



Welcome to the May 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: CANH withdrawal on the papers and DOLs statistics;

(2) In the Property and Affairs Report: variation of trusts and the Court of Protection, and Charles J's last hurrah;

(3) In the Practice and Procedure Report: a new President for the Court of Protection and a regionalization update;

(4) In the Wider Context Report: the interim report of the independent MHA review, capacity and housing, covert medication and capacity in the MHT context, and a guest article on autonomy and mental capacity;

(5) In the Scotland Report: an appreciation of the Public Guardian and an update on the AWI consultation;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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.

Contents

End of an era: beginning of another?	2
Review of adults with incapacity legislation.....	3

End of an era: beginning of another?

Sandra McDonald will cease to be Public Guardian on 27th July 2018. Her service to the whole subject of adults with incapacity throughout her 14 years’ tenure has been outstanding. The current review of the legislation can be traced back to her 2011 paper on graded guardianship, itself a response to the predictable challenges arising from the combination of increasing workload, inefficiencies in the systems required by statute, and constraints upon resources; but at a deeper level driven by the empathy of a former nurse (and herself a carer in her own family setting) for the human realities, in all their variety, encapsulated within the provisions of statute, regulations and codes of practice.

She has constantly sought to achieve practical solutions, or at least marginal improvements, right across her remit. She addressed the former chaotic situation over bonds of caution by negotiating and putting in place the option of a semi-automated systems with a provider who would accept all cases. She analysed areas of risk and targeted supervisory and investigative resources accordingly. She pioneered, then introduced, electronic registration of powers of attorney. The huge year-on-year increase in applications for registration nevertheless presented one of her major challenges. Because of the evident advantages of encouraging people

to grant powers of attorney, and the demonstrable savings to the public purse by doing so, she gave full support to the “mypowerofattorney” campaign as it gradually extended to further parts of the country. Her powers of persuasion were nevertheless required to secure the resources necessary to make inroads into the inevitable backlog of registrations. She introduced special arrangements for professional guardians dealing with a volume of guardianships and willing to undergo relevant training.

Outreach and engagement have been constant themes of her tenure. It would be interesting to know, if the calculation has been made, how many conferences and seminars she has addressed, and how many total hours at lunch and coffee breaks she has spent at such events in close engagement with individual practitioners and small groups.

Her post has already been advertised, though it is understood that some adjustment in responsibilities is envisaged. It is apparently intended to re-focus the role of Public Guardian, with more concentration on the change programme that the Office faces over forthcoming years (though change has been a constant feature for many years already). It is however likely to be helpful to the new appointee that some of the present responsibilities of the

Public Guardian may no longer be included in that role.

The good news is that Sandra intends to remain active in the subject to which she has already contributed so hugely, probably as an independent adviser and trainer.

Those of us responsible for this Scottish section of the Mental Capacity Report are particularly grateful for the assistance which she has never hesitated to provide, along with the benefit of her wisdom and experience.

Adrian D Ward

Review of adults with incapacity legislation

The period for response to the Scottish Government consultation on reform of adult incapacity law ended on 30th April 2018. Responses of key bodies are available online, including the [Law Society of Scotland](#), the [Mental Welfare Commission for Scotland](#), the [Equality and Human Rights Commission](#), Edinburgh Napier University's [Centre for Mental Health and Capacity Law](#) and the [Faculty of Advocates](#). The Scottish Government team conducting the review have arranged an invitation event on 28th June 2018 to report on the responses to consultation. We expect to be able to report on that event in July.

Adrian D Ward

Editors and Contributors



Alex Ruck Keene: alex.ruckkeene@39essex.com

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. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



Neil Allen: neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click [here](#).



Annabel Lee: annabel.lee@39essex.com

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click [here](#).



Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).

Editors and Contributors



Katie Scott: katie.scott@39essex.com

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, and is chair of the London Group of the Court of Protection Practitioners Association. To view full CV click [here](#).



Simon Edwards: simon.edwards@39essex.com

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](#).



Adrian Ward: adw@tcyoung.co.uk

Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. 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; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

Conferences

Conferences at which editors/contributors are speaking

Medical treatment and the Courts

Tor is speaking, with Vikram Sachdeva QC and Sir William Charles, at two conferences organised by Browne Jacobson in [London](#) on 9 May and [Manchester](#) on 24 May.

Other conferences of interest

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers 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.

Our next report will be out in early June. 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.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com



International
Arbitration Chambers
of the Year 2014
Legal 500



Environment &
Planning
Chambers
of the Year 2015

clerks@39essex.com • **DX: London/Chancery Lane 298** • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.