



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

(1) In the Health, Welfare and Deprivation of Liberty Report: Injunctions against family members; Draft LPS forms published; and serious medical treatment applications.

(2) In the Practice and Procedure Report: Remote observations of hearings and new SRA guidance on vulnerable clients.

(3) In the Wider Context Report: Mental Health Bill Update; Archie Battersbee case in the Court of Appeal; Posthumous use of embryos; and CAMHS gatekeeping.

(4) In the Scotland Report: World Congress and Scott Review Updates; Learning Disabilities and Mental Health legislation; and permanence orders.

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 autistic man. We are very grateful to him and his family for permission to use his artwork.

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### Remote observations of hearings: new framework

With effect from 28 June 2022, a new framework governing remote access by non-participants to proceedings was introduced by the Police, Crime, Sentencing and Courts Act 2022 – introducing new sections [85A](#) and [85B](#) into the Courts Act 2003 – and the [Remote Observation and Recording \(Courts and Tribunals\) Regulations 2022](#).

This framework – which applies to all courts and tribunals – is explained in the [Practice Guidance](#) issued by the Lord Chief Justice and the Senior President of Tribunals on 28 June 2022. It applies whether the court is sitting in person, but enabling remote observation, or if the court is, itself, sitting remotely. In broad terms, its effect is to:

- provide judges with the power to make directions to enable members of the public to observe proceedings remotely (by video or audio);
- set down a series of considerations for judges to apply when deciding whether to make such a direction;
- make it (by the Courts Act 2003 s85B) a criminal offence to make an unauthorised recording during any such remote observation.

The introduction of the new framework places matters on a clearer statutory footing than previously; whilst judges had grappled with the problem of recording of remote observations (see [Re TA \(recording of hearings; communication with court office\)](#) [2021] EWCOP 3), they had been doing so in circumstances where the powers to

prevent recording were perhaps not entirely obvious.

It is likely that the [Remote Hearings Guidance](#) issued by the Vice-President, Hayden J, in March 2020 will be updated in due course to address the provisions of this new framework, not least as the provisions of the template order attached to that guidance now require updating to reflect that there is no need now to injunct observers from making unauthorised recordings, as this is covered by the offence under Courts Act s85B.

It should be noted that, in the Court of Protection, this new framework alongside, rather than replacing, the provisions of the [Transparency Practice Direction](#). The Transparency PD provides the mechanism by which the court decides whether the matter should be held in public, and subject to what limitations as to identification of P.

The new framework (and guidance) the mechanism by which non-participants may be given remote access to the hearing, whether that hearing is being held in person or online/by telephone.

### *'Accepting instructions from vulnerable clients or third parties acting on their behalf'*

On 30 June the SRA published new guidance for solicitors acting on behalf of vulnerable clients: ['Accepting instructions from vulnerable clients or third parties acting on their behalf'](#).

The guidance focuses on the importance of considering mental capacity and other issues

before accepting instructions and commencing to act.

may retain capacity in others, including, in certain circumstances, litigation capacity.

It provides reminders that a deterioration in a client's presentation does not necessarily mean an absence of mental capacity to instruct solicitors and the importance of making reasonable adjustments to support a client to give instructions where they remain able to do so. It reminds solicitors of the importance of obtaining signed authority from clients where they instruct third parties to act on their behalf.

When a client loses the mental capacity to instruct solicitors, the guidance reminds solicitors that they may accept instructions from a third party with appropriate authority, either:

- i. a court appointed litigation friend;
- ii. a representative appointed by a tribunal, eg a mental health tribunal;
- iii. a court-appointed accredited legal representative in Court of Protection health and welfare cases.

The guidance also provides a helpful reminder that while solicitors may be able to take instructions on behalf of a client where they come from a deputy, the powers of a deputy are circumscribed such that, for example, a property and affairs deputy may not make decisions or provide instructions to a solicitor on matters concerning a client's welfare.

As the guidance reiterates, the SRA principles require that a solicitor always acts in the best interests of his or her client – whether or not they have mental capacity to instruct solicitors directly. Best interest in this context does not have the same meaning as the s.4 best interests test under the MCA 2005.

The guidance is sometimes non-specific in its use of the word "capacity"; it is important that solicitors remind themselves that mental capacity is decision-specific and that notwithstanding that an individual lacks capacity to make decisions in one area of their lives, they

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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 and Seminars

### Forthcoming Training Courses

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

16 September 2022	BIA/DoLS legal update (full-day)
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To book for an organisation or individual, further details are available [here](#) or you can email [Neil](#).

### **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](mailto:marketing@39essex.com).

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