



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.

Editors

Victoria Butler-Cole QC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Rachel Sullivan
Stephanie David
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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.

Contents

Draft Mental Health Act Bill published	2
The 'human element' in the social space of the courtroom: framing and shaping the deliberative process in mental capacity law	5
Making Values Matter in the Court of Protection – new film	7
Call for Carers	8
Mental capacity and personal injury awards	8
A “just” approach to uncertainty in mental health and capacity practice and policy	9
Deprivation of Liberty in the Shadows of the Institution: The movie.....	9
Lady Hale on MCA/MHA fusion and children in mental health detention	9
Book Review: Supporting Legal Capacity in Socio-Legal Context	11

Draft Mental Health Act Bill published

Following a commitment given in the Queen’s Speech in May 2022, a draft [Mental Health Bill](#) has been brought forward today (27 June 2022). It contains 49 clauses and 3 schedules, accompanied by [explanatory notes](#) and an [Impact Assessment](#).

Its main elements are:

- Amending the definition of mental disorder (for civil detentions only) so that people can no longer be detained solely because they have a learning disability or because they are autistic. The draft Bill also includes the proposal to require integrated care boards in England to establish a (consent-based) register of autistic people and those with learning disability who have ‘risk factors’ for detention under the civil parts of the Mental Health Act 1983 (‘MHA 1983’), and for this register to be taken into account in commissioning and market function decisions;
- Changing and tightening the criteria needed to detain people under the civil sections of the MHA 1983 (and to place patients on CTOs), as well as tightening the definition of ‘appropriate medical treatment’ to seek to reinforce the requirement that such treatment has a reasonable prospect of alleviating or preventing the worsening of the disorder or manifestation of the disorder – i.e. (implicitly) addressing the concept of therapeutic benefit;
- Shortening s.3 to 3 (from the current 6 months at the first instance, then 6 months, then 1 year at a time (and making equivalent changes to the position in relation to guardianship);
- Introducing a statutory care and treatment plan for all patients in detention (other than on very short term emergency provisions) as well as subject to guardianship, to be produced – where possible – with the patient. This brings England into line with Wales; the operation of such plans are to be monitored by the hospital managers;
- Changing the approach to treatment under Part 4, by creating an approach that functionally mirrors the approach

to decision-making under the MCA 2005, including provision for consideration of advance decisions to refuse treatment. The approach mirrors, but does not entirely replicate, the MCA approach, as there are still 'let outs' for treatment against a person's will, framed by reference to the nudge theory of making it more burdensome for a clinician to do so. There is no statutory provision for advance choice documents, but their principles are incorporated into the provisions of new clauses 56A and 57A. The period during which it is possible to treat on the basis of one clinical opinion alone is also being reduced from 3 months to 2. It will also no longer be possible to administer treatment under the 'urgent' provisions of s.62 to a patient who is capaciously/competently refusing it. The explanatory notes contain a helpful table of the implications of the change.

- Giving patients better support, including offering informal patients the option of an independent mental health advocate (already the position in Wales); and allowing patients to choose their own 'nominated person', rather than have a 'nearest relative' assigned for them. Where no nominated person has been appointed, and the patient currently lacks capacity (or for a child, competence), there are provisions to enable the AMHP to appoint one;
- Tightening the rules around CTOs, including the requirement for the appointment of a community clinician and liaison between the community and the responsible clinician, and enabling the Tribunal to make recommendations that the responsible clinician reconsiders conditions;
- Introducing a 28-day time-limit for transfers from prison to hospital for

acutely ill prisoners (subject to an 'exceptional circumstances' let-out) and ending the temporary use of prison for those awaiting assessment or treatment.

- Introducing a new form of supervised community discharge. This will allow the discharge of restricted patients into the community, with the necessary care and supervision to adequately and appropriately manage their risk.
- Increasing the frequency with which patients can make appeals to Tribunals on their detention and provide Tribunals with a power to recommend that aftercare services are put in place;
- Tidying up the perennial problems in relation to determination of ordinary residence for purposes of s.117 MHA aftercare.

More will be forthcoming here as I have the chance to dig further into its detail, but a number of key points merit immediate emphasis.

First, this is draft legislation which amends the MHA 1983. This is in line with the approach of the [Independent Review](#) chaired by Sir Simon Wessely, which deliberately took an approach of modernising the MHA 1983, rather than attempting to start again from a blank sheet of paper as has happened (for instance) in Northern Ireland in the form of the Mental Capacity Act (Northern Ireland) 2016. Some might say that the amending approach is underwhelming; others might say that it represents realism. As the former legal adviser to the Review, I need:

- to declare an interest;
- to say that it seems to me that there some frequently underestimated merits to proceeding with due caution

in respect of legislative reform in this area;¹ and

- to express regret that the Northern Ireland legislation ('fusing' mental health and mental capacity legislation) is moving sufficiently slowly towards implementation that, contrary to the hopes of many, it has not been possible to learn lessons from it within this reform cycle.

Second, and crucially, the draft legislation is going to be subject to pre-legislative scrutiny by a joint Parliamentary committee, anticipated to review the Bill and report in late autumn. The Government intends then to make such amendments as are required to respond to the recommendations of the committee with a view to introducing the Bill in 2023. The timeframe thereafter starts to sound long, with full implementation to be achieved by 2030-2031. We might anticipate that the pre-legislative scrutiny committee will want to examine the timeframe for implementation carefully, to see whether it is striking the right balance between ensuring implementation is effective and allowing too much more water to go under what is roundly recognised to be a bridge in need of some considerable upgrading.

Third, the draft legislation adopts many, but not all, of the recommendations of the independent Review. Even where it does not adopt those recommendations expressly (as with the recommendation to place principles on the face of the Act), it can be seen in many cases to have 'internalised' those recommendations through the measures that it introduces to push practice towards greater respect for the rights, will and preferences ² of those subject to the

Act. Nonetheless, we might anticipate that the starting point for the pre-legislative scrutiny committee will be to examine why measures recommended by the Review have not found their way into the draft Bill, and to stress-test the reasoning for this. In this regard, and again declaring an interest from my role on the Review, I am bound to say that I hope that particular attention is paid to the position in relation to the role of the Tribunal in relation to treatment challenges, as this is notably absent from the draft Bill, but featured significantly in the Review's thinking as a safeguard which, by its very existence, would help guide clinicians to proceeding in line with their patient's will and preferences.³

Fourth, in one crucial respect, the draft Bill introduces a measure that was specifically **not** recommended by the Review, namely the removal of those with learning disability and autism from the scope of detention under s.3 MHA 1983. Whilst coming from an entirely legitimate and understandable desire to try to stop the inappropriate detention of people with these conditions, for my part I have grave doubts that, in isolation, this change would achieve this as opposed to leading to the use of an alternative framework (the Mental Capacity Act) to authorise detention of those in crisis. The Bill includes some measures which might potentially alleviate this in the form of a 'register' for those autistic people or people with learning disability at risk of civil detention.⁴ However, a serious discussion is needed, and I would hope can take place during pre-legislative scrutiny, as to whether such would actually achieve the goal being sought – and what further measures (for instance

¹ See also in this regard the Review's approach to the question of whether non-consensual treatment or admission is ever compliant with international human rights norms at Appendix B of its report, an approach I would say remains valid despite the passage of nearly three further years since the report was published.

² A term that I am deliberately drawing from Article 12 (4) of the Convention on the Rights of Persons with Disabilities, given the direct implications of the MHA 1983 for the legal capacity (i.e. the extent to which their

decisions are viewed as determinative) of those falling within its scope.

³ Slightly curiously, the Impact Assessment notes (at para 81) that "[t]he Government proposes to allow the MHT to review the patient's CTP where concerns have been expressed."

⁴ Although, being consent based, it is not immediately obvious how this would benefit those whose conditions have a profound impact upon their decision-making abilities.

amendments to the MCA 2005) might be required to stop Rumsfeld-ian known unknowns from coming to pass.

Fifth, it is impossible to escape the irony of this draft Bill being published within a week of the Bill of Rights Bill, reflecting as it does a serious policy commitment towards greater promotion of the human rights of those within its scope. It might be said that the Bill is doing ‘the right thing’ in terms of making the promotion of those rights a matter for Parliament, but in many ways, this Bill is enabling Parliament to play ‘catch-up’ to understandings of rights in this area developed, in significant part, by the courts.⁵ It may also be appropriate here to set out again how the [Review](#) identified how human rights operate in this area:

Knowing an individual’s rights in specific circumstances should be straightforward. The difficulty comes when there is more than one right involved (e.g. the right to liberty versus the right to life) or when rights of others may conflict with the rights of the patient. Here we are required to strike fair balances, using the recognised concept of proportionality. Any government, or other body, must respect the rights of those in whose lives it sanctions intervention. At the same time, it may have other duties. It may be required to protect the lives of those contemplating serious self-harm or suicide. It must have regard to the safety of any others where there is a reasonably probable consequence of what a patient might do. These sorts of issues are the justification for the compulsive powers the state authorises and uses in this field. Our position is those interventions must be the least invasive or restrictive required to enable the state to fulfil its duties. An approach which focuses solely on the rights of one specific group can never be sufficient for a state concerned for the rights and safety of all.⁶

Put another way, it might be said that human rights arguments assist everyone – including

clinicians – to navigate the ethical dilemmas that are involved in respecting rights, will and preferences in the presence of mental disorder.⁷

Sixth, the changes proposed in the draft Bill, for instance in relation to the detention criteria, as well as learning disability and autism, will increasingly cement a distinction between ‘civil’ and ‘forensic’ patients. It might be thought that this is a reflection of the different purposes that the MHA 1983 is playing in these two contexts, but this is likely (and rightly) to be something that is a focus of scrutiny at the pre-legislative stage.

Seventh and finally, all the law reform in the world can only go so far towards securing actual respect for rights, will and preferences – it is, ultimately, impossible to legislate for actual respect, which reflects the qualities of those charged with discharging duties and power under the Act. And without commitments to change, including financial commitments, legislative change will fall upon very stony ground. This was a central theme of the Review, and it is incumbent upon all those concerned with securing meaningful change in this area to keep banging this drum.

The ‘human element’ in the social space of the courtroom: framing and shaping the deliberative process in mental capacity law

The recent article of Dr Camilia Kong, Rebecca Stickler and colleagues ‘[The ‘human element’ in the social space of the courtroom: framing and shaping the deliberative process in mental capacity law](#)’ raises a number of interesting and thought-provoking questions about how decisions are made in the Court of Protection. The paper’s abstract summarises its goals:

⁵ Amongst other examples are the decisions in *X v Finland*, making the clear the importance of procedural safeguards in relation to involuntary treatment and *Rooman v Belgium*, emphasising the requirement of the link between detention and the availability of treatment with a therapeutic benefit.

⁶ See also the section in the Review report on “How we are meeting our human rights obligations”

⁷ For very practical examples of this, see the work of the British Institute of Human Rights, in particular their toolkit for embedding human rights in Mental Health Services

The context- and person-specific nature of the Mental Capacity Act 2005 (MCA) in England and Wales means inherent indeterminacy characterises decision-making in the Court of Protection (CoP), not least regarding conflicting values and the weight that should be accorded to competing factors. This paper explores how legal professionals frame and influence the MCA's deliberative and adjudicative processes in the social space of the courtroom through a thematic analysis of semi-structured interviews with legal practitioners specialising in mental capacity law and retired judges from the CoP and the Courts of Appeal with specific experience of adjudicating mental capacity disputes. The concept of the 'human element' offers important new insight into how legal professionals perform their roles and justify their activities in the conduct of legal proceedings. The 'human element' takes effect in two ways: first, it operates as an overarching normative prism that accounts for what good practice demands of legal professionals in mental capacity law; secondly, it explains how these professionals orientate these norms in the day-to-day conduct of their work. The 'human element' further presents challenges that demand practical negotiation in relation to countervailing normative commitments to objectivity and socio-institutional expectations around professional hierarchies, expertise, and evidential thresholds.

There was consensus among participants as to what the 'ideal' was for professionals working in the Court of Protection:

Most participants identified that integral to the effective performance of their professional roles is meaningful communication with all parties and the adoption of a collaborative, as opposed to adversarial or aggressive, approach to professional practice. This requirement

was linked to a commonly articulated account of CoP cases as

'... not about anyone winning or losing' (LP40), but 'looking forward, and looking for solutions' (LP27), and asking 'what's your destination? And then let's signpost the right route together' (LP13).

The necessity of this approach was connected to the messiness of, and difficulties within, personal and professional relationships seen as intrinsic to mental capacity law cases. This, coupled with the discretionary exercise demanded by the MCA, risks 'battlelines' being drawn with each party fiercely defending what they strongly consider to be P's best interests and rejecting, doubting or minimising any contrary positions.

A number of professionals identified that, through dialogue and collaboration, battlelines can be eroded, re-positioned or relaxed, and people can ideally be brought together with a shared objective of finding the right outcome for P. This could make the CoP better able to obtain a comprehensive, truer understanding of P's values with all different 'voices' being heard. Participants also highlighted the skills and character traits of empathy, trust, honesty, sensitivity, and rapport building as being crucial to fostering an inclusive, conciliatory and collaborative approach.

Participants also noted:

- The lack of training for those interacting directly with people lacking capacity, and for speaking to them about sensitive issues;
- The importance of empathy and emotional intelligence, particularly in considering the situation from the perspective of P;

- The common view that ‘foregrounding’ P (understanding and acting in line with P’s wishes as much as possible) was extremely important in both health and welfare and property and affairs; however, it often proved difficult in practice to articulate P’s values in the same way as their wishes and lawyers representing a litigation friend may force those acting for P to express views directly contrary to P’s in court, which can be an ‘uncomfortable’ or ‘intrusive’ experience;
- *‘The idea that mental capacity law attracted people with the same values emerged repeatedly in participants’ account of their work, operating, as one barrister described it, as ‘a small club of practitioners and judges’ (LP35) in which someone who did not hold similar core values was going to be quickly identified, exposed, and treated differently. This latter point captures interesting ways in which self-defining and reflexive accounts of participants rested on ‘ingroup membership’, distinguishing those drawn to this area of law for the putatively ‘right’ (or more altruistic) as opposed to ‘wrong’ (or self-regarding) reasons and values.’*
- *Participants described ambivalence regarding the professional hierarchies that are internally and externally deferred to, affirmed, and sustained in their practice. The tendency to defer to certain professional voices – particularly in the medical field – was described as an invidious aspect of CoP work. One participant spoke of the ‘medical mafia’ and how ‘the ranks sometimes close’*
- *... professionals recognised a tension between a commitment to personal values and motivations underpinning their account of good practice in mental capacity law and the legal requirement*

placed upon them to undertake a detached and objective assessment of reasons in context.

Making Values Matter in the Court of Protection – new film

Following a previous training film about [communication and participation](#) for Court of Protection lawyers, a project team including researchers based at the Institute for [Crime and Justice Policy Research](#) (ICPR), at Birkbeck’s School of Law, have developed a second training film for specialist lawyers as part of the [Judging Values and Participation in Mental Capacity Law](#) project, which is funded by the Arts and Humanities Research Council.

The second training film, ‘Making Values Matter in the Court of Protection’ is [now available to watch on YouTube](#), and aims to improve Court of Protection practitioners of the meaning and role of values in decision making. The film also aims to increase lawyers’ knowledge about how to identify values and incorporate them into decision making; and demonstrate examples of good practice when lawyers communicate with a person and their family to explore and discuss their values.

The creation of this resource was enabled through a Research England Policy Support Fund grant at the University of Bristol, and co-produced with the charity, [VoiceAbility](#), which provides advocacy for people with a learning disability and/or autism.

The film features an interview with a person with learning disability, about their values and a follow-up discussion with that person’s relative. A VoiceAbility leader and her father were central to the filmed demonstration, which also includes commentary, discussion and reflections on the law and practice from Senior Research Fellow, Dr Camillia Kong, and three specialist Court of Protection lawyers (one from law firm Irwin Mitchell and two from 39 Essex Chambers).

Designed to be watched from start to finish, the video can also be used as an interactive professional development resource to promote discussion and reflection amongst groups of practitioners as part of their professional development.

Call for Carers

Neil and fellow researchers at the University of Manchester are seeking to understand the experiences of people supporting a family member to live at home with dementia during the pandemic. The study is taking place across the UK, and you do not have to live with the family member to complete the survey. If you are in this position, they would love to hear from you, or if you are in a position to help to find respondents, that would be enormously helpful.

The survey is available online or in paper format – the online link is [here](#), and they would be very grateful if you could circulate to relevant individuals and networks or post to your social media. If you have a group where paper copies would be better, please contact Jayne Astbury on jayne.astbury@manchester.ac.uk or telephone 07385 463 137 for delivery of a stack of surveys.

The survey is expected to take about 30-45 minutes to complete and will remain open until 30 June 2022.

Mental capacity and personal injury awards

Martin v Salford Royal NHS Foundation Trust [2022] EWHC 532 (QB) (11 March 2022)(HHJ Bird sitting as a DHCJ)

Other proceedings - Personal Injury

Summary

This is the latest judgment in this long running piece of personal injury litigation. The liability judgment of Andrews J (as she then was) is reported at [2018] EWHC 1824 (QB) and the

quantum judgment of HHJ Bird is reported at [2021] EWHC 3058 (QB).

This judgment was to determine **how** the damages were to be paid: either (i) by a lump sum order or (ii) by a periodical payments order and if periodical payments are appropriate whether that order should be variable. There was agreement that there should be an order for periodical payments, and so unsurprisingly this was what was ordered by the Court. The Court also concluded that the order should be variable.

Our interest in this case however arises from the determination of the issue as to whether the claimant (whom was found to have capacity) should receive damages to reflect the set up and running costs of a personal injury trust.

The Claimant had an emotionally unstable personality disorder (EUPD) and a diagnosis of schizophrenia. The Judge found that while the Claimant had capacity to make decisions about her property and affairs, she was vulnerable to suggestion and at risk of being influenced to spend her money in inappropriate ways as a result of her EUPD. Accordingly, the claimant argued that the Court had a positive duty to protect her as a vulnerable person, and this required it to award the claimant the costs of setting up a personal injury trust, despite the fact that she had capacity to manage her own money.

The Court held that save where children and protected parties or protected beneficiaries are involved, the Court does not generally adopt a protective role and declined to do so on this occasion.

Comment

The most significant discussion in the judgment on the issue of whether or not the Court has a protective function in respect of a capacitous but vulnerable person was in response to an argument that the operational duty pursuant to article 2 was engaged (the Claimant had expressed suicidal ideation in the past). The Court concluded that it was not. What is not clear is the extent to which the parties and the Court explored whether the Claimant could be said to be someone whose capacity was at times vitiated by her vulnerability (and in particular the undue influence of others) such that it may have been appropriate for the Court to exercise its inherent jurisdiction adopting the principles set out in Munby J's (as he then was) judgment *Re SA* [2005] EWHC 2942 (Fam). In such circumstances, the existence of a personal injury trust may well provide the opportunity for assessment of the Claimant's capacity (by the trustee) so as to ensure that any decision made by the Claimant in the future is a capacitous one.

A “just” approach to uncertainty in mental health and capacity practice and policy

As part of the Wellcome-funded Mental Health and Justice Project, the King's Policy Institute held a Policy Lab in November 2021 to address the following question:

Where there is significant uncertainty affecting a decision in the mental health and capacity context, what would we aspire to as a “just” approach and how could different mechanisms support this?

There are many dimensions of uncertainty, and decisions taking place under uncertainty may have different levels of risk. In the Policy Lab we focused on decisions where there is high uncertainty but not high immediate risk, as this space provides the most scope to invest time and effort in ensuring a “just” approach to decision making. Work on the Lab was led by Alex, alongside Alex Pollitt of the Policy Lab, and facilitator Ross Pow of Power of Numbers. A briefing report from the Lab, [published](#) in June

2022, summarises the key ideas produced, while accompanying appendices include a more detailed record of the day's discussion and the briefing pack circulated to participants in advance.

Deprivation of Liberty in the Shadows of the Institution: The movie

The recent book by Dr Lucy Series, *Deprivation of Liberty in the Shadows of the Institution*, was noted in our May 2022 edition, and is available as a free e-book [here](#). It is now joined by a film produced in collaboration between Dr Series, the artist [Grace Currie](#), and the film production company [Helter Skelter](#). Dr Series describes this film in her own post [here](#), and notes that ‘[t]he film is funded from my Wellcome fellowship grant, and so can be distributed under a creative commons license ([CC BY-NC-ND 4.0](#)), which means that you can take this film and use it (so long as you don't modify it), for example in training, in workshops or events where you are discussing deprivation of liberty topics. Or just watch it and share it with people who might find it interesting.’ You can watch the video on Grace Currie's webpage [here](#).

Lady Hale on MCA/MHA fusion and children in mental health detention

There is a [brief and interesting interview with Lady Hale](#) in the 27 May 2022 British Journal of Psychiatry Bulletin. We would note Lady Hale's comments on some topical issues, including the MCA/MHA interface and children in mental health detention (focusing particularly on Northern Ireland):

Hale acknowledges, however, that we may now be in a situation which is confusing for practitioners, particularly in the interface between the Mental Health and Mental Capacity Acts.

‘It does inevitably mean that there are procedures which it might be easier to do without. I agree that there have to be safeguards in both

types of situation. But whether they have to be as complicated as they are, whether one could unite the Mental Health Act and the Mental Capacity Act

into a single system that operated in all kinds of eventualities that might arise for people with all kinds of diagnoses ... I think that would be the right thing. We'd be back to the Mental Health Act of 1959, of course, which was trying to do the same.'..

Northern Ireland's very recent introduction of 'fusion legislation' is something Hale watches with keen interest and is 'hoping it works out well'. The MCA (NI) 2016 is the first legislation of its kind, aiming to provide a framework for the care and treatment of people who lack capacity to consent, across all areas of health and social care. Hale sees it as a potential way to resolve some of the confusion and complications of the English system.

'I think in principle the justification for doing things to and with people who lack the capacity or who don't consent to it, is that they lack the capacity to consent to it. That's the best philosophical justification for interfering with their autonomy in that way. Of course, it does depend on what you mean by lack of capacity. But I think that it's possible to devise a definition of lack of capacity which would cater for the major mental illnesses as well, because of the way in which they interfere with the mental decision-making process. And so my own view is that's the right way to go.

'I've got some of the way towards persuading the Mental Health Act review here that that might in the

long run be the right way to go. But I think they're waiting to see how things work out in Northern Ireland before they adopt something like that.'

The discussion on whether to remove learning disability and autism from the Mental Health Act is a particularly fraught one, but Hale suggests that we may be asking the wrong question. An approach based on a test of capacity would make the condition for detention – whether mental illness or mental disability – secondary, she says. 'They ought all to be in a single, simple, coherent system. But that's the lawyer in me, you see, that likes it to be principled and to get away from the notion that this is a stigmatizing thing, as opposed to a necessary safeguard for people who, in their own best interests, have to have their liberty curtailed.'...

How, for example, should Northern Ireland's new mental capacity legislation deal with the under-16 s?

'I think the under-16 s are a problem everywhere. We've had quite a lot of litigation here, but not only for under-16 s, 16 and 17 year olds as well [a reference to the 2019 *Re: D* case,³ where she delivered the main judgment, finding that parents could not consent to deprive a 16 or 17 year old of their liberty]. There are really tricky questions about whether you have a separate regime for them and what the regime should be and to what extent should it recognise children's autonomy. And I don't have any simple answers to that at all.'

...What about the use of mental health legislation more generally for under-16 s. Does she support my use of detention for

young in-patients subject to an extremely restrictive programme of care to which they cannot consent?

'For a long, long time I've been worried that the anxiety to spare any patient, but particularly a child patient, what is seen as the stigma of having been the subject to formal processes actually, of course, deprives those people of the protection which the formal processes are designed to give them. And if we think that anybody deserves protection against what I am sure is well-meaning but misguided attempts to help them or secure them, the need for protection is just as great with young people as it is with older people. So I think I've always thought that was the right position in principle. But of course, in practice, you want your safeguards to be not too bureaucratic and more readily operable and not too time-consuming, as long as there are some safeguards.'

Book Review: Supporting Legal Capacity in Socio-Legal Context

[Supporting Legal Capacity in Socio-Legal Context](#) (Mary Donnelly, Rosie Harding and Ezgi

Taşcıoğlu, eds., Hart, 2022, hardback/eBook, c.£76/61)

The second wave of scholarship about the UN Convention in the Rights of Persons with Disabilities is now firmly with us. Following hard on the heels of a volume edited by Michael Ashley Stein and others on the CRPD in the mental health context⁸ comes another edited volume of equally high quality and (almost) equal jurisdictional reach, thinking about legal capacity more broadly. *Supporting Legal Capacity in Socio-Legal Context*, edited by Mary Donnelly, Rosie Harding and Ezgi Taşcıoğlu,⁹ is an edited collection stimulated by a workshop convened by the Oñati Institute in July 2019. As the editors acknowledge, the pandemic (touched upon, albeit only relatively briefly, in some of the chapters) substantially delayed progress towards publication. In the circumstances, indeed, the editors and contributors are to be congratulated for having persevered against the odds to bring so substantive a work to completion.

The book contains 16 chapters, written by contributors from the UK (importantly, including England & Wales and Scotland – two of the three distinct jurisdictions within one island; Northern Ireland, sadly,¹⁰ does not feature), Canada, Finland, India, Ireland, Spain, Sweden and Turkey. The contributors (and indeed) editors are, in many ways, a 'who's who' of capacity law scholarship – even if, as the editors rightly acknowledge, there is no explicitly disabled voice amongst the authors.¹¹ Crucially, it is a volume

⁸ Stein, M. A., Mahomed, F., Patel, V., & Sunkel, C. (Eds.). (2021). *Mental health, legal capacity, and human rights*. Cambridge University Press, reviewed here.

⁹ In line with the approach taken in the volume, I do not use their titles here, or those of the contributors. No disrespect is intended thereby.

¹⁰ "Sadly," because of the experiment that Northern Ireland is embarking upon with the enactment – but not yet full implementation of the Mental Capacity Act (Northern Ireland) 2016, fusing mental capacity and mental health legislation.

¹¹ The volume edited by Stein et al does feature "service user" perspectives (to use the term adopted by the editors of that volume). Without wanting to make too much of this, reflecting as it does, no doubt, different editorial strategies, priorities and challenges, it is nonetheless a noteworthy difference when the two volumes are placed side by side. For those wanting (in effect) to hear the voices of those whose legal capacity who may be in issue outside the 'conventional' mental health field, I could not do better than recommend the work of Eilíonóir Flynn, one of the contributors to this volume, in particular the Voices Project, and the edited

which does not seek to impose a homogeneity of stance towards the CRPD upon its contributors, but at the same time (including in the editors' opening chapter) steering away from the polarising tone of some of the debates which on occasion has characterised the first wave of CRPD scholarship, generating much heat but frequently a frustrating lack of illumination as to what operationalising the right to legal capacity really means. The volume also fulfils in spades the editors' hope that it "showcase[s] the contribution of socio-legal methodologies in developing an evidence-base for the enhanced right to legal capacity."¹²

It is divided into three broad sections: (1) charting the conceptual contours of capacity law; (2) reforming capacity law: making, shaping and interpreting legal frameworks; and (3) supporting legal capacity in everyday life: balancing empowerment and safeguards. This means that it has something for (almost) everyone, whether you be student, researcher, activist, law-maker, clinician, social worker, philosopher or lawyer, and whether you be a newcomer to these debates or steeped in the arcana of "100% supported decision-making."

Of particular interest, at least to me, are those chapters which shed light on areas which are insufficiently understood within the Anglosphere. These include the chapters by Patricia Cuenca Gómez on the reforms to Spanish civil legislation on legal capacity on persons with disabilities and Ezgi Taşcioğlu on Turkey's state reporting to the Committee on Persons with Disabilities, both of which (in different ways) illuminate how legal capacity has a very different place within civil law jurisdictions to that which it has in common law jurisdictions.

volume to which it gave rise: Flynn, E., Arstein-Kerslake, A., De Bhailís, C., & Serra, M. L. (Eds.). (2018). *Global perspectives on legal capacity reform: Our voices, our stories*. Routledge.

¹² Page 3.

¹³ An example of this, indirectly, can be found in the fascinating table produced by Rosie Harding in her chapter on Supporting Legal Capacity of what she has

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.¹³ Hence (and in equally crude terms) 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.

Equally interesting, for a different reason, is the chapter by Titti Mattson on decision-making in relation to social services for persons with dementia in Sweden, which explores some of the complexities of a system placing a high premium on supporting individuals to remain at home and upon interventions (at least in social services) being based solely upon consent – both 'big ticket' items from a CRPD perspective. The chapter by Soumitra Pathare and Arjun Kapoor also provides an important (and in this volume¹⁴ isolated) example of attempts to bring about CRPD compliance within a low-resource country setting: in this case, India, through the prism of the Mental Healthcare Act 2017.

It would also be wrong to leave this review without highlighting the chapter by Eilíonóir Flynn, '*The (Contested) Role of the Academy in Activist Movements for Legal Capacity Reform: A Personal Reflection*.' In some ways an unusual piece within an academic collection, given its

identified as 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.

¹⁴ The Stein et al work achieves a greater – if still not universal – jurisdictional spread.

very personal tone, it makes for particularly interesting reading. The former Chair of the Committee on the Rights of Persons with Disabilities, Theresa Degener, has described the Committee as having been “perhaps naïve” to devote its first General Comment – and hence, by implication, a very substantial amount of its small ‘p’ political capital – to the issue of legal capacity.¹⁵ That naivete might also be seen in the way in which General Comment 1 proceeded on the basis that it was setting out an approach to legal capacity which simply spoke for itself, akin to a prophecy¹⁶ revealing self-evident truths. In some ways, Flynn’s chapter – dealing with the process of the passage of the Assisted Decision-Making (Capacity) Act 2015 in Ireland – can be seen as a report of the point at which the prophetic approach contained in General Comment 1 had to be tested by law-makers seeking to reduce the high level principles of the CRPD to domestic legal provisions. Flynn does not hide her disappointment at the end result in Ireland, but the chapter – and the book as a whole – represents necessary reading for those taking stock of the first wave of scholarship and activism, and working how best to move forward to enhancing the right to the enjoyment of legal capacity on an equal basis.

[Full disclosure, I provided comments on a draft of the chapter by Camillia Kong on the significance of strong evaluation and narrativity in supporting capacity. I was also provided with an inspection copy of this book by the publishers. I am always happy to review books

in the field of mental capacity and mental health law (broadly defined).]

Alex Ruck Keene

¹⁵ Degener T. Editor’s foreword. *International Journal of Law in Context*. 2017 Mar;13(1):1-5, an observation also noted by Mary Donnelly in this work (page 20).

¹⁶ A word I use advisedly, drawing upon the work of James Gustafson, to which my attention was drawn by Scott Kim, a collaborator of mine over many years, including on the Mental Health & Justice project. Whilst Gustafson’s work has nothing directly to do with the CRPD, his analysis of different types of moral discourse is extraordinarily helpful for those seeking to understand why the discussions between the proponents of the ‘hard-line’ or ‘radical’ interpretation of legal capacity within the CRPD and those operating

within legal, clinical and policy frameworks as they stand so often appear to be ones where those involved are talking different languages: they are. See, in particular, Gustafson, J. M. (1988). *Varieties of moral discourse: prophetic, narrative, ethical, and policy. The Stob Lectures*. Interestingly, Flynn uses the religious language of conversion in her chapter, noting that she was “[i]nitially highly sceptical about whether such a ‘radical’ notion [as that contained in Article 12 CRPD] was possible to achieve. However, my conversion, since it occurred, has been complete, proving that there really is no zealot like a convert when it comes to Article 12” (page 133).

Editors and contributors

Victoria Butler-Cole QC: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



Neil Allen: neil.allen@39essex.com

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).



Nicola Kohn: nicola.kohn@39essex.com

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](#).



Katie Scott: katie.scott@39essex.com

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](#).



Rachel Sullivan: rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click [here](#).



Stephanie David: stephanie.david@39essex.com

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click [here](#).



Arianna Kelly: arianna.kelly@39essex.com

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click [here](#).



Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click [here](#).



Simon Edwards: simon.edwards@39essex.com

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](#).



Scotland editors

Adrian Ward: adw@tcyoung.co.uk

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.



Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).



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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com



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clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

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