



Welcome to the June 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the JCHR has questions for the Government about the delay to the LPS; anorexia and capacity, and Caesarean sections and P-centricity;

(2) In the Property and Affairs Report: Hegel and testamentary capacity, and cross-border management of personal injury settlements;

(3) In the Practice and Procedure Report: a freeze on freezing injunctions, and ss.48 and 49 MCA under the spotlight;

(4) In the Wider Context Report: Mental Health Act reform potential and pitfalls, an update to the Mental Health and Justice Capacity Guide, and food refusal in prison;

(5) In the Scotland Report: Issues with powers of attorney – an unprecedented tangle, the Powers of Attorney Bill and Implementation of the Scott Report.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the Mental Capacity Report.

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

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Reforming the Mental Health Act – Approaches to Improve Patient Choice: the Parliamentary Office of Science and Technology

Whilst we wait to learn what the next steps may be in relation to mental health reform in England & Wales, the Parliamentary Office of Science and Technology has published the most recent of its ‘POSTnotes’ on [Reforming the Mental Health Act – Approaches to Improve Patient Choice](#), summarising proposed reforms to the Mental Health Act (1983) to improve patient choice, highlighting relevant research evidence and stakeholder perspectives. Its key points include that:

- The Mental Health Act 1983 has been criticised as being overly restrictive, with inadequate scope for patient choice and autonomy.
- The Government’s Draft Mental Health Bill proposes reforms to improve patient choice. A joint parliamentary committee report on the draft Bill recommended further changes to enhance choice, including a statutory duty to offer patients advance choice documents. Reports to date suggest that advance care planning could offer some benefits, but uptake can be low.

- Proposals to replace the Nearest Relative who has certain powers under the Act, with a Nominated Person of the patient’s choosing, have been widely welcomed. There are questions about operationalisation and safeguarding.
- Alongside the reforms, the Government is piloting ‘culturally appropriate advocacy’, which preliminary findings suggest could help advocates better support patients from ethnic minority backgrounds.
- The draft Bill removes learning disabilities and autism as grounds for detention under Section 3 of the Act. Stakeholders have raised concerns about unintended diversion to more restrictive pathways, such as the criminal justice system. A range of stakeholders share the view that careful implementation is needed to maximise the benefits of proposed reforms.
- The Government has not announced when the Bill will be introduced.

We also take the opportunity to note here the report from Mind on [Our rights, our voices Young people’s views on fixing the Mental Health Act and inpatient care](#).

Professor Eldergill on Mental Health Reform

In his personal capacity, rather than a judge of the Court of Protection, Professor Anselm Eldergill has published a fascinating [briefing note](#) on the LPS and the draft Mental Health Bill, making the case – in relation to the latter – for a “small commission of experienced MHA practitioners to review the work that has been done and draft themselves a completely new Bill.”

Update to the Capacity Guide

The Capacity Guide – research-informed, multidisciplinary guidance on assessing and recording capacity – was an output of the Wellcome Funded Mental Health & Justice Project. It can be found [here](#), and has been updated to take account of recent case-law, as well as a recording tool (with thanks to James Codling of Cambridgeshire County Council).

Food refusal in prison

Alex has recorded an ‘in conversation with’ to [Donna Phillips](#), Head of Safeguarding at Spectrum Community Health CIC, about the challenges that arise where prisoners refuse food, and about her research leading to a [new toolkit](#) to help work through the dilemmas that arise.

Disagreements in the care of critically ill children: literature review and the Means Test Review

As part of its DHSC-commissioned review, the Nuffield Council on Bioethics has published a [literature review](#) written by Dr Kirsty Moreton, Associate Professor in Law, Birmingham Law School, University of Birmingham. As the executive summary identifies, the:

thematic review sought to examine the literature and evidence base between 2017-2023 relating to three questions. First, what are the causes of

disagreement in the care of critically-ill children in England? Second, what are the impacts of these disagreements on the child, their family, the healthcare professionals, the NHS and wider society? Third, what are the possible mechanisms for avoiding, recognising, managing and resolving disagreement? Eight possible causes of disagreement are identified, which have been grouped into internal, relational and external causes. Internal causes such as psychological responses, differences relating to religious beliefs and moral values, and expectations of medical science and the “good parent” are often manifested initially. These internal views can affect the relational interactions between healthcare professionals and families both in terms of communication, and behaviours. Breakdown of relational trust may then lead to external causes, such as families turning to the internet and social media or the involvement of third-party organisations. Finally, the growing recognition by families of the possibility of innovative treatments or care abroad can add to conflict.

[...]

Appropriate mechanisms for resolving disagreement can be matched with the severity of the dispute. Internal approaches are suitable for mild conflicts, with the literature outlining the merits of sensitive, well-timed communication and shared decision-making, situated within Conflict Management Frameworks including elements such as structured communication tools, managerial processes and psychologist involvement. Escalation to moderate disagreement may call for third-party intervention, but doubts are expressed in the literature of the effectiveness of the common approach of seeking expert second opinion. The use of Clinical

Ethics Committees is seen as more promising in bringing parties together, with even the potential for determinative decision-making, but a major reorientation of its role and remit would be required. Mediation has received sustained attention, with suggestions that its early use can be effective, although success may be limited where disagreements turn on religious beliefs or moral values. The strength of its voluntary nature is stressed, urging the avoidance of mandated participation. Legal resolution is generally needed in severe dispute and changes to the legal threshold for intervention from best interests to significant harm has received substantial attention, with strongly made arguments on both sides, but no clear consensus. Changes to the best interests test have also been advocated, along with alternative tests, and court structures. Whilst there is recognition of the problematic aspects of court proceedings, the value of a transparent and robust legal process is also recognised.

In respect of children, it is also relevant to note that as part of its response to the Means Test Review, the Government has committed to removing the means test for parents or those with parental responsibility facing withdrawal or denial of life-sustaining treatment for children under 18. The consultation document explains

257. There were 42 responses to this question: 36 (86%) agreed, one (2%) disagreed and five (12%) responded with maybe. This proposal was broadly supported in the consultation responses as it will positively impact individuals in a complex and stressful situation. However, some respondents, whilst in agreement with the proposal, did state that the policy should be extended to those with caring responsibility for adults facing withdrawal or withholding of life-sustaining treatment. Some

respondents added that the current means testing of parents in this situation is wrong in principle, as they are being treated in a different way to parents in special Children Act proceedings – therefore the proposal to remove this means testing was welcomed. Respondents also believed that this approach would reduce delays in the appointment of legal representation and therefore reduce delays in decision making for the child. Government response

258. These proceedings can be enormously difficult for all concerned and require an understanding of complex medical and legal arguments and private representation can therefore be expensive. Parents and those with parental responsibility must currently undergo a means test for legally aided representation and may therefore find themselves ineligible for legal aid on financial grounds. They are therefore often faced with trying to represent themselves, which may be very difficult considering both the complexity and the highly emotive context of these matters.

259. We acknowledge the assertion that the policy should be extended to those with caring responsibility for adults facing withdrawal or withholding of life-sustaining treatment, but our position acknowledges the significant importance of the welfare of the child, and of the consequences to their parents. We believe that legal representation must be available to ensure their position can be properly represented and we will implement this measure.

These changes will be brought about in 'Phase 1' of the statutory changes; the precise timing of this is not entirely clear, but it would appear that this is to be within the next 2 years.

The removal of means testing for parents / those with parental responsibility in life-sustaining treatment cases involving children is very welcome, not least as a step towards limiting the involvement of those with strong agendas 'supporting' desperate parents. Many of the themes in the literature review will resonate strongly with those involved in disputes relating to adults with impaired decision-making capacity – it might be thought that the arguments in relation to funding apply equally to those with caring responsibilities for adults.

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Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).



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Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click [here](#).



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Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, ICBs and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click [here](#).



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



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



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

Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Parishil Patel KC is speaking on Safeguarding Protected Parties from financial and relationship abuse at Irwin Mitchell's national Court of Protection conference on 29 June 2023 in Birmingham. For more details, and to book your free ticket, see [here](#).

Alex is leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book (with an early bird price available until 31 July 2023), see [here](#).

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

Advertising conferences and training events

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

Our next edition will be out in July. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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