



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

(1) In the Health, Welfare and Deprivation of Liberty Report: the Supreme Court takes on capacity, learning to learn, and capacity and illicit substances;

(2) In the Practice and Procedure Report: the Court of Appeal's concern about judicial visits, and reporting restrictions and accountability;

(3) In the Wider Context Report: Parole Board guidance on mental capacity, and how consumer law can help navigate care home dilemmas;

(4) In the Scotland Report: a truly shocking report of institutional inhumanity, and the extent of incapacitation under s.67 of the Adults with Incapacity Act 2000.

Because there's not a huge amount to report, there is no Property and Affairs Report this month. However, a reminder of this [consultation](#) currently underway, closing on **12 January 2022** about third-party access to limited funds. Dr Lucy Series has provided an excellent overview of the consultation [here](#).

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.

You may notice some changes next year, as coordination duties are being taken over by Arianna whilst Alex is on sabbatical, but rest assured that this will remain a one-stop shop for all the capacity news which is fit to print. In the meantime, and for those for whom it is not an empty hope, we wish you happy holidays, and will see you (probably virtually) in 2022.

### Editors

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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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### People at the Heart of Care: Adult Social Care Reform White Paper

The DHSC social care White Paper, 'People at the Heart of Care', was published on 1 December 2021. The paper announces several new funding streams, and provides details on previously-announced power for the CQC and Secretary of State to monitor local authority performance of Care Act duties. It does not contain any new information on the cap on care costs (or how this will interact with the Liberty Protection Safeguards, a matter of considerable importance).

We would highlight:

- The Government has confirmed a plan to allow self-funders to access local authorities' own contracted care home rates. This appears to be a change to a long-standing gap in the Care Act that local authorities are only obliged to

provide care in care homes for self-funders under certain limited circumstances.

- New funding streams:
  - £500m in social care workforce development over the next three years. 'This dedicated investment in knowledge, skills, health and wellbeing and recruitment policies will improve social care as a long-term career choice.'
  - £300m to integrate housing into local health and care strategies
  - £150m for improvements in care-related technologies
  - £70m for investment in *'market-shaping, commissioning and contract management capability in local authorities...this offer includes a focus on...access to continuous professional development, support for developing a clear career path for commissioners, and strengthening leadership.'*
  - £25m for services for informal carers
  - £30m *'to help local areas innovate around the support and care they*
  - *provide in new and different ways'*
  - £5m for improving information and advice
- CQC duties:

- *'We will introduce a duty for the Care Quality Commission (CQC) to independently review and assess local authority performance in delivering their adult social care duties under Part 1 of the Care Act 2014.*
- *'We are putting in place new legal powers for the SSHC to intervene in local authorities to secure improvement where there are significant failings in the discharge of their adult social care functions under Part 1 of the Care Act 2014.'*
- *Statutory interventions for local authorities are to be used in 'exceptional circumstances, where CQC has identified a serious and persistent risk to people's safety and where other forms of support are insufficient to drive improvement.'*
- *'We will lay secondary legislation in due course, to specify which functions of local authorities under Part 1 of the Care Act 2014 will form the basis of the assessments'*

### Parole Board guidance: mental capacity assessments and litigation friends

The Parole Board has published [guidance](#) for its members on ensuring that prisoners who may lack mental capacity to participate in their parole reviews receive appropriate assessments, and are appointed litigation friends if necessary. We set out the headline points below.

The guidance sets out the relevant decision as being 'in effect "to conduct the parole proceedings"'. It analogises this to the

*Masterman-Lister* test for litigation capacity, also noting at 1.4 that '[t]his includes capacity to give instructions to anyone the prisoner appoints to represent them in the parole process, who may or may not be legally qualified.'

The responsibility rests with the panel *'to identify cases where capacity is in doubt and take appropriate steps to ensure that these prisoners are adequately assisted and/or represented.'* (1.5)

*'Where a prisoner is found to lack mental capacity, the Board, working with the Public Protection Casework Section (PPCS), has in place a process whereby a litigation friend can be appointed to make decisions and enable effective participation, either directly or by instructing a legal representative.'* (1.5)

The guidance anticipates that under the Mental Capacity Act, the prisoner may have *'already appointed someone to manage their affairs, which may include matters relating to parole. Panels will need to check whether the appointment of such a person also enables that person to make decisions about Parole Board proceedings.'* (2.2) It is not entirely clear whether it is suggested that a health and welfare LPA would hold this power, although this would be doubtful.

The guidance offers further detail on the proposed relevant information at 3.3 as:

- the issues on which the prisoner's consent or decision is likely to be necessary in the course of the proceedings;
- understanding the advice of their representative; and
- giving instructions relevant to their case.

The guidance reminds Parole Board members of

the need to ensure that communication is appropriate and accessible for the prisoner, whether or not the prisoner has been assessed as lacking capacity.

The guidance recommends at 5.1 that *'Individuals working with the prisoner should be alive to signs or indications that suggest the prisoner may lack capacity to make decisions about their parole review, and this should be addressed as soon as possible.'* The examples included extend to both the prisoner's representatives, but also prison staff, or local authority or medical staff working with the prisoner, or anyone in the prisoner's life. It notes that if the Mental Health Casework Section is involved with the prisoner, this may be a source of information to consider concerns about mental capacity.

The guidance sets out the process for considering a mental capacity concern at 5.4:

*'Once PPCS is aware of a potential mental capacity concern, they will convene a case meeting to bring together the relevant individuals to decide next steps. This will include taking a view on whether a mental capacity assessment should be commissioned...Where the prisoner is assessed as lacking mental capacity for the purposes of conducting their parole review, the steps set out in the PPCS process map will be followed, which briefly will be:*

- *Mental capacity assessment confirms prisoner lacks capacity;*
- *PPCS will add a flag on PPUD;*
- *PPCS will look to identify a litigation friend;*

*• PPCS will submit a request to the Board (via an SHRF) to appoint a nominated person to act as the prisoner's litigation friend or advise that no suitable person can be found.'*

A panel may re-refer a prisoner to the PPCS process or seek further information if the prisoner has been found to have capacity, but the panel continues to have concerns.

The guidance specifies that the capacity evidence should be recent, and relate directly to the decision as to whether to participate in a parole board hearing. The guidance leaves somewhat open the question of whether a medical professional is required to complete the assessment, but it is clear that this is strongly recommended.

It is for the panel to appoint a litigation friend and must consider whether any particular appointment is in the prisoner's best interests. The panel may convene a hearing to determine the appropriateness of a litigation friend if that is in question. The criteria for a litigation friend in a Parole Board hearing track the normal requirements for appointment of a litigation friend, though it is noted that conflicts of interests for a litigation friend in respect of co-defendants should be avoided. The Official Solicitor may be appointed as a litigation friend of last resort. Neither an IMHA or an IMCA are obliged to act as a litigation friend in a parole hearing. *'However, on the rare occasion where this may be proposed, and they agree, it would be independent of their role as an IMHA or IMCA.'* (6.7) A solicitor who is not the prisoner's legal representative may be appointed per *R (EG) v Parole Board* [2020] EWHC 1457; another prisoner may also be appointed, but the

guidance notes care should be taken with such a request.

Funding may be required to cover the cost of a litigation friend; there is currently no funding for Legal Aid to do so and the parole board does not cover these costs. *'However, where a family member or friend is acting as the litigation friend there may be access to small Parole Board funds to cover travel and subsistence costs. This would not extend to professional fees or lost earnings.'* (11.2)

At the hearing, the panel should use its discretion *'to make directions for arrangements to enable participation in parole hearings. This is particularly important where a prisoner has cognitive difficulties, learning difficulties, a mental disorder or for any other reason may be lacking mental capacity to make decisions and participate effectively in their parole review.'* (13.2) The guidance recommends taking the following steps at 13.2:

- *The composition of the panel should be considered, and it is recommended that a specialist member (ideally a psychiatrist) is appointed as a co-panellist;*
- *Additional time should be allocated to such oral hearings;*
- *The Board should support and facilitate engagement between the legal representative, the litigation friend, and the prisoner, issuing directions as required.*

The panel should also consider other adaptations, including (13.3):

- *Tailoring questions to the prisoner's needs and abilities. Clear and simple language is often vital. Avoid questions which*

*carry a high risk of being misunderstood or producing unreliable answers, such as leading, or tag questions. Panels should consider breaking down questions into smaller sections, preparing the prisoner for each stage of the communication. Panels should take care to not rush prisoners facing such difficulties. Such prisoners may need longer to process the questions and think about their answers;*

- *Discussing whether a communication specialist, such as a Speech & Language Therapist, or intermediary is required to facilitate communication both prior to and during any oral hearing;*
- *Adjusting the setting and conditions to facilitate participation for vulnerable prisoners, such as the way the room is set out;*
- *Adjusting the hearing procedure to facilitate participation. For example, the prisoner may be given regular breaks in their hearing if it is known that they have a short attention span, or listing only one case for that day, to ensure the panel has sufficient time available if needed;*
- *Directing a person to carry out assessments which may be needed for the panel to understand how to facilitate participation in the hearing. A person directed to make such an assessment could be a*

*professionally qualified mental health specialist, either working within or retained by the prison estate, or from or on behalf of the social services department of the relevant local authority. An appropriately qualified member of the Board may be able to assist a panel to form a view on whether an assessment is needed;*

- *Directing that adaptations be made to facilitate participation, such as by provision of an easy read version of documents or information. An appropriately qualified member of the Board may be able to assist a panel to form a view on what adaptations are needed;*
- *Directing witnesses from local authority social services departments to attend to assist in explaining matters to and supporting the prisoner, and to explain how they will provide care to the prisoner as part of the risk management plan for release.*

Panels must consider whether *'non-disclosure of information about victims may be linked to the mental capacity of the prisoner, either at the time of the offence, or at another time, or during the parole review, which contribute to their inability to disclose the information. Panels will need to explore whether capacity has, at any time, been an influencing factor on the failure to disclose information about victims. [...] In particular, where a prisoner has not disclosed the whereabouts of the remains of a victim; or if the prisoner has not identified a child subject in indecent photographs they were convicted of possessing, there is a legal duty for the Parole Board to take this into account for initial release*

*cases.'*

Of note, in addition, is what the guidance does **not** cover. This guidance is very firmly addressed to the participation of the prisoner in the parole process. As it makes clear at 16.11, separate guidance is being published to help panels navigate the difficult waters of DoLS and licences.

### When is mental capacity not mental capacity?

*Campbell v Advantage Insurance Company Ltd [2021] EWCA Civ 1698* can be added to the growing list of cases which appear to be about the MCA 2005 but in fact are not. As Dingemans LJ identified at paragraph 1, the appeal in personal injury proceedings raised *"a short but interesting point of law about whether a claimant can rely on his own drunkenness, and consequential lack of insight, either to avoid a finding of contributory negligence or to reduce the apportionment of responsibility for his contributory negligence."* The question arose in circumstances whether the first instance judge had asked himself whether the claimant (who was drunk) had had capacity to consent to being move from the front to the back seat of the car in which he was a passenger, and to being driven by the driver (who was also drunk). The judge had applied the Mental Capacity Act 2005 to the question, found that the presumption of capacity was not displaced in respect of either question. Together with other factors irrelevant for these purposes, this led the judge to make a reduction of 20% for the claimant's contributory negligence.

On appeal, it was asserted that the judge had wrongly applied a test of capacity under the MCA

2005. Dingemans LJ analysed the position thus:

*28. It appears that the judge raised the issue of the Mental Capacity Act 2005 with the parties at the beginning of the trial because of the terms of the Particulars of Claim. At paragraph 8(12) it had been pleaded that Mr Dean Brown [the driver] had placed Mr Lyum Campbell [the Claimant] in the rear seat "well-knowing that the Claimant was unable to reach a capacitous or informed decision as to whether he wished be driven away from the position outside the club by Dean Brown". In the light of the statement of case it was not surprising that the judge decided to address the formal position under the Mental Capacity Act 2005.*

*29. Section 1 of the Mental Capacity Act 2005 establishes relevant principles which apply for the purposes of the Act. These principles include: "(2) A person must be assumed to have capacity unless it is established that he lacks capacity." As was noted in the submissions before the Court this provision mirrors the common law position set out in *Masterman-Lister v Jewell* [2002] EWCA Civ 1889; [2003] 1 WLR 1511 at paragraph 17 where it was said "it is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved".*

*30. In these circumstances where the issue of capacity had apparently been put in issue on behalf of Mr Lyum Campbell, the judge cannot be criticised for addressing the issue of capacity. The judge's treatment of the issue was in accordance with the express terms of the*

*Mental Capacity Act 2005. All that the judge did was to point out that a person is presumed to have capacity until the contrary is proved, and this did not amount to an impermissible reversal of the burden of proof in relation to the issue of contributory negligence.*

We would, with respect, go further than did Dingemans LJ. As he himself noted at paragraph 29, the principles under s.1 MCA 2005 apply **for purposes** of the MCA 2005. The MCA 2005 does not set down a universal test of mental capacity for all purposes, and there are large parts of the law which are not governed by it (for instance, the test for entry into a contract, making a lifetime gift or – controversially – the test for capacity to make a will, at least when looked after the event). As the court in this case was concerned with a common law claim – for personal injury – we suggest that the actual answer to the ground of appeal was that the MCA 2005 was irrelevant, and that the judge was considering the position by reference to the common law presumption in favour of (legal) capacity applicable to adults. The judge could certainly, if required, have directed himself that he wished to apply the analytical components of the test for mental capacity contained in the MCA 2005 to the question of whether, at common law, the claimant had or lacked the capacity to decide to take the decisions he did. But that would be to develop the common law, rather than to apply the MCA 2005.

### **Mental Health Units (Use of Force) Act 2018**

Olaseni 'Seni' Lewis died at the age of 23 when he was restrained by 11 police officers in a mental health hospital. Seni's law – the Mental

Health Units (Use of Force) Act 2018 – was passed to make hospitals safer by reducing the use of force. Seni's death, the law, and its wider context, were the subject of a powerful film.

Accompanied by statutory guidance, the law finally came into force on 7 December 2021. Use of force in mental health units is at an all-time high, with restrictive interventions rising to over 151,000 in 2020-21. The legislation is aimed at English hospitals providing care and treatment to those with mental disorder (whether detained or not) and covers how to meet legal obligations under the Act, best practice advice, and the obligations on officers from Wales when in English mental health units.

Use of force is defined as including physical, mechanical or chemical restraint of a patient, or the isolation of a patient (which includes seclusion and segregation). The Act defines the types of force as:

- physical restraint: the use of physical contact which is intended to prevent, restrict or subdue movement of any part of the patient's body. This would include holding a patient to give them a depot injection
- mechanical restraint: the use of a device which is intended to prevent, restrict or subdue movement of any part of the patient's body, and is for the primary purpose of behavioural control
- chemical restraint: the use of medication which is intended to prevent, restrict or subdue movement of any part of the patient's body. This includes the use of rapid tranquillisation (see NICE guideline (NG10) Violence and aggression: short-term management in mental health, health and

community settings).

Under the Act, a responsible person must be appointed who must publish a policy on the use of force in the unit, and information for patients about their rights. That person must ensure the staff receive appropriate training in the use of force and keep records of its use, with statistics reported annually to the Secretary of State for Health and Social Care. If the police attend to assist staff, they must wear and operate a body camera at all times when reasonably practicable.

### Capacity and care homes – consumer law to the rescue?

After it was withdrawn temporarily in the summer, the Competition and Markets Authority have re-issued an updated version of its guidance: "UK care home providers for older people – advice on consumer law." Designed in the first instance for care home providers, it provides useful guidance at the same time for situations where others are concerned about whether a particular care home provider is (colloquially) doing the right thing.

Of particular relevance are the sections on visiting (paragraphs 4.80-4.83) and termination by the care home (paragraphs 4.93-4.103, reminding providers, in particular, of the fact that "*most care home residents in England and Wales are legally entitled to a minimum of 28 days' written notice to vacate a care home under the Protection from Eviction Act 1977 (or the period set out in your contract, if longer)*").

### National Autistic Taskforce forum

The National Autistic Taskforce Forum: High Quality and Effective – The Future of Autism



Care was held virtually on 23rd September 2021 for an invited audience, which included representatives from a range of local authorities, NHS bodies, care inspectorates and care providers from across the UK. The Forum focussed on the NAT publication: [An independent guide to quality care for autistic people](#). A series of short videos (approx. 5 mins each) were made in advance of the Forum by a series of guests, who were asked to introduce each of the recommendations of the guide. Workshops held during the forum focused on discussing these recommendations and their implications for care and support for autistic people. This page contains links to both the videos and summaries of the discussions of the recommendations at the forum.

## Book Review

*Words to Remember* (Revd Phil Sharkey, Independent Publishing Network 2021)

I was recommended this book shortly after having also been recommended another book about dementia in hospital, [Wandering the Wards: An Ethnography of Hospital Care and its Consequences for People with Living with Dementia](#), by [Katie Featherstone](#) and [Andy Northcott](#). The book, published by Routledge, is freely available in e-book form. Drawing on five years of research embedded in acute wards in the UK, the authors follow people living with dementia through their admission, shadowing hospital staff as they interact with them during and across shifts. It provides an almost unrelentingly grim picture of the organisation and delivery of routine care and everyday interactions at the bedside, which reveal the powerful continuities and durability of ward cultures of care and their impacts on people

living with dementia. Much of the grimness stems from watching, vicariously hard-pressed and caring staff only just keeping the system together through routines, how singularly ill-suited those routines often are (and the staff know that they are) to the individual needs of those with dementia, and how little space or time there is to respond to the patients' voices.



Reading [Words to Remember](#) by the Revd Phil Sharkey was made all the more powerful against this backdrop. This short book, available from the [Addenbrooks Charitable Trust](#) website (cost £10; the profits going to the Trust) is a remarkable work, not least because it shows what happens when time can be carved out. The Reverend Phil Sharkey is Chaplain at Addenbrooke's Hospital, and led a reminiscence project, funded by a grant from the Royal Voluntary Service, to use poetry to facilitate memory recall amongst those patients living with dementia. As the author explains, "[a]s the project developed and I was given words by the patients in response to poetic stimulus and conversations, I began to realise that the fractured sentences, and sometimes newly coined expressions, were becoming their poetic response

to the situation and reflected, in a non-linear form, their effort to communicate to me, who they were, and what was important to them. Loss, despair, loneliness and confusion were common themes, but laughter, love and fun also shone through." The second stage of the project was to have been to train chaplaincy volunteers to take the work further, but COVID then hit. Returning to the poems from the patients, Sharkey was then moved to write his own poems "back" to them as a creative, spiritual response. On each page, therefore, the patient's own poem first appears (including, where relevant, the supporting 'editorial' information required where the words needed to be amplified by actions), mirrored by the author's own response. The third element to the book are a number of powerful, and above all intensely personal stitched drawings images by [Georgie Meadows](#).

If the (sometimes unquestioned) reality of hospital care for those with dementia may all too often that portrayed by Featherstone and Northcott, the attentiveness to the individual voice (even at or beyond the words) of Sharkey provides at least some light to the shade, and inspiration to aim for.

*Alex Ruck Keene*

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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](#).

### **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 January. 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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