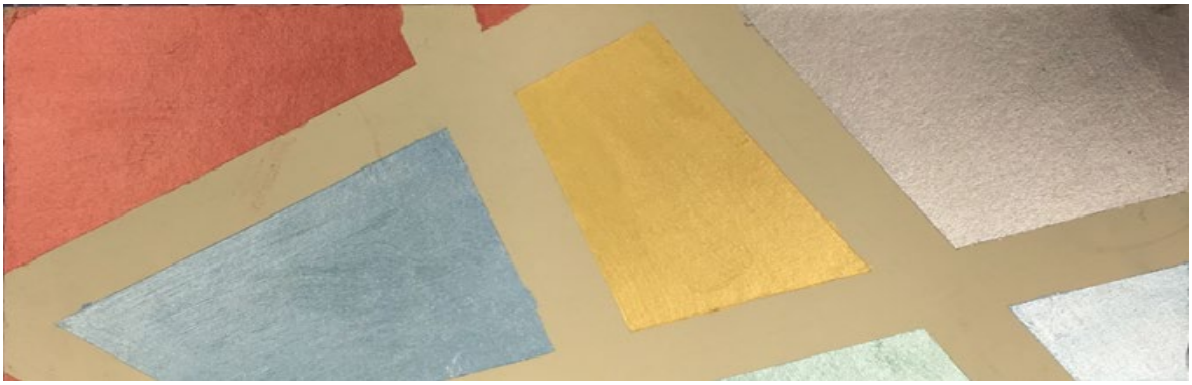

Welcome to the May 2025 Mental Capacity Report. It is our 150th issue, and, to mark this, Tor and Alex have recorded a discussion reflecting on how the report (then the newsletter) came to be back in 2010, and on how the law and practice have evolved since then. The first issue of the newsletter they discuss can be found here.

Highlights:

(1) In the Health, Welfare and Deprivation of Liberty Report: new and updated guidance notes;

(2) In the Practice and Procedure Report: naming clinicians (and other professionals), and cross-border deprivation of liberty;

(3) Section 63 MHA 1983 and diabetes, and the Mental Health Bill progresses to the Commons;

(4) In the Children's Capacity Report: the Court of Appeal explains why local authorities cannot consent to the confinement of children in their care;

(5) In the Wider Context Report: the other party's interest in litigation capacity, how far landlords are supposed to go in hoarding cases, and a new Convention on the rights of older adults on the cards?

(6) In the Scotland Report: AWI reform update and cross-border deprivation of liberty – Scottish reflections what is appealable in the AWI context.

As there were no developments meriting specific reporting in the property and affairs field this month, we do not have a Property and Affairs report.

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.

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 law reform – the latest

Scottish Government has intimated that the First Minister is expected to make an announcement on 6th May. By then this edition of the Report will have gone to press, even if still awaited by subscribers. It is anticipated that the First Minister will substantially advance the next session of the Scottish Government's Programme for Government announcement. Normally the Programme for Government is announced in or around early September, for the remainder of the parliamentary year ahead. Because of the imminence of elections to the Scottish Parliament in 2026, the First Minister will on 6th May 2025 make an announcement which will cover the Scottish Government's policy and legislative ambitions for the year to the elections to the Parliament on 6th May 2026, maximising the time for delivery, before any legislation that has not completed its passage through the Parliament prior to the recess before the election will be lost. While it is entirely for Ministers to decide what to include in the announcement, it may reasonably be anticipated that this would provide the First Minister with the opportunity to offer an update on the promised AWI Amendment Bill.

In advance of the First Minister's announcement, on 2nd May 2025 Maree Todd MSP, Minister for Social Care, Mental Wellbeing and Sport, issued a letter to several relevant consultees and stakeholders indicating that work on the promised AWI Amendment Bill will continue beyond September 2025, with workstreams on Supported Decision Making, Deprivation of Liberty, and Forced Detention and Covert Medication, "as well as assessing each section of the current Act through a continuous improvement lens". The Minister has indicated her "expectation of bringing forward an amendment Bill early in the next parliamentary term". That does indicate that urgently required reforming legislation will not as promised be introduced during the current parliamentary session, which ends when the Parliament goes into recess this summer, nor prior to the 2026 elections, following which the nature of the future Scottish Government will be known.

It is helpful that the Minister acknowledges that "this decision may be disappointing". At the same time she re-affirms her commitment "to modernising the legislation, to reflect international standards on human rights in particular"; and states her belief that further time is required "to get this right for both the vulnerable individuals at the heart of AWI as well as those working to protect and support them".

The Minister cites as reasons for the delay the need to modernise the AWI legislation and "risks relating to European Convention on Human

Rights (ECHR) non-compliance in relation to deprivation of liberty". These are all matters that have been well known, at least since Scottish Law Commission commenced work on its 2015 Report which offered legislation to enable deprivations of liberty to be lawfully authorised, and as regards needs to improve AWI legislation at least since responses were submitted to Scottish Government on that topic in 2016.

On balance, "we are where we are", and in recent issues of this Report we have stressed how very short is the timescale envisaged in the 2024-2025 Programme for Government of introducing legislation before this summer's parliamentary recess. The worst outcome would have been inadequate legislation, ticking just a few boxes, and doing so in a hastily prepared way, but then a lull of indeterminate duration for a further wave of legislation. More information and consideration, and the terms of the forthcoming Programme for Government to be intimate don 6th May, will help form an assessment of the advantages and disadvantages of the course intimated by the Minister. We shall defer making any such assessment at least until the July Report.

Adrian D Ward

Another SGO unfit for recognition

In *Aberdeenshire Council v SF (No.2)*, [2024] EWCOP 10, the Court of Protection found itself unable to accept a Scottish guardianship order ("SGO") for recognition and enforcement, because it was so deficient as to be unlawful, among other defects. Reactions in Scotland were polarised. There were those who apparently did not see that decision coming, sooner or later and in one way or another, whether or not they ought to have done so. Their reaction was shock and dismay. On the other hand, it would appear that most if not all expert practitioners in the AWI field consider that there was nothing unique about this case. All have experience of encountering similar grave deficiencies, typically when dealing with small courts or inexperienced sheriffs.

One has to dismiss any suggestion that the *Aberdeenshire* case attained its notoriety because of some one-off errors by a particular sheriff. Even if they were, they were so fundamental as to be cause for re-examining the operation of Scotland's AWI regime as a whole.

One also hears suggestions that, in the Court of Protection, Scotland's procedures were viewed through an Anglo-centric perspective: that cannot be so, when at the heart of the case was compliance with Hague Convention 35 of 2000 on the International Protection of Adults, reproduced in identical terms, so far as material, in Schedule 3 of the Adults with Incapacity (Scotland) Act 2000 and Schedule 3 of the Mental Capacity Act 2005; and with the requirements of the Human Rights Act 1998. The criticisms arise as much from Scottish requirements as those of England & Wales. The outcome was that an English judge was impelled to refuse recognition and enforcement of an SGO in England.

Actions in response to the *Aberdeenshire* case have also been polarised. Very many sheriffs have evidently studied it and are taking full account of it. While as yet largely happening "behind the scenes", it would appear that major efforts are underway to put Scotland's house in order in relation to all relevant aspects of judicial handling of all AWI proceedings.

On the other hand, the basic message of that case apparently did not "get through" everywhere. One might reasonably have expected that in the short term there would at least be no repetition of anything so fundamentally deficient. Hence there appears to have been across-the-board astonishment and

dismay that on 15th April 2025, following a hearing on 1st April 2025, Mrs Justice Theis DBE, Vice President of the Court of Protection, found herself similarly unable to order recognition and enforcement of an SGO, in the case of *Argyll and Bute Council v RF (by his litigation friend, the Official Solicitor)* [2025] EWCOP 12 (T3); and that the SGO considered in the *Argyll and Bute* case followed upon an application for a guardianship order made on 18th December 2024 and granted on 16th January 2025, apparently in complete disregard of all of the lessons from the decision in the *Aberdeenshire* case, fully reported and discussed in the Scottish legal press and elsewhere several months previously. See for example my three-part article published in May 2024 in Scots Law Times entitled: "Scotland in 2024: a human rights blackspot" (2024 SLT News commencing at 59; see in particular part 3 commencing 2024 SLT News 71, where *Aberdeenshire Council v SF* is considered from page 73 onwards).

As with the *Aberdeenshire* case, the decision in the *Argyll and Bute* case cannot be said to be Anglo-centric. It likewise founds principally upon the provisions of Hague 35 and relevant provisions of the Human Rights Act 1998. In a nutshell, the English court did not suggest that the 2000 Act was defective. In this latest case, however, on the facts narrated in the judgment, the procedure and whole approach adopted by both the local authority and the sheriff were so fundamentally contradictory to the requirements of justice, the fundamental purposes of relevant Scottish legislation, and respect for the basic human rights of persons with disabilities, as to demonstrate the persistence of apparently fundamental deficiencies.

At the time of the hearing before the Court of Protection, *RF* was 64 years old. He was born and brought up in the area of Argyll & Bute Council, which remained responsible for meeting his social and welfare needs. His father and two siblings still reside in that area. An "incapacity report" in December 2024 suggested that he had a cognitive impairment; another such report a week later suggested that he has a learning disability and a personality disorder. It seems that these were the two medical reports required by section 57(3)(a) of the 2000 Act. The judgment narrated that:

> *"About 30 years ago RF was involved in an accident following which it is reported his behaviour became more volatile although medical investigation did not establish any brain injury arising from the accident. The combination of this incident and the loss of a sibling resulted in RF exhibiting severe dysregulated behaviour from a young age."*

One suspects that the sibling may have died as a result of the same accident.

For a narrative of subsequent diagnoses, care and treatment, and proceedings in both countries prior to the SGO made on 16th January 2025, see Theis J's judgment. The 2025 SGO appointed the chief social work officer as welfare guardian and conferred the following powers:

(a) *To decide where RF should live, to require him to live at that location, to convey him to that location and to return him to that location in the event of him absenting himself therefrom.*

(b) *To decide and approve the appropriate level of care and supervision to be provided to RF to safeguard his health and wellbeing.*

(c) *To decide whether RF should be permitted to participate in holiday and cultural and social events and if so the nature and extent thereof.*

> (d) *To authorise, where necessary and appropriate for the safety and protection of RF and others, any physical restraint including environmental restraint, by care providers who have completed the necessary restraint training provided it complies with all aspects of good healthcare and social care practice.*

One would suggest that "for the safety and protection of … others" in power (d) was incompetent under the jurisdiction of the 2000 Act, the purpose of which, in terms of the long title, was "*to make provision as to the … personal welfare of adults who are incapable by reason of mental disorder or inability to communicate*", and for connected purposes. One would suggest that issues of risks to the safety of others are matters for mental health legislation.

It appears to have been agreed by all participating parties that *RF* lacked capacity to conduct the proceedings and to make decisions about his residence and care and support; nor was there any dispute that the court might not have had reason to believe that.

Points to note from the narrative in the judgment indicate that although in previous proceedings *RF* had been offered an independent advocate "to present his views" at any stage of that process, and had declined, this was not offered in relation to the 2025 proceedings. At no point was he asked for his views about the prospect of a guardianship order being sought, or that the chief social work officer should be guardian. It is narrated that he wanted to return to Scotland, and also to keep his existing care manager. Remarkably, the local authority mental health officer ("MHO") visited *RF* "in early December 2024" (one suspects for the purpose of preparing the MHO report), and "*did not ask him about Guardianship as he [the MHO] considered asking about that would cause unnecessary distress and agitation for RF*". That was surely a remarkably inappropriate reason for concealing from *RF* the nature of the proceedings to be taken against him, quite apart from the fact that it is difficult to envisage how any court could have complied with section 1(4)(a) of the 2000 Act without knowing his "wishes and feelings" about what was proposed.

It is also remarkable that the local authority, at a case conference in October 2024, seems to have planned for the application on a basis that supplanted the function of the court in presupposing what might have been the outcome if relevant considerations and information had been put to the court, and on that basis deciding what should and should not be done and reported to the court. Likewise there was evidence about what the local authority itself would have done by way of review upon granting of the SGO, rather than what should have been reported to the court to enable the court to keep the deprivation of liberty under review; and evidence about the support plan which appeared not to have been updated since March 2024, with no mechanism for review to consider whether the restrictions on *RF*'s liberty, including 2:1 support at all times, remained necessary and proportionate; nor for *RF* to have any independent support or representation as part of any review.

Following a helpful review of both Strasbourg and English jurisprudence, and the submissions of the parties, Theis J described her task as follows:

> *"The role of the court in this application is to consider, by way of a limited review in each case where an application for recognition and enforcement is made whether (1) the process whereby the order in question was made, and (2) the effect of that order, afforded sufficient protection for the EHCR rights of the individual who is the subject of the order."*

With reference to the three potential grounds for disapplication under Hague 35, she considered the issues of lawfulness, natural justice and public policy in relation to the SGO; the same considerations as led to the decision in the *Aberdeenshire* case.

On lawfulness, she confirmed that the parties were agreed that section 6 of the Human Rights Act 1998 applied, and the court could not act in a way that is incompatible with a Convention right. One might add, though she did not make this comment, that this requirement of course applied also to the decision of the Scottish court in granting the order. She commented that due to the nature of the 2025 SGO, and in particular the provisions in it regarding the deprivation of *RF*'s liberty, Articles 5, 6 and 8 of the European Convention required careful consideration. She pointed out, by reference to the jurisprudence of the Strasbourg Court, that while Article 8 contains no explicit procedural requirements, the decision-making process involved must be fair and such as to ensure due respect for the interests safeguarded by Article 8. On lawfulness she concluded, after discussion, that:

> *"RF was not joined as a party to the application, no independent advocate or safeguarder was appointed to represent him, despite the draconian nature of the orders being sought. RF depended on third parties (a combination of family members, social workers and clinicians) to ensure the Sheriff court had all the relevant information about his circumstances and his views. This does not, in my judgment, sit easily with the requirements of Article 5 (1) for an adult who is being deprived of his liberty to be afforded sufficient effective opportunity to be heard in the course of those proceedings. He did not have independent assistance to have effective access to the court and the opportunity of being heard. It remains unclear why the routes that are available to achieve this were not taken, such as through the involvement of an independent advocate or appointing a safeguarder."*

She continued by stating that in her judgment the steps taken by the MHO were:

> *"insufficient to discharge this obligation in the context of the order being applied for, with the powers it contained and for the period of time being sought. During his single visit in early December 2024 [the MHO] did not ask RF about the Guardianship application and RF was served with the application after this visit. There is no evidence of any further attempts to seek RF's views about the application after that (other than the brief reference to RF's reaction when served with the application), nor further consider the involvement of an independent advocate, nor other opportunity for RF to be represented. In those circumstances it is difficult to conclude that RF was given an effective opportunity to be heard on the application, which may require independent representation bearing in mind his circumstances and presentation. As a consequence, RF's Article 5(1) rights were not upheld. There was an absence of an effective opportunity for RF to be heard in the proceedings in which the 2025 Guardianship order was made and, as a result, was unlawful under s6(1) HRA 1998.*

On natural justice, she concluded that:

> *"I am satisfied that this case was not urgent, as the previous order had lapsed over six months earlier. RF was not given an effective opportunity to be heard and that omission amounted to a breach of natural justice."*

On public policy, she again pointed out that section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. She concluded that:

> *"The right under Article 5(4) for a review was determined in Winterwerp [Winterwerp v The Netherlands (1979) 2 EHRR 387] at [55] to require a review of lawfulness to be available at reasonable intervals. The 2025 Guardianship order made in RF's case was for three years. There is no mechanism in that order for reviews. Mr Ruck Keene draws the court's attention to the reference in [the MHO]'s report dated 18 December 2024 to the reviews of RF's position that would be conducted stating in the additional note he submitted he is 'due to review the order 12 weeks after it was made; and again at 6 months'. There is no evidence that has taken place. The support plan in the court bundle states it was created on 7 December 2024 but the next review date is six months prior to that in June 2024, and the contents suggest that it has not been amended since March 2024. The support plan does not contain any provision for a review to consider whether the ongoing restrictions on RF's liberty authorised by the 2025 Guardianship order remain necessary and proportionate or for RF to have any independent support and representation as part of that review."*

She rejected submissions that *RF* had the ability to apply to the court under section 71(1) of the 2000 Act, or that *RF* (or someone on his behalf) could raise his case with the Mental Welfare Commission. That did not meet the rights protected by Article 5(4):

> *"In my judgment RF's Article 5 rights would be 'theoretical and illusory' not 'practical and effective'. There was no mechanism in place to give practical effect to those provisions for RF bearing in mind the basis for the proceedings regarding RF's mental capacity and the lack of any effective review process. The absence of this mechanism, in the context of the extent of the powers given in the order to deprive RF of his liberty, the length of time the order is for, the likelihood of a possibility of a move back to Scotland, RF's inability to trigger a review himself and the absence of any representation to do so on his behalf for three years without a structure for review that RF is able to access is, in my judgment, beyond a period that could be considered to be reasonable. This is in the context of the maximum one year period in the MCA 2005 for the authorisation of a deprivation of liberty pursuant to Sch A1, para 29(1)."*

No party to the proceedings had suggested that if grounds for non-recognition were held by the court to be established, the court nevertheless could exercise a discretion and recognise the order anyway. On the basis that, in addition to being unlawful, the 2025 SGO was made in breach of natural justice and that recognition of it would be manifestly contrary to public policy, she concluded that she should exercise her discretion to refuse recognition of the 2025 order.

It is perhaps relevant to observe that, as with the *Aberdeenshire* case, it would appear that the Court of Protection had only the terms of the guardianship order itself as to the basis on which the sheriff (in each case) decided that it was appropriate to issue the order. At various times in these Reports, where I have criticised decisions for apparent deficiencies such as failure to comply fully with section 1 principles, I have subsequently learned that there had at least been some attempt to do so. That applies even to cases where written judgments have been issued, but they have failed to narrate such steps. It can reasonably be asserted that when matters

such as the liberty of an adult citizen, in terms of Article 5 of the European Convention, is at risk, it is plainly inappropriate that a judgment narrating all the steps taken by the sheriff should not be available. One might reasonably anticipate that in due course the approach of the judiciary will be that on human rights and other grounds such judgments must always be issued in AWI cases, apart – exceptionally – from any occasional situations where there might be no need to do so. Moreover, a requirement to record in writing that all necessary steps have been taken, and all necessary issues addressed, not only provides clarity to which those with an interest in particular proceedings are entitled to receive. Across several cases, it reaffirms the need for such steps to be taken, constantly reinforces the need to take such steps, and provides public reassurance that they are being taken. Such a requirement also helps to ensure that in individual cases necessary steps are taken, with clear reasoning for the outcome of doing so.

The decision in the Court of Protection in the *Argyll & Bute* case demonstrates that even after the *Aberdeenshire* case fundamentally deficient decisions, to the extent that they are unlawful, can still be made and in at least the *Argyll & Bute* case have been made. That is a systemic failure. It is a unique characteristic of the AWI jurisdiction, that it is an inquisitorial rather than adversarial jurisdiction: the sheriff must comply with the section 1 principles in relation to every order, regardless of what may be averred, produced or pled. To that extent it is fundamentally more different from civil or criminal jurisdictions than they are from each other. It is unfortunate that in both cases the sheriffs apparently received no necessary assistance from solicitors acting. However, there can be no expectation that sheriffs will receive any such guidance in complying with the obligation upon them, and the lack of such guidance does not remove the obligation of sheriffs to comply. The principal victims of unfairness in consequence of such miscarriages of justice are of course the adults affected. In these two cases, one cannot escape the impression that "the system" has been unfair to the two sheriffs involved, given that the recommendation by Scottish Law Commission in 1995 to allocate the adults with incapacity jurisdiction to sheriffs was predicated upon it being dealt with by suitably specialised sheriffs. That is happening in practice in a number of larger courts. The challenge to "the system" is to ensure that it happens *de facto* in all cases, regardless of the size of the court and the circumstances in which applications under the 2000 Act might be allocated to particular sheriffs.

I have opted not to name the sheriffs who granted the SGOs in each of these cases.

Adrian D Ward

Assisted Dying for Terminally Ill Adults (Scotland) Bill

The Scottish Parliament's Health, Social Care and Sport Committee's Stage 1 Report on the Bill was published on 30th April 2025, with the Stage 1 debate and vote on the Bill anticipated for 13th May 2025.

Jill Stavert

Scottish Commission for People with Learning Disabilities (SCLD)

The SCLD has published a report on *Legislative, cultural and practice perspectives informing Supported Decision Making in Scotland*, which is also available in full and easy read formats. It highlights that supported decision-making is crucial for people with learning disabilities to feel more independent and empowered. However, it also acknowledges that implementing effective supported decision-making may require changes

in the law, practice and societal attitudes towards people with learning disabilities as a society.

Jill Stavert

Centre for Mental Health Practice Policy and Law Research (Edinburgh Napier University) updates

1. Webinar series on Restraint and Restrictive practices

The Centre is holding a series of webinars on Restraint and Restrictive Practice in response to calls for clearer and more consistent guidance for, and avoiding, its use.

The first webinar on restraint and restrictive practices relating to children and young persons across all settings was held on 29th April, and there are two more in the series:

15th May 2025: Restraint and Restrictive Practice (Adults).

29th May 2025: Restraint and Restrictive Practice: Moving Forward

All events are free to attend but you must reserve a place via Entbrite by clicking on the links above.

2. CPD modules available

The Centre is currently offering three CPD modules on mental health and capacity law (and related rights-based approaches) and related practice:

1. Introduction to mental health and capacity law and related human rights
2. Capacity and Supported Decision-Making
3. Mental and physical care and treatment and consent

For details about, and to register for, the courses follow the links above.

Jill Stavert

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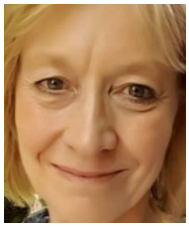

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Conferences

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

Alex also does 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.

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 June. 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.

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