



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

(1) In the Health, Welfare and Deprivation of Liberty Report: a rare appellate level decision considering best interests (and confirming that they should be rare);

(2) In the Property and Affairs Report: (partially) endorsing an attorney's actions after the event;

(3) In the Practice and Procedure Report: choosing litigation friends;

(4) In the Wider Context Report: the National Mental Capacity Forum reports, and an important Strasbourg re-cap of the principles applying to capacity;

(5) In the Scotland Report: a new Public Guardian and the MWC is cautious about attorneys consenting to restrictions on liberty;

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

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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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### Public Guardian appointed



Fiona Brown, currently Deputy Public Guardian and Deputy Accountant of Court, will become Scotland's third Public Guardian with effect from 1<sup>st</sup> August 2018. She

will also take over the linked role of Accountant of Court, an office that has existed since 1889. She will take over both roles from Sandra McDonald, whose forthcoming retirement was reported in the [May 2018](#) report.

Fiona Brown has worked for what is now Scottish Courts & Tribunals Service ever since she became an Administrative Assistant at Airdrie Sheriff Court when she left school in 1993. Successive promotions have taken her to various locations since then. Her last appointment before she joined the Offices of the Public Guardian and Accountant of Court was as Fines Enforcement Manager for the Sheriffdom of South Strathclyde, Dumfries & Galloway. That appointment coincided with the introduction of the then new fines enforcement regime, ahead of unification with District and JP courts. She created the Fines Enforcement Team for her sheriffdom and was fully involved in

implementation of the National Fines Enforcement Scheme.

In December 2014 she joined the Office of the Public Guardian, taking up post as Deputy Public Guardian and Deputy Accountant of Court, initially on a temporary basis, her appointment being substantive from June 2015. Since then she has been the operational lead for the OPG Guardianship Team, and the Accountant of Court Team. She has led on a variety of projects including implementation of the Professional Guardians Scheme, a significant internal restructuring, and the re-engineering of supervisory processes in order to achieve compliance with the UN Convention on the Rights of Persons with Disabilities.

She says that she is *"absolutely delighted"* at the appointment: *"I am excited by the challenge and am really looking forward to leading the Office of the Public Guardian and of the Accountant of Court through this next phase, a period which will bring significant changes. I am quite sure, with the support of the team, we will deliver effective and positive results."*

Paying tribute to her predecessor, she added: *"It is a fantastic opportunity, but I have big boots to fill;*

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*I wish Sandra McDonald well in her new venture as an independent advisor and trainer in the mental capacity field, and am pleased that we don't lose her entirely!"*

*Adrian D Ward*

### **Mental Welfare Commission for Scotland Advice Note on Powers of Attorney authorising significant restrictions of liberty**

In March the Mental Welfare Commission published its advice on whether a person holding a Power of Attorney can authorise a significant restriction of liberty of an individual with incapacity. In the absence of reform, the Adults with Incapacity (Scotland) Act 2000 is currently silent on this issue.

This is very pertinent to compliance with Article 5 ECHR (the right to liberty), requiring as it does both legal authorisation for a non-consensual deprivation of liberty and a real and effective ability to challenge the legality of such deprivation of this liberty. However, the ability of welfare attorneys, or similar arrangements, to consent to deprivations of liberty has been, and remains, a rather grey area in European Court of Human Rights jurisprudence. Its ruling in Staney hinted that such an arrangement might be permissible and Article 5 compatible but no further guidance was provided and its Stankov ruling, in fact, implied that extreme caution should be adopted here.

There is, of course, the argument that if an adult has granted an attorney the power to consent to care arrangements, including arrangements amounting to a deprivation of liberty, then this should be respected. This is recognised by the Commission – and it encourages people granting powers of attorney to be as specific as

possible in the powers granted – but the Commission does not consider that a power of attorney can be safely relied on to authorise coercive measures which amount to a deprivation of liberty.

Noting the Article 5 ECHR requirement for legal authorisation for a non-consensual deprivation of liberty and the requirement of Article 12 of the Convention on the Rights of Persons with Disabilities that measures affecting a person's legal capacity must respect their rights, will and preferences, the Commission adopts a cautious approach. It recommends that where there is persistent verbal, or non-verbal, resistance from an adult with incapacity to a significant restriction of liberty (e.g. relating to remaining in a care setting) then it is better to seek court authorisation for such deprivation of liberty (even where a power of attorney contains a relevant provision).

At the same time, the Commission acknowledges that some resistance may be very temporary, but easily overcome with persuasion or direction, provided this respects the adult's rights. Moreover, some resistance may be for interventions not considered to be a significant restriction of liberty (e.g. to ensure personal hygiene or nutrition). In this particular connection, the Commission considers that such resistance may need to be overcome for the immediate safety of the adult or other people and that a legal process is not required if the attorney is acting within the apparent scope of their powers. However, where doubt exists as to the scope of such powers then the Commission advises that an

application is made to the sheriff court under Section 3(3) of the Adults with Incapacity (Scotland) Act 2000 for directions.

*Jill Stavert*

### **Mental Welfare Commission for Scotland report on people with dementia in community hospitals**

The Mental Welfare Commission has recently published a [report](#) of its visits to 78 wards in 56 of the 89 community hospitals in Scotland (between June and September 2017). Every patient with dementia who was able and willing to talk was met. The Commission also spoke to staff and family carers, and reviewed case files and drug prescription sheets.

A reading of the full report is recommended but, in essence, its key findings were that whilst there was provision for the physical health needs of patients with dementia there tended to be a lack of care planning for care and support focusing on the patient's dementia both in terms of the environment in hospital and arrangements at home. A need for targeting training amongst staff was identified. Moreover, when rights-based issues were discussed with staff the Commission often felt such staff were not familiar with incapacity and mental health legislation. Apparently, relatively few mentioned how a patient was to be supported with personal care and would be encouraged to maintain their

skills and independence. 12 recommendations were made.

Existing principles that underpin both the Adults with Incapacity (Scotland) Act 2000 and Mental Health (Care and Treatment) (Scotland) Act 2003<sup>1</sup> specifically reinforce the need to maintain the autonomy and exercise of legal capacity of individuals with mental disorder, including dementia. ECHR jurisprudence is increasingly reinforcing this and, of course, Article 12 of the UN Convention on the Rights of Persons with Disabilities takes this much further, something that the Scottish Government has noted in its recent consultation on proposals for reform of the Adults with Incapacity (Scotland) Act 2000.<sup>2</sup> For this reason health boards and staff in community hospitals must take serious heed of the Commission's report and its recommendations.

*Jill Stavert*

### **Lawscot Wellbeing**

"Lawscot Wellbeing" was launched by the Law Society of Scotland at a well-attended event hosted by Burness Paull in Edinburgh on 14<sup>th</sup> May 2018. It is an [online resource](#) providing help and guidance for members of the Law Society of Scotland and employers. It works in collaboration with others in the public and voluntary sector, including NHS Scotland, LawCare, SeeMe, Scottish Association for Mental Health, and others. Its functions include

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<sup>1</sup> See sections 1 of both the Adults with Incapacity (Scotland) Act 2000 and Mental Health (Care and Treatment) (Scotland) Act 2003.

<sup>2</sup> The Scottish Government will be releasing information on responses to the consultation shortly, although several organisations have already published their responses online.

providing information and signposting to members of the Law Society, to assist in managing emotional wellbeing; supporting them and others employed in the Scottish legal sector who may experience difficulties in accessing support services and advice; providing support to colleagues and managers assisting people in difficulty or crisis; providing guidance to members of the Society who have concerns about the emotional wellbeing of clients; challenging the stigma that can surround issues of emotional wellbeing; and championing best practice. The service has confidential helplines. It provides in addition support to members of the Society returning to the profession after maternity or paternity leave, and those facing redundancy. Perhaps the most telling comment at the launch event was that someone is “no less of a lawyer” because they encounter and seek to address emotional wellbeing issues. Striking advocacy of the potential impact of such issues, and the importance of access to help and support in dealing with them, was provided by Eilidh Wiseman, a Past President of the Law Society.

*Adrian D Ward*

### **Review of adults with incapacity legislation**

In our [last Report](#) we included links to available responses to the Scottish Government Consultation on Reform of Adults with Incapacity Legislation. Mhairi Maguire has now provided the following link to the response by Enable Scotland, [here](#).

*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](http://www.mentalcapacitylawandpolicy.org.uk). 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. She sits on the London Committee of the Court of Protection Practitioners Association. 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 4<sup>th</sup> 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, and is chair of the London Group of the Court of Protection Practitioners Association. To view full CV click [here](#).



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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



**Adrian Ward:** [adw@tcyoung.co.uk](mailto:adw@tcyoung.co.uk)

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



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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, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

## Conferences

Conferences at which editors/contributors are speaking

**Court of Protection seminar: The capacity to marry and divorce, and damages in the Court of Protection**

Tor is speaking, with Fenella Morris QC, at a seminar organised by Irwin Mitchell on 21 June in London. For more details, and to book, please use this [email address](#).

**Other conferences of interest**

**UK Mental Disability Law Conference**

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details, see [here](#).

**Towards Liberty Protection Safeguards**

This conference being held on 24 September in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and 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 report will be out in early July. 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](mailto:marketing@39essex.com).

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