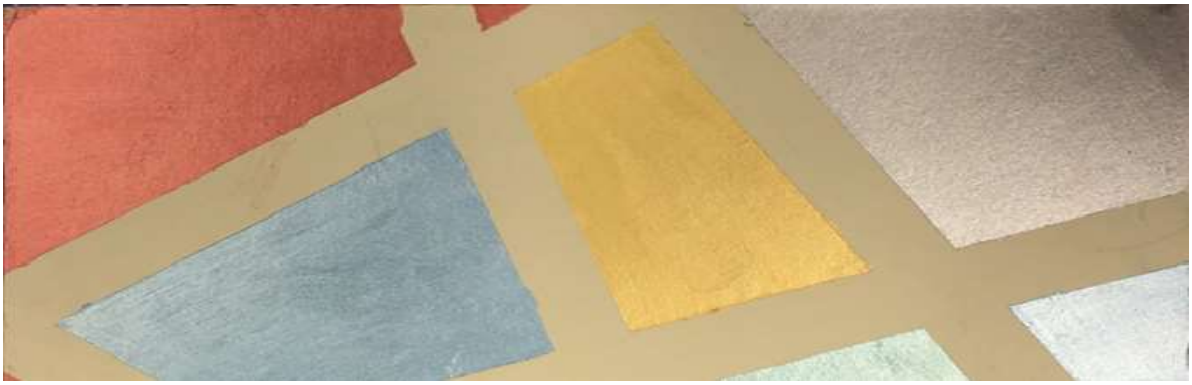
Essex CHAMBERS

# MENTAL CAPACITY REPORT: SCOTLAND

December 2021 | Issue 118



Welcome to the December 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Supreme Court takes on capacity, learning to learn, and capacity and illicit substances;

(2) In the Practice and Procedure Report: the Court of Appeal's concern about judicial visits, and reporting restrictions and accountability;

(3) In the Wider Context Report: Parole Board guidance on mental capacity, and how consumer law can help navigate care home dilemmas;

(4) In the Scotland Report: a truly shocking report of institutional inhumanity, and the extent of incapacitation under s.67 of the Adults with Incapacity Act 2000.

Because there's not a huge amount to report, there is no Property and Affairs Report this month. However, a reminder of this consultation currently underway, closing on 12 January 2022 about third-party access to limited funds. Dr Lucy Series has provided an excellent overview of the consultation here.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides.

You may notice some changes next year, as coordination duties are being taken over by Arianna whilst Alex is on sabbatical, but rest assured that this will remain a one-stop shop for all the capacity news which is fit to print. In the meantime, and for those for whom it is not an empty hope, we wish you happy holidays, and will see you (probably virtually) in 2022.

**Editors**
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Rachel Sullivan
Stephanie David
Nyasha Weinberg
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



## Institutional inhumanity?

The most shocking scenario that this author has encountered in several years of writing for the Report is portrayed in "Significant case review: report into P19", published by Angus Council on 25th November 2021. Both the Executive Summary and the full report may be accessed via this link.

The lead team for the review comprised the hugely experienced authors of the review report, Fiona Rennie and Grace Gilling, and Fred McBride, who provided external support and supervision. A report of otherwise outstanding quality is perhaps only marred by the absence of a suitably qualified and experienced lawyer from those disclosed as having played a leading role. That may have been a factor in the dismissal in the report of the possibility that European Convention on Human Rights ("ECHR") might have been relevant to the circumstances in which the adult identified as P19 died in pain and squalor, without even adequate care, despite "significant involvement with 19 services across a wide range of agencies and organisations in the months leading up to death", and despite him having been identified as an "adult at risk" in terms of the Adult Support and Protection (Scotland) Act 2007 ("the 2007 Act") some four months before his death at the age of 50 in December 2018, his family not having been warned that he was dying. The cause of death was certified as Disseminated Malignancy (a condition in which cancer is spread widely throughout the body).

This Mental Capacity Report item addresses three areas of particular relevance to lawyers and legal practice. To the extent that it does so critically, that should not be seen as detracting from the impressive quality and huge general relevance of the review report as a whole, which certainly provides a substantial list of issues which will require to be fully and carefully addressed by the Scottish Mental Health Law Review towards creating a regime which makes good in law and in practice the aspirations to ensure realisation of basic human rights principles for people most in need of the protection of those principles.

At time of death, P19 was emaciated, weighing only 42kgs and with a BMI of 14.2. Multiple

sclerosis had been diagnosed in December 2014, and the bowel screening kit which he used in October 2017 tested positive. Prior to August 2018 he was already known to a variety of services, some of which had had significant involvement with him (his gender is not disclosed in the review report) over a number of years, whilst others were involved on a more ad hoc basis for specific interventions. He had a history of alcohol abuse, but in the last week of life he was no longer drinking alcohol, and he was eating and drinking very little. The conditions of the house were described by staff as "horrendous". He was incontinent of both faeces and urine and was heavily soiled, as were carpets and furnishings. He was in much pain and unable to mobilise. His skin was sore and peeling due to the level of incontinence. Two days before he died, staff had to use a basin to undertake personal care as he was unable to mobilise to reach the bathroom. Pre-Covid, staff wore white suits, gloves, aprons, shoe covers, oversleeves, protective eye gear and masks whenever they entered the house, but they found the smell unbearable, and some staff would be physically sick and/or in tears at his situation.

Managers of the care-at-home provider decided that they could no longer continue to provide support in view of the effects of the situation on staff. This was discussed at a core group meeting six days before his death, and the day of his death was the last day that the care-at-home provider was providing support. There were still no contingency plan in place, although a variety of options were being explored. A hospital admission had been attempted and refused. All nursing homes across a wide area had been contacted, but there were no vacancies available.

Did those circumstances breach Article 3 of ECHR? Article 3 provides that: "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment". These elements are separable, and indeed separated by use of the word "or". Inhuman treatment breaches Article 3. Degrading treatment breaches Article 3. The review report discloses multiple chaotic failures in management and coordination, throughout a range of statutory agencies, which clearly caused the horrendous circumstances in which P19 declined and died. Upon an ordinary use of language, which - in terms of the Vienna Convention on the Law of Treaties - is the principal way in which international instruments should be interpreted, it is difficult to suggest that P19 was not, at the hands of the statutory agencies responsible for those failings, the victim of "inhuman treatment" and "degrading treatment".

To any lawyer reading the review report, a warning light immediately flashes when on page 52 it quotes from what it asserts to be a definition of "inhuman treatment or punishment" in the Human Rights Act. Neither in that Act nor anywhere else in statute is there any such definition. The non-existing definition is quoted as including:

- serious physical assault
- psychological interrogation
- cruel or barbaric detention conditions or restraints
- serious physical or psychological abuse in a health or care setting; and
- threatening to torture someone if the threat is real and immediate.

The review report comments:

> *"The ECHR was developed following the second world war to ensure that governments would never again be allowed to dehumanise and abuse people's rights. In this context, the definitions [meaning, it seems, the non-existent definition referred to above] of inhuman treatment covered by the HRA do not appear applicable to the lack of dignity and the degrading living conditions P19 died in."*

Interpretation of Article 3 is a matter of balance between two broad ways of approaching that interpretation, as was expressed some 20 years ago by Reed and Murdoch in "A guide to human rights law in Scotland". On page 172 they wrote that:

> *"Both questions involve an assessment often essentially subjective in nature: there can be an unresolved tension between recognition of the Convention as a 'living instrument' to be interpreted in a purposive manner reflecting contemporary expectations, and awareness of the historical legacy which underpinned inclusion of this guarantee at the heart of protection of physical integrity."*

The review report appears to take account only of the latter consideration, to the exclusion of the former, which one might reasonably expect to have carried significant weight in the circumstances.

In many cases, an element in findings of "degrading" treatment is that the object of the treatment was to humiliate and debase the person concerned. "However, the absence of such a purpose cannot rule out a finding of a violation of Article 3" (Council of Europe, Human Rights Handbook No 6 "The prohibition of torture: a guide to the implementation of Article 3 of the European Convention on Human Rights").

A second matter of particular interest is encapsulated in "Research question 4": "How effective are the current processes for requesting a capacity assessment within NHS Tayside and how these processes are applied in practice?", addressed on pages 32 – 38 of the review report. In short, many of those with responsibility for P19 treated his refusals of assistance and treatment, despite a history of alternating refusals and acceptances, as capacitous and requiring to be accepted. They did so on the basis that a consultant psychiatrist "had assessed P19 as having capacity". It seems that no-one checked "capacity for what?" or "continuous capacity?", nor asked to see the supposed assessment. In fact, the consultant had not undertaken a general assessment of capacity. The consultant had assessed P19 on an undisclosed date for the purposes of proceeding under section 47 of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"). The findings in this section of the review report commenced with: "*No one person took responsibility for obtaining a capacity assessment*". The findings also included that: "*There is no clear pathway for people to access an assessment of capacity, including people with alcohol issues*". It would appear that only the authors of the review report, and no-one engaged with P19 during his lifetime, identified that many of the symptoms described could have been indicative of alcohol-related brain damage, which possibility should have been addressed, including in the context of whether such a diagnosis would potentially

"*have afforded the protection of the Adults with Incapacity Act*". On the contrary, the review report narrates that: "*Professionals were advised from medical staff that they had to wait for P19 to be free from the influence of alcohol to have a capacity assessment undertaken*". The review report concluded in this context that: "*As a consequence, staff often felt disempowered and assumed that there was little that they could do to intervene, particularly when P19 was still consuming alcohol.*"

The third notable area for lawyers follows upon that last-mentioned observation. Intervention under the 2007 Act is not dependent upon an assessment of incapacity. Indeed, where the 2000 Act followed upon the Scottish Law Commission's "Report on Incapable Adults" No 151 of 1995, the 2007 Act followed upon the Commission's next and separate work in the area, in its "Report on Vulnerable Adults" No 158 of 1996, which proceeded under explanation that: "*In this Report vulnerable adults are taken to be people aged 16 or over who are unable to safeguard their welfare or property …*" It explained that the proposals in that Report were made to replace "*the existing statutory provisions on removal of … adults living uncared for in insanitary conditions under … National Assistance legislation*". Even 70 years ago, under the National Assistance Act 1948 section 47 (as amended by the National Assistance (Amendment) Act 1951), if P19's condition and circumstances had come to the notice of the local authority, he would have been promptly removed and cared for. Not least shocking of the review report's findings is that (page 50): "*There is no evidence that powers under the Adult Support and Protection (Scotland) Act 2007 were considered in relation to P19*". The review report describes the nature, application and potential relevance of assessment orders and removal orders under the 2007 Act. The review report points out that an assessment order might have facilitated a capacity assessment, the progression of welfare guardianship, and a formal diagnosis to inform treatment and support "*as P19 was an adult at risk and was asking for help*". Somewhat charitably, the review report commented that: "*The difficulty in utilising this order [a removal order] would have been identifying and securing a suitable place to remove P19 to, given that the sheriff requires to be satisfied as to the availability and suitability of a place to which the adult at risk is to be moved.*" That would appear to be no answer at all to a situation in which there was a glaring imperative that P19 be removed and cared for and that the possibility of using powers under the 2007 Act appears not even to have been considered. In consequence, P19 suffered and died in the appallingly inhumane circumstances that the review report describes.

The Crown Office was not informed of the full circumstances surrounding P19's death. It is not disclosed that there was a report to Health and Safety Executive as regards the effects on front-line care workers, as well as P19. One might speculate as to what might have happened if a child had endured until death similar inhumanity attributable to parents aware of the child's suffering and responsible for the child's care.

*Adrian D Ward*

## The extent of incapacitation under section 67 of the 2000 Act

Is the definition of "transaction" in section 67(1) of the Adults with Incapacity (Scotland) Act 2000 limited to transactions in the generally

understood sense of that word, or does it go beyond most dictionary definitions to include acts and decisions in relation to personal health and welfare matters?

The Sheriff Appeal Court provided its answer to that question (though not framed as above) in *RM and SB as joint guardians of the adult PKM (Appellants) v Greater Glasgow Health Board (Respondent)*, 2021 SAC (Civ) 33, an appeal from Dumbarton Sheriff Court. The sheriff at first instance had refused an application by PKM's joint guardians for two orders under section 70(1)(a) of the 2000 Act. By the time of final disposal of the appeal, the parties had agreed the terms of an amended order, and the Appeal Court granted an amended order in those terms. The route by which Greater Glasgow Health Board ("the Board") moved from opposition to the orders originally sought, to agreement with the amended order, involves issues of suggested conflict between medical decision-making and the decisions of guardians holding relevant powers. That route is significant and is addressed first. However, although the Appeal Court pointed out that the decision at first instance had become irrelevant because the order sought before the Appeal Court differed from that before the sheriff, the Appeal Court narrated that "Before us and before him [the sheriff at first instance] a question of law arose upon which we express an opinion", that point being the question regarding the scope of section 67(1) identified above.

At the heart of the matter was whether the adult PKM should receive dialysis despite his objections to doing so.

To understand the change in the Board's position, one has to start with the terms of the two orders originally sought, and the order that was agreed and granted. The orders originally sought were quite lengthy, which is perhaps why the Note delivered by Sheriff Principal Pyle on behalf of the Appeal Court briefly stated them "read short". For the benefit of readers of this Report, we are grateful to one of the solicitors involved for supplying the full terms of the two orders sought, which were as follows:

1. *An order under section 70(1)(a) requiring the Adult to comply with the decisions and directions of the joint Guardians in determining his healthcare and where he should attend for healthcare treatment as directed by the Joint Guardians.*

2. *An order under section 70(1)(a) requiring the Adult to comply with the following steps of treatment as directed by the Joint Guardians*

    a. *To attend for and have blood taken for the monitoring of the adults condition*
    b. *To attend for and undertake such procedures as necessary for the mapping of the adult veins*
    c. *To attend for and undertake such procedures as necessary for the insertion of a fistula*
    d. *To attend for and undertake the process of kidney dialysis by insertion of needles into the fistula and taping them in place*
    e. *To attend for and undertake such sedation as directed by the Joint Guardians to allow any necessary procedure for dialysis to take place*
    f. *To allow such restraint of the adult as is necessary to ensure*

> *the adult complies with this order under s70 of the Act.*

We are likewise grateful for a note of the grounds of appeal, which were as follows:

> *a. The Sheriff erred in law in considering the capacity of the Adult as a relevant factor in determining the grant of the order.*
>
> *b. esto the Sheriff was entitled to consider the capacity of the adult in determining the grant of the order the evidence of the adults capacity should have allowed the Sheriff to find the adult lacked capacity or in the alternative taken further evidence on the adults capacity including evidence from the adult himself.*
>
> *c. The Sheriff erred in law in not placing sufficient weight on the terms of s67 of the Act in allowing the Guardians to make decisions on matters that the Adult was no longer capable of deciding upon.*

The order agreed and granted was a single order as follows:

> *"An order under section 70(1)(a)* [of the Act] *requiring the Adult to comply with the joint guardians' decision to consent to medical treatment by behaving in a manner that allows kidney dialysis treatment to occur and to attend whenever is required for that purpose."*

What was the difference? Sheriff Principal Pyle narrated that:

> *"The Health Board's primary concern before the sheriff and before this court was that the original orders sought would trespass upon matters which were for clinical judgment for the medical team and were both as a matter of principle and of practice otiose in that they sought what was in effect continuing compliance by the adult to medical treatment for the rest of his life in the face of his persistent declaration that he did not want the treatment and the medical opinion that he would not comply."*

In addition, the solicitor referred to has explained that when the original application was presented it was thought that dialysis could be done under sedation, but by the time of the hearing before the Appeal Court that was no longer possible.

The Appeal Court granted the order in the latter form upon acceptance by the guardians that "this was very much the last chance to secure the adult's consent", that if compliance by the adult did not materialise then "there would be no medical treatment", and that in any event "the order should not be construed in any way as interfering in clinical decisions which are wholly within the province of the medical team".

As the matter was ultimately dealt with on the basis of an agreement between the parties, we should perhaps be grateful that this Note was issued at all, and that it went as far as it did. However, the Appeal Court offered no definition of the scope, in this context, of "clinical decisions which are wholly within the province of the medical team". One would venture to suggest that, regardless of how section 67 might be construed, there is not in fact scope in the circumstances of this case for conflict between medical decisions and guardians' decisions. If they hold relevant powers, guardians can do and decide up to the limits of what the adult – if capable – could do and decide, but not beyond.

It is well acknowledged that a competent patient can accept or reject treatment that is offered, and can make a choice where alternatives are offered, but cannot demand treatment that doctors are not willing to offer. In the present case, it would appear that the doctors were not prepared to offer dialysis. Perhaps there could have been an argument whether they ought not to have taken account of the adult's apparent refusal of consent, but it seems rather a long way from that to ordering them under section 70 to use force against their patient to carry out a procedure which the patient is resisting, in their belief capacitously in fact, the only objection to that view being the assertion of incapacitation under section 67(1).

That however was a point that the Appeal Court did not need to address, and did not address, but that leads to the question of proper construction of section 67(1), on which the Appeal Court did express its opinion.

Section 67 as a whole could be said to be both disempowering and empowering. Under section 67(1) the adult is incapacitated in relation to any "transaction" within the scope of the guardians' powers, whether in fact capable or not. Conversely, section 67(5) gives effective validity to any "transaction" by the adult known by the other party to that transaction to be acting within authority conferred on the adult by the guardian, regardless of any actual capability. The opinion of the Appeal Court would increase those areas of both disempowerment and empowerment by including acts and decisions in personal health and welfare matters in the definition of "transaction", in terms of that opinion for the purposes of section 67(1), but impliedly also for the purposes of section 67(5). See the Note for the full reasoning of the Appeal Court. The sheriff had taken the view that "transaction" was incapable of a wide interpretation such as to include consent to medical treatment. Counsel for the Board founded upon the references in section 67(2) and (3) to respectively property and financial affairs, and personal welfare. Counsel for the guardians relied upon the definition of "transaction" in section 9(d) of the Age of Legal Capacity (Scotland) Act 1991 expressly to include "the giving by a person of any consent having legal effect", an extension absent from section 67 of the 2000 Act.

In holding that "transaction" does include consent to medical treatment, the Appeal Court's reasons were (firstly) to accept the Board's reasoning as to the effects of section 67(2) and (3); and (secondly) to refer to "the general nature of the 2000 Act, which is to protect vulnerable adults who in most, if not all, cases will have complex medical needs which will require ongoing medical supervision and treatment", and that in consequence: "It would make no sense, therefore, for the scope of the guardians' powers to be restricted such that medical treatment should not be included within their responsibilities". While referring to the danger of taking a definition of a word in one statute to determine its definition in another, contrary to the view advanced on behalf of the guardians the Appeal Court took the view that the definition in the 1991 Act supported its view of the definition in the 2000 Act. The Appeal Court was also of the view that there was no inherent tension between section 67(1) and the principles in section 1(4), on the basis that in the construction, and application in practice, of the whole 2000 Act, the general principles in section 1 must be applied, that being no different to the

approach which requires to be taken "in the application of the general principles contained in the European Convention on Human Rights" ["ECHR"] to all domestic law. The Appeal Court suggested that the difficulty which arose in the present case was that a medical opinion was sought on whether the adult had capacity, rather than what were the adult's present wishes and feelings: the extent to which the adult's present wishes and feelings should be taken into account inevitably depended "upon the extent to which the medical practitioner considered the adult's expression of wishes and feelings were genuinely held and were separate from his general medical condition", in the present case of schizophrenia. In other words, the issue for the medical practitioner was the ability, rather than the capacity, of the adult properly and accurately to express his wishes and feelings. Whether the adult's present wishes and feelings are followed by the guardians depends on the whole circumstances, not least upon that medical opinion.

The Appeal Court acknowledged "that any perceived tension between sections 67(1) and section 1 will surface in specific situations and will have to be evaluated on the facts of the individual case". The court's opinion was expressed in the context of that particular case, and should not be seen as of general application, beyond the point that regard should be had to the whole circumstances and the weight to be given to the present and past wishes and feelings of the adult.

The Appeal Court concluded by stressing that "the powers of a guardian and, in particular, any order under section 70 must not trespass on decisions which as a matter of medical ethics but also as a matter of law are properly ones for clinical judgement". The court had been careful to obtain the guardians' assurance "that the decision whether to give dialysis treatment to the adult and the assessment of the extent, if any, of his consent to such treatment is a matter for the doctors, not the guardians – or even this court".

It would appear that the background provided by paras 6.130 to 6.136 of Scottish Law Commission Report No 151 (1995) was not considered, and that the Appeal Court was not addressed on the following points, some though not all of which might be matters for the Scottish Mental Health Law Review:

1. The powers of attorneys under welfare powers of attorney are expressly disapplied (by section 16(5)(b) of the 2000 Act) during periods when the granter is capable in relation to the matters in question. Did the legislature intend to distinguish the powers of attorneys compared with those of guardians, or on the contrary should section 16(5)(b) be taken as influencing the scope of the definition of "transaction"?

2. Is any interpretation of section 67(1) that effectively incapacitates the adult excluded by application of Article 8 of ECHR, particularly where – as is increasingly the case – ECHR should be interpreted having regard to the provisions of the UN Convention on the Rights of Persons with Disabilities?

3. Did it accord with the requirements of Article 6 of ECHR (requiring fair process), in circumstances where (we are told) a safeguarder had been appointed and at first instance had expressed views to the court

clearly disputed by the adult, to proceed without the adult's representation before the court?

The inter-relationship between sections 64 and 70 of the 2000 Act was among the matters addressed by the Sheriff Appeal Court in *JK v Argyll and Bute Council*, on which we reported in the June 2021 Report. Those issues did not arise in the present case.

It is understood that further litigation between the same parties, potentially addressing similar issues, is current, and that it is possible that in view of the determination of the Sheriff Appeal Court in the present case, consideration of that further case may leapfrog the Sheriff Appeal Court for early consideration by the Inner House.

*Adrian D Ward*

[By way of editorial note from across the border from Alex, it should be noted that the approach under the 2000 Act is very different to that under the Mental Capacity Act 2005. A deputy appointed by the Court of Protection is statutorily prohibited by section 20(1) Mental Capacity Act 2005 from making decisions on behalf of the person where the person has capacity to do so, notwithstanding the fact that the court must (by definition) have been satisfied that a deputy needed to be appointed on the basis that the person did not (at the time) have capacity to make the decisions within the scope of the appointment. There is also no equivalent to section 70 of the 2000 Act within the Mental Capacity Act 2005]

## Deprivation of liberty of children in cross-border situations

An aspect of the failure of the legislature to address the whole topic of deprivation of liberty in Scotland is the lack of provision for recognition in Scotland of orders of the High Court in England & Wales authorising the deprivation of liberty of vulnerable children from England & Wales who are placed in Scotland because of the availability of suitable placements here, but not in England & Wales. Pending suitable legislation, the Court of Session has been dealing with such situations by way of applications to the *nobile officium*. After having dealt with 22 previous such applications, and with more expected, the Court of Session took the opportunity of issuing, in *Lambeth Borough and Medway Council, Petitioners*, [2021] CSIH 59; 2021 SLT 1481, a Note to provide guidance to practitioners as to the appropriate procedure to follow in such petitions pending remedial legislation.

In the preliminary paragraphs of the Note, the Court of Session narrated the circumstances, and that the court had been advised by those representing the Scottish and UK Governments in the past that they were waiting for the decision of the UK Supreme Court in *In re T (a child)*, [2021] UKSC 35; [2021] 3 WLR 643; [2021] 2 FLR 1041, before deciding what statutory provisions were required. Child law practitioners will wish to follow the guidance in the Note in individual cases. It is appropriate to draw the attention of practitioners dealing with adult incapacity law to some general points in the Note.

Delivering the Note, Lord Menzies stressed three preliminary points. First, each child has their own particular needs and problems. What is

appropriate as regards both care provision and deprivation of liberty will vary from case to case, and that will inform the appropriate procedure. The court has not provided a fixed formula which must be followed in every case. Second, the function of the court is not to rubber-stamp High Court decisions. While they are usually taken by a single judge, such petitions in Scotland require consideration by three Inner House judges. Lord Menzies acknowledged the heavy responsibility that they carry, particularly where the deprivation of liberty of a child is involved. Third, all such applications must be presented expeditiously. Lord Menzies narrated situations in the past where that had not happened, and commented: "That will not do".

Also of interest to adult incapacity practitioners, the Note provides indications of further steps that might be necessary in the event of delay in providing a legislative solution. He commented in particular on the possibilities that there might be advantages in having a single designated judge able to acquire expertise in such cases, and to provide consistency of decision-making. Following the pattern under Hague Convention cases of appointing a liaison judge "might promote greater dialogue between the judiciary in Scotland and England & Wales in this area". As Lord Menzies acknowledged, some of these matters would probably require amendment to the Rules of Court, and an Act of Sederunt. Adult incapacity practitioners may reflect that the administration of the adult incapacity jurisdiction is characterised by great variation, rather than consistency, with some cases in some courts dealt with by sheriffs who have specialised in the jurisdiction, but not so across the country, despite the recommendations of Scottish Law Commission that led to the Adults with Incapacity (Scotland) Act 2000 being predicated upon specialist sheriffs being allocated to adult incapacity cases (see Scottish Law Commission Report on Incapable Adults, No 151, of September 1995). Following the wholesale unlawful deprivations of liberty of elderly adults, and those with mental or intellectual disabilities, preceding and during the pandemic, and continuing despite having been prominently identified, we are a long way from the expeditious addressing of situations of adult deprivation of liberty in Scotland. Adults, as much as children, should not be deprived of their liberty in Scotland without appropriate lawful approval conferred with the care commendably described by Lord Menzies, sadly a principle characterised more by its cavalier and wholesale breach than by its observation. Any judicial liaison appears to take place on an ad hoc basis, and the Protocol for Children's Cases in Scotland, and England and Wales concluded in July 2018 (available here) sadly does not include express consideration of cases concerning deprivation of liberty.

Standing the apparent lack of interest by Government in addressing with the alacrity the long overdue lack of appropriate legislative procedures and provision for lawful deprivation of liberty of adults, one wonders how long the Court of Session may have to wait to be relieved of the task of dealing with such cases concerning incoming children.

*Adrian D Ward*

## New Glasgow AWI Practice Note

Sheriff Principal Turnbull has issued Practice Note No 1 of 2021, which will be applicable to all applications made to Glasgow Sheriff Court

under the Adults with Incapacity (Scotland) Act 2000 made on or after 1st January 2022, and to any other proceedings under that Act (appeals, and counter-proposals for the appointment of guardians contained in answers, being specifically mentioned in the Practice Note) commenced after 1st January 2022. Paragraph 6 of Glasgow Practice Note dated 3rd July 2006, and the whole of Practice Note No 2 of 2015 dated 30th September 2015, are superseded and revoked with effect from that date. The new Practice Note may be accessed here.

*Adrian D Ward*

## Centre for Mental Health and Capacity Law webinars

The Centre for Mental Health and Capacity Law at Edinburgh Napier University will be running two webinars in early 2022.

The first is 'Investigation of Deaths in Mental Health Detention and Homicides' on 19th January 1pm-3pm (GMT) with speakers Deborah Coles (Director of Inquest), Dr John Crichton (Consultant Forensic Psychiatrist), Dr Ruth Ward MBBS, MRCPsych, Alison Thomson (Executive Director (Nursing), Mental Welfare Commission for Scotland) and Jackie McRae (Social Worker and Solicitor, currently with Scottish Parliament). Attendance is free but you must register via Eventbrite, where you can also find more information about the webinar.

On 23rd February at 1pm-13pm (GMT) there will be a webinar on 'Adult Support and Protection' with currently confirmed speakers Dr Amanda Keeling (Academic Fellow in Disability Law, University of Leeds) and Kate Fennell (Adult Protection Lead, Edinburgh Health and Social Care Partnership, Edinburgh City Council and Lecturer, Edinburgh Napier University). Once again, admission is free but registration via Eventbrite is required. The Eventbrite registration link will be available early in the new year, please email the Centre on cmhcl@napier.ac.uk to be placed on its email list if you wish to be alerted to this and other Centre events.

*Jill Stavert*

## World Congress on Adult Capacity 2022

A reminder that the World Congress on Adult Capacity 2022 will be held in person in Edinburgh from 7th-9th June. For those looking for an excuse to escape from what might well now be rather reduced festivities, please note that there is still time to submit an abstract with the submission deadline being 7th January 2022. More details can be found on the Congress website https://wcac2022.org/.

*Jill Stavert*

# 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 and the European Court of Human Rights. 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 QC:** **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 contributor to 'Assessment of Mental Capacity' (Law Society/BMA), 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 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.

**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 2019). 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.

**Rachel Sullivan:** **rachel.sullivan@39essex.com**

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

**Stephanie David:** **stephanie.david@39essex.com**

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

**Arianna Kelly:** **arianna.kelly@39essex.com**

Arianna has a specialist practice 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 matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a 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.

## Scotland editors

**Adrian Ward:** **adw@tcyoung.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 are regularly presenting at 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.

### 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 January. 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