



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

(1) In the Health, Welfare and Deprivation of Liberty Report: an Anglo-Welsh LPS update and cases covering contingency planning, executive capacity, decision-specificity and restraining the detained patient;

(2) In the Property and Affairs Report: Hayden J takes on common LPA problems, an MOJ toolkit and a rather startling assertion about the position of professional solicitor deputies;

(3) In the Practice and Procedure Report: habitual residence under the spotlight, contempt and the Court of Appeal and the most recent Court of Protection statistics;

(4) In the Wider Context Report: the LGSCO ombudsman and deprivation of liberty, Article 2 and DoLs, visiting in care homes, and a report from our new Irish correspondents;

(5) In the Scotland Report: AWI masterclasses and the Scottish Government respondents to 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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2,612 at AWI Masterclass

The Mental Welfare Commission for Scotland, and NHS Education for Scotland, working jointly identified an unexpectedly large need for training in the basic requirements of the Adults with Incapacity (Scotland) Act 2000, in the context of the current human rights landscape. They organised a “Masterclass” on 23rd February 2023, which I conducted. A video recording of the event, with associated papers, is now available via the [Turas Once for Scotland: Adults with Incapacity](#) page. If you need to register for a Turas account, you can do so [here](#).

To the surprise of all concerned, the event attracted a registered attendance of 2,612, of whom the great majority were directly involved in “frontline” provision of social care (approximately two thirds of the total) or healthcare (approximately one third of the total). The total attendance is understood to be unprecedented. The size of the attendance, and the nature of the 54 questions entered in the chatbox during the event, appear together to have demonstrated two things. The first is the huge, and apparently unmet, demand, mostly by frontline practitioners, for basic information about the 2000 Act and its application. The second is the very limited, and at times not entirely accurate, knowledge which such staff already have. Those factors, and positive responses received to the Masterclass, have prompted Mental Welfare Commission and

NHS Education for Scotland to arrange a follow-up event (“Masterclass 2”) which has been scheduled for Thursday 24th August 2023. The “flyer” for that event is available [here](#).

Adrian D Ward

ELI project on advance choices

We have previously reported that following upon issue of the final report of a Law Society of Scotland project on advance choices, and medical decision-making in intensive care situations, there has been considerable international interest in the topic of advance choices, and European Law Institute established a project to draft model laws for use across Europe on advance choices, with relevant supporting materials. The project commenced on 1st January 2023 and is scheduled to run for 30 months, including publication and initial dissemination of a final report. ELI’s normal procedure is to hold a “kick-off webinar”. For the advance choices project, the kick-off webinar took place online on 15th May 2023. A video recording of the event is now available and can be accessed [here](#).

Adrian D Ward

Scottish Government Response to the Scottish Mental Health Law Review (1)

The Scottish Government published its [response](#) to the Scottish Mental Health Law Review (Scott Review) recommendations on 28th June 2023.

This broadly supports the Scott Review recommendations, endorsing their human rights-based approach, and commits to a wide-ranging mental health and capacity reform programme with the high-level priorities of:

- Adults with Incapacity law reform
- Supported Decision-Making
- Mental Health law reform
- Human Rights Enablement
- Enhancing carers' rights and role
- Reducing coercion across the system
- Strengthening accountability, and scrutiny in the mental health system

It also provides some general initial timescales for delivery under these seven priorities grouped under 2023-26, 2026-29 and 2029+.

As the response states this is a high-level response to the Scott Review recommendations the reform programme will take place alongside other reforms such as the proposed creation of a National Care Service, incorporation of international human rights treaties into devolved law in Scotland and Learning Disability, Autism and Neurodiversity legislation, and also the Scottish Government's Mental Health and Wellbeing Strategy (which does not appear to have a timespan) which was published on 29th June. The precise detail and how closely the reform programme follows and gives effect to the Scott Review recommendations will thus become clearer over time. It is, however, imperative that reform momentum is not lost.

Jill Stavert

Scottish Government Response to the Scottish Mental Health Law Review (2)

Alex would also observe that the summary of the 'listening exercises' conducted by the Scottish Government and recorded in the response provides an interesting snapshot of areas of consensus / disagreement in this area, of interest both in Scotland, but also more broadly:

To shape this high-level response to the SMHLR, we met with a range of stakeholders, including those representing lived and learned experience of the system. These meetings were designed to hear views on the final report, its recommendations and identify priorities for change. We also attended wider stakeholder meetings and network events to hear people's views about the SMHLR final report.

In general, we heard strong support for the ambition and overall direction of travel set out by the SMHLR and a desire to see progress towards this, together with meaningful lived experience involvement. Stakeholders noted a particular need for AWI and guardianship reform. This was almost universally identified as the priority for legislative reform, and for embedding of human rights-based approaches. There was also recognition of the need to strengthen accountability across the system with concerns about the perceived fragmentation of the current approach to regulation and scrutiny of services. There was also agreement on the importance of supporting carers' role and rights, including the potential for families, friends and wider support networks to enhance our approach to early intervention and prevention and to whilst balancing with the rights of the individual and their autonomy. In addition to these points, a broader range of views were also expressed on some

of the more specific technical and policy reforms proposed in the final report.

A number of people with experience of caring for or supporting people with dementia and other similar conditions and human rights organisations, highlighted concerns about the way that the Adults with Incapacity Act currently operates. The absence of a Deprivation of Liberty framework within Scots law was highlighted as a particular concern, with many stakeholders wanting action to progress recommendations in these areas as a priority.

People with a learning disability, autistic people and many organisations who advocate for or on behalf of them, raised concerns that the SMHLR recommendations would mean that people with a learning disability or autistic people could still be subject to detention and non-consensual care and treatment under reformed mental health law. This is because the Review recommends their continued inclusion within the group of people who the Mental Health Act would apply to. There was strong support amongst these groups for the removal of learning disability and autism from any definition that replaces 'mental disorder' as part of any future reform to ensure that they are no longer within the scope of the Mental Health Act.

We recognise these concerns and note that the SMHLR has taken a different approach on this issue from that of the Rome Review which preceded it. As a result, there was a strong desire for the recommendations of the Rome Review to be considered alongside the SMHLR recommendations and for Scottish Government to work with people with lived as well as learned experience of the system.

In contrast, others supported the SMHLR recommendations to change the purpose and scope of the law and they supported the proposed new approach to human rights. They felt this would create a more effective human rights basis for our legislation, in line with the UNCRPD. It was also unclear what the implications of alternative options would be or what legislative framework people with a learning disability or autistic people who require care and support would prefer or find most effective for upholding their rights in the future.

Some of those with lived experience felt that the SMHLR did not go far enough in recommending the end to all forms of non-consensual or compulsory care and treatment. They felt that this was not in line with human rights standards. In contrast, others with lived experience felt that there are times where non-consensual care and treatment can be necessary and that the recommendations would help to strengthen safeguards, whilst retaining provisions to provide non-consensual care and treatment where this was deemed to be necessary or beneficial for the safety of themselves or others.

There were also questions about the level of investment required to fully deliver on the ambition set out in the Review, at a time when resources are constrained.

Concerns were additionally raised about the implications of the recommendations for the diverse workforces who deliver our mental health and social care support and services. It was recognised that many of the proposed changes would place additional pressure or demands on their capacity or require further training, support, and skills development to deliver effectively. People were

particularly concerned about how this would be achieved in practice and what the resource implications would be.

We also heard concerns about introducing significant further change at a time when there is already wider transformation underway across our health and social care systems. It was felt that some of the proposals and a focus on further reform at this time could increase pressure on service delivery. Stakeholders were also keen to understand how the Review recommendations would fit within developments across the wider health and social care landscape, some of which have been noted earlier, and sought assurance that appropriate links will be made across government to ensure coherent and well-managed change.

Equally, stakeholders recognised that a long-term programme of reform will be needed, and that legislative reform will necessarily take time. There was support for a staged approach, working in partnership. There were also concerns about the potential for unnecessary delay in some areas and calls to make progress in the shorter term on areas of reform that have broad stakeholder support and do not require substantial change to the law.

We will build on this early engagement and continue to work with stakeholders to scope and agree a way forward. What is clear is that there are areas where change and reform is more pressing, coupled with a strong consensus to see early progress made. While other areas need further work and detailed consideration before reaching a decision about whether, or how, to proceed.

Alex Ruck Keene

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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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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click [here](#).



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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



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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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Conferences

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

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 September. 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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