



Welcome to the June 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal presses the reset button in relation to capacity and sexual relations, and three difficult medical treatment decisions;

(2) In the Property and Affairs Report: the impact of grief on testamentary capacity;

(3) In the Practice and Procedure Report: a remote hearings update, and a pragmatic solution to questions of litigation capacity arising during the course of a case;

(4) In the Wider Context Report: DoLS and the obligations of the state under Article 2 ECHR, the Parole Board and impaired capacity, and recent relevant case-law from the European Court of Human Rights;

(5) In the Scotland Report: the interim report of the Scott Review critiqued.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#). We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report, not least because the picture continues to change relatively rapidly. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, [here](#); Alex maintains a resources page for MCA and COVID-19 [here](#).

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

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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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Scott Review – Interim Report

An Interim Report from John Scott QC, Chair of the Scottish Mental Health Law Review, was promised for the end of May 2020 and duly issued, despite delays caused by current circumstances. It is available [here](#). It was followed on 12th June by the June issue of the Scottish Mental Health Law Review Newsletter, available [here](#).

The Interim Report is necessarily more interim than originally intended. The deadline for contributions to the online consultation seeking views and experiences of mental health law in Scotland was extended by a month to 29th May 2020, so that all of the responses – particularly those submitted closer to the deadline – had not yet been considered and analysed by the time that the Interim Report was issued. It is commendable that the Interim Report was nevertheless issued on time. It is a valuable and interesting document, containing much to commend, though both leaving and creating uncertainties that are potential causes for concern. However, it is understood that the Review Team is pressing forward with consideration of all responses received to the consultation, and it is possible that a further document will be issued by the Review in time for us to cover it in the July Report. It is

understood that the intention is that the Interim Report already issued, together with that further document, will form “partner pieces”, to be read together. Accordingly, while the commendations in this Report are unqualified, the concerns must be read as provisional, subject to re-consideration when the full picture of the Review’s intentions at this point in time and going forward is clarified.

The Interim Report commences with a statement of the very reasons why we welcomed John Scott’s appointment to lead the Review, when first announced. He has an impressive background in human rights, and of discharging similar remits in other spheres. He has always been clear that he has no significant experience as a practitioner in the area to be addressed by the Review. Thus, as he now writes, he “set out to inform myself with as much information, evidence and views as possible”. For the broad purposes of the Review, that is far better than the potentially more limited area of vision of anyone already immersed in parts of the subject. The subject overall is too wide, with too many sources of potentially valuable information, and developing too rapidly, for an adequate picture to be gained other than by the commendable methodology adopted by the Review.

The Call for Views and Experiences of Mental

Health Law in Scotland is only one part of the story. John Scott narrates how he personally has attended conferences and meetings, including meetings of a lived experience group. He has read extensively and listened to a wide variety of people – including “those with lived experience, carers, practitioners, professionals, lawyers, and members of the judiciary”. This has led him to comment, inevitably but reassuringly, that: “This began my appreciation of the wide range of sincerely-held but often very different, sometimes incompatible, views held on fundamental aspects of mental health law”. Not having done so before, he arranged to observe proceedings at the Edinburgh Guardianship Court and, with consent of all parties, to attend a hearing of the Mental Health Tribunal for Scotland. That also is commendable, though as the arrangements were made respectively by (now retired) Sheriff Fiona Reith and Laura Dunlop QC, President of the Mental Health Tribunal, unsurprising that this was helpfully facilitated. The overall methodology of the Review to date presents as careful and inclusive. That, and the standards of openness and communication evidenced by the issue of the Interim Report at this point in time, are important features of the work of the Review which, one trusts, will be retained going forward. The Interim Report should be read by all interested in the subject: this Report does not attempt even to summarise the range of content.

The uncertainties created by the Interim Report, and not removed by the ensuing Newsletter, raise fundamental issues as to whether the Review will in fact fulfil its purpose. Put minimally, the uncertainties relate to the need better to communicate and express how the Review will fully address its purpose from now

on. One already hears significant anxieties as to whether there is an apparent intent of the Review to narrow its own scope substantially. If such a narrowing were in fact to be sustained, it would greatly reduce the value of the Review’s concluding output.

The Review’s Terms of Reference refer to all three relevant areas of legislation, including ensuring compliance with human rights requirements, considering the need for convergence, addressing “how equal and non-discriminatory enjoyment of rights can be achieved”, how decision-making autonomy can be maximised whenever interventions are considered under all three pieces of legislation (with reference to roles under all three), and “the overlaps in legislation and practice between” all three.

The requirement in the Terms of Reference to consider previous and ongoing work commences with reference to “[Scotland’s Mental Health and Capacity Law: The Case for Reform](#)” (published by the Centre for Mental Health and Capacity Law, Napier University and the Mental Welfare Commission, May 2017), which adopts a similarly holistic approach.

All of this contrasts starkly with the very limited proposed output of the Review appearing on page 36 of the Interim Report (and in slightly abbreviated form on page 10), and on the Review’s website, as follows:

“Stage 3: What we think should happen

“In this stage we will obtain opinions on our recommendations for change to mental health law and practice before publishing a report. It might be that further investigation and reports follow

this.”

This indicates a substantial narrowing from the required scope of the Review down to mental health law (that is to say, the area of law currently covered by the 2003 Act). The broader requirements of the Terms of Reference will not be fulfilled if that occurs.

The terminology employed in the Interim Report appears to create further uncertainty, including as to whether an even further narrowing beyond the matters provided for in the 2003 Act is envisaged.

The report “Scotland’s Mental Health and Capacity Law: The Case for Reform” commences by referring to “rights based mental health and capacity law to protect the rights of people with mental illness, learning disability, dementia and associated conditions”. The Interim Report refers frequently to “mental health” and to “mental health law”. “Mental health” is the counterpart of “mental illness”, so that the references to that phrase are relevant only to people with mental illness, excluding those with “learning disability, dementia and associated conditions”. References to “mental health law” are broader, but still limited. They can cover people with “mental illness, learning disability, dementia and associated conditions” to the extent that they are currently brought within the scope of mental health law, but not all of their needs within the legal environment.

In Scotland, objections to the inappropriate medicalisation of the great range of relevant disabilities beyond the consequences of mental illness go back at least four decades.

The initial focus to date on mental health law has been entirely appropriate. This is the first

significant review of experience under the 2003 Act. However, mental health law has now caught up with adult incapacity law, and is ahead of adult support and protection law, so the Review needs to proceed on all fronts from now on. The process of review of adult incapacity law is far from complete. It has already been protracted, commencing with review of deprivation of liberty issues which concluded with the Scottish Law Commission Report on Adults with Incapacity of October 2014. Following initial consultation, that process widened rapidly to identify wide-ranging needs for reform of adult incapacity law as a whole, in conjunction with the other two areas. In welcoming the establishment of the Review, we took the position that the advantages of a comprehensive review outweighed the disadvantages of delay, and could be turned to good use by steps to improve practice within existing legislation in the meantime, including the proposed reviews of relevant Codes of Practice. Self-evidently, that does not in any way remove the need for reform and updating of legislation.

If any area of law now lags behind, it is adult support and protection law, which has still not been similarly reviewed since first enacted in 2007.

We have to look forward to early clarification and reassurance that the Review will from now on proceed to address its full remit.

I submitted a personal Critique of the Interim Report to John. He has kindly permitted me to make my Critique public. It is available [here](#).

Adrian D Ward

Scott Review – more time for submissions

As we went to press, the Scott Review extended the time for contributions to the online consultation seeking views and experiences of mental health law in Scotland. As narrated in the preceding item, it was already extended by a month to 29th May 2020. The Secretariat to the Review recently confirmed that it would continue to accept submissions after 29th May 2020. The Secretariat advised on 16th June that responses received after close of business on 18th June 2020 would still be considered in relation to the overall objectives of the Review, but would not be published with the responses for Phase 1 of the consultation.

Adrian D Ward

MH case – leave to appeal refused

On 5th June 2020 the Supreme Court refused permission to appeal the decision of the Inner House of the Court of Session on 3rd May 2019 in the case *MH (AP) v Mental Health Tribunal for Scotland*. That decision addressed issues relating to access to justice and the actual physical presence of members of the judiciary in hearings concerning the liberty and autonomy of persons with mental disabilities. We described the decision in our [May 2019](#) issue. In two separate items, Jill commented upon the decision as to whether it was necessary for the convener of a Mental Health Tribunal hearing to be personally present at the hearing, and upon the issue of whether the patient in that case – indeed patients in proceedings before the Tribunal generally – should be entitled to anonymity. The court decided that personal presence was not essential, and that patients

would require to justify being accorded anonymity in each case. The decision on the personal presence of the convener was reported at 2019 SLT 615, and that report was followed by a note advising that, following submission of a medical report, the court had decided that the appellant's name should be anonymised in those proceedings. We reported that in the [June 2019](#) Report. We undertook to report whether leave for appeals in respect of either or both decisions to the Supreme Court was sought, and if so whether granted.

Leave has been sought. It has been refused. There was widespread interest across the United Kingdom in this case, and there is now significant disappointment that the jurisdictions of the United Kingdom are not to benefit from consideration by the Supreme Court, for the first time, of how vulnerable adults with mental health issues are treated across the four jurisdictions of the United Kingdom, and the anticipation that, given the points of general principle for the use of compulsory measures of detention and treatment in relation to people suffering from mental ill-health, applications for public interest interventions were expected from NGOs and others working in this area across the United Kingdom. The Supreme Court customarily only gives the briefest of reasons for refusals of permission to appeal, or for that matter to intervene. In this case, the Supreme Court asserted only that: "... the application does not raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time. On the facts, the Panel does not consider the complaint of unfairness to be arguable". One is left to speculate as to the basis on which the Supreme Court arrived at those conclusions, and whether

the conclusions would be the same if previously untested questions had been raised on equivalent issues concerning processes affecting fundamental interference, otherwise unlawful, with the liberties and personal integrity, and rights to privacy, of persons not having mental or intellectual disabilities.

Adrian D Ward

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Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click [here](#).

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click [here](#).

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

At present, most externally conferences are being postponed, cancelled, or moved online. Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

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 July. 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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