

## EDITORIAL

This issue of the IJMHL is the third since the journal was relaunched in 2016. Since that time, the journal has received a steady stream of excellent submissions on mental health and/or mental capacity law from authors in various jurisdictions.

The intersection of mental health and mental capacity laws is at the heart of Emma Cave and Jacinta Tan's article, 'Severe and Enduring Anorexia Nervosa in the Court of Protection in England and Wales'. The article outlines the clinical uncertainties associated with prognosis and treatment of severe and enduring Anorexia Nervosa (SEAN). In five recent cases, the Court of Protection in England and Wales has been asked to consider the capacity and best interests of patients with severe and enduring Anorexia Nervosa. The article recommends that the courts adopt a patient-centred rather than clinician-centred approach to framing the decision that is subject to a capacity assessment. Where a patient with Anorexia Nervosa lacks capacity, reliance on their stated treatment preferences should be balanced with their views and hopes regarding prognosis. The value of different treatment options should be assessed in this light. The article warns that, given the clinical and ethical uncertainties regarding prognosis and appropriateness of treatment, there are dangers in relying on the same court-appointed expert in all cases. Kris Gledhill was the editor for this article.

The effects of the UN Convention on the Rights of Persons with Disabilities continue to extend across several jurisdictions. Katerina Kazou considers the definition of disability in the CRPD in her article, 'Analysing the Definition of Disability in the UN Convention on the Rights of Persons with Disabilities: Is it Really Based on a "Social Model" Approach?' The article argues that the definition of disability in the CRPD is closer to the definition provided in WHO's International Classification of Functioning, Disability and Health (ICF) than it is to the 'social model' of disability. The ICF understands disability as the multi-dimensional and interactive experience of a wide range of difficulties in functioning. In particular, these difficulties include impairments, limitations in performing activities and restrictions in participating in life situations, and arise out of the complex interaction between health conditions, personal factors and barriers in the physical and social environment. Kazou believes there could be positive effects in associating the CRPD with the ICF, as it can avoid the criticism faced by the 'social model' for its limitations, especially for considering impairment as being entirely irrelevant to the experience of disability. At the same time, the valuable insights of the 'social model' regarding the disabling effect of social and environmental barriers can be retained, but without ignoring the relevance of impairment to the experience of disability or minimising the health needs of persons with disabilities.

In his article 'Negotiating Relationality: Mental Capacity as Narrative Congruence', David Gibson argues that the concept of capacity that emerges from the Mental Capacity Act (2005) is conceptually flawed and places practitioners in an impossible situation regarding its application. He believes that the continued support by the UK government and others for the Act strengthens the idea that the capacity/incapacity distinction is natural and that incapacity is an intrapsychic feature of an individual. The paper proposes an alternative model for understanding capacity and its assessment based on a narrative theory that recognises the role of the practitioner and identity negotiation. The paper includes three principles of a narrative theory of capacity assessment:

- i) Mental Capacity determinations are judgements arising from and sometimes relating to an individual's personal identity but always in a relational dynamic.
- ii) What is assessed in mental capacity determinations is the congruence between the narrative account of events or behaviours of the assessor and the assessed.
- iii) The impetus to assess capacity begins where alternative accounts that can lead to narrative conflict are shared with or identified by an assessor of capacity.

In his article, 'Some Continental European Perspectives on Safeguards in the Case of Deprivation of Liberty in Health and Social Care Settings', Walter Boente addresses a dearth of comparative academic literature on deprivation of liberty in health and care settings across Europe. His article reviews relevant laws in Germany, Switzerland, France, Austria and Spain. He notes that there is a trend to emphasise the role of the judge, or at least an independent person, but there is no consensus as to whether the judge should play a role in the admission or control process. The judge does not replace the *medical* experts, but is considered a neutral, independent expert in *supervising* the decision making process. Boente notes that the impression remains that the continental European systems are based on a historically founded, objective, or sometimes paternalistic, perspective on deprivation of liberty. There might be differences between national laws, for example in their use of private or public law mechanisms, regarding the appointment of a representative for the person concerned, or even on the amount of information which the person must receive, but the systems remain patchwork, taking the wrong starting point. One outcome is that continental legislation struggles to address the requirements of the CRPD.

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