



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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World Congress and Scott Review

We had originally intended to include a more full assessment of the 7th World Congress on Adult Capacity (Edinburgh, 7th–9th June 2022) following Alex’s “Dispatch” immediately after the Congress in the June Report. This however has been deferred for the very good reason that the Faculty of Advocates has kindly offered post-Congress sponsorship towards a more full evaluation report, on which members of the organising committee are now working. While at an early stage of preparations for the 7th World Congress, helpful information was provided to the organising committee by the organisers of all preceding World Congresses, this was not in the structured form of an evaluation report. It is anticipated that the report now in preparation, drawing among other things on the evaluations that all attendees were invited to submit, will be of value in reporting to sponsors, for the information of attendees and others with an interest, and in particular for the organisers of forthcoming World Congresses. The next World Congress, in 2024, will be held in Buenos Aires, probably in the second half of August 2024. It is perhaps an indicator of the success of the 7th World Congress that immediately following it a number of countries have indicated interest in hosting the 2026 event, including some countries which – like Scotland – are significantly smaller than any of the host countries of preceding Congresses.

Other outcomes of the Congress already developing include a potential Europe-wide project on advance choices (advance directives),

following upon that aspect of the Scottish project that we described under “Addressing two major deficiencies in Scots law” in the [May 2022 Report](#).

The massive involvement in the Congress of the Executive of the Scottish Mental Health Law Review is understood to have fed through in many ways to the continuing work of the Review, as it gallops with increasing intensity of effort towards the target of September 2022 to produce its Final Report. The Consultation on Additional Proposals described in our [June Report](#) has now closed. The response of the Law Society of Scotland may be seen [here](#). There has been further engagement with experienced practitioners on specific topics.

Adrian D Ward

The place of learning disabilities in mental health legislation

I would draw attention to the piece by Alex in the [June 2022 Wider Context Report](#) as regards the draft Mental Health Bill for England & Wales, which although not applicable to Scotland is of significant interest in Scotland on the topic of removing provisions for people with learning disabilities from mental health legislation, and the dangers of this making very little practical difference for people with learning disabilities.

From a Scottish perspective, there is nothing new about recognising that issues and requirements of people with learning disabilities are significantly different from those for people

with mental health issues, and should require different provision. Thus in early Scots law the jurisdiction of the sovereign was limited to people with mental health issues resulting in conduct considered to be disruptive (in the terminology of the time “the furious”) and only the sovereign could authorise deprivation of liberty in respect of them. Jurisdiction in respect of people with learning disabilities was quite separate, under the feudal lord who, in the terminology of the time, was guardian of “his idiot and fatuous vassals”. As law developed, the two jurisdictions were consolidated under the sovereign, but – interestingly – the sovereign always delegated guardianship to a team of selected relatives, usually from both the father’s and mother’s side selected on grounds of suitability (“men of judgement and discretion”). It was only from about the 14th century onwards, with the assimilation of principles of Roman law, that appointments shifted to a single guardian who was the nearest male agnate, confirmed by a statute of 1585 which, curiously, set a long-running precedent for applying to adults the law of children, on this occasion the Roman law of children, rather than the Roman law of adults. The assertions in recent years that people with relevant disabilities “are not big children” are not so much something new, as another plea to return to perceptions of many centuries ago.

The need to remove people with learning disabilities from mental health legislation has been a long-running theme in more recent decades. Thus in “Scots Law and the Mentally Handicapped”, 1984, I wrote (page 109): *“The law of the mentally handicapped suffers from the bracketing of mental handicap and mental illness. They are put together as ‘mental disorder’. In dealing with ‘mental disorder’, lawyers and lawmakers seem to have given disproportionate attention to the short-term crises of severe mental illness.”* This unease about that bracketing has developed through to the recommendations of the Rome Review that such separation should be effected in legislation. It will be interesting to see how this trend is followed through the Final Report of the Scott Review into legislation and,

crucially, the way in which such legislation is actually implemented in practice.

(On the early history outlined above, see Chapter IV of my book “The Power to Act” (1990).)

Adrian D Ward

Recall of Permanence Order refused: mother with “learning difficulties”

A decision of 12th July 2022 by the Sheriff Appeal Court in the Petition of Highland Council for a Permanence Order re the child A, [\[2022\] SAC \(Civ\) 22](#), is of significant interest, but we describe it guardedly, because a significant element in the outcome would appear to be the manner in which matters were conducted on behalf of the mother of the child A. We leave it to readers to note the progress of the case, and the outcome, from the Opinion of the Sheriff Appeal Court (which was delivered by Sheriff Principal M W Lewis). Briefly, according to that Opinion, the mother of the child A has “learning difficulties”, and child A himself has “global developmental delay”. The mother sought to oppose an application for a Permanence Order under section 80 of the Adoption and Children (Scotland) Act 2007 by Highland Council. She instructed solicitors. The Council’s application was heard at a preliminary hearing on 8th April 2022. The mother was not present or represented at the hearing, and the sheriff was not aware of the mother’s desire to oppose. At the hearing, the sheriff granted a Permanence Order as sought. The order included the mandatory provision and various ancillary provisions.

The mother’s solicitors sought to retrieve the situation by the Appeal to the Sheriff Appeal Court, on various grounds. The terms of the grounds of appeal, and their appropriateness, are explained and addressed in the Opinion of the Court. Precedents demarcating when such grounds are competent, and when they are not, were considered. On the basis of that

consideration, the Appeal was refused. The Court did not need to address factual issues as to the extent to which the mother's personal circumstances and the background to the predicament which she faced might warrant the exercise of any discretion available to the Court. No such discretion was available. The Court was careful to explain that in reaching its conclusions it had considered carefully the background circumstances "in light of the rules". It identified ways in which the mother's predicament could still be addressed.

Adrian D Ward

Interest not due on delayed Legal Aid payments

In *Scottish Legal Aid Board v Ormiston's Law Practice Ltd* [2021] SAC (Civ) 22; 2022 S.L.T. (Sh Ct) 86, the Sheriff Appeal Court held that interest was not due in accordance with the provisions of the Late Payment of Commercial Debts (Interest) Act 1998 on late payments by Scottish Legal Aid Board in respect of Legal Advice & Assistance

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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.

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