

# Mental capacity and mental health law: overview of the legal and policy landscape

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**Caveat: personal view only**



# England & Wales in outline

- Mental Capacity Act 2005
  - Functional definition of capacity
  - 'Best interests' on the other side of capacity, refined by judicial interpretation
  - A workaround for the inability to give consent to care / treatment and inability to enter into binding contractual relations
  - Graduated safeguards
  - Framework for administrative authorisation of deprivation of liberty added 2009
- Mental Health Act 1983
  - Not capacity based
  - Administrative detention, followed by right of challenge to tribunal
  - Coercive framework creeping into the community
- Nb neither the MCA nor the MHA explain **why** (in particular) state agents are intervening, but simply **how** they can intervene: duties to intervene come from elsewhere
- The common law
  - Still governs many fundamental relations – e.g. contractual and testamentary capacity
  - High Court inherent jurisdiction as 'safety net' for capacitous but vulnerable

## Reform debates

- The slow burn: capacity-based deprivation of liberty: 2014-
  - Supreme Court decision in [Cheshire West](#) and House of Lords scrutiny of MCA
  - Law Commission project 2015-17
  - The maximalist conception of coercion: confinement absent consent, even if in line with person's known will and preferences
  - Legislation passed 2019: as of April 2023, now delayed 'until after the life of this Parliament'
- The faster burn: Mental Health Act reform: 2017-
  - Political initiative: rising rates of detention and racial disparities
  - Increasing threshold for detention, focus on (constrained) increase in autonomy, non-legislative tools – but examination of prevention of detention largely out of scope
  - Independent Review: 2017-2018, draft legislation before Parliament 2022: ?
  - Racial disparities have only worsened in the interim...

# Actual reform: ‘Seni’s Law’

- Olaseni (‘Seni’) Lewis was a 23 year old Black man, who died as a result of prolonged police restraint in mental health hospital in 2010 ([RIP SENI: racism, graffiti and the UK’s mental health crisis - video | Mental health | The Guardian](#))
- Mental Health Units (Use of Force) Act 2018, into force 2022
- Use of force includes physical, mechanical or chemical restraint of a patient, or the isolation of a patient (which includes seclusion and segregation)
- Not statutory prohibition, but focus on transparency and accountability
- First reported case: use of force to secure physical health treatment for detained mental health patient: *Norfolk and Suffolk NHS Foundation Trust v HJ* [\[2023\] EWFC 92](#)
- Questions:
  - Why was Seni’s Law passed when other legislative efforts have or seem to be stalling?
  - Will it work? And what does ‘working’ mean?

## Also on the horizon

- Powers of Attorney Bill
  - Only mental capacity reform likely to be implemented by the current Government
  - Largely procedural changes to creation of powers of attorney and push for digital-first
  - ? Missed opportunity to implement 2017 Law Commission proposals for supported decision-making scheme

# Autonomy under the spotlight

- Assisted dying / assisted suicide
  - Court challenges now firmly closed down
  - Repeated private Parliamentary bills not given time to progress
  - Health and Social Care Committee of Westminster Parliament inquiry underway
- Limits of autonomy before the courts
  - *McCulloch and others v Forth Valley Health Board* [\[2023\] UKSC 26](#): the doctor, not the patient, decides what alternative treatments are reasonable
  - *R (JJ) v Spectrum Community Healthcare CIC* [\[2023\] EWCA Civ 885](#): the rights of healthcare professionals in the context of risks

# The CRPD

- Losing judicial hearts and minds: contrast *Cheshire West* and *JB*
- Current HR climate in England & Wales chilly – including at judicial level: *Maguire*
- Unclear (at best) whether there is a consensus in favour of ‘hard-line’ CRPD Committee / affiliated approach in relation to detention, treatment or the concept of capacity



# The UK and Ireland

- Northern Ireland
  - Capacity legislation enacted but implementation stalled beyond (essentially) deprivation of liberty framework
- Scotland
  - Scott Review and Scottish Government response – broad terms of reference, wide-ranging recommendations founded on CRPD – what will actually be taken forward and when?
- Ireland
  - Assisted Decision-Making (Capacity) Act 2015 (as amended) in force April 2023 – ambition, scope and gaps

# Wider trends

- Reforms influenced by CRPD, e.g.
  - Norway: move to capacity-based mental health legislation in 2017
  - Law reforms in different states / territories of Australia
  - Civil law jurisdiction reforms relating to legal capacity especially in Latin America, but v easily misunderstood by those from common law jurisdictions
- Increased recognition of
  - Need for (and tools to support) reducing coercion
  - Tools to support the exercise of legal capacity
- Continuing debate about whether CRPD compliance requires abolition of (even capacity-based) legislation providing for involuntary care and treatment
- Is the CRPD Committee changing its mind about capacity?

# Resources

- [ARK Presentation to Muckamore Abbey Inquiry](#)
- [ARK & ors: Mental capacity—why look for a paradigm shift? | Medical Law Review | Oxford Academic \(oup.com\)](#)
- [39 Essex Chambers | Mental Capacity Law | 39 Essex Chambers | Barristers' Chambers](#)
- [Mental Health & Justice | \(mhj.org.uk\)](#)
- [Mental Capacity Law and Policy](#)
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