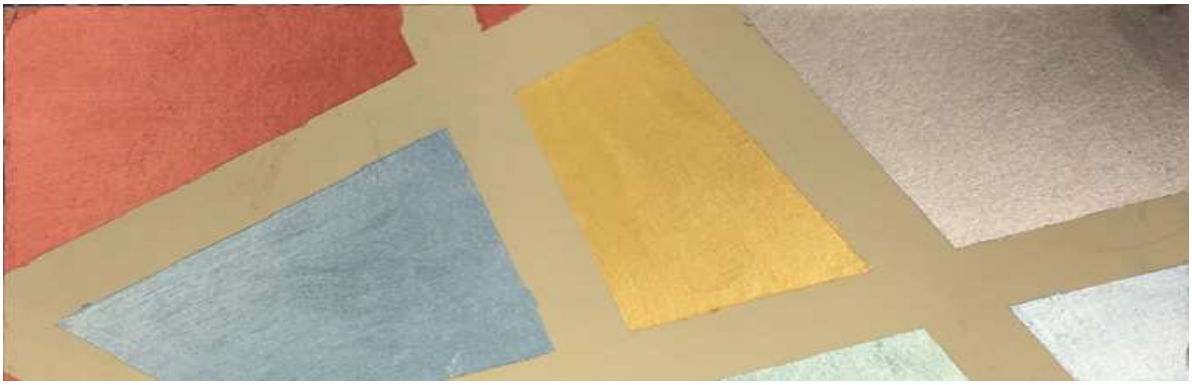
Essex CHAMBERS

MENTAL CAPACITY REPORT: SCOTLAND

September 2021 | Issue 115



Welcome to the September 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: capacity, silos and pigeon-holes, medical treatment dilemmas, and the limits of support;

(2) In the Property and Affairs Report: LPA modernisation and help with COP1 and COP1A forms;

(3) In the Practice and Procedure Report: the Court of Protection is, in fact, a court, costs updates, and insights in the future of remote hearings;

(4) In the Wider Context Report: a policy round-up, the inherent jurisdiction and children, advocacy in restricted settings, and the limits on the duty to secure life;

(5) In the Scotland Report: Mental Welfare Commission reports on the use of the Mental Health Act during COVID-19 and advance statements, and thoughts about SIDMA.

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. 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. 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, and Neil a page 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.

Editors
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
Arianna Kelly
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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.

Contents

Mental Welfare Commission for Scotland reports on the use of the MHA in Scotland during the pandemic

In July 2021, the Mental Welfare Commission for Scotland published its report *The use of the Mental Health Act in Scotland during the Covid-19 pandemic: Rising numbers, falling safeguards*. Although the Coronavirus Act 2020 did provide for the possibility of some reduced safeguards relating to psychiatric compulsion to take account of pressure on health and social care services in Scotland these did not in fact come into force.[1] All compulsory measures therefore continued to operate under the ordinary provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 with its underpinning principles designed to ensure that any compulsion is lawful and proportionate and that the autonomy of the patient is respected. However, in emergency situations, even where ordinary legislation is used close attention must be paid to ensure that there is legal authority, proportionality and non-discrimination in relation to any measures adopted.

A brief summary of the report is provided here and a reading of the full report is highly recommended for more detail, particularly relating to different health boards and patient characteristics, but what it highlights is an overall increase in the use of compulsory measures under the Mental Health Act between 1 March 2020 and 28 February 2021.

Between 1 March 2020 and 28 February 2021, there was a rise in all types of detention, the highest rates being attributed to the larger health boards in Scotland. Emergency and short term detentions rates were constantly above average whilst Compulsory Treatment Orders tended to fluctuate around the average rates rather more. It also appears that the biggest increases were in the most deprived areas and, whilst the relevant data was incomplete, there were above average increases in compulsion amongst the BAME community in Scotland.

Obtaining Mental Health Officer (MHO) consent

[1] The only emergency related amendment to the Mental Health (Care and Treatment) (Scotland) Act 2003 that did come into force was under the Coronavirus (Scotland) (No 2) Act 2020 which temporarily removed the requirement for a nominated person to have their signature witnessed by a prescribed person when they consented to become a named person. This provision was largely welcomed.

for emergency detentions is required, unless impracticable, under section 36 of the Act. The absence of such consent has been an ongoing issue but during the pandemic this became worse as did the granting of back-to-back Short Term Detention Certificates (STDCs). MHO consent is a potential safeguard against the unnecessary use of emergency detention which impacts on an individual's rights to liberty and autonomy (Articles 5 and 8 ECHR and Articles 14 and 12 CRPD). Moreover, as STDCs are not subject to the safeguard of tribunal or court authorisation and scrutiny, the lengthening of any period of short term detention by the immediate granting of another certificate again impacts on these rights. The Commission notes in the report that constant review of a patient is, of course, good practice and thus where a STDC is in fact revoked because the patient is doing well but then a further one granted because there is a deterioration then there is unlikely to be a problem. However, where it is a case of simply replacing a certificate which is about to expire with another STDC then this is cause for concern.

Another area of concern related to Social Circumstances Reports which are an important element of mental health services meeting their obligation to respect a patient's social, economic and cultural rights. A part of this is the MHO duty under section 231 of the Act to prepare such a report. The Commission has previously indicated its unhappiness about a reduction of such reports in connection with STDCs which became worse during the pandemic.

The report, however, makes it clear that the pandemic simply exacerbated existing issues. The 'take away messages' from the report relate not only, therefore, to emergencies but also to 'normal' times and it must be remembered that the use of compulsion under the Act has been progressively rising anyway.

Jill Stavert

Significantly Impaired Decision-Making Ability (SIDMA)

SIDMA is a fundamental criterion, a 'capacity test', for civil compulsory psychiatric care and treatment under the Mental Health (Care and Treatment) (Scotland) Act 2003. Its retention and/or amendment is something which is currently being considered, amongst other things, by the Scottish Mental Health Law Review which is due to report in the Autumn of 2022.

There has been very little research conducted on SIDMA and its use but in July 2021 the Mental Welfare Commission for Scotland published a very helpful Research Brief *Significantly impaired decision making ability – How well is it recorded in practice?* which builds on an earlier 2010 study and highlights an apparent lack of clarity around its use in practice. Rather than repeat the briefing's findings verbatim here readers are referred to the briefing itself. For more information on the research and background to SIDMA in Scotland you may also wish to read the excellent 2021 article by Wayne Martin et al in the *International Journal of Law and Psychiatry* entitled 'SIDMA as a criterion for psychiatric compulsion: An analysis of compulsory treatment orders in Scotland'.

Jill Stavert

Advance Statements in Scotland

The Mental Health (Care and Treatment) (Scotland) Act 2003 contains provisions in sections 275-276 recognising advance statements and prescribing how they must be made. Advance statements under the Act provide a vehicle by which a person may express how they do and do not wish to be treated if they were to become unwell as a result of 'mental disorder' and have impaired decision making about medical treatment. Clinicians must have regard to the wishes expressed in the advance statement as must the Mental Health Tribunal for Scotland. The wishes can, however, be overridden subject to various reporting requirements and safeguards.[2] Whilst concerns have been raised about the validity and currency of wishes expressed in advance statements, particularly those which have been made some time ago, they are also seen as an important means by which to ensure that a person's dignity and autonomy is respected where they are facing psychiatric compulsion. The Scottish Mental Health Law Review is looking at the role, efficacy and effectiveness of advance statements from a human rights and practice perspective.

Since 2017, as a result of an amendment to the 2003 Act by the Mental Health (Scotland) Act 2015, which also saw duties being placed on health boards to support the making of advance statements and place these in patient records, the Mental Welfare Commission for Scotland has maintained a register of advance statements (the information being collected being the existence of one, where it is kept and any overrides of it).

In July 2021, the Commission published a report *Advance Statements in Scotland* which highlights the low take up of advance statements amongst the 4,721 persons for which there was a T3 certificate between 29 June 2017 and 1 December 2020. A T3 certificate is completed by specially trained independent senior psychiatrists for those persons who are subject to compulsion under the 2003 Act. Of this June 2017-December 2020 cohort, only 6.6% had an advance statement and, compared across the three years for which the Commission had complete information from its register (2018-20), the proportion of individuals receiving treatment who had an advance statement was similar in each year, being 7.2%, 6.9% and 7.3%, respectively, so there was no real change across this period. Compared to those who did not have an advance statement, the Commission found that those who had one were younger, a slightly higher proportion were male and a slightly higher percentage were from the most deprived areas in Scotland, and, perhaps unsurprisingly, those with an advance statement tended to have experienced more previous episodes of psychiatric compulsion than those who did not have one.

36.9% had their advance statement overridden and, when compared with those whose advance statement was not in conflict with the

[2] There is no case law in Scotland relating to the overriding of advance statements under the 2003 Act. However, it is important to appreciate that such overrides do engage a number of human rights, namely Articles 3, 5 and 8 ECHR and 12, 14 and 17 CRPD, as well as equality and discrimination issues (see, for example, J Stavert 'Added Value: Using Human Rights to Support Psychiatric Advance Statements' (2013) 17(2) *Edinburgh Law Review* 210-223).

recommended treatment, it was found that there was a higher proportion of overrides for those from the most deprived areas, for women, for those who were White Scottish or other White ethnicities, and for those who had a higher number of previous episodes.

The Commission recommends greater encouragement by health boards of the making of advance statements and commissioning of more research in order to establish the best time to contact a person to make an advance statement. Moreover, as the information required to be placed on the Commission's register makes it difficult to assess the content of advance statements and therefore the significance of overrides and other matters, it also recommends that the Scottish Mental Health Law Review considers whether it would be useful to distinguish between an advance statement to refuse treatment from wishes about receiving specific treatments. In light of the implication that a more focussed intervention to increase the uptake of advance statement is required, it also requests that the Review considers whether there should be a requirement that that people are offered the opportunity to develop an advance statement after the completion of an episode of compulsory treatment.

Jill Stavert

Editors and contributors

Alex Ruck Keene: **alex.ruckkeene@39essex.com**

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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.

Annabel Lee: **annabel.lee@39essex.com**

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.

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.

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

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 October. 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

Chambers UK Bar
Court of Protection: Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and Community Care
Top Tier Set

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