



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: Vaccine judgments; deprivation of liberty of 16- and 17-year-olds; and brain stem death.
- (2) In the Property and Affairs Report: Capacity to make an LPA; and remuneration for non-professional deputies.
- (3) In the Practice and Procedure Report: A dispatch from the World Congress on Capacity; and updates on the National Deprivation of Liberty Court for children.
- (4) In the Wider Context Report: Draft Mental Health Act Bill is published; Mental capacity and PI awards; values in the Court of Protection; and helpful and interesting videos.
- (5) In the Scotland Report: Dispatches from the World Congress.

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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The World Congress on Adult Capacity: a dispatch

For the first time since the before-times, I found myself in mid-June 2022 heading on a train to an actual conference, with real people. Three days later, I returned from the 7th World Congress on Adult Capacity mentally over-stimulated and physically exhausted, having been entirely immersed in capacity related matters of every hue. The bald numbers from the Congress would be impressive under any circumstances, but even more so in the present state of the world: 274 participants from 30 countries, participating in 28 sessions. Some of those sessions were plenary, including an uncompromising¹ plenary presentation by the Vice-Chair of the UN Committee on the Rights of Persons with Disabilities, Professor Jonas Ruškus, and a tour de force application of the Kuhnian model of scientific progress to the world of capacity by Professor Wayne Martin – the text of which is available [here](#). The opening speech by the indefatigable President of the organising committee (and mainstay of our Scotland Report), Adrian Ward, can be found [here](#); and his closing remarks [here](#), generously – and rightly – thanking the other members of the organising committee and supporting cast (including the other mainstay of our Scotland Report, Jill Stavert, who led on the academic programme).

¹ But on one view slightly surprising, in that he singled out Ireland (alongside Peru, Colombia and Costa Rica) as an example of a jurisdiction closer to compliance with Article 12 CRPD. Whilst the new Assisted Decision-

The majority of the sessions took place in parallel and, even more acutely than usual, I suffered conference cloning regret syndrome. Even though the conference organisers took full advantage of technology to enable distribution of materials, there is no substitute to hearing the presentation live, or to participating in discussion in the immediate aftermath.

We hope to bring you more coverage of the Congress next month, but for now, four personal observations must suffice.

First: perhaps because of the mind-set of those attending, perhaps because of the particular journey that I took through the different sessions, or perhaps because of the stage of the journey that we are now at, it was striking how, whilst the CRPD permeated all aspects of the conference, the permeation was one focused on practical, rather than theoretical matters. Debates about the validity or otherwise of the concept of mental capacity, for instance, placed squarely on the table by Professor Ruškus, did not feature in the remainder of the conference sessions that I attended, whilst detailed and gritty discussions about how best to support decision-making abilities, and to reach the ‘right’ decision for the person otherwise, did. To single out as an example, perhaps invidiously, I would note [L- Decide](#) project run by Support Girona, who have set up a fascinating model for supported

Making (Capacity) Act 2015, yet to come into force, undoubtedly tracks much closer to compliance with the letter of Article 12(4), it is still founded upon a functional model of mental capacity.

decision-making agreements including not just the person and their supporter, but also a facilitator. This is not merely a theoretical model, but one developed within the framework of existing law.

Second: I was reminded, again, how legal capacity has a very different place within civil law jurisdictions to that which it has in common law jurisdictions. In (very) crude terms, it seems to me that whereas legal capacity is a clearly, and expressly, identified concept within the grounding codes of civil law jurisdictions, identifying the place of legal capacity is a much more piecemeal affair within common law jurisdictions.² Hence (and in equally crude terms) it seems to me the importance placed by activists upon reforms in civil law jurisdictions which lead to amendments in the relevant code as to the meaning of legal capacity (and when a person can be 'incapacitated'), and the scepticism of common lawyers that those amendments give the full picture of what happens in situations where a person is temporarily or permanently cognitively impaired to the point that they cannot make (or communicate) a decision.

Third: there was, for me, a running theme implicit in many of the discussions and presentations of the impossibility of legislating for the qualities that are required for the delivery of support, through whatever legal mechanism is put in place. Whilst I was unable to attend the session at which he spoke, Graham Morgan, a member of the Executive of the Scottish Mental Health

Law Review³ has previously put it very vividly – how can you legislate for love? And if you cannot legislate for such qualities, is time and effort better spent on supporting the development of those qualities amongst those providing support, or on changing the wording of the law?

Fourth: the organisers are to be heartily congratulated on having pulled off against overwhelming odds a superb Congress, and for both laying down a real gauntlet to their successors in Argentina and the tools to support them to take up that challenge.

Alex Ruck Keene

National Deprivation of Liberty Court

More details have been released on the new National Deprivation of Liberty Court at the Royal Courts of Justice, which will deal only with applications for deprivations of liberty in relation to children:

The President of the Family Division today announces the launch of a National DoLs (Deprivation of Liberty) court on 4 July 2022. The court will deal with applications seeking authorisation to deprive children of their liberty and will be based at the Royal Courts of Justice under the leadership of Mr Justice Moor.

From 4 July 2022, all new applications seeking these orders will be issued in the Royal Courts of Justice (RCJ).

The new court will be supported by two Family High Court/deputy high court judges each week and a dedicated administrative team based in the RCJ.

² An example of this, indirectly, can be found in the fascinating table produced by Rosie Harding in her chapter in her new co-edited volume, "Supporting Legal Capacity in Socio-Legal Context (Hart, 2022), where she identifies 16 different supported and substituted decision-making frameworks in English capacity law. And that list only addresses statutory frameworks,

to which it would be necessary to add all the different ways in which the common law addresses the consequences of cognitive impairments.

³ A project which loomed large in the work of the Congress, not least through the visible and highly engaged presence of its chair John, now Lord, Scott QC.

Cases will either be retained for hearing within the National DoLs Court or will be returned to circuit, based on agreed criteria.

It is anticipated that, subject to judicial direction, cases will be heard remotely.

Sir Andrew McFarlane, President of the Family Division said:

'This is important, sensitive work and the continued growth in the number of these applications to the family courts requires the creation of a dedicated listing protocol. The national DoLs court will provide the necessary expertise in dealing with these matters. I am grateful to Lisa Harker and the Nuffield Family Justice Observatory who have kindly agreed to conduct research which will enhance our understanding of the nature of this work.'

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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](#).



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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 and Seminars

Forthcoming Training Courses

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

14 July 2022	BIA/DoLS legal update (full-day)
15 July 2022	Necessity and Proportionality Training (9:30-12:30)
15 July 2022	Necessity and Proportionality Training (13:30-16:30)
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.

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.

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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