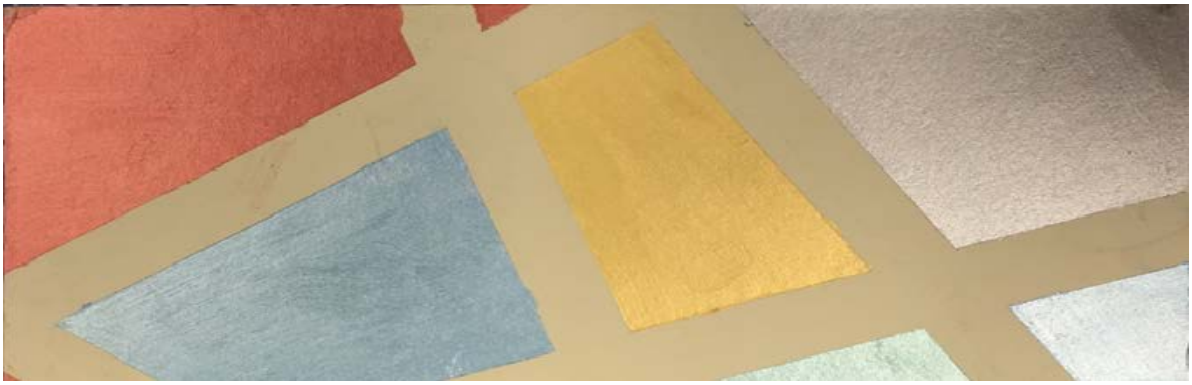
MENTAL CAPACITY REPORT: SCOTLAND

April 2024 | Issue 139



Welcome to the April 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a very difficult dilemma arising out of covert medication, and key deprivation of liberty developments;

(2) In the Property and Affairs Report: fixed costs for deputies, deputies and conflicts of interest, and the Child Trust Fund saga continues;

(3) In the Practice and Procedure Report: three amended Practice Directions, when (and why) should the judge visit P and fact-finding in the Court of Protection;

(4) In the Mental Health Matters Report: the Government (rather surprisingly) responds to the Joint Committee on the draft Mental Health Bill, and important reports from the PHSO and CQC;

(5) In the Wider Context Report: a snapshot into litigation capacity and Jersey sheds light on the concrete realities of assisted dying / suicide;

(6) In the Scotland Report: the Assisted Dying for Terminally Ill Adults (Scotland) Bill.

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.

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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.

Contents

Assisted Dying Bill published

On 27th March 2024 the Assisted Dying for Terminally Ill Adults (Scotland) Bill was introduced in the Scottish Parliament by Liam McArthur, Liberal Democrat MSP for Orkney. It and the accompanying documents have been prepared by Mr McArthur's team, working in conjunction with the Parliament's Non-Government Bills Unit. What stands out immediately is the high quality of drafting throughout, the massive but well organised amount of supporting information,[1] and the clarity and impartiality with which it has been presented. It is not for a commentator, or for this Report, to take a stance in general terms on whether this Bill is "a good thing" or not. I seek to provide an outline of the current human rights and public opinion context; the extent of difference from previous similar proposals, which appears to be significant, with a narrower scope and – within that scope – more robust safeguards; and an outline of the main provisions of the draft Bill, narrated selectively. Of particular interest to this readership is likely to be consideration of the robustness of the intended safeguards, and the provisions regarding proxies, those being likely to be points of focus for professional comment, whether individually or on behalf of professional organisations which would be likely to be neutral as to the merits of the proposal, but to consider carefully the comments that they might wish to make on the content and practical operation of the Bill if it were to be passed.

One starts with the general observation that if we are in an environment where it is increasingly accepted that professional and ethical responsibilities should be based in concepts of human rights, including rights to autonomy and self-determination where these do not impinge on the rights of others, there has to be a clear distinction between private views applicable to oneself, and public acknowledgement that one's own right to take one view implies acknowledgement of the right of others to take either the same or a different view.

For many practising lawyers there may also have been uncomfortable experiences, such as I myself have had, of being consulted by a client with a progressive terminal condition who gave very rational reasons why he feared the final stages, and asked whether anyone assisting him to hasten his inevitable death would be committing a crime. The answer, of course, had to be yes. His response: "*So the law forces me to contemplate ending my own life while I am still able to do so, which would be sooner than I would otherwise wish to?*" A pragmatic observation has to be that the availability of cutting short the extreme distress of a slow death can be a great comfort to those facing that prospect, even if they do not in fact ever take up the option; and indeed can make them more content to accept all available palliative care and more relaxed

[1] It is a coincidence, but relevant, that only a few days before introduction of the Scottish Bill, a Proposition on Assisted Dying was presented to the States Assembly of Jersey. See the coverage by Alex in the wider context section of this Report. Proposed as a preliminary to any legislative process, in its 245 pages it addresses carefully and in detail a wide range of relevant issues.

about deferring decisions such as this Bill would make available. There are of course likely to be those who may listen politely to all of that, but then assert strong arguments in principle against facilitating that option for anyone. One can only hope that such arguments will avoid lurid misleading headlines, and will rationally and courteously address what the present Bill actually does propose, and not what it doesn't.

Among Mr McArthur's reasons for proposing the Bill, as narrated in the Policy Memorandum, is that: "The current legal position is unacceptably unclear as there is currently no specific legislation in Scotland which makes assisted dying a criminal offence, yet it is also possible to be prosecuted for murder or culpable homicide for assisting the death of another person." One of the purposes of the Bill is that it "improves legal clarity by making it lawful for a person to voluntarily access assisted dying if they meet the various criteria set out in the Bill". It provides "for health professionals to assist in that process, while continuing to ensure that assisted death outwith the provisions of the Bill remains unlawful." As we shall see, the nature, extent and frequency of medical involvement and safeguards is a particular feature of the Bill. Against the above background, the Bill would establish a lawful process for an eligible person to access assisted dying, "which is safe, controlled and transparent, and which [Mr McArthur] believes will enable people to avoid the existential pain, suffering and symptoms associated with terminal illness, which will in turn afford the person autonomy, dignity and control over their end-of-life". Mr McArthur "believes that the current de facto prohibition on such assistance has been proven to be unjust, unsafe, and unacceptable, causing needless suffering for many dying people and their families".

That there have been three previous proposals "related to this general policy area" is to an extent misleading. In 2005 there was a public consultation on a draft proposal, a final proposal to introduce a Bill was lodged, but it failed to gather sufficient parliamentary support to enable it to be introduced in the Parliament. Bills introduced in 2010 and 2013 both fell at Stage 1. The Policy Memorandum asserts that: "*There are several key and fundamental differences between this Bill and the previous Bills introduced in the Parliament, particularly in the details of the process for accessing assisted dying and the extent of the safeguards in place to protect those involved. In addition, previous Bills focused on the decriminalisation of providing assistance to a person to end their life, but did not establish a legal, health professional led process for assisted dying to take place.*"

The 2010 Bill would have permitted access to assisted dying not only by a person who is terminally ill, but also a person who was "*permanently physically incapacitated to such an extent as not to be able to live independently and finds life intolerable*". The 2013 Bill limited access to those with an illness, from which there was "*no prospect of any improvement in the person's quality of life*", that was either "*terminal or life-shortening*", or a condition that was, for the person, "*progressive and either terminal or life-shortening*". Mr McArthur's Bill only permits access for those who have an advanced and progressive terminal illness which is expected to cause their premature death.

The Policy Memorandum contains a significant amount of comparative analysis from other parts of the British Isles (including, for example, Jersey and the Isle of Man) and internationally. This includes an analysis of differences in the methods of assistance provided in different countries across the world.

A relevant factor is the extent to which public opinion has shifted. The Policy Memorandum

narrates various reputable polls over the period of 2019 – 2023 showing support for assisted dying ranging from 72% to 87%. The lowest figure of 72% has to be set against opposition from 14%, and another 14% "don't knows" recorded in that poll. There were 14,038 responses (the highest number of responses to date to a consultation on a Member's Bill in the Scottish Parliament) to Mr McArthur's 2021 consultation on his draft proposal. A clear majority of respondents (10,687 - 76%) were fully supportive of the proposal, with a further 244 - 2% partially supportive.

Regardless of personal views, lawyers are likely to be interested in process and safeguards, including safeguards within the well-known categories in Article 12.4 of the United Nations Convention on the Rights of Persons with Disabilities: protection against undue influence, respect for will and preferences, and so on.

If the Bill as drafted came into force, to be eligible for the process a person must be terminally ill; aged 16 or over; ordinarily resident in Scotland for at least 12 continuous months; registered with a GP in Scotland; and to have the mental capacity to request assistance to end their life. It is interesting that the proposal is for ordinary residence, with ordinary residence for this purpose not defined in the Bill or by reference to other legislation, rather than some other linking factor. It is not obvious why habitual residence was not preferred, for greater clarity where someone has moved to (or back to) Scotland more than 12 months previously. There appear to be differences between Scotland and England & Wales in official guidance on when ordinary residence (for purposes of social work responsibilities) follows a physical move, which could create uncertainty, whereas greater certainty is likely as to habitual residence where a person has moved from England & Wales or elsewhere[2]. Expect this to be addressed if the Bill reaches Stage 2.

It is asserted that the definition of "terminally ill" in the Bill "requires a person to be in an advanced stage of terminal illness (i.e. close to death)". The Memorandum states that while Mr McArthur "has deep empathy for, and understanding of, people suffering intolerably for many years who are not at the end of life, he believes parameters must be drawn that are most appropriate for the diseases, illnesses and conditions affecting the people of Scotland, and after careful reflection decided that assisted dying for people in the end stages of life is most appropriate. It is not the intention that people suffering from a progressive disease/illness/condition which is not at an advanced stage but may be expected to cause their death (but which they may live with for many months/years) would be able to access assisted dying." That appears to be one of the key limitations which could shift the boundaries of acceptability; with the possibility, again, of proposed amendments at Stage 2.

The proposed safeguards are however extensive, requiring two doctors, independently of each other, to determine eligibility. The person must have been informed and preferably have discussed their situation, and the opinions open to them (for example palliative, hospice and other care options), with a registered medical practitioner before deciding to apply. That is just one aspect of extensive requirements to ensure that the person makes a truly informed decision.

The envisaged process includes requirements for a "first declaration" and a "second declaration", with a "period for reflection"

[2] Habitual residence is the primary criterion under Hague Convention 2000 on the International Protection of Adults, and also in the private international law of many states which have not (yet) ratified the 2000 Convention.

between them. The first declaration is a request by a terminally ill adult to be lawfully provided with assistance to end their own life. There is a specified form. The adult's signature must be witnessed by "the coordinating registered medical practitioner" (the medical practitioner first approached by the adult to say that the adult wishes to make such a request) and "another person". There are requirements that both witnesses must see the declaration being signed, and there are disqualification provisions. The "coordinating registered medical practitioner" must carry out an assessment to ascertain whether the adult is terminally ill, is eligible, and made the declaration voluntarily, without being "*coerced or pressured by any other person into making it*". If satisfied on these points, that practitioner must refer the person to an "independent registered medical practitioner", who independently assesses the same points. The independent practitioner requires to have "*such qualifications and experience as the Scottish Ministers may by regulation specify*", not have provided treatment or care to the adult in relation to the terminal illness, and not have any disqualifying relationships, as well as not having been a witness to the first declaration. There are detailed provisions as to the requirements for the assessment, including for discussion with the adult and information to be given to the adult. The first declaration must be recorded in the adult's medical records, as must other key items.

The normal period for reflection will be 14 days, except where both medical practitioners "reasonably believe that the adult's death is likely to occur before the end of that period", in which case it should be a "*shorter period (being not less than 48 hours) beginning with the day on which the first declaration is made*".

It is open to the adult to cancel the first declaration. If the adult has not cancelled, and if both medical practitioners have carried out the required assessments and made specified statements, then once the period for reflection has ended the adult may make a second declaration, signed and dated by the adult, and witnessed by the coordinating registered medical practitioner, and either another person or the independent registered medical practitioner. Similar requirements apply. The second declaration must also be recorded in the adult's medical records. There is, again, provision for the adult to cancel the declaration.

There are provisions for signature of either or both declarations by a proxy, who is able to declare that the adult is unable to sign their own name and has authorised the proxy to sign the declaration. There are detailed provisions regarding this and – perhaps rather surprisingly – a fixed list of who might be a proxy: a practising solicitor, a member of the Faculty of Advocates, or a Justice of the Peace in Scotland. If the Bill proceeds, it might be a matter for debate whether an attorney holding express powers to sign such a declaration should be added, and whether Scottish Ministers should be empowered by regulation to add to the list.

Following provisions of the Bill regulate the provision to the adult of "*an approved substance with which the adult may end their own life*" by either the coordinating registered medical practitioner or an authorised health professional. The coordinating registered medical practitioner or authorised health professional must remain with the adult until the adult decides whether to use the substance, and if so, until the adult has died. If the adult decides not to use the substance, the medical practitioner must "*remove it from the premises at which it was provided*". If the adult uses it and dies, there are detailed provisions about the "final statement" that the medical practitioner must complete. Further provisions include a "conscientious objection" section making it clear that "*an*

individual is not under any duty (whether arising from any statutory or other legal requirement) to participate in anything authorised by this Act to which that individual has a conscientious objection". There are explicit provisions regarding exemption from criminal and civil liability, and also creation of an offence for coercing or pressurising the adult into making a first or second declaration. The explicit provision for such an offence thus goes further than the consequences of proven undue influence for other purposes. See the published Bill for all relevant provisions, including ancillary provisions, not narrated here, the purpose of this item being to give a general indication, not a detailed narration.

The next step will be for the Parliament to consider in principle, at Stage 1, whether the Bill should proceed to further consideration.

Adrian D Ward

Editors and Contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
Alex 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 Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole KC: 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. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click here.

Neil Allen: neil.allen@39essex.com
Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Arianna Kelly: Arianna.kelly@39essex.com
Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a 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 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click here.

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. To view full CV click here.

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a 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: adrian@adward.co.uk

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.

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. 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

Members of the Court of Protection team regularly present at seminars and 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.

Adrian will be speaking at the following open events: the World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details here) and the European Law Institute Annual Conference in Dublin (10 October, details here).

Peter Edwards Law has announced its spring training schedule, here, including an introduction – MCA and Deprivation of Liberty, and introduction to using Court of Protection including s. 21A Appeals, and a Court of Protection / MCA Masterclass - Legal Update.

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 May. 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.

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

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

Chambers UK Bar
Court of Protection: Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and Community Care
Top Tier Set

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