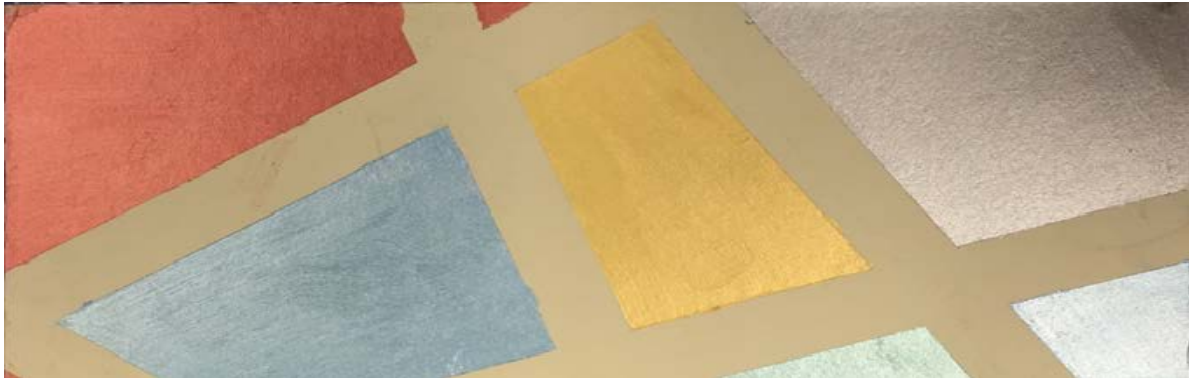




Welcome to the July 2024 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: sexual capacity complexities, wishes and feelings in the balance, and finding the P in a PDOC case;
- (2) In the Property and Affairs Report: deputy bond provider problems and a job opportunity in the Official Solicitor's office;
- (3) In the Practice and Procedure Report: how far can the Court of Protection go to ensure its orders are complied with, and risk taking, best interests and health and welfare deputies;
- (4) In the Mental Health Matters Report: Tier 4 beds (again) and the Mental Health Tribunal and the Parole Board;
- (5) In the Wider Context Report: local authority consent to confinement, the Irish courts continue to grapple with the consequences of the framework, and Strasbourg pronounces on assisted dying;
- (6) In the Scotland Report: exasperation at the pace of the Scottish Government's Mental Health and Capacity Reform Programme.

There is one plug this month, for a [free digital trial](#) of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see [here](#).

Alex trusts that readers will not mind a slight blowing of the trumpet at his having been awarded Outstanding Legal Achievement at the [2024 Modern Law Private Client Awards](#) for his work sharing knowledge about the Mental Capacity Act 2005 (and hence, in significant part, thanks to his fellow editors on this Report), and being appointed Professor of Practice at King's College London from August 2024 (a position which reflects the opportunities given by Chambers to him to moonlight so often away from the day job – for which he is very grateful!).

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the [Mental Capacity Report](#).

Editors

Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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

Contents

AWI reform: will Scottish Government deliver? 2

Adult disability payments: Upper Tribunal decisions 3

A symposium focused on adult capacity: Past Present and Future, and celebrating Adrian Ward’s 80th birthday 5

AWI reform: will Scottish Government deliver?

We undertook to continue to report relevant developments as they come to our notice, when we reported in the [October Report](#) the inclusion of a Bill described as “a first step to update and modernise the Adults with Incapacity (Scotland) Act 2000” in the Programme for Government 2024-2025 announced by First Minister John Swinney on 4th September 2024. In the [September Report](#) we reported on the publication on 25th July 2024 of Scottish Government’s “Adults with Incapacity Amendment Act Consultation”. We followed that with Jill Stavert’s more detailed observations on deprivation of liberty aspects of the consultation in the October Report.

We have nothing of substance on which we may yet report further, but consideration of relevant timescales does point to the relevance of the questions: “will Scottish Government deliver?”; “what will Scottish Government deliver?”; and – lying behind these – “how will Scottish Government deliver?”. The timescales, now, are daunting. We understand that to achieve the promise in the Programme for Government it will be necessary by the beginning of February 2025 for policy work to have been completed, full instructions given to parliamentary draftsmen, their work to be completed, and the Bill to be ready for presentation to the Parliament.

The only existing draft legislation on any aspect of relevant reforms that must now be delivered is the “Draft Adults with Incapacity (Scotland) Bill” in Appendix A to Scottish Law Commission Report No 240 on Adults with Incapacity published in October 2014, 100 months before the deadline which we now have of February 2025. The deadline for responses to the Amendment Act Consultation was 17th October 2024. We understand that a substantial number of responses was received. It will have been a remarkable achievement if Scottish Government was able to review and assess those responses within 14 days of the deadline, so as to take appropriate account of them in addressing the work to be completed by the beginning of February 2025; but even if that was achieved, that will have left just three months (3% of the total time since publication of the Scottish Law Commission draft) for the tasks outlined above to be completed and – with at least minimally adequate opportunity for consultation during that period – a Bill that is at least minimally adequate presented to the Parliament. However, even minimally adequate does not mean a short Bill. With all the straightforward, but now urgent and essential, reforms identified over the years, it will be – as described in the October Report – a “quite massive Bill”.

Fortunately, most of the groundwork to enable such a minimally adequate Bill to be lodged was done some time ago, in the form of the Scottish Law Commission 2014 Report, the Three

Jurisdictions Report by the Essex Autonomy Project in June 2016, responses to relevant Scottish Government consultations in 2016 and 2018, and above all the Report of the Scottish Mental Health Law Review published two years ago on 26th October 2022. Together, these should now speed progress on the essentials for updating, including in relation to the principles in the Adults with Incapacity (Scotland) Act 2000; putting in place an adequately lawful deprivation of liberty regime; addressing questions of how powers of attorney and advance directives (advance choices) would correlate with that regime, including transitional provisions; adequate updating of the guardianship and intervention order provisions of Part 6 of the 2000 Act; and the long list of so-called “technical improvements” to the 2000 Act that have been awaiting attention for some years now.

While we, and no doubt our readers, look forward to what of greater substance we shall be able to report in our December issue, readers should be warned to watch out for further consultations by Scottish Government as they occur, inevitably with short deadlines for responses: do not wait for us to tell you about them, because deadlines may have passed in the meantime!

Adrian D Ward

Adult disability payments: Upper Tribunal decisions

During October 2024 two decisions of the Upper Tribunal were published, both determining appeals from the First Tier Tribunal for Scotland in relation to adult disability payments. This brief note refers to both, as well as to an earlier similar determination by the Upper Tribunal issued in July. Points of interest in relation to general questions of capacity/incapacity arose in all three.

Social Security Scotland v AM

This was an Upper Tribunal decision by Lord Fairley dated 23rd July 2024 and now reported at 2024 SLT (Tr) 165. Social Security Scotland refused AM’s application for adult disability payment on the grounds that AM scored insufficient points on the descriptors set out in Schedule 1 to the Disability Assistance for Working Age People (Scotland) Regulations 2022. AM appealed successfully to the First Tier Tribunal, which found that he had some physical conditions, alcohol addiction issues, and although not diagnosed as having a learning or cognitive disability, had attended a special needs secondary school and struggled with reading and writing. The First Tier Tribunal made findings by reference to various descriptors, in consequence of which the First Tier Tribunal held that he was entitled to adult disability payment.

Social Security Scotland appealed to the Upper Tribunal on the grounds that AM’s difficulties would have required to have arisen from a clinically recognised illness, disease or other health condition in order to qualify for the awards of points. Put briefly, the key issue in the appeal was whether relevant references in the Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2022/54) to a “physical or mental condition or conditions” meant conditions arising from a clinically recognised illness, disease or other health condition. In other words, Social Security Scotland argued for adoption of a medical model of disability, moreover such a model restricted to a clinical diagnosis. Unsurprisingly for anyone aware of modern concepts of disability, Lord Fairley disagreed with that approach:

“[23] The requirement for there to be [a] ‘mental condition’ for these purposes means no more than there must be a physical or mental cause of the relevant effect. In other words, the claimant

must lack the physical or mental power or capability to perform the activity in question. It is not essential that the absence of power or capability should arise from a clinically recognised illness, disease or other health condition."

Social Security Scotland v HK

This was an Upper Tribunal decision by Lord Lake dated 1st October 2024 and now reported at 2024 SLT (Tr) 161. The factual background to this case was a re-determination of HK's ongoing entitlement to adult disability payment upon deterioration in HK's condition. The obligation to carry out a re-determination fell upon Scottish Ministers, upon them becoming aware of a change of circumstances which might result in an alteration to the component or rate of benefit payable, regardless of whether Scottish Ministers received an application (Regulation 48(a) of the 2022 Regulations). HK was dissatisfied with the determination by Social Security Scotland, and appealed to the First Tier Tribunal. Social Security Scotland then appealed to the Upper Tribunal against the finding of the First Tier Tribunal that HK was entitled to increased benefit. The principal point at issue was whether the First Tier Tribunal could determine the entitlement itself on the information before it, or whether its powers were limited to quashing the decision by Social Security Scotland and referring the matter back for them to make a fresh determination. One may or may not be correct to draw an inference that deterioration had continued between the time of the original assessment by Social Security Scotland, and the consideration of the matter by the First Tier Tribunal.

Lord Lake held that the First Tier Tribunal was entitled to proceed as it had done. The purpose of the relevant Regulations was to ensure that the assessment of entitlement remained up to date. That was not dependent on an applicant

taking any steps. It was an obligation on Social Security Scotland. It would be highly artificial and at odds with the apparent intention behind the Regulations for the First Tier Tribunal to decide on a basis which no longer reflected the up-to-date entitlement. The determination by the First Tier Tribunal was one which it had the power to make, and the appeal was refused.

Social Security Scotland v BM

This was an Upper Tribunal decision by Lady Poole dated 14th October 2024 and now reported at 2024 SLT (Tr) 157. In this case, Social Security Scotland was successful in an appeal against a determination by the First Tier Tribunal. The question at issue was the calculation of points for various descriptors, in the manner referred to in the account of the AM case above. The reasons for finding points to be scored by the First Tier Tribunal were that because BM was an undischarged bankrupt he was not permitted to operate his bank account, and his partner did so; and although he had osteoarthritis in his hips and a diagnosis of depression, these considerations did not demonstrate that BM's budgeting skills were limited by a relevant disability. Lady Poole held that the First Tier Tribunal had in these matters made an error of law, and that the error was material because its award of points took BM over the threshold for entitlement to adult disability payment. She allowed the appeal, quashed the decision of the First Tier Tribunal, and remitted the matter to the First Tier Tribunal for re-consideration by a differently constituted Tribunal.

Adrian D Ward

A symposium focused on adult capacity: Past Present and Future, and celebrating Adrian Ward's 80th birthday



On 25th October, we celebrated Adrian Ward's 80th birthday with a symposium on adult capacity in Glasgow, and what a happy, interesting and entertaining day it was, with around 60 people attending, all colleagues and/or friends and family of Adrian from across Scotland and beyond and from all sectors and walks of life.

The programme was designed to generate discussion amongst invitees around the topic of adult capacity law and practice, with speakers being asked, and all excellently delivering on this request, to say a few words on a particular topic before the wider conversation started. It also provided a very apt opportunity to highlight and celebrate Adrian's significant lifetime commitment to this area of law and practice. To mark the occasion the discussion sessions' titles were largely taken from the titles of Adrian's publications.

Jan Killeen and Hilary Patrick ('Scots Law and the Mentally Handicapped and The Power to Act'), both with notable and well-respected experience in policy and law reform, started the day with a fascinating discussion of the chronology and activism leading to the enactment of the Adults with Incapacity (Scotland) Act 2000. Their talk included describing how Adrian as a young solicitor discovered that there was no recognised area of law to specifically cover adult incapacity matters and how the 2000 Act came about as the

result of the dedication of Adrian and a small group of supporters. We were also reminded that the Adults with Incapacity Act was the first piece of ordinary legislation enacted by the Scottish Parliament!

In the second session ('A New View: Adults with Incapacity Legislation') Lynda Towers, formerly a government lawyer and solicitor and now Convenor of the Law Society of Scotland's Mental Health and Disability Sub-Committee (taking over recently from Adrian after his 30+ year stint as convenor), provided an interesting insight into actual and potential legal developments since the enactment of the Adults with Incapacity Act, and how, propelled by human rights developments, this has changed and is changing. She was accompanied by Professor Kees Blankman of Vrije Universiteit in Amsterdam who spoke to Europe's adult capacity legal landscape, and finally, much to everyone's amusement, in jest suggesting that Adrian may well be Dutch on the basis that ice skates bearing the name 'Ward' appear to have historically been made in the Friesland province of the Netherlands. He concluded by presenting Adrian with a pair of the aforementioned ice skates.

The second session was followed by a 'Fireside Chat' session in which Alex Ruck Keene in a brilliantly relaxed but incisive manner encouraged Adrian to talk about his life and interests. Those who had hitherto assumed that Adrian has lived and breathed adult capacity law and nothing else all of his life were disabused of this belief! His enthusiasm and skillset have extended to sporting and musical activity too.

The afternoon started with a session on 'International Protection of Adults' where Alex Ruck Keene discussed cross-border issues with a particular focus on the complex issue of deprivation of liberty. Professor Katja Karjalainen from the University of Lapland pointed out that

different laws and human rights interpretation may be applied to the same person who moves, or is moved, from one country to another causing confusion and inconsistencies in protection.

The last discussion session of the day looked to the future. During 'The Legal Rights of Persons with Disabilities: ECHR, CRPD and beyond' Professor Colin McKay, of the Centre for Mental Health Practice Policy and Law Research at Edinburgh Napier University, discussed how the law should be about actively enabling individuals to live life on our own terms. Professor Wayne Martin, from the University of Essex, asked us three questions, namely: (1) what do we mean by the universality of rights; (2) how do we measure the success of rights realisation; and (3) how do we see the Scottish direction of travel in terms of rights realisation. Lord John Scott KC, who was Chair of the Scottish Mental Health Law Review (2019-2022) immediately followed these speakers saying a few words on the review and also mentioning Adrian's kindly offered, and very much fulfilled, role as an informal 'critical friend' to the review.

The day's proceedings were rounded off by closing words from Sandra McDonald, former Public Guardian for Scotland and now independent adviser and author on adult capacity matters, who was also the overall Chair for the day. Her address included reading a touching message from Adrian's brother David, an Emeritus Professor of Medicine living in the USA, and who, amongst other things, exhorted his brother that at 80 he should consider whether he needs to work 60 hours a week. I am probably not alone in wondering whether Adrian will take his brother's advice! Sandra's conclusion was completed by a moving Vote of Thanks from Adrian himself before a drinks reception and, for many, dinner.

The conversation throughout the day and evening never appeared to cease. The passion

from all there for this area of law and practice and genuine warmth towards, and regard and affection for Adrian and appreciation of his being a massive driving force in the field was very evident.

Thanks go to the Royal Faculty of Procurators in Glasgow for their kind loan of the venue for the day, and to our generous sponsors, Estate Research, 39 Essex Chambers and Policy Hub Scotland. I would also like to acknowledge and thank my fellow symposium 'organising team' members Sandra McDonald, Jill Carson, Kate Fearnley and Alison Hempsey for all their incredibly hard work in bringing this to fruition. The eagle-eyed amongst you will notice that this team is identical to the World Adult Capacity Congress 2022 organising team but minus Adrian who this time, rather than being its chair, was firmly told (once we had ascertained, of course, that he was in agreement with us holding the event) that his role would be that of a 'constitutional monarch' only!

And last, but not at all least, thank you Adrian for being such an inspiration for and mentor to us all, and for your 80th birthday giving us the excuse to hold such an event for this purpose.

Jill Stavert

Editors and Contributors



Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com

Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



Victoria Butler-Cole KC: 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 is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click [here](#).



Neil Allen: neil.allen@39essex.com

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).



Arianna Kelly: Arianna.kelly@39essex.com

Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click [here](#).



Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click [here](#).



Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click [here](#)



Simon Edwards: simon.edwards@39essex.com

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



Adrian Ward: adrian@adward.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

Jill Stavert: j.stavert@napier.ac.uk



Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. 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 the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in December. 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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

clerks@39essex.com • [DX: London/Chancery Lane 298](#) • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

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

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.
39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.
39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.
39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.