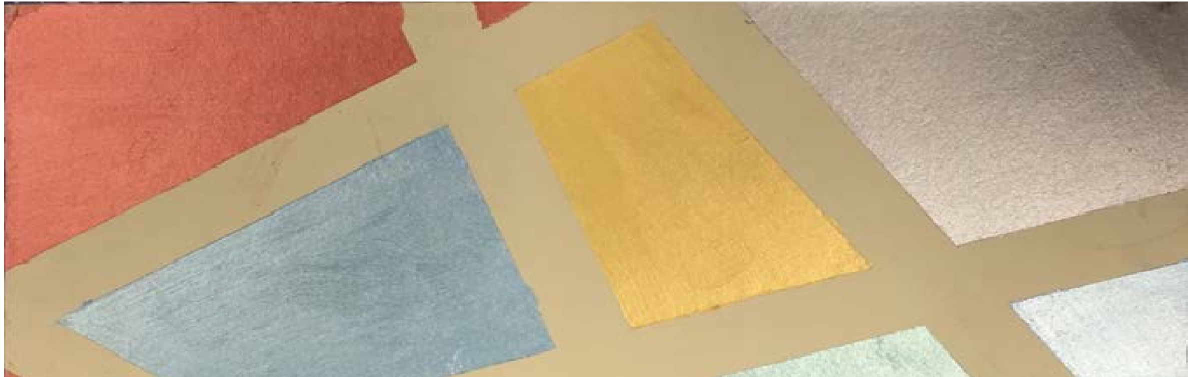
39 Essex CHAMBERS

MENTAL CAPACITY REPORT:
THE WIDER CONTEXT
July 2023 | Issue 133



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.

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Stephanie David
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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.

Contents

The LGSCO and deprivation of liberty 2
OPG guidance about vaccination 5
Article 2 and deprivation of liberty 5
Visiting in care homes, hospitals and hospices – consultation on proposed new legislation in England 7
Updated guidance from the Law Society 8
Safe Care At Home Review 8
A striking asymmetry – adolescents choosing and being responsible 10
Research corner 11
EU proposals for improvements in cross-border protection of adults 11
Deprivation of liberty applications relating to children: what is actually happening? 12
IRELAND 14

The LGSCO and deprivation of liberty

The Local Government and Social Care Ombudsman ('LGSCO') decision in Surrey County Council (22 014 808) (23 March 2023) considered significant delays in the processing of DOLS applications. The LGSCO noted that it had become aware of these delays in the process of investigating another complaint, and 'consider[ed] that others may be affected by these significant delays.'

The LGSCO also considered figures provided by NHS Digital regarding the Council's handling of DOLS requests in 2021-2022. The decision stated:

> *18. Information about Councils' handling of DoLS requests is contained in NHS Digital figures for England. These figures show that Surrey County Council had 5700 outstanding DoLS requests on 31 March 2022. This is the highest backlog in England.*
>
> *19. The Council's backlog increased by 600 during 2021/22.*
>
> *20. The NHS Digital figures show the mean duration to complete a DoLS assessment in England is 154 days. However, the mean duration for the Council to complete a DoLS assessment is 345 days.*
>
> *21. The Council completed only 7.6% of the standard requests it received within 21 days. In England the average number of standard requests completed within 21 days is 20.4%.*
>
> *22. During 2021/22 the Council assessed and made decisions on 3700 requests. Of these decisions the Council:*
>
> - *granted 840 requests*

- *did not grant 1320 requests because the person had died.*
- *did not grant 1400 a further requests because of a change in the person's circumstances, such as a change in care home. A new DoLS request would need to be submitted.*

The decision stated that it understood that many local authorities were "*struggling with the number of DoLS requests they receive and the lack of resources to address this. The Council appears to be following ADASS advice on prioritising cases. However, the statutory timescales as set out in paragraph 10 still apply, and planned new legislation has not been introduced that may change these requirements*" (paragraph 23). The LGSCO considered that the Council was "*failing to issue DoLs authorisations within the statutory timescales and in many cases the delay is so significant that the person has moved to another care or nursing home, or has died without the Council's DoLS authorization*" (paragraph 24). The LGSCO found that "*there may be many people who, because of the Council's delays in assessing DoLS requests, have had restrictions placed on them that were not the least restrictive options, had they been properly and promptly assessed*."

The Council agreed to provide an action plan within three months on how it would address these delays and reduce the backlog.

Wirral Metropolitan Borough Council (22 010 680) was a complaint was brought by Ms B, on behalf of her mother, Mrs C, who complained that the Council had failed to take a proper best interests decision or facilitate a move from a residential care home back to the family home before Mrs C's death in April 2021. Ms B further complained that Mrs C's deprivation of liberty in the care home had not been authorised, and the Council had not explained the law to her.

Mrs C had been diagnosed with Alzheimer's disease. She was admitted to a care home in December 2019 at a time when her husband had been admitted to nursing care, and both the social workers and Ms B felt that Mrs C was not safe to live on her own. The decision describes this move as an 'emergency short-term admission to care', and states that Mrs C was found to lack capacity to make decisions as to her care. An application was made for a DOLS authorisation, which was considered a 'medium priority.'

Ms B had consistently stated her view that Mr and Mrs C should return home with a package of care. A 'trial' return home for Mrs C was conducted in January 2020, with Ms B caring for her. This trial ended early due to adaptations being made to the home (the installation of a wet room). Ms B was planning to leave employment to care for her parents if her partner was able to secure employment.

Mrs C's husband died in February 2020. Preliminary discussions regarding funding a direct payment for Mrs C did not progress (it appears likely due to the first wave of the pandemic), and the Council arranged for Mrs C to live in a care home on a long-term basis. Ms B continued to wish for Mrs C to return home, but a meeting to discuss this was not convened until December 2020. The social worker then stopped the meeting when Ms B brought a friend to support her.

The Council then carried out what appeared to be the fourth capacity assessment undertaken in a year, which indicated that Mrs C was opposed to returning home. Mrs C's deprivation of liberty was not authorised until February 2021.

Ms B had proposed making an application to the Court of Protection to determine Mrs C's residence. In the winter of 2021, the Council "*advised Ms B that she would need to become Ms*

B's Deputy before Mrs C could move to the family home. The Council record says it would then take a best interest decision and "wrap around care and support should be planned for a safe return home for [Mrs C] if [Ms B's] powers are granted [..] by COP [Court of Protection]"."

Some progress was made in March 2021, with a new social worker being appointed, who carried out a home visit and recommended an OT assessment. Mrs C sadly became ill in March 2021 and died in April 2021.

The LGSCO considered that the Council had committed fault for several reasons:

- The Council failed to authorise Mrs C's deprivation of liberty for 15 months. This was a significant delay beyond the 21-day limit.
- Council documentation had wrongly recorded that a standard authorisation was in place in April 2020.
- "*[T]he Council could have done more to explain to Ms B what the Deprivation of Liberty safeguards are and their use; the relevance of the Mental Capacity Act; what is meant by 'best interest' decision making and the role of the Court of Protection. These are not familiar concepts to those who do not work within social care. And even in that environment, confusion sometimes arises.*"
- The Council gave inaccurate advice that Mrs C's potential move home could not occur unless Ms B were her deputy, and "*failed to distinguish between what was legally permissible and its own views towards the move. If it considered such a move was not in Mrs C's best interests, then it could have referred the matter to the Court of Protection, possibly to run alongside Ms B's application to become Mrs C's deputy. But it was not the case that one had to depend on the other.*"
- The LGSCO had concerns that the Council's view of the situation may have "*unreasonably influenced the mental capacity assessment in December 2020. The record for this is conspicuously less thorough than for other similar assessments. This assessment found Mrs C wanted to remain in the care home. But that went against the grain of all other mental capacity assessments which found Mrs C did not have capacity to decide where she should live or where her care needs should be met.*"
- The LGSCO found that injustice arose from the faults above, causing avoidable distress to Ms B. She was to be paid £500 as a symbolic payment to reflect the unnecessary time and trouble caused by the failings above.

The Council also agreed to take steps to introduce a procedure so it can identify when it has failed to meet the 21-day limit to consider a request for a DOLS authorisation; remind social work staff "*of the importance of giving clear information to relatives on the Deprivation of Liberty safeguards; Mental Capacity Act assessments; the role of the Court of Protection and best interest decision making*" and review written materials given to families.

However, the LGSCO was "*not persuaded the overall trajectory of this case would have been different if* [the faults] *had not occurred*" because he was "*not persuaded that at any point Ms B was in a position to receive Mrs C back at the family home, with a package of care in place (to include the support needed from a PA). I accept this was Ms B's aspiration and she undertook efforts to make that aspiration a reality. But it is clear from*

the record the COVID-19 pandemic caused a significant interruption in Ms B's plans. So, it was not until December 2020 when she began to push the Council to support a move for Mrs C back to the family home. The time period to put in place arrangements for Mrs C's return, before she died, was therefore short – a little over three months. For it to have happened, the Council would have needed to satisfy itself the family home was suitably adapted for Mrs C; that there was 24-hour care on hand to meet her needs and that such a move was in her best interests. As Ms B herself noted these arrangements were not ones that could be rushed.' While more could have been done to progress matters and issues of fault arose, the LGSCO did 'not consider these factors delayed the progress of Ms B's request to any significant degree. I also find there is much evidence from both before and after December 2020 that the Council never closed its mind to the idea of Mrs C returning home. But as I have said above, I think there was simply too much to be done that could have enabled the move to happen before April 2021. A view that must also take account of Mrs C's poor health in March 2021 which would have delayed a move.' The LGSCO did consider that greater speed in authorising Mrs C's deprivation of liberty 'may have helped focus the Council's mind sooner on the steps that would be needed if Mrs C were to return home. But it would not have changed the chronology of those events in Ms B's control which were fundamental in making any move happen. Nor would it have stopped the disrupting influence of the pandemic."

The LGSCO did not find fault on the part of the care provider in restricting visits during the pandemic, though considered that it was disappointing '*that no more record keeping has been provided to show how the Care Provider sought to balance these competing pressures at the time. This is especially in the light of it recording Mrs C's distress at window visits.*

Comment

Delays in authorising deprivations of liberty have been a repeated theme in LGSCO decisions (see, e.g., its findings in relation to severe and systemic delays in Staffordshire, including failing to consider many applications at all, delays in assessments in Kent which separated an elderly couple and a recent finding against the London Borough of Sutton). In these judgments, the delays in authorisations were striking, and both reveal systemic backlogs which appear to be endemic. We note the NHS England findings which make clear that the average processing time across the country is more than seven times the 21-day limit cited by LGSCO. It appears likely that many more local authorities will find themselves subject to decisions of this nature for so long as the severe backlogs persist.

OPG guidance about vaccination

The OPG has issued helpful guidance for health and welfare attorneys and deputies about their role in vaccination (both for COVID and more generally), including guidance about how to make a best interests decision in the event that the person lacks capacity to consent to the vaccination. It highlights the circumstances under which a disagreement about best interests will trigger an application to court, serving as an important reminder that those working with attorneys and deputies do need to keep being professionally curious about whether the steps that the attorney / deputy are in the best interests of P.

Article 2 and deprivation of liberty

R (Maguire) v His Majesty's Senior Coroner for Blackpool & Fylde and another [2023] UKSC 20 (Supreme Court (Sales, Reed, Lloyd-Jones, Rose, Stephens SCJJ)

Best interests – medical treatment – practice and

procedure (Court of Protection) – other

Summary[1]

Jackie Maguire lacked capacity to make relevant decisions and was subject to a standard DoLS authorisation in a care home. Weeks before her death, she began to experience symptoms of a sore throat, diarrhoea, vomiting, and a raised temperature. On 21 February 2017 her symptoms worsened, and she suffered a fit. Care home staff called an ambulance but she refused to go to hospital. Paramedics obtained out-of-hours advice from a GP who advised that, while it was desirable for her to attend hospital, her condition was not so serious that they should override her wishes and force her to go. The following morning she collapsed again. Paramedics used light physical restraint and took her to hospital in her best interests where, shortly after admission, she suffered a fatal cardiac arrest. A post-mortem revealed a perforated stomach ulcer resulting in peritonitis.

The central issue was whether Article 2 ECHR required an "expanded" or standard conclusion for the purposes of s.5(2) Coroners and Justice Act 2009. The standard version would be confined to how, when and where she died whereas an expanded conclusion involves a commentary about the circumstances in which Jackie came by her death. This is required where the enhanced procedural obligation applies.

The Supreme Court noted that there are three types of positive procedural obligations:

1. Basic: to check whether there might be any question of a potential breach of a person's right to life under Article 2, State authorities should take some steps to establish whether the cause of death is from natural causes.
2. Enhanced: in particular contexts, a State may be required to take further steps to investigate possible breaches of the Article 2 substantive obligations to ensure appropriate accountability and redress and, as appropriate, to punish persons responsible for the death.
3. Redress: in certain other cases where there is no relevant compelling reason giving rise to an enhanced procedural obligation, but there is still a possibility that the substantive obligations in Article 2 have been breached, there is an obligation to provide means by which a person complaining of such possible breaches can make that complaint, have it investigated or obtain redress.

Article 2 provides two types of positive substantive obligations which, on the facts of this particular case, resulted in the following conclusions (the numbers in square brackets being references to numbers in the judgment).

1. The systems duty: to have appropriate legal regimes and administrative systems in place to provide general protection for the lives of citizens and persons in its territory. In a healthcare context, only rarely will this be breached: [145]; the same is true in a care home context: [147]. In this case, the systems in place at the care home were capable of being operated in a way which would ensure that a proper standard of care was provided to residents, even though there may have been individual lapses in putting them into

[1] Note, Alex, Tor and Nicola having been involved in the case, none of them have contributed to this summary. Jackie Maguire is referred to by her first name here – and in the Supreme Court judgment – at the request of her family. We would otherwise have called her "Ms Maguire."

effect: [146]; [156]; [165]. Whilst criticism could be made of people's individual performances, there was no failure of the systems duty: [153]; [155]; [184].

2. The operational duty: to take operational steps to protect a specific person or persons when on notice that they are subject to a risk to life of a particularly clear and pressing kind.

   (a) *Care homes*: When an individual is placed in a care home, a nursing home or a hospital, the State does not assume responsibility for all aspects of their physical health; it is not the guarantor of adequate healthcare in all respects: [190]. The focus must be on the specific risks to Jackie's health of which the authorities knew or ought to have known: [192]. The operational duty applies in a graduated way depending on their perception of the risk to Jackie: [199]. The care home's responsibility was to look after Jackie on behalf of the State in substitution for her family. Their task was to ensure that she could access the healthcare which is available to the population generally in the same way that a family could secure access for a vulnerable member [199] and this is what the care home staff sought to do: [200]. There was therefore no arguable breach of the operational duty by the care home: [204].

   (b) *Healthcare providers:* When assessing whether the operational duty arose, it is necessary to take into account a range of relevant factors, including the desirability of fostering Jackie's sense of personal autonomy and a sense of trust between her and her carers, by respecting her wishes where possible: [57]-[60]; [205]. None of the healthcare professionals involved was on notice that Jackie's life was in danger on 21 February 2017 and the paramedics gave proper consideration to the question of whether she ought to be removed forcibly to hospital. They made an assessment which was reasonable in the circumstances, that the risk to her was not so great as to make that appropriate: [208]. As a result, there was no arguable breach of the operational duty by any of the healthcare providers: [209].

Comment

The judgment provides a useful summary of the various procedural and substantive duties under Article 2. In relation to the systems duty, it illustrates the importance of the CQC's regulatory role which, shortly after Jackie's death, had inspected the care home and was satisfied with the systems in place and standard of care. As to the operational duty, the judgment recognises that this is not limited to prisons and hospital settings and therefore could be triggered in care homes. But, crucially, actual or constructive knowledge of the nature and degree of the risk to the particular person's life is key which, on these facts, did not trigger the duty.

Visiting in care homes, hospitals and hospices – consultation on proposed new legislation in England

The Department of Health and Social Care is consulting (with a closing date of 16 August 2023) so as to obtain "*views on introducing secondary legislation to protect visiting as a fundamental standard across CQC-registered settings so that no one is denied reasonable access to visitors while they are resident in a care home, or a patient in hospital or a hospice. This*

includes accompanying people to hospital appointments (outpatients or diagnostic visits)."

The consultation document can be found here, and the consultation response form here. For queries, email visiting@dhsc.gov.uk.

In terms of formulating responses, it may be of assistance to some to note that the Joint Committee on Human Rights made the following recommendation in its report published in July 2022 on protecting human rights in care settings (full disclosure, Alex was the specialist adviser to the Committee for this inquiry):

> *81. We still do not believe that there are sufficient measures in place to ensure adequate respect for the right to private and family life (Article 8 ECHR) in relation to care users and visiting arrangements in care settings.*
>
> *82. We remain concerned that in England, non-statutory guidance that intends to restrict visiting does not adequately meet the criteria of "in accordance with the law" that is required for any interferences with human rights. Moreover, given the variable application of the guidance, it also seems to be failing to ensure adequate positive protection for the right to family and private life. Even if every care setting now complied with the guidance seeking to facilitate visiting, stronger assurances would be needed to adequately protect the rights of care users and their loved ones against future improper interference.*
>
> *83. The Government must introduce legislation to secure to care users the right to nominate one or more individuals to visit and to provide support or care in all circumstances, subject to the same infection prevention and control rules as care staff.*
>
> *84. The Government must legislate to give the CQC the power to require care settings to inform them of any changes to their visiting status, and to report live data on levels of visiting and restrictions. The CQC must make compliance with visiting restrictions a key consideration when undertaking its regulatory and monitoring roles.*

Updated guidance from the Law Society

The Law Society has produced updated guidance for solicitors working with clients who may lack capacity to give instructions.[2] It helpfully sets out the relevant details in the context of making a will or lifetime gift and conducting civil proceedings, with guidance on what to do if capacity is questionable. Separate updated guidance has also been provided for those advising clients who may be at risk of financial abuse, with practical steps to take, many of which will assist other professionals, such as social workers, who face similar dilemmas.

Safe Care At Home Review

During the passage of the Domestic Abuse Act 2021, concerning evidence was presented by Peers and the deaf and disability sector on abuse against people receiving care in their own homes. In response, the government decided to review the existing protections and support for adults with care and support needs who are at risk of, or experiencing, abuse in their own homes by people providing their care. The Safe Care at Home Review was jointly led by the Home Office and Department of Health and Social Care, and was published on 12 June 2023. It applies only

[2] Full disclosure, Alex was involved in both sets of guidance discussed here.

to England, as health and social care is a devolved matter.

The 86 page review is a detailed and thorough analysis, highlighting in particular that:

- *our understanding of the prevalence and nature of abuse in care relationships is limited. Research in this area can often focus on specific subsets of groups, such as those with disabilities or older people. This evidence may not be generally applicable to all adults receiving care in their own homes. For example, while NHS digital data on safeguarding adults collect data from local authorities on the scale of safeguarding activities, this data cannot be applied as a prevalence measure as not all cases of abuse will be reported.*

- *Based on the evidence collected, the review identified three key themes as areas where improvements should be made, underpinned by eight key findings. The review proposes a set of actions for government to take forward in response to these findings – and, perhaps importantly – each set of findings is accompanied by specific actions to which DHSC and Home Office have committed themselves.*

- *One finding of note is that "Frontline professionals often lack the necessary tools and resources to fully protect and support people with care and support needs who are, or are at risk of being, abused in their own home by the person providing their care," and one action of note is that "DHSC will review any new and relevant evidence on powers of entry for social workers since this issue was last considered by government during the passage of the Domestic Abuse Act 2021. This should include Safeguarding Adult Reviews in England and the use of equivalent powers in Scotland and Wales."*

Specifically in relation to matters mental capacity related, the Review noted (footnotes omitted):

> *108. Understanding the implementation of the Mental Capacity Act 2005 and its interaction with the Care Act 2014, was especially highlighted by social work and policing practitioners as an area where significant improvements are needed. For example, stakeholders reflected that in some cases, section 42 enquiries under the Care Act 2014 may not be investigated fully if there is any question about the victim's mental capacity. Existing guidance and resources available to support the police include 'Achieving Best Evidence' which is designed to ensure that victims are heard no matter their needs. Despite this, practitioners noted that the police would sometimes halt investigations when there was a question of someone lacking capacity. This was because police officers felt that they would not be able to gather enough evidence to pursue these sorts of cases in court.*
>
> *109. DHSC have supported SCIE, as a sector-led improvement partner, in the development of online training materials regarding the Mental Capacity Act 2005, to increase understanding of the application of the Act among social care professionals. However, some stakeholders emphasised that training on the Act alone will not address all issues with its implementation. Knowledge and understanding of executive functioning, referring to the ability of an individual to understand the relevant information and give effect to their decision, has developed since the inception of the Act. The University of Bristol noted in their SAR analysis on self-neglect, that practitioners lack confidence in carrying out capacity assessments or determining when they would need to do them. Someone may 'seem' able to make a decision on a*

> *specific issue at a given time and place, such as accepting they 'agreed' to gift someone providing care with their assets, but may not be able to understand the consequences of this decision in the longer term. Safeguarding leads reported that continual updating of training on mental capacity aimed at frontline professionals is required, but that it is challenging to get it right despite their best efforts.*
>
> *110. Practitioners including police and social workers expressed concerns about abuse of people with care and support needs who 'do have capacity' to make all relevant decisions but are targeted by people ostensibly providing care. Stakeholders shared the example of individuals with disabilities being 'groomed' to provide sexual favours or financial payments. Policing and social work stakeholders highlighted that the combination of limited resources and the complexities of these cases make them difficult to respond to.*

Despite the depth of the Report, it is important to note that it does not cover the situation where the abuse (whether physical, emotional, financial or otherwise) is not committed by a person in a 'care' relationship. The problem of 'grooming' identified immediately above occurs frequently outside such relationships – and in situations which do not fall within those caught by the Domestic Abuse Act. At the risk of sounding like a stuck record, Alex would note that, were the Law Commission to be able to undertake a 'Vulnerable Adults' project as he has sought for some time, it would be able to look at all aspects of the law here, rather than having to salami-slice things according to relationship.

A striking asymmetry – adolescents choosing and being responsible

In Re ZA [2023] EWCA Crim 596, the Court of Appeal set out a number of important 'learning points' in relation to the sentencing of children and young people. We flag it because of one paragraph:

> *52. It has been recognised for some time that the brains of young people are still developing up to the age of 25, particularly in the areas of the frontal cortex and hippocampus. These areas are the seat of emotional control, restraint, awareness of risk and the ability to appreciate the consequences of one's own and others' actions; in short, the processes of thought engaged in by, and the hallmark of, mature and responsible adults. It is also known that adverse childhood experiences, educational difficulties and mental health issues negatively affect the development of those adult thought processes. Accordingly very particular considerations apply to sentencing children and young people who commit offences. It is categorically wrong to set about the sentencing of children and young people as if they are "mini-adults". An entirely different approach is required.*

We do not disagree, but venture to note that the observations sit at a striking tangent to the analysis of capacity for purpose of the MCA 2005. On one view, it could almost be said on the basis of this passage that the condition of being under 25 might, itself, be an impairment or disturbance in the functioning in the mind or brain…

Quite what capacity – and / or competence – is supposed to look like in relation to those under 18 was a theme of the Independent Mental Health Act review, and was picked up by the Joint Committee which scrutinised the draft Bill (see the report at paragraphs 221-222). We do hope that it is possible for the Law Commission in its

recently announced project to review the law relating to social care for disabled children finally to grasp this nettle.

Research corner

Alex has done an 'in conversation with' Dr Kevin Ariyo about the research that he led (as part of the as part of the Mental Health & Justice Project) into interpersonal influence and decision-making capacity, focusing on the way in which this issue has played out in the courts, and asking what the research might tell us about how we can think better about this area. The article Alex and Kevin discuss was led on by Kevin with Dr Nuala Kane, Dr Gareth Owen and Alex, and was published in June 2023 in the Medical Law Review: Interpersonal influences on decision-making capacity: a content analysis of court judgments. The survey of professionals Kevin mentions towards the start of the discussion can be found here.

Many may find nuggets of useful information in Baddeley, A, Brewin, CR, Davies, GM, Kopelmann, MD & MacQueen, HL 2023, 'Legal aspects of memory: A report issued by the Psychology and Law Sections of the British Academy', *Journal of the British Academy*, vol. 11, pp. 95-97 with annex. The chapters cover (1) a review of memory; (2) memory through the lifespan; (3) witness testimony; (4) eyewitness identification; (5) conditions that may impair memory (6) suspects' testimony; and (7) the memory expert in court (the last including 'mental capacity and fitness to plead).

EU proposals for improvements in cross-border protection of adults

On 31 May 2023, the European Commission set out two proposals to seek to secure better cross-border cooperation in relation to adults who are not in a position to protect their own interests. A proposed Regulation would introduce a streamlined set of rules that would apply within the EU. The rules, modelled on those contained in the 2000 Hague Convention on the International Protection of Adults, would govern, which court has jurisdiction, which law is applicable, under what conditions a foreign measure or foreign powers of representation should be given effect and how authorities can cooperate. The proposed regulation, going further than the 2000 Convention, also proposes a set of practical tools, such as:

- facilitating digital communication;
- introducing a European Certificate of Representation, which will make it easier for representatives to prove their powers in another Member State;
- establishing interconnected registers that will provide information on the existence of protection in another Member State;
- and promoting closer cooperation among authorities.

It should be noted that the proposed Regulation – as with the 2000 Convention – will not expressly cover advance decisions / advance choice documents save and to the extent that these contain directions to a specified representative. It is unclear whether this is an oversight or deliberate; either way, it is unfortunate given the increasing recognition of such tools as powerful methods to secure respect for the will and preferences of adults facing a potential loss of decision-making capacity.

Alongside the proposed Regulation, a proposed Council Decision provides for a uniform legal framework for protecting adults involving non-EU countries, by obliging all Member States to

become or remain parties to the 2000 Convention.

The proposal for a Regulation will still need to be discussed and adopted by the European Parliament and the Council. It would apply 18 months after its adoption and Member States would then have 4 years to make their communication channels electronic, and 5 years to create a register and interconnect it with registers of other Member States.

The proposal for a Council Decision is to be adopted by the Council after consultation with the European Parliament. Member States that are not yet party to the 2000 Convention will have 2 years to comply with the Council Decision and join the Convention.

Whilst the proposed Regulation will not directly affect the UK, given Brexit, the fact that there is a likelihood that within the medium term the majority of countries with whom there is regular cross-border 'traffic' in relation to adults requiring protection will be signatories to the 2000 Convention will only increase the pressure on the UK to ratify the Convention in respect of England, Wales & Northern Ireland in addition to Scotland.

Deprivation of liberty applications relating to children: what is actually happening?

[In an extremely helpful, but depressing, report published on 22 June 2023, the Nuffield Family Justice Observatory analysed applications received during the first two months of the national deprivation of liberty court pilot (July and August 2022), focusing on the legal orders subsequently made, with cases tracked up to 31 December 2022.[3] For the avoidance of the doubt that we see manifest everywhere, the national DoL court has nothing to do with the Deprivation of Liberty Safeguards regime provided for in the Mental Capacity Act 2005. The 'DoLS' regime applies solely to adults over the age of 18 in care homes and hospitals. The National DoL court is nothing other than an (important) administrative mechanism for the listing of cases before the High Court exercising its inherent jurisdiction to authorise the deprivation of liberty of those under 18.

It is not sensibly possible to improve on the summary of the report prepared by the NFJO themselves, as follows]:

Nuffield FJO's study is the first national overview of the outcome of DoL applications. It analysed whether orders applied for are granted and how long for, the nature of the restrictions authorised, where children are placed, and children's and parent/carers' participation in proceedings. The study focused on 113 children – a subsection of a larger sample of 208 children included in previous Nuffield FJO research on the needs of children subject to DoL applications.

In 104 of the 113 cases (92 per cent), applications for DoL orders were granted. [In the other cases, the full report notes that "the case was withdrawn at or before the first hearing. Mainly, this was because the deprivation of liberty was no longer thought necessary but in some cases the local authority was directed to apply to the court of protection due to the child's age, or a secure accommodation order was made to place the child in a secure children's home."] While these orders are intended to be a temporary measure, most children (68.3 per cent) were still subject to an order on 31 December 2022.

[3] The NFJO is also regularly collecting, analysing and publishing data from the court, and estimates that approximately 1,300 applications will have been made over a 12-month period.

The restrictions authorised by the court involved severe constraints that remained in place for significant periods of time. Each child was subject to an average of six different types of restriction on their liberty, including, in almost all cases (99 per cent), constant supervision, usually by multiple adults. The use of restraint was permitted in over two-thirds (69.4 per cent) of the 104 cases. Over a six-month period, only a minority of children (seven, 9.2 per cent) experienced a relaxation to deprivations of their liberty.

While it didn't appear that the restrictions applied for were routinely questioned or scrutinised, in some cases, the court ordered the local authority to file an 'exit plan', with clear information about how and when the restrictions would be reduced, to share with the child. In a small number of cases, the court refused to authorise some of the restrictions – usually related to the use of restraint or limits placed on the child's access to the community.

In over half of the cases (53.8 per cent), children were placed in at least one unregistered2setting, ranging from semi-independent accommodation, Care Quality Commission-registered accommodation, hospital wards, and temporary rented accommodation, including hotels or caravans. A significant majority of children (over 70 per cent) where the deprivation of liberty was sought primarily to manage risks related to criminal exploitation, emotional difficulties, behaviours that were a risk to others, and self-harm were placed in at least one unregistered setting, indicating a lack of suitable regulated provision for children experiencing such risks. Children subject to a DoL order primarily due to a learning and/or physical disability were the least likely to be placed in unregistered accommodation.

The placements were also far away from where children were living – on average 56.3 miles away from their home. Six children were placed in Scotland (at an average of 254.4 miles from the child's home area).

Information about children's access to education and therapeutic services was limited in the orders, and concerns about this were often raised by the court, children's guardians and parents or carers. In several cases, the court directed the local authority to provide a more detailed care plan.

The research also highlights that children have limited opportunities to formally participate and have their voices heard in DoL proceedings. Article 12 of the UN Convention on the Rights of the Child (UNCRC) states that children have the right to express their views in all matters affecting them, and to have their views considered and taken seriously. Yet just 10 out of 104 children attended at least one hearing in their case. Five spoke to the judge directly before the hearing and six wrote to the judge to share their views. Furthermore, in 15 per cent of cases, a children's Cafcass guardian had not been appointed for the child at the first hearing. This was usually due to applications being made at very short notice or delays in making children party to proceedings. Five children were separately represented (where the child separates from the guardian and instructs their own solicitor).

Furthermore, despite DoL orders having a severe impact on family life, most parents or carers did not have legal representation; parents and/or carers were legally represented (for at least one hearing) in just 12 cases (11.5 per cent). This is likely to be because parents are not automatically entitled to legal aid for legal representation in DoL cases, unlike in care proceedings.

[One of the authors of the report, Alice Roe, spoke at the seminar that we held in Chambers in

March 2023, at which a range of speakers addressed many of the issues relating to deprivation of liberty of children and young people. A recording of the seminar can be found here.]

IRELAND

We are delighted to have two Irish correspondents join us to provide us with news from on the ground as the new Irish capacity regime takes effect. The first is Emma Slattery BL, a barrister who has been in practice since 2013, specialising in capacity law. Emma is the author of the forthcoming Bloomsbury work 'Assisted Decision-Making Handbook.' The second contributor is Henry Minogue BL, who was called to the Bar in 2016 with interests in family law, human rights law and commercial law.

Their first news from across the Irish Sea follows.

Overview of the ADMA Acts & Commencement

On 26th April 2023, the Assisted Decision-Making (Capacity) Act 2015 and the Assisted Decision-Making (Capacity) (Amendment) Act 2022 ('ADMCA'[4]) were commenced. The ADMCA repealed the Marriage of Lunatics Act 1811 and the Lunacy Regulation (Ireland) Act 1871 which applied a status approach to capacity. There are an estimated 2,200 wards of court in Ireland who will transition out of wardship over the coming three years. The ADMCA has put in place a three-tier system of support for those who either lack capacity in relation to some or all of their personal welfare, property and affairs, or both, or whose capacity is or may shortly be in question. At the lowest tier, a relevant person with capacity can appoint a decision-making assistant to assist them in making certain decisions. At the mid-tier, a relevant person with capacity can appoint a co-decision-maker to make certain decisions jointly with them. At the top-tier, the Court can appoint a Decision-Making Representative to make decisions as agent for the relevant person or determine that the person lacks capacity, unless they have a co-decision-maker to make decisions jointly with them. From a practical and procedural perspective, the ADMCA grants the Circuit Court (the second lowest court in a 5-tier court system) almost exclusive jurisdiction to hear and determine matters arising under the ADMCA, with the exceptions of living organ donation, withdrawal of life sustaining treatment, applications under the Convention on the International Protection of Adults, and appeals from the Circuit Court.

The ADMCA requires that capacity be assessed functionally based on the relevant person's "*ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time*". A person will be considered to lack capacity to make a decision if that person is unable to use, retain, and weigh the relevant information, and communicate the decision.

The ADMCA has introduced guiding principles which provide for a presumption of capacity, and which require the provision of assistance prior to deeming a person to lack capacity. The principles further provide that unwise decisions alone do not indicate incapacity and that any intervention should be based on individual circumstances and with due respect to the person's rights and dignity. The person's will, preferences, and beliefs must be considered, and the person him or herself must be involved as much as possible. Finally, the potential for recovery and urgency should be considered

[4] The Decision Support Service has collated links to the primary and secondary legislation here.

when intervening in respect of a person lacking capacity.

The ADMCA also supersedes the system for creating Enduring Powers of Attorney with a more robust system, along with increased safeguards, and provides for the creation of Advanced Healthcare Directives, with the option of appointing a Designated Healthcare Representative.

2. The Decision Support Service

Part 9 of the ADMCA provides for the creation of the Decision Support Service ('the DSS'), to which Áine Flynn was appointed Director in October 2017. The Director's role involves promoting public awareness of the ADMCA and the matters relating thereto, boosting public confidence in its processes, and providing relevant information to those affected and their support network. The Director is also responsible for supervising the compliance of various decision-makers with the Act.

Section 95B permits the Director to specify that any document be in electronic form or be submitted in electronic form. The DSS has thus adopted a 'digital first' model. The 'digital first' model of the DSS has caused some disquiet[5] amongst the legal community, particularly with regard to EPAs[6]. The main issue raised relates to the online process requiring the solicitors' use of their client's MyGovID (which requires a Public Services Card[7]), with no access to a solicitor's portal. Concerns were raised that a solicitor may be requested to provide the legal practitioner's statement in circumstances where they had not observed the full process of the creation of the EPA[8]. However, through engagement with the Law Society's Mental Health and Capacity Taskforce, a paper-based system and guidance has been provided to practitioners.[9]

3. Rules of Court and Practice Directions

The ADMCA is a far-reaching Act with many 'moving and interlinked' parts. As such, it comes as no surprise that the legislation and subsequent Rules and Regulations were completed in a staggered fashion.

The Circuit Court will be the workhorse of the ADMCA, and thus the Rules published on 28th April 2023 are necessarily detailed and involved. In general, applications are made by way of originating notice of motion and grounding affidavit. This procedure benefits from being assigned a hearing date from the point of filing, thus there is no delay or waiting for one party to set the matter down for hearing.

The Circuit Court has commenced hearing applications, with many initial applications arising in circumstances where a declaration of capacity is required to enable an application be made under the Nursing Home Support Scheme.[10] The technical and detailed process is proving difficult for both lay applicants and legal practitioners to navigate, with Sage Advocacy appearing in the Dublin Circuit Court to offer support to litigants. However, one notable feature is that the relevant person the subject of the application was not represented in any of the applications before the Court on the 23rd June 2023.

The Rules of the Superior Courts were published on the 30th May 2023. In the intervening period,

[5] Statement from the Dublin Solicitors Bar Association in May 2023
[6] Irish Times article dated 18th June 2023
[7] The Public Services Card has been the subject of two unfavourable investigations by the Irish Data Protection Commissioner, a summary of which can be found here.
[8] Law Society Practice Note dated 22nd May 2023
[9] Law Society Statement dated 22nd June 2023
[10] Further information about the Nursing Home Support Scheme

the President of the High Court bridged the gap with Practice Direction HC 120 and 121.

Pursuant to Part 6 of the ADMCA, all 2,200 current adult wards must be discharged from wardship within three years of commencement (i.e., 26th April 2023). It is understood that the uptake has been slow and that only around 27 applications for discharge have been issued.

The ADMCA was originally intended to come into force alongside a statutory regime regulating deprivation of liberty. Work is underway to prepare the heads of bill of "Protection of Liberty Safeguards Bill"[11], the purpose of which is to provide legislative clarity on the issue of deprivation of liberty safeguards.[12] The High Court's jurisdiction with regard to deprivation of liberty orders was considered recently in the decision *In the matter of KK* [2023] IEHC 306, which will be discussed in greater detail in the next issue.

Part 10 of the ADMCA requires the review of detention orders made by the wardship court prior to commencement. Practice Direction HC 121, which came into effect on the 11th day of May 2023, outlines the process.

One notable feature of the Rules is that the participation of the relevant person is a common theme. This can be observed in the sections concerning 'Service of Application', 'Remote participation in hearings' and within the affidavit of service. The Rules provide that the relevant person must be served personally with the application, the summons server must explain the nature and implications of the application, explain that the person is encouraged to participate in the hearing, during which his or her participation will be facilitated, and the Court must be made aware of any special arrangements required to facilitate the relevant person's participation in the hearing. Additionally, the relevant person will be facilitated in attending the hearing remotely.

Another central theme is the expeditious use of court time and the minimisation of costs. This appears in the amending sections of the rules concerning; hearing of applications under Part 6, Reviews under ss. 107 and 108, and proceedings for the care, treatment or detention of persons who lack capacity. It is important in respect of costs to have regard to a recent decision from the Court of Appeal, *Re TH* [2023] IECA 35, which gave practitioners firm guidance with respect to the handling or management of cases relating to matters of wardship, and particularly where the issues of costs and its potential impact upon the estate of the ward are to be considered.

Regulations

Since April, several statutory instruments have been made to implement various sections of the main act. These regulations include S.I. No. 202/2023 which outlines the applicable fees and instances where these fees may be waived; S.I. No. 203 of 2023 which specifies the payment of expenses and remuneration to decision-making representatives; S.I. No. 204 of 2023 which details the types of healthcare professionals recognised by the Act and the requirements for their respective registries; S.I. No. 205 of 2023 which focuses on the formalities of decision-making agreements; and S.I. No. 206 of 2023 which concerns the inspection of registers and receipt of documents for services provided by various professionals under the main Act.

There is also a provision in the Act authorising the Director to make specifications, with the

[11] Government Legislation Programme Spring Session 2023

[12] For further context see *The Deprivation of Liberty Safeguard Proposals: Report on the Public Consultation*)

consent of the Minister. However, as of writing, these specifications have yet to be published.

.

Editors and Contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
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.

Victoria Butler-Cole KC: vb@39essex.com
Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click here.

Neil Allen: neil.allen@39essex.com
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.

Arianna Kelly: Arianna.kelly@39essex.com
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.

Nicola Kohn: nicola.kohn@39essex.com
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.

Katie Scott: katie.scott@39essex.com
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.

Stephanie David: stephanie.david@39essex.com

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.

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here

Simon Edwards: simon.edwards@39essex.com

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.

Adrian Ward: adrian@adward.co.uk

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.

Jill Stavert: j.stavert@napier.ac.uk

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.

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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.