



Welcome to the April 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Draft MCA and LPS Code published; capacity to terminate a pregnancy; the (limited) role of the Inherent Jurisdiction; and is an application needed in all vaccine disputes?

(2) In the Property and Affairs Report: the Court of Appeal weighs in on testamentary capacity, and the evidence used to prove it; and an invitation to the pilot for digital submission of property and affairs cases

(3) In the Practice and Procedure Report: reporting restrictions; the role of COP in MHA discharge planning; costs; and notable conferences on capacity;

(4) In the Wider Context Report: the impact of s.49 reports on mental health professionals; Article 2 and 3 damages claim; the *M'Naghten* test considered; and is having a deputy an Article 14 'status'?

(5) In the Scotland Report: Guardians' remuneration; open justice or anonymisation; and still time to contribute to the Scott Review or sign up to the World Congress on Adult Capacity in Edinburgh;

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also find updated versions of both our capacity and best interests guides.

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

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The Guardians’ remuneration

We have reported on this topic in recent Scotland sections, including last month when we explained that an “Uplifts Working Group” has now been established. We are grateful to the Public Guardian and to the four members of the Working Group for confirming that we may now publish the names and contact details of the members of the Working Group. They have agreed to be contacted by solicitors who wish to offer feedback or suggestions, as is Fiona Brown herself. Fiona Brown accordingly appears at the head of the list, which is as follows:

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We were pleased to hear that the Working Group had its first meeting on 23rd March, which is reported to have gone well.

Adrian D Ward

Open justice or anonymisation; written decisions; and Article 8

From time to time we comment on child law cases because of elements of relevance to adult incapacity practice. In the petition of *X & Y v The Principal Reporter and KB*, [2022] CSOH 32, *X & Y*,

foster carers and prospective adopters of a child IB, aged five, appealed unsuccessfully to the Court of Session against aspects of a decision by a children’s hearing in respect of IB. See the full Opinion of Lady Wise for an account of all matters addressed before her, the arguments of the parties, and her decisions. Three aspects are of potential interest to adult incapacity practitioners, namely whether X & Y were entitled to non-disclosure to IB’s mother of their names and addresses; whether it was fatal that written reasons for the decision of the children’s hearing were not provided; and some comments on Article 8 of the European Convention on Human Rights, including the distinction between private life and family life and whether engagement of a person’s Article 8 rights in proceedings conferred right to attend and participate.

The leading case on anonymisation of parties remains *MH v Mental Health Tribunal for Scotland*, 2019, SC 432, upon which we reported in the [May 2019 Report](#), further referred to in the [June 2019 Report](#). The key principle stated by Lord President Carloway in that case is that there will always be a presumption in favour of open justice, unless the particular rules or circumstances necessitate anonymity. Subsequently to the decision in that case, the court received and accepted evidence justifying anonymity, and granted it. In the [February 2022 Report](#) we referred to a Statement of Reasons in the litigation between PKM’s Guardians and Greater Glasgow Health Board, where the importance of anonymity led the Second Division not to report its Statement of Reasons in the usual way at all. We commented that this decision of the Second Division was not easy to reconcile with the decision of the First Division in

MH. In X & Y, Lady Wise referred to MH but not to PKM. KB, the mother of IB, had apparently accepted that IB should be adopted. She wanted to know where IB would be, and the identity of her prospective adoptive parents. Access arrangements were in place and there was no evidence that she had used previous knowledge of IB's whereabouts inappropriately. The children's hearing had ruled in favour of disclosure to KB, overruling a request by IB's social worker for non-disclosure, and Lady Wise agreed. Before the children's hearing there had been some discussion about the appropriate test to be met before non-disclosure could be ordered. In her decision, Lady Wise narrated that: *"No suggestion was made to the hearing that the petitioners wished non-disclosure for their own benefit and so the discussion centred only on whether it would be harmful to IB were the names and address to be disclosed."* Lady Wise emphasised that: *"there is no barrier to those such as the petitioners requesting anonymity in the children's hearing procedure, but it cannot be automatic because the statutory scheme applies to a wide spectrum of cases."* In cases involving the children's hearing: *"any request for anonymity is necessarily considered on a case by case basis"*. Looking at the topic more broadly: *"There is simply no basis for an assertion that the rules applicable to one tribunal ought to be the same as those applicable in separate court proceedings"*. On this point she concluded by re-emphasising the presumption in favour of open justice enunciated in MH.

Secondly, the petitioners criticised the failure of the hearing to provide written reasons for its decision on the non-disclosure measure. Lady Wise described this as a "procedural regularity" but held that: *"The critical issue, however is whether the procedural irregularity has been 'damaging to the justice of the proceedings' – C v Miller, 2003 SLT 1379 at 1395."* She held that she had received sufficient explanation from the account of the proceedings before the hearing in the evidence before her, and that on this occasion the "procedural irregularity" was not damaging to the interests of justice. This does

however resonate with the long-standing concerns about the paucity of decisions by sheriffs in the adults with incapacity jurisdiction, particularly when most such decisions affect or at least address fundamental rights of the adult involved. The lack of clear lines of authority that would be available in written decisions seems to be an element in the often uncoordinated diversity of decision-making by different courts and individual sheriffs across the country. The difference with the volume of reported cases in England & Wales exceeds anything proportional to respective populations, and reflects the considerable benefits of having their jurisdiction limited to a specialist court.

Finally, it is of interest to note that Lady Wise held that the X & Y case engaged the right to private life, but not the right to family life, in terms of Article 8 of ECHR. She held that mere engagement of Article 8 rights in proceedings before a children's hearing did not necessarily confer any right to attend or to participate.

Adrian D Ward

World Congress and Scott Review consultation

Beyond the constant demands of current workload, dominant themes for Scottish practitioners in all aspects of adult incapacity work, and all related areas including in particular mental health law and adult support and protection law, are the 7th World Congress on Adult Capacity, 7–9 June 2022 in Edinburgh, and the consultation period upon the consultation document issued by the Scottish Mental Health Law Review ("the Scott Review") on 17th March 2022, with an unprecedentedly short consultation period concluding on 27th May 2022.

Generally on the World Congress, see our description in the [March Mental Capacity Report](#), which included details of the plenary sessions. Most of the detailed information for the plenary sessions can now be viewed on the Congress website www.wcac2022.org: click on "Congress

programme” and then in the first line on the link at “here” to the full programme. This shows the great wealth of contributions to be heard at the Congress, much of it of interest to Scottish practitioners, particularly those seeking to develop best practice, and present arguments in favour of best practice, drawn comparatively from a worldwide context, particularly in view of the dearth of reported decisions in Scotland, and the apparent uncoordinated diversity of decisions both reported and unreported, mentioned in the preceding item. Registrations to attend continue to flow in from across the world, and those who have not yet registered should do so at the “Registration” link on the website without delay, to avoid risk of disappointment.

The Scott Review consultation document, together with separate Summary (and also an easy-read version), are all available on the SMHLR website at [Homepage | Scottish Mental Health Law Review](#). We do not attempt to summarise here the content of the 189-page consultation document when a Summary is also available, and all those with an interest will wish to concentrate on reading the primary material and commenting on it, particularly the specific consultation questions listed at the end of each chapter. Value would not be added by seeking to provide in addition a “summary of the Summary”! Moreover, formulation of responses will require careful consideration of the consultation document as a whole, rather than rapid reactions to individual points in isolation. We have however already referred to the seriously inadequate consultation period from 17th March to 27th May 2022, somewhat less than the minimum for routine consultations of relatively narrow scope of three months, and the norm for consultations of this magnitude of six months.

Consultees will wish to concentrate on doing the best that they can within the available period, contributing the best value that they can achieve towards the overall review process. The 170 or so from a great variety of backgrounds who attended a seminar on the review hosted by

Edinburgh Napier University on 23rd March will certainly have benefitted towards making their contributions by an impressive and well co-ordinated presentation by the review team, led by John Scott. John will participate substantially in the World Congress, including leading the review team in a dedicated session just a fortnight after conclusion of the consultation period.

Adrian D Ward

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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

7th World Congress on Adult Capacity, Edinburgh International Conference Centre [EICC], 7-9 June 2022 The world is coming to Edinburgh – for this live, in-person, event. A must for everyone throughout the British Isles with an interest in mental capacity/incapacity and related topics, from a wide range of angles; with live contributions from leading experts from 29 countries across five continents, including many UK leaders in the field. For details as they develop, go to www.wcac2022.org. Of particular interest is likely to be the section on “Programme”: including scrolling down from “Programme” to click on “Plenary Sessions” to see all of those who so far have committed to speak at those sessions. To avoid disappointment, register now at “Registration”. An early bird price is available until 11th April 2022.

The Judging Values and Participation in Mental Capacity Law Conference

The *Judging Values in Participation and Mental Capacity Law* Project conference will be held at the [British Academy](#) (10-11 Carlton House Terrace, London SW1Y 5AH), on **Monday 20th June 2022 between 9.00am-5.30pm**. It will feature panel speakers including Former President of the Supreme Court Baroness Brenda Hale of Richmond, Former High Court Judge Sir Mark Hedley, Former Senior Judge of the Court of Protection Denzil Lush, Former District Judge of the Court of Protection Margaret Glentworth, Victoria Butler-Cole QC (39 Essex Chambers), and Alex Ruck Keene (39 Essex Chambers, King’s College London). The conference fee is £25 (including lunch and a reception). If you would like to attend please register on our events page [here](#) by 1 June 2022. If you have any queries please contact the Project Lead, [Dr Camillia Kong](#).

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

22 April 2022	DoLS refresher for mental health assessors (half-day)
28 April 2022	The Mental Health and Capacity Act Interface (full-day)
6 May 2022	Necessity and Proportionality training (half-day)
13 May 2022	BIA/DoLS legal update (full-day)
16 May 2022	AMHP legal update (full-day)
17 June 2022	DoLS refresher for mental health assessors (half-day)
14 July 2022	BIA/DoLS legal update (full-day)
16 September 2022	BIA/DoLS legal update (full-day)

To book for an organisation or individual, further details are available [here](#) or you can email [Neil](#).

Conferences (continued)

Pregnancy, Childbirth and the Mental Capacity Act: 4 May 2022

Ian Brownhill will be offering a course through Edge Training to assist delegates to navigate the challenging landscape of mental capacity law in the field of obstetrics. Delegates will cover the basics of the Mental Capacity Act and how the law should be applied in relation to specific decisions such as caesarean sections and birth plans. Related areas will also be covered such as contraception and termination of pregnancies. There will be particular consideration of those detained under the Mental Health Act and guidance on when to apply to the Court of Protection. To register, click [here](#).

Essex Autonomy Project Summer School 2022

Early Registration for the 2022 Autonomy Summer School (*Social Care and Human Rights*), to be held between 27 and 29 July 2022, closes on 20 April. To register, visit the [Summer School page](#) on the Autonomy Project website and follow the registration link.

Programme Update:

The programme for the Summer School is now beginning to come together. As well as three distinguished keynote speakers (Michael BACH, Peter BERESFORD and Victoria JOFFE), Wayne Martin and his team will be joined by a number of friends of the Autonomy Project who are directly involved in developing and delivering policy to advance human rights in care settings. These include (affiliations for identification purposes only):

- > Arun CHOPRA, Medical Director, Mental Welfare Commission for Scotland
- > Karen CHUMBLEY, Clinical Lead for End-of-Life Care, Suffolk and North-East Essex NHS Integrated Care System
- > Caoimhe GLEESON, Programme Manager, National Office for Human Rights and Equality Policy, Health Service Executive, Republic of Ireland

> Patricia RICKARD-CLARKE, Chair of Safeguarding Ireland, Deputy Chair of Sage Advocacy

Planned Summer School Sessions Include:

- > Speech and Language Therapy as a Human Rights Mechanism
- > Complex Communication: Barriers, Facilitators and Ethical Considerations in Autism, Stroke and TBI
- > Respect for Human Rights in End-of-Life Care Planning
- > Enabling the Dignity of Risk in Everyday Practice
- > Care, Consent and the Limits of Co-Production in Involuntary Settings

The 2022 Summer School will be held once again in person only, on the grounds of the Wivenhoe House Hotel and Conference Centre. The programme is designed to allow ample time for discussion and debate, and for the kind of interdisciplinary collaboration that has been the hallmark of past Autonomy Summer Schools. Questions should be addressed to: autonomy@essex.ac.uk.

Our next edition will be out in May. 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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