

# Judging Values and Participation in Mental Capacity Law

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Final project report

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“A guiding principle of the project was the importance of fostering strategic partnerships with legal stakeholders within and beyond England and Wales.”

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## Summary

The Mental Capacity Act 2005 (MCA) in England and Wales sets out legal obligations to persons with impairments of the mind or brain who may lack decision-making capacity. The empowering ethos of the MCA is expressed in the presumption that individuals have mental capacity and the requirement for professionals and courts to support individuals to participate in making decisions about their lives. In 2014, the House of Lords (HL) Select Committee published its *Mental Capacity Act: Post-legislative Scrutiny* report, which marked a welcome phase of internal critical reflection on the challenges facing the practical implementation of the MCA. Given that the vast majority of cases are decided in social and healthcare settings, the HL report highlighted the institutional and professional cultural barriers in these domains to the implementation of the empowering ethos of the MCA. These barriers include an over-emphasis on risk aversion, paternalism, the avoidance of responsibility to vulnerable adults, and disregard for the wishes of the subject of proceedings – known as ‘P’.

Progress to ensure respect for the individuals whose lives fall under the remit of the MCA depends on effective collaboration with professionals charged with its practical application,

not least the legal stakeholders whose practices and principles guide legal proceedings in the Court of Protection (CoP). Although only a small proportion of cases make their way to the CoP, their gravity and wider influence mean that it is crucial to explore areas of potential improvement in how decisions are framed and made in formal legal contexts. This is of particular importance given that legal proceedings represent an escalation of complex disputes about capacity and best interests which often invoke conflicting values and perspectives; yet a decision is legally required.

The inbuilt indeterminacy in the MCA creates specific challenges in the ‘legal work’ involved in its application. The person-, context-, and decision-specific nature of capacity assessments and best interests decisions means the MCA admits for flexibility and discretion in interpretation and decision-making. Cases that come before the CoP often involve fraught disputes about treatment, intimate partners, contact with family, living arrangements, and finances. The indeterminacy of mental capacity law extends not just to the substantive decisions that are made but also to the legal procedures themselves. The MCA and Code of Practice emphasise the

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importance of the participation of P in a decision(s) that affects their life, but whether and how P participates varies from case to case.

Making decisions in these contexts involves complex deliberations and judgements that inevitably evoke values of some kind – namely, the commitments that matter to us and guide how we live our lives. The underlying values of institutions and professional cultures, as well as the actual people making decisions, can have a profound impact on the practical implementation of the MCA and the direction of decisions that aim to have P, and P’s values, at their heart. As a result, how legal professionals grapple with values is critical.

The broad importance of values is not only due to their implicit influence in legal decision-making, but also because the legislation itself embeds values in the best interests framework in section 4(6), where the decision-maker is obliged to consider ‘the beliefs and values that would be likely to influence [P’s] decision if he had capacity’. Despite the explicit mention of values the MCA remains silent on what ‘values’ means and why they are significant in the context of best interests decision-making. Ultimately, respect for and attention to P’s values may hinge on professionals themselves understanding the significance of and engaging with their own values.

In a spirit of critical friendship towards the MCA and CoP, the *Judging Values and Participation in Mental Capacity Law* project embarked on an ambitious programme of research about the role of values and participation amongst legal professionals. Funded by the Arts and Humanities Research Council from 2018 to 2022, the project worked in partnership with legal practitioners, retired judges, and advocates to provide a research base for generating practice-relevant tools to help legal professionals negotiate difficult values conflicts in the CoP as well as instilling the importance of P’s effective participation in legal proceedings. Core areas of concern for the *Judging Values* project were:

1. the values embedded within the MCA’s legislative framing;
2. the values that motivate and guide legal professionals’ day-to-day practice and decision-making;
3. the justification and mechanisms for P’s participation in legal proceedings; and
4. the values-based grounding for improved P-centric practices and decisions under the MCA.

## About the *Judging Values* project

The *Judging Values* project team was a research collaboration between academics from Birkbeck College, the University of Bristol and the University of Oxford. A guiding principle of the project was the importance of fostering strategic partnerships with legal stakeholders within and beyond England and Wales. These were established through two professional consultants and legal practitioners from 39 Essex Chambers, as well as via

a project Advisory Group that involved international legal professionals, academics, and policy-makers.

The core areas of concern were interrogated through three Work Packages that utilised theoretical and empirical methodologies to generate understanding of, and to critically analyse, the MCA's statutory provisions, case law, and legal professional practice.

### The project in numbers

- Interviews with 56 legal professionals across England and Wales: 44 legal practitioners and 12 retired judges
- 22 public engagement events and talks, including presentations to the CoP Practitioners' Association, CoP Bar Association, No5 Chambers, the Society of Legal Scholars and Socio-Legal Studies Association conferences, as well as international academic seminars
- 13 academic and practitioner publications and 1 edited volume, including contributions to the leading international socio-legal and legal philosophy journals: *Journal of Law and Society*, *Legal Studies*, *Cambridge Law Quarterly*, and *Law and Philosophy*
- 2 publicly available continuing professional development videos on YouTube, developed in collaboration with the charity VoiceAbility, persons with lived experience, and CoP practitioners
- Engagement with experts and academics from 4 continents and 11 jurisdictions
- 11 progress newsletters and 1 symposium with our international Advisory Group
- 1 project conference drawing together key legal stakeholders and international experts, attended by 135 delegates



Professor John Coggon (far left) and Professor Penny Cooper (left) with Baroness Brenda Hale of Richmond (centre left), Sir Mark Hedley (centre right), former Senior Judge Denzil Lush (right), and former District Judge Margaret Glentworth (far right) presenting on a panel at the Judging Values and Participation in Mental Capacity Law conference, at the British Academy in London.



Academics Professor Cameron Stewart (left), Dr Stephen Latham (second left), Dr Sumytra Menon (centre), Professor Mary Donnelly (second right), and barrister Alex Ruck Keene KC (Hon) presenting on a panel at the Judging Values and Participation in Mental Capacity Law conference, at the British Academy in London.



## Work Package 1

Work Package 1 (WP1) engaged in legal and empirical analyses of how legal practitioners and retired judges invoke and apply values in framing and making legal decisions about effective participation, capacity, and best interests. Through semi-structured interviews with CoP practitioners, including solicitors and barristers, and retired judges from

the CoP and Appellate Courts, we explored how these professionals:

- understand the role and proper place of values in framing and deciding cases;
- envisage whether, why and how P should participate in legal proceedings.

### Summary of main findings from WP1

1. *Professional motivation and identity-formation*<sup>1</sup> were closely connected to distinctive but common values and character traits that ought to shape practitioners' professional identity and practice in the CoP, constituted by:
  - empathy, compassion and emotional sensitivity;
  - a motivation to advocate for persons with cognitive impairments;
  - consideration of others and collaboration; and
  - an internal sense of wrongness, rightness, and fairness.
2. *What it means to practise well in the CoP*<sup>2</sup> revolved around abilities to focus on P's subjectivity and humanity in addition to the development of non-legal 'soft' skills, such as good communication, rapport-building and emotional sensitivity, as well as the skilful negotiation of conflicting values.
3. *The indeterminacy of the MCA means that legal professionals engage with values constantly*,<sup>3</sup> from what motivates their work in the CoP, to the day-to-day performance of their work, and to the substantive decisions that are ultimately made.
4. *The legal and ethical significance of effective participation*<sup>4</sup> is reciprocal: ensuring P-centricity, so that P's voice is heard and that the legal process is *with, for*, and not just *about* P, whilst also humanising legal professionals from P's perspective.



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## Work Package 2

Work Package 2 (WP2) explored the theoretical framework of the legal and ethical obligations towards P that may help realise the empowering ethos of the MCA in practice, critically reflecting on:

- the emergent claims about good professional practice put forward by our participants;
- the use of deliberative mechanisms to adjudicate P's best interests, such as the 'balance sheet';
- the implications and validity of the 'unwise decision' principle in the MCA, comparing and contrasting its function in capacity assessments and best interests decision-making in case law; and
- the meaning of P-centricity in practice and elucidating its deeper importance in orienting practice and judging within the CoP.

### Summary of main findings from WP2

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1. *The balance sheet is unfit for purpose in judicial decision-making: its quantitative assumptions mean that, as a deliberative tool, it is unable to provide clear and transparent evaluations of the conflicting, and often equally valid, values at play in best interests decision-making.*<sup>5</sup>
  2. *The concept of an unwise decision as a principle of the MCA is often misinterpreted, such that it bleeds into the standard of best interests for substituted decision-making.*<sup>6</sup> There is a discrepancy between the parliamentary interpretation of the 'unwise decisions' clause and its later application in judicial decision-making.
  3. *The meaning and practice of P-centricity should not be understood through a simplistic lens of acceding to P's subjective wishes or reduced to a particular outcome.*<sup>7</sup> It involves a subtle ethical orientation that engages with P's unique way of perceiving and experiencing the world.
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## Work Package 3

Work Package 3 (WP3) sought to develop a range of research-based professional development tools to help improve practice and procedures for legal advocates and judges, particularly:

- communication and interpersonal skills that will help improve the

effective participation of P in CoP proceedings; and

- how values may be productively engaged with in the process of deliberations about capacity and best interests.

### Summary of main contributions from WP3

WP3 resulted in numerous professional development tools being created through knowledge-exchange workshops and collaborations, specifically:

1. The video *Communication and Participation in the Court of Protection*<sup>8</sup> was conceived in response to our research data indicating that practitioners desired and needed training tools on how to communicate with P in the CoP, to enhance P's participation. The video was launched through the CoP Practitioners' Association and was described as 'pioneering'<sup>9</sup> and the 'most important video on technical practice [... that is] going to revolutionise practice'.<sup>10</sup> Since its launch in November 2021 it has been shared with the Japan Adult Guardianship Association. It has been viewed over 1600 times.
2. The second video, *Making Values Matter in the Court of Protection*,<sup>11</sup> stemmed from our research which indicated that legal professionals struggle to understand the importance of values in the course of their CoP work, particularly in engaging with the values of P. Funded by the Research England Policy Support Fund, through the Impact Acceleration Account at the University of Bristol, the video premièred at the Judging Values conference in June 2022.

Both videos were developed in close partnership with the advocacy charity for persons with autism and/or learning disabilities, VoiceAbility, and with persons with lived experience and also with legal practitioners.

3. A professional toolkit, *The Court of Protection: Eliciting a Person's Values*, has been developed and published on The Advocate's Gateway (TAG),<sup>12</sup> an open-access, online resource for legal professionals which provides practical, evidence-based guidance on communicating with vulnerable court-users.



VoiceAbility Speak Out leaders, Sean Nightingale (left), Anne Hunt (centre), and Bill Jones (right) discuss what they would expect of lawyers in order for persons with learning disabilities and/or autism to participate effectively in CoP proceedings in the film, *Communication and Participation in the Court of Protection*.



Dr Camillia Kong (left) speaks with solicitor Camille Ivinson (centre) and barrister Victoria Butler-Cole KC (right) discuss the challenges and importance of effective communication amongst legal practitioners in the film, *Communication and Participation in the Court of Protection*.

## Recommendations for professional practice

1. The 'unwise decision' principle in the MCA must remain confined to the assessment of capacity and is not a valid part of best interests decision-making.
2. Clarity and transparency about values invoked in best interests decision-making and their meaning can help generate more satisfactory decisions, unlike oversimplifying deliberative mechanisms, such as the balance sheet, or unexplained reference to values such as dignity.
3. Judgments in the CoP should encourage complexity and nuance in the language of values and challenge the tendency to reduce values to the binary of autonomy versus welfare.
4. The goal of legal professionals practising and judging in the CoP should be personal and professional reflexivity rather than complete impartiality (not least because complete impartiality requires a detachment that the MCA does not permit).
5. Practitioners and judges must develop effective communication and interpersonal skills to enact the full and effective participation of P in legal proceedings.
6. P-centric practices and decisions involve attitudinal, interpersonal skills in the exploration of P's wishes, feelings, beliefs, and values, which are an essential rather than optional part of best interests decision-making, particularly in cases of communication challenges or lifelong incapacity.

## Implications for international developments in mental capacity law and policy

1. Close interrogation of the values that are embedded in mental capacity legislation across jurisdictions, whose values are given priority within its implementation, and whether P participates in decision-making are vital for critical reflection on domestic law, as well as envisaging the direction of future reform in law and policy.
  2. There may be significant value in bottom-up rather than top-down approaches to law reform in the drive to instantiate the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in different jurisdictions.
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3. Close partnership and international collaboration between academic research and legal stakeholders – including practitioners and judges – are vital for practice- and policy-

related advancements that may tangibly improve the participation and empowerment of persons with disabilities.

## Areas for future research

1. Research into the experiences of participation and decision-making amongst court users of the CoP (i.e. P and those close to P, such as family members), particularly to cross-reference the accounts given by the participants of the *Judging Values* study.

2. Comparative exploration of culturally specific values that impact on the implementation of mental capacity law, examining how values and approaches across different jurisdictions can mutually enhance and improve practices and procedures on the ground.

“Clarity and transparency about values invoked in best interests decision-making and their meaning can help generate more satisfactory decisions”

## Recommendations for professional practice

### 1. The 'unwise decision' principle in the MCA must remain confined to the assessment of capacity and is not a valid part of best interests decision-making.

The MCA provides that a determination of incapacity may not be based merely on a person's making (what may be considered to be) an unwise decision. This provision aims to accommodate value pluralism and the need to respect different world views, preferences, and priorities. It seeks to honour the salience given to people making their lives their own, and specifically the need to assure equality for persons with impairments in relation to this matter. In practice, however, it has led to the idea of wisdom not simply being confined to questions of (in)capacity, and rather coming to feature too in what views and values may inform best interests decisions. Instability in both the MCA's framing and in the nature of its application means professionals need to be conscious and aware of the tendency to utilise wisdom as not just a standard in assessing capacity, but also in best interests decision-making. Without this critical awareness there is a danger of losing sight of the individual and their context-specific circumstances. Adopting a P-centric approach requires negotiating the

difficult tension that is embedded within the very principles of the MCA: between respecting the prospective, arguably unwise, idiosyncratic decisions of an individual and, where they are deemed to lack capacity, nonetheless making a best interests decision that is *for* rather than simply *about* P.

Although the MCA clearly states in section 1 that an unwise decision cannot be equated with a finding of a lack of mental capacity, there have been variable ways in which the standards of wisdom have nonetheless influenced best interests decision-making, as required also under section 1. Close examination of the unwise decisions principle is indicative of a deeper instability in the actual framing of the MCA: on the one hand, unwise decisions cannot be used to infer incapacity; on the other hand, best interests decisions both in the deliberation and outcome often, implicitly or explicitly, draw precisely on a concept of wisdom (or other equivalent values, e.g. prudence). The *Judging Values* project explored the evolution of the principle of 'unwise decisions', from debates in Parliament to judicial interpretations of the unwise decisions clause in deliberations and decisions. Charting this evolution is important because it

reveals how the original policy intent of the MCA was for the principle of unwise decisions to have the purpose of protecting the right of individuals to make idiosyncratic or imprudent choices, whereas judicial interpretations of best interests have typically imported the standard of wisdom into best interests decision-making, appealing to a more demanding concept that is bound up with making choices that are considered to be good for P, irrespective of whether P and P's values would suggest otherwise. In sum, the danger is that the idea of wisdom (or wise decisions) in best interests may (and often does) influence, often implicitly, the values that guide the decision-maker's understanding of P's best interests. Guarding against this is an important step towards ensuring individuals' freedom to make decisions that incorporate *their* values, whether they have or lack capacity.

## 2. Clarity and transparency about values invoked in best interests decision-making and their meaning can help generate more satisfactory decisions, unlike oversimplifying deliberative mechanisms, such as the balance sheet, or unexplained reference to values such as dignity.

Best interests decisions by their nature involve competing values from different perspectives and evaluations of what is important.

The value of a person's enduring (though enmeshed) relationship can sit in direct tension with the value of greater independence in their life; the value of preserving a person's life, for instance, can be fundamentally at odds with the person's wish to refuse a particular treatment intervention where this will result in their death. These competing values are *incommensurable* – meaning that they cannot be measured or quantified using a common measurement. Though the balance sheet approach is widely considered as a means to facilitate deliberations around best interests (indeed, it is often included in guidance provided for professionals), our research suggests this is too crude and unhelpful a tool for deciding between incommensurable values, often hiding rather than exposing the substantive judgements, reasons, and intuitions that help aid decision-making one way or another. Best interests decisions and judgements often appeal to deeply held values around dignity and human flourishing, but what these mean (and why they are significant) tends to be unclear. Our research instead suggests that professionals charged with making best interests decisions should seek to achieve the goal of *articulacy*: namely, becoming more *transparent*, *clear*, and *comprehensible* in terms of the

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values at stake and the evaluations that help elevate one particular proposition over another. Not only is this important to justify significant decisions that are made on behalf of P, but it helps foster an enriched discussion and debate about the inevitable significance and influence of values in the framing of such difficult cases.

### 3. Judgments in the CoP should encourage greater complexity and nuance in the language of values and challenge the tendency to reduce values to the binary of autonomy versus welfare.

If, as above, the goal is to become more articulate about the deeper significance of certain values in specific circumstances and how they bear on deliberations about best interests, professionals need to be equipped with a richer vocabulary of values. However, guidance materials tend to give very little attention to values as compared with the other components of section 4(6) of the MCA (i.e. wishes, feelings, and beliefs). It is often assumed that autonomy and welfare are the predominant values and, moreover, that these values can be personified respectively in P and the best interests decision-maker. However, these merely scratch the surface of the range of values that come into play in the complex cases that often come to the CoP. As Sir Mark Hedley writes in *The Modern Judge*:

The essential judgment [...] between autonomy and protection in the best interests judgment on behalf of one who lacks capacity, involves complex value judgments which, whilst they are presented as 'welfare' or 'best interests' evaluations, are in fact a nuanced, complex, and profound distillation and balancing of values where [...] no one answer may emerge as the only reasonable outcome.<sup>13</sup>

Take the example of an elderly person resisting a move to a care home where many of her needs would be better met: whilst on the surface it might look like a straightforward value conflict between autonomy and welfare, on closer examination other significant values in the mix are those of emotional security and sense of belonging jarring with the value of physical safety. Considering these values and why they matter to P and the case at hand is vital to making a satisfactory judgement. Even autonomy can have a multitude of meanings, understood both as a negative constraint against interference in a person's choices to a duty to promote certain skills that enable that person to act. Different ways of understanding values and how to realise them can also be a source of conflict.

Why is cultivating this more nuanced language of values important? Our research indicates that a more sophisticated understanding of values is key to understanding

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and undertaking the complex range of legal and ethical obligations and duties that are owed to P in the course of CoP work: *these obligations are not exhausted by the values of autonomy and welfare*. Values also are critical to developing a more holistic notion of P-centric practices and what they require. For instance, the House of Lords report, *Mental Capacity Act 2005: Post-legislative Scrutiny*, highlighted how the assumption of respecting P's autonomy (particularly in the presumption of capacity) often led professionals to neglect other duties to support and care for P. Respecting P's autonomy or promoting their welfare are thus not the only values that may matter to P, nor may they exhaust all that is owed to P, or be the most pressing issues to consider in the unique circumstances.

#### 4. The goal of legal professionals practising and judging in the CoP should be personal and professional reflexivity rather than complete impartiality (not least because complete impartiality requires a detachment that the MCA does not permit).

Research from the *Judging Values* project revealed the extent to which values influence CoP practices and judging – from *why* practitioners and judges are motivated to specialise in this area of law, to *how* they go about their professional duties. Values around relationships, home, safety and self-determination are often

universal, despite how their realisation differs between individuals. Cases can also evoke strong resonances with personal experiences – whether these be of family members with learning disabilities or becoming elderly and impaired, to one's own ethical and personal values about what is important about human flourishing.

Although ideals of the law suggest that these kinds of values ought to be set aside so that one becomes more impartial and objective, our research strongly indicates the importance of recognising and engaging with these value sources as an important way of *humanising* and *recognising the gravity* of CoP work. The fact that the cases *do* inevitably evoke professionals' own values helps practitioners and judges show that it is impossible to shed oneself entirely of those values because they can be so intrinsic to one's personal and professional identity. Awareness and reflexivity of how they shape one's professional work is essential to navigating these value influences with skill, so that they become more transparent in practice and judging. If one is ignorant of how values shape one's own decisions, one may not fully understand the need to respect value plurality in the decisions of Ps. Our TAG Toolkit explores the process of developing greater professional reflexivity during CoP work.<sup>14</sup>

## 5. Practitioners and judges must develop effective communication and interpersonal skills to enact the full and effective participation of P in legal proceedings.

Proceedings in the CoP, whether they be around contested capacity or best interests, are often fraught and intrusive to P. This is a key reason why P's participation is so critical – so as to empower them to be involved in decisions that can profoundly affect their lives. Whilst the nature of participation might differ according to the needs and wants of the individual, our research also found the *quality* of participation largely depends on the communication and interpersonal skills of practitioners and judges. In fact, interviews with legal professionals often provided examples where participation of P was hampered because of the lack of training on how to communicate and build trust and rapport with P. These skills, along with a willingness to seek help from communication experts such as speech and language therapists, were seen to be critical to help improve the participation of P in legal proceedings.

Consultation with persons with lived experience of learning disabilities and/or autism further reveals the importance of basic things, such as professionals:

- i. introducing themselves before a meeting, through sending a letter

along with a picture, so that Ps are not caught off-guard;

- ii. explaining their role and why they are in a position to ask intimate questions about P's life and decisions;
- iii. speaking clearly, using easy to understand words as opposed to jargon, and setting aside preconceived assumptions about P's level of understanding;
- iv. finding out how P prefers to communicate or physically position themselves in the environment of a meeting; and
- v. establishing common ground with P through neutral topics and adopting humility, empathy, and sensitivity so as to adapt according to P's needs.

The training film, *Communication and Participation in the Court of Protection* has set out a number of these skills in more detail.

## 6. P-centric practices and decisions involve attitudinal, interpersonal skills in the exploration of P's wishes, feelings, beliefs, and values, which is an essential rather than optional part of best interests decision-making, particularly in cases of communication challenges or lifelong incapacity.

Legal professionals working in the CoP frequently speak of the importance

of P-centricity in best interests decision-making, but what it entails can be unclear or, more concerningly, oversimplified to a commitment to enact the subjective wishes, feelings, and preferences of P, no matter the circumstances. This can sometimes mean that the obligation to consider P's perspective and what matters to them – their wishes, feelings, beliefs, and values – can be seen as dispensable in contexts where P has had lifelong incapacity or communication challenges. An individual may not be able to communicate through language or they may have a condition that has meant they require intense support for their daily care. These facts in themselves, however, do not mean that they do not have meaningful experiences of the world or have a sense of what matters to them in their life. It may mean that they communicate these through their bodies, through subtle gestures, through interacting with their environment in a particular way, or by connecting with those whom they love.

But professionals require a richer, more holistic notion of P-centricity in

order to engage with the meaningful perspective of P in these more ambiguous circumstances – this is crucial in order to capture the deeper ethical significance behind the legal obligation of section 4(6). First and foremost is to challenge the assumption that a lack of capacity or severe communication challenges means that P does not have meaningful experiences of the world or does not have a sense of what matters to them. Second is closer attention to the orientation and comportment of professionals: namely, how professionals engage and interact with P, conveyed through attitudes and ways of approaching and interpreting what matters to P. P-centricity understood in this subtle, attitudinal way shows the importance of professionals developing humility and empathy towards P's different ways of perceiving, experiencing, and communicating with others.

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## Implications for international developments in mental capacity law and policy

1. Close interrogation of the values that are embedded in mental capacity legislation across jurisdictions, whose values are given priority within its implementation, and whether P participates in decision-making, is vital for critical reflection on domestic law as well as envisaging the direction of future reform in law and policy.

The *Judging Values* project's focus on values and participation, specifically the questions of *what* values are, *whose* values are important, *why* these matter, and *how* they impact on the voice and participation of the person with disabilities have been highly fruitful, initiating further internal critique of the MCA and shedding light on critical incoherence within the legal framing and practical issues with its implementation. These reflective questions can be replicated in critical interrogations of mental capacity regimes, both from a domestic and cross-jurisdictional perspective. Whilst the human rights perspective of the CRPD has been important, its predominance has occluded the internal, critical analysis that we believe should come prior to its wholesale adoption in domestic regimes, particularly if progressive

change and reform is to be realised in this area of law.

2. There may be significant value in bottom-up rather than top-down approaches to law reform in the drive to instantiate the CRPD in different jurisdictions.

It is vital to attend to the values that contextualise and are embedded in the legislation if the empowering spirit of the CRPD is to motivate change in domestic regimes, as seen in the MCA. Our study has shown the critical importance of understanding the professional culture and ethos of the legal stakeholders charged with implementing mental capacity legislation. This importance lies at two levels: first, understanding of the professional and institutional culture is key to identifying the existing values that progressive ideals within the CRPD might 'latch onto', meaning that reforms build on the values that may already motivate good practice. Secondly, professional investment in progressive change can be consolidated through professionals participating in the development and design of training that seeks to advance the respectful treatment of persons with disabilities.<sup>15</sup>

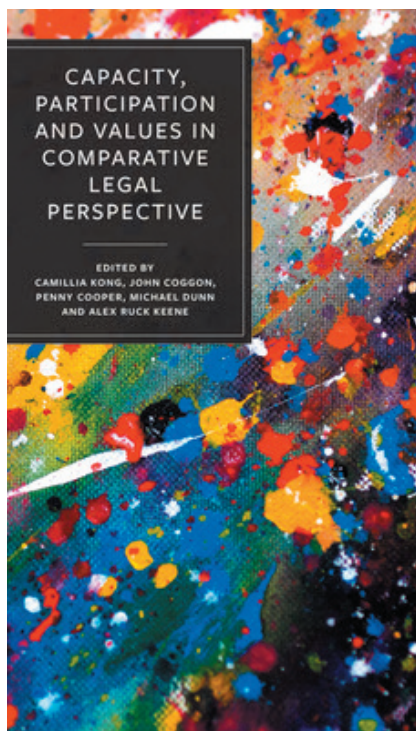
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3. Close partnership and international collaboration between academic research and legal stakeholders — including practitioners and judges — are vital for practice- and policy-related advancements that may tangibly improve the participation and empowerment of persons with disabilities.

A guiding light of the *Judging Values* project was the importance of close engagement and partnership with legal stakeholders who practise and have judged in this area of law. It is tempting to utilise the CRPD (and, more specifically, the CRPD Committee's interpretation of Article 12) as the only valid legal approach that properly empowers and respects persons with disabilities – and to date, much legal scholarship and law reform efforts have adopted this approach. However, exploring the experiences and expertise of legal stakeholders, within England and Wales as well as internationally, who practise and judge within imperfect legal regimes – as the MCA might be considered – still provides highly valuable insights that could generate progressive change. But we need to afford space for these perspectives in the first place.

Bringing such expertise to bear on practice- and policy-related recommendations is important because it ensures attempts to improve the treatment of persons with disabilities are appropriately



Further reading: Camillia Kong, John Coggon, Penny Cooper, Michael Dunn and Alex Ruck Keene (eds) *Capacity, Participation, and Values in Comparative Legal Perspective* (Bristol University Press, forthcoming).

attuned to the practical realities and challenges on the ground and, even more vitally, secures buy-in from those crucial stakeholders who have the power to instantiate cultural and policy change. Indeed, professionals themselves have presented their own internal challenge to practice, not only highlighting laudable areas of practice and judging that have remained hidden thus far but also areas that require change, improvement, and reform. This spirit of critical friendship with practitioners and judges has been key also to the broad practical dissemination of academic research and findings, forming a crucial evidence base to help impact legal professionals and their work moving forward.

## Areas for future research

1. Research into the experiences of participation and decision-making amongst court users of the CoP (i.e. P and those close to P, such as family members), particularly to cross-reference the accounts given by the participants of the *Judging Values* study.

The professionals who took part in our study gave an account of the values, skills, and traits that they see as key to enacting P-centricity in practice and judging. These accounts were illuminating because they reveal what practitioners and retired judges view as important to ensuring P participates and is respected in legal proceedings, but notably absent is an account of the experiences of Ps and their family members, of how these groups perceive their participation and the consideration of Ps under the MCA and in the CoP. Future research must explore these perspectives to critically reflect on as well as enrich the accounts provided by professionals.

2. Comparative exploration of culturally specific values that impact on the implementation of mental capacity law, examining how values and approaches across different jurisdictions can mutually enhance and improve practices and procedures on the ground.

The *Judging Values* project has initiated some academic reflection on the different socio-cultural values and practices that currently exist in different jurisdictions. Collaborative work undertaken within the project is stimulating further academic research activities and outputs, for example, an in-depth comparative analysis of mental capacity law jurisprudence between Singapore and England and Wales, and how these differences might be best explained by reference to institutional, social and cultural factors. Further explorations of mental capacity regimes in parallel will be important to draw attention to divergent values and practices and bring these into dialogue with one another, harnessing productive ideas as to how persons with disabilities may be better respected.

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## Notes

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*Judging  
values* *P*articipation