Mental Capacity Law Newsletter February 2015: Issue 53

Scotland

Introduction

Welcome to the February 2015 Newsletters, revamped to reflect our new name of 39 Essex Chambers. We have taken the opportunity of the launch of our new Chambers website to bring together all our mental capacity resources in one place. There is also a new Twitter Feed for this section of the site, which will be 'Tweeting' all of the newsletters, case reports, articles and guidance notes we produce.

Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a further chapter in the saga of consent to sex; unlawful removals from the family home; and the new DOLS forms;

(2) In the Property and Affairs Newsletter: failed attempts to prevent the OPG/COP having oversight over an attorney and to get costs against the OPG and the OPG's review of deputy monitoring;

(3) In the Practice and Procedure Newsletter: an important case on declarations and contempt; a rare decision on permission;

(4) In the Capacity outside the COP Newsletter: the new Practice Note for representation before the MH Tribunal; the new MHA Code of Practice; and the new offences of ill-treatment and wilful neglect;

(5) In the Scotland Newsletter: detailed coverage of the Special Case that has resolved the question mark over the validity of powers of attorney raised by Sheriff John Baird, as well as important guidance on vulnerable clients and Practice Rules relating to powers of attorney, and an update on the Mental Health (Scotland) Bill.

We also bid temporary farewell and all best wishes to Anna Biccaregui as she goes on maternity leave, and a very warm welcome to Annabel Lee who joins the editorial team in her place.

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Special Case between Great Stuart Trustees Limited and Sandra McDonald, Public Guardian

"Detailed judgment to follow but decision of Inner House is that POA containing the same wording as that in the bank's style in NW does comply with s15(3)(b)". This message sent by Alison Hempsey of TC Young from outside the Court of Session at 16.10 on 10th December 2014 arrived while Adrian was giving a seminar to Wigtown Faculty of Solicitors, including coverage of the topic which had created more interest than any other in his autumn series of Faculty seminars. With the permission of his audience, and on the basis of ensuring that material presented was as up to date as possible, he opened it up and read it out. The many relieved smiles from the audience were no doubt replicated as the news rapidly spread across Scotland.

It was appropriate that the first news came from Alison, who had returned to the office on 29th April 2014 with the startling news that although she had been successful in having her clients appointed guardians to NW in the face of opposition from a bank holding (they thought) a continuing power of attorney, Sheriff Baird had (in her words) "bowled a curved ball" in that his ratio decidendi was that the document held by the bank was not a valid continuing power of attorney at all in terms of the Adults with Incapacity (Scotland) Act 2000 ("the Act", references in this item to sections being sections of the Act except where otherwise indicated). Alison provided the information for our initial coverage of the decision here and readers of the Newsletter will be familiar with the story through our ensuing coverage in the June and October issues up to our report in our last issue of the Special Case about to be lodged. The Special Case was lodged on 2nd December 2014. Exemplifying best practice of a modern legal system focused upon the needs which it exists to serve, within one week an Extra Division of the Inner House of the Court of Session was assembled, the hearing was fixed for 10th December 2014, and appearance arranged of James McNeill QC for the attorney, James Wolffe QC (Dean of Faculty) for the Public Guardian, and Kenneth McBrearty QC as amicus curiae. While this may have seemed like an appeal from Sheriff Baird's Decision, it was not, and Alison's presence was simply as an interested observer, thanks to courteously prompt and helpful communications from the parties' solicitors and the Dean of Faculty himself.

As we have already narrated, Sheriff Baird's decision at Glasgow was followed by Sheriff Murray at Forfar reaching the opposite conclusion upon a similar document. Also as we have narrated, those two decisions are now reported as W, 2014 SLT (Sh Ct) 83 and B v H 2014 SLT (Sh Ct) 160. We have already provided readers with the terms of the documents before the courts in those two cases, so far as material. Similarly, the material terms of the document before the court in the Special Case were as follows:

> *"I, JS, [address] appoint [the granter's sister-in-law], whom failing whether by reason of death, declinature or incapacity, Great Stuart Trustees Limited, [address] to be my continuing attorney in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000 (which Act and any subsequent amendment thereof is referred to as the 'Act').*
>
> *"My continuing attorney is referred to as my 'Attorney'. My Attorney may manage my whole affairs as he/she thinks fit with full power for me and in my name or his/her own name as my Attorney to do everything*

regarding my estate which I could do myself and that without limitation by reason of anything contained in this power of attorney or otherwise.

"Without prejudice to these general powers my Attorney shall have the following powers: [19 specific powers including giving receipts and discharges for any part of the granter's estate, receiving transfers and payments to his estate, receiving all forms of income due to the granter, arranging the granter's tax affairs, purchasing or selling stocks, shares and other investments and taking up rights issues and the like, operating bank accounts, administering and managing any heritable property in which the granter might have an interest, purchasing, selling or leasing any property, heritable or moveable, conducting legal proceedings, carrying on business, and borrowing or lending; also a number of more personal specific powers including authorising expenditure for services to the granter or the purchase of any item that is required by him, and making gifts to a range of persons.]

"All decisions which may be made and all documents which may be granted by my Attorney shall be equally valid and binding as if made or granted by me. This continuing power of attorney shall subsist until it is recalled in writing."

The deed was signed by the granter, and certified by a solicitor in the usual way, on 8th July 2004. The judgment of the court delivered by Lord Drummond Young narrated the material terms of the certificate incorporated in the document, albeit standard, because of their relevance to the view arrived at by the court.

The granter's sister-in-law (erroneously referred to in the judgment as his wife – we thank Susan Oates of Murray Beith Murray WS, one of the instructing solicitors, for drawing our attention to this) had died. The trustee company had been acting as continuing attorney. They would shortly require to sell the granter's house, but had been advised by Senior Counsel that W cast doubt upon whether they could competently sell the house and grant good title. They were concerned whether, in the granter's interests, they ought to cease acting and apply for guardianship, even though that would impose an additional burden on the granter's estate. They sought the advice of the Public Guardian, whose functions under section 6(2)(e) include providing information and advice to continuing attorneys, as to the validity of the document. On the basis of advice which the Public Guardian had received, she informed the trustee company that the document should continue to be treated as a valid continuing power of attorney, and that an application for guardianship would not accord with the section 1 principles. Nevertheless, recognising the widespread uncertainty caused by the decision in W, she considered it to be in the public interest that the conflict of authority between the two decisions referred to above be authoritatively resolved as soon as possible. As Lord Drummond Young narrated "Following discussions between the first and second parties it was decided that a special case would be the easiest and most expeditious means of resolving the problem". The question of competency of the Special Case is covered separately in the following item of this Newsletter.

The substantive issue before the court was whether the document complied with the requirement for validity as a continuing power of attorney, set forth among other requirements in section 15(3)(b), for a document which "incorporates a statement which clearly expresses the granter's intention that the power be a continuing power". In terms of section 18, unless compliant with all of the requirements of section 15 it would "have no effect during any period when the granter is incapable in relation

to" relevant decisions. The judgment of the court traces the background to section 15, particularly that provided by Report No 151, dated July 1995, of the Scottish Law Commission on "Incapable Adults", noting:

- that the main advantage of contractually conferred powers of attorney is that they are relatively cheap and flexible compared with court-appointed guardians;
- that at common law the appointment of an attorney lapsed in the event of the subsequent mental incapacity of the granter (Adrian has always questioned that assertion in relation to documents specifically stating that they should continue beyond incapacity);
- that section 71(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 created a presumption in favour of continuation unless the granter opted out;
- that this was reversed by the Act, which created a requirement to opt in, and thus the requirement for section 15(3)(b);
- that the Commission rejected the use of a prescribed style of document, as that could create difficulties if there were any deviation, or in unusual cases; and
- that accordingly: "the only requirement should be that the document clearly shows that the granter intended the attorney to have continuing power".

Against that background, the Extra Division held:

- that section 15 must be construed purposively;
- that the clear policy was that the creation of a continuing power should not be a matter of implication but should be done expressly, but the use of a prescribed style was rejected, indicating that no particular significance should be attached to the precise wording used, as long as the intention is sufficiently clear;
- that section 15(3)(b) is concerned solely with the expression of the granter's intention, and should be construed accordingly; and
- that on the foregoing basis the document granted by Mr JS "is unquestionably a valid continuing power of attorney for the purposes of section 15".

The court held that the terms of the operative clause, quoted above, were sufficient to reach that conclusion. As this Newsletter noted in its first commentary on W, "continuing attorney" is defined in section 15(2) as a person on whom a continuing power of attorney is conferred. The court also noted that the document contained express reference to section 15 and commented that: "It is difficult to imagine what function that reference would have served if there had been no intention to create a continuing power of attorney within the meaning of that section". These elements were sufficient to "clearly express the granter's intention".

The court noted further characteristics of the document which were not essential to the court's decision, but which reinforced the court's conclusion. These included various of the specific powers conferred; the concluding reference (quoted above) to "this continuing power of attorney"; and the incorporation of the certificate in terms of section 15(3)(c). Upon comparison of

the two Sheriff Court Decisions, the Extra Division declared a preference for the reasoning of Sheriff Murray.

In W, Sheriff Baird had also taken the view that the document before him in that case failed to comply with section 15(3)(ba), which requires a document which "where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, states that the granter has considered how such a determination may be made". That requirement was introduced by the Adult Support and Protection (Scotland) Act 2007 and therefore was not relevant to the document before the court (granted in 2004). The Extra Division nevertheless helpfully addressed obiter the issues concerning section 15(3)(ba) raised by the decision in W, pointing out that that provision is concerned only with "springing" powers of attorney. In the opinion of the court the document before the court, and also the document before the sheriff in W, conferred continuing powers which were immediately exerciseable. Although the decision in W narrated that the attorney in that case had accepted an argument that it was never intended that the attorney should act while the granter retained capacity, that was irrelevant because the wording of the document appeared to be to the contrary.

Following the Decision in W, the Public Guardian has been commendably proactive in taking her own advice and expressing her own views, giving general guidance, identifying Special Case procedure as an appropriate means to resolve the issues given that the appeal in W was (as we have narrated) withdrawn, and playing her part in bringing this Special Case before the court. It is therefore appropriate that the concluding words to this saga should be her modestly understated comment to the Newsletter that: "I appreciate that there was some anxiety about the validity of the standard form of power of attorney. It is helpful that we now have a clear and authoritative position which supports the validity of the standard style".

Adrian D Ward

Special Case (2) - Competency

On the question of competency, the Opinion of the Extra Division of the Court of Session delivered by Lord Drummond Young in the case described in the preceding article is studiously (and unsurprisingly) couched as following precedents already established. One suspects, nevertheless, that it may in future be referred to in support of any future request to the court to allow Special Case procedure to be used to resolve matters of considerable and/or urgent public importance.

As we noted in December's article, Special Case procedure is now provided for in section 27 of the Court of Session Act 1988, which allows a Special Case to be presented to the Inner House of the Court of Session "where any parties interested, whether personally or in some fiduciary or official capacity, in the decision of a question of law are agreed upon the facts, and are in dispute only on the law applicable to those facts". We anticipated, correctly as we now know, that the parties would be the Public Guardian in her official capacity and an attorney acting in that attorney's fiduciary capacity. However, in the case heard on 10th December 2014 both parties to the case were agreed that the document before the court was a valid continuing power of attorney in terms of section 15. There was thus a *prima facie* question of competency. In *Mackinnon's Trs v MacNeill*, 1897, 24 R 981, Lord Kinnear (at 987-988) said:

"It is not the purpose of special cases to obtain an opinion of the Court on questions which are not brought before it in such a way as to enable the Court not only to express an opinion but to give a decisive judgment on them. …. we are not in the practice of deciding questions which are not disputed, or which counsel for the respective parties have declined to argue".

Again in *Mitchell Innes' Trs v Mitchell Innes*, 1912 SC 228, Lord Kinnear emphasised that the court's decision must be *res judicata* if it is to be properly binding. However in that case, in circumstances close to the present case, at issue was whether trustees had power to sell certain heritable subjects, it being agreed that a sale would be expedient. Accordingly, although there was no real contention between the parties, a Special Case was competent because a prospective purchaser would have a clear interest to take action. Similarly in *Turner's Trs v Turner*, 1943 SC 389, the disposal of an estate was a practical issue for trustees, and was the basis upon which that Special Case was held to be competent. In the present case Lord Drummond Young derived two principles from *Turner's Trs*: "first, if another form of action would be competent, a special case will normally be competent; and secondly, the underlying principle is that the court will decide questions that are practical, not questions that are hypothetical or academic". In the present Special Case the court noted that the questions raised were certainly not hypothetical or academic, given the imminent need to sell the house. In consequence, other forms of action, such as an action for declarator, would be competent, even if the merits of the case were conceded by the defenders in the Special Case. Declarator would not bind third parties, but "it is obvious that others who practice or carry on business in the area in question are likely to follow the court's decision". A Special Case was no different.

Three aspects of the Decision in the present Special Case may well be seen as helpful guides in future. Firstly, the court noted that "the fundamental issues raised …. are of great general importance", even although that factor was "not technically relevant to the competency of the Special Case". In other words, that point was not "technically relevant", but nevertheless worthy of mention.

Secondly, the court appointed an *amicus curiae*, expressly to ensure that "while our decision cannot bind third parties, it has been reached following proper argument, and is therefore likely to command greater authority than a decision reached without a contradictor".

And thirdly, the court provided its Opinion – albeit *obiter* – on a point which clearly did not meet either of the tests derived by the court from *Turner's Trs*, namely the issues concerning section 15(3)(ba) of the Adults with Incapacity (Scotland) Act 2000. The court did so by reason (only) of points firstly and secondly above, namely the "great general importance" of those issues and the fact that an *amicus curiae* had acted as contradictor. The conclusion to be drawn, in relation to matters arising in respect of adult incapacity or any other area of law, is that the Court of Session might reasonably be invited to appoint an *amicus curiae* and – having heard argument – to provide an *obiter* Opinion on a matter which by itself would not qualify for Special Case procedure if that is combined with another question which does so qualify, but which is nevertheless of great general importance.

Appeals under the adult incapacity jurisdiction are relatively rare. It is understood that the withdrawal by the bank of its appeal in *W* may well have been motivated at least in part by

consideration for *W* and her family, and a desire not to cause them further difficulty or uncertainty. This effective widening of the potential scope for use of Special Case procedure (if that is what has occurred) may in consequence one day be helpful in particular in relation to adult incapacity matters.

Adrian D Ward

The Development of Strategic Litigation in Scotland

> *"Perhaps the most fundamental point is that strategic interest litigation is in the public interest. And in sharp contrast to litigation about private rights, public interest litigation extends to issues that are of interest to the public at large, or at least to a section of it."*

That excerpt from the address by Lord Hope to a conference in Edinburgh on "The Development of Strategic Litigation in Scotland" on 24th November 2014, and the shift in judicial attitudes which Lord Hope narrated, perhaps resonates somewhat with the preceding item. The conference was organised jointly by the Equality and Human Rights Commission and the Faculty of Advocates. The contributions by Lord Hope, entitled "A Judicial Perspective on Strategic Litigation", and by Ailsa Carmichael QC entitled "Intervention: Practical Tips", both available here, have instantly become required reading for anyone contemplating a public interest intervention in litigation in Scotland. For reasons only of space, we here concentrate on Lord Hope's contribution with the warning, however, that as usual every word of it is relevant, rendering it almost impossible to précis!

Practitioners of adult incapacity law in Scotland still remember and value the immensely careful and helpful Judgment by Lord Hope, while still Lord President and shortly before he moved to the House of Lords and thence to the Supreme Court, in the *Law Hospital* case (1996 SLT 848), on the question of withdrawal of life support in the case of severe brain injury. The one regret was that Lord Hope dealt with the matter so well that this allowed the Scottish Parliament room to drop from the Adults with Incapacity (Scotland) Act 2000 proposed provisions on the withholding or withdrawal of life-sustaining treatment, on the basis that the law in this area could safely be left to the courts to develop.

Lord Hope's address on 24th November 2014 was no less impressive. Having modestly expressed anxiety lest he be thought "to be trespassing on what is the preserve of the judges here", he proceeded to narrate how during his time, and with his full participation, the Supreme Court has dragged the Scottish judiciary away – in the case of public interest litigation – from a requirement of title and interest to sue, to a consideration of standing. He went through relevant precedents, and then effectively summed them up with a charming personal anecdote, to be found in his Judgment in *Walton v Scottish Ministers* [2013] UKSC 44, 2013 SC (UKSC) 67 at paragraph 152: "Drawing on my own experience of a local planning inquiry when objecting on environmental grounds to a wind farm close to my cottage in Perthshire, I said that an osprey which I had been observing, whose route to and from its favourite fishing loch was at risk of being made much more dangerous by the presence of 16 turbines on our neighbour's hillside, had no means of taking that step on its own behalf. If its interests were to be protected, someone had to be allowed to speak up on its behalf".

As to interveners he pointed out that: "The main criterion for an intervention is whether the would-be intervener, through its expertise or

access to information that it is best placed to provide, would be likely to be able to assist the court in understanding either the legal issues in question or the factual basis for a given line of argument". He also warned of the effects of the range of perceptions of frequent interveners from his own tribute to the helpful written intervention by JUSTICE in the Supreme Court in *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13 at paragraphs 47-49, to one "frequent intervener's Counsel" whose name on the last page of an application moved Lord Rodger to comment: "We do not want yet another lecture from him!".

Lord Hope concluded with his clear concerns about the consequences of governmental exasperation with judicial review processes, and summed up matters in his concluding paragraph as follows: "There is a nice balance to be struck if strategic litigation is to prosper in Scotland. It is to be found by being careful that you really do have something to say before you apply for leave to intervene and, if you are allowed to do so, by being as succinct and as economical as possible. You must get your priorities right too – as to when it is really worth intervening, and when it is better not to do so. In my experience, if an intervener had a useful point to make, the judges were not slow to pick it up – usually at the stage of reading through the printed cases before the hearing began, so that we were ready for it when it came to a brief submission during the oral argument. And you need to be aware that the government will be watching you and that, if they think that our system is operating against what they judge to be in the public interest, they may follow the English example to make the use of the jurisdiction much more difficult".

Adrian D Ward

Vulnerable Clients – Addition to Guidance

Amanda Millar of McCash & Hunter LLP, Solicitors, Perth, is an energetic member of the Council of the Law Society of Scotland who, through her membership of both the Mental Health and Disability Sub-Committee and the Professional Practice Committee, provides a link between those committees which is valuable, including in the updating and development of the Society's "Vulnerable Clients" guidance, which Amanda continues (in practical terms) to oversee. The guidance has now been extended to cover children with two scenarios which have been added to those provided by Adrian when he first drafted this guidance, and the related guidance on Powers of Attorney. The two new scenarios are:

> *"Type G: Client aged 15 years wishes separate legal advice about a matter that concerns them; client dominated by parents, nevertheless capable and parents competent and motivated to act properly. (Capacity and influence, influence not undue or malign)"*

> *"Type H: Client aged 13 years wishes to appeal detention to the Mental Health Tribunal for Scotland; supported by independent advocacy worker to contact solicitor, which worker is present during the meeting with the client and speaks regularly for the client. Client of limited but sufficient capacity, vulnerable to undue influence but not unduly influenced. (The solicitor must respect and if necessary support the client's capacity, without discrimination on grounds of the client's mental disorder. Care needed to ensure the instructions are clear)"*

Adrian D Ward

Powers of Attorney: New Rules and Guidance

New Practice Rules relating to powers of attorney duly made on behalf of the Council of the Law Society of Scotland and approved by the Lord President, and related guidance, came into operation on 1st January 2015. They are essential reading for anyone preparing power of attorney documents, and any "regulated person" (including solicitors) acting, or invited to act, as an attorney. Concerns prompting the formulation and issue of the new Rules and guidance include the status of a solicitor appointed attorney by a relative or friend, possibly for personal rather than professional reasons, including in particular such a solicitor in employment other than a practice unit and thus unable to comply with previous accounting rules; the extent to which granters of powers of attorney in favour of regulated persons might or might not be protected by the Guarantee Fund (and might expect or not expect to be so protected); and the position where regulated persons acting as attorneys might cease to be such, including through being struck off.

The Law Society of Scotland Practice Rules 2011, as amended by the Law Society of Scotland Practice Rules (Amendment No 2 Rules) 2014 should be referred to for their terms. This note draws attention to them but should not be relied upon for their content or effect. Subject to that, the Rules now in effect distinguish a situation where a power of attorney is granted in favour of a regulated person not in the course of his or her practice and where no fees are chargeable, nor any remuneration received, in respect of the power of attorney. In that situation, any monies which are intromitted with under the power of attorney, and any money of the granter not held or received by a practice unit with which the regulated person is associated, is not "clients' money" in terms of the Rules. Note however that this interpretation is the converse of the new Rules, which state the circumstances in which monies held or intromitted with are "clients' money".

The provisions regarding lists to be delivered to the Council of the Law Society of powers of attorney held now apply to all powers of attorney held by or granted to a regulated person who is associated with a practice unit, during the relevant accounting period. The list need only include powers of attorney granted in favour of such regulated person taken in a professional capacity.

The Rules cover powers of attorney in favour of any entity in which the regulated person participates in any way and which carries on activities in the course of the regulated person's practice. Exclusions include powers of attorney for the sole purpose of making tax (including LBTT) returns and land registration and other submission of electronic or non-electronic documentation.

Main points under the guidance (which again should be referred to for its terms) include an explanation of the new requirements and of when a regulated person might be treated as acting in a private capacity. The presumption is that any regulated person will have agreed in their professional rather than private capacity to any appointment to be an attorney. However, a private appointment by a person related by blood, adoption, marriage or civil partnership will be automatically deemed non-professional, while a private appointment by a personal friend would not be automatically deemed non-professional and the onus of proving that it was private would rest upon the regulated person. In either case, it is important to ensure that the granter is aware of the repercussions of a private appointment,

and good practice would dictate that there is written evidence that the granter has been informed that Guarantee Fund protection will not be available, and has accepted that. It is recommended that whether the appointment is professional or private should be included in the power of attorney document, if the granter consents to that. Power of attorney files should be retained until the power of attorney has come to an end.

We thank Alison Atack, Solicitor, for her assistance in the preparation of this item.

Adrian D Ward

Practice Note – Edinburgh Sheriff Court

The Sheriff Principal at Edinburgh has issued a Practice Note which will apply from 2nd February 2015 to all applications in Edinburgh Sheriff Court under the Adults with Incapacity (Scotland) Act 2000. The Practice Note is available on the Scottish Courts website here. An electronic version of the Practice Note may also be obtained by emailing the AWI mailbox at Edinburgh Sheriff Court, which is edinburghawi@scotcourts.gov.uk. That mailbox is also the contact point for the AWI Clerk at Edinburgh.

The Sheriff Principal has also directed that with effect on and after 5th February 2015 there will be a Guardianship Court every Thursday, which will deal with all applications under the 2000 Act at Edinburgh Sheriff Court. The Sheriff Principal has nominated Sheriff F L Reith QC, Sheriff D S Corke and Sheriff P J Braid to deal with all such applications as from 2nd February 2015, failing whom any other sheriff at Edinburgh Sheriff Court. We are grateful to Sheriff Reith for drawing this information to the attention of the Newsletter, and we welcome this further significant move in the trend towards specialisation in the AWI jurisdiction. Sheriff John Baird has for many years specialised in the jurisdiction in Glasgow Sheriff Court. The changes in Edinburgh come at a time of transition in Glasgow in consequence of Sheriff Baird's forthcoming retirement (he will actually sit in Glasgow Sheriff Court for the last time on 24th March 2015). His retirement will be the subject of future coverage in the Newsletter.

Adrian D Ward

Update on the Mental Health (Scotland) Bill: Stage 1 Report by Committee on Health and Sport

After taking evidence the Committee on Health and Sport, as Lead Committee, published its Stage 1 report on 30 January 2015.[1]

As previously mentioned in the July 2014 issue of this newsletter, the Mental Health (Scotland) Bill seeks amend the Mental Health (Care and Treatment)(Scotland) Act 2003 and to the Criminal Procedure (Scotland) Act 1995. It also proposes the introduction of a victim notification scheme in relation to mentally disordered offenders.

Giving evidence to the Committee, Jamie Hepburn, Minister for Sport, Health Improvement and Mental Health, stated that the key objective of the Bill is to effect some changes to current practice and procedures in order to "ensure that people with a mental disorder can access effective treatment in good time."[2] He also stated

[1] Scottish Parliament Committee on Health and Sport, *Stage 1 Report on Mental Health (Scotland) Bill*, 3rd Report, Session 4 (2015) ("Report")
[2] Para 11, Report.

that "In doing so it seeks to build on the principles of the 2003 act."[3]

The Committee found that responses to the call for evidence were broadly supportive of the policy intentions behind the Bill. However, whilst this is noted and the Bill's contents are not entirely problematic, several aspects of the Bill require particular attention to ensure that Scotland's mental health legislation remains patient-centred and human rights-based.

The following are some brief preliminary observations on the report as time between publication of the report and of this newsletter will allow. For greater detail one should refer to the report itself.

1. **Extension of existing automatic 5 working day extension between the end of a short term detention certificate and the Mental Health Tribunal hearing to 10 working days (s1, Bill)**

This was recommended by the McManus Review as a means of reducing multiple hearings. There has, however, been mixed support for this provision although it has been universally agreed that reducing the stress on patients associated with multiple hearings is clearly desirable. The Minister also stated to the Committee that it is patients' interests rather than administrative convenience that is driving this proposed amendment[4]. Notwithstanding this, concern has been expressed about the extent to which such amendments will actually reduce multiple hearings (despite the Tribunal working hard to reduce the number of multiple hearings in recent years). Moreover, the risk of parties simply working towards the new deadline may mean that some patients are subjected to disproportionate periods on short term detention (which in some cases could mean up to seven weeks) and there is reduced ability to challenge detention and treatment decisions during this period. This has clear Articles 5 (right to liberty) and 6 (right to fair trial) ECHR implications. Moreover, it should not be forgotten that there may be instances when the Tribunal determines that the patient no longer requires to be detained.

There has also been concern expressed about exactly how the proposal that time spent on this extended period of detention will be offset against the overall time spent on detention under a subsequent CTO.

The Committee recommends[5] that (a) the Scottish Government provides a detailed plan of the estimates of reduced multiple hearings that will result from the amendment and likely average number of days detained following its introduction; (b) this provision is supported by a monitoring regime the aim of which being the improvement of user experience and that it does not result in an overall longer period spent in pre-hearing detention; and (c) the Scottish Government responds to concerns about clarification on calculation of the deducting of the proposed extension time from the continuous period of detention.

These recommendations are welcome. However, as the proposed amendment currently stands there will have to be constant monitoring to ensure that such automatic extension is used proportionately at all times. Whilst such monitoring is important one could argue that the existence of a maximum period of 10 working days is placing temptation in the way of a very busy system and the onus to challenge

[3] Para 1, Report.
[4] Para 42, Report.
[5] Paras 49-51, Report.

disproportionality will be on individuals who are likely to be very unwell and vulnerable.

2. Additional duties on Mental Health Officers (MHOs)

The Bill imposes various new duties on MHOs and the Committee appears to have accepted the resourcing and workload issues faced by them at present (see in this regard also Jill's article in our July 2014 newsletter). It has therefore sought further assurances from the Scottish Government regarding resourcing and a strategic review of MHO provision to improve the recruitment, training and retention[6]. Given the integral role that MHOs play in decisions regarding involuntary care and treatment for persons with mental disorder these recommendations are welcome and it is sincerely hoped that the Scottish Government will implement them.

3. Orders regarding level of security (ss11-12, Bill)

In *RM v The Scottish Ministers*[7] the Supreme Court made it clear that the necessary regulations must be made to ensure that the right not to be detained in conditions of excessive security in non-state hospitals can be effectively exercised. The Bill addresses this to a degree by clarifying who may appeal against detention in conditions of excessive security in a hospital other than in the State Hospital but confines this category of patients to those only in medium secure settings. Moreover, the regulations are still absent.

The Committee has recommended[8] that that the Scottish Government provides a proposed timetable for bringing the regulations into effect. Given concerns that the amendments do not extend the ability to challenge the level of security in detention in low secure settings, and that there may be occasions where an individual in a low secure setting could appeal still remain in low-secure accommodation elsewhere, the Committee has also asked the Minister to respond as to whether this scenario might not be an appropriate one to merit the inclusion of the right of such an appeal[9]. It goes without saying that both these issues have important Article 8 (right to private and family life) ECHR (and corresponding Articles 17 and 23 CRPD) implications.

4. Nurses holding power (s14, Bill)

It is proposed to extend the existing maximum period during which nurses may detain patients pending examination by a medical practitioner from two to up to three hours. As previously mentioned, no justification as to the proportionality of such an extension has been provided. Clearly, this raises issues regarding restriction of liberty (Article 5 ECHR). The Committee has therefore asked to Scottish Government to justify why this is necessary, namely, how often has it actually been necessary to resort to emergency detention measures because a registered medical officer's attendance has been delayed[10].

5. Time for appeal, referral or disposal (s15, Bill)

The Bill proposes reducing the period within which an appeal can be made against a decision to transfer to hospital (state or otherwise) from 12 weeks to 28 days. Again, the Committee is seeking justification from the Scottish

[6] 72-73, Report.
[7] *RM v The Scottish Ministers* [2012] UKSC 58.
[8] Para 89, Report.
[9] Para 90, Report.
[10] Para 102, Report.

Government as to why this is necessary and also, given that it appears that the provision allowing the Tribunal to order the transfer of the patient whilst an appeal is pending, an assurance that the place that the patient had come from would be held until the appeal had been determined[11].

6. Opting out regarding appointing Named Persons (ss18-20)

It would appear that the both the Committee and the Minister accept that requiring the patient to expressly opt out of appointing a Named Person does not entirely respect the patient's right to autonomy[12]. It will now be necessary to wait and see how this is approached.

7. Advance statements (s21, Bill)

Recognising the value of advance statements but potential barriers to their being used the Committee recommends that the Scottish Government considers placing a statutory duty on health boards and local authorities to promote them[13]. This is an important and welcome recommendation both in terms of reinforcing the requirement for patient participation under the 2003 Act, and under Article 8 ECHR, but also in terms of moving towards the April 2014 UN Committee on the Rights of Persons with Disabilities *General Comment on Article 12 CRPD: the right to equal recognition before the law.* Of course, how exactly this is approached in any amendments to the Bill remains to be seen.

8. Cross-border transfer of patients and dealing with absconding patients (s24, Bill)

In essence, concerns were raised that this provision could potentially permit treatment and loss of rights regarding treatment that the individual would otherwise have possessed in the other jurisdictions. Again, the Scottish Government has been asked to respond to such concerns[14].

9. Mental health disposals in criminal cases (s29, Bill)

It will be recalled that the Bill seeks to extend the period a court is able to extend an assessment order from 7 to 14 days. The Committee has asked the Scottish Government to comment on the necessity and justification for this[15]. As previously mentioned[16], this has implications in terms of timeous determination of a patient's case under Articles 5 and 6 ECHR.

10. Victim Notification Scheme (s44, Bill)

The Committee welcomes the introduction of such a scheme but states that a balance must be struck between the rights of the patient and of the victim. For this reason it is seeking clarification from the Scottish Government as to why it considers it necessary to include a Ministerial power to amend the provision, under delegated legislation, so that it applies only to persons subject to compulsion orders given that this could potentially apply to persons who have only committed minor offences. It has also asked the Scottish Government for information on how it will monitor the scheme to ensure that mentally disordered offenders are not discriminated against as well as when information about such offenders subject to compulsion or

[11] Paras 110-112, Report.
[12] Paras 121-122, Report.
[13] Paras 157-158, Report.
[14] Paras 164-165, Report.
[15] Para 176, Report.
[16] See Mental Capacity Law Newsletter, Scotland, September 2014 Issue.

restriction orders can be withheld in 'exceptional circumstances'[17].

11. Independent advocacy

The Committee acknowledges the importance of advocacy in improving user experience but also notes that its provision may be inadequate across Scotland and often targeted at persons subject to compulsory proceedings. It therefore believes that there is a need to assess to the adequacy of advocacy services and that strengthening of the line of local authority accountability for delivering such services may assist here. The possibility that such assessment could fall within the remit of Care Inspectorate's review programme has been noted. The Scottish Government has therefore been asked to provide further information on how it will ensure that, as well as monitoring the local authority provision of advocacy services, it will assess advocacy provision in secure settings and hospitals, as these lie outside the Care Inspectorate's responsibilities[18].

Further information is also sought from the Scottish Government as whether planned Scottish Government guidance on advocacy for carers will strengthen the rights of carers to access independent advocacy[19].

Independent advocacy is integral to patient support. Whilst it is appreciated that it is difficult to fully address provision of such services within legislation it is disappointing that the Committee has decided that the current provision for advocacy in the Act is "quite strong"[20] and therefore does not recommend further reinforcing s.259. Such reinforcement of section 259, along with its recommendations (which are very welcome), would, however, maintain and enhance the spirit of the Act in terms of promoting autonomy and equal partnership in shared decision-making. It would also go some way to addressing the requirements of the UN Committee on the Rights of Persons with Disabilities General Comment on Article 12 CRPD. It should be noted that research indicates that at any one time in Scotland around 1.2 million people (representing 21% of the population) have a right to independent advocacy[21].

12. Learning disabilities, autistic spectrum disorders and wider review of legislation

Recognising that the Bill is not seeking to provide a wholesale review of the 2003 Act the Committee has, however, noted the calls for a wider review of legislation. This would involve considering removing people with learning disabilities and autism spectrum disorders from the remit of mental health law and a wider review of mental health and incapacity legislation in general. It invites the Scottish Government to provide its view on this at the same time as supporting Scottish Government comments that it is currently considering the Scottish Law Commission's long term review of incapacity legislation together with the wider issues of restriction of liberty and capacity.

13. The use of force, covert medication and restraint

It will be recalled that at present there is no mention of these matters in the 2003 Act and little in the Act's Code of Practice. The Committee has accordingly asked the Scottish Government "to respond to the comments made

[17] Paras 193-196, Report.
[18] Paras 208-211, Report.
[19] Para 21, Report.
[20] Para 209, Report.

[21] See Scottish Independent Advocacy Alliance, *Mental Health (Scotland) Bill: SIAA Briefing for the Health and Sport Committee*, November 2014, p2.

by witnesses for a greater reference to the use of force, restraint or covert medication in legislation and in the 2003 Act's Code of Practice"[22].

Conclusion

It appears that the Committee has genuinely listened to much of what has been conveyed during its taking of written and oral evidence. However, it is disappointing that it has fallen short of recommending amendments in some respects, for example, at the very least in relation to extension of the existing automatic 5 working day extension after the end of a short term detention certificate, bolstering s.259 regarding independent advocacy and placing an absolute obligation on MHOs to advise patients of their rights (including that to independent advocacy). That being said, cognisant of the fact that the legislation deal with compulsory treatment and that the rights of persons with mental disorder must only be restricted in limited circumstances where it is lawful and proportionate to do so, it has rightly has asked the Scottish Government to justify many elements of the proposed amendments as proportionate measures. Additionally, it seeks assurances regarding resourcing issues that have been raised during Stage 1.

The 2003 Act has been generally regarded internationally as an example of good legislative practice in terms of being patient-centred and human rights compliant. It is to be hoped that the current Bill will ultimately seek to maintain and reinforce this. Stage 2 is awaited with interest.

Jill Stavert

For the next issue

The Mental Welfare Commission for Scotland will shortly be publishing its updated guidance on *Deprivation of Liberty*. There will be discussion of this, along with further discussion of the Scottish Law Commission report *Adults with Incapacity*, in the next issue. Meanwhile, if anyone would like to make a contribution to the ongoing debate in this newsletter concerning adults with incapacity and deprivation of liberty in Scotland please contact Adrian Ward and Jill Stavert.

The next issue will also contain an update on the Assisted Suicide (Scotland) Bill.

[22] Para 229, Report.

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Conferences at which editors/contributors are speaking

Grasping the Thistle: A Discussion about Disabled People's Rights within the United Nations Disability Convention and Scottish Public Policy

Jill will be speaking at this roundtable arranged by Inclusion Scotland on 6th February.

Capacity and consent: complex issues

Jill is chairing, and Adrian will be speaking at, the next workshop of the Centre for Mental Health and Incapacity Law, Rights and Policy on 11th February, which will be addressing complex issues in capacity and consent. For further details, see here.

Royal Faculty of Procurators in Glasgow

Adrian is speaking at conferences convened by the RFPG on 11 February (Private Client) and 25th February ('Demand-led' – i.e. on topics selected in advance by attendees). Details available here.

The National Autistic Society's Professional Conference

Tor will be speaking at this conference, to be held on 3 and Wednesday 4 March in Harrogate. Full details are available here.

DoLS Assessors Conference

Alex will be speaking at Edge Training's annual DoLS Assessors Conference on 12 March. Full details are available here.

Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson's Annual Elderly Care Conference in Manchester on 20 April. For full details, see here.

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, 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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early 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 Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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