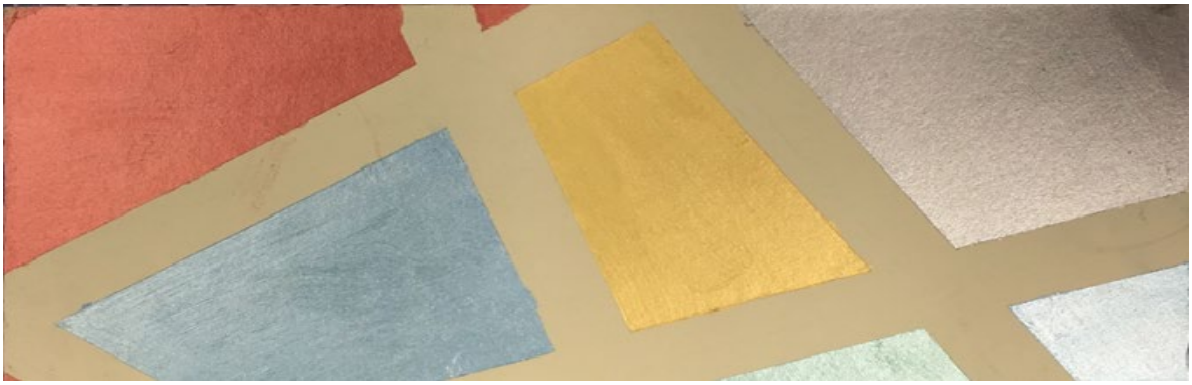

Welcome to the March 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: insight into the proper place of insight, best interests decision-making and good clinical governance, and anorexia and the changing calculus of decision-making;

(2) In the Property and Affairs Report: the Court of Protection's (international) jurisdiction over children;

(3) In the Practice and Procedure Report: fees changes relating to the Court of Protection and the OPG guidance on disclosing visitors' reports;

(4) In the Mental Health Matters Report: the Mental Health Bill progresses and the independent investigation into the care and treatment of Valdo Calocane;

(5) In the Children's Capacity Report: why the report is named as it is, the Court of Appeal confirms that local authorities cannot consent to the confinement of children in care, and guidance for judges writing to children;

(6) In the Wider Context Report: the updated Code of Practice on diagnosing death and restraint in Northern Ireland.

(7) In the Scotland Report: no hard news, but the way ahead for AWI reform becomes clearer, and unhelpful uncertainty about powers of attorney.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page here.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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Diagnosing death

The Academy of Medical Royal Colleges has updated its Code of Practice for the diagnosis of death. It also includes, as Appendix 2, the Royal College of Paediatrics and Child Health 2025 update on the diagnosis of death using neurological criteria in infants, children, and adolescents. Paragraph 6.69 is of particular importance, given the small but increasing trend in cases where families challenge the use of the diagnosis of death by neurological criteria.

> *Managing requests to prevent the application of neurological criteria or to continue somatic support after death has been confirmed*
>
> *In rare circumstances, the patient's family may, for a variety of reasons, request that:*
>
> *a. neurological criteria to diagnose and confirm death should not be used, despite the clinical suspicion that the patient has died, or*
>
> *b. if death has been diagnosed and confirmed using neurological criteria, that somatic support, such as mechanical ventilation and other intensive care treatments, be continued. Section 7 outlines principles of communication which may be helpful in supporting families, and others who care for the welfare of the person, through the diagnosis and confirmation of death, and preempt such disagreement.*
>
> *We recommend approaching the patient's family in the usual way that treatment disagreements are managed in intensive care. That is, with respect and compassion, honesty and transparency, listening and seeking to understand, with patience and allowing more time for explanation within the areas of disagreement, and by providing cultural and religious support and second opinions if acceptable to the family. Offering the patient's family the opportunity to see radiological imaging, with appropriate clinical explanation, and to witness the clinical testing of brainstem reflexes and the apnoea test, even repeating the tests for a third time, may also help family acceptance and understanding.*
>
> *Legal advice should be sought urgently if agreement cannot be reached in a reasonable amount of time and at most within a few days.*

It is of importance that nowhere here (or in the section relating to children) is the guidance framed on the basis that the consent is being sought from family members. There is a lurking issue which needs to be resolved by the courts in due course as to whether carrying out the tests required to diagnose death by neurological criteria are governed by the MCA 2005 (in the case of adults at all). The better view is that it is not – the tests should not be being carried out

absent a reasonable clinical view that the patient is, in fact, dead. Upon death, a patient can, by definition, have no best interests.

It is also, further, of importance that the Code highlights the need for early legal advice to be sought, rather than to allow the situation to continue in an unresolved fashion.

Restraint in Northern Ireland

The moves towards implementing parts of s.9 MCA (NI) 2016 (the equivalent of s.6) MCA 2005 continues apace. The Department of Health in Northern Ireland has recently published its analysis of the responses received to its consultation on the commencement of the provisions. In headline terms, there was support for provisions to be implemented, which is unsurprising, because Northern Ireland is currently in the very uncomfortable position of having statutory provisions for deprivation of liberty, but nothing to cover either best interests decision-making more broadly, or to identify when and how restraint in support of such decision-making is legitimate. Commencing s.9 would help with the second, but not the first (which will remain governed by the common law doctrine of necessity). Consultees also made clear that there was a need for further work to be done to develop the accompanying code of practice.

Research corner

Readers may be interested to learn about the 3rd summer school to be held by the Centre for Investigating Contemporary Social Ills (CICSI) together with the School of Philosophical, Historical and Interdisciplinary Studies at the University of Essex. Day 1 will be focused on change of ending coercion in mental health settings; Day 2 will look at effecting wider social change, and will hear about possibilities of lobbying, activism, bringing social patterns of distress into view in therapy sessions, and paying attention to values and ways of living. For more details, and to book, see here.

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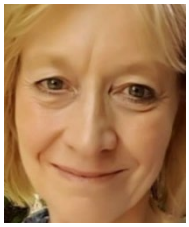
Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership 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 regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does 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.

Our next edition will be out in April. 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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