



Welcome to the April 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal turns the conventional understanding of deprivation of liberty under the MHA on its head; children, consent and deprivation of liberty, changes to inquest requirements in relation to DoLS/Re X orders, and a reminder of the legal aid pitfalls in s.21A applications

(2) In the Property and Affairs Report: new guidance on access to and disclosure of the wills of those lacking capacity, the OPG's good practice guide for professional attorneys and new fixed fees for deputies;

(3) In the Practice and Procedure Report: the Supreme Court pronounces on best interests, available options and case management, a new Senior Judge for the Court of Protection, and updates on case-law relating to funding and HRA damages;

(4) In the Wider Context Report: a new approach to advance care planning and the European Court of Human Rights grapples with Article 12 CRPD;

(5) In the Scotland Report: Scottish powers and English banks, the Scottish OPG cracks down and a review of the second edition of a leading textbook;

And remember, you can find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#). 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

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Annabel Lee  
Anna Bicarregui  
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The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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### Scottish powers and English banks

The editors and the respective Law Societies of the two jurisdictions are regularly made aware of the difficulties encountered by those seeking to make use of Scottish powers of attorney in England and Wales. We are pleased to confirm, though, that with the assistance of the Scottish Public Guardian, confirmation has been obtained that the Cooperative Bank, which had a period of not accepting Scottish powers, is now firmly back “on message.”

This gives us the occasion to remind Scottish attorneys that they are now able to make use (if they encounter difficulties in England and Wales) of a dedicated procedure under the [amended Court of Protection Rules](#) to obtain a declaration that they are acting under a valid “foreign” power. Before making any such application, we strongly suggest that they put the recalcitrant institution (be it public or private) on notice that they will seek their costs of so doing.

### OPG scrutiny of PoA certificates

Scotland’s OPG is tightening up its scrutiny procedures in relation to PoA certificates. Deeds will not be registered if they contain minor typographical errors or inconsistencies in

granter or attorney names, or where section 3 or the signature and date are incomplete. Full details of the changes and the underlying rationale can be found [here](#). Further, and from 3 April 2017, and following guidance issued by the Law Society of Scotland, the OPG will no longer accept a prescribed PoA certificate signed by a trainee solicitor: see further [here](#).

### Book Review: *Mental Health, Incapacity and the Law in Scotland*, Hilary Patrick, 2<sup>nd</sup> edition by Jill Stavert

When I reviewed the 1<sup>st</sup> edition of Hilary Patrick’s “Mental Health, Incapacity and the Law in Scotland” I predicted that, within much of its extended area of coverage, “This book will be the authoritative starting-point for lawyers and non-lawyers alike for some years to come”. I was right. This [2<sup>nd</sup> edition](#), a decade later, is to be welcomed for several principal reasons. It has been thoroughly updated. It displays the same encyclopaedic mastery of a huge area of law, and the same clear exposition – accessible to a wide intended readership. Above all, it answers concerns about the huge gap left when the apparently irreplaceable Hilary Patrick supposedly retired from mental health law in 2011. The irreplaceable has been replaced.

Hilary's decision to invite Professor Jill Stavert to write this 2<sup>nd</sup> edition, and Jill's generous acknowledgement of Hilary's contribution to some parts of the new volume and her "wholesale editing" of the book, confirm that this has been a smooth transition. Jill's own contribution to her chosen subject has been massive, characterised by her founding and leadership of the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University, and the excellent ongoing work of the Centre.

The scope of the 2<sup>nd</sup> edition is substantially the same as of the first, if changes in the meantime are taken into account. A full and authoritative exposition of mental health law, and a somewhat shorter but fully adequate account of the Adults with Incapacity (Scotland) Act 2000, take up about half of the text. These are followed by a multi-dimensional coverage of an impressively wide range of topics. As a generalisation, lawyers will find that topics for which substantial other modern coverage is already available receive relatively brief treatment. Thus the arrival upon the scene of the Adult Support and Protection (Scotland) Act 2007 is covered mainly by reference to Nicola Smith and Nairn Young's "Adult Protection and the Law in Scotland", now also in its 2<sup>nd</sup> edition, a "younger sister" volume from the same publishers. However, for many topics where there is not any other modern coverage, or at least any coordinated coverage such as is offered here, this book as now updated will continue to be authoritative. It also remains multi-dimensional in not only addressing the interactions between different areas of law, but also in that as well as addressing the law topic-by-topic, it approaches its subject-matter from the point of view of

people with dementia, people with learning disabilities, refugees and asylum seekers, children and young people, and carers.

Also to be welcomed is that Jill has, where appropriate, adopted the same collaborative team approach as did Hilary. The team is new, ranging from the highly experienced Nicola Smith to an impressive first venture into authorship at this level by Rebecca McGregor, research assistant at Edinburgh Napier University. Nicola covered financial management, and Rebecca refugees and asylum seekers, as well as providing research assistance. Also recruited from Jill's University was Douglas Maule, to cover consumer rights. May Dunsmuir's unique status as President of the Additional Support Needs Tribunal for Scotland and an in-house convener at the Mental Health Tribunal for Scotland allowed her to contribute on representation at the (Mental Health) Tribunal and tribunal procedure, and to provide input also on children and young people. Katherine Bolt, solicitor and mediator, covered protection against discrimination and respect for diversity. Hilary returned in the role of team member in updating the chapters on patients' rights, consent to treatment and people at risk, as well as in the editing role mentioned above. That such a team has been brought together is tribute to the impressively growing quality of Scotland's leading-edge capability in this whole field. Pride of place must go to Jill's own massive contribution. For a flavour of it, read Chapter 1 – then put the book on a nearby shelf for ready reference, if you can manage to put it down at that point!

It is remarkable that this substantially revised and updated edition is almost exactly the same

length as its predecessor, and that the structure devised by Hilary has stood the test of time and is only minimally changed. Examples of change range from a significant new section on “Human Rights and Community Care” to subtle but significant changes such as “access to justice” in place of “civil rights”, and “financial powers of attorney” in place of the often confusing statutory description “continuing powers of attorney” (the latter having now entered the European vocabulary for any power of attorney, welfare or financial, that continues in force or enters into force in the event of the granter’s incapacity).

The tables in the 1<sup>st</sup> edition were poor, and are much improved in the 2<sup>nd</sup>. Criticisms of the indexing remain: for example, the entry for trusts refers only to paragraph 42.23, not mentioning the principal section on wills and trusts in paragraphs 34.10 – 34.13, the section on “establishing a trust” in paragraph 38.5, the section on discretionary trusts in paragraphs 42.24 – 42.25 and the description of liferents in the last paragraph of 42.26. Beyond that, I have struggled to fulfil a reviewer’s duty to find other blemishes: one is that none of the sections on advocacy, even in the coverage of the Adults with Incapacity (Scotland) Act 2000, mention the specific role allocated under section 3(5A) of that Act. Also worthy of mention might have been the unique limitation upon the responsibilities of attorneys under section 17 of that Act. To counter-balance those criticisms, while reading for review I found an answer that had previously evaded me to a question that had hitherto niggled.

It is significant that this new edition states the law at 31<sup>st</sup> March 2016. That was the closing

date for responses to the Scottish Government Consultation which has led to current major coordinated review of mental health, incapacity and adult protection law, which will in course of time be likely to lead to significant reform. Implementation will be some years ahead. This volume covers the position thoroughly in the meantime.

*Adrian D Ward*

[Note, this review is reproduced from the online version of the Journal of the the Law Society of Scotland by kind permission of the editor]

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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](#).



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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click [here](#).



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Annabel 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](#).



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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](#).

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



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Adrian is a Scottish solicitor, a consultant at 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, Director of the Centre for Mental Health and Incapacity Law, Rights and Policy and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

## Conferences

### Conferences at which editors/contributors are speaking

#### Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity at this conference in Glasgow on 20 April 2017. For more details, and to book, see [here](#).

#### Deprivation of liberty: what does the future hold?

Alex will be speaking at this event on 5 May in Consett, County Durham on 5 May. For more details, and to book, see [here](#).

### Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next Newsletter will be out in early May. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: [marketing@39essex.com](mailto:marketing@39essex.com).

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