



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

(1) In the Health, Welfare and Deprivation of Liberty Report: substance over form in DoLS authorisations, complex questions of coercion in medical treatment, and the limits of fluctuating capacity in the context of sex;

(2) In the Property and Affairs Report: a brisk dismissal of an attempt to appeal a judgment of Senior Judge Hilder about charging by a deputy, and easy read guides to making LPAs;

(3) In the Practice and Procedure Report: an important rapid consultation on hearings and the judicial view of remote hearings;

(4) In the Wider Context Report: the CPR responds to vulnerability, strengthening the right to independent living, capacity in the rear view mirror and the ECHR and the CRPD at loggerheads;

(5) In the Scotland Report: the Mental Welfare Commission on hospital discharges, change at Scottish Government (but how much) and welfare guardianships and deprivation of liberty.

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.

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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

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### Consultation on hybrid and remote hearings

A rapid two-week consultation was launched on 10 June by the President of the Family Division to identify good practice from remote and hybrid hearings over the last 15 months to provide an evidence base to assist with decisions regarding future ways of working as parties, representatives and judges return physically to court. This survey expressly includes consideration of the Court of Protection. The survey can be found [here](#) and the deadline for responses is 27th June 2021.

### Remote hearings: the judicial view

In the early days of lockdown, then-Senior President of Tribunals, Sir Ernest Ryder, commissioned Dr Natalie Byrom and the Legal Education Foundation to carry out a survey of tribunals judicial office holders who had sat in remote hearings between 19 March 2020 and 31 July 2020, to gather feedback on their experiences. The report and the recommendations (dated June 2021) entitled '*Understanding the impact of COVID-19 on tribunals: The experience of tribunal judges*' can be found [here](#). Some of the experiences and challenges related will chime with experiences before the Court of Protection, hence the coverage in this section of the report.

The data was collected from judicial office holders via an online survey. It was open to all judicial office holders who had participated in hearings between 19 March 2020 and 31 July 2020. 1507 judicial office holders completed the survey in full including 670 from the Health, Education and Social Care Chamber.

The report considered a broad range of issues, from satisfaction with the technological aspects of remote hearings, through to the impact remote hearings has on access to justices, to the impact of remote hearings on judicial wellbeing. Of particular interest for our purposes are the parts of the report that consider the experiences of those participating in Mental Health Tribunals.

- Access to the hearings was a key issue to emerge. This was adversely affected by a lack of access to adequate equipment and broadband for those in detained settings, creating practical barriers to accessing remote hearings. Respondents reported patients being prevented from joining video hearings altogether, or forced them to attempt to participate from shared equipment. Further, respondents reported patients being too daunted by the thought of a remote hearing to attend at all.
- A further concern expressed was the impact on the hearing of the withdrawal of pre-hearing examinations of the patient by the

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medical member. The particular concerns articulated were:

- The loss of the opportunity for the tribunal members to identify vulnerability in the absence of this interview, and the consequent lost opportunity to put in measures to address such vulnerability.
- The lost opportunity to gain additional information on the patient's condition and general mental state.
- The lost opportunity to establish rapport with the patient.
- A further theme to emerge was the impact on the patient of participating in a remote rather than an in person hearing. The issues raised in respect of this issue were multi-factorial:
  - Concern were expressed that even if vulnerable patients were identified, the circumstances of the pandemic made it difficult to put in place effective adjustments that would enable patients to effectively participate. For example allowing them to sit with their lawyers, or with a supporter.
  - A number of respondents reported that proceeding with hearings by video or telephone risked exacerbating patient's symptoms, particularly where they were suffering from psychosis. It was reported by respondents that this had led to increased numbers of patients leaving their hearings part-way through or declining to attend in the first place.

- A number of respondents reported experiences where patients had, unbeknownst to the panel, become very distressed during hearings and reacted with expressions of physical violence as a consequence. Other respondents reported concerns for the safety and wellbeing of nursing staff who were tasked with supporting patients to access remote hearings.
- Respondents reported that remote hearings were longer than in person hearings, which in itself posed a barrier to communication with patients who were unable to cope with long hearings, and left before they concluded.

The report makes a number of detailed recommendations. Of particular relevance to Mental Health Tribunals – and potentially the Court of Protection – are the following:

- Checks should be conducted to ensure that patients in detained mental health settings are able to access the technology and broadband required to participate in remote hearings. Hospitals should be asked to ensure that patients are able to join hearings from a quiet room and via a device that is not shared, and have access to writing materials to take notes.
- Leadership judges should issue guidance that remote hearings (both telephone and video) should be used with caution where:
  - Hearings are long;
  - Factual matters are in dispute;
  - Issues of credibility are engaged;

- There are multiple participants and witnesses;
- Parties are unrepresented;
- Parties require the assistance of an interpreter;
- Parties experience physical or mental health difficulties, including hearing loss;
- Issues are highly contested.

In practice, if these recommendations are followed, then once restrictions arising from the pandemic are lifted, remote hearings in mental health cases will not be common.

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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 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](http://www.mentalcapacitylawandpolicy.org.uk). 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 and created the website [www.lpslaw.co.uk](http://www.lpslaw.co.uk). To view full CV click [here](#).

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



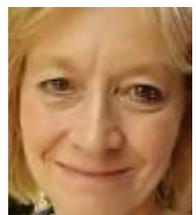
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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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## Conferences

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](#).

Neil is doing a DoLS refresher (by Zoom) on 29 June 2021. For details and to book, see [here](#).

Neil and Alex are doing a joint DoLS masterclass for mental health assessors (by Zoom) on 12 July 2021. For 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.

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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](mailto:marketing@39essex.com).

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[For all our mental capacity resources, click here](#)