MENTAL CAPACITY REPORT: SCOTLAND

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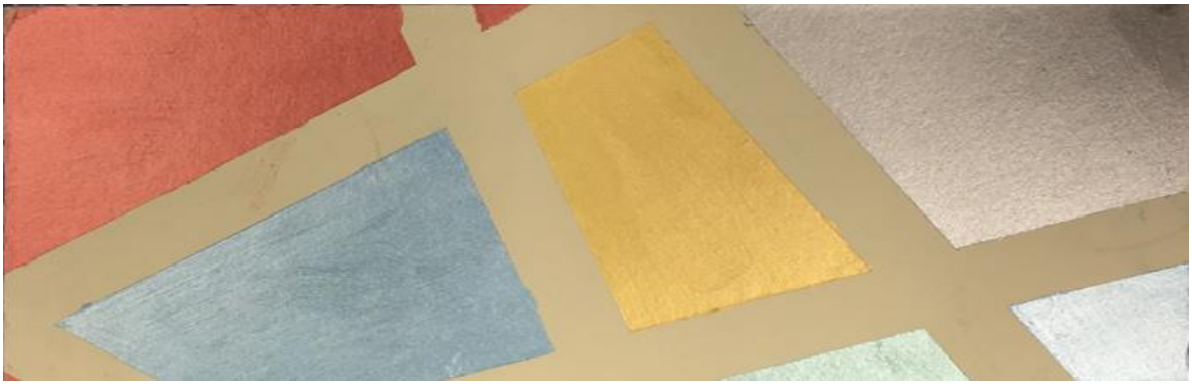

Welcome to the June 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: standing in the shoes of P in a difficult decision as to cancer treatment, s.21A and the LAA, Welsh DoLS and Sir James Munby P on the warpath;

(2) In the Property and Affairs Report: Charles J puts statutory wills under the spotlight and new OPG guidance on travel costs;

(2) In the Practice and Procedure Report: the minutes of the Court of Protection Court Use Group;

(3) In the Wider Context Report: an election corner special report, new resources for GPs and about ADRTs, psychiatric treatment under scrutiny from Europe and moves to secure greater cross-border protection for adults;

(4) In the Scotland Report: important perspectives on supported decision-making, independent living and legislative reform;

Remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

You are also invited to our 10th birthday party for the MCA 2005 to be held on 29 June, with the keynote speech to be delivered by Baker J and a packed programme of talks and masterclasses concerned with key aspects of the Court of Protection's work and future. For details, and to book, see here.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Nicola Kohn
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

Editorial Note

Much of the Scotland Report this month is taken up with reports into how the law may – or should – look in future, revealing the accelerating pace of change in this area. Whilst the commentary here is prepared from a Scottish perspective, its insights are, at the level of principle, of much more general application.

Powers of Attorney

As the Journal of the Law Society of Scotland has reported, registrations of powers of attorney in Scotland have fallen sharply after several yearsf of successive increases. 50,373 powers of attorney were registered with the Scottish Office of the Public Guardian in 2016, compared to 61,184 the previous year. The reasons for this fall, which is in contrast to the position in England and Wales, are not yet known, but undoubtedly merit further study.

The "bedroom tax", a procedural point, and possible human rights issues

In *Secretary of State for Work and Pensions v (First) The City of Glasgow Council (Second) IB* [2017] CSIH 35, an Extra Division of the Inner House of the Court of Session upheld an appeal by the Secretary of State for Work and Pensions in which the central issue was the interpretation of "bedroom" in Regulation E13 inserted into the 2006 Regulations by the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013. Given the line of relevant authority which has already been established, the outcome of the appeal is in one sense unsurprising. For adult incapacity practitioners, it contains one procedural point of interest. For the absence of reference to human rights issues the decision is remarkable, particularly in a decision issued on 31st May 2017 and therefore shortly after publication by the UN Committee on the Rights of Persons with Disabilities of its Draft General Comment on the right of persons with disabilities to live independently and to be included in the community under Article 19 of the UN Convention on the Rights of Persons with Disabilities (see next item).

The decision narrates that *IB* was tenant of a property comprising five main rooms plus kitchen and bathroom, rented from a housing association. This was her former family home, and when used as such there was no dispute that four of the rooms were bedrooms. *IB*'s housing benefit was reduced by 25% by Glasgow City Council on the basis that she was under-occupying the rented property by two bedrooms. *IB* successfully appealed that decision to the extent that the First-tier Tribunal decided that the property had three (not four) bedrooms because: "*What was formerly a fourth bedroom on the ground floor was a livingroom at the relevant date and had been for a number of years*". The discount was accordingly reduced from 25% to 14%. An appeal

by the Secretary of State to the Upper Tribunal was unsuccessful, but further appeal to the Inner House was successful.

IB is described in the decision as an adult single woman in her 50s who has a severe learning disability and autistic traits, unable to live on her own. Her sister and brother-in-law ("Mr and Mrs O") had been appointed her guardians in February 2013. The terms of the guardianship order were not narrated. Following the death of *IB*'s mother in April 2005, she had gone to live with Mr and Mrs O. In the summer of 2009 she moved back into her own home. Mr and Mrs O moved there with her. Shortly after that move, a downstairs bedroom was converted into a living room for *IB*'s own use, in accordance with professional advice from a social worker. Mr and Mrs O continued to use the original living room. The First-tier Tribunal narrated in its decision that: "*Both parties require some privacy. In particular, the appellant can get unsettled and agitated and wants her own space to watch the television programmes she likes and listen to music. She has a television in her bedroom but does not use it. She has carers who call twice a week to take her out and spends some time in her living room with them*". One would observe that the need for this arrangement, and the professional advice to that effect, are unsurprising having regard to the brief description of *IB* as having a severe learning disability and autistic traits.

The essence of the decision by the Inner House is contained in three sentences: "*In our opinion the classification and description of a property used as a dwelling is a matter of fact to be determined objectively according to relevant factors such as size, layout and specification of the particular property in its vacant state. That classification cannot be changed except by structural alterations made with the landlord's approval which have the result of changing the classification of the property having regard objectively to its potential use in a vacant state. Thus the classification of a property as having one or more bedrooms does not change depending on the actual needs of the occupants or how they use the rooms for whatever reason from time to time*".

The point of procedural interest was that *IB* was simply designed in the pleadings in the case by her name and address, without reference to the guardianship order. Her Counsel had confirmed to the court that he was instructed by Mr and Mrs O as guardians. Counsel took no issue about the form of the proceedings which designed *IB* alone as second respondent. That would appear to be correct. *IB* was indeed the relevant party. The function of the guardians was to enable the exercise of her legal capacity in the matter.

Not addressed in the decision is the question whether the terms of Article 19 UN Convention on the Rights of Persons with Disabilities ("CRPD") should have been taken into account in arriving at the decision. The terms of CRPD are not directly legally binding, but CRPD has been ratified without reservation by the UK Government. Article 19 requires states parties to recognise the equal right of all persons with disabilities to live in the community, with choices equal to others. This includes the right to choose place of residence, and where and with whom to live on an equal basis with others. Although no direct evidence on the point is narrated in the decision, it seems reasonable to anticipate that, as a consequence of her autistic traits in particular, *IB* would not have been able to live in the house without the facility of a separate living room. It would appear that there would be an argument that what amounts to a financial penalty arising from her need for that provision, in order to live in the home of her choice, violates Article 19.

The court and other authorities involved in this matter were obliged to comply with the European Convention on Human Rights ("ECHR"). Article 8.1 guarantees everyone's right to respect for private and family life, and his or her home. Article 8.2 contains exceptions. Only one exception could be of possible relevance. That would be that an interference with the Article 8.1 right is "necessary in a democratic society in the interests of … economic wellbeing of the country". It seems improbable, however, that the costs to the public purse of ending *IB*'s current living arrangements would have been less than the

reduction in housing benefit resulting from the decision, therefore it seems improbable that this exception would have applied. Moreover, although Article 19 of CRPD is not binding and Article 8 of ECHR is binding, it would seem reasonable to have regard to the UK's ratification of CRPD (and thus of Article 19 of CRPD) in interpreting Article 8.

If there was a violation of Article 8, then there would also appear to have been a violation of Article 14, which prohibits discrimination in relation to any Convention right. The decision appears to accept that if *IB*'s disabilities had been physical, and to meet those disabilities a bedroom had been converted to a wet room with landlord's permission, then it would no longer have been classed as a "bedroom" for the purpose of the 2013 Regulations. It is difficult to see that it would be other than discriminatory to disallow a non-physical alteration of use as an equally important consequence of a non-physical condition which is intellectually equally disabling.

Adrian D Ward

Draft General Comment on Article 19 of the UN Convention on the Rights of Persons with Disabilities ("CRPD")

The UN Committee on the Rights of Persons with Disabilities ("UN Committee") has issued a "Call for comments on the draft General Comment on the right of persons with disabilities to live independently and be included in the community (article 19)". The deadline for submissions is 30th June 2017. Aspects of Article 19 are described in the preceding item of this Report. The draft General Comment, naturally, is of much wider scope. It offers definitions of "independent living", "community living", "life settings outside of institutions" and "personal assistance". It considers each of the paragraphs of Article 19 in turn. It suggests that the core elements of Article 19 are the following:

a) To have legal capacity to decide where and with whom and how to live is a right for all persons with disabilities, irrespective of impairment;

b) The right to choose where to live requires a realistic option of accessible housing to choose from;

c) The right to live independently does not entail dependence on informal support from family and friends;

d) To have access to basic personalised and human rights-based disability specific services;

e) To have access to basic mainstream community-based services and support on an equal basis with others; and

f) The possibility of living independently must not be negatively affected by measures taken to respond to economic constraints.

The case described in the preceding item could be seen as engaging, in particular, item f) of the foregoing.

The draft then proceeds to suggest what are the obligations of states parties in order to comply with Article 19; the relationship of Article 19 with other provisions of CRPD, and a list of 12 suggested action points for implementation at national level.

Compliance with Article 19 is a particularly live issue in Scotland at this time. Practitioners are being consulted about situations in which people appear to be put under pressure to move from their own homes solely because savings might be possible if support were provided in a group setting. Such pressure is sometimes accompanied by a suggestion that a person could remain in their own home if they were to admit another disabled person on a board and lodging or similar basis. In its references to support services, the draft does contain a brief reference (in paragraph 67) to the requirement upon states parties to ensure access to justice and to provide appropriate legal advice, remedies and support, but this probably does not extend far enough to counter the assault upon the rights of people with disabilities currently imposed by Scottish Legal Aid Board, with policies that fail to allow solicitors adequate remunerated time to ascertain the will and preferences of people

with intellectual disabilities, or to communicate with them adequately, directly or through their supporters, in accordance with their professional obligation to do so.

The draft perhaps requires strengthening in order to emphasise that its references to "deinstitutionalisation" refer not only to moving people out of large institutions, but to avoiding institutionalisation in any setting. It is probably also necessary to expand the brief reference to a "paradigm shift from the medical model to the human rights model of disability". An institutionalised approach, treating people with disabilities as objects of care rather than holders of rights, can arise as much from social care models as from medical care models. Some of the worst generic deprivations of human rights which I have personally observed overseas have been in institutions designated as social care institutions, rather than as medical institutions; and issues at home such as the pressures upon people not to continue to reside in accommodation of their choice also arise from social care approaches and assessments, rather than medicalised approaches. The draft does not appear to be explicit that the right to remain in an existing home is as much supported by Article 19 as the right to move into a home of one's choice.

Adrian D Ward

Mental Health and Capacity Law: the Case for Reform Report

Introduction

On 30th May 2017, the Mental Welfare Commission for Scotland and Centre for Mental Health and Capacity Law (Edinburgh Napier University) launched their joint report: *Mental Health and Capacity Law: the Case for Reform*. It represents the culmination of information and views gathered during a recent law reform scoping exercise.

At the start of the twenty-first century Scotland was regarded as a world leader in terms of principled and rights based mental health and capacity law. However, international human rights law and practices in this field have developed further and this has called into question the fundamental assumptions that underpin relevant Scottish legislation. There remains widespread support for the principles of the Adults with Incapacity (Scotland) Act 2000 and Mental Health (Care and Treatment) (Scotland) Act 2003. There is nevertheless concern that individuals may remain disempowered and unable to effectively assert their rights and that the balancing of safeguards and rights to appropriate care has been undermined by resource constraints.

With a view to further discussing and considering this the Commission and the Centre jointly held three stakeholder roundtable events during the autumn of 2016. The main topics for discussion were graded guardianship, the possibility of unified legislation and capacity issues. The aim of the discussion was to highlight and analyse key issues in Scottish mental health and capacity legislation and to review future opportunities for reform. The matters explored and developed at these events form the basis of this report.

Human rights considerations

The conversations focused on the fact that although Scotland's laws and practice must continue to remain compatible with European Convention on Human Rights (ECHR) rights, the influence of the UN Convention on the Rights of Persons with Disabilities (CRPD) must also now be taken into consideration.[1]

In particular, the need to engage with the requirements of Article 12 CRPD (the right to equal recognition before the law) in terms of providing access to appropriate support so that persons with mental impairment are able to exercise legal capacity on an equal basis with others was considered. The

[1] The UK became a state party to the CRPD and its Optional Protocol in 2009.

Article 5 ECHR challenges presented by the *Bournewood* and *Cheshire West* rulings relating to persons who lack capacity and who may be deprived of their liberty in health and social care settings were further discussed. The message in *X v Finland* that Articles 5 and 8 ECHR considerations are separate in cases involving detention and potential non-consensual treatment was also noted.

The possibility of introducing unified mental health and capacity legislation, such as the Mental Capacity (Northern Ireland) Act 2016, in Scotland was also a topic for debate. We were particularly keen to explore views on whether the Northern Ireland Act's absence of a diagnostic threshold and enhanced support for the exercise of legal capacity provisions might be the most effective means by which to promote parity of esteem in terms of the care and treatment of persons with physical and mental health issues and meet both ECHR and CRPD requirements.

Such discussions also took place against a backdrop of the Scottish Government's announcement that it will conduct a review of the position of learning disability and autism within the 2003 Act's definition of 'mental disorder' and its review of the 2000 Act to respond to both the CRPD and to the Article 5 ECHR deprivation of liberty case law.

Conclusions and recommendations

A number of broad themes arose from both the roundtable discussions and from information gathered during a Mental Welfare Commission parallel exercise involving discussions with people with lived experience and carers.

It was certainly agreed that if Scotland is to lead the field again we need to reform our own law. Moreover, more can and should be done to maximise the autonomy and exercise of legal capacity of persons with mental disorder including where non-consensual care and treatment is being considered and implemented.

In the short to mid-term such reform should involve strengthening the principles that underpin the 2000 and 2003 Acts and, firstly, amending the 2000 Act taking into account the Essex Autonomy Project *Three Jurisdictions Project* recommendations, building on graded guardianship proposals and replacing Parts 3 and 4 of the 2000 Act and DWP appointeeship. It would also involve an overhaul and revisiting of how mental capacity is assessed and whether the 2003 Act should continue to use 'significantly impaired decision-making ability' as a criterion for intervention. It was acknowledged and agreed that improving practice may be more important than changing legal tests and that there is a need to develop consistent cross-professional standards on the assessment of capacity.

It was also considered that there is a need to provide greater synergy between the 2000 and 2003 Acts and the Adult Support and Protection (Scotland) Act 2007 to ensure that where an individual potentially falls to be considered under more than one piece of legislation this is effectively and consistently achieved. There was strong support for a single judicial forum, probably the Mental Health Tribunal for Scotland, to consider cases under both the 2003 and 2000 Acts and possibly even the 2007 Act.

Finally, whilst there did not appear to be an overall appetite for the immediate introduction of unified legislation amongst the stakeholders consulted, there did seem to be enthusiasm for increased convergence of mental health and capacity law over time.

Recommendations

In light of the above, the report therefore makes following recommendations:

Recommendation No. 1: There should be a long-term programme of law reform, covering all forms of non-consensual decision making affecting people with mental disorders. This should work towards a coherent and non-discriminatory legislative framework which reflects UNCRPD and ECHR requirements and gives effect to the rights, will and

preferences of the individual. Further, in accordance with Article 4(3) UNCRPD, persons with lived experience of mental disorder must be actively consulted in any reform process.

Recommendation No. 2: The aim should be increased convergence of the legislation over time, particularly with respect to the criteria justifying intervention.

Recommendation No. 3: There should be a single judicial forum to oversee non-consensual interventions. The balance of views favoured the Mental Health Chamber of the new tribunal structure as the appropriate forum.

Recommendation No. 4: Within the reform programme, priority should be given to the problems with the law which have the most significant negative effect on the lives and rights of people who are subject to them. The first priority should be to reform the Adults with Incapacity (Scotland) Act 2000.

Recommendation No. 5: The Adults with Incapacity (Scotland) Act 2000 reform should build on proposals for 'graded guardianship', which have attracted widespread support. It should also take account of the proposals to address UNCRPD compliance set out in the Essex Autonomy Project *Three Jurisdictions Report*.

Recommendation No. 6: The 'design principles' set out in para 6(a) of Chapter Three should be used to guide reform relating to guardianship.

Recommendation No. 7: Graded guardianship should also replace parts 3 and 4 of the Adults with Incapacity (Scotland) Act 2000 and DWP appointeeship

Recommendation No. 8: As part of the programme of reform, consideration should be given to the replacement of the 'SIDMA' test in the Mental Health (Care and Treatment)(Scotland) 2003 by a capacity test. However, the priorities before considering such legislative change should be: (a) to improve practice and develop consistent standards across medicine, psychology and the law on the assessment of capacity and (b) to identify and implement practical steps to enhance decision making autonomy whenever non-consensual interventions are being considered.

It remains to be seen the extent to which these recommendations are given effect in mental health and capacity law, practice and policy. We do, however, live in interesting times for such law, practice and policy.

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Supported decision-making: learning from Australia

A further major contribution to current processes of law reform, and review of good practice, was issued last week. Jan Killeen's contribution to the creation of Scotland's adult incapacity regime and its further development, soundly based upon research, has been immense. Her research and contribution continues with the publication of this report, available here. Jan writes in the Preface that: "Collaboration for change is central to the way I work". She organised the first major Scottish conference on dementia in 1984, leading to the formation of Scottish Action on Dementia. She then played a major role a decade later in the merger of Scottish Action on Dementia and Alzheimer Scotland to become Alzheimer Scotland – Action on Dementia. In her role as Policy Director of that organisation she was the driving force behind the creation and subsequent success of the massive alliance that campaigned for introduction of the Adults with Incapacity (Scotland) Act 2000. She pushed others (including me!) into the limelight, but without her efforts that alliance would neither have existed nor have succeeded. The successor to the alliance was the implementation steering group for the 2000 Act, and Jan carried that work seamlessly forward into her research which led to her

report "The Adults with Incapacity (Scotland) Act 2000: learning from experience" (Scottish Executive, 2004). Her report was the largest single influence behind the amendments to the 2000 Act by the Adult Support and Protection (Scotland) Act 2007.

We may confidently expect this latest report to have similarly substantial impact. It results from a six-week research trip to Australia facilitated by the Winston Churchill Memorial Trust. She selected Australia because it is the first country in the world to have piloted supported decision-making projects in response to the UN Convention on the Rights of Persons with Disabilities. The report describes and rigorously assesses the various different models of supported decision-making that Jan witnessed, and makes a series of recommendations. She concludes that the forthcoming review by the UN Committee on the Rights of persons with Disabilities of UK compliance with the Convention has the potential to be a welcome catalyst for change and, together with the recent reviews of capacity/incapacity laws in the UK, represents an important step forward. She warns, however, that if governments are serious about ensuring equality of all citizens then additional resources will be needed to support the implementation of reformed capacity/incapacity legislation which complies with the UK's commitment to the Convention.

The report is packed with useful information and rigorous assessment, to the extent that it is almost impossible to precis: anyone engaged or interested in the current review of legislation, and reviews of best practice, should read it. The value of her work is enhanced by the care and caution with which she identifies positive features and outcomes of the Australian experience, but also identifies that a review of evaluations of Australian pilot schemes exposed flaws in the methodology, and identified gaps in research. She makes it clear that: "supported decision-making continues to be 'work-in-progress'".

There are two significant limitations to the work which she is able to report. One is acknowledged: that the pilot schemes did not address supported decision-making in the context of ageing conditions. The other, not explicitly stated, is that the pilot schemes, and in consequence Jan's research, are limited to decision-making, not to the significantly wider requirement of Article 12 of the Convention for support in exercising legal capacity. However, while this whole area is indeed "work-in-progress", Jan's report progresses it substantially.

Adrian 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 Trust 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 2009), 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 appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. 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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Adrian is a Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: *"the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,"* he is author of Adult Incapacity, Adults with Incapacity Legislation and several other books on the subject. To view full CV click here.

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Conferences

Conferences at which editors/contributors are speaking

Essex Autonomy Project Summer School

Alex is speaking at the Essex Autonomy Project Summer School in July, which this year has the theme *Objectivity, Risk and Powerlessness in Care Practices*. The multi-disciplinary programme will give delegates the opportunity to discuss the challenges of delivering care in a framework that supports and empowers individuals. For full details, and to apply online, please see the Summer School website.

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. For more details, 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.

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