

## Scotland

### Introduction

Welcome to the March 2015 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: a case rivalling *Neary* in its importance, a case at the outer limit of the COP's powers and an update on *Re X*;
- (2) In the Property and Affairs Newsletter: recent decisions of Senior Judge Lush, including a rare refusal of an application by the OPG for revocation of a power of attorney including an interesting assessment of the place of P's wishes and feelings;
- (3) In the Practice and Procedure Newsletter: the significant case of *Bostridge* on nominal damages, extreme product champions, veracity experts and the place of morality;
- (4) In the Capacity outside the COP Newsletter: two extremely important decisions of Charles J in relation to the MHT and patients who may lack capacity, an extremely significant Strasbourg decision on Article 5; anonymisation, the capacity to drive; and a new SCIE directory of MCA resources;
- (5) In the Scotland Newsletter: an appreciation of Sheriff John Baird, an update on deprivation of liberty in the context of the SLC report, new guidance from the MWC about managing the finances of those lacking the material capacity; an update on incapacity matters addressed (or not) in proposals for court reform and the further Devolution Command paper, and an update on the Assisted Suicide Bill.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#).

### Editors

Alex Ruck Keene  
Victoria Butler-Cole  
Neil Allen  
Annabel Lee  
Simon Edwards (P&A)

### Scottish contributors

Adrian Ward  
Jill Stavert

### Table of Contents

Introduction	1
Sheriff Baird retires – end of an era	2
Financial matters – new good practice guidance	3
Deprivation of liberty, adults with incapacity and Scotland: the ongoing debate	3
Court reform timetable	6
Further Devolution Command Paper	7
Assisted Suicide (Scotland) Bill – Update	7
Conferences at which editors/contributors are speaking	12

For all our mental capacity resources, click. Transcripts not available at time of writing are likely to be soon at [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk).

## Sheriff Baird retires – end of an era

Sheriff John A Baird is expected to sit in Glasgow Sheriff Court for the last time on 24<sup>th</sup> March 2015. His contribution to the development of the new jurisdiction introduced by the Adults with Incapacity (Scotland) Act 2000 has been vast. None of his judicial colleagues would be likely to dispute or begrudge the assertion that it has greatly exceeded that of any other member of Scotland's judiciary, and because it took place during the formative years of the jurisdiction, it may well never be matched. His achievement is comparable to that of Lord Penrose in developing the specialist commercial court in the Court of Session.

John Baird was educated at St Aloysius College, Glasgow and Glasgow University. He was admitted as a solicitor in 1976, and as an advocate in 1986, practising mainly in the areas of personal injuries, administrative law (including licensing law), and the criminal appeal court. He was appointed as a temporary sheriff in 1992 and as a full-time sheriff in 1996. As a personal injury lawyer he had always had an interest in psychiatric illness as a consequence of personal injury. Early in his judicial career he developed an interest in the area of mentally disordered offenders. He describes himself as never comfortable with former legislation which involved the court in the civil law aspects of mental health issues. With the 2000 Act, he saw the opportunity to try to combine his interests to ensure, within the jurisdiction of Glasgow Sheriff Court, consistency of approach, notwithstanding that despite widespread support the recommendation of the Scottish Law Commission that this jurisdiction be entrusted to specialist sheriffs had not been taken up. He was attracted in particular by the opportunity given to the court to help people, principally those who came to

court under this jurisdiction, but also in trying to provide a prompt and efficient service to lawyers involved in processing this work. He says that he has found this very rewarding.

Part 6 of the 2000 Act, governing guardianship and intervention orders, came into force on 1<sup>st</sup> April 2002. It quickly became apparent to Sheriff Baird that the volume of such work was going to grow substantially and the court needed to organise itself to deal with that work properly. It was his own suggestion that one sheriff should become principally responsible, and he proceeded to develop the processes which now exist in Glasgow Sheriff Court with the aim of enabling applications to be processed effectively and efficiently. He developed the process of "front loading" the requirements for applications, as eventually enshrined in the Glasgow Practice Note. In consequence the Glasgow court has been able to achieve a rate of disposal of incapacity cases at first calling which has varied in a narrow band from 88% to 90%. The court has also been able, partly through the effective use of specialist safeguarders, to minimise the number of disputed cases, and in particular to minimise the number of contested proofs. He generously acknowledges the contribution of solicitors regularly practising in the jurisdiction to achieving these outcomes.

This is not the place for, nor would space accommodate, a full description of his contribution to adult incapacity jurisprudence. It is unlikely that any account even of any one aspect of that jurisprudence will not include one or more of his decided cases, which have in particular developed the range of the use of the jurisdiction under Part 6 of the 2000 Act, the use of procedure to obtain directions under section 3(3), and the interface with other jurisdictions, notably criminal and mental health law. The

practicality of his approach perhaps has derived from his early years as a solicitor, for example when sending parties off to check the file notes when a Will was made, in a case where it was suggested that testamentary provision be varied to take account of changed circumstances. He has supported the need for high standards of professionalism where circumstances of a particular adult have required this, on occasions appointing a solicitor as guardian and on another granting an application by an experienced accountant acting as financial guardian for additional remuneration. He has not hesitated to respond robustly when an adult's interests have been poorly served, whether by relatives in situations of conflict more interested in their own interests than those of the adult, or poor professional services in drafting a Will which clearly did not effectively reflect the adult's intentions, or a power of attorney document found to be "not fit for purpose". Over the years he has given much encouragement, and so far as properly possible from the bench assistance, to solicitors developing an interest in this work.

He has assisted developments in other courts similar to his own pioneering work, notably and recently in Edinburgh Sheriff Court, and it is to be hoped that the possibilities now opened up by the Courts Reform (Scotland) Act 2014 will allow his pioneering work to be developed further, and to be formalised. One of his regrets is that, in comparison with similar jurisdictions in other countries, Scotland's adult incapacity jurisdiction has not normally directly involved members of the senior judiciary, so that the work of the sheriff court in this most important area of activity has not perhaps achieved the profile which it might deserve.

The Newsletter wishes him well as he sets off to pursue his cultural and historical interests in the

United States, taking in part of the Masters Golf Competition at Augusta, using accumulated leave before he moves officially into retirement in the middle of April.

*Adrian D Ward*

## Financial matters – new good practice guidance

On 12<sup>th</sup> February 2015 the Mental Welfare Commission published new guidance entitled "Managing the finances of people who are unable to manage their own money – a new guide". The guidance has been produced by the Commission in consultation with the Office of the Public Guardian and the Care Inspectorate. It is available [here](#), or in hard copy by request to the Commission at Thistle House, 91 Haymarket Terrace, Edinburgh EH12 5HE.

The guidance is intended for professionals such as doctors, nurses, social workers and care home managers. It includes in "quick guide" form the whole range of options from informal arrangements and DWP appointeeships through continuing powers of attorney to the methods available under Parts 3, 4 and 6 of the Adults with Incapacity (Scotland) Act 2000. The quick guide is followed by more detailed information, with links to relevant provisions of the Act and relevant codes of practice. Sensibly, the use of trusts is also covered, again with many appropriate links. The document concludes with some informative case examples.

*Adrian D Ward*

## Deprivation of liberty, adults with incapacity and Scotland: the ongoing debate

### Introduction

At the time of writing the Scottish Government's response is still awaited to the Scottish Law Commission's October 2014 report and recommendations<sup>1</sup> for legislative change endeavouring to address the deprivation of liberty and Article 5 ECHR compatibility issues raised by both the European Court of Human Rights *Bournemouth* and UK Supreme Court *Cheshire West* rulings.

The Mental Welfare Commission for Scotland will also shortly be publishing its updated guidance on *Deprivation of Liberty*. It has already issued guidance on s.13ZA Social Work (Scotland) Act 1968 in response to the *Cheshire West* ruling<sup>2</sup>.

Whether the Scottish Law Commission's recommended amendments to the Adults with Incapacity (Scotland) Act 2000 will completely close the '*Bournemouth* gap' remains to be seen. Some questions arise about these and for a full discussion of the proposals please see the October 2014 and December 2014 issues of this newsletter. However, amongst other things, consideration should be given as to whether or not the proposals will fully meet the procedural safeguards required under Article 5(4) ECHR where persons lacking capacity to consent to a

deprivation of liberty are concerned, notably in the realm of automatic judicial review.

### European Court of Human Rights - special procedural safeguards and persons with incapacity

In rulings involving persons who had been declared to lack capacity the European Court of Human Rights (the Court) has emphasised that forms of judicial review may differ between jurisdictions but that where such review is not automatic there must be the ability to apply periodically for judicial review of indefinite or lengthy periods of detention<sup>3</sup>. Moreover, special procedural safeguards may be necessary where a person lacks capacity to fully act for themselves<sup>4</sup>. This is particularly pertinent where a court did not initiate the placement<sup>5</sup>.

The Court is reluctant to specify exactly what these special safeguards should look like and acknowledges that automatic judicial review might not be the only means of providing such safeguards<sup>6</sup>. However, one should not overlook the fact that a person who lacks capacity may be unable to instigate judicial review and there may not be anyone else who is willing or able to do this on their behalf. It is therefore difficult to envisage that anything other than automatic judicial review will meet Article 5(4) requirements. Article 5(4) case law, as developed, makes it clear that the procedural safeguards must be real and effective<sup>7</sup> and to guarantee the right for an individual who lacks capacity "as

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<sup>1</sup> Scottish Law Commission (2014) [Report on Adults with Incapacity](#), Report No.240, Edinburgh: The Stationery Office (the Report)

<sup>2</sup> Mental Welfare Commission for Scotland (2014), [Mental Welfare Commission response to queries related to when to use s13ZA v Guardianship following the Cheshire West Supreme Court decision](#).

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<sup>3</sup> *Stanev v Bulgaria* (2012) 55 EHRR 22 at paras 168-171, *DD v Lithuania* [2012] ECHR 254 at para 163 and *MH v UK* (2013) ECHR 1008 at para 77.

<sup>4</sup> *Stanev* at para 179, *DD* at para 163 and *MH* at para 77. See also *Megyeri v Germany* (1992) ECHR 49 at para 22.

<sup>5</sup> *DD* at paras 164-165.

<sup>6</sup> *MH* at para 82.

<sup>7</sup> *Stanev* at para 170, *DD* at para 165 and *MH* at paras 82-86.

nearly as possible as practical and effective...as it is for other detainees.”<sup>8</sup>. It must not be an illusory and theoretical right but one which practically and actively assists the individual in the appeal process<sup>9</sup>. The individual must not be reliant on the person who authorised the deprivation of liberty to challenge its lawfulness<sup>10</sup>. Moreover, a third party may be able to initiate such judicial review provided only that they are subject to a non-discretionary duty to do<sup>11</sup>.

### SLC recommendations

Broadly, the SLC recommends amendments to the Adults with Incapacity Act to allow for:

1. Preventing an adult with incapacity who is in hospital and receiving medical treatment, or being assessed as to whether medical treatment is required, from going out of hospital or some part of an NHS or private hospital<sup>12</sup>.
2. The authorisation of significant restriction of liberty in relation to (1) placement in a care home or accommodation arranged by an adult placement service<sup>13</sup>; and (2) short term care<sup>14</sup>.

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<sup>8</sup> *MH* at para 82.

<sup>9</sup> *MS v Croatia (No.2)* (2015) ECHR 196.

<sup>10</sup> *DD* at para 166

<sup>11</sup> *Stanev* at para 174, *Shtukurov v Russia* (2008) ECHR 223 at para 124 and *MH* at paras 92 and 94.

<sup>12</sup> s.50A of the draft Bill accompanying the Report.

<sup>13</sup> By reason of vulnerability or need resulting from infirmity, ageing, illness, disability, mental disorder, or drug or alcohol dependency.

<sup>14</sup> s52 of the draft Bill accompanying the Report.

3. The ability to apply to the sheriff in relation to an unlawful detention of an adult with incapacity<sup>15</sup>.

The SLC acknowledges<sup>16</sup> that the *Stanev* ruling indicated that substitute decision makers may be able to consent to a deprivation of liberty on behalf of an incapacitated person. However, it equally recognises that the case law is as yet not sufficiently developed to rely on this entirely. It accordingly provides for various safeguards. Specifically, in terms of the availability of judicial review, these are:

- a. In the case of the authorisation of preventing an adult with incapacity from going out of hospital:
  - i. The ability for the patient or anyone claiming an interest in their personal welfare to apply to the sheriff for an order setting an end date for such a measure<sup>17</sup> or to review any action taken in reliance on the authorising certificate<sup>18</sup>.
  - ii. Noting that the possibility to challenge administration of medication for confining the person to hospital under the existing s52 (Appeal against decision against medical treatment) of the Act.
- b. In the case of authorisation of significant restriction of liberty by welfare attorneys or guardians or the sheriff court, such of restriction will last for one year only (but this can be renewed).

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<sup>15</sup> S.52J draft Bill accompanying the Report.

<sup>16</sup> Paras 3.56-3.60 of the Report.

<sup>17</sup> s.50C draft Bill.

<sup>18</sup> s.50A(6) draft Bill.

- c. The adult or any person claiming an interest in the adult's personal welfare may apply to the sheriff in relation to an unlawful detention of an adult with incapacity.

However, whilst acknowledging the potential resourcing issues involved, there is an absence of automatic judicial review to challenge the legality of the deprivation of liberty in each case. As mentioned above, this may not therefore meet the 'special procedural requirements' identified in related ECHR case law for persons lacking capacity who are unable, or have no one else able/willing, to institute judicial review proceedings. Moreover, where the authorisation to a significant restriction of liberty, and its renewal, is granted by a welfare attorney or guardian the potential thus exists for indefinite deprivation of liberty to occur without 'real and effective' safeguards being available. Admittedly, where such situations arise the decision to authorise the deprivation of liberty will undoubtedly be made solely with the objective of benefitting the individual concerned. However, we must also be mindful of the cases where this may not be the case and this is where the protective measures of Article 5 are of fundamental importance.

It will be interesting to see how this debate, and any related implementation, evolves as well as the ongoing developments in England and Wales.

*Jill Stavert*

## Court reform timetable

The Lord President, Lord Gill, set out the timetable for reform of the justice system following upon the Courts Reform (Scotland) Act 2014 in a major address to the Holyrood Digital Justice Conference on 28<sup>th</sup> January 2015, available [here](#). It contains much of interest for

practitioners engaged in the adult incapacity jurisdiction, but does not once mention that jurisdiction and indeed is notable for what it does not say about that jurisdiction. Thus it could have been mentioned, but is not, in the following paragraph:

*"In consequence of the reforms, the shrieval bench will be relieved of the burden of minor criminal work. The sheriffs will have the opportunity to pursue specialisms in the field of civil law, such as family law and commercial law, and to specialise in the criminal field in cases of serious crime under solemn procedure. This will present the sheriffs with the demanding task of improving their judicial skills and in accepting a high degree of responsibility; but that is a challenge that any sheriff should be glad to accept."*

The following passage resonates with the preceding item on the work of Sheriff Baird:

*"The reforms seek to remedy one of the besetting problems in our courts in modern times – that of maximising the productive use of available court time. The three keys to the successful implementation of the reforms will be judicial specialisation; judicial case management and flexibility of shrieval deployment."*

A welcome feature of the reforms is that there will be a single Sheriff Principals Appeal Court, so that there will no longer be a system in which the first level of appeal from the sheriff will result in a decision binding only within one shrievaldom. It is to be welcomed that Sheriff Principal Mhairi Stephen QC has been appointed President to the Sheriff Appeal Court, which will first be established to deal with criminal cases and from January 2016 will have jurisdiction also in civil cases. Sheriff Stephen is reported to have been supportive of the modernisation of adult

incapacity procedures in Edinburgh Sheriff Court – see the discussion of the Practice Note in our February Newsletter [here](#).

*Adrian D Ward*

## Further Devolution Command Paper

In January 2015 the Secretary of State for Scotland presented to Parliament a Command Paper entitled “Scotland in the United Kingdom: an enduring settlement”. It included draft clauses for amendments to the Scotland Act. Disappointingly, a matter which has caused concern and difficulty in relation to Scottish adult incapacity law has not been addressed. The new arrangements would give legislative force to the Sewel Convention, the proposed wording being to the effect that:

*“it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”*

The problem is that although provisions are proposed (paragraph 31 of the Command Paper) for involving Scottish Ministers in agreeing the UK position in EU negotiations, there is no equivalent to the Sewel Convention where the UK Government enters an International Instrument which has direct implications for Scots law in devolved matters. Thus the UN Convention on the Rights of Persons with Disabilities has the potential to impact seriously and significantly upon Scotland’s Adults with Incapacity (Scotland) Act 2000, and other laws in that area, but it appears that the Scottish position was not taken into account, and there was certainly no meaningful consultation in Scotland, regarding the negotiation of that Convention, the entry into it, or the decision to ratify without reservations.

There is a risk of the same happening in relation to any other International Instrument.

*Adrian D Ward*

## Assisted Suicide (Scotland) Bill – Update

In the [January 2014](#) newsletter Jill Stavert reported that the Assisted Suicide (Scotland) Bill had been introduced into the Scottish Parliament in November of 2013. Now, over one year later, the Bill remains at Stage 1 and the Health and Sport Committee has stopped taking evidence. Commissioned by the Health and Sport Committee, an ‘Analysis of submissions of evidence on the Assisted Suicide (Scotland) Bill’<sup>19</sup> has, however, been published which further highlights the significant human rights concerns in relation to the Bill which require further consideration.

### The European Convention on Human Rights (ECHR) and Assisted Suicide

The European Court of Human Rights (ECtHR/the Court) has ruled that the right to life under Article 2 does not encompass a right to die.<sup>20</sup> Likewise, the Court has not declared that Article 8, right to private and family life either requires states to have legislation permitting assisted suicide or prohibits the enactment of such legislation. However, the Court has stated that, ‘...an individual’s right to decide by what means and at

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<sup>19</sup> Scottish Parliament, ‘Analysis of submissions of evidence on the Assisted Suicide (Scotland) Bill’ Michelle Rostant-Bell, Commissioned by the Scottish Parliament Health and Sport Committee (2014) [http://www.scottish.parliament.uk/S4\\_HealthandSportCommittee/Reports/HS\\_Assisted\\_Suicide\\_Report.pdf](http://www.scottish.parliament.uk/S4_HealthandSportCommittee/Reports/HS_Assisted_Suicide_Report.pdf) (hereafter ‘Analysis of Submissions’)

<sup>20</sup> *Pretty v. the United Kingdom* (2346/02) (2002) 35 EHRR 1 para.40

*what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention.*<sup>21</sup> Nevertheless, owing to the lack of consensus across the Council of Europe, the margin of appreciation afforded to states in this regard is wide and restrictions may be justified based primarily on the state's assessment as to the *'...risk and likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created.'*<sup>22</sup>

Owing to the wide margin of appreciation afforded to states in this area, it is therefore unlikely that the Court would deem any Assisted Suicide (Scotland) Act to be fundamentally incompatible with the Convention. However, it may take issue with the particular statutory provisions. In *Gross v Switzerland*, its most recent pronouncement on assisted suicide, the Court held that *'...Swiss law, while providing the possibility of obtaining a lethal dose of sodium pentobarbital on medical prescription, does not provide sufficient guidelines ensuring clarity as to the extent of this right.'*<sup>23</sup> The Court here was concerned with legal certainty and the clarity of the extent of the right to assisted suicide provided for under Swiss law. Thus, it is imperative that any Scottish law is sufficiently clear and precise, and clearly demarcates the limits of the provisions, while also providing robust safeguards.

The following sections will explore some aspects of the Bill which require further consideration.

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<sup>21</sup> *Haas v Switzerland* (31322/07) (2011) 53 EHRR 33 para.51

<sup>22</sup> *Pretty v. the United Kingdom* (2346/02) (2002) 35 EHRR 1 para.74

<sup>23</sup> *Gross v Switzerland* (67810/10) (2013) 58 EHRR 7 para.67

## Assisted Suicide (Scotland) Bill – Section 12 – Capacity and Mental Disorder

The 'Analysis of submissions of evidence on the Assisted Suicide (Scotland) Bill' (hereafter 'Analysis of Submissions') highlights that there is widespread concern and confusion regarding how the Bill would apply to individuals with mental disorder. Under s.12(1)(a) of the Bill it is provided that a person has capacity to make a request for assisted suicide if the person *'...is not suffering from any mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)) which might affect the making of the request...'* Consequently, it appears that anyone with a mental disorder as defined under the 2003 Act is automatically excluded from using the provisions of the legislation. While this may be viewed as a safeguard, it raises questions regarding the discriminatory nature of such provisions.

As is widely acknowledged, the presence of mental disorder does not automatically equate with incapacity. Someone with a mental disorder, be that a mental illness, personality disorder or learning disability, may retain capacity, or indeed experience fluctuating capacity. To exclude someone with a mental disorder from seeking assisted suicide may give rise to a violation of Article 14 ECHR, prohibition of discrimination, on the basis of disability in connection with Article 8.<sup>24</sup>

As mentioned in the January 2014 edition of this newsletter, the capacity provisions in the Bill

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<sup>24</sup> There is also the potential for discrimination claims to be raised in regard of persons who meet the criteria but are unable to complete the physical act of suicide without assistance.

should be seen in light of the recent UN Convention on the Rights of Persons with Disabilities (CRPD) developments. The General Comment published by the Committee on the Rights of Persons with Disabilities in 2014, interprets Article 12, right to equal recognition before the law, as a right of all persons to possess full legal capacity and calls for assessments of mental capacity to be abolished, as well as substituted decision-making.<sup>25</sup> Therefore, under this interpretation, the provisions of the Bill requiring individuals requesting assisted suicide to have capacity would be incompatible with Article 12. The removal of the capacity requirements from the Bill would, however, raise significant opposition, particularly from those who are concerned that the Bill, as it currently stands, contains insufficient safeguards. It should also be noted that while the CRPD is not incorporated into UK law, enactments of devolved legislation can be prevented if they are in contravention of the UK's international obligations.<sup>26</sup>

Regardless of CRPD considerations, there appears to be another aspect of section 12 of the Bill which casts doubt on the exclusion of individuals with mental disorder from seeking assisted suicide. Namely, that capacity is considered to be lacking in those with a mental disorder 'which might affect the making of the request.' It is unclear whether this means that an individual with a mental disorder which does not affect their making of the request for assistance would be permitted to make such a request. This would evidently undermine any safeguard designed to protect vulnerable mentally ill persons from taking their own life.

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<sup>25</sup> Committee on the Rights of Persons with Disabilities, [General Comment No. 1](#) (2014) Article 12: Equal recognition before the law, adopted 11 April 2014

<sup>26</sup> s.35 Scotland Act 1998

### 'Life-Shortening' Illnesses and Conditions

The use of the term 'life shortening' in relation to illnesses or conditions which may qualify an individual for assisted suicide, is also raised as a contentious issue in the 'Analysis of Submissions'. Those in support of the Bill were generally content with this wording, however others suggested that it should be extended to also include those who consider their lives to be 'intolerable'.<sup>27</sup> Those opposing the Bill were critical of the inclusion of 'life-shortening' illnesses or conditions as one of the criteria for requesting assistance, on the basis that this could be interpreted to include a vast range of illnesses and conditions, including disability and mental illness.<sup>28</sup> In its submission, the Law Society of Scotland, observed that for people with major types of mental illness, their condition can often impact upon their life expectancy by between 10 and 20 years.<sup>29</sup> It is therefore not implausible that the argument could be made that a mental disorder constitutes a 'life-shortening' illness. If this is combined with the previously mentioned interpretation of section 12(1)(a), it follows that an individual with a mental disorder, who can show that their illness/condition will be life-shortening and that the mental disorder itself is not affecting the making of the request, may be able to seek assisted suicide.

### Article 2 ECHR and the Need for Safeguards

The above considerations, while casting doubt over whether the provisions of the Bill are sufficiently clear, also raise issues in terms of

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<sup>27</sup> 'Analysis of Submissions' p.25

<sup>28</sup> 'Analysis of Submissions' p.25

<sup>29</sup> Law Society of Scotland, 'Assisted Suicide (Scotland) Bill' [submission](#).

whether the Bill provides sufficient safeguards for the protection of Convention rights. In relation to assisted suicide the ECtHR has stated that *'...it is appropriate to refer, in the context of examining a possible violation of Article 8, to Article 2 of the Convention, which creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives...'*<sup>30</sup> It is considered that individuals with mental disorder would be considered 'vulnerable persons' by the Court.

In this regard, the 'Analysis of Submissions' highlights the widespread unease surrounding the lack of provision for psychiatric assessment within the Bill.<sup>31</sup> Rather, the Bill makes provision for medical practitioners endorsing the first and second requests for assistance to provide statements which specify that they are of the opinion that: the person has capacity; that the person has a terminal or life-shortening illness or condition; and that the person's conclusion that their quality of life is unacceptable is not inconsistent with the facts known to the practitioner.<sup>32</sup> As previously noted, there are issues with the provisions concerning capacity which may affect their robustness as safeguards. In addition, the 'Analysis of Submissions' conveys that respondents considered the basis for assessment of capacity to be unclear, in that there are inconsistencies between the definition in the Bill, the definition of incapacity under the Adults with Incapacity (Scotland) Act 2000 and the 'significantly impaired decision-making ability' test under the Mental Health (Care and Treatment) (Scotland) Act 2003.<sup>33</sup>

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<sup>30</sup> *Haas v Switzerland* (31322/07) (2011) 53 EHRR 33 para.54

<sup>31</sup> 'Analysis of Submissions' p.3

<sup>32</sup> s.9(2) and s.11(2)

<sup>33</sup> 'Analysis of Submissions' p.28

Thus, owing to the questionable effectiveness of the capacity requirements within the Bill, and the lack of a need for psychiatric assessment, the Bill could potentially be incompatible with the ECHR. In *Haas v. Switzerland* the Court stated that *'...the risks of abuse inherent in a system that facilitates access to assisted suicide should not be underestimated...the right to life guaranteed by Article 2 of the Convention obliges States to establish a procedure capable of ensuring that a decision to end one's life does indeed correspond to the free will of the individual concerned.'*<sup>34</sup> The Court then went on to find that the requirement for a medical prescription to be issued on the basis of a 'full psychiatric assessment' ensures compliance with this obligation.<sup>35</sup> The implications of not requiring a psychiatric assessment are therefore potentially problematic. In essence, the failure to include the need for a psychiatric assessment may mean that the Bill provides insufficient protections for ensuring that a decision to end one's life truly reflects the will of the person, particularly for individuals with mental disorder.

In connection with the capacity requirement, it should also be noted that there is no requirement for a capacity assessment for the completion of a preliminary declaration under section 4 of the Bill. It is considered that this omission may leave vulnerable persons open to undue influence and also contributes to the conclusion that there is insufficient protection for those with mental disorder considering assisted suicide.

## Conclusion

Regardless of the moral and ethical debate surrounding assisted suicide, any legal provisions

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<sup>34</sup> *Haas v Switzerland* (31322/07) (2011) 53 EHRR 33 para.58

<sup>35</sup> *Ibid*

sanctioning such acts must contain sufficiently robust safeguards in order to achieve a balance between protecting the right to life under Article 2 and personal autonomy protected by Article 8. For persons with mental disorder, assisted suicide raises particularly difficult questions surrounding capacity, the potential for undue influence and the protection of potentially vulnerable individuals. The above considerations are intended to raise just some of the potential human rights implications of the Bill which require further consideration.

*Jill Stavert and Rebecca McGregor, Research  
Assistant, Centre for Mental Health and  
Incapacity Law, Rights and Policy, Edinburgh  
Napier University*

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## Conferences at which editors/contributors are speaking

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### 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](#).

### Editors

Alex Ruck Keene  
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### 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.

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Our next Newsletter will be out in early April. 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](mailto:marketing@39essex.com).

## David Barnes

Chief Executive and Director of Clerking  
[david.barnes@39essex.com](mailto:david.barnes@39essex.com)

## Alastair Davidson

Senior Clerk  
[alastair.davidson@39essex.com](mailto:alastair.davidson@39essex.com)

## Sheraton Doyle

Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

## Peter Campbell

Practice Manager  
[peter.campbell@39essex.com](mailto:peter.campbell@39essex.com)

**London** 39 Essex Street, London WC2R 3AT  
Tel: +44 (0)20 7832 1111  
Fax: +44 (0)20 7353 3978

**Manchester** 82 King Street, Manchester M2 4WQ  
Tel: +44 (0)161 870 0333  
Fax: +44 (0)20 7353 3978

**Singapore** Maxwell Chambers, 32 Maxwell Road, #02-16,  
Singapore 069115  
Tel: +(65) 6634 1336

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## Editors

Alex Ruck Keene  
Victoria Butler-Cole  
Neil Allen  
Annabel Lee  
Simon Edwards (P&A)

## Scottish contributors

Adrian Ward  
Jill Stavert

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**Alex Ruck Keene**  
[alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)

Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2015, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk). **To view full CV click here.**



**Victoria Butler-Cole**  
[vb@39essex.com](mailto:vb@39essex.com)

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). **To view full CV click here.**



**Neil Allen**  
[neil.allen@39essex.com](mailto:neil.allen@39essex.com)

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.**



**Annabel Lee**  
[annabel.lee@39essex.com](mailto:annabel.lee@39essex.com)

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



**Simon Edwards**  
[simon.edwards@39essex.com](mailto: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.**



**Adrian Ward**  
adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: *“the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,”* he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. **To view full CV click here.**



**Jill Stavert**  
J.Stavert@napier.ac.uk

Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. 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 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. **To view full CV click here.**