

[18] "This dignitary perspective compels societies to acknowledge that persons with disabilities are valuable because of their inherent human worth rather than their net marginal product." Michael Ashley Stein, 'Disability Human Rights' (2007) 95 California Law Review 75, 106.

[19] *See* Perlin, '"There Are No Trials Inside the Gates of Eden": Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence' (n 13).

[20] Theresia Degener, 'Disability in a Human Rights Context' (2016) 5 Laws 35, 3.

[21] *ibid 4.* ("The human rights model of disability defies the presumption that impairment may hinder human rights capacity.")

[22] ibid 2.

Legal capacity comprises a person's ability to (i) hold rights and duties (legal standing) and (ii) exercise those rights and duties (legal agency).[23] As set out in the CRPD Committee's General Comment No. 1, legal capacity is distinct from mental capacity and should not be conflated with each other. Broadly speaking, mental capacity refers to the decision-making skills of a person, which the CRPD Committee observes "naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors".[24] Yet, far too often, the legal capacity of disabled persons have been denied or restricted on the basis that they lack mental capacity by reason of their intellectual or psychosocial disability. The CRPD Committee makes clear that such laws, policies and practices must be reformed because they fall foul of Articles 5 and 12 of the CRPD.[25]

The recognition of the right to legal capacity is "essential for access to justice" and "in order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognised as persons before the law with *equal standing* in courts and tribunals".[26] In this regard, the CRPD Committee has clarified that declarations of unfitness to stand trial or non-responsibility in criminal justice systems on the basis of an accused person's disability and the detention of disabled persons on this basis are contrary to Article 14 of the CRPD and should be abolished.[27] Some have however criticised the CRPD Committee's call to abolish such defences, with Perlin going so far as to describe it as "the single most wrongheaded (and potentially destructive) statement uttered by any supporter of the CRPD since its initial drafting".[28]

Others, like Tina Minkowitz, have applauded the CRPD Committee's recommendations, noting that "a negation of criminal responsibility that is based on insanity or mental incapacity… undermines the equal recognition of persons with disabilities before the law as individuals with mutual obligations towards others and an equal right to participate in defining and negotiating those obligations".[29] At the same time, informed by Article 5 of the CRPD, she proposes that the determination of a disabled person's criminal responsibility should be "addressed with both formal and substantive equality measures".[30] On one hand, as a matter of formality equality, disability-specific defences that negate criminal responsibility should be abolished. On the other hand, as a matter of substantive equality, diversity in decision-making should be accommodated when adjudicating culpability to realise substantive equality for

[23] Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) Article 12: Equal recognition before the law (n 8) para 13.
[24] Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law (n 8) para 13.
[25] ibid 32.
[26] ibid 38.
[27] Committee on the Rights of Persons with Disabilities Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities (n 10) para 16.
[28] Perlin, 'God Said to Abraham/Kill Me a Son' (n 12) 480. See also Jillian Craigie, 'Against a Singular Understanding of Legal Capacity: Criminal Responsibility and the Convention on the Rights of Persons with Disabilities' (2015) 40 International Journal of Law and Psychiatry 6; Wondemaghen (n 12).
[29] Minkowitz (n 12) 447.
[30] ibid 455.

offenders with disabilities in the criminal process. This would, for example, require the factfinder to consider the accused's perceptions, beliefs and worldview rather than simply assume that the accused was not able to form the subjective intent to commit an offence because they have an intellectual or psychosocial disability.[31]

The disagreement between Perlin and Minkowitz however may not be as dire as it seems. Perlin's principal concern with the abolition of disability-specific defences is in respect of the grave consequences it would have *ceteris paribus* as more offenders with intellectual and psychosocial disabilities would end up incarcerated and "lead to torture… at the hands of both prison guards and other prisoners".[32] However, Minkowitz's proposal is not confined only to the abolition of disability-specific defences; instead, she emphasises that while disabled offenders should not be exempted from imprisonment on the basis of their disability, the state must carry out their sentence "subject to reasonable accommodation and in compliance with the objectives and principles of the CRPD".[33]

This debate hints at Steele's criticism of the CRPD as "anti-disability-specific" but not "anti-carceral" in that reliance on the CRPD "risks only further entrenching criminalised disabled people in the mainstream criminal justice system, rather than delivering us a world beyond prison".[34] Indeed, neither Perlin nor Minkowitz seem to have considered the potential role of penal abolition in advancing disability justice.[35] This Article returns to the limitations of the CRPD in transforming the criminal legal system and the relationship between disability justice and penal abolition in Section IV.

Whereas the above discussion has focused on the question of criminal *responsibility* (in terms of whether an accused with intellectual or psychosocial disability should be convicted of a crime), this Article turns to consider the issue of criminal *culpability* (in terms of what the appropriate sentence should be meted out to an offender with intellectual or psychosocial disability who is convicted of a crime). Given the numerous disability-specific practices in criminal sentencing such as the doctrine of diminished responsibility and the recognition of intellectual and psychosocial disability as a mitigating factor, it is important to consider whether these practices are compliant with the CRPD and if not, how they should be reformed.

[31] ibid 456–457.
[32] Perlin, 'God Said to Abraham/Kill Me a Son' (n 12) 481.
[33] Minkowitz (n 12) 458.
[34] Steele (n 13) 73.
[35] See, for example Liat Ben-Moshe, *Decarcerating Disability: Deinstitutionalization and Prison Abolition* (University of Minnesota Press 2020); Shannon Dodd and others, 'The Forgotten Prisoners: Exploring the Impact of Imprisonment on People with Disability in Australia' [2022] Criminology & Criminal Justice 17488958221120896; 'Cripping Abolition' (*The Abolition and Disability Justice Coalition*, 6 August 2020) <https://abolitionanddisabilityjustice.com/opening/> accessed 6 May 2023; Maya Goldman and Lucy Trieshmann, 'The Breaking Point: A Critical Disability Analysis of Abolition' (2021) 169 University of Pennsylvania Law Review; Rowe and Dowse (n 16).

III. SENTENCING OF OFFENDERS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN SINGAPORE

As a former British colony, Singapore adopts the Westminster system of constitutional government and criminal sentencing is a matter that involves all three branches of government. First, the legislature enacts legislation which prescribes the sentencing scheme for offences. Second, the judiciary exercises its sentencing discretion to determine the appropriate sentence for the individual offender based on the facts of each case and the statutory scheme. Finally, the relevant executive agency – be it the prison, the probation officers, etc – carries out the sentences imposed by the court.

Nagaenthran's execution has put Singapore's criminal legal system in the spotlight, with British billionaire Sir Richard Branson – who also serves as a commissioner on the Global Commission on Drug Policy – suggesting that the execution has "cast serious doubts on Singapore's willingness to uphold international law".[36] Given the separation of powers in respect of criminal sentencing, this criticism should be directed at the Singapore legislature, rather than the judiciary, because the death penalty is prescribed as a mandatory punishment for the offence of drug trafficking for which Nagaenthran was convicted. The judiciary has no discretion in this regard and there are only two statutory exceptions, one of which is the partial defence of diminished responsibility, where the court is similarly required – as a matter of statute – to impose a sentence of life imprisonment instead of the death penalty.[37]

As the imposition of the death penalty on offenders with intellectual or psychosocial disability has received significant academic attention,[38] this Article focuses instead on the court's exercise of sentencing discretion more generally in relation to this group of offenders. Though Singapore ratified the CRPD in 2013, the judiciary's approach to the criminal sentencing of so-called "mentally disordered" offenders (which is used to refer to those with intellectual or psychosocial disabilities) does not appear to have been influenced or informed by the CRPD.[39] There is no diversion programs to provide such offenders with treatment and support at the pre-arrest or pre-plea stage.[40] However, the court has the discretion to impose probation or community sentences, including mandatory treatment orders, if certain statutory requirements are satisfied.[41]

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[36] Richard Branson, 'Stop the Killing of Nagaenthran Dharmalingam' (*Virgin.com*, 8 November 2021) <https://virgin.com/branson-family/richard-branson-blog/stop-the-killing-of-nagaenthran-dharmalingam> accessed 4 May 2023.

[37] Section 33B of the MDA (n 5).

[38] See generally, Marc J Tassé and John H JD Blume, *Intellectual Disability and the Death Penalty: Current Issues and Controversies* (ABC-CLIO 2017); Michael L Perlin, *Mental Disability and the Death Penalty: The Shame of the States* (Rowman & Littlefield 2013); Richard J Wilson, 'The Death Penalty and Mental Illness in International Human Rights Law: Toward Abolition' (2016) 73 Washington and Lee Law Review 1469; Allison Freedman, 'Mental Retardation and the Death Penalty: The Need for an International Standard Defining Mental Retardation' (2014) 12 Northwestern University Journal of International Human Rights [i].

[39] For a general overview of Singapore's approach to the sentencing of "mentally disordered" offenders, see Chua (n 11).

[40] Kumaralingam Amirthalingam, *Criminal Justice and Diversionary Programmes in Singapore*, 24 CRIM LAW FORUM 527–559, 553–554 (2013) *cf*. Richard D Schneider, 'Mental Health Courts and Diversion Programs: A Global Survey' (2010) 33 International Journal of Law and Psychiatry 201.

[41] Chua (n 11) 460.

In determining the appropriate sentence, the Singapore courts engage in a two-step inquiry. First, the court must first decide which sentencing principle – deterrence, incapacitation, rehabilitation or retribution – is the dominant one which will narrow the relevant sentencing options. Second, the court determines the most appropriate sentence based on what the dominant sentencing principle is. If the dominant sentencing principle is rehabilitation, then the court may choose from the available rehabilitation options be it probation, mandatory treatment or community service. Alternatively, the court may sentence the offender to imprisonment for an appropriate length of time based on what would best serve the public interest and also rehabilitate the offender.

In sentencing offenders with intellectual or psychosocial disabilities, the Singapore courts have held that "the existence of a mental disorder on the part of the offender is always a relevant factor."[42] However, the sentencing court must grapple with what has been described as the "paradox of sentencing the mentally ill", where the existence of an intellectual or psychosocial disability can be a "mitigating consideration or point towards a future danger that may require more severe sentencing."[43] In addition, courts must also grapple with the "tension between the sentencing principles of specific and general deterrence on the one hand, and the principle of rehabilitation on the other" where the disability is sufficiently serious and causally related to the commission of the offence.[44]

This section examines how the Singapore courts have negotiated these challenges in determining the dominant sentencing principle and also the appropriate sentence in a series of recent cases involving the sentencing of offenders with either an intellectual or psychosocial disability.

A. Determining the dominant sentencing objective

In *Public Prosecutor v Low Ji Qing*,[45] the Court of Appeal summarised the applicable principles when sentencing a "mentally disabled" offender based on past cases. First, the existence of a mental disorder on the part of the offender is generally a relevant factor in the sentencing process.[46] However, the manner and extent of its relevance depends on the circumstances of each case, in particular, the nature and severity of the mental disorder.[47]

Second, the starting point in the sentencing process is the principle of deterrence. On one hand, the element of general deterrence may be accorded full weight in some circumstances, such as where the disability is not serious or is not causally related to the commission of the offence, and the offence is a serious one.[48] On the other hand,

[42] *Lim Ghim Peow v Public Prosecutor* [2013] 4 SLR 1287; [2014] SGCA 52 ("*Lim Ghim Peow*") at [25].
[43] *Public Prosecutor v Goh Lee Yin* [2008] 1 SLR(R) 824; [2007] SGHC 205 ("*Goh Lee Yin*") at [1].
[44] *Lim Ghim Peow* (n 42) at [26] and [28].
[45] [2019] 5 SLR 769; [2019] SGHC 174.
[46] ibid at [44(a)].
[47] ibid at [44(b)].
[48] ibid at [44(c)].

notwithstanding the existence of a disability on the part of the accused person, specific deterrence may remain relevant in instances where the offence is premeditated or where there is a conscious choice to commit the offence.[49]

Third, if the disability renders deterrence less relevant, where for instance the offender has a significantly impaired ability to appreciate the nature and quality of his actions, then rehabilitation may take precedence.[50] Nevertheless, even though rehabilitation may be a relevant consideration, it does not necessarily dictate a sentence that excludes incarceration since the accused person could potentially be rehabilitated in prison too.[51]

Finally, in cases involving heinous or serious offences, even when the accused person is labouring under a serious mental disorder, the retributive and protective principles of sentencing may prevail over the principle of rehabilitation.[52]

The foregoing principles highlights three principal considerations that influence which sentencing principle should take precedence and how an offender's disability is accounted for in the sentencing process: first, the nature of the offender's disability; second, the causal connection between the disability and the commission of the offence; and third, the impact of the disability on the offender's ability to appreciate the gravity and wrongfulness of the offence they had committed.

(1) Nature of the offender's disability and the seriousness of the offence in question

In *Goh Lee Yin*,[53] the High Court held that the starting point in determining any sentence is the four classical principles of sentencing stated in *R v James Henry Sargeant*:[54]

> *What ought the proper penalty to be? … [The] classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.*

Goh Lee Yin is a case involving an adult offender who was diagnosed with kleptomania which had purportedly prompted her to commit the thefts for which she was being sentenced. In such a case, the High Court held that "the principles of rehabilitation and deterrence must form the prime focus of [the court's] attention."[55] This is because the nature of offences committed by kleptomaniacs, shoplifting, is not particularly serious as to engage the principles of retribution and prevention. However, if an offender's disability caused them to commit a particularly heinous offence, then those principles would be more salient.

[49] ibid at [44(d)].
[50] ibid at [44(e)].
[51] ibid at [44(f)].
[52] ibid at [44(g)].
[53] *Goh Lee Yin* (n 43) [58].
[54] (1974) 60 Cr App R 74, 77.
[55] *Goh Lee Yin* (n 43) at [60].

In the same vein, the court held that the "low-key nature of the offence", which does not "seriously affect or inconvenience [the] public... [and] the items stolen are of little value",[56] leads to the conclusion that rehabilitation should form the primary focus in cases involving kleptomaniacs to help keep kleptomaniacs from reoffending.[57] In contrast, deterrence plays a less significant role in cases involving kleptomaniac offenders for two reasons. First, general deterrence is less important because of the "very low incidence of kleptomania among apprehended shoplifters."[58] Second, specific deterrence is of limited relevance given that kleptomania is an impulse control disorder where the offender "may not be fully able to control his or her actions prior to and while committing the offence."[59]

However, both general and specific deterrence may come into play in the exceptional circumstance where the offender in question has skipped their treatment plan persistently. In such a case, general deterrence is relevant to signal to kleptomaniacs that they could not expect to skip their treatment programs and then steal, with the courts forgiving them everything.[60] Similarly, specific deterrence is engaged in a secondary manner to discourage the offender from violating the treatment program.[61] At the same time, because the causal link between the omission to adhere to treatment and the actual commission of future offences cannot be conclusively proved, the court held that this secondary manifestation of specific deterrence (to discourage the offender from violating the treatment plan) should not be applied with equal force as the primary manifestation of deterring the offender from re-offending.[62]

(2) Causal connection between disability and the offender's commission of the offence

The fact that an offender is mentally disabled however does not always or necessarily lead a court to find that rehabilitation should be the dominant sentencing principle. Instead, the disability must also be causally connected to the offence in question. Hence, in *Public Prosecutor v Chong Hou En* ("*Chong Hou En*"),[63] the High Court held:

> *[J]ust because a disorder is included within the pages of the DSM-5 and ICD-10 does not* automatically *mean a court of law will attribute weight to the disorder as a substantial mitigating factor… The diagnosis must be supported by a clinical expert's opinion on the* nature *of the disorder and how it affects an individual.*[64]
> (emphasis in original)

In this case, though the offender was diagnosed with voyeurism, the court held that the diagnosis is not determinative to override the principle of deterrence in favour of rehabilitation. Instead, the court must go on to "establish whether or not the voyeur is able to control himself when he plans, takes preparatory steps and eventually

[56] ibid at [107].
[57] ibid at [98].
[58] ibid at [93].
[59] ibid at [80].
[60] ibid at [95].
[61] ibid at [83].
[62] ibid at [85].
[63] [2015] 3 SLR 222; [2015] SGHC 69.
[64] ibid at [58].

commits the acts of voyeurism."[65] Hence, the court will consider the offender's disability only insofar as it impairs his ability to control their own behaviour prior to and during the commission of the offence. Where the connection between the disability is more attenuated, the court is unlikely to give any weight to the fact of the accused's disability as a mitigating factor since it is not considered *directly* relevant to the commission of the offence.

(3) Offender's ability to appreciate the gravity and wrongfulness of the offence

Even if the offender's disability has some causal relation to the offense in question, the nature of the offence may lead the court to consider that the retributive and preventive principles should take precedence over rehabilitation. In *Lim Ghim Peow*, the accused had set his ex-lover on fire which resulted in her death as a result of her burn injuries. Because of the heinous nature of the offence, the fact that the accused was diagnosed with major depressive disorder was secondary and did not convince the court to prioritize his rehabilitation over the principles of retribution, prevention and deterrence. Specifically, though the court acknowledged that the accused's major depressive disorder impaired his degree of self-control and decision-making capacity, it nonetheless considered that the disability did not mean that he lacked the "capacity to comprehend the events or the capacity to appreciate the wrongfulness of his actions."[66]

As this above quote suggests, the court is concerned not simply with the gravity of the offence itself but whether the offender is capable of appreciating what he has done. It was on this basis that the Court of Appeal rejected Nagaenthran's appeal to reduce his sentence to life imprisonment. In finding that he could not rely on the statutory defence of diminished responsibility, the Court of Appeal held that even assuming that he was suffering from an "abnormality of mind", Nagaenthran "clearly understood the nature of his acts and did not lose his sense of judgment of the rightness or wrongness of what he was doing".[67]

In contrast, in *PP v ASR*, the Court of Appeal held that though the offender had raped the victim after threatening to pull a knife on her, rehabilitation remained the dominant sentencing consideration. This is because whether rehabilitation was displaced as the dominant sentencing consideration turned principally on the offender's state of mind at the time of the offence.[68] In this case, the court held that the offender – who was 14 years old at the time of the offence and intellectually disabled – did not understand the gravity and consequence of what he had done because of his low cognitive ability.[69] Accordingly, these factors substantially reduced his culpability and the nature of the offence by itself would not displace rehabilitation as the dominant sentencing objective.

[65] ibid.
[66] *Lim Ghim Peow* (n 42) at [50].
[67] *Nagaenthran (CA)* (n 4) at [34] and [40].
[68] *PP v ASR* (n 14) at [103].
[69] ibid at [110] – [113].

B. Ascertaining the offender's state of mind at the time of the offence

What is significant about *PP v ASR*, compared to previous cases, is the meticulous manner by which the court went about ascertaining the offender's state of mind to determine whether he was capable of appreciating the gravity and wrongfulness of what he had done. This contrasts with earlier cases, like *Lim Ghim Peow* where the court found that "there was nothing to indicate that the [offender] lacked the capacity to comprehend his actions or appreciate the wrongfulness of his conduct."[70] In *Lim Ghim Peow*, the court did not directly assess the offender's state of mind at the time that he committed the offences. Instead, it mainly relied on the conclusion of the expert psychiatric witness and its own inference that the offender must have had the capacity to appreciate what he had done based on the fact that he had "carefully planned his moves."[71]

In this case, the accused was a student at a special education school and had been assessed by the Institute of Mental Health a few months after the commission of the offences to have an IQ of 61. His mental age was assessed by one expert to be eight years old, and by another to be between eight and ten years old. On the day of the offence, he had spotted the victim who went to the same special education school though they did not know each other. He followed her to her apartment building and forced himself on her when they exited the elevator. When she resisted and tried to flee, the accused told her that he would take out a knife if she did not lie down. He then penetrated her without her consent and ejaculated on her underwear. After he found a comb about 15cm long that belonged to the victim, he inserted it into her vagina and placed it into her mouth after taking it out. He then said, "Bye bye", and left the scene.

In its judgment, the Court of Appeal carefully considered the evidence set out in an expert report that demonstrated the accused had "a limited understanding of the nature and consequence of his actions."[72] Specifically, the court noted that while the offender "knew that what he had done to the victim was wrong; [t]he question was the extent of this awareness."[73] Based on the offender's responses to the psychiatrist's questions about the incident during which he committed the offences, the court found that the offender was:

> *a person with a distorted, confused but ultimately simplistic view of sexuality, and of the significance and heinousness of the sexual abuse that he committed… Critically, he appeared not to have even begun to understand the depravity of his conduct, the degradation and trauma suffered by the victim, and the consequences for the both of them.*[74]

Though the court's finding was consistent with the expert's conclusion that the offender "knew that his actions were wrong, but '… did not appreciate the legal wrongfulness of his act[s]'",[75] what is striking is that the court did not simply accept

[70] *Lim Ghim Peow* (n 42) at [52].
[71] ibid at [51].
[72] *PP v ASR* (n 14) at [113].
[73] ibid at [110].
[74] ibid at [111].
[75] ibid.

the expert's words at face value. Instead, the court looked to the relevant evidence to ascertain the offender's state of mind at the time of the offence. This offender-specific inquiry is important because it ensures that the court attends to the particular manner by which an offender's disability impacts their mental responsibility for and appreciation of the wrongfulness of what they had done. This prevents the court from engaging in sanist reasoning that the offender's intellectual or psychosocial disability must necessarily reduce their culpability or not, as was arguably the case in *Lim Ghim Peow*.

IV. CRIMINAL SENTENCING IN THE CRPD ERA

This section analyses Singapore's sentencing jurisprudence through the lens of the CRPD. As discussed above in Section II, the CRPD demands both formal and substantive equality in respect of the equal enjoyment of legal capacity. In addition, the CRPD represents a shift away from the medical model of disability which raises questions as to how much reliance courts should place on expert medical evidence in the sentencing process.

Yet, ultimately, criminal legal system that recognises the equality of disabled and non-disabled persons before the law could still fail to respect the inherent dignity of disabled persons – and non-disabled persons as well. Singapore's experience demonstrate that even when criminal sentencing is conducted in compliance with the CRPD, our contemporary imagination of criminal punishment – be it incarceration, or the death penalty or caning – may ultimately be contrary to the CRPD's purpose of promoting respect for the inherent dignity of disabled persons. Looking beyond the CRPD, this section ends by considering the limits of a *disability rights* approach to criminal justice and how we should instead turn to a broader engagement with criminal justice reform through the lens of penal and prison abolition.

A. Equal enjoyment of legal capacity

In relation to formal equality, the conscientious approach adopted in *PP v ASR* demonstrates how sentencing courts should approach an offender's intellectual or psychosocial disability in a manner that is consistent with the CRPD's demand that disabled persons enjoy equal recognition before the law. Rather than draw any inference based on the fact of the offender's disability, a court should look specifically at the particular offender before it to determine those questions. Whether an offender has a disability or not should not be conclusive as to what the dominant sentencing principle or appropriate sentence should be.

While the imposition of rehabilitative sentences may ostensibly appear to violate the formal equality principle since it is available only to offenders whom the court has found to be "suffering" from a mental disorder, this may be justified as a form of reasonable accommodation. Such sentencing orders would thus still remain consistent with the CRPD, since Article 5(3) of the CRPD requires that state parties take all appropriate steps to ensure that reasonable accommodation is provided to promote equality and eliminate discrimination. Hence, where the court has determined that rehabilitation should be the dominant sentencing objective, it should apply its mind as

to the most appropriate sentence to achieve rehabilitation – be it probation, a mandatory treatment order (notwithstanding that such orders violate Article 25(d) of the CRPD),[76] or even rehabilitation in a structured environment through imprisonment – in light of the specific offender's needs and circumstances. In fact, what would fly in the face of the CRPD is a *de jure* or *de facto* diversion of *all* offenders with intellectual or psychosocial disabilities to a specific type of rehabilitative sentence.

B. Reliance on expert medical evidence

As a facet of substantive equality, the court should not simply rely on the evidence of medical experts but look at the totality of the evidence adduced at trial, including especially the testimony of the offender should they choose to testify in the proceedings. The court must also ensure that diversity in the decision-making process is accommodated. This means that judges should be circumspect about making assumptions or drawing adverse inferences about how an offender with intellectual or psychosocial disability should conduct or express themselves. They should also approach the question with an attentiveness to the danger that sanism might seep into their reasoning or colour their perception of the offender.

Making these considerations explicit invites judges to challenge their personal biases and appreciate the complexities of how intellectual and psychosocial disability may manifest differently in each individual. In this regard, and as emphasised by the CRPD Committee, judges should receive the necessary training about the rights of persons with disabilities, in particular "the fact that persons should not be identified purely on the basis of impairment" and "the diversity among persons with disabilities and their individual requirements in order to gain effective access to all aspects of the justice system on an equal basis with others".[77]

In this regard, it is questionable whether the court's finding that there was a high degree of planning, preparation and premeditation necessarily means that the offenders in *Lim Ghim Peow* and *Chong Hou En* are equally culpable as a non-disabled comparator. Unfortunately, this did not seem to have crossed the court's mind in either case. In accordance with the CRPD's requirements, the court should have considered the offender's conduct in planning and preparing to commit the relevant offences in the *context of their disability*. These actions, by themselves, should not lead the court to assume that the offender's disability had no bearing or causal relation to the commission of the offences, and therefore that the offender should have been conscious of the wrongfulness of what they were doing.

[76] Lisa Brophy and others, 'The Urgent Need to Review the Use of CTOs and Compliance with the UNCRPD Across Australian Jurisdictions' [2022] International Journal of Mental Health and Capacity Law 3; George Szmukler, Rowena Daw and Felicity Callard, 'Mental Health Law and the UN Convention on the Rights of Persons with Disabilities' (2014) 37 International Journal of Law and Psychiatry 245.
[77] Committee on the Rights of Persons with Disabilities General comment No. 6 (2018) on equality and non- discrimination (n 23) para 55.

C. Limits of the CRPD in the pursuit of dignity for disabled persons in criminal justice reform

This Article's discussion on how criminal sentencing should be conducted in light of the CRPD should make clear that the CRPD may be of limited utility in the context of criminal justice insofar as its purpose is the promotion of respect for the inherent dignity of disabled people. Beyond the two requirements of formal and substantive equality discussed above, the CRPD seems incapable of offering any substantive critique of the forms of punishment imposed by the penal state. As Steele observed, the CRPD "does not provide the tools to grapple with the full complexities and contradictions of disability-specific coercive interventions in a criminal legal context and in relation to criminalised disabled people."[78] In Singapore's context, putting aside the issue as to whether he was afforded accommodations in the investigation process, this unsatisfactory state of affairs is perhaps best demonstrated by the sentencing of Nagaenthran to the gallows, which arguably was conducted in compliance with the CRPD in finding that he was not disabled for purposes of the statutory exemption from the death penalty.

This can be attributed to the fact that the CRPD was not intended to create *new* substantive rights but to address the problem that "existing human rights instruments have fallen far short in their protection of the human rights and fundamental freedoms guaranteed to persons with disabilities".[79] Insofar as the international human rights regime has "accepted and normalised the existence of prisons through the production of an extensive range of norms and standards pertaining to the treatment of prisoners",[80] it is unsurprising then that the CRPD does not offer any guidance as to whether existing penal sentences would be consistent with the dignity and rights of persons with disabilities.

Yet, even if the two requirements of formal and substantive equality are satisfied, it is clear that the criminal legal system is in urgent need of reform and reimagination. Bringing into dialogue the two fields of penal abolitionism and critical disability studies, Rowe and Dowse argue that both strands of scholarship call attention to the "depth of violence inherent in carcerality and the social, physical, psychic, political and economic harms synonymous with carceral practices and incarceration".[81] In particular, the implementation of disability-specific rights in prison may "justify even greater funnelling of the already extraordinary resources into penal institutions" and "leave unexamined an arguably primary root cause of the penalisation of people with and without disability: social-structural injustice".[82]

In this regard, Isobel Renzulli has argued that a human rights based approach to imprisonment "cannot be limited to improving the conditions inside the prison or

[78] *Id.* at 59.
[79] Arlene S Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2014) 51.
[80] Isobel Renzulli, 'Prison Abolition: International Human Rights Law Perspectives' (2022) 26 The International Journal of Human Rights 100, 109.
[81] Rowe and Dowse (n 16) 210.
[82] ibid 211.

limiting its use"; instead, it must also implement "transformative interventions outside the narrow and punitive confines of the criminal justice system… for a more equitable and inclusive social justice agenda, where human flourishing matters more than punishment".[83] Specifically, Renzulli points to the role that economic, social and cultural rights play in challenging structural inequalities and "tackling exclusion and social disadvantage, as factors heightening the risk of imprisonment".[84] Considering that the CRPD comprises both first-generation civil and political rights as well as second-generation economic, social and cultural rights,[85] it remains to be seen how these two components of the treaty can be creatively interpreted and applied to the criminal legal system to address the harms of the carceral state and its penal practices.

V. CONCLUSION

Drawing on recent jurisprudence in Singapore, this Article has presented a critical disability perspective on whether and how courts should weigh an offender's intellectual or psychosocial disability in the criminal sentencing process. It adds to the scholarship on the implementation of the CRPD in the criminal context, which has hitherto focused on other components of the criminal process such as the role of mental health courts, disability-specific defences and court-ordered mandatory treatment. Heeding the CRPD's demand for a paradigm shift in how disability and legal capacity are understood, this Article demonstrates what the treatment of offenders with disabilities on an equal basis in the criminal legal system can and should look like within the context of criminal sentencing by focusing on how an offender's disability should be taken into account in determining the appropriate sentence.

Yet, the equality of disabled persons in the criminal sentencing process may be insufficient to realise the more ambitious objective of the CRPD to promote respect for the inherent dignity of disabled persons in light of its inability to interrogate the carceral state. Future research should look beyond the CRPD and engage with the related fields of critical disability studies and penal abolitionism to imagine how the criminal sentencing of offenders with intellectual and psychosocial disabilities can and should be carried out in a way that is consistent with respect for their inherent dignity.

[83] Renzulli (n 80) 114.
[84] ibid 112.
[85] Degener (n 20) 44–47.

INTERNATIONAL PERSPECTIVES ON END-OF-LIFE LAW REFORM: POLITICS, PERSUASION AND PERSISTENCE, EDITED BY BEN P. WHITE AND LINDSAY WILMOTT (CAMBRIDGE UNIVERSITY PRESS, 2021)

ALEX RUCK KEENE*

I should start this review with a declaration of interest: I was somewhat surprised to discover that one of the chapters (by Celia and Jenny Kitzinger, on Challenging Mandatory Court Hearings for People in Vegetative and Minimally Conscious States) appeared to feature me in quite such a starring role.[1] Even without knowing that I might make an appearance in the book, however, I was immediately attracted by its premise, which is to take (most of a) step back from arguments about whether and how the law relating to the end of life should change, and to examine why the law has (or has not) changed in different places at different times. Further, picking the book up, three other things became immediately obvious.

The first is that the book really does follow through on the international aspect promised by the title, with ten case studies drawn from England & Wales,[2] the United States, Canada, the Netherlands, Belgium and Australia. The choice of the case studies means that, even if not its primary purpose, the book serves as a useful snapshot of the state of the debate around assisted dying in the major jurisdictions where it is legal.

The second is that it is not solely focused on questions relating to assisted dying[3] (the subject of seven of the case studies), but also includes three case studies relating to issues around withholding and withdrawing life-sustaining treatment, primarily in relation to those lacking capacity/competence to make the relevant decisions. One small regret in this regard is that the editors, in their elegant and concise overview of the terrain identify a third major zone of law's interest – issues around palliation – there is no case study directly relating to this. It would have been very interesting, for instance, to learn more about the process of law reform in this area in France leading to the express legalisation of 'continuous sedation until death' (la sédation profonde et continue maintenue jusqu'au décès') in the so-called Claeys-Leonetti law (2016).

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[1] I was also involved in the *Conway* case concerning the compatibility of s.2(1) Suicide Act 1961 with the European Convention on Human Rights, which is also considered in the book: *Conway, R (on the application of) v The Secretary of State for Justice & Ors* [2018] EWCA Civ 1431, see also *Conway, R (On the Application Of) v The Secretary of State for Justice* [2017] EWHC 2447 (Admin).

[2] A small point: the editors refer to the United Kingdom, but the three relevant case studies relate to the position in England & Wales. Different issues might well have arisen in relation to case studies relating to Northern Ireland or Scotland given their different legal frameworks: a further edition of the work may well include a case study looking at assisted dying and devolution.

[3] As ever, and as the editors acknowledge, it is necessary to be clear about the language being used: the editors use the term (see p.5) to encompass both voluntary euthanasia and assisted suicide.

The third feature of the book is that it contains a co-authored chapter at the end, involving contributors from each of the previous chapters (alongside the editors) reflecting both on the processes of law reform emerging from the individual case studies and on future directions of travel for both reforms and research. It would have been very interesting to be in on the drafting process of this chapter (and of the workshop held in 2017 at which the papers giving rise to the case study chapters) were discussed, but the significant amount of work that it must have involved has paid off in a chapter, and a work, which has a coherence sometimes missing in edited collections.

That coherence does, perhaps, come at something of a price, recognised in the concluding chapter.[4] The focus is primarily upon instances where law reform occurred, and hence 'more often on the reasons why the law changed – that is the facilitators for reform and the individuals or groups who were influential in fostering change – rather than on the reasons why the reform was challenging.'[5] This means also that there is only relatively modest discussion of opposition from certain groups to the reforms identified, in particular in those chapters written by those most directly involved in the reforms described. One interesting (sort of) exception to this is the chapter written by Penney Lewis on whether assisted dying should require the consent of a High Court judge, a particular focus of debates in England & Wales, and a proposal contained within the most recent legislative reform put forward.[6] Lewis is a proponent of a change in the law in England & Wales, but her chapter sets out a detailed analysis of why she considers to be misplaced the potential reliance upon approval by a High Court judge. Her chapter is therefore a fascinating insight into a live debate **within** a campaign movement; for wider debates, it will be necessary to look elsewhere.

As a final price which is paid by the coherence of the book, and not least because it is something that I have repeatedly grappled with both academically[7] and as a practitioner, I would also have wished there to be more discussion of the complexities of representation and disability rights within the law reform process: it is perhaps striking that the UN Convention on the Rights of Persons with Disabilities receives only one mention within the book,[8] despite what might be thought obvious relevance to both aspects of end-of-life law reform discussed here. That might, of course, reflect its lack of prominence in the debates in the different jurisdictions considered, but that, in and of itself, would be an important data point.

However, keeping the focus clearly upon law reform, but taking a broad approach to the concept of such reform, means that the volume is able to dig into some

[4] See the section on 'limits on a case study approach: what is missing?' at pp.271-273.
[5] Page 272.
[6] The Assisted Dying Bill introduced by Baroness Meacher in 2021. It is a Private Members' Bill, i.e. not one introduced by the Government. Without Governmental support, its prospects of reaching the statute books are very slim.
[7] Some of my thoughts can be found my chapter 'Contesting death rights: Reflections from the courtroom,' in S Westwood (ed), 'Regulating the End of Life: Death Rights' (Routledge, 2021).
[8] In Emily Jackson's chapter on the changing relevance of patient's wishes in relation to withdrawing and withholding life-prolonging treatment under the Mental Capacity Act 2005 in England & Wales.

significant socio-legal questions. In particular, it is possible to mine the case studies to ask questions both as to the comparative effectiveness – and comparative legitimacy – of strategies based upon litigation as opposed to strategies based upon legislative campaigning. And the stimulating chapter by Thaddeus Mason Pope on the Texas Advance Directives Act examines in detail (in effect) the collapse of a coalition of interests behind a legislative reform and the consequences for the partial unwinding of the reform.

Overall, the book is essential for those grappling with end-of-life law, and will certainly form core reading on the course on the subject I teach at King's College London: even the caveats noted above will provide useful starting points for discussion. All I will have to do is to ask students to take references to me with a grain of salt…

COMPULSORY MENTAL HEALTH INTERVENTIONS AND THE CRPD, BY ANNA NILSSON (HART, 2021)
THE RIGHT TO BE PROTECTED FROM COMMITTING SUICIDE, BY JONATHAN HERRING (HART, 2022)

ALEX RUCK KEENE*

Although not designed to be read together, these two works complement each other interesting ways in addressing obligations upon the State in the context of crisis.

The first, by Anna Nilsson, Postdoctoral Fellow at the Faculty of Law, Lund University, is based in large part upon her doctoral thesis, and is the more ambitious in scope. Motivated, as she describes, by a conflict between two competing positions within the current debate over the future of coercive psychiatry, the book seeks to articulate a framework for permissible compulsory care using the model of proportionality developed by Robert Alexy. For those unfamiliar with his work, it is a reconstruction and theorisation of the German Federal Constitutional Court. It can, perhaps rather crudely, be seen as a refined version of the principles by which the European Court of Human Rights tests whether interference with qualified ECHR rights are justified (i.e. asking whether the interference is in pursuit of a legitimate aim, is necessary in a democratic society, and is proportionate; Alexy adds a second stage, as to whether the policy or practice is suitable in the sense of contributing to the legitimate aim). It also, in a way distinctly unfamiliar to common lawyers, involves the use of formulae to assist in the balancing exercise required at each state.[1]

Before she applies Alexy's framework to compulsory care, Nilsson opens with a crisp chapter on the approach to mental health care under the CRPD, serving as a helpful tour d'horizon of the debates, and identifying that the treaty text is silent on the key question, as it neither prohibits nor explicitly permits compulsory mental health care. In this chapter, she focuses, in particular, on the importance, but also the ambiguity, inherent in the concept of 'on an equal basis with others' which attaches to the central CRPD rights in play. She notes that the CRPD Committee has recognised that some state policies may give rise to differential treatment but be justified, so as not to give rise to unlawful discrimination but has "devoted little attention to the question of what standard such justifications must meet" (p.37). A central plank of her argument is that the standard is (or perhaps more accurately should be) that adopted by other UN bodies, namely that:

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[1] For a common law critique of attempts to use a cruder version of such formula – the balance sheet – in determining best interests for purposes of the Mental Capacity Act 2005, see Kong, C., Coggon, J., Dunn, M., & Ruck Keene, A. (2020). An aide memoire for a balancing act? Critiquing the 'balance sheet' approach to best interests decision-making. *Medical Law Review*, *28*(4), 753-780. In fairness, Nilsson recognises the potential objection to Alexy's work as attempting to compare the incommensurable (page 102).

> "*not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the* [relevant convention]."[2]

Nilsson not the first person to have made the argument that the standard UN approach is applicable to the CRPD,[3] but her argument is the most sustained and nuanced, using Alexy's approach to help tease out each of the aspects of the objective and reasonable standard, and hence to provide a framework to evaluate domestic systems of compulsory mental health care. As she makes clear (see p.159) and applying this framework, she considers that the CRPD does permit some form of compulsory care for purposes of protecting the health and life of the person concern, in the circumstances where an individual is in need of medical care and a free and informed treatment decision cannot be obtained, even though they have access to decision-making support. However, to be consistent, any rule that does apply in domestic law in this regard must apply regardless of whether the situation involves a person with a psychosocial condition. With specific regard to suicide, she proposes that it is possible to produce a consistent argument justifying the use of compulsion for purposes of suicide prevention for people with certain psychosocial conditions, as there is no other group of people at similar risk of ending their lives by their own hands. However, and as Nilsson does throughout the book, she emphasises that any such justification rests crucially on evidence – in this case about the rates of suicide amongst different groups. And, more broadly, the more evidence that there is that voluntary alternatives are as effective as compulsory means in preventing serious deterioration in health or suicide, the harder it will be to justify compulsory care.

As interesting as Nilsson's argument is, and as helpful as it is in identifying a nuanced way through the debates, it does have two problems. The first is a simple matter of rhetoric. Recourse to Alexy's abstruse formulae to justify what, in the eyes of a significant minority, is seen as medical torture, does feel close to analysing angels dancing on the head of a pin. It is, at minimum, unlikely to persuade those who are not, at some level, already persuaded – even in inchoate fashion – to the idea that there are some circumstances where intervention is legitimate.

The second is perhaps a matter of timing. Whilst Nilsson does make reference to the UNCRPD Committee's General Comment 5 on Equality and Non-Discrimination, published in 2018,[4] she does so only in relatively short compass, perhaps (I speculate here) because it post-dated the bulk of her doctoral work. It is unfortunate she does not engage with it in more detail, because this General Comment adds to a body of evidence suggesting that it is not clear that the UNCRPD Committee does, in fact, subscribe to the same approach as other UN bodies when it comes to

[2] UN Human Rights Committee General Comment on Non-Discrimination (1989/1994) at paragraph 13.
[3] For instance, it was developed by reference to the Mental Capacity Act 2005 by the Essex Autonomy Project team led by Wayne Martin. See Martin, W., Michalowski, S., Jütten, T., & Burch, M. (2014). Achieving CRPD Compliance: Is the Mental Capacity Act of England and Wales compatible with the UN Convention on the Rights of Persons with Disability? If not, what next?.
[4] CRPD/C/GC/6.

differential treatment.[5] If this is so, then there is, even on the sometimes rarefied plane of debates in this context, a more fundamental problem to her analysis: namely that the UNCRPD Committee may simply not accept that there could ever be any justification for differential treatment in the context of mental health crisis. Whether the UNCRPD Committee are right in this (both as a matter of interpretation of the Convention, and in a broader, ethical, sense) is a different question, but it would have been interesting to see Nilsson tackling this issue head-on.

These two issues perhaps rather detract from the book's use for those seeking to win arguments. However, they do not stop the book being a very useful tool for those who might be seeking to design principled and evidence-based mental health care regimes, because it provides a helpful set of measures against which to stress test both legislation[6] and policies.

In his latest book, Jonathan Herring, DW Wolf-Clarendon Fellow in Law at Exeter College and Professor of Law at the Faculty of Law, University of Oxford, takes on a narrower, but intensely problematic, aspect of the terrain covered by Nilsson: namely State obligations towards suicidal[7] people. Herring explains in his introduction how he was motivated to write the book by his 'astonishment' at how many of his students thought that the appropriate response for a doctor faced with a patient expressing a wish to die was to facilitate suicide, and how the right to die had come to dominate in discussions about suicide and end-of-life questions. His book is a characteristically thoughtful and elegant development of the legal and ethical case for treating those with suicidal thoughts, and the taking of reasonable steps to prevent them attempting suicide. Each chapter takes the form, in effect, of a mini-essay. Some are very helpful convenient summaries, such as the opening

[5] For a detailed analysis of this argument, see Gurbai, S. (2020). Beyond the Pragmatic Definition? the right to non-discrimination of persons with disabilities in the context of coercive interventions. *Health and Human Rights*, *22*(1), 279. General Comment 6 only refers to the concept of objective and reasonable criteria in relation to the situation where reasonable accommodation is denied (see paragraph 27). At paragraph 17, the CRPD Committee identifies that the definition of discrimination within the CRPD "is based on legal definitions of discrimination in international human rights treaties, such as article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and article 1 of the Convention on the Elimination of All Forms of Discrimination against Women. It goes beyond those definitions in two aspects: first, it includes 'denial of reasonable accommodation' as a form of disability-based discrimination; second, the phrase 'on an equal basis with others' is a new component. In its articles 1 and 3, the Convention on the Elimination of All Forms of Discrimination against Women contains a similar but more limited phrase: 'on a basis of equality of men and women'. The phrase 'on an equal basis with others' is not only limited to the definition of disability-based discrimination but also permeates the whole Convention on the Rights of Persons with Disabilities. On the one hand, it means that persons with disabilities will not be granted more or fewer rights or benefits than the general population. On the other hand, it requires that States parties take concrete specific measures to achieve de facto equality for persons with disabilities to ensure that they can in fact enjoy all human rights and fundamental freedoms."

[6] In this regard, it can also be seen as a useful adjunct to the tools developed by David Goddard in his recent, stimulating, book on "Making Laws that Work: How Laws Fail and How We Can Do Better" (Hart, 2022).

[7] I am very conscious of the linguistic issues here. I am using this term broadly to encompass those with suicidal thoughts, and those who may have taken action upon those thoughts.

chapters on definitional issues, the empirical evidence for the causes of suicide,[8] and of the arguments for societal responsibility for suicide. Other chapters seek to advance an argument, in particular the chapter on human rights and suicide, which involves a close reading of the case-law of the European Court of Human Rights to develop a thesis that the state's obligations to secure the right to life under Article 2 in the presence of suicide risk extend beyond the paradigmatic position of psychiatric patients. And the last chapter, about euthanasia and suicide, helpfully locates the debates around assisted dying/euthanasia within the wider (often too often lost) context of the 'right' approach to suicide.

As a self-confessed capacity nerd, I turned with particular interest to the sections on capacity in chapters 5 (ethics and suicide) and 7 (the current law on suicide). In crude paraphrase, Herring considers the test for capacity contained within the Mental Capacity Act 2005 does not serve the interests of the suicidal well. I do not dispute this; indeed, there are further avenues Herring could have explored here, including the Strasbourg jurisprudence relating to life-sustaining treatment refusal in the presence of doubts about mental capacity.[9] Another could have been the phenomenon of capacity being used against those expressing suicidal ideas that has attracted increasing attention over recent years.[10] In this regard, and as discussed in works highlighting that phenomenon, it is deeply problematic that professionals (often, but not exclusively liaison psychiatrists) appear often to be asking themselves whether a person has capacity to take their own life without actually (a) having a clear idea as to precisely what the components of that decision might be;[11] and (b) the relevance or otherwise of the question. As I have discussed elsewhere,[12]

[8] Albeit with a strongly Western-centred focus; more broadly, it would be fascinating to read a book by an author from the Global South on the same theme.

[9] In *Arskaya v Ukraine* [2013] ECHR 1235, for instance, the ECtHR found that there had been a breach of Article 2 ECHR where a person, S, repeatedly refused to life-saving treatment in circumstances where "*S. showing symptoms of a mental disorder, the doctors took those refusals at face value without putting in question S.'s capacity to take rational decisions concerning his treatment. Notably, if S. had agreed to undergo the treatment, the outcome might have been different* […]. *the Court considers that the question of the validity of S.'s refusals to accept vitally important treatment should have been properly answered at the right time, namely before the medical staff refrained from pursuing the proposed treatment in relying on the patient's decision. From the standpoint of Article 2 of the Convention a clear stance on this issue was necessary at that time in order to remove the risk that the patient had made his decision without a full understanding of what was involved*."

[10] See, inter alia, Beale, C. (2022). Magical thinking and moral injury: exclusion culture in psychiatry. *BJPsych bulletin*, *46*(1), 16-19; Aves, W. (2022). If you are not a patient they like, then you have capacity". DOI:10.13140/RG.2.2.34386.84163.

[11] Noting in this regard the Supreme Court decision in *A Local Authority v JB* [2021] UKSC 52, in which the Supreme Court emphasised both the relevance of foreseeable consequences as part of the information to be processed, and also (at paragraph 74) that

> *[t]he importance of P's ability under section 3(1)(a) MCA to understand information relevant to a decision is also specifically affected by whether there could be "serious grave consequences" flowing from the decision. Paragraph 4.19 of the Mental Capacity Act 2005 Code of Practice provides:*
>
> > *"If a decision could have serious or grave consequences, it is even more important that a person understands the information relevant to that decision."*

[12] See my blogpost: https://www.mentalcapacitylawandpolicy.org.uk/capacity-and-suicide/

in many situations, it is completely irrelevant as to whether or not a person has capacity to take their own life: if the provisions of the Mental Health Act 1983 are likely to be in play, the question is the risk that they are at, not whether or not the risk they are at is (in effect) capacitously caused.

Whilst I found myself nodding in agreement with the majority of the book (and frequently emailing myself materials contained in the footnotes), two issues did niggle. The first is that I felt Herring did skate perhaps too rapidly over the question of whether and when compulsion to prevent suicide was justified. He addresses, in relatively brief compass, the recent Strasbourg jurisprudence[13] identifying the tension between the right to liberty and bodily integrity on the one hand, and the right to life on the other. However, for my part, I would have welcomed a more granular investigation of this issue, not least because it would have been useful to have a discussion of the extent to which there is (or can be) a conflation in the public policy mind between detention and securing the right to life.[14] That would also have allowed him to tease out another potential argument against zero-suicide policies (addressed in chapter 8), which he only addresses in very glancing terms: namely that it can lead to 'excessive' steps taken to avoid suicide – and especially excessive compulsory steps, which are not only not always effective in preventing suicide, but also can cause harm in and of themselves,[15] Indeed, this is precisely an area where it would have been interesting to see Herring apply the sort of analysis applied by Nilsson in her book to the question of when compulsion can be justified in the interests of securing the right to life.

The second issue is one which, I have to say, I found very surprising, given Herring's usual sensitivity to language. I did wonder when I saw the reference to "committing suicide" in the title whether Herring was going to give an explanation in the introduction as to why he used this term. Suicide has not been a criminal offence in England & Wales since 1961; given the extensive literature on why the term should not be used,[16] it was curious not to see an explanation as to why it was used. It is quite possible that it was, in effect, a sub-editorial decision on the part of the publisher as to the choice of title – if so, it was a revealing one about quite how far we still have to travel.

Nonetheless, despite these issues, I will definitely be putting this book on my reading list for my Law at the End-of-Life course at King's College London as a stimulating, important, and nuanced contribution to an area which can sometimes all too easily be portrayed in unhelpfully crude terms.

[13] In particular *Fernandes de Olivera* (2019) 69 EHRR 8.
[14] This came through very strongly in the *Rabone & Anor v Pennine Care NHS Foundation* [2012] UKSC 2, the tenor of which could on one view be read as being to the effect that 'keeping the person in hospital means keeping alive; letting the person out of the hospital means letting them die.'
[15] Albeit that, by definition, if the harm is to a person who is still alive, there may be an argument to be had as to whether such harm is a price worth paying to keep another alive.
[16] See, for instance, Nielsen, E., Padmanathan, P., & Knipe, D. (2016). Commit* to change? A call to end the publication of the phrase 'commit* suicide'. *Wellcome open research*, *1*.