



Welcome to the May 2022 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: Fact-finding in relation to coercive and controlling behaviour; habitual residence; and how recent should evidence be for the deprivation of liberty of a child?
- (2) In the Property and Affairs Report: The Governments to the 'Modernising Lasting Powers of Attorney' consultation
- (3) In the Practice and Procedure Report: Balancing privacy and open justice; costs of proceedings; and compliance with practice directions.
- (4) In the Wider Context Report: Mental Health Act reform; COVID-19 in care homes; and MARSIPAN is replaced.
- (5) In the Scotland Report: The World Congress; the Scott Review; and more on the PKM Litigation and Guardians' remuneration.

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.

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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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World Congress, 7-9 June 2022

Registrations are still open for the 7th World Congress on Adult Capacity, Edinburgh International Conference Centre, 7-9 June 2022. The full Congress programme is now available at www.wcac2022.org. Keep checking it for further adjustments and updates. That link can also be used to register. The Congress is a "must" for all practitioners in the field, with a unique opportunity to enjoy in Scotland, and for only the second time in Europe, a major learning experience towards meeting fundamental demands and challenges to the essence of being a lawyer. The UN Convention on the Rights of Persons with Disabilities challenges us all to ensure that the full rights and status of people with disabilities are respected and made real for them, not only in the ringing declarations of international instruments and the polished language of laws, practices and procedures, but in the lives and experience of them, and of those who love them, care for them, and seek to serve them in professional or voluntary roles. That is the greatest challenge facing all of us, though for this Congress delegates from over 30 countries across six continents have in many cases overcome exceptional challenges to attend, and the organisers have faced a journey through challenges unforeseen when Scotland was accorded the honour of hosting this leading world event in the smallest country yet to do so.

Preparation of the Final Report of the Scott Review into mental health and incapacity law has been timed to take full advantage of the Congress, with the current consultation process ending a fortnight before the event. There will be active participation and a dedicated presentation from the Review Team. Participation in plenary events includes Lord Scott, balanced by HHJ Carolyn Hilder (Senior Judge at the Court of Protection), Ministers from both Scottish and UK Governments, and many world-leading figures, as well as representation of lived experience.

The organisers are grateful to all sponsors, led by the Law Society of Scotland as Gold Sponsor, for their contributions, and to UK Government for their support, without all of which the event would not happen – particularly in current stringent times. They are also most grateful to Alzheimer Scotland for funding and facilitating the attendance of people with relevant lived experience, and their carers. Everyone who registers for the event can not only expect so much personal and professional benefit, but is making their own contribution towards the viability of hosting an event when "the world comes to Scotland" to share the universal challenge of delivering on fundamental rights of all people, in all places, and in all circumstances.

Certificates for CPD purposes are available for those who request them.

Register now to avoid disappointment.

Adrian D Ward

Lord Scott and the Scott Review

We are delighted to congratulate John Scott QC, Solicitor Advocate, on his appointment as a Senator of the College of Justice, meaning (for readers who are not Scots lawyers) that he is now a judge of the High Court of Justiciary in criminal matters, and the Court of Session in civil matters. It adds to our delight that upon taking up this appointment he obtained special permission to continue his existing role as Chair of the Scottish Mental Health Law Review through his significant role at the World Congress (see preceding item) to publication of the Final Report of the Review, due in September 2022.

The current consultation period on the work so far of the Review ends on 27th May 2022. All those who feel that they might have something to contribute to the Review process, even if only on one of the several questions posed at the end of each chapter of the consultation document, should respond by the deadline. This is a once-in-a-generation opportunity to influence the future shape of the wide areas of mental health, adults with incapacity, and adult support and protection law, with anticipated shifts towards a firmly human rights basis for assessing and meeting needs, embodied in processes of human rights enablement linked, for purposes of relevant assessments, to an autonomous decision-making assessment; with better coordination of the current different regimes by a process of alignment and possibly fusion of legislation, and possible acceptance and implementation of the case made by the Law Society of Scotland in 2016 for a single unified tribunal dealing with all relevant jurisdictions in a coordinated way, with unified standards, procedures and specialist expertise across Scotland, and competence to make disposals or issue orders under any of the current

jurisdictions in a matter brought before the tribunal in any one of those jurisdictions.

Crucially, the aspirations of the Review will be essentially dependent upon government remedying its current under-funding of minimum necessary provision to meet human rights standards (which has led, for example, to a reduction by more than one half of mental health officer capacity in relation to needs) and remedying its own long-standing violations of its existing human rights obligations (such as failure to put in place an appropriate procedure to regulate deprivations of liberty in terms of Article 5 of the European Convention on Human Rights). The Report of the Review is likely to be only one step along the road to implementation of reforms. For example, unlike Scottish Law Commission reports in this area, it is not intended that it should include draft legislation. However, it is to be anticipated that the Report may highlight matters of particular urgency for reform.

All of the foregoing is tentative, dependent upon the Review Team's assessment of responses to the consultation, testing of its ideas at the World Congress, and ongoing work (which may include further targeted consultations) thereafter.

Adrian D Ward

New Sheriff Principal, new Practice Note

We congratulate Sheriff Nigel Ross on his appointment as Sheriff Principal of the Sheriffdom of Lothian and Borders, following upon the retirement of Sheriff Principal Mhairi Stephen. He took up appointment from 2nd May 2022, but at least some phasing in the handover is indicated by the issue on 3rd May 2022 by Sheriff Principal Stephen of a new Practice Note for AWI cases in Edinburgh Sheriff Court, though it was actually dated 26th April 2022, applying to all applications under the 2000 Act for guardianship and intervention orders, and all Minutes for renewal and/or variation of guardianship orders and for appointment of

additional or replacement guardians, at Edinburgh Sheriff Court on and after 3rd May 2022. Subject to stated exceptions, it applies to counter-proposals for appointments made by way of craves included in Answers. The Practice Note in effect consolidates and updates good practice, and can be used as a checklist. Notable in particular is that it expands on the requirement in section 1(4)(a) of the 2000 Act to take account of the present and past wishes and feelings of the adult “so far as they can be ascertained by any means of communication”, to take account of applicable human rights standards, such as those derived from Article 6 of the European Convention on Human Rights, the requirement for support for the exercise of legal capacity in Article 12(3) of the UN Convention on the Rights of Persons with Disabilities, and a requirement for respect for *inter alia* the adult’s will and preferences in terms of Article 12.4 of that Convention. In consequence, in terms of paragraph 3(k) of the guidance: *“The application must include averments as to the present and past wishes and feelings of the adult about any order sought and the powers requested so far as they can be ascertained. If it is not possible to ascertain them, the application must include averments (1) as to why this is not possible and (2) as to the steps taken, if any, (including any assistance and/or support provided) with a view to ascertaining them”*. Under section 1 of the 2000 Act the sheriff is obliged to be satisfied as to due compliance with the principles in section 1 in relation to any intervention, as *“the person responsible for authorising or effecting the intervention, regardless of what might be averred or produced”*. In consequence, one trusts that sheriffs will be vigilant in ensuring full compliance with paragraph 3(k).

Adrian D Ward

Routes of appeal clarified

In the [June 2021 Scotland section](#), we reported the decision of the Sheriff Appeal Court in *JK (Respondent & Appellant) v Argyll and Bute*

Council (Applicant & Respondent). In that case the court addressed fundamental questions as to whether powers can be granted to a welfare guardian under the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”) which have the effect of depriving the adult of his or her liberty, and also the inter-relationship between sections 64 and 70 of the 2000 Act. On 29th April 2022, an Extra Division of the Inner House of the Court of Session rejected an application for leave to appeal to the Court of Session, the Sheriff Appeal Court having refused the applicant’s appeal, and the applicant’s subsequent application for leave to appeal to the Court of Session. The applicant sought leave direct from the Court of Session. The question arose as to whether she could competently do so.

The applicant referred to two potential routes for appeal. Under section 2 of the 2000 Act, unless otherwise expressly provided for, decisions of the sheriff under the 2000 Act might be appealed to the Sheriff Principal, whose decision could with leave of the Sheriff Principal be appealed to the Court of Session. It was not open to appellants to seek leave from the Court of Session.

The Courts Reform (Scotland) Act 2014 (“the 2014 Act”) transferred the appellate jurisdiction of the Sheriff Principal to the Sheriff Appeal Court. Section 113 of the 2014 Act provides for appeal from a decision of the Sheriff Appeal Court constituting final judgment in civil proceedings with the permission of the Sheriff Appeal Court, or, if that court refuses permission, with the permission of the Court of Session. So, did the limitation in section 2 of the 2000 Act still apply, or had it been superseded by section 113 of the 2014 Act?

The Court of Session decided the matter by reference to the further provisions in subsections (3) and (4) of section 113 of the 2014 Act. Section 113(3) provides that section 113 “does not affect any other right of appeal against any decision of the Sheriff Appeal Court to the Court of Session under any other enactment”, and,

crucially, section 113(4) provides that section 113 “is subject to any provision of any other enactment that restricts or excludes a right of appeal from the Sheriff Appeal Court to the Court of Session”. The 2000 Act excluded appeal to the Court of Session except where the Sheriff Principal had granted leave. The role of the Sheriff Principal had transferred to the Sheriff Appeal Court. Accordingly, appeals from the Sheriff Appeal Court to the Court of Session require the leave of the Sheriff Appeal Court, and if that is refused it is not competent to seek leave from the Court of Session.

Adrian D Ward

PKM Litigation

In previous Reports we undertook to keep readers updated on the progress of the litigation between PKM’s Guardians and Greater Glasgow Health Board (see the Scotland sections in [December 2021](#), [February 2022](#) and [March 2022](#)). We last reported that at a hearing in Dumbarton Sheriff Court on 24th February a proof before answer was ordered. Given the “life-or-death” urgency of this litigation, it is surprising that this case has yet to be decided, and is apparently not being case managed on a tight timescale. The proof before answer is due to proceed on 17th and 20th June, and 14th July, 2022. There was due to be a pre-proof hearing on 18th May 2022 to address procedural matters. PKM himself is still not represented, though one of the parties is his safeguarder. We understand, however, that he is listed as a witness by one of the parties, but that this is opposed by another. We shall of course report the final disposal, and any significant information that becomes available in the meantime.

Adrian D Ward

Guardians’ Remuneration

We have also been following in recent issues the topic of professional guardians’ remuneration, and the establishment by Fiona Brown, Public Guardian, of an “Uplifts Working Group”. For members of the Group and their contact details, see the Scotland section of the [April Report](#). We are grateful to Fiona Brown for providing the following further information on the work of the group and permitting us to publish it.

At the first meeting of the group in March, the group:

- Agreed the remit of the group;
- Listed and agreed the current frustrations with the remuneration and uplift process;
- Agreed common situations where more time is spent in guardianship cases e.g. excessive calls/visits from the Adult/Family, visits to HP etc.;
- Agreed the improvements required to ensure ease for both OPG staff and Professional Guardians i.e. a Pro-Forma Application;
- Adjusted the list of “routine functions” listed on the current OPG guidance document;

The routine functions were updated, the annual increase in scale remuneration was applied, and a first draft Application was shared.

At the second meeting in April, the group:

- Reviewed and offered feedback on the draft Application, and agreed that guidance be inserted in the actual application, rather than having a separate document;
- Considered the timing and method for submitting an Application;
- Discussed the possibility of being able to withdraw uplift amounts, the following reporting year, if funds were not available in the year in respect of which the uplifts were allowed;

- Discussed the rate of uplift e.g. a set %, professional hourly rate up to a capped amount, or a set OPG uplift hourly rate for all (options being tested with live cases before the next meeting);
- The costs and options re insurance and visits on vacant property, as this is costly to estates and time consuming for professionals (Marsh/Aviva offer a product for Estate Managers, which Professional Guardians can use, where excessive visits are not required);
- Discussed how professional guardians could share best practice.

We understand that the group is next due to meet on 16 June 2022, with the intention that it assess the options around rates for uplift, and again consider a draft Application Form (with guidance inserted).

The total timescale for the work of the group has not yet been fixed.

Addressing two major deficiencies in Scots law

A report drafted by a cross-committee Working Group was published by the Law Society of Scotland on 20th May 2022, addressing two areas of major deficiency in Scots law. See [Human rights must be at the core of proposals for law reform around advance choices and medical decision making | Law Society of Scotland \(lawscot.org.uk\)](https://www.lawscot.org.uk/news/advance-choices-and-medical-decision-making)

The Working Group comprised members drawn from various committees of the Law Society of Scotland and an external expert, and included legal and medical practitioners, academic lawyers, and an English barrister. The aim of the project was to consider and address current deficiencies in Scots law in relation to (a) advance choices (in the original remit described as advance directives), and (b) medical decision-making in intensive care situations. The report demonstrates the need for Scots law adequately to address those deficiencies, and without

proposing draft legislation it nevertheless offers clear proposals for the content of appropriate legislative provision, and related matters.

The report narrates that the problems resulting from those deficiencies were exacerbated during the pandemic with advice and encouragement based on the law of England & Wales, which is different, and which does cover some aspects to a greater (albeit still limited) extent than Scots law. Critically, many medical practitioners in Scotland do not understand the legal position when they have to make medical decisions in intensive care situations, and it is not possible to obtain informed consent from the patient (or a guardian or attorney representing the patient). They do not understand that they do not have the legal protections available to colleagues in England & Wales if they act properly in the circumstances, but “get it wrong”. The report offers for the first time a legal framework. It draws on the principle of *negotiorum gestio*, traditionally seen as regulating a situation in which the gestor steps in to act on behalf of an adult who is capable but absent and cannot be contacted for instructions, to situations where the adult is not physically absent but in consequence of medical emergency is “absent” in the sense of being unable to hear and respond to explanations and offers of treatment.

Members of the public have been encouraged to make “advance directives”, but there is no statutory provision for them in Scotland, nor is the law clear about how to ensure maximum effectiveness of decisions that they might wish to make in advance of incapacity. Such decisions can cover a wide range of matters, such as what to do with the house and contents, where they would (and would not) wish to be placed in a care home, what to do with a pet they can no longer look after, and so on – as well as medical matters, but going far beyond medical matters. The significant characteristic of “advance choices”, as the report calls them, is that people make their own decision in

advance. They do not entrust decisions to someone else such as an attorney (and they may want to cover the situation where there is no-one whom they would wish to appoint as attorney, or there is no longer a chosen attorney able to act).

In accordance with relevant human rights instruments, advance choices can cover either "instructions given" or "wishes made", or both. Provision in Scots law for both types is necessary to comply with modern human rights requirements. Sometimes circumstances can change between when an advance choice is issued, and the later date when it becomes operational. The report offers precise criteria for addressing such situations.

The report lists the questions which the Working Group formulated, drawn largely but not entirely from the provisions of Council of Europe Recommendation (2009)¹¹ on advance directives and powers of attorney and work following upon that Recommendation, and provides the answers offered to those questions. At 33 pages the report itself is relatively succinct, but nevertheless covers ground that will be largely novel to many Scots lawyers. A wealth of detail is contained in six Annexes to the report, accessible online by links in the report, and authored by various members of the Working Group.

The work of the Group, and the need to take forward provision on advance directives/advance choices, has already attracted international attention. See for example the response of the European Law Institute to the European Commission's public consultation on the Initiative on the Cross-border Protection of Vulnerable Adults (April 2022), and in particular the section on "Promotion of the use of advance directives" commencing on page 15, available at:

https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_Protection_of_Adults.pdf. There have been suggestions that the Institute might undertake

work to prepare suggested European model laws on advance directives/advance choices.

Adrian D Ward

Declarations

Readers should note that Prof. Jill Stavert is a member of the Review Team for the Scott Review. She and Adrian Ward are both members of the organising committee for the World Congress on Adult Capacity, Jill with responsibility for the academic programme and Adrian as President. Both (along with Alex Ruck Keene, currently on sabbatical leave from his role as General Editor of the Mental Capacity Report) were members of the Working Group that issued the report described in the last item above. Adrian was one of the authors of the ELI report mentioned above.

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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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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](#).



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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](#).



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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](#).



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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; 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.



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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 and Seminars

Physical restraint and PBS plans in the Court of Protection, 26 May 2022, 5:00-7:00PM

Victoria Butler-Cole QC and Dr Theresa Joyce will be holding a seminar (chaired by Senior Judge Hilder) on their [recent paper](#) to assist legal professionals and judges in understanding and responding to PBS plans that include the use of physical restraint against people with learning disabilities. There will be an opportunity for questions and discussion. Questions can be sent in advance to marketing@39essex.com or during the seminar using Zoom's Q&A function. People can attend either remotely or in person, and can find full details (including how to register) [here](#).

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

17 June 2022	DoLS refresher for mental health assessors (half-day)
14 July 2022	BIA/DoLS legal update (full-day)
15 July 2022	Necessity and Proportionality Training (9:30-12:30)
15 July 2022	Necessity and Proportionality Training (13:30-16:30)
16 September 2022	BIA/DoLS legal update (full-day)

To book for an organisation or individual, further details are available [here](#) or you can email [Neil](#).

7th World Congress on Adult Capacity, Edinburgh International Conference Centre [EICC], 7-9 June 2022 The world is coming to Edinburgh – for this live, in-person, event. A must for everyone throughout the British Isles with an interest in mental capacity/incapacity and related topics, from a wide range of angles; with live contributions from leading experts from 29 countries across five continents, including many UK leaders in the field. For details as they develop, go to www.wcac2022.org. Of particular interest is likely to be the section on "Programme": including scrolling down from "Programme" to click on "Plenary Sessions" to see all of those who so far have committed to speak at those sessions. To avoid disappointment, register now at "Registration". An early bird price is available until 11th April 2022.

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.

Conferences (continued)

The Judging Values and Participation in Mental Capacity Law Conference

The *Judging Values in Participation and Mental Capacity Law* Project conference will be held at the British Academy (10-11 Carlton House Terrace, London SW1Y 5AH), on **Monday 20th June 2022 between 9.00am-5.30pm**. It will feature panel speakers including Former President of the Supreme Court Baroness Brenda Hale of Richmond, Former High Court Judge Sir Mark Hedley, Former Senior Judge of the Court of Protection Denzil Lush, Former District Judge of the Court of Protection Margaret Glentworth, Victoria Butler-Cole QC (39 Essex Chambers), and Alex Ruck Keene (39 Essex Chambers, King's College London). The conference fee is £25 (including lunch and a reception). If you would like to attend please register on our events page [here](#) by 1 June 2022. If you have any queries please contact the Project Lead, [Dr Camillia Kong](#).

Essex Autonomy Project Summer School 2022

Early Registration for the 2022 Autonomy Summer School (*Social Care and Human Rights*), to be held between 27 and 29 July 2022, closes on 20 April. To register, visit the [Summer School page](#) on the Autonomy Project website and follow the registration link.

Programme Update:

The programme for the Summer School is now beginning to come together. As well as three distinguished keynote speakers (Michael BACH, Peter BERESFORD and Victoria JOFFE), Wayne Martin and his team will be joined by a number of friends of the Autonomy Project who are directly involved in developing and delivering policy to advance human rights in care settings. These include (affiliations for identification purposes only):

- > Arun CHOPRA, Medical Director, Mental Welfare Commission for Scotland
- > Karen CHUMBLEY, Clinical Lead for End-of-Life Care, Suffolk and North-East Essex NHS Integrated Care System

> Caoimhe GLEESON, Programme Manager, National Office for Human Rights and Equality Policy, Health Service Executive, Republic of Ireland

> Patricia RICKARD-CLARKE, Chair of Safeguarding Ireland, Deputy Chair of Sage Advocacy

Planned Summer School Sessions Include:

- > Speech and Language Therapy as a Human Rights Mechanism
- > Complex Communication: Barriers, Facilitators and Ethical Considerations in Autism, Stroke and TBI
- > Respect for Human Rights in End-of-Life Care Planning
- > Enabling the Dignity of Risk in Everyday Practice
- > Care, Consent and the Limits of Co-Production in Involuntary Settings

The 2022 Summer School will be held once again in person only, on the grounds of the Wivenhoe House Hotel and Conference Centre. The programme is designed to allow ample time for discussion and debate, and for the kind of interdisciplinary collaboration that has been the hallmark of past Autonomy Summer Schools. Questions should be addressed to: autonomy@essex.ac.uk.

Our next edition will be out in 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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