



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

(1) In the Health, Welfare and Deprivation of Liberty Report: LPS delayed to April 2022; alcohol dependence and other capacity conundrums; stem cell donation and altruism, and when to come to court in medical treatment cases;

(2) In the Property and Affairs Report: updated OPG guidance on making LPAs under light-touch lockdown and a face-off between potential professional deputies;

(3) In the Practice and Procedure Report: a basic guide to the CoP; litigation capacity and litigation friends and observations about intermediaries and lay advocates;

(4) In the Wider Context Report: capacity and the Mental Health Tribunal, a change of approach to s.117 aftercare and lessons learned from a close encounter with triage;

(5) In the Scotland Report: the Scott Review summary of responses to its initial survey and a response from the Chair to the critique in our last issue.

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, not least because the picture continues to change relatively rapidly. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, [here](#); Alex maintains a resources page for MCA and COVID-19 [here](#).

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

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The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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### Scott Review – summary of responses issued

The first main phase of the work of the Scottish Mental Health Law Review (“the Scott Review”) was to seek views and experiences about mental health law in Scotland. The consultation period lasted from January to the end of May 2020. Remarkably, despite the great volume of responses received, the Review Team published their “Summary of Responses to the Phase 1 Consultation” on 1<sup>st</sup> July 2020, barely a month after the extended consultation period ended. 264 responses were received, a number of them “composite” responses from large organisations. In addition, the Review Team took account of evidence gathered at meetings with nine organisations. Even without the constraints of lockdown, to have converted all of that input into 43 pages of coherent narrative, done to a high standard, is a significant achievement upon which the Review Team is to be congratulated. The document is available [here](#).

Already widely welcomed is the unequivocal clarification provided in the first two pages in response to the significant concerns, on which we reported in the [June Report](#), that both the Interim Report of the Review issued in May 2020 and the ensuing Newsletter issued on 12<sup>th</sup> June appeared to signal a substantial narrowing of the

work of the Review Team to concentrate on mental health law, largely to the exclusion of adults with incapacity and adult support and protection law. The introduction to the Summary of Responses could not be clearer. The exclusive focus upon mental health law is to be restricted to the first phase now completed. Sensibly, next will follow an equivalent examination of how the Adult Support and Protection (Scotland) Act 2007 works alongside adult incapacity and mental health legislation. There is an explicit assurance to those who contributed to the 2018 Consultation on the Adults with Incapacity (Scotland) Act 2000 that their responses, and the conclusion and recommendations made following that Consultation and subsequently, will be used by the Review.

A few issues that have caused concern still await clarification. It would be helpful to have equally explicit reassurances that areas of law that properly belong within the three Acts but are at present located in other legislation, or which are not addressed at all, will be fully covered by the Review. Put simply, one seeks reassurance that the Review will address the three areas of relevant law, not just three existing Acts. Clearly, the greatest concerns about non-compliance with basic human rights requirements attach to these “extraneous” topics. Examples are the problematic shortcut past many of the

protections of the 2000 Act provided by section 13ZA of the Social Work (Scotland) Act 1968; and the ongoing scandal of the almost complete absence of adequate protections in the existing system of appointees receiving social security benefits – not even subject to the principles of adult incapacity law or the general provision of monitoring and control in the 2000 Act. Some of the most serious gaps include three topics originally proposed for inclusion in the 2000 Act, but omitted: provision to remove all the uncertainties around advance directives (emphasised during the current crisis, and by the greater clarity of the law in England & Wales); inadequate provision and safeguards for medical and other decision-making in intensive care settings, including decisions about withholding or withdrawing life-preserving treatment (the deficiencies of current provision also being highlighted both by the current crisis and comparison with the greater certainty, and also the clearer protection for professionals acting properly in emergency situations, provided in England & Wales); and the lack of mandatory requirements for a specialised judiciary (the need for which is emphasised by existing contrasts between sheriff courts, largely dependent upon resources available to each).

Readers of the Summary of Responses should be clear that this is a well-structured account of what the Review Team heard, bringing several relevant themes out clearly; but it is not a programme of work for the Team ahead. As the document puts it: “It is important to note that this report is an analysis of responses received from individuals and organisations, highlighting the themes of significance for them. It reflects their priorities which will help to inform ours.” Nevertheless, anyone with relevant experience

who reads the Summary will quickly recognise the authenticity with which it reflects experience “on the ground”, and emerging themes which to a large extent may be found to be broadly common to all areas of law within the remit of the Review. There are however some matters where differing experiences point to a need for comparison between the relevant Acts. For example, concerns about the language of the 2003 Act emerged as soon as the Bill was published, with recognition even at that stage that the “jigsaw puzzle” approach to drafting in that Act, compared to the relative clarity of the 2000 Act, was not appropriate to legislation likely to be referred to on a daily basis by professionals and others who are not lawyers. However, though one might conclude that in some matters one of the relevant Acts is somewhat better than another, all require improvement to approach “best” rather than “better”. The latest Summary of Responses reports concerns that the principles “need teeth”, already recognised in places such as the [Three Jurisdictions Report](#) that benign statements of principle require to be developed into attributable and enforceable duties.

The Summary of Responses contains a great deal, not mentioned here, of interest and value. This Report does not attempt the almost impossible task of providing a summary of a summary!

At the end of my item “Scott Review – Interim Report” in the June Report, I mentioned that John Scott QC, Chair of the Scottish Mental Health Law Review, had kindly permitted me to make public the personal Critique of the Interim Report which I had submitted to him. A link was provided. I am delighted that John has now

provided a response to the Critique and has permitted us to publish it. His response also takes account of some of the points in this article, which he saw in draft. His response appears immediately below, with our thanks to him for contributing in this way.

*Adrian D Ward*

### The Scott Review – response to Adrian Ward’s critique

*[As presaged above, we are very pleased to be able to set out here John Scott QC’s response]*

Adrian Ward has engaged positively, indeed enthusiastically, with the review from the outset. He has continued this helpful engagement with a [paper](#) containing his views on the work of the review to date, including what we have published in our Interim Report in May and the recent report containing analysis of the 264 responses received to our Call for Evidence as well as other evidence received. I am grateful to Adrian for the opportunity to offer some thoughts on his paper.

Our Interim Report acknowledged that our focus so far, including in our Call for Evidence, has been primarily on the Mental Health (Care and Treatment) (Scotland) Act 2003. Adrian has identified some of the reasons for this in his analysis. In our report, we also referred to other important work, concluded and ongoing, in relation to Adults with Incapacity and Adult Support and Protection legislation, as well as the Independent Review of Learning Disability and Autism in the Mental Health Act (*“the Rome Review”*).

Ours is the overarching review which is intended to pull together all the strands of this other work, to meet our principal aim - to improve the rights

and protections of persons who may be subject to the existing provisions of mental health, incapacity or adult support and protection legislation as a consequence of having a mental disorder, and remove barriers to those caring for their health and welfare.

In relation to the work of the Rome Review, we await the response of the Scottish Government which, in turn, will inform our work in relation to learning disability and autism. In particular, a significant factor will be the Government’s approach to the key recommendation to remove learning disability and autism from the definition of mental disorder in the Mental Health Act.

Much work has been done in the Rome Review, as well as in reviews of the AWI and ASP legislation. In the next phase of our overarching review, we will need to make our own assessment of the work done in these other areas, determine what remains to be done, and then consider how best to test the idea of convergence of the respective Acts.

There are strong advocates for convergence, like Adrian, and others who consider that there are risks for some individuals which point away from convergence.

We have established Advisory Groups – Communications and Engagement; Compulsion; Capacity (and Support for Decision-Making); Child and Young People; and Social Economic and Cultural Rights.

It is intended that these groups, and others yet to be established, will look at key subjects and report into the Executive Team to assist in our progress towards recommendations about changes in the law.

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Our work to date, and the focus of the Call for Evidence, should not cause concern about a narrowing of the scope of our review. We are grateful to Adrian for posing questions about this to allow us to clarify matters. The Terms of Reference have not narrowed or changed. We will exhaust our remit over the full course of the review, recognising that some work on AWI and ASP will be necessary in phase 2 to ensure proper equivalence in relation to all three pieces of legislation.

To address one important example of a concern about undue narrowing of focus, reference in our work to date to advance statements is not intended to rule out wider consideration of the matters mentioned by Adrian in relation to advance directives. At the first meeting of the Capacity Advisory Group, one member encouraged us, consistent with our approach to date, to be expansive and ambitious in our thinking, not confining ourselves to an examination of current law and practice. Interesting discussion ensued on some of the terminology around capacity assessment which we have resolved to address with our own glossary to assist us with the many questions to be considered, for example, to what extent does the wording of the legislation actually affect the clinical process of assessment. The Capacity Group is one of the groups in which crucial matters relevant to all three pieces of legislation will be considered.

In phase 2, we will continue with our approach of engaging and listening, always ready to adapt to the new methods of working and communicating being adopted by individuals and groups, lived experience and others. Having

a further interim report in 6 months will allow a further opportunity to check progress against the Terms of Reference. We look forward to further constructive engagement with all those with an interest.

*John Scott QC  
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Chair of the Scottish Mental Health Law Review*

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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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## 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.

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We are taking a break over August, and hope that at least some of you are able to do so too. Our next edition will be out in September. 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](mailto:marketing@39essex.com).

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