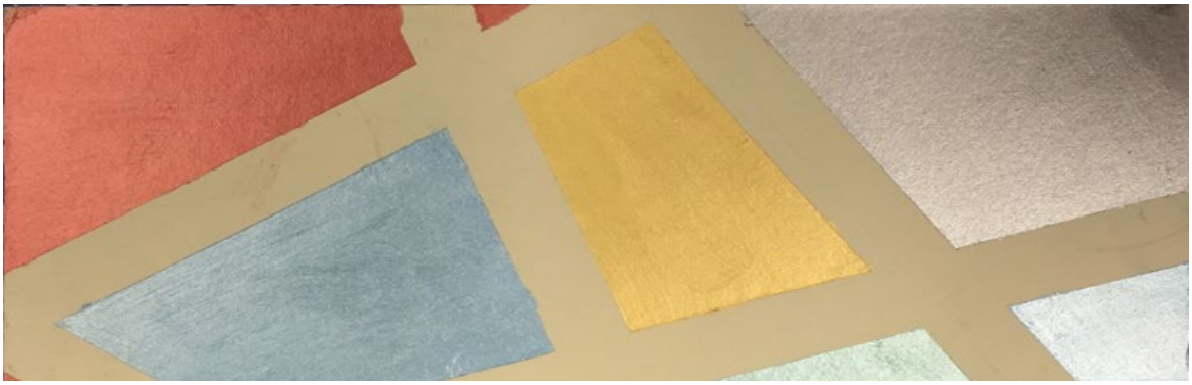

Welcome to the October 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: time-specificity of capacity (again), a Welsh primer on key caselaw and urban myths around s.4B MCA 2005;

(2) In the Property and Affairs Report: two guest articles from new members of the Court of Protection on attorney elephant traps;

(3) In the Practice and Procedure Report: the purpose of transparency and the length of restrictions, and the contempt consequences of being found to have capacity;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the CRPD and the United Kingdom in a stand-off;

(5) In the Children's Capacity Report: the Law Commission's Disabled Children's Social Care report and improving the outcomes of children in complex situations.

(6) In the Scotland Report: an update on AWI reform, and forthcoming European cross-border Regulation.

We do not have a Wider Context Report this month, but the progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page here.

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 reform: "Better six years late …?"

In the June Report we recorded the widespread outrage at the mixed messages from Scottish Government regarding long-overdue and now urgently-required AWI reform. Nevertheless, our heading for that item "AWI reform into the long grass – but still rolling" has proved to be appropriate. The process of AWI reform is indeed now rolling forward, but reactions continue to be ambivalent. On the positive side, the massive and carefully constructed way in which a programme of improvement and reform is now being rolled forward would probably have received a broad and unqualified welcome if it had happened when it ought to have happened, namely following upon the announcement of the establishment of the Scottish Mental Health Law Review (the "Scott Review") by the then Minister for Mental Health on 19th March 2019. That announcement included the following clear undertaking:

> *"At the same time as the review takes place, we will complete the work we have started on reforms to guardianships, including work on restrictions to a person's liberty, creation of a short term placement and amendments to power of attorney legislation so that these are ready when the review is complete."*

The significant downside is that for such a comprehensive and generally admirable process to begin only now serves to emphasise the point, put bluntly, that for the six years and more since 19th March 2019 Scottish Government did not keep its word. There were appearances of activity, with tediously lengthy consultation processes which generally alienated those who had most to contribute, by making unreasonable demands upon scarce professional and other time. Those processes meandered along for lengthy periods towards inconclusive endings, which now appear to have generated nothing of significant value for the process at last underway. To that extent, what has now been revealed cannot be expected to have dissipated altogether the outrage caused by the First Minister's statement on 6th May 2025, which we reported in June. On the other hand, for those who have the generosity to forgive – if not forget – that six years' delay, the moves at last taking place deserve a welcome, albeit a qualified one.

Positive is the reference to "improvement and reform". Those of us who have consistently pressed the case for reform have at the same time been confronted with the extent to which, 25 years after its enactment, even the basic principles in section 1 of the Adults with Incapacity (Scotland) Act 2000 are often disregarded, and particular provisions of the Act misunderstood and misapplied. One exemplification has been the encapsulation "there is no such thing as an AWI" for the excellent work done by Mental Welfare Commission and Health Education Scotland towards addressing the widespread issues extending across those delivering health and

social care. It refers to the use of "there is an AWI in place", as treating certificates under section 47 of the 2000 Act as taking us back to the complete incapacitation of the Mental Health and Lunacy (Scotland) Act 1913, and as authorising any form of non-consensual intervention. One could equally point to the massive recent upgearing in judicial training in response to the many cases which we have reported, up to and including the September Report, where the courts have failed to implement their obligation to apply (and to be seen to apply) the requirements of the section 1 principles, and to recognise that when they effect or authorise interventions they are exercising an inquisitorial, not adversarial, jurisdiction, in which they must comply with the principles regardless of what is put before them by applicants or others.

We in Scotland are not alone in experiencing what are termed "implementation gaps". They featured significantly in the World Congress on Adult Support and Care in August 2024. One can reasonably assert that the general level of understanding of the 2000 Act is now less than it was in the years immediately following enactment. One could also reasonably link that to the fact that the implementation steering group, covering a wide range of stakeholder interest and overseeing in an advisory capacity all aspects of implementation, continued only until the needs for adjustment, addressed in the Adult Support and Protection (Scotland) Act 2007, had been identified. Any reforming legislation, anywhere, represents a task less than half done by the time that it is enacted. A function similar to that of the implementation steering group established a quarter of a century ago will be necessary, and will require to be sustained.

One has to agree that much can be achieved by improving practice now, even without law reform; but there will require to be continuity through to helping to shape reformed legislation, and then ensuring its proper implementation. If the human rights-based arguments are not persuasive enough for government, the economic imperatives must surely be so. One has to suggest that the massive consequential costs in seriously inefficient demands upon skilled time across the professions is unsustainable. Scotland simply cannot afford not to reduce that drain upon the public purse by investing adequately in needs such as the recruitment, training and retention of at least twice the mental health officer capacity as at present; the ending of the discriminatory practices of Scottish Legal Aid Board highlighted in the September Report, in order to reverse the major reduction in adequate legal support and ensure that applications and other proceedings under the 2000 Act are appropriately prepared and processed; and sufficient support for court processes, to ensure at least the same speed and continuity of proceedings, through to disposal, as is generally the aim for criminal processes – recognising that AWI processes can have an equal or greater impact on individual rights than criminal law processes, with the significant difference that there is no question of fault or alleged fault on the part of those to whom AWI processes are applied (subject only to use of guardianship as a criminal justice disposal).

As to the substance of the process now underway, the Expert Working Group ("EWG") has already met, and its monthly meetings from now on are already scheduled. We intend to provide information on the membership and remit of that group in the November Report. The group is an advisory group, with no decision-making powers, but it will make recommendations to the Ministerial-led Oversight Group ("MOG"), which has also met already, with its next meeting due in December. It is evident in the meantime that the EWG will have a substantial role in shaping, by its recommendations, the work of the

workstreams, now extended to 12 from the 10 listed in the June Report. Again, we intend to report more fully on these, with comments as appropriate, in the November Report.

Overall, many readers may remain dubious. What is missing from the written information so far available is any clear target date for introduction of legislation. We nevertheless hope to be able to mitigate that with the further information which I personally expect to be able to report both from the discussions with representatives of government within the EWG, and also the clearly committed personal engagement in the reform process of Tom Arthur MSP, Minister for Social Care and Mental Wellbeing and Sport, not only in his personal leadership of the work of the MOG, but – for example – in his invitation to me to meet him in-person and one-to-one. The meeting has now taken place. Subject to necessary clearance, I hope to be able to share the outcome in the November Report. For management reasons the deadline for this October Report had to be brought forward, allowing insufficient time to incorporate in this Report all that I now hope to cover in the November Report.

Adrian D Ward

Cross-border practice

All AWI practitioners are likely to be aware of the need for well-informed competence in cross-border matters. Powers of attorney, and guardianship and intervention orders, may address situations where cross-border aspects are known. Even where they are not known, they may arise. Clients' needs may include advice seeking clarity in urgent situations. A significant and increasing proportion of adults who have impairments of capacity, or who may be vulnerable to such impairments, move across borders, temporarily or permanently, or have interests across borders.

Cross-border issues divide into incoming and outgoing, referring to measures from other countries which are potentially operable here, or our own measures crossing borders in the other direction. An increasing number of European states are joining Scotland in having ratified Hague Convention No 35 of 2000 on the International Protection of Adults. Ratification by all European Union states is in the pipeline. The Hague Convention provides clarity as to matters of jurisdiction, recognition, enforcement, cross-border certification, and judicial cooperation.

Disappointingly, Scotland remains the only jurisdiction within the United Kingdom in respect of which the Hague Convention has been ratified. A step forward was the new Judicial Protocol on which we reported in the June 2025 Report. Even more disappointing is that cross-border dealings remain difficult in practice, whatever might be the position in theory.

Against this existing background, it is strongly to be recommended that practitioners be aware of the forthcoming European Union Regulation "on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults". The current draft is available here. This proposal has significance in Scotland for three reasons. Firstly, its terms are likely to dominate future cross-border dealings with EU states. Secondly, non-EU European states are paying close attention to the proposed Regulation, and once it is in force it may have relevance in relation to them. The situation of European states not within the EU is very much "on the radar" of the European Commission, and was one of the topics addressed at a major international conference on the proposed Regulation in Milan on 17th and 18th September 2022 (I record an interest in that I was an invited speaker with the explicit role of offering a viewpoint on the Regulation from outside the European Union).

Thirdly, there ought not be significant difficulties and uncertainties cross-border within the United Kingdom, but practitioners frequently encounter them. Some aspects of the proposed regime within the EU could beneficially be applied within the UK. Put conversely, it would be absurd if the UK could not at last "put its own house in order" at least to the standard likely to be achieved within the EU. As regards the EU proposal, it is worth quoting the first sentence of the Explanatory Memorandum:

> *"The EU aims to create, maintain and develop an area of freedom, security and justice in which the free movement of persons, access to justice and the full respect of fundamental rights are ensured."*

As regards the Hague Convention, the Explanatory Memorandum to the EU proposal narrates that the Hague Convention "*is unanimously considered as an efficient private international law instrument that is fit for purpose at global level*". It narrates that ratification of the Hague Convention by EU Member States is essential, and presses the case for all EU states to ratify. The proposed EU Regulation makes direct reference to the corresponding provisions of the Hague Convention where appropriate. The proposal for the Regulation "*builds on the [Hague] Convention to further simplify its rules and improve efficiency in cooperation between Member States [of the EU]*".

One has to read significantly further at the link quoted above, including through 69 Recitals, to reach the actual proposed text of the Regulation. It is clearly and effectively drafted. It retains the terminology of "measure" and "power of representation" in the Hague Convention. The provisions for recognition are robust:

> *"A measure taken by the authorities of a Member State shall be recognised in the other Member States without any special procedure being required" (section 1, Article 9.1).*

Grounds for refusal of recognition are limited and clearcut, substantially mirroring the Hague Convention. The EU already has the concept of an "authentic instrument". These are provided for in Article 16.1:

> *"An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy in the Member State concerned".*

At least that standard should be provided for within the UK.

The provisions of Chapter 6, section 1, on Central Authorities are important. The Commission appeared to be receptive to my suggestion that states be encouraged to have a single Central Authority for both EU and Hague Convention purposes, as it would be potentially confusing to have separate Central Authorities for each. Note was also taken of the suggestion that in practical operation it could be valuable for persons with an interest to have direct access to a Central Authority in another state, rather than having always to go through respective Central Authorities.

Of particular importance in practical terms will be the provisions for certificates of representation, and concerning registration. Once the Regulation has been finalised, practitioners would be well advised to note the provisions regarding the "European certificate of representation" and the actual style of certificate appended. In practical terms, in cross-border

situations it is always wise to seek competent advice from the anticipated receiving jurisdiction, rather than trying to "navigate blindly" through what might be required. It might well enhance practical operability to offer to obtain and provide a certificate in the EU form, albeit from outside the EU. A further worthwhile step would be, at UK level or failing that at Scottish level, to seek to negotiate an agreement with the EU that certificates provided from the UK or Scotland, as the case may be, could be afforded the same recognition as certificates from within the EU. That would involve applying the EU standards to the issue of certificates, but that would be an advantage rather than a burden. Logically, the same arrangements could be applied cross-border within the UK.

Also worth noting, in this short and selective review of some salient points, are the provisions of Chapter VIII on the Establishment and Interconnection of Protection Registers. The background here is that I was one of a five-person team asked by European Law Institute ("ELI") to respond on behalf of ELI to earlier consultation by the European Commission on this topic. I pointed out the importance of access to information from registers, including cross-border. ELI's proposal was for a centralised register, which overall would be likely to be more cost-effective for each state than operating its own registers and interconnecting with others, and for non-EU states to be able to opt into that system. That was ambitious, but did lead to the existing proposals on establishment and interconnection of registers. Some states do not yet have effective registers at all. One gains the impression that none yet has registration systems, including real-time access to relevant data, along the lines that are being progressively implemented here in Scotland. Nevertheless, while the proposed Regulation as it stands does not contain opt-in provisions, that is something that it would be worth seeking to achieve. Even the question of direct access by persons having an interest still requires to be developed.

There would of course require to be clear recognition by practitioners that cross-border dealings mean accessing another legal system in its entirety, not simply assuming that one is dealing with "like for like". We have an obvious example within the UK. Scottish powers of attorney may be registered at any time after they have been granted, and before any of their provisions become operable. English powers of attorney may only be registered upon evidence of impairment of capabilities such as to trigger the need for operation.

Adrian D Ward

Urgent AWI Practice Update: An RFPG Half-Day Conference

Adrian is speaking at this conference in Glasgow on 8 October organised by the Royal Faculty of Procurators in Glasgow. For more information, see here.

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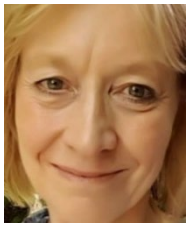

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Conferences

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 November 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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