



Welcome to the November 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: two deprivation of liberty cases making clear what should (and should not) happen before the court; two important cases about reproductive rights and capacity, and capacity under stress in different contexts;

(2) In the Property and Affairs Report: welcome clarity as to how to make foreign powers of representation effective; and capacity and the financial implications of marriage;

(3) In the Practice and Procedure Report: two important judgments from the Vice-President highlighting different aspects of case management and confirmation as to the procedural rules governing inherent jurisdiction applications in relation to adults;

(4) In the Wider Context Report: news from the National Mental Capacity Forum (and a survey they need completing); an important case about the intersection of capacity, the inherent jurisdiction and the Mental Health Act 1983 in the context of force-feeding; and when you can rely upon your own incapacity to your benefit.

(5) In the Scotland Report: four important publications from the Mental Welfare Commission.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [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, where you can also find clear [guidance](#) as to the (non) place of mental capacity in relation to voting, ahead of the deadline for registration in the General Election of 26 November.

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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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The Mental Welfare Commission for Scotland publications

The Mental Welfare Commission for Scotland has recently published the following good practice guides and reports.

Capacity, consent and compulsion for young people with borderline personality disorder: Good Practice Guide

This very detailed guidance covers the complex issue of treating young persons (defined as someone under 18 years of age) with borderline personality disorder. It also provides guidance for children (defined as a person aged under 16) and their parents with borderline personality disorder. Specifically aimed at professionals it does state that it might additionally be useful for patients, and their relatives and carers.

‘Personality disorder’ falls within the statutory definition of ‘mental disorder’ in Scotland allowing non-consensual interventions under the Mental Health (Care and Treatment) (Scotland) Act 2003 and Adults with Incapacity (Scotland) Act 2000. The guidance notes that it is rarely recorded as the only reason for compulsion but that when it does occur then it tends to be in relation to short term detention as opposed to longer term Compulsory Treatment Orders or guardianship.

The guidance’s focus is on decision-making capacity and consent, and how these can be assessed and supported. Although there is not

much detailed discussion of the underpinning human rights requirements for the recommended approaches there is clear evidence that cognisance is taken of relevant ECHR and CRPD standards and applied within the existing legislative framework and principles. Some useful illustrative case studies are also provided.

Use of Seclusion: Good Practice

This is an updated version of the Commission’s previous guidance on the use of seclusion for persons with ‘mental disorder’ (as defined by the Mental Health (Care and Treatment) (Scotland) Act 2003). Its purpose is to provide guidance for the use of seclusion in accordance with safeguarding individual rights, welfare and safety. It points out that seclusion can be physical or psychological and can occur in both hospital and community settings. The guide is not, however, intended to cover seclusion in prisons, young offenders’ institutions, other custodial care settings or schools.

Importantly, the guidance makes it clear from the start that seclusion should not be used as a first line response to aggressive and/or violent behaviour or as a therapeutic intervention but only exceptionally circumstances to manage extremely difficult behaviour. In keeping with Scotland’s mental health and incapacity legislative and human rights principles it points out the need to look for alternative ways of addressing such behaviour and that ‘Failure to

do this has the potential to lead to inhuman and degrading treatment of some of the most vulnerable people in our society.’ and amount to human rights violations.¹ Again, as with the *Capacity, consent and compulsion for young people with borderline personality disorder* guidance some illustrative case studies are provided.

Mental Health Act Monitoring Report 2018-19

On 23rd October 2019, the Commission published its annual monitoring statistics for the Mental Health (Care and Treatment) (Scotland) Act 2003 for 2018/2019. A broader range of figures, and comparisons over the last ten years is also included. Obviously, amongst other information and evidence, the Scott Review will be considering these findings.

The findings must be read in context so please do look to the report itself for more detail but essentially numbers of instances of all forms of civil compulsion (Emergency Detention Certificates (EDCs), Short Term Detention Certificates (STDCs) and Compulsory Treatment Orders, hospital or community based) are up, and are the highest they have been since the 2003 Act was implemented. Continuing episodes of detention over the past ten years have also increased (increasing by 25.6% from 2,840 in January 2010 to 3,567 in January 2019).

Rates of emergency detention (including those granted with Mental Health Officer (MHO) consent) vary across the health boards in Scotland and the numbers of young persons detained under EDCs and STDCs have increased. Significantly, and worryingly, the greatest increase in rate of EDCs per 100,000 population

in the past year has been young men aged 16-17 and both young men and women aged 16-17 have shown the greatest increase in emergency detentions across the observed ten year period. In addition, STDCs have risen by 122% for women under the age of 25 since 2009/10.

The Commission highlights that there is a gap in the completeness of data relating to ethnic minorities subject to the 2003 Act in Scotland. Reflecting the decreasing numbers of MHOS in Scotland but their important role local authorities are also reminded of their statutory duties to designate MHOs for each patient’s case² and to appoint sufficient MHOs to discharge statutory functions.³

In the criminal justice sphere, however, numbers of persons with a mental disorder who are accused or convicted of a criminal offence and who are placed on a Criminal Procedure (Scotland) Act 1995 order requiring them to be treated in hospital or in the community remain similar across the last ten years. Additionally, the work of Police Scotland with others has resulted in the use of police stations as a place of safety falling to one of its lowest levels (3% of use of place of safety rather than 18% in 2011/12).

Autism and complex care needs

This themed visit report looking at support for people with autism was published on 30th October 2019. Essentially, the message is that more appropriate and tailored support is required in terms of care and treatment. Clearly, the timing of this report is very pertinent given that the Independent Review on Learning

¹ pp 6 and 20.

² s229 2003 Act.

³ S32 2003 Act.

Disability and Autism in the Mental Health Act is due to report later this year.

The Commission met 54 people with autism⁴ living in hospital or in the community across Scotland as well as speaking with medical and care staff and with family members and carers. The visits resulted from a recognition of the particular complex needs of people with autism which are not always being met in settings designed for people with other conditions. In general terms, it was found that there is a wide variation in how services are currently able to meet the needs of persons with autism.

It was found that whilst appropriate environments tended to be provided for those living in the community and thought had been given in hospital as to how to make changes to accommodate particular needs of persons with autism this was not always possible. It also found that a wide variation in assessment and post-diagnostic support exists across Scotland and a dual diagnosis can be seen as a barrier to proper assessment of autism. Moreover, a large proportion (45) of the 54 persons with autism who were spoken with were prescribed psychotropic medication on a regular basis (40 of whom were being prescribed regular antipsychotic medication). Delays in hospital discharge owing to lack of availability of suitable accommodation was also noted and affected significant numbers (13) of the 28 persons with autism who were hospital. The impact of diagnosis and care, and lack of support, on families is also noted.

The report concludes that providing appropriate support through designing services to properly address the complex needs of persons with autism requires time, expertise and resourcing. However, failure to take this action could not only prove to be even more expensive but fails the individuals concerned.

Jill Stavert

⁴ Aged between 18 and 65 years old, who were either (a) inpatients in NHS Adult Acute, PICU or Learning Disability inpatient wards and units; (b) subject to a formal civil order under the Mental Health (Care and

Treatment) (Scotland) Act 2003 (MHA) or Adults with Incapacity (Scotland) Act 2000 (AWIA); or (c) in specialist autism services.

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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. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).

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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 contributing editor to Clayton and Tomlinson 'The Law of Human Rights', 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](#).

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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. To view full CV click [here](#).

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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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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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

Conferences at which editors/contributors are speaking

Mental Capacity Law Update

Neil is speaking along with Adam Fullwood at a joint seminar with Weightmans in Manchester on 18 November covering topics such as the Liberty Protection Safeguards, the inherent jurisdiction, and sexual relations. For more details, and to book, see [here](#).

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 – the 100th – will be out in December. 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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