

## Scotland

### Introduction

Welcome to the September 2015 Newsletters: Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: an update on the *Re X* saga, clarification over DoLS and conditional discharges, scrutiny of DoLS scrutinisers, an important decision on withdrawal of treatment, and a guest article by Dr Gareth Owen on capacity and brain injury;
- (2) In the Property and Affairs Newsletter: an important decisions on P's use of funds for school fees in the context of mutual dependency, successive deputies, adverse costs orders and interest free loans, bad LPA behaviour, and family members as deputies;
- (3) In the Practice and Procedure Newsletter: clarification over the (lack of) funding of s49 court reports, the importance of participation in proceedings, and habitual residence;
- (4) In the Capacity outside the COP Newsletter: CRPD Committee's guidelines on article 14, assisted suicide, and litigation capacity in other proceedings;
- (5) In the Scotland Newsletter: questionable policies and article 8 ECHR, the Education (Scotland) Bill, new guidance and ordinary residence, and new DOL guidance.

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  
Anna Bicarregui  
Simon Edwards (P&A)

### Guest contributor

Beverley Taylor

### Scottish contributors

Adrian Ward  
Jill Stavert

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

## Professor Jill Stavert

The appointment as professor at Edinburgh Napier University of Jill Stavert has received a delighted welcome from all those throughout Scotland and beyond who know her and her work. After graduating in law and psychology from what is now Oxford Brookes University, Jill qualified as a solicitor in England & Wales in 1987 and worked in private practice in London until she moved to Scotland in 1991. She qualified as a solicitor in Scotland early in 1994, then was drawn ever further into the human rights field. While raising a young family in Malaysia she undertook Ph.D research with Lancaster University into international human rights standards and their reflection at national level. Using Malaysia and its internal security laws as a case study, she focused in particular on cultural/religious relativist arguments against so-called universal human rights standards. After the award of her Ph.D in 2001 she worked as a tutor at Edinburgh University Law School and as a contract researcher, then joined Edinburgh Napier University in 2004. In addition to her lecturing and research, she became the Law Group's Research Leader in 2011 and was promoted to Reader of Law in 2012. Her greatest achievement to date, nevertheless, was to realise her dream – prompted by many others in the field – to meet the need for a multi-disciplinary academic centre which would undertake research, but which would have strong links with practice in relevant fields, bringing together the academic and practical in ways in which each would inform, benefit and motivate the other. Such is the massively beneficial extent to which that aspiration has already been achieved, that it is difficult to comprehend that it is still less than two years since the Centre for Mental Health and Incapacity Law, Rights and Policy was finally established, and very effectively “went into business”, in November 2013.

Jill's appointment as professor with effect from 1<sup>st</sup> August 2015 is both an accolade richly deserved by her personally for her drive, vision, ability and at times courage in all that she has achieved so far, and at the same time a recognition of the importance of the subjects to which she has dedicated her academic energies which all of us working in the field – both academic and practical – can celebrate.

Jill's appointment came barely a month before – but not after – publication of figures showing that only 21.8% of professors in Scottish universities are women, and a call from Ms Angela Constance, Scottish Education Secretary, for appointment of a higher proportion. Without any doubt, Jill's appointment has been achieved on merit, recognising abilities which shine through her consistently mild, considerate and helpful manner.

Her emphasis upon partnership between academia and practice reflects the philosophy of her university, and is exemplified (among many other ways) in the extent to which she has drawn me – a practitioner – into the work of the Centre; a partnership between her Centre and my firm of TC Young which sees two of us from each within the core research group for the “Three Jurisdictions” work of the Essex Autonomy Project (click [here](#) for details), and her willingness to join me as joint contributors to the Scottish section of this Newsletter.

Jill is a valued member – and the only academic member – of the Law Society of Scotland's Mental Health and Disability Sub-Committee.

*Adrian D Ward*

## Local authority in breach of Article 8, ECHR?

Practitioners have drawn to the attention of the Newsletter a number of instances indicating that at least one Scottish local authority has recently adopted a policy of pressurising people with social care needs, who live in their own homes, either to move into group homes or alternatively to accept lodgers or tenants (the proposed status has not yet been made clear) in their own homes. There is no prospect of any benefit to the householders in question, if one discounts the implied threat of a reduction in standards of support if they do not comply. It would appear that the purpose of this policy is to allow necessary support to be provided more cheaply, by grouping together people with similar support needs. The policy raises a question as to whether it is in breach of the right for respect to private and family life in terms of Article 8 of the European Convention on Human Rights. Some may see a first step back towards institutionalisation.

*Adrian D Ward*

## Education (Scotland) Bill

Aspects of the Education (Scotland) Bill, at present in Stage 1 of its progress through the Scottish Parliament, have received widespread expressions of concern and requests for reconsideration. The Mental Health and Disability Sub-Committee of the Law Society of Scotland has suggested in its submission that the Bill as drafted contains an apparent non-compliance with Article 6 of the European Convention on Human Rights (“ECHR”) which would render the Bill ultra vires of the Scottish Parliament; an apparent non-compliance with the requirement of the UN Convention on the Rights of Persons with Disabilities (“UN CRPD”) which would render enactment of the Bill liable to

be prevented by the Secretary of State as contravening the UK’s international obligations, and an apparent weakening of the case for maintaining that Scotland’s adult incapacity regime is not such a regime as requires to be abolished, having regard to General Comment No 1 (2014) “Article 12: Equal Recognition before the Law” of the UN Committee on the Rights of Persons with Disabilities dated 19<sup>th</sup> May 2014 (“the General Comment”).

The Committee’s concerns centre on proposed amendments to the Education (Additional Support for Learning) (Scotland) Act 2004 contained in the Schedule to the Bill. In relation to Article 6 of ECHR, it would appear that the Bill as drafted would permit an education authority, notwithstanding that it would itself be a party to any proceedings before the Additional Support Needs Tribunals, itself to decide whether a child or young person should be permitted to take such proceedings. The Bill proposes both a “capacity” test and a “best interests” test. It is understood from discussions that it is intended that these be tests to apply for the purpose of access to assessment procedures, not access to the Tribunals. The Committee has nevertheless argued that the proposed “maturity” element of the capacity test should be eliminated in the case of 16 and 17-year olds, as they are adults for the purposes of incapacity law; and that if the purpose of the “best interests” test is to allow children to be shielded from potentially harmful information, then the approach should not be that a “best interests” test should be satisfied, but rather a question of whether application of safeguards to prevent any such apprehended harm would be justified. The introduction of a “best interests” test in Scots law – bearing in mind that such a test was explicitly rejected for the purposes of adult incapacity law – seems particularly inappropriate at a time when the concept of a paternalistic “best interests” test has been rejected in the General Comment as being incompatible with UN CRPD.

*Adrian D Ward*

## **New guidance – old flaw – or new interpretation of the law?**

In the [July](#) Newsletter under the heading “New guidance – old flaw?” we reported the introduction on 1<sup>st</sup> June 2015 by Scottish Government of new “Guidance on the Recovery of Expenditure on Accommodation and Services under Section 86 of the Social Work (Scotland) Act 1968”. We expressed surprise that the new guidance still followed previous guidance in its interpretation of relevant case authority on the question of when ordinary residence moves when persons lacking sufficient capacity to decide the matter themselves in fact move from one local authority area to another. However, as we noted at the end of that item, Annex A to the new guidance concluded with a note that the guidance would be reviewed and, if necessary, amended following the decision of the Supreme Court in the *Cornwall* case. As reported more [fully](#), that decision has now been issued. Significant from a Scottish viewpoint is the emphasis by Lord Carnwath in his leading Judgment, with which the majority of justices agreed, that the decision focused upon a provision which is purely “administrative and fiscal”, which does not affect the rights of the person concerned, but only the allocation of responsibility as between local authorities. A different approach might be justified as compared to one directed to a person’s entitlement to a benefit (see paragraph 57 of the Judgment).

Three local authorities were involved in the case. As a child, the person to whom the case related – “PH” – was placed by Wiltshire in South Gloucestershire, where he remained until he reached the age of 18. He was then placed in Cornwall. However, relevant

legislation provides that such placements do not give rise to what would otherwise be a change of ordinary residence. The Supreme Court held that this disapplication continued through the transition from child to adult provision. Lord Carnwath accordingly held that: “PH’s placement in South Gloucestershire by Wiltshire is not to be regarded as bringing about a change in his ordinary residence. Throughout the period until he reached 18 he remained continuously where he was placed by Wiltshire, under an arrangement made and paid for by them. For fiscal and administrative purposes his ordinary residence continued to be in their area, regardless of where they determined that he should live. It may seem harsh to Wiltshire to have to retain indefinite responsibility for a person who left the area many years ago. But against that there are advantages for the subject in continuity of planning and financial responsibility. As between different authorities, an element of arbitrariness and ‘swings and roundabouts’ may be unavoidable.”

On the one hand, this decision may help resolve past difficulties where people had moved from an English local authority area to one in Scotland, the English local authority refused to accept no further financial responsibility on the basis of English guidance, but the Scottish authority took the view that it was not liable under Scottish guidance. On the other hand, it seems that Scottish guidance can no longer safely rely upon the “*Vale*” tests. There would appear to be a question as to whether even a move of an adult lacking capacity from one local authority area to another, agreed by an attorney or guardian with relevant powers, will necessarily always result in a change in ordinary residence. There also now seems to be scope for greater divergence between habitual residence for the purposes of adult incapacity legislation and ordinary residence in relation to local authority duties; without adding the further complication of the concept of “living in” a place under the Care Act 2014 and subordinate legislation.

Further clarification from Scottish Ministers is awaited with interest, and with the hope that it may be preceded (unlike the guidance issued on 1<sup>st</sup> June 2015) by consultation beyond the circle of local authorities themselves, to take account of the interests of people who are the subject of such provisions, and those who represent them.

*Adrian D Ward*

Edinburgh Napier University; Adrian Ward and Alison Hempsey of TC Young, Solicitors; Alex Ruck Keene (of 39 Essex Chambers and University of Manchester) who is the common member of the Mental Health and Disability Committees of both the Law Society of England & Wales and the Law Society of Scotland; and Colin Caughey of the Northern Ireland Human Rights Commission.

*Adrian D Ward*

## Essex Autonomy Project – update

In the [April](#) Newsletter we reported the extension to cover all three United Kingdom jurisdictions of the Essex Autonomy Project to advise UK Government departments on compliance of mental capacity/adult incapacity laws with the UN Convention on the Rights of Persons with Disabilities, having regard to the interpretation of the Convention by the UN Committee on the Rights of Persons with Disabilities in General Comment No 1 (2014) entitled “Article 12: Equal Recognition before the Law”. It has now been confirmed that Essex Autonomy Project has been commissioned by the Arts and Humanities Research Council and Economic and Social Research Council to provide technical research support to UK Government bodies in preparation for the forthcoming United Nations review of UK compliance with the Convention, in relation to all three UK jurisdictions. TC Young, Solicitors, are also contributing to funding and have provided a base in Edinburgh at which the project team has been meeting. Additional funding and support come from the Law Society of Scotland, and the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University. The members of the core research team are Professors Wayne Martin and Sabine Michalowski of the University of Essex; Professor Jill Stavert and her colleague Rebecca McGregor of

## Mental Health (Scotland) Act 2015

The Mental Health (Scotland) Act 2015, amending mainly the Mental Health (Care and Treatment)(Scotland) Act 2003, and also the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice (Scotland) Act 2003, received Royal Assent on 4<sup>th</sup> August 2015 <http://www.legislation.gov.uk/asp/2015/9/contents/enacted>. For further details of the changes it will bring see the [July](#) issue of the newsletter.

*Jill Stavert*

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## Conferences at which editors/contributors are speaking

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### **The Mental Capacity Act 2005 – Ten Years On**

Alex will be delivering his paper, '(Re)presenting P', and Neil will be delivering, 'The (not so?) great confinement' at this major conference hosted by the University of Liverpool on 9 and 10 September 2015. For further details and to book, see [here](#).

### **Court of Protection Practitioners' Association National Conference**

Alex will be speaking at COPPA's national conference on 24 September 2015. For further details, and to book, see [here](#).

### **Queen Mary University**

Jill will be a discussant at the Rethinking Deprivation of Liberty in a Health and Social Care Context Conference at Queen Mary University of London on 30 September 2015.

### **Bromley Safeguarding Adults Board 2015 Conference**

Annabel is speaking at this conference on 6 October 2015 about the role of the Court of Protection.

### **Jordan's Court of Protection Conference**

Alex will be delivering, 'More Presumptions Please? Wishes, feelings and best interests decision-making' at Jordan's Annual Court of Protection Conference on 13 October 2015. For further details, and to book, see [here](#).

### **Seventh Annual Review of the Mental Capacity Act 2005**

Neil and Alex will both be speaking (along with Fenella Morris QC) at this annual fixture in York on 15 October 2015, under the auspices of Switalskis solicitors. For further details, and to book, see [here](#).

### **Taking Stock**

Neil will be speaking on 16 October 2015 at this annual fixture, arranged by Cardiff Law School and the University of Manchester, at the Royal Northern College of Music. For further details, and to book, see [here](#).

### **Community Care Live**

Annabel is presenting a legal masterclass on the Mental Capacity Act 2005 and Alex will be on a panel discussion on deprivation of liberty at Community Care Live 2015 in London on 3-4 November 2015. For further

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### **Scottish contributors**

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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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details, and to register for this event, see <http://www.communitycare.co.uk/live/>

### Other conferences and training events of interest

Our friends Empowerment Matters are hosting an IMCA conference on 12 November at the Smart Aston Court Hotel in Derby, entitled 'Interesting Times – developments for IMCAs in practice and law.' For more details and to book, see [here](#).

The charity, Living Well Dying Well, is holding its first annual national conference, 'Doing Death Differently' in London on 7 November 2015. For more details and to book, see [here](#).

Peter Edwards Law have released details of their autumn training courses on matters MCA and Care Act related. The full details of (very well received) courses can be found [here](#).

Our next Newsletter will be out in early October. 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).

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Alex has 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, 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

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



[Neil Allen](#) 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

Annabel appears frequently in the Court of Protection and is instructed on behalf of the Official Solicitor, individuals, local authorities, care homes and health authorities. Her COP practice covers the full range of issues in health and welfare, property and affairs, and medical treatment cases, with particular expertise in international cross-border matters. Annabel also practices in the related fields of human rights and community care. To view full CV click [here](#).



[Anna Bicarregui](#) anna.bicarregui@39essex.com

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click [here](#).



[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](#).

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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](#).



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Jill Stavert is Professor of 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](#).