



Welcome to the February 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a personal view on the Mental Capacity (Amendment) Bill from Tor, damages where the MCA has gone awry and the Supreme Court on the MHA in the community;

(2) In the Property and Affairs Report: neglect and attorneys, a speedy (and sensitive) statutory will and attorneys as personal representatives;

(3) In the Practice and Procedure Report: a challenging decision on the inherent jurisdiction, CoP statistics and guidance on anonymisation;

(4) In the Wider Context Report: the Code of Practice is being revised, guidance on CANH and the Mental Capacity Action Day looms;

(5) In the Scotland Report: a welcome change to guidance in relation to voter registration, and the death of the former Director of the Mental Welfare Commission.

Last, but very much not least, her fellow editors invite you to join in congratulating Tor on her appointment as Queen's Counsel.

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

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Scottish Contributors

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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.

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Voting Rights

The Mental Health and Disability Committee of the Law Society of Scotland has been instrumental in achieving an alteration by the Electoral Commission to guidance which previously had the effect of disqualifying some people with cognitive impairments from voting. This nullified the previous success of campaigners, including People First (Scotland), to persuade Parliament to remove the previous disqualification from voting of some people with mental and intellectual disabilities, contrary to the UN Convention on the Rights of Persons with Disabilities. The barrier erected by the Electoral Commission took the form of advice to electoral registration officers that the declaration of truth, required to be signed in order to register to vote, could not be signed on behalf of an elector by an attorney. Strangely, that discrimination was compounded by advice to the contrary in England & Wales. The Electoral Commission originally suggested that registering to vote was neither a personal nor a property matter covered by the Adults with Incapacity (Scotland) Act 2000. The Law Society Committee disagreed on a range of grounds, including that the only powers which cannot competently be conferred upon an attorney are those set out in section 16(6) of the 2000 Act, or matters from which an

attorney is expressly excluded from acting under any other statute or rule of law. At the request of the Law Society Committee, the Equality and Human Rights Commission took the matter up with the Electoral Commission, and successfully persuaded the Commission that its original view of the law was incorrect. The revised guidance is available [here](#).

Adrian D Ward

Glasgow City Council v Scottish Legal Aid Board

We reported aspects of the decision at first instance in this case in the [March 2018 Report](#). In a separate case, the Lord Ordinary had dismissed petitions by a man for judicial review of certain decisions by Glasgow City Council concerning the care of the man’s mother, for whom he held power of attorney. The man sought Legal Aid to appeal against that decision. Scottish Legal Aid Board granted Legal Aid, but the Council maintained that the Board had acted unfairly towards the Council in determining the man’s Legal Aid applications. The Council applied to the Lord Ordinary, who held that the Board had acted unfairly towards the Council in determining the applications, and quashed the Board’s decision to grant Legal Aid. The Board appealed to the Inner House against that

decision. The Inner House allowed that appeal: [\[2018\] CSIH 37](#); 2018 SLT 935.

The Inner House acknowledged that, in determining whether to grant a person Legal Aid to pursue a civil action, the Board are under an obligation to act fairly, not only to the applicant but also to the “opponent” who may be affected by the decision. However, what fairness requires in different situations is variable. Sometimes fairness may dictate that the level of notice required should be the equivalent of that in a civil action and that both parties be afforded an equal opportunity to present their cases. In other cases it may be sufficient that the opponent is advised of the general nature of the matter under consideration by the Board, and should be allowed to make representations, which the Board will be required to take into account. The Inner House considered carefully the nature of the Legal Aid system and the statutory framework of the Legal Aid (Scotland) Act 1986. The statute permits an opponent to make written representations about the application. However, that does not confer a right to launch a full defence to the merits of the applicant’s case. The Act does not “create pre-litigation litigation”. In the present case, the Inner House commented that: “The facts and circumstances, although already known to the council, were set out in full, as were the legal considerations which formed the basis of both the submissions to the Lord Ordinary and his opinion on the merits. The council had more than sufficient notice of what the case was about, although they hardly required much given their existing state of knowledge. They ought to have been able to grasp that the argument in the appeal was, as it in the event transpired, that the Lord Ordinary had erred in law in deeming that the assessment

had met the relevant statutory tests.” The review of the Board’s decision requested by the man, and the fact of such review, “adds nothing”, the Board apparently having sought a supporting opinion from Counsel “which they presumably obtained and which would not have been disclosable to the council”. The Inner House concluded that there was no unfairness.

Adrian D Ward

Dr Jim Dyer

We go to press immediately following the funeral on 11th February of Dr Jim Dyer, former Director of the Mental Welfare Commission for Scotland, who died peacefully on 24th January 2019 after a prolonged illness borne typically with quiet fortitude and even at times good humour.

Jim practised as a consultant psychiatrist at the Royal Edinburgh Hospital from 1981 until joining the Commission as Medical Director in 1991. In 1993, he became the first full-time Director of the Commission, and led the organisation until retiring in 2003. He went on to become the first ever Scottish Parliamentary Standards Commissioner, serving for 6 years, and a medical member of the Mental Health Tribunal for Scotland. In his decade at the Commission, he did much to increase its impact, including its work to end the entrapment of patients at Scotland’s high secure hospital, and major investigations into the ill-treatment of adults with learning disabilities. He championed reform of incapacity law in the years leading up to the Adults with Incapacity (Scotland) Act 2000, and was an influential member of the Millan committee, whose landmark report led to the Mental Health (Care and Treatment) (Scotland) Act 2003.

He was a thoughtful, hugely knowledgeable and in his mild-mannered way highly effective leader, highly regarded by all who knew him.

Adrian D Ward with input from Colin McKay

New Chair sought for the Mental Welfare Commission

The Very Reverend Dr Graham Forbes CBE will have served for eight years in the vital role of Chair of the Mental Welfare Commission for Scotland when he steps down in March 2019. The process of recruiting his successor is proceeding.

Adrian D Ward

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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](#).



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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), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



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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](#).



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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. To view full CV click [here](#).



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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](#).

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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](#).



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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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](#).



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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



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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

Conferences at which editors/contributors are speaking

Edge DoLS assessor conference

Alex is speaking at the Edge DoLS assessor conference on 8 March, alongside other speakers including Lord Justice Baker and Graham Enderby. For more details, and to book, see [here](#).

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, 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 edition will be out in March. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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