JUDICIAL TRAINING: ACCESS TO JUSTICE FOR PEOPLE WITH DISABILITIES

A preliminary paper
for
JUDICIAL INSTITUTE
by
Adrian D Ward MBE LL.B
and
Polona Curk, Ph.D, MA, B.Sc

INTRODUCTION

The purpose of this paper, and of the recommendations with which it concludes, is to assist the judiciary in its primary duty to ensure that justice is done, to a standard not constrained by lack of the assistance which can be made available in the ways suggested in those recommendations.

In 2009 the *United Nations Convention on the Rights of Persons with Disabilities* ("CRPD") and the *Optional Protocol* to CRPD ("the Protocol") were ratified by the United Kingdom Government on behalf of all jurisdictions in the United Kingdom. Article 13 of CRPD is in the following terms:

> "***Article 13 – Access to justice***
>
> *1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.*
>
> *2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.*"

In our submission, and for reasons developed in this paper, the measures which we recommend to implement Article 13 will require implementation in daily judicial practice, and will enhance the standard of the mainstream work of the judiciary. They are not matters of limited application when particular circumstances are drawn to the attention of a court. Indeed, the potential for deficit in the quality of justice delivered is greatest where relevant circumstances are not drawn to the attention of a court, particularly where a person at risk of danger or disadvantage is unable, or not enabled, to alert the court, or to tell anyone else who informs the court. The final research question at the end of Chapter 4 of this paper specifically addresses the role of the judiciary.

The reference in Article 13.2 to "those working in the field of administration of justice" certainly includes the judiciary (though equally certainly extends further, and well beyond the example given of "police and

prison staff"). There will be obvious advantages in achieving a degree of consistency in the training of different groups, but it makes sense to start with the judiciary, and this paper results from a request from the Judicial Institute for Scotland to review the existing *Equal Treatment Bench Book* ("the Bench Book") in the light of the training obligation under CRPD Article 13.2.

What should be the objective and content of "appropriate training"?

Article 13.2 is explicit as to the objective. It is to help ensure effective access to justice for persons with disabilities. What is "effective access to justice"? The answer is outlined with apparent simplicity in Article 13.1. Such access must be "on an equal basis with others". It must facilitate the effective role of persons with disabilities as direct and indirect participants in all legal proceedings, including at investigative and other preliminary stages. That includes participation as witnesses. The ways in which such effective participation is achieved must include the provision of procedural and age-appropriate accommodations. As elsewhere in CRPD, "including" is used carefully. It does not exclude other methods which may be necessary to achieve compliance.

Any apparent simplicity in Article 13 is deceptive, for two reasons.

Firstly, individual provisions of CRPD – including Article 13 – require to be understood in the context of the provisions of CRPD as a whole, and an understanding of them. Secondly, the purpose of training in terms of Article 13.2 is to help ensure compliance with Article 13.1. That requires an assessment of the extent to which existing relevant provisions in law, procedures, practice and available guidance are compliant with CRPD. To the extent that they are not, also required is an assessment of what should be done to achieve compliance.

The general issue of CRPD compliance in these ways should be addressed before the question of content of "appropriate training" can be fully determined. Learner drivers will not achieve driving test standard if the skills imparted to them are relevant only to driving a defective vehicle. The vehicle must be brought up to required standard. The skills imparted must be appropriate to a vehicle of that standard. Likewise for judicial training, the content must be appropriate to a context in which compliance with Article 13.1 is achievable.

One aspect of appropriate training will be a full understanding of Article 13 in its context. This paper aims to assist towards providing the content of that component. Beyond that, this paper assesses the suitability of the Bench Book as a possible component of such training. It also seeks to identify ways in which, to achieve CRPD compliance, it would seem necessary to review aspects of existing relevant provisions in law, procedures and practice. It concludes with recommendations.

As to the context of Article 13 within CRPD, the preamble to CRPD assists understanding of the purpose of CRPD, and thus achieving a teleological interpretation of its provisions. Articles 1 – 5 (the "General Articles") are of general application, and again relevant to the interpretation of the specific provisions which follow. Those specific provisions are largely inter-dependent. In Chapter 1, this paper reviews the context to Article 13 provided by the General Articles, and by other selected relevant provisions of CRPD.

CRPD itself also requires to be construed in the broader context of other international obligations, notably those arising from the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECHR") and relevant legislation (including, notably, the Equality Act 2010 and the Adults with

Incapacity (Scotland) Act 2000 ("AWI 2000")). ECHR is considered in Chapter 2 of this paper, and AWI 2000 in Chapter 3.

Unlike ECHR and relevant legislation, CRPD does not have the force of law[1] but (a) it is relevant to interpretation of our domestic law, under the principle favouring interpretations which are consistent with international obligations, (b) the Protocol provides a mechanism for complaints of violation of the requirements of CRPD to be taken to the *UN Committee on the Rights of Persons with Disabilities* ("UN Committee"), established under CRPD Article 34, and (c) under CRPD Article 35 the UK has a responsibility to report regularly to the UN Committee on measures undertaken to fulfil its obligations under CRPD, and under CRPD Article 36 the UN Committee is required regularly to review UK progress towards CRPD compliance, and to offer "suggestions and general recommendations" for realising the aims of CRPD. The first review by the UN Committee of UK progress towards compliance took place in 2017. Compliance with Article 13.2 was not explicitly addressed in the course of that review, but it is to be expected that it will require to be addressed in future reports and reviews.

Note that the categorisations "General Articles" and "Particular Articles" (see "Definitions and Abbreviations in this Paper" below) are selective, and do not cover all of the Articles of CRPD. Articles 6, 7 and 8 address respectively women with disabilities, children with disabilities, and awareness raising. They are followed by the Particular Articles, namely Articles 9 – 29. The provisions of the remaining Articles 31 – 50 inclusive cover, but are not limited to, statistics and data collection, international cooperation, national implementation and monitoring, and the UN Committee and various aspects of its role and its interaction with member states. We have not addressed in this preliminary paper particular matters relevant to women and children with disabilities. Our coverage of people with disabilities (and other vulnerabilities) applies equally to men and women. While adults with disabilities should absolutely never be treated as "big children", there is a degree of overlap between adults and children in the matters considered in this paper.

The Bench Book is a valuable resource, so far as it goes. Nothing in this paper should be read as detracting from that value. The Bench Book addresses a range of issues that require to be considered in order to achieve equal treatment in the administration of justice. Persons with disabilities are considered in Chapter 9 of the Bench Book. Such persons may, and not infrequently do, also come within categories addressed in the other chapters of the Bench Book. However, the most significant outcome of review of the Bench Book is the conclusion reached in section 4.12 of this paper, namely that the Bench Book rather appears to contradict its title. It appears not so much to promote equal treatment, as to attempt to mitigate unequal treatment, sometimes in ways with potentially discriminatory effect. The same applies to the *Equal Treatment Bench Book* published by the Judicial College (for England & Wales, the "*E & W Bench Book*"), which was substantially updated in February 2018. The underlying approach of both the (Scottish) Bench Book and the E & W Bench Book requires fundamental reorientation in order to achieve compliance with contemporary human rights standards.

It is also notable that the Bench Book (a) does not refer to CRPD, (b) contains valuable guidance on particular issues but does not address the consequences of disability holistically, and (c) by and large takes existing law and procedures as a "given", and thus as creating a regime into which persons with disabilities require to be fitted as best as can be achieved, rather than addressing the extent to which existing law

[1] The contrary is asserted, incorrectly, in the E & W Bench Book (see "Definitions and Abbreviations" below), Appendix A-12, para 8.

and/or procedures may require adjustment in order to achieve compliance with CRPD. These considerations are addressed in this paper. The Bench Book itself is reviewed in Chapter 4 of this paper.

Also reviewed, briefly, in Chapter 4 are the provisions regarding "vulnerable witnesses" and "vulnerable persons" in (or introduced by) the Criminal Procedure (Scotland) Act 1995, the Vulnerable Witnesses (Scotland) Act 2004, the Victims and Witnesses (Scotland) Act 2014, and proposed amending legislation currently before the Scottish Parliament. We suggest that there are some unhelpful limitations in relevant provisions of that legislation. It is not the purpose of this paper to suggest subjects for law reform. Such limitations can be made good by appropriate good practice; and in our view must be addressed at least at the level of guidance and resulting practice in order to achieve compliance with CRPD.

The final report of the Criminal Justice Disability Project ("CJDP"), set up by the Justice Board to promote and enable accessibility of service across the criminal justice sector in Scotland for people with disabilities, dated June 2018, was published on 31st July 2018. It contains a wealth of useful information and a large number of valuable recommendations. However, it does not to any great extent overlap the matters addressed in this paper, therefore it is not reviewed here. Many of our recommendations are nevertheless relevant to matters addressed in the CJDP final report.

A general limitation of this paper is that it does not seek to address all disability-related matters that might properly be drawn to the attention of a court by a party to adversarial litigation, properly represented. Of course, it is not particularly unusual for a court to ask that it be addressed upon a particular point, perhaps not pled by parties, if that point is nevertheless of concern to the court in performance of its obligation to ensure that justice is done. This paper does not seek to address the question as to whether (and if so to what extent) it is an obligation of a court, rather than good judicial practice, to raise such points when that appears to be necessary to ensure that there is no discrimination on grounds of disability. It may nevertheless be thought necessary to address that question. See section 1.10 for an example of one Particular Article of CRPD to which such considerations might be appropriate.

It should of course be noted that the jurisdiction under AWI 2000 is to a significant extent inquisitorial rather than adversarial. See Chapter 3 below, where AWI is considered. We also refer in Chapter 3 to relevant matters that arise in the context of the current Scottish Government review of AWI 2000.

The general scheme of this paper is as follows. As already indicated, Chapters 1 – 4 review respectively CRPD, ECHR, AWI 2000 and both Bench Books[2]. Chapter 4 also considers some relevant legislation, and concludes by identifying research questions arising from those first four chapters. Those research questions are addressed in Chapter 5. Literature referred to in Chapter 5 is listed alphabetically at the end of that chapter, in section 5.8. In Chapter 6 we set out our conclusions and recommendations. This paper ends with an Appendix containing some relevant excerpts, referred to in the course of the preceding text.

The authors are referred to separately as "Ward" and "Curk", and together as "we". "Ward" should not be confused with "Ward, T", author of the last item listed in section 5.8. While this is a jointly authored paper, for which we take joint responsibility, it might be helpful to record that Ward was lead author of Chapters 1 – 4, and Curk was lead author of Chapter 5. This paper, and those five chapters in particular,

[2] The (Scottish) Bench Book and the E & W Bench Book: see "Definitions and Abbreviations" which follow this Introduction.

may be seen as to a significant extent recording an exploratory conversation between Ward as lawyer and Curk as psychologist.

In keeping with that exploratory nature of this work, we emphasise at the outset of Chapter 6 that the conclusions and recommendations that we offer are preliminary, partial, and subject to review in the light of further work that we suggest should be done.

Contents

DEFINITIONS AND ABBREVIATIONS IN THIS PAPER

1995 Act:	Criminal Procedure (Scotland) Act 1995
2003 Act:	Mental Health (Care and Treatment) (Scotland) Act 2003
2004 Act:	Vulnerable Witnesses (Scotland) Act 2004
2014 Act:	Victims and Witnesses (Scotland) Act 2014
2016 Act:	Criminal Justice (Scotland) Act 2016
Article:	Refers to an Article of CRPD except where otherwise indicated
AWI:	Adults with incapacity
AWI 2000:	Adults with Incapacity (Scotland) Act 2000
Bench Book:	Equal Treatment Bench Book, where necessary for clarity referred to as the "(Scottish) Bench Book"
CRPD:	The United Nations Convention on the Rights of Persons with Disabilities
E & W Bench Book:	The Judicial College (England & Wales) Equal Treatment Bench Book, revised edition February 2018
ECHR:	The European Convention for the Protection of Human Rights and Fundamental Freedoms
General Articles:	Articles 1 – 5 of CRPD
General Comment No 1:	General Comment No 1 (2014) by the UN Committee entitled "Article 12: Equal Recognition before the Law". See also the Appendix to this paper, item B
Judge:	Anyone exercising a judicial or quasi-judicial function
Lawyers:	All advocates and/or solicitors conducting proceedings in court, both in civil and in criminal proceedings, as prosecutors or acting for any party, and acting as examiners-in-chief or cross-examiners; and in references relating to or derived from other jurisdictions, their equivalents in any such other jurisdiction
Particular Articles:	Articles 9 – 29 of CRPD
Protocol:	The Optional Protocol to CRPD
SLC 1995:	(In Chapter 3) Scottish Law Commission Report No 151 (September 1995) on Incapable Adults
Special measures:	Special measures or provisions proposed or applied with the intention of assisting witnesses (as defined) with disabilities or other vulnerabilities
Three Jurisdictions Report:	Essex Autonomy Project: "Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK" http://autonomy.essex.ac.uk/eap-three-jurisdictions-report
UN Committee:	The UN Committee on the Rights of persons with Disabilities
Vienna Convention:	The Vienna Convention on the Law of Treaties
Witnesses:	Persons (other than judges, court staff or lawyers) directly engaged with processes of administration or delivery of justice, whether as parties or witnesses or otherwise

CHAPTER 1: CRPD

1.1 Purpose, and definition of persons with disabilities

The purpose of CRPD, and the definition of persons with disabilities, are set out respectively in the two paragraphs of CRPD Article 1 ("Purpose"), the first of which is in the following terms:

> "*The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*"

This sets an absolute standard, re-emphasised by repetition of the phrase "on an equal basis with others" throughout CRPD. It is relevant to state the consequences in negative language. It is not permissible that any person with any disability, of whatever nature and however severe, should not by reason of such disability enjoy the universality of all human rights and fundamental freedoms to the full. In order to comply with CRPD, that is the standard which every judge must meet in all aspects of the administration and delivery of justice within that judge's responsibility, control and influence; and that must be done in a manner that respects, and promotes respect for, the inherent dignity of all persons with disabilities, without exception.

The second paragraph of CRPD contains an inclusive, but neither comprehensive nor exclusive, definition of persons with disabilities, in the following terms:

> "*Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*"

For persons within that explicitly included category, the "external" barriers, not their disabilities, are the impediments to full participation. That view is supported by paragraph e. of the Preamble to CRPD, which reads as follows:

> "*Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,*"

The word "include" in the definition indicates acceptance that there are also people whose participation will still be hindered by their disabilities even if all "external" barriers are removed. There is however scant – if any – explicit acceptance anywhere in CRPD of inherent limitations which result from any disability; which all limit participation regardless of removal of all "external" barriers. Positive discrimination is expressly permitted in CRPD Article 5.4.

The word "include" is also relevant to the qualification "long-term" in the definition. That qualification is more relevant to "physical" and "sensory" disabilities, than to "mental" and "intellectual" impairments. A "mental" or "intellectual" impairment of short duration is relevant where action or a decision to avoid detriment or discrimination is necessary, if it requires to be taken during the period of impairment and cannot reasonably be deferred.

The words “physical”, “mental”, “intellectual” and “sensory” do not represent any clearly defined distinctions among separate, well-recognised categories of impairments. On the contrary, they at best represent overlapping and interlinking realities. Little is to be gained from trying to define them for the purposes of CRPD, as CRPD constantly refers generically to “persons with disabilities”, and does not in its operative provisions distinguish among those categories. It is relevant here to warn that terminology is in any event constantly shifting, and is variable geographically and indeed from one user of such terminology to another. For example, many experts in the field would regard “mental impairments” and “intellectual impairments” as wide-ranging, and either as being synonymous, or that the latter has superseded the former. However, in North America “intellectual impairment” is often used for “learning disability” only. It is best simply to see this aspect of the definition in Article 1 as meaning all impairments, of any kind whatsoever, that may result in a disability.

For convenience, and for consistency with CRPD, this paper uses this terminology from CRPD, but does not endorse it or seek to use it with precision. In particular, we generally refer to “mental and intellectual impairments” without seeking to distinguish between them.

For the purposes of training in accordance with Article 13.2, it is relevant to understand the characteristics, and resulting requirements (a) of the huge and varied range of impairments that may result in relevant disabilities and needs, (b) of the consequences of different impairments in combination, and (c) of the great diversity of disabilities and needs that can result from impairments even within the same diagnostic description.

In this regard, CRPD is open to two criticisms. Firstly, it largely attempts to treat all disabilities, and their consequences and resulting requirements, in universal terms. That leads to an apparent bias in favour of better-known disabilities and those with consequences that are more effectively articulated. It is less easy to “fit” persons whose impairments are “mental” or “intellectual” into the provisions of CRPD, than it is to apply those provisions to persons whose impairments are “physical” or “sensory”. Within the “mental” and “intellectual” categories, greater difficulties of application of CRPD’s provisions, and greater concerns about the relevance of those provisions, arise in relation to persons whose impairments are – broadly put – more severely or profoundly disabling.

However, the requirement (referred to below) for non-discrimination on grounds of disability must reasonably be interpreted as forbidding unfair discrimination among different disabilities or degrees of disability. The rights of access to justice under Article 13.1 apply to all persons with all types of impairments and disabilities. Indeed, in a broader sense, they apply to everyone regardless of personal characteristics. In our view, “appropriate training” provided to the judiciary can reasonably be extended to ensuring effective access to justice “on an equal basis with others” for all, including those with vulnerabilities that may not fall within particular definitions of disabilities, to ensure that the ends of justice are best served in relation to all who come before the courts, or engage with them in any way.

1.2 Definition of discrimination on the basis of disability, and related provisions

1.2.1 “Discrimination on the basis of disability”

Article 2 (“Definitions”) defines “Discrimination on the basis of disability” as follows:

> "*any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;*"

Discrimination on the basis of disability is prohibited by Article 5.2 (see 1.3.4 below).

For an example of the broad effects of this prohibition, see the complaint under the Protocol, and related Article, mentioned in section 1.9 below.

CRPD sometimes uses the full phrase "discrimination on the basis of disability", for example in Articles 4.1 e and 5.2; sometimes varied, such as "discrimination against persons with disabilities" in Article 4.1 b; and sometimes reduced to "discrimination" (e.g. Article 5.1) or its converse "non-discrimination" (e.g. Article 3.4). Article 31.1 of the Vienna Convention provides that:

> "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

Article 3 of CRPD ("General principles") provides *inter alia* that:

> *"The principles of the present Convention shall be: … b. Non-discrimination"*

1.2.2 "Reasonable accommodation"

The inclusion of the element of reasonable accommodation in the definition of "discrimination on the basis of disability" leads to the definition, also in Article 2, of "reasonable accommodation". It means:

> "*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;*"

Article 5.3 states that:

> "*In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.*"

There is potential for tension between the principle of non-discrimination and the requirement for reasonable accommodation, albeit that the requirement for the latter is explicitly included within the definition of the former. To make special provision can be discriminatory, and as demonstrated in Chapter 5 below it can be harmfully discriminatory.

In the recently reported case of *City of Edinburgh Council v R*[3], the Inner House upheld a decision of the Additional Support Needs Tribunal for Scotland that it was not a sufficient answer to a complaint against a local authority, as education authority, of discrimination in terms of section 15(1)(a) of the Equality Act 2010 that a coordinated support plan had been provided, where the coordinated support plan was found

[3] [2018] CSIH 20; 2018 SLT 652.

to be inadequate. In the language of CRPD, not reported as having been used at any stage of this case, the *ratio* of this decision can be applied generally as emphasising that for a "reasonable adjustment" to be satisfactory as such, it must be adequate for its purpose in order to avoid discrimination on the grounds of disability.

1.2.3 "Universal design"

Article 2 defines "universal design" as meaning:

> "*the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. 'Universal design' shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.*"

The "general obligations" in Article 4 include:

> "f. *To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;*"

The obligations of States Parties in relation to universal design are at first sight less absolute than their obligations to take all reasonable steps to ensure that reasonable accommodation is provided. However, the obligation to promote universal design in the development of standards and guidelines is significant. The whole ethos of CRPD emphasises the importance of removing barriers and ensuring that people with disabilities enjoy rights, and are treated, "on the same basis as others". To the extent that those purposes can be fully achieved by implementation of the principle of universal design, that is clearly the best route towards compliance with CRPD, rendering reasonable accommodation unnecessary, and to that extent avoiding the potential identified above for tension between the concepts of non-discrimination and reasonable accommodation.

1.2.4 The trilemma

It must be acknowledged that there is further tension among some of the fundamental requirements of CRPD (sometimes referred to as "*Yotam's Trilemma*"[4]). Article 5 prohibits discrimination against persons with disabilities. Article 12 (see section 1.5 below) requires recognition of legal capacity in all matters on an equal basis with others. Article 16 requires protection against exploitation, violence and abuse. If any two of these are treated as absolutes, the third may be contravened. If people with mental or intellectual impairments are permitted to transact on an equal basis with others, without any discrimination, their right to protection against abuse may be violated. If means are put in place to protect them against abuse (such as, under AWI 2000, provisions that transactions by an adult within the powers of the adult's guardian are invalid unless sanctioned by the guardian), then there is discrimination; and so forth. The solution to this trilemma, it is suggested, is that where necessary these principles require to be balanced;

[4] So described from its exposition in Tolub, Y. 2016; "Alternatives to Guardianship in Financial Affairs: A Bizchut Report", available in English: http://bizchut.org.il/.

but that in striking such a balance non-discrimination should be prioritised, and compromised only to the minimum extent necessary to ensure full recognition of legal capacity[5] and necessary protection from abuse. Much debate and discussion following CRPD has stated principles in rigid and absolute terms: the realities of disabilities often require in practice that principles be taken into account as highly desirable in isolation, but not to the point of violating other principles or disregarding practical consequences. Where principles appear to be conflict, the best balance for the circumstances of the individual and the individual case requires to be achieved.

1.2.5 Application to the judiciary

The particular points mentioned here, as with much else in this paper, are selective. They are however selective as of particular relevance to the discharge of judicial functions.

The definition of "discrimination on the basis of disability", and the broader principle eliminating discrimination generally, encapsulate the broad purpose of CRPD described in section 1.1 above, and the broad effect of the requirements of CRPD as a whole. Summarised, nothing in any aspect of the delivery or administration of justice should contain any element, or potential element, of discrimination on the basis of disability. That includes *inter alia* all physical attributes of any premises used for any aspect of the administration of justice; all communications related to the administration of justice; and all aspects of the conduct of judicial proceedings.

"Equality before the law" is a fundamental principle of any free and democratic society. That principle demands that so far as feasible all barriers be removed to the full participation and treatment of everyone, regardless of all individual characteristics, in the administration of justice. That can only be fully achieved by application of the principle of universal design, described in 1.2.3 above, not only to all people with disabilities of all kinds, but to all people whose personal characteristics might otherwise cause them to encounter barriers or inequalities affecting their full participation and equal treatment.

To the extent that application of principles of universal design cannot, or cannot yet, ensure full equality before the law, the effective provision of reasonable accommodation is necessary. It is necessary not only because it is mandatory under CRPD, but because in the absence of fully effective universal design, or failing that fully effective reasonable accommodation, the principle of equality before the law is violated. It is likely to be violated in particular in relation to equal recognition before the law (in CRPD addressed in Article 12, see 1.5 below) and access to justice (in CRPD addressed in Article 13, see the Introduction to this paper, and 1.6 below).

In this context, see also in particular Article 5 of CRPD dealing with equality and non-discrimination (section 1.3.4 below) and Article 6 of CRPD on accessibility (section 1.4 below).

1.3 Other provisions of General Articles of particular relevance

1.3.1 The relevance of the General Articles in their entirety

The General Articles (Articles 1 – 5 of CRPD) are essential reading, in their entirety, for a proper understanding of CRPD and all of its ensuing provisions. To select some elements for any particular

[5] See discussion of Article 12.2 in section 1.5 below for the use of "legal capacity" in CRPD.

purpose is essentially a matter of personal choice, and does not diminish the significance of the General Articles in their entirety.

It is suggested, however, that the following are of particular relevance to the judicial role.

1.3.2 Article 3 ("General principles")

Article 3, quoted selectively, reads as follows:

> "*The principles of the present Convention shall be:*
> *a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;*
> *b. Non-discrimination;*
> *c. Full and effective participation and inclusion in society;*
> *d. – h. …*"

The freedom to make individual choices is significant. As is demonstrated in section 5.1 of this paper, witnesses (as defined for this paper) should be given the choice whether to accept special measures, and a choice among special measures if there are alternatives. To do otherwise can hinder rather than help.

1.3.3. Article 4 ("General obligations")

Article 4, edited, reads as follows:

> *"1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:*
>
> *a. …*
> *b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;*
> *c. …*
> *d. …*
> *e. To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;*
> *…*
>
> *3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.*"

In accordance with Article 4.3, relevant representative organisations should be involved in the implementation of the recommendations in this paper. Article 4.3 can usefully be read in conjunction with the rights of individual choice In Article 3a (see 1.3.2 above).

1.3.4 Article 5 ("Equality and non-discrimination")

Article 5.1 is of particular relevance in the present context. It reads as follows:

> "*1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.*"

Article 5.2 re-emphasises the prohibition of discrimination on the basis of disability (see 1.2.1 above). Article 5.2 reads as follows:

> "*2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*"

Article 5.3, requiring provision of reasonable accommodation, is quoted and described in 1.2.2 above. Article 5.4 permits positive discrimination and is referred to at the end of 1.1 above.

1.3.5 Application to the judiciary

As regards aspects of the application of the General Articles, and of various aspects of the Particular Articles (especially Articles 12 and 13), see section 1.2.5 above and Chapters 4 and 5 below.

1.4 Particular Articles: Article 9 ("Accessibility")

Article 9.1 has wide application, including to court buildings; communications and provision of information by the courts; and all services to the public provided by courts. Article 9.1 (unedited) is in the following terms:

> "*1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:*
>
> *a. Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;*
> *b. Information, communications and other services, including electronic services and emergency services.*"

Article 9.2 specifies particular measures, some of which are clearly relevant to court buildings, procedures and services. The introductory words of Article 9.2, and selected provisions of particular relevance, are as follows:

> "*2. States Parties shall also take appropriate measures to:*
> …

d. Provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

e. Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

f. Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

…"

1.5 Particular Articles: Article 12 ("Equal recognition before the law")

Article 12 has been the subject of much discussion and debate, and many academic papers. For the views of the UN Committee, see General Comment No 1 (2014) by the UN Committee entitled "*Article 12: Equal Recognition before the Law*". For analysis by Essex Autonomy Project in relation to the jurisdictions of the United Kingdom, see "*Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK*" http://autonomy.essex.ac.uk/eap-three-jurisdictions-report ("*the Three Jurisdictions Report*"). There is some empirical evidence that in some states the discussion and debate has resulted in attempts to comply with Article 12 being consigned to categories of "too difficult" and "await consensus in place of current dispute". However, much of the dispute is as to the extent to which implications of Article 12 should, in the context of CRPD as a whole, be projected beyond the clear language of Article 12 itself (see quotation in 1.2.1 above from the Vienna Convention).

Article 12 applies to everyone within the non-exclusive definition of people with disabilities in CRPD Article 1, described in section 1.1 above. It is natural that it requires to be considered most frequently in relation to people with "mental [and] intellectual" impairments, but the judiciary should be vigilant to recognise situations in which it is potentially engaged in relation to anyone with any form of disability. Conversely, vigilance is also required to identify unwarranted assumptions that physical or sensory disabilities imply impairment of mental or intellectual capabilities.

This section offers practical guidance for judges drawn from a conservative approach to the actual words of Article 12. In relation to people with mental or intellectual impairments, it should be read in parallel with Chapter 3 below on AWI 2000, which contains some cross-references to this section.

For ease of reference, the full text of Article 12 of CRPD is reproduced in item A of the Appendix to this paper. The full text of each numbered paragraph of Article 12 also appears here, with comments interspersed.

1.5.1 Article 12.1

> "*1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*"

This, it is submitted, reflects the position in Scots law. It is appropriate for the judiciary to be alert to, and deal with, any situations or submissions which indicate or imply a diminution of full recognition of any person with a disability as a person before the law.

1.5.2 Article 12.2

> "*2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*"

This use of "legal capacity" has caused some confusion. It adopts a broad concept of capacity. See for example the entry "Capacity" in David M Walker "*Oxford Companion to Law*"[6]. Note the distinction between "legal capacity" in Articles 12.2 and 12.3, and "exercise of legal capacity" in Article 12.4. Compare this broad use of "capacity", the converse of "incapacitated"[7], with the use of "incapacity" as derived from "incapable" in section 1(6) of AWI 2000. It may reasonably be said that it is discriminatory to fail to recognise, take account of, and provide for situations where a disability results in impairment of capabilities to exercise "legal capacity" (defined as indicated above), or at least to do so without assistance.

1.5.3 Article 12.3

> "*3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*"

At least in the view of the authors of the Three Jurisdictions Report[8], "support" also has a broad meaning. It covers both decision-making by people themselves where they are capable of doing so, albeit with support, and decision-making by representatives appointed by the person, or appointed by a court or other body. The Three Jurisdictions Report suggests (at page 13) that the relevant question here is: *"What measures should be taken to support the exercise of legal capacity, <u>both</u> by supporting persons with disabilities to make decisions themselves wherever possible, <u>and</u> by supporting their ability to exercise their legal agency even in circumstances when they lack the ability to make the requisite decisions themselves?"* It would appear reasonable to suggest that it accords with Scots law and practice to regard the judicial role as including a responsibility to ensure appropriate "support" (of either kind) for any person with any role in proceedings who "may require" such support "in exercising their legal capacity".

Scottish Government has commissioned current research into "supported decision-making" in Scotland. It is understood that the research includes reviewing equality and disability policies, strategies and laws in Scotland, to identify where the Scottish Government has made a commitment to empowering people with disabilities to take control as far as possible, with an endeavour to assess what evidence exists of policy implementation.

---

[6] "**Capacity.** One of the attributes of a person or entity having legal personality, denoting legal ability to bear and exercise rights or to be affected by legal duties or liabilities. According to a person's status (q.v.) he may have full legal capacity or capacity qualified in certain respects. Thus, an infant or minor or person of unsound mind has restricted legal capacity as compared with the person of full age and sound mind.

Capacity or incapacity is frequently fixed by different rules in different parts of the legal system; a person may be capable of marriage at a different age from that at which he acquires capacity to vote and so on.

Capacity has to be considered both actively and passively. Active capacity is concerned with capacity to have and exercise rights and to enter into and undertake legal transactions, e.g. contracts. Passive capacity is concerned with capacity to be subjected to a legal liability or to be held responsible for torts or crimes. Thus, very young children are not capable of being held responsible criminally."

[7] In some jurisdictions a court procedure for (total) incapacitation is followed by appointment of a guardian by a guardianship authority.

[8] Of which Ward was one.

Notwithstanding the focus upon decision-making in much relevant comment and literature, the concept of "exercising … legal capacity" goes further. It encompasses acting as well as deciding. See section 3.4 below on the concepts of both acting and deciding in AWI 2000.

1.5.4 Article 12.4

> "*4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*"

Article 12.4 has the effect of placing particular obligations upon the judiciary in the conduct of (a) proceedings to establish a measure, (b) proceedings in any way related to a measure (such as proceedings concerning the validity, operation, variation or termination of a measure), and (c) proceedings where anyone appointed under a measure has, in that capacity, a role in the conduct of those proceedings or otherwise, in the context of the proceedings, in relation to a person with a disability.

"m*easures that relate to the exercise of legal capacity*" – In international instruments and international usage, this is a broad and all-encompassing term. In relation to Scots law, and to each of the categories (a), (b) and (c) above, it encompasses attorneys, guardians, and appointees under intervention orders; persons operating access to funds under Part 3 of the 2000 Act, and managers of establishments under Part 4 of the 2000 Act; persons exercising powers in medical and research matters under Part 5 of the 2000 Act; DWP appointees; judicial factors; curators *ad litem*; safeguarders, persons appointed to convey the views of an adult, and independent advocates, operating under relevant provisions of the 2000 Act; persons acting as *negotiorum gestor* (though obviously not in relation to category (a) above); and so forth.

"*respect [for] the rights, will and preferences of the person*" – To be respected, all of these must first be ascertained. As to "will and preferences" there must be good reason why a judge (still in any of the situations (a), (b) and (c) above) should not hear what these are direct from the person in question, such person being provided with all necessary support, in accordance with Article 12.3. If a judge is satisfied that the court must accept evidence of the person's will and preferences provided indirectly, the court must be rigorous in satisfying itself that the person's will and preferences have been accurately ascertained and conveyed, and that all safeguards under Article 12.4 have been effectively applied. To achieve that, particular regard must be had to precise roles. For example, a curator *ad litem* or safeguarder, acting entirely properly, may arrive at conclusions which do not accord entirely, or at all, with the person's will and preferences. To act within the requirements of Articles 5 and 12, the court must ensure that the person with the disability has the same rights as would a person without a disability, for such dissenting position to be effectively presented and argued before the court: which may well require separate legal representation.

There will often be tensions within and among the elements of "rights, will and preferences". "Preferences", in the plural, reflects that, for everyone, making a particular decision may involve balancing

conflicting preferences. The following example[9] illustrates various approaches to the interpretation and application of this phrase:

> **Example A**: John [not his true name] had a severe learning disability and no verbal communication. Staff who knew him well noticed a deterioration in his behaviour. They noticed in particular that he had become extremely protective of his face. They suspected toothache. However, he was absolutely resistant to anyone coming anywhere near his mouth. It subsequently transpired that he was indeed suffering from toothache.
>
> (i) Ward's subsequent interpretation in the light of Article 12.4: John's will was to resist any interference with his mouth, his preference was for the pain of toothache to end, and his right was to receive the same treatment as anyone else. With the minimum necessary intervention or coercion, it should be ensured that he received appropriate dental examination and treatment.
> (ii) The member of the UN Committee who is now its chairperson: All efforts should be made to persuade John to accept treatment, but if he refused, then he would have to continue to suffer toothache.
> (iii) An experienced nurse (who happens also to be a solicitor): If option (ii) were to be followed, he would probably start to claw at his own face to try to get rid of the pain, continuing to do so until he caused himself serious injury.
> (iv) People First, a campaigning organisation of people who themselves have learning disabilities, who heard about this scenario and debated it: Lawyers are too complicated about analysing will and preferences. John's overriding will was that the pain should stop. We would if necessary sedate him, and take him to a dentist.
>
> **Example B** (a case before Glasgow Sheriff Court): A lady with dementia was fiercely independent. Above all, she insisted upon remaining in her own home. She believed that she could cope without assistance, and refused to admit carers. In fact, only with such care could she be sustained in her own home. Her son sought a guardianship order. She declared that she much loved her son, but did not need a guardian and did not wish him to be appointed. The son was appointed guardian with powers to ensure that carers would be admitted and could properly perform their functions; because otherwise her overriding desire to remain in her own home would not be sustainable.

In such situations, what is "will" and what are "preferences"? An Essex Autonomy Project position paper "*Achieving CRPD Compliance*" of 22nd September 2014 hypothesised a woman in labour who has a very severe needle phobia. The baby is breach, the safest way forward is a caesarean section, she "wills" the health of the baby and herself, but sampling her blood is an essential part of preparation for the caesarean section and upon seeing the needle she is overwhelmed with fear. That paper suggests that her will is the birth of a healthy baby by the safest means possible, but that her preference is "get that needle away from me". One might say that the labels "will" and "preference" could equally well have been attached the other way round. The same applies to analysis (i) of Example A above.

Curk suggests investigation of the following approach. Where there are such tensions, they represent not a conflict between will and preference, but conflicts among factors resulting in potentially different expressions, at different times or in different circumstances, of "will". Such factors could be many and varied, perhaps requiring an extended concept of "preferences". They might, for example, include thoughts about one's responsibilities, values, risks, resources, and so forth, which can all be encapsulated within the use of "preferences" (in the plural) in Article 12.4. Whenever anyone tries to make a significant decision, one is often balancing different "preferences". It makes sense to describe all these competing considerations, including the purely instinctive ones, as "preferences". In Curk's proposal, we should not

[9] The original scenario being a real situation from Ward's time in the 1990s as chairman of an NHS Trust.

think in terms of conflict between will and one or more preferences, but processes of trying to balance different preferences (within that very wide definition), some of which are in apparent conflict, resulting in an expression of will. As explained in the next paragraph, that expression may subsequently change. That applies whether the process of arriving at that expression of will is instinctive, rational, generated with support, constructed, or any of these in combination.

When is "will" final? Stair[10] distinguishes "three acts in the will", which he characterises as "desire, resolution and engagement". These can be seen as three successive steps taken (or, as the case may be, not taken) as exercises of will. As to desire and resolution, Stair wrote: "*Desire is a tendency or inclination of the will towards its object, and it is the first motion thereof, which is not sufficient to constitute a right; neither is resolution (which is a determinate purpose to do that which is desired) efficacious, because, whatsoever is resolved or purposed, may be without fault altered, unless by accident the matter be necessary, or that the resolution be holden forth to assure others*". In other words, even if balancing of preferences as described in the preceding paragraph results in an expression of will, this can still be altered. After further discussion of resolution, he describes engagement in this sentence: "*It remaineth then, that the only act of the will, which is efficacious, is that whereby the will conferreth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform*". This can be illustrated with a simple example such as online shopping. The shopper is attracted by various items (desire), and decides to purchase some by adding them to the basket (resolution). But to complete the operation of the will to purchase the items, the shopper has to commit with a further act, that is, pay for them (engagement). Without this final act, for example if the shopper realises that the total price is beyond the shopper's desired spend, the shopper will abandon the whole process: the will is not efficacious.

That there are separate steps is shown in cases where a volitional impairment may prevent engagement. In *Ward, Applicant*[11], it was averred that an adult was able to instruct the terms of a proposed Will, but that in consequence of his mental illness, and the fact that it had been untreated for decades, he was unable to commit himself to the step of "engagement" in this or any other matter. His impairment, it was averred, prevented him from actually signing the Will.

"*conflict of interest*" – Unlike the judicial role, where recusal is the appropriate response to conflict, in relation to persons with disabilities the requirement is often that conflict be recognised and appropriately managed.

> **Example C** (a case from Glasgow Sheriff Court, relationship amended): An aunt was greatly supportive of a niece with a learning disability, understood her better than anyone else, and on the basis of all available evidence (including relevant reports) was the best person to be appointed guardian to the niece, except that as part of her support for the niece the aunt had provided a suitable home for the niece and then – to ensure that the niece's rights were properly safeguarded – had arranged for a tenancy to be granted to the niece. The aunt was thus the niece's landlord. The aunt was appointed guardian, subject to a particular provision that in any matter concerning the tenancy she should report that matter to the Public Guardian and only proceed in such manner as might be sanctioned by the Public Guardian (with the usual right of recourse under section 3(3) of the 2000 Act to seek directions of the court). Thus the conflict of interest was recognised, and a mechanism to manage it was established.

[10] See Stair, Institutions of the Law of Scotland I, 10, 2.

[11] 2014 SLT (Sh Ct) 15.

"*undue influence*" – It is necessary for the judiciary, in any matter concerning people with disabilities, to be rigorously alert to the possibility of undue influence. People may themselves be complicit in such undue influence, and in masking it, because they are dependent (emotionally or in practical ways) on the influencer, "I don't want to upset them", and so on. The difficulties can be compounded by the tendency of people with some disabilities to agree with whomever they are speaking to at the time, or to say what they believe that people want to hear[12]. Ward has experience of people with disabilities agreeing with different factions of a divided family, or both sides of a conflict between family and professional carers, so that those with opposite views on a particular matter are both convinced that they are accurately reflecting the views of the disabled person. In relation to undue influence generally, see, for example, the *Law Society of Scotland's Vulnerable Clients Guidance* available at https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-5-vulnerable-clients-guidance/.

In the context of litigation, particular judicial vigilance is required in relation to the tendency of some people with disabilities to answer questions literally and narrowly, without further explanation, and a further tendency to provide answers which they feel will please the questioner. This topic is dealt with in Chapter 5 of this paper.

"*are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests*" – The remaining elements of Article 12.4 all require vigilance from the judiciary, and for the purposes of this paper speak for themselves.

1.5.5 Article 12.5

> "*5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*"

These requirements, and the particular circumstances in which they may apply, also require vigilance by the judiciary, and also speak for themselves.

1.5.6 General Comment No 1 and the Three Jurisdictions Report

Paragraphs 7, 21 and 27 of the General Comment are reproduced in item B of the Appendix to this paper. Taken together, these suggest that so-called "substitute decision-making" should be abolished, and along with it regimes such as guardianship and mental health laws. CRPD itself contains no such requirement, and does not mention "substitute decision-making". As is demonstrated in the Three Jurisdictions Report[13], the drafting committee explicitly and unanimously agreed that substitute decision-making should be permitted, and that the language adopted for Article 12 was intended neither to prohibit nor to endorse substitute decision-making. The Three Jurisdictions Report also reviewed the status of

[12] Some of this, including the potentially higher levels on Gudjonsson's suggestibility scale of people with learning disabilities, is addressed in Chapter 5.
[13] Page 10 and Appendix B.

documents such as General Comment No 1[14]. They should be accorded considerable importance, and deserve careful consideration, but are not in themselves formally binding interpretations of the convention or treaty in question[15]. It is unhelpful that paragraph 27 of General Comment No 1 has appeared in the various, significantly inconsistent, versions quoted in the Appendix to this paper (item B). Moreover, element (iii) appears to accept the role of "a substitute decision-maker" and to be concerned more about the methodology adopted by the substitute decision-maker.

In the paragraphs referred to and elsewhere, General Comment No 1 appears to suggest that the "will and preferences" of a person with a disability should be implemented as if constituting a competent act or decision. Article 12.4 in fact requires "respect" for, not compliance with, "the rights, will and preferences of the person", not only "will and preferences". As demonstrated above, there can be tensions or outright conflicts among these elements.

Where a disability arises from a mental or intellectual impairment, it is probably more helpful to note the concept of the "best interpretation of will and preferences" proposed in paragraph 21. It is certainly a reasonable and unobjectionable interpretation of Article 12, in the context of CRPD as a whole, that in relation to any interventions (in the language of section 1 of AWI 2000, and in other contexts), a "best interpretation of will and preferences", rather than a "best interests" approach, should be adopted. We suggest in Chapter 3 that this is what AWI 2000 already requires, and that the "constructing decisions" approach described in Chapter 3[16] not only equates to the "best interpretation" approach more recently proposed by the UN Committee, but already provides a methodology for implementing that approach.

Generally on Article 12, and in more detail, see the Three Jurisdictions Report.

1.6 Article 13 ("Access to justice")

Article 13 is the starting-point for this paper, and it is quoted in full in the Introduction. Article 13.1 is wide-ranging in its requirements, which speak for themselves. See in particular the matters addressed in Chapter 5 below, in relation to people with disabilities as parties and witnesses.

1.7 Article 15 ("Freedom from torture or cruel, inhuman or degrading treatment or punishment")

Article 15, in edited form, reads as follows:

> "*1. No one shall be subjected to … degrading treatment …*
>
> *2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to … degrading treatment …*"

[14] Three Jurisdictions Report page 9 and Appendix A.
[15] See also International Law Association: Committee on International Human Rights Law and Practice, 2004, "Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies", para 16.
[16] See section 3.3.6, and item C of the Appendix to this paper.

The text of this Article has been deliberately edited to focus upon the element of "degrading treatment". There is a risk that some persons with disabilities, exposed for the first time to the entirely alien world of the rituals, and the cut and thrust, of litigation, may feel degraded. Indeed, it is not uncommon for people with no disabilities to be shocked by the experience of involvement in litigation, and to describe the experience as degrading. It is probably unhelpful, in seeking to serve the ends of justice, that people with no intention of resorting to dishonesty or other deliberate misconduct, and who are pursuing complaints or disputes or simply giving evidence, should be made to feel that way by the justice system. For judges, this is a matter for careful control of all that takes place within their courtrooms.

1.8 Particular Articles: Article 27 ("Work and employment")

Aspects of Article 27 are potentially relevant in relation to all who, as part of their work and employment, have roles in any aspect of the administration of justice for which judges have responsibility, or which they are able to influence. The introductory words of Article 27.1, and the first three of several particular requirements, read as follows:

> "*1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:*
>
> *a. Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;*
> *b. Protect the rights of persons with disabilities on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and health working conditions, including protection from harassment, and the redress of grievances;*
> *c. Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;*
> *…*"

1.9 Particular Articles: Article 29 ("Participation in political and public life")

Most of Article 29 relates to political activity. If however the elements of "political" and "public" are separable, then Article 29 would appear to be applicable to jury service. Many of the provisions highlighted above are in any event relevant to jurors, or potential jurors, with disabilities, and would appear broadly to have the same effect as the more specific requirement of the opening words of Article 29, which are as follows:

> "*States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:*
>
> *a. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others …*"

Zsolt Bujdosó and five others v. Hungary[17] was a complaint under the Protocol of violation of Articles 12 and 29 in relation to the right to vote. The complaint was upheld by the UN Committee. It is mentioned here principally because the proceedings and decision[18] demonstrate the far-reaching effect of the prohibition of discrimination on the basis of disability in CRPD.

1.10 The relevance of other Particular Articles

Generally as to the relevance of Particular Articles, see the Introduction.

Solely by way of recent example, a case where – according to the decisions both at first instance and upon appeal – a possible issue of potential contravention of CRPD was neither pled nor raised, is *Q v Glasgow City Council*, [2018] CSIH 5; 2018 S.L.T. 151 (the decision at first instance being at l [2016] CSOH 137). The son and attorney of an elderly lady unsuccessfully challenged the lawfulness of assessment decisions by Glasgow City Council, the effect of which was that the lady would in future be cared for in a care home, rather than in her own home. There was no reference to the lady's right under Article 19 of CRPD to choose her place of residence and to receive necessary support and services there. Also, there was no narration of her own wishes in the matter, contrary to the requirement of Article 12.4 (see above). (It could also be said that the decision engaged the lady's right to respect for her private and family life under article 8 of ECHR, which explicitly extends to one's home and which may be interfered with only in the limited circumstances in article 8.2 of ECHR.[19]) This is an example of a case where it might have been appropriate for the judiciary to be particularly alert to situations where human rights of an individual might be engaged, and that individual is not personally and separately represented – or where in any event they are engaged. Article 12.4 is clear about the requirement for respect for the rights, will and preferences of people with disabilities. They cannot be respected unless they are made known, and where necessary effectively advocated.

[17] CRPD/C/10/D/4/2011.

[18] As described by Lucy Series in "Discrimination, Capacity and Voting Rights", The Small Places, June 10, 2014 available at https://thesmallplaces.wordpress.com/2014/06/10/discrimination-capacity-and-voting-rights/.

[19] On article 8 of ECHR, see section 2.2 below.

CHAPTER 2: ECHR

2.1 General and article 14 of ECHR

The provisions of ECHR are directly applicable and binding. Any of them may be engaged at any time in any matter concerning people with disabilities, potentially in addition engaging article 14 of ECHR ("prohibition of discrimination"), which (edited) reads:

> "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as … or other status*."

Viewed in this century, omission of specific reference to disability is surprising, but is encompassed by "other status".

The following references to particular provisions of ECHR are limited and selective, in order to make particular points relevant to the engagement of judicial functions with people with disabilities. The jurisprudence in relation to them is extensive, but generally is briefly summarised, not quoted. Relevant provisions can conveniently be addressed out of number order, commencing with article 8.

2.2 Article 8 of ECHR ("right to respect for private and family life")

Article 8.1 of ECHR reads as follows:

> "*Everyone has the right to respect for his private and family life, his home and his correspondence.*"

In the context of persons with disabilities, there can be tension between the elements of "private and family".

> **Example D** (*A Local Authority v WMA and MA* [2013] EWHC 2580 (COP), described by Ward in "Two 'adults' in one incapacity case? – thoughts for Scotland from an English deprivation of liberty decision", 2013 SLT (News) 239-242): A man with a learning disability lived with his mother. Her health was failing. He was her "eyes and ears". A court nevertheless concluded (by reference to English criteria) that it was in his best interests to be placed elsewhere, and HHJ Cardinal so ordered. However, the case engaged the private rights of both son and mother, and the family rights of each. HHJ Cardinal stressed that "*private and family life … are not the same as each other*" and that "*a right to respect for family life does not trump the right to respect for private life*". Nevertheless, the ECHR rights of all involved in such situations may require to be addressed. See also the discussion of AWI 2000 section 1(1) in 3.3.1 below, and the further example quoted there.

Article 8.2 of ECHR reads as follows:

> "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*."

The ”and” between “in accordance with the law” and “necessary in a democratic society …” is significant. Compliance with, for example, AWI 2000 or the Mental Health (Care and Treatment) (Scotland) Act 2003 (“2003 Act”), is not of itself sufficient to ensure that the rights under ECHR article 8 are not infringed. The list in article 8.2 is clear and limited, and a requirement for proportionality is introduced by “necessary”.

2.3 Article 5 (“right to liberty and security”)

Article 5 of ECHR is not addressed here in any detail, as suitable provision to ensure compliance in relation to people with mental or intellectual impairments was the subject of Scottish Law Commission Report No 240 (12th September 2014) on “Adults with Incapacity” and (at time of writing) of review (following consultation) by Scottish Government. Under article 5 of ECHR, “*Everyone has the right to liberty and security of person*” except “*in the following cases and in accordance with a procedure prescribed by law*”. Of particular relevance is the last exception (edited) “*e. the lawful detention of persons … of unsound mind …*”. Any such detention will also engage the article 8 rights described above, and article 6 rights addressed below. These issues must be considered in any situation where any person with a disability may be “detained” without their own competent consent.

Note the potential for conflict between exception e. in article 5.1 of ECHR being dependent upon “unsound mind”, and the prohibition under Article 14.1(b) of CRPD that “*the existence of a disability shall in no case justify a deprivation of liberty*”.

2.4 Article 6 (“right to a fair trial”)

The process of determining issues raised by potential engagement of rights under articles 5 and 8 of ECHR lead to article 6 of ECHR. Much of the jurisprudence under article 6 relates to criminal and contested civil cases, but the requirements of article 6 are (it is submitted) equally relevant when the interests of a person with a disability would be engaged if that person were a party to the proceedings, and has not competently agreed to what might otherwise be an infringement of article 5 or article 8 rights. Article 6.1 of ECHR, in full, reads as follows:

> “*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*.”

While article 6.1 largely speaks for itself, in its application to people with disabilities (and in its interaction with articles 5 and 8) it requires the judiciary to ensure that the person with a disability has such support and representation as may be necessary to ensure the person’s full and effective participation whether as a party, or as a person with an interest in or potentially affected by proceedings in such manner as would cause a fully competent person with no disability to seek advice about entering the proceedings, or instituting separate proceedings, or taking other steps to safeguard or assert that person’s rights or interests. This reinforces the obligations identified above in connection with CRPD Articles 12.3 (ensuring “support” for any person who “may require” such support “in exercising their legal capacity”) and 12.4 (ensuring “respect [for] the rights … of the person”).

Articles 6.2 and 6.3 of ECHR relate to criminal proceedings. Of particular note in the context of disability is the following among the "minimum rights" assured by article 6.3:

"*(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court*."

That includes a right to non-verbal or non-linguistic interpretation.

CHAPTER 3: AWI 2000

3.1 Introduction

This chapter identifies particular points for judicial awareness of disabilities, prompted by consideration of aspects of section 1 of AWI 2000. It is suggested that what is mandatory under the AWI 2000 principles points towards good practice across all aspects of judicial responsibility and activity. Points of correlation between AWI 2000 and CRPD, or comment by the UN Committee, are identified. Apart from being limited to such points, this chapter concludes by addressing relevant aspects of the current review of AWI 2000 by Scottish Government.

3.2. The principles, not best interests

Paragraph 21 of General Comment No 1 by the UN Committee[20] reads as follows:

> "*Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.*"

That view is being progressively adopted worldwide as states reform legislation to comply with CRPD. So far as Ward is aware, Scotland was unique in the world in rejecting "best interests" as an appropriate test in relation to adults, almost two decades before General Comment No 1 was issued. Paragraph 2.50 of Scottish Law Commission Report No 151 (September 1995) on Incapable Adults ("SLC 1995") reads as follows:

> "*Our general principles do not rely on the concept of best interests of the incapable adult … We consider that 'best interests' by itself is too vague and would require to be supplemented by further factors which have to be taken into account. We also consider that 'best interests' does not give due weight to the views of the adult, particularly to wishes and feelings which he or she had expressed while capable of doing so. The concept of best interests was developed in the context of child law where a child's level of understanding may not be high and will usually have been lower in the past. Incapable adults such as those who are mentally ill, head-injured, or suffering from dementia at the time when a decision has to be made in connection with them, will have possessed full mental powers before their present incapacity. We think it is wrong to equate such adults with children, and for that reason would avoid extending child law concepts to them. Accordingly, the general principles we set out below are framed without express reference to best interests.*"

Adults with disabilities are not "big children". It is plain from the above that a best interests test is (a) inappropriate for adults in any context and (b) simply the wrong test under the AWI 2000 jurisdiction.

[20] General Comment No 1 (2014) by the UN Committee entitled "Article 12: Equal Recognition before the Law"; paragraph 21 is also reproduced in item B in the Appendix to this paper.

That a shift in attitudes towards people with disabilities is still required is indicated by the extent to which a "best interests" test has nevertheless been applied even within the AWI 2000 jurisdiction.

Research carried out for Ward[21] reviewed all available decisions under AWI 2000, and was reported in an article entitled "*With and without 'best interests': the Mental Capacity Act 2005, the Adults with Incapacity (Scotland) Act 2000 and constructing decisions*"[22]. That article noted that, according to the research, 44% of the decisions reviewed were by Sheriff John Baird up to his retirement in early 2015. For all practical purposes he was a specialist sheriff, being lead sheriff for AWI cases in Glasgow Sheriff Court[23]. None of his decisions was based on any "best interests" concept. All applied the section 1 principles. In one reported case the specific question before him was whether a proposed outcome would "secure the Adult's welfare and best interests". He pointed out that "best interests" was not the appropriate test.

Of all the sheriffs (other than Sheriff Baird) and Sheriffs Principal whose decisions under AWI 2000 were available, one half had at least on one occasion based a decision or part of a decision explicitly upon what they considered to be the adult's "best interests". See also comment below on section 1(2).

3.3 The principles individually

This section quotes the principles. It does not seek to discuss and analyse them comprehensively. It makes particular comments relevant to an understanding, in relation to judicial functions, of the intention of the principles and the requirements of CRPD. These points are addressed both as matters which are mandatory within the AWI jurisdiction, and also as representing good practice in any matter where there is a potential disability element.

3.3.1 Section 1(1)

> *"**1.** – (1) The principles set out in subss (2) and (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult."*

"Intervention" covers both decisions to do something, and decisions not to do so. It also applies to procedural and ancillary decisions: every time, it is necessary to ask whether the proposed decision, order or disposal accords with the principles.

Note that the wide wording of section 1(1) means that the principles must be applied to any adult (disabled or not) affected by an intervention under the Act. See example D and the article there referred to[24] for a case where proceedings concerned a son, but if the case had occurred in Scotland under AWI

[21] By Rebecca McGregor, colleague of Ward on the core research group for the Three Jurisdictions Report, and at that time a research assistant in the Centre for Mental Health and Incapacity Rights, Law and Practice at Edinburgh Napier University.

[22] So entitled as it compared the best interests test under the Mental Capacity Act 2005 with the position under AWI 2000: article by Alex Ruck Keene and Adrian Ward in the International Journal of Mental Health & Capacity Law at [2016] IJMHCL 19.

[23] He dealt with over 3,000 AWI cases during his career.

[24] In section 2.2 above, the article being "Two 'adults' in one incapacity case? Thoughts for Scotland from an English deprivation of liberty decision".

2000 his mother would also have come within the requirements of section 1(1). Such situations have arisen in Scottish practice:

> **Example E** (unreported case): Two people with learning disabilities shared the same flat. Various support services were delivered to both of them jointly. One was the tenant. There were problems both with the conduct of the tenancy and as to the suitability of the accommodation for the tenant. The local authority commenced guardianship proceedings in respect of the tenant. These were certainly likely to amount to an intervention in the affairs of the other resident. Within the AWI 2000 proceedings, it was mandatory that the principles be complied with in relation to that other resident. If in the same factual circumstances the landlord had commenced proceedings of any nature against a tenant who was not incapable as defined in AWI 2000, relating to the tenancy, then though that would not have been within AWI 2000, as a matter of good practice the principles would require to be complied with in relation to both residents. The obligation identified at 2.4 above to ensure that they receive support, and if necessary representation, would apply.

3.3.2 Section 1(2)

> "***1.*** *– (2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention*."

As regards "benefit", Sheriff Principal Stephen on 26th August 2014 in *Appeal by BG in the Application by West Lothian Council*, noted at 2014 GWD 40-730, said:

> *"This is indeed the core principle namely that it is the welfare of the adult and the benefit to the adult which is the overarching principle. The court then has to consider the least restrictive option and take into account the present and past wishes and feelings of the adult and the views of the nearest relative and the primary carer of the adult in so far as it is reasonable and practicable to do so. The sheriff also requires to take into account the views of any other person who appears to the sheriff to have an interest in the welfare of the adult."*

There does not appear to be anything in AWI 2000 to give the principle in subsection (2) any precedence over other principles. This dictum seems to come close to equating "benefit" with "best interests". It certainly does not accord with CRPD and the interpretation thereof advanced by the UN Committee (see paragraph 21 of General Comment No 1, quoted at the outset of section 3.2 above). It is difficult to reconcile with the terms of SLC 1995 also quoted in section 3.2 above. It does not appear that such considerations were drawn to the attention of the court in this case. If this case and the research findings mentioned at 3.2 above point to a trend away from the original intention towards adoption of a "best interests test", whether by using that term or by interpreting section 1 of AWI 2000 to achieve the same effect, it is notable that this is a trend in the opposite direction to that adopted in England, where increasingly "best interests" is interpreted in a manner consistent with the priority of the person's will and preferences required by CRPD, and indeed the intentions of AWI 2000. The most notable and authoritative statement of that position under the Mental Capacity Act 2005 was given by Lady Hale in *Aintree University Hospital NHS Foundation Trust v James* ([2013] 3 WLR 1299, [2013] COPLR 492) (Supreme Court), where she said that the purpose of the best interests test in the 2005 Act is "*to consider matters from the patient's point of view*": and that "*Insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being*."

It is respectfully suggested that Lady Hale's dictum better encapsulates an approach consistent with the intentions of AWI 2000 and consistent with CRPD, and indeed an approach to which the "constructing decisions" methodology referred to at 3.3.6 below would be appropriate. In Scottish terms, if any one of the principles should be given prime position, that should be the principle set out in section 1(4)(a), quoted below.

It is submitted that section 1(2) is better seen as a screening provision, eliminating any intervention that does not comply. That is demonstrated by its negative language. It is not a positive provision pointing to any particular outcome if that initial screening test is passed.

3.3.3 Section 1(3)

> "***1.*** *– (3) Where it is determined that an intervention as mentioned in subs (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention*."

This provision is frequently misquoted as meaning the simplest form of intervention, or equivalent. The least restrictive intervention "in relation to the freedom of the adult" is one where the adult's rights and freedoms are fully and appropriately protected. Thus, a guardianship order might satisfy this requirement, where allowing an unregulated, unappointed *de facto* guardianship to continue would not.

3.3.4 Section 1(4)

> "***1.*** *– (4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of –*
>
> *(a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;*
> *(b) the views of the nearest relative, named person and the primary carer of the adult, in so far as it is reasonable and practicable to do so;*
>
> *(c) the views of –*
> *(i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and*
> *(ii) any person whom the sheriff has directed to be consulted,*
> *in so far as it is reasonable and practicable to do so; and*
> *(d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.*"

The priority of (a) is emphasised not only by the requirement in Article 12 of CRPD to respect *inter alia* the will and preferences of the adult, or failing that the best interpretation thereof, but also because the qualifying words "in so far as it is reasonable and practicable to do so" in each of the other paragraphs (b), (c) and (d) does not apply to (a). The obligation to ascertain and take account of the adult's present and past wishes and feelings is absolute, limited only to the extent that it can be shown to be impossible: but under most interpretations of CRPD impossibility would not be accepted, because it will always be

possible to arrive at a best interpretation. A methodology for doing that would be the "constructing decisions" approach described in section 3.3.6 below. Paragraphs (b), (c) and (d) should all be used to help build up the "best interpretation".

3.3.5 Section 1(5)

> "***1.*** *– (5) Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills*."

This principle speaks for itself, and is replicated in some of the other provisions of AWI 2000.

It should be noted that the applicability of the principles was extended by amendment to AWI 2000 in 2007[25], introducing sections 3(5A) and (5B), under which in any proceedings before the sheriff (but not expressly in relation to any other intervention) "*the sheriff shall, without prejudice to the generality of section 1(4)(a), take account of the wishes and feelings of the adult who is the subject of the application or proceedings so far as they are expressed by a person providing independent advocacy services*" (defined in section 259(1) of the 2003 Act).

3.3.6 "Constructing Decisions"

In "*Adult Incapacity*" (Greens, 2003) Ward offered in Chapter 15, entitled "Constructing Decisions", a method for making decisions that accord with the requirements of section 1 of AWI 2000 and with the rejection, for the purposes of AWI 2000, of a "best interests" approach[26]. As we have suggested in section 1.5.6, the "constructing decisions" methodology would appear not only to equate with the "best interpretation" approach advocated in General Comment No 1, but to provide a methodology for implementing that approach. It would also appear to provide a methodology for implementing the approach described by Lady Hale and quoted in section 3.3.2 above[27]. The "constructing decisions" approach includes a hierarchy of sources from which the elements of a choice or decision may be arrived at, in order to construct that choice or decision. That hierarchy and the methodology for selecting from it are reproduced in item C of the Appendix to this paper[28], though this should be read in the context of Chapter 15 of "Adult Incapacity" as a whole.

3.4 Definition of capacity

The definitions of "incapable" and "incapacity" are set out in section 1(6) of AWI 2000, which is in the following terms:

> "***1.*** *– (6) For the purposes of this Act, and unless the context otherwise requires –*
> *"adult" means a person who has attained the age of 16 years;*

[25] By the Adult Support and Protection (Scotland) Act 2007.
[26] See section 3.2 and in particular the quotation there from SLC 1995.
[27] Quotation from *Aintree University Hospital NHS Foundation Trust v James*, cited in section 3.3.2 above.
[28] The "constructing decisions" methodology was adopted in the successful arguments for the respondent in *North Ayrshire Council v JM* (Sh Ct) 2004 SCLR 956.

"incapable" means incapable of –

(a) acting; or

(b) making decisions; or

(c) communicating decisions; or

(d) understanding decisions; or

(e) retaining the memory of decisions,

as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature of otherwise); and

"incapacity" shall be construed accordingly."

Note that, unlike in some other jurisdictions, AWI 2000 addresses both acting and decision-making, thus largely equating with the concept of "exercising … legal capacity" in Article 12.3 of CRPD (and "exercise of legal capacity" in Article 12.4). As regards strictures in much comment upon CRPD about the concept of "incapacity", note that in AWI 2000 the term is expressly derived from "incapable" (i.e. factually incapable), not from any concept of incapacitation.

3.5 The forum for the jurisdiction under AWI 2000

Part 6 of AWI 2000 entered into force on 1st April 2002. Prior to that, tutors to adults were appointed in the Court of Session, statutory guardians in the sheriff court, and curators bonis in either of those courts. All of those appointments were replaced by guardianship and intervention orders under Part 6. There was much debate about the choice of forum for the new jurisdiction. In its Discussion Paper No 94 (September 1991) entitled "Mentally Disabled Adults: Legal Arrangements for Managing their Welfare and Finances", Scottish Law Commission asked the following question: "*Should all applications relating to the personal welfare and financial affairs of mentally disabled people … be heard by the courts, new Mental Health Tribunals or new Mental Health Hearings?*"

Ward wrote an analysis of the likely requirements of the new jurisdiction, summarised in Part D of the Appendix to this paper. The Law Society of Scotland adopted his analysis, and his suggestion that the appropriate forum should be the sheriff courts, but with the new jurisdiction exercised by specialised sheriffs. In para 26 of SLC 1995, Scottish Law Commission narrated perceived advantages of the courts, and in para 28 referred to "*… the perceived disadvantages of the courts. The courts were regarded by many respondents as intimidating, legalistic, adversarial and only willing to look at the issues put in front of them, lacking in understanding of the needs of the mentally incapable, slow, expensive and associated with criminal proceedings*". The Commission commented that it believed that some of the criticisms were unfounded, but acknowledged the need to address them. Para 2.28 continued as follows: "*The Law Society suggested that if the courts were to be the forum then proceedings should be conducted by specially selected 'designated sheriffs'. These designated sheriffs should receive training about various aspects of mental incapacity and the needs of the mentally incapable and would specialise in such cases and so develop their expertise further. The concept of nominated or designated judges is not a new one. They exist in the Court of Session in relation to judicial review and in England & Wales for cases under the Children Act 1989. We think the Law Society's suggestion is an excellent one that would go a long way to address the concerns expressed by those opposed to the use of the courts*". That solution in fact attracted general support. Provisions to that effect, including provision for "designated sheriffs", were included in the draft Incapable Adults Bill annexed to SLC 1995. Although that draft formed the basis of AWI 2000, for reasons that have never been publicly explained the provision regarding "designated sheriffs" did not

appear, and that omission has still not been remedied, notwithstanding that the Courts Reform (Scotland) Act 2014 contains general enabling powers to introduce judicial specialisation in the sheriff court. In practice, some sheriffs have specialised in the AWI jurisdiction, but too many cases are still handled in ways which do not command satisfaction, with inadequate case management, failure to apply the section 1 principles rigorously and as intended, and with a far higher proportion of continuations – including multiple continuations – than (informal) specialist sheriffs. The criticisms of the courts reported in para 28 of SLC 1995 are being heard again, with increasing frequency.

In para 2.21 of SLC 1995 the Commission narrated that the suggestion in their Discussion Paper of a "one-door" approach had been welcomed on consultation. The Discussion Paper advocated a "one-door" approach for what is now the AWI jurisdiction, the Mental Health Act jurisdiction (at that time under the 1984 Act) and the jurisdiction under section 47 of the National Assistance Act 1948 (now replaced and substantially extended by the Adult Support and Protection (Scotland) Act 2007). The Commission wrote (also in para 2.20) that: "*The current need for separate applications (sometimes in different courts) to deal with a mentally incapable adult's personal welfare and financial affairs was deprecated*". AWI 2000 brought all relevant jurisdictions to the sheriff court, but there was no procedural provision for unified applications, or to allow remedies under one jurisdiction to be granted upon an application under another. Moreover, the unification of jurisdictions in the sheriff court lasted only until mental health tribunals were introduced by the 2003 Act.

In para 2.29 of SLC 1995 the Commission wrote: "*The way the courts deal with the mentally incapable could also be improved by requiring all hearings to be held in chambers. The normal public court rooms should not be used as they are unsuitable for small informal hearings. Indeed, we think it should be made competent for the sheriff to conduct a hearing out with the court if that would be more convenient for those involved. There seems to us no reason why a hearing should not take place in a small private room in the hospital or other place where the adult is living. The sheriff should be directed to encourage discussion and be prepared in appropriate cases to take a proactive role in the process, by calling for further information, reports or assessments, for example*". Unfortunately, a feature of conduct of the AWI jurisdiction continues to be the great diversity of practice, with at least one court (at time of writing) still hearing all applications in open court. Only the most experienced sheriffs appear to "front-load" a process by calling for further information that would be likely to assist the court when applications are first presented and examined. The number of sheriff courts has reduced, but there has been no move towards hearing applications in other locations. This, combined with avoidable continuations (often multiple continuations) of hearings, has proved to be a severe disadvantage for many families finding it necessary to make arrangements for care and travel substantial distances. It is understood that the Mental Health Tribunal for Scotland conducts hearings in some 76 different venues. Sheriff court venues have reduced from 49 in 2012 to 39 now.

Against the above background, the Scottish Government Consultation Document "Adults with Incapacity Reform" (January 2018) sought views *inter alia* on the alternatives of the sheriff court or a tribunal for the AWI jurisdiction[29]. In an initial presentation of results on 28th June 2018, the Scottish Government team reported 67 responses in favour of transfer to a tribunal, and 19 in favour of retention of the AWI

[29] This followed in particular a proposal by the Law Society of Scotland for a unified tribunal dealing with AWI, mental health and adult support and protection matters; though the consultation document referred to transfer of the AWI jurisdiction to the Mental Health Tribunal for Scotland.

jurisdiction in the sheriff court[30]. From the viewpoint of respecting and protecting the rights of persons with disabilities, however, the Discussion Paper contained an aspect of greater concern than the choice of forum between sheriff court and tribunal. That greater concern is briefly addressed in the final paragraph of this section.

The Scottish Government team are working continuously on the review. They plan a further "more targeted" consultation in January 2019, and hope to have legislation introduced in the Scottish Parliament before the end of 2019. This may be the first step in a longer process leading to fully unified legislation. Even if it were to transpire that the AWI jurisdiction is ultimately transferred away from the sheriff court, we suggest that there are at least four reasons why necessary steps should be taken to optimise the standard of conduct of that jurisdiction by the sheriff court in the meantime.

Firstly, at a very minimum it is likely to be two or three years before any such change occurs. People with disabilities, their families and carers, and others who engage in AWI processes are entitled to an optimum standard of administration and delivery of justice in the meantime.

Secondly, having the AWI jurisdiction within the court system at least for that period will assist in developing both practical arrangements and cultural awareness throughout the court system towards dealing appropriately with people with disabilities generally, and with other vulnerabilities. Conversely and negatively, it will potentially be damaging if failure to improve the quality of administration of the AWI jurisdiction should reinforce views that the courts generally are unhelpful towards people with disabilities and other vulnerabilities.

Thirdly, if necessary and identifiable improvements are made in the delivery of the AWI jurisdiction by the courts, that might provide a better basis for decisions about what should be the appropriate forum out into the future.

Fourthly, and – we would suggest – potentially of greatest concern among all the issues identified in this section, the Scottish Government Consultation Document did not simply present the alternatives of sheriff court of forum. It also proposed an entirely bureaucratic process for dealing with many guardianship applications. It is difficult to see how such a process could comply with minimum human rights standards, or adequately respect the rights, will and preferences of persons with disabilities drawn into the system. As regards the European Convention, the proposals would appear potentially to violate Articles 6, 8 and 14 of the European Convention. That concern is reinforced by the decision of the European Court on Human Rights in *AN v Lithuania*[31], in which that court made it clear that the same procedural requirements and safeguards as apply for deprivation of liberty cases are also required to ensure human rights compliance in guardianship applications. Objections submitted by the Law Society of Scotland to the proposal for such a bureaucratic process include those which appear in Part E of the Appendix to this paper. We suggest that, in the broad context of respecting and where necessary asserting the rights of people with disabilities and vulnerabilities, there is an overriding and urgent requirement for the courts to play, and to be seen to be playing, a fully effective role.

[30] The Scottish Government team has acknowledged that these are "just numbers", with their evaluation of responses, including the reasons given in favour of them, still to follow.
[31] Application No 17280/08, European Court on Human Rights.

CHAPTER 4: THE BENCH BOOKS AND RELEVANT LEGISLATION

4.1 The (Scottish) Bench Book

As stated in the Introduction to this paper, the Bench Book addresses a range of issues that require to be considered in order to achieve equal treatment in the administration of justice. Nothing in this paper should be read as detracting from the value of the Bench Book so far as it goes. However, for reasons identified in this chapter, the Bench Book would benefit from fundamental review. This chapter should be seen as going beyond the existing content of the Bench Book by drawing upon the broader issues, and some of the particular points, identified in Chapters 1 – 3 above. The sections of this chapter replicate relevant chapter headings of the Bench Book, except that section 4.13 refers to the recently revised E & W Bench Book, and some significant features of both Bench Books, and section 4.14 introduces the research questions generated by this and preceding chapters. Only chapters of the Bench Book that are of particular relevance in the context of this paper are referred to.

We support the approach of the Bench Book in seeking to address the subject of equal treatment comprehensively. Likewise, we submit, training prompted by the specific obligation under Article 13.2 should not be limited to training relevant to the needs and circumstances of persons with disabilities, but should extend to those of persons with other vulnerabilities, not seeking to put boundaries around such categories, but addressing any situations where anyone drawn into processes of administration and delivery of justice might be or become significantly vulnerable. Reasons include those elicited by research question 6 at the end of this paper. This paper, and the recommendations in Chapter 6, proceed on a similarly broad basis.

The comments and assertions made in this chapter are drawn from pragmatic experience. For the extent to which they are supported in relevant literature, see Chapter 5.

4.2 Chapter 3. General introduction and overview

References to people with an imperfect knowledge of the English language should also include people with no knowledge of English, with language skills impaired by disability, or with no spoken language skills at all; and of course some people's only language skills may be limited skills in a language other than English[32].

The subject of "indicators of honesty and respect", and of body language generally, requires much greater treatment. Firstly, the differences do not only apply between continents. Conventions in the use of eye contact, full-face interaction, gestures and expressions, and so forth, vary significantly within continents and even within Scotland, both geographically and by reference to social background. Secondly, disabilities of all kinds can affect body language, including use of eye contact. A simple example is the tendency of some people with only mild autism to avoid eye contact even when speaking direct to someone close by. Many consequences of disabilities can be quite subtle, but can result in instinctive discriminatory treatment regarding assumptions as to credibility, comprehension, and so forth. Injustice will almost certainly result, sooner or later, from any judicial deficiency in full understanding of these

[32] Ward has encountered that with a Gaelic speaker with a learning disability.

matters[33]. Particularly devastating both to a person's confidence, and to that person's trust in the justice system, can be overt criticism or attempts to "correct" such characteristics.

Even with adequate judicial training in these matters, the challenge remains as to how to avoid injustice through lack of understanding of these matters on the part of members of juries.

The importance of (a) the discriminatory effects of the application of reasonable adjustments and (b) the need for universal design should be stressed even in this introductory chapter 3. For example, the list of those who could be disadvantaged under current arrangements, in the penultimate paragraph of chapter 3, points to a system inadequately adapted to achieve fairness and justice for all, requiring a general re-appraisal and introduction of fairer and more inclusive methods and arrangements, rather than – as suggested in the fourth paragraph – frequent need for rigorous investigation on a case-by-case basis of suitable adjustments.

See also the last paragraph of section 4.13 below, and the research questions introduced in section 4.14.

4.3 Chapter 4. Ethnicity

It is noted that a wider area of concern than matters arising from ethnicity is addressed in this chapter. An example is the description of "the protected characteristics". This wider context perhaps deserves a chapter of its own, and in any event two further points, in relation to people with disabilities, require to be stressed. Firstly, disabilities and their effects can co-exist with all or any other "protected characteristics". Secondly, the requirement to do justice goes beyond any definition such as that of "protected characteristics": the need for universal design, or at least for reasonable adjustments, may arise in relation to the personal characteristics of anyone coming in any way into contact with the justice system.

4.4 Chapter 5. Names and forms of address

In the case of people with mental or intellectual impairments, it is important to ensure that other persons are referred to by the name with which the person with a disability is familiar. Thus, if "John Edward Stewart" is generally known as "Edward", referring to him as "John" or "Mr Stewart" can result in blank incomprehension, or an attempt to relate the question to some other person. Ward is aware of examples of this in practice.

4.5 Chapter 6. Oaths

As far as possible, all aspects of the administration of the oath should be structured so that there is no need to treat people with disabilities differently. Regarding the short section "Persons with learning disabilities", treating them as "big children" will generally be inappropriate, and perceived by them as discriminatory. With reference to the section "Form of oath or affirmation", there cannot be any good

[33] Ward recalls a case in which an otherwise highly respected and experienced judge took objection to what he considered to be inappropriate smiling by a party to a litigation, while that party was sitting in the body of the court. The judge proceeded in short order to discredit almost entirely the evidence which he had heard from that party, and repeated his criticisms in a written judgment which could be said to be damaging to that party's esteem and reputation.

reason to assume that raising the right hand (and the ability to do so – if indeed one has a right hand) will enhance the accuracy and honesty of evidence given. Simply to observe the likelihood of a relevant physical disability, and to excuse someone from doing something required of others, can make the excused person feel that they are being treated as "lesser", affecting their confidence from then on, bearing in mind that such a person is already more likely than average to feel intimidated and disadvantaged by the court environment.

4.6 Chapter 7. Interpreting services

Under "Civil cases" it is suggested that the interpreting service is limited to spoken languages interpreting for civil party litigants. It should be ensured that interpreting services both for spoken language and in relation to all forms of communication difficulties are equally available to everyone, in any interaction with the justice system.

This is probably also the point at which issues arising from language competence should be addressed[34]. Further important issues are the tendency of many people with mental or intellectual impairments, even mild ones, to answer questions only in a very limited and literal manner[35], or to be influenced in their answers by what they feel will best please the questioner[36].

4.7 Chapter 9. Persons with disabilities

It is suggested that much of the material from the preceding chapters of this paper should be introduced here, including the CRPD definition of persons with disabilities, and the relevant provisions of CRPD.

As it stands, chapter 9 is flawed at the outset by implying that regard need only be had to disabilities within the definition in section 6(1) of the Equality Act 2010. Account requires to be taken of the full range of disabilities which at any point in time and for any person may be relevant to achieving equality and the ends of justice in relation to that person. This could be an entirely short-term disability.

---

[34] An example narrated to Ward by a reliable source was of a claimant, who was asked a detailed question about the immediate aftermath of the incident in which the claimant had been injured, said that he could not remember very well because he was "concussed". Counsel cross-examining the witness made a great issue of the fact that there was no evidence of concussion before the court, and sought thus to discredit the witness' evidence. The witness had of course simply used "concussed" to describe his state of shock.

[35] Ward has experience of a case (which did not proceed to court when the true circumstances emerged) of a man with a learning disability accused of chasing two young girls down the street to their fear and alarm. At several stages of the matter he had been asked why he was running down the street. He had said only that he was in a hurry. Only upon further questioning did it emerge that he had permission on limited occasions to leave the group home where he resided and travel into the city centre, provided that he arrived back by a specified time. If he were to be late back, he was at risk of losing that or other privileges. On the occasion in question he had missed the usual bus back. That was the reason for his haste. His ungainly rushed progress may well have scared the two girls, but he was oblivious to anything other than his desire to return home quickly. A prompt explanation to the two understandably alarmed girls would have been an appropriate outcome.

[36] This does not necessarily imply unreliability. It is more often a consequence of the failure of the questioner to adopt entire neutrality when asking the question. Many people with cognitive impairments can be more sensitive to tone and body language than the words actually used: thus, an implication of disbelief or cynicism can cause such a witness to indicate uncertainty about facts of which they are actually quite certain. Some of these issues are addressed in Chapter 5.

The words “are disabled” in the second paragraph should be avoided. They imply a separate category of people. It is better to follow the approach of CRPD and (here) to amend to “have a disability”. More generally, it is better to refer to “persons with disabilities” or “a person who has a disability”.

The sections relating to reasonable adjustments should, for reasons already explained, be balanced with material on the importance of universal design.

On terms and terminology, it might be helpful to recognise the difference between preferred terminology for general use, on the one hand, and accurate descriptions of categories of disability, on the other. There also requires to be a clear distinction between a particular disability, and the cause of the disability. A “mental disorder” is not a disability of itself, but may be the cause of a disability. See section 1.1 above on the terminology of CRPD and the use of that terminology in this paper.

The obligation to provide support (Article 12.3 of CRPD) should be mentioned wherever relevant, an example being the reference to “unable to instruct a solicitor” under “Appointment of a curator *ad litem*”. Likewise, this might be an appropriate point at which to introduce the requirement for separate representation where the actual will and preferences of a person with a disability differ from the position advanced by a curator *ad litem*, safeguarder, or similar.

The section on “Key points in maximising communication” could usefully be presented as essential practice in all communications, applying the principles of full inclusion and universal design. Putting people in categories, and dealing with those categories differently, will almost always result in perceptions of discrimination, and in some people being included in a category unnecessarily, and others being excluded to their disadvantage.

4.8 Chapter 10. Children

Two simple points are relevant.

Firstly, the interaction between childhood and disability requires to be addressed. That is a requirement of Article 7 of CRPD.

Secondly, arbitrary age limits for different purposes, including childhood and adulthood, have no evidence basis in relation to actual development and capabilities. For example, recent research indicates that the brain normally continues to develop, particularly in matters such as decision-making competence, up to about the age of 24.

Such issues are best overcome by adopting, as far as possible, provisions and arrangements based on universal design and full inclusivity.

As an example, everything described under the heading “A child’s anxieties” can be relevant to any adult, and experience indicates that these issues often are fully relevant to adults.

4.9 Chapter 12. Intimidated and other vulnerable witnesses

It may be appropriate to introduce recent consideration and research on undue influence, and on resilience as the counterpart of (and perhaps a concept preferable to) vulnerability.

4.10 Chapter 14. Persons without representation

The suggestion in the Introduction to the section on party litigants in civil proceedings that "certain persons with mental incapacity" are not permitted to conduct their own cause requires full explanation of that limitation, including as to how it is not discriminatory in relation to contemporary human rights standards.

4.11 The E & W Bench Book

The E & W Bench Book goes some way, but only some way, towards meeting comments in the preceding sections of this chapter regarding the (Scottish) Equal Treatment Bench Book, and the issues focused in Chapters 1 and 2 above. It mentions, albeit relatively briefly, CRPD. It helpfully explains the difference between the medical and social models of disability, and their significance. It also explains that "'disability' is defined differently in various statutes and international instruments", and that "Irrespective of whether a party or witness meets any particular legal definition, this chapter is concerned to ensure reasonable adjustments are made for individuals who have an impairment which might interfere with their ability to have a full and fair hearing" (paragraphs 86 and 87 of Chapter 3).

While the E & W Bench Book is a useful and in many respects well-updated resource that should certainly be considered in any review of the (Scottish) Bench Book, it has disadvantages. It is massive, and there must be a question as to whether judges can reasonably be expected to find their way through it to relevant provisions when that may be necessary with some urgency. While it tries to break its subject-matter into broad categories, they are at times confusing. Of particular relevance to disability issues are Chapter 3 "Physical disabilities", Chapter 4 "Mental disability", and Chapter 5 "Capacity (mental)". The division between the subject-matters of Chapter 3 and Chapter 4 is unclear. For example, in Chapter 3 under "What is physical disability?" the list includes "many mental impairments". If there is to be categorisation, it is not certain that "sensory impairment" (included in the same section) should not be dealt with separately. The reason for the inclusion of Chapter 5 is even less clear: not helped by the fact that, unlike Chapters 3 and 4, it does not include at the outset a section on "Why this chapter matters".

There is much overlap between the actual recommendations in different chapters: particularly as between Chapters 3 and 4, many of the recommendations are similar or even identical. Indeed, the multiplicity of recommendations, and their replication across different chapters, together with the difficulties in dividing the subject into areas covered by different chapters, lead to what is suggested is a fundamental point in the following section of this chapter.

4.12 "Equal treatment"?

Perhaps the most startling aspect of both the Scottish Bench Book and the more recent E & W Bench Book is that both are entitled "Equal Treatment Bench Book" when they are precisely the opposite. They are long lists of special provisions and special adjustments. They do not offer ways in which people who interact with the courts can all be treated equally. They do the opposite. They put people into various categories requiring long lists of adjustments in order to squeeze them into the archaic rituals of court practice. Many of the recommendations really come down to ways in which courts can better do their job, by avoiding unnecessary intimidation, disadvantage, discomfort and so forth. One might suggest that a better approach would be to review rigorously all of the recommendations in both Bench Books to assess

the extent to which there would be any disadvantage in adopting them as general good practice, rather than as special practice for particular groups and categories. By accommodating particular characteristics of some people within general good practice, the proclaimed objective of "equal treatment" would be achieved rather than falsified; and needs which are specific to particular people and which can only be met by special provision would be identified, and better focused.

Some simple examples may clarify this point. Is it better to try to define circumstances in which it would be appropriate to remove wigs and gowns, or to ask whether there are any circumstances in which they are indispensable? Is it better to ask in what circumstances witnesses might sit, or whether it is indispensable that some should stand? Is it better to define circumstances in which professionals in court should speak clearly, avoid ambiguity, and so forth, or is it indispensable that in some circumstances they should not be required to do these things? And so forth. Similar questions could be applied to almost every recommendation in both Bench Books. Certainly, in a proportion of cases the answer will be that the special provision is necessary but that the norm, from which the special provision is an exception, is also necessary. But in every case where it is possible, recommendations should be transferred from the category of special provision to the category of general good practice. Put another way, in the language of CRPD, universal design should generally be preferred to reasonable accommodation, as was suggested in the context of CRPD itself in section 1.2.3 above.

Even where measures of reasonable accommodation appear to be required, the methods proposed do not appear to be robustly based upon research as to their efficacy or impact. Do they work? Can they be made to work better? Do they risk an adverse rather than beneficial effect? Such concerns lead to the research questions introduced in the final section of this chapter.

4.13 Relevant legislation

This section briefly summarises and considers relevant provisions of the Criminal Procedure (Scotland) Act 1995 ("1995 Act"), the Vulnerable Witnesses (Scotland) Act 2004 ("2004 Act"), the Victims and Witnesses (Scotland) Act 2014 ("2014 Act")[37] and the Criminal Justice (Scotland) Act 2016 ("2016 Act"). The provisions of these Acts are also referred to in section 5.6 below, in response to the 6th research question listed in section 4.14 below. These provisions are entirely commendable in their intentions, and largely so in the manner in which they are implemented, except that in the light of the research evidence reviewed in Chapter 5 of this paper questions arise as to whether in some aspects the provisions go far enough. We do not seek here to summarise the provisions of this legislation as a whole. We concentrate on aspects that may be improved. As explained in the Introduction to this paper, we do not see it as our function to propose a programme of law reform. However, we do suggest that pending any review and reform of legislation, the deficits which we identify can be addressed as matters of good practice and related guidance. Indeed, it is our view that they must be so addressed in order to achieve compliance with CRPD.

The provisions for support of "vulnerable persons" of section 42 of the 2016 Act are limited to inability to "understand sufficiently what is happening" and to "communicate effectively with the police" owing to mental disorder. "Mental disorder" has the meaning given by section 328 of the 2003 Act. The 1995 Act (as amended by the 2014 Act) provides that a person is a vulnerable witness if under the age of 18, or if there is a significant risk that the quality of the evidence the witness will give will be diminished because they have a mental disorder (also as defined in the 2003 Act) or because of the fear or distress that will

[37] The 2014 Act amended the 1995 Act.

occur in connection with giving evidence at a hearing. The reference to the "quality of evidence" relates to quality as regards completeness, coherence and accuracy. The 2014 Act added specified categories of alleged victims: broadly stated, alleged victims of sexual offences, trafficking for exploitation, domestic abuse and stalking. A person is also a vulnerable witness if it is considered that there would be a significant risk of harm to the person because they are going to give evidence in the proceedings. In determining whether a person is a vulnerable witness, the court is required to have regard to the best interests of the witness, and to take account of any views expressed by the witness. Initiation of protective procedures rests with a party intending to cite an adult vulnerable witness and (again), in assessing whether a person is likely to be a vulnerable witness, regard must be had to the best interests of the person, and any views expressed by the person. A limited list of special measures appears in section 271H of the 1995 Act. Part 2 of the 2004 Act contains broadly similar provisions applicable to civil proceedings.

The provisions briefly referred to above give rise to the following potential issues. The first is their complexity. One might question whether it is helpful to have a long list of categories of those who do and do not qualify for such treatment. To the extent that the categories are predicated upon mental disorder, they are potentially contrary to the requirements of CRPD. One questions whether the whole scheme of these provisions could be simplified (a) by adopting as far as possible a scheme of universal design, limiting to the minimum the requirement for special provisions at all, and (b) to the extent that special provision might be required, concentrating upon the simple purposes of maximising the quality of evidence given to the court and the court's ability to assess that evidence accurately, and preventing avoidable harm or detriment to the person in question. Secondly, it would seem necessary to widen references to fear or distress occurring in connection with giving evidence at a hearing, both to encompass psychological or other harm generally, and to consider such adverse effects in relation to engagement with the processes of justice in any way. This could include possible such effects upon, for example, a potential juror. Thirdly, references to completeness, coherence and accuracy of evidence are too narrow. Also relevant are factors that may adversely affect perceptions and assessment of quality of evidence. Fourthly, vulnerabilities of persons such as "alleged victims" appear to be focused upon particular proceedings, but once vulnerability has been identified care must be taken to consider the impact of such vulnerability, and of the ways in which it is addressed, upon the person in the context of any other proceedings, civil or criminal, current or future, involving the same person in any way. Fifthly, it is not clear that "significant risk of harm" is applied to all aspects of the engagement with the processes of justice, nor whether the qualification "significant" is appropriate: if there is a risk of harm, however great or small, it should be considered and if necessary addressed. Sixthly, requirements to have regard to the best interests of a person and to take account of any views expressed are insufficient to comply with CRPD, and raise questions as to whether they are sufficient to achieve the best arrangements for an individual, and to avoid arrangements that might be counter-productive or harmful. Rather than "best interests", the test must reflect and comply with the principles of the 2000 Act, and the requirement of CRPD Article 12.4 to respect the rights, will and preferences of the individual. Seventhly, the views of the person must always be ascertained and taken into account, again reflecting the requirements of both the 2000 Act and CRPD. There must be an attributable duty to do this.

Proposed amendments before the Scottish Parliament at time of writing would not appear to address the above issues.

4.14 The research questions

Questions about efficacy and impact arise not only in relation to reasonable accommodations that are currently recommended, or that may be proposed. Such questions arise in relation to all aspects of the current administration and delivery of justice, and to any proposals for change intended to apply the principle of universal design to achieve greater effective equality before the law and more effective non-discrimination. Such questions require to be researched and answered, and the answers implemented, in order to create the environment in which content can be identified for proposed training to be delivered in accordance with Article 13 of CRPD, if such training is to achieve the purposes of CRPD in general, and of Article 13.2 in particular.

The research questions posed in this section, and addressed in Chapter 5 below, are not intended to be comprehensive. They pick up particular issues which have arisen up to this point in this paper. They are intended to exemplify questions which require to be researched and answered, and Chapter 5 is intended to exemplify a research-based methodology for addressing them.

The questions which we have thus identified are as follows:

1. How do we know what works?

2. How do witnesses with disabilities (and other vulnerabilities) experience special dispensations, such as being permitted to sit down when giving evidence in court?

3. How do the format and style of questions, and the lawyer's attitude during witness examination, influence (support or hinder) the evidence-giving of witnesses with disabilities (and other vulnerabilities)?

4. How should the potential for biases of judges and/or jurors in relation to witnesses with disabilities (and other vulnerabilities) be addressed?

5. How can the reliability of the evidence of such witnesses best be ensured?

6. How effective are existing provisions in Scots law in relation to "vulnerable witnesses" and "vulnerable persons"?

7. What is the principal role of the judiciary in relation to the foregoing matters?

CHAPTER 5: SUPPORTING EVIDENCE-GIVING OF WITNESSES WITH DISABILITIES (AND OTHER VULNERABILITIES)

5.1 Introduction: How do we know what works?

Although the requirement for reasonable accommodation is explicitly included in the principle of non-discrimination, a special measure or provision can itself be discriminatory, and harmfully so, especially if the witness's views have not been obtained as to the helpfulness of proposed special measures or provisions (in the remainder of this chapter simply called "special measures", except where another term is more appropriate). This section looks at some examples of special measures and potential problems.

The dearth of psychological research into the effectiveness of support for witnesses with disabilities is surprising[38]. If such support has two aims, namely (1) to ensure that such witnesses enjoy legal capacity on equal basis with others, and (2) to help them give their best evidence, then it is not always clear that it does either. As regards the first aim, literature suggests that special legal provisions around evidence-giving might actually increase the perception of witnesses with disabilities of themselves as being vulnerable, rather than support their equality. This may adversely impact how "competent" a witness is then perceived to be when giving evidence (Edwards 2013: 309). If "disability is as much a product of socio-spatial barriers as it is biological impairment" (Edwards 2013: 307, and see 1.1 above), then we might consider the impact of disabling attitudes in the creation of obstacles for people with disabilities, including describing their identities in terms of vulnerability and incapacity (ibid: 308), and basing the legal provisions that are intended to support disabled witnesses, in terms of the vulnerability of such witness, rather than equality (309).

As regards supporting witnesses to give their best account of an event, as Chong and Connolly (2015) point out, we need to consider relevant psychological questions that the use of such support poses around its effectiveness with various groups of witnesses. Edwards highlights that different pieces of legislation often create contradictory legal identities, that what is a barrier for one person may not be for another, and each disabled person may need a different type of support (2013: 311). There is also no clear distinction in the research literature between witnesses with mental or physical disabilities, although most literature seems to focus on mental disabilities when discussing vulnerable witnesses. It is possibly as a reflection of this focus that, when discussing special measures for vulnerable witnesses, the giving of evidence through video-link or behind screens, removal of wigs and gowns by judges and lawyers[39] and or use of supporter or intermediary (for example, Turner et al., 2016 (Scotland); Justice Cobb 2018 (England &Wales)), is most often suggested. Other influences, for example, position in space and the movements of the lawyer, which might (also) be relevant for witnesses with physical disabilities, are notably not examined. However, as Burton et al. (2007: 5-7) argue on the basis of their Home Office-funded research into the implementation of special measures in England and Wales, a conservative estimate of around 24 per cent of witnesses can be considered vulnerable and might benefit from some

[38] More research has been undertaken into the effects of such support on children, rather than for adults, and among adults, more about witnesses with mental disabilities rather than those physical disabilities. See Chong and Connolly (2015).

[39] We define as lawyers all advocates and/or solicitors conducting proceedings in court, both in civil and in criminal proceedings, as prosecutors or acting for any party, and acting as examiners-in-chief or cross-examiners; and in references relating to or derived from other jurisdictions, their equivalents in any such other jurisdiction: see "Definitions and Abbreviations" on page 3.

special measure, and vulnerabilities may vary significantly from one circumstance to another. Thus, the first important suggestion in this respect would seem to be actually to have witnesses have a *say* as to whether they want special measures or not, and which ones they would find helpful.

It is important that witnesses are given information about special measures, so that they can make an informed assessment of what would help them most. This would, for example, in criminal proceedings prevent the police recommending the measures based on assumptions that could be to the disadvantage of the witness. In fact, Burton et al. suggest witnesses should be consulted already by the police pre-trial, to identify which measures would suit them most. One of the most important views expressed by witnesses in research was that they would have liked to have had a choice (Burton et al. 2007: 14). In this regard, the authors argue that familiarisation visits are the most important form of support, because they enable the witness actually to see what a particular measure is or feels like in practice.

It seems that often this does not happen. Mathew Hall points out that witnesses are often assigned special measures when giving evidence without consideration of possible *negative* implications of these measures for them and *without any mechanism that will establish whether the measures are in fact wanted by the witnesses*. (Hall 2007: 34, added emphasis) This is something that might in fact hinder them in giving full and uninhibited evidence. It might also negatively impact the trial. For example, Mulcahy describes how the courtroom layout was considered to have adversely affected the trials of Tompson and Venables (*V v United Kingdom 1999*) for the murder of Jamie Bulger, which enabled the defendant to successfully claim a breach of human rights. In that case, special dispensation was first arranged to raise the dock with the intention to ensure the defendant's better view. However, it was afterwards argued that this had instead created greater exposure and thus discomfort and, according to the defendant's lawyer, prevented the defendant from receiving a fair trial (Mulcahy 2007: 386).

5.2 How do witnesses with disabilities (and other vulnerabilities) experience special dispensations, such as being permitted to sit down when giving evidence in court?

5.2.1 Height, sitting and position in space

The example at the end of the preceding section highlights the importance of considering special provisions in terms of space in the courtroom that go beyond questions of accessibility. Literature about the design of the courtroom is clear: the physical structures and space embody and advance the prevailing legal order, related ideologies and current ideals of justice, security fears and interests of various professional groups (Bybee 2012: 1015, Mulcahy 2007: 383, Rossner et al 2017:318). In other words, the way the space is organised is also a way of organising individuals. For example, status and privilege is communicated by giving space and accommodation, the expression of marginalisation through confinement of someone in the dock. Mulcahy argues explicitly that although it is assumed space is just a background and the judgment given in one place would be the same as the judgment reached in another, in fact, 'spatial dynamics can influence what evidence is forthcoming, the basis on which judgments are made' (2007: 384).

In practice, that means that the credibility of the speakers and of what they say is affected by their position in space, sight-lines and acoustics. Sight-lines, distances and levels, as defined in the specifications for Crown and Magistrates courts in England and Wales, are carefully arranged to establish particular relationships between the participants in the courtroom (as specified in the Department for Constitutional Affairs (2004) Court Standards and Design Guide, quoted in Mulcahy 2007: 389). Importantly, amongst

other elements of the space, Mulcahy references the height (for example raised floor) as a potential to become a "physical manifestation of hierarchy and power" (ibid: 385), and argues that it has been used since medieval times to signify power and enable visual control (396). Conversely as shown in her example of the trials of Tompson and Venables above, height can also create feelings of exposure and vulnerability.

The issue is that when, by special dispensation, some witnesses are for example permitted to sit down, this creates a differentiation and a categorisation of a particular witness, focusing the attention on them in some way. Rossner et al. highlight the potentially negative implications that a different position in the courtroom space, or treating one person differently, can have, for example by drawing undue attention of the jury or causing prejudice. Although mainly focusing on the use of dock for the defendant, they argue that *any* arrangement that can make one person look different from other people in the room could lead to prejudice as there is research evidence that jurors are less sympathetic to people that they perceive as in some way different from themselves (Rossner et al 2017: 323, 325-326).

However, as Bybee (2012) argues, the organisation of the space could also be used to challenge disciplinary tendencies and promote greater equality and fairness. How? Firstly, rather than creating a difference in the position of one person by special dispensation, it is arguably better that if one witness is allowed to give evidence seated (for example due to disability), then all witnesses should sit when doing so, so as not to position one witness in a different manner that could potentially have an adverse effect on the jury's perception of that witness or their evidence. This supports the principle of "universal design" as preferable to supposed "reasonable accommodation".

Secondly, the experience of height in space could also be used in support of the witness's evidence. As mentioned above, Mulcahy connects height to power and hierarchy as well as exposure. But this could also be used positively as long as it is done in consultation with the witness. Research from the commercial sector, which similarly indicates the association of verticality with power, morality and ability, offers ideas related to the way people think and act depending on their position in space, and the way in which their power perception can thus be influenced by changes in the perception of their height in space (Aggarwal and Zhao, 2015: 131). Researching the contextual and situational factors of the environment, Aggarwal and Zhao (2015) argue that differences in perceived physical height (such as sitting on a higher chair vs. on a lower chair and being on a higher floor vs. ground floor in the building) affect the mental/conceptual construal of the individual. In particular, when perceiving themselves to be at higher level in physical space people process information more abstractly, taking 'a big-picture perspective, and focus[ing] on the central aspects; at low construal levels, they process information more concretely, take a narrow perspective, and focus on the peripheral and detailed aspects' (Aggarwal and Zhao 2015: 121).

The authors show that change in height might thus trigger change of conceptual construal: for example, one of their studies demonstrated how participants perceiving themselves as in higher spatial position also indicated a higher preference for larger-but-later award than those perceiving themselves as lower in space who preferred smaller-but-sooner award. (130). In the context of commerce, Aggarwal and Zhao advise that sales people and other agents have "their clients sit in a higher chair when discussing important issues because an increased elevation would boost their construal level, helping them see the big picture relevant to making thoughtful decisions in financial, health, or other consumption domains" (132).

This might, by inference, also affect evidence-giving in court. In terms of witnesses giving evidence seated, a higher stool might, according to this research, change their power perception. Chair height or raised floor level might also be used to boost the disabled witness's construal level when discussing central issues

of the evidence. A lower chair, on the other hand, might help them focus on the practical, peripheral and detailed aspects of the evidence. In any case, the most important point is that the witness should be informed as to what measures are available, explained how they might affect them, and consulted on whether they themselves might find them helpful or not.

5.2.2 Courtroom Proxemics: Distance and movement

The delicate dynamics of spatial arrangements are highlighted further by research into court proxemics. Proxemics examines the space that individuals need in order to feel comfortable and the effects of intrusion in this space. Brodsky et al. (1999:1) follow the classification by anthropologist Edward T Hall of this space into four zones: intimate zone (up to 16 inches around the individual), personal zone (up to four feet), social zone (four to twelve feet) and public zone (twelve feet to infinity) (see also Hall 1966:116-124). When personal space is violated, individuals become aroused, tense or angry and they try to compensate by distancing themselves (if they can). Proxemics in court refers mainly to the bodily position in, and use of, courtroom space of the lawyer rather than witnesses, but it influences the interpersonal dynamics between the two, and it becomes more significant in cross-examinations. Besides the intrusion in personal space, the influencing factors on whether a person will feel threatened in this way are also gender, culture, race, status and nonverbal symptoms (gaze, smiling and posture).

Research in court proxemics has been done mainly in the US, so there may be differences from court layouts and formalities in the UK. Nonetheless, some points about the lawyer-witness dynamics might be applicable. In their observation study conducted in Alabama, US, Brodsky et al. observe that whilst lawyers most often actually "remained seated at their tables or remained standing behind the podium while questioning witnesses" (1999: 6), when they do stand up and move around the courtroom, they examine witness from a closer proximity (social zone and partly personal zone) during cross examination than during direct examination (when they tend to stay in the public space zone). This would seem to confirm the view that this is a tactic lawyers use in order to intimidate the opposing witness (whether they actually do it consciously or not). Importantly, Brodsky et al. conclude that "[w]hen a lawyer intrudes upon personal space of a seated witness or juror, anxiety or anger may result" (1999: 6) (though they do not explain why a *seated* position is emphasised here).

Appearing as a witness in court is stressful for anyone, but even more so for vulnerable witnesses (Burton et al. 2007: 2). Indeed, Brodsky et al. make a passing observation, quoting another American lawyer Peskin (1980), that vulnerable, distraught or mentally ill people might have a greater need for personal space and might feel more intimidated by the lawyers' behaviour and get more anxious (Brodsky et al.,1999). This knowledge becomes problematic if a vulnerable witness's greater need for personal space is abused and intruded into intentionally as a tactic, in order, as Peskin advised, to make the witness anxious and the evidence appear more hesitant and uncertain (quoted in Brodsky 1999: 5).

Fortunately, it would seem that attitudes have changed significantly since the 1980s, or in any case they seem less aggressive in Britain. Contrary to Peskin, Adrian Keane, in his paper analysing quality assurance and training schemes in England and Wales, argues that the "professional duty of the advocate is not to ignore or take advantage of the difficulties faced by vulnerable witnesses, but to develop new methods to test their evidence". (2012: 176). Nonetheless, rather than relying on changing attitudes, it would perhaps be desirable if lawyers were advised not to come closer than the public space zone, that psychology advises, to the opposing witness with a disability or other vulnerability.

Brodsky et al's research also recommends that lawyers should display an open posture, and should

remove physical barriers between themselves and the judge, jury or witness, to have as much movement as possible and to emphasise a standing upright straight posture, to convey confidence and appear authoritative (Bernstein 1994, Klein 1993, Sanito 1983, Nelson 1995, Vinson 1987, Ryan and Svaldi 1993 – all quoted in Brodsky et al 1999). It is an important question as to how such extensive movement around the court room, and an emphasised upright standing posture, might be perceived by a disabled witness who perhaps lacks mobility, and might possibly thus feel disempowered. Though their study does not address this, research into police interviews in Norway *does* show that the behaviour of the interviewer influences the behaviour of the interviewee and that this can cause severe misinterpretation. For example, it was reported that when police interviewers were moving more, they induced a similar behaviour in the witness, and these increased bodily motions were sometimes interpreted as suspicious behaviour (Kaufmann et al 2003: 30). Clearly, more research into such dynamics in space is needed.

5.3 How do the format and style of questions, and the lawyer's attitude during witness examination, influence (support or hinder) the evidence-giving of witnesses with disabilities (and other vulnerabilities)?

5.3.1 General

It has been suggested that special measures will bring little benefit if there is not also a change in the attitudes and practices of the questioning lawyers. In fact, the latter seems to be most problematic. As Hall highlights in relation to using video link: "…it is clear that the video-link equipment itself will do little to keep witnesses calm and (relatively) comfortable if the lawyers conducting the trial do not adapt their working practices accordingly…" (Hall 2007: 42). Hall cites a 2002 Witness Satisfaction survey conducted in England and Wales, which showed that witnesses with disabilities mostly wanted to feel appreciated and helped and to be considered in a courteous manner, as well as to have had the opportunity to say everything they wanted to say in their evidence-giving. In other words, the conduct of the lawyers and other court staff towards them was seen as more important than the special dispensations (Hall 2007: 36).

Hall seems to be referring to disrespectful or (perceived as) aggressive conduct of the lawyers. He is not the only one. Several authors have argued that traditional cross-examination techniques are inappropriate for vulnerable witnesses and should be minimised or abandoned altogether. They might even elicit inaccurate evidence (Keane 2012: 179). Considering that the population of people with intellectual or learning disabilities (LD) is at greater risk of having crimes committed against them than general population (O'Kelly et al. 2003, Kebbell et al. 2001, Perlman et al. 1994), the research into the support of such witnesses' ability to provide accurate evidence is especially important.

In the UK, several measures are already in place, such as pre-trial preparation, removal of wigs and gowns, frequent breaks, etc (O'Kelly et al 2003:230). However, some simple measures that could be effectively used to help are not widely in place. In particular, research has shown that the question format, style and attitude used have a heavy influence on the accuracy of the evidence of people with learning disabilities (O'Kelly et al. 2003, Kebbell et al. 2001, Milne 2002, Perlman et al. 1994). In this section we consider how an examination style that is unsuitable for vulnerable or disabled witnesses can affect the evidence in relation to the following issues:

1) Language complexity and understanding of questions.
2) Accuracy of evidence.

3) Suggestibility and inconsistency.

5.3.2 Language complexity and understanding of questions

Reviewing English-language research on how interview questions influence witnesses with intellectual disabilities, Bowles and Sharman examined which formats elicited most errors in such witnesses. Their paper highlights how some question formats, and the language used, do not take into account that witnesses with LD may lack the knowledge of certain words or are not able to understand some of the language (Bowles and Sharman 2014: 215). More specifically, Keane (2012: 179, 193) argues that using figures of speech, irony or sarcasm might not be understood correctly by witnesses with even mild learning disabilities, in particular those with autism who are likely to interpret them in their literal rather than intended sense. Similarly, complex questions that include a double negative, or which have complicated vocabulary or sentence structure, may cause hesitancy and confusion in witnesses with learning disabilities which may discredit the evidence of such witnesses in the eyes of a jury (Kebbell et al 2001:99).

Such type of questioning as described above was most common in cross-examinations, and Keane contends that these techniques could "confuse vulnerable witnesses, reduce their ability to comprehend the issues and diminish the cogency and accuracy of their testimony [i.e. evidence]" (2012:175). Burton et al. highlights, in line with Hall as mentioned at the beginning of this section 5.3, that any effort with implementing other special measures will not have the desired impact unless lawyers are also effectively regulated. The regulation has to curtail the use of unnecessarily confusing language and aggressive cross-examination tactics (Burton et al. 2007: 23)

5.3.3 Accuracy of evidence

Perlman et al. (1994), who conducted research on reporting on observed events with adults with learning disabilities in Canada, as well as Bowles and Sharman's (2014) meta-study of literature in this area, do show that such adults provided fewer details than the control participants in response to free recall and general questions. Nonetheless, the *accuracy* of the provided information was comparable to controls (Bowles and Sharman 2014: 214). In addition, Perlman et al. also report that whilst the witnesses with LD made more errors of omission on recall tasks, they also tend to recall less *incorrect* information because they have less prior preconceptions, and less encoding of erroneous information into memory, than adults without disabilities (Perlman et al. 1994: 172).

In response to specific questions, or statement questions that were correct and had simple structure, Perlman et al.'s study shows participants with LD displayed the *same* level of accuracy as controls. The authors argue that providing semantic cues in the questions improved recall performance. However, the participants with LD provided less salient information in response to non-leading short questions.

5.3.4 Suggestibility and inconsistency

As Bowles and Sharman point out, "people's memories of an event are less accurate when they are asked leading questions containing misinformation than questions containing no misinformation" (2014: 205-206). In other words, misleading information distorts witness memories, regardless whether the questions are open or closed. Whilst this distortion happens to all people, it partly depends on the complexity of the cognitive structure of the individual: people who score highly on intelligence tests are

more able to resist misinformation than others, and people with intellectual disabilities are more vulnerable to this effect.

The influence of misleading questions in general has been explained through various reasons, for example misattribution (mixing the information received after the event in question or during the questioning with the information encountered in the event) and suggestibility (being influenced by other people's statements). For example, Perlman et al (1994) suggested that population with LD often fails to use organisational cues to recall information spontaneously. This might mean they are more vulnerable to the influence of external cues, including misleading ones. But of particular importance has been the question of "interrogative suggestibility", defined on Gudjonsson suggestibility scale, which describes to what extent a person accepts suggested messages of the interviewer in the way that these messages affect their responses (Milne et al 2002: 9).

Suggestibility is partly a function of the influence of authority. For example, children are more vulnerable to suggestion than adults, rarely challenge credibility of adult conversational partners, and sometimes adjust their responses to the perceived intent of the authority figure rather than their own knowledge of the event. It has been argued that this partly extends to people with developmental disabilities. This may be particularly so because compliant behaviour is often expected of them and rewarded. This would imply that such suggestibility is in their case also a function of social and motivational factors, rather than being purely dependent on cognitive abilities. For example, some studies of adults with mild or moderate developmental disabilities indicate that this group might be more suggestible about facts of which they are unsure, but not about facts that they clearly remember (Perlman 1994: 173). Milne et al similarly argue there are social factors involved, for example that suggestibility is partly a coping strategy in the face of uncertainty (i.e., when one is unsure), and of expectations of the interrogative situation (2002: 14).

Importantly, studies with both adults and children suggest that vulnerability to suggestion is partly a function of the question format. For example, free recall and general questions seem to work better in this respect. The worst case of questions for witnesses with LD are constraining, coercive and complex questions. Firstly, in most studies the population with LD were more suggestible on the *misleading* questions and they also performed worse than the controls in cases of false *statement* questions. Both have been ascribed to the desire to conform to the perceived intent of the authority figure (Perlman 1994: 185). This seems to be confirmed by the research suggesting that adults with LD are also more likely to acquiescence: that is, to reply 'yes' to the 'yes/no' questions, and more than twice as likely to agree with the leading questions than the general population.

Nonetheless, an important aspect of the above-mentioned Canadian study by Perlman et al. was the non-verbal behaviour of the participants, which should also be considered. For example, although the LD participants were more suggestible on the misleading short-answer questions, they seemed to have displayed awareness that the question contained erroneous information – they would frown, ask for the question to be repeated, shift in their chairs, pause, or change their tone of voice. The authors argue that this suggests that they were seeking assurance that they were providing the desired response, whilst lacking confidence to challenge the interviewer (186), rather than being cognitively unable to determine that the question contained misleading information. Therefore, the authors suggest that it would be sensible to spend more time briefing witnesses with LD about their rights to oppose the lawyers, as well as to advise the judge and jury about the problem of suggestibility/compliance in such cases.

Finally, questioning predicated upon alleged inconsistencies, or repeating the same question several times, may also confuse a witness with LD. Consequently, it can result in damage to their apparent credibility and may have the effect of misrepresenting the evidence given by such a witness. There are several potential reasons for this. Firstly, when such witnesses are subjected to such questioning they may start looking at the questioner (or interviewer) for cues to the desired answer and, as mentioned above, try to comply with what they think is expected of them. Secondly, the apparent inconsistency may simply be the result of lower language competency and precision as described above. Lastly, as Keane points out, for many vulnerable witnesses, especially children, inconsistency is normal and might spring from factors such as developmental immaturity, or the difficult nature of disclosure in cases of abuse (Keane 2012:179).

5.4 How should the potential for biases of judges and/or jurors in relation to witnesses with disabilities (and other vulnerabilities) be addressed?

If a person, especially a vulnerable witness, reacts with anxiety or emotionally due to feeling vulnerable when giving evidence, whether this results from inadvertent consequence of a special provision, aggressive cross-examination, or otherwise, is there a risk that, to a watching judge and/or jury, such reactions could give impressions of unreliability, or be misinterpreted as evasion or guilty defensiveness? Studies of the effects of evidence, coherence, witness credibility, and other psychological factors on jury decision-making would seem to suggest that there is a danger of this.

Studies of psychological factors affecting judgements and jury verdicts are not usually focused on vulnerable witnesses in particular, but rather on nervousness and other emotional signs in general. Nonetheless, they are important to look at in this context, since research shows that judgements are by no means influenced only by the content of the evidence, but also by the witness' behaviour. In making judgements, we are both consciously and non-consciously influenced by signs that we associate with truth-telling or lying, of which emotional states are particularly important. For example, another Norwegian study, by Wessel et al., reports that behavioural signs such as emotional activation, upset and nervousness were deemed to signify deception in studies both with lay people (mock jurors) as well as legal professionals, or at the minimum that such evidence was judged as less credible, independently of its truth and content (Wessel et al. 2006: 221). A disabled witness' potentially greater anxiety, sometimes maybe an inadvertent effect of special dispensation that turned out to be uncomfortable for the witness, might affect credibility as perceived by the judge and/or jury.

These prejudices seem to affect juries more than judges. For example, the results reported by Wessel et al suggest that the effect of emotional expression on judges' assessments of the witness' credibility was weaker than that of jurors (2006: 225). This in their opinion reflects not only judges' professional knowledge but also their greater experience of the system, for example being aware that witnesses are actually prepared for the hearing, including as to the emotional expressions that they display. Nonetheless, Porter et al (2009: 120) question the ability of both judges and juries accurately to evaluate the credibility of witnesses, especially due to misreading emotional expressions. They argue that their review of judicial attitude in Canada shows that credibility assessment is predominantly (and mistakenly) approached as a straightforward matter of relying on common sense. The authors provide a theoretical framework for understanding the dangers of the decision-making process, and suggest that specific training of judges on credibility biases would be needed.

In a similar way, additional information to juries could help safeguard or improve credibility perceptions of an anxious vulnerable witness. For example, on the basis of their research into preconceptions of truth-telling or deception signs in potential jurors in Australia, Coyle et al. recommend that especially prepared information be provided to jurors by way of written judicial directions, that can correct their misconceptions about the behavioural signs of credibility/deception (2014: 486). Finally, there are options to include an expert on the credibility of a particular witness, which have been used in cases of child witnesses with autism or intellectual disabilities (T. Ward 2009).

5.5 How can the reliability of the evidence of witnesses with disabilities best be ensured?

If, as suggested above, the conventional practices in court are not suitable to elicit best evidence from witnesses with disabilities, new ways of supporting and testing their evidence must be developed.
Several "best practices" have been suggested that can enable witnesses with learning disabilities to produce reliable evidence. The format of the interview should be adjusted to the witnesses with intellectual disabilities: for example, to use free recall first then change to ask specific questions. Interview should ask simple, open ended questions and avoid using suggestive and multiple-choice questions. Bowles and Sharman also propose employing memory retrieval strategies in order to help people with intellectual disabilities to recall the event better, such as reinstating the environmental context of the time of the event, allow for recall of every – even unimportant - detail, not focus on the order of the events, etc. (Bowles and Sharman 2014: 206, 207, 215). It would be desired for the style of questioning to interrupt the evidence-giving less and to establish a rapport with the witness (Hall 2007, Bowles and Sharman 2014).

Amongst strategies to prevent adversarial techniques in examination of vulnerable witnesses that could undermine their evidence or produce responses that could bias the jury against them, judicial training and judicial intervention seem to feature most often. However, as Keane points out, judicial intervention is reactive and takes place after the problem, when damage has potentially already arisen in court (2012: 184). He argues instead for re-professionalisation, for example, in the form of special training and accreditation system for lawyers who would then be allowed to interview vulnerable witnesses such as children or people with intellectual disabilities. The training should draw on medical and psychological expertise, rather than only legal expertise, to ensure that lawyers understand special needs of different types of vulnerable witnesses and are able to elicit the best evidence. In some cases, evidence from third parties, such as social services or police, could be admitted rather than too complex questions being put to a vulnerable witness (193). Finally, questioning by specialist interrogators might be advised in some cases, such as is already the case in Israel, Norway and South Africa (Keane 2012: 183, 190, 197).

Another existing option not mentioned in this list but with some similarities to Keane's proposal of specially trained lawyers, was actually already introduced in England & Wales by the Youth Justice and Criminal Evidence Act 1999: the use of a registered intermediary to facilitate communication with the police and the judiciary in cases of vulnerable witnesses, in particular witnesses with learning disabilities. The measure was piloted in 2004 and has been rolled out nationally in England and Wales since 2007 (see O'Mahony 2009). Trained in areas of psychology, language and speech therapy and similar, the intermediary assesses the needs of the witness and outlines "ground rules" for the examination in court, intervening in court if agreed ground rules are not adhered to (O'Mahony 2009:234). O'Mahoney emphasises the need for the information about this option to be made more available to police, learning disability services, lawyers, and other stakeholders within and around the justice system. There have been suggestions to extend this scheme to defendants with learning disabilities, however, more complex issues

are at stake in such cases that need to be researched[40]. O'Mahoney suggests that there is a problem with the wording of the legislation in England & Wales in that it is limited to witnesses with a diagnosis of learning disability, which excludes other cognitive impairments below the threshold for this diagnosis (2009: 235-236). Provisions of Scots law with regard to support for vulnerable persons in Scotland do give rise to similar concerns (see section 5.6 below).

Finally, since it is indicated that witnesses with disabilities can feel more vulnerable and indeed more anxious than a non-disabled witness when giving evidence in court, it would also seem useful that they get more support in preparing for the trial. As Kacy Miller, an American consultant who works with preparation of witnesses for testifying, points out, increased anxiety interferes with the witness' ability to understand information and think rationally. This ability, as we saw above, may already be impaired in some witnesses with disabilities, so support is needed in order to obtain good evidence in trials. Miller lists developing positive feelings of being accepted and appreciated as most helpful (Miller, 2011: 30). This, however, is something that, according to the aforementioned survey quoted in Hall (2002), witnesses with disabilities have been saying all along.

5.6 How effective are existing provisions in Scots law in relation to "vulnerable witnesses" and "vulnerable persons"?

In section 4.13 above, we identified relevant potential issues in relation to the provisions of the 1995 Act, 2004 Act, 2014 Act and 2016 Act. These are largely answered by this Chapter 5 as a whole. The need to remove limitations upon the persons for whom special provisions might be appropriate is emphasised by Khan, who argues, "[a]ny witness who is not able to testify due to lack of support or protection is a loss to the proper functioning of a criminal justice system" (Khan 2013:27). The literature cited above demonstrates the risks of harm, including psychological harm, from engagement with court processes generally, and the risks of inappropriate assessments of the actual quality of evidence given. Vulnerabilities are likely to apply generally. It is essential always to seek the views of the witness before deciding whether special measures would be appropriate, and if so what special measures should be selected.

5.7 What is the principal role of the judiciary in relation to the foregoing matters?

The review of literature suggests that researchers in both legal and psychological/psychiatric fields are of the opinion that the duty of judges to ensure a fair trial should include deployment of the *available* special measures for vulnerable witnesses. Furthermore, Akbar Khan, the Director of Legal and Constitutional Affairs Division, Commonwealth Secretariat in London, argues that creating a context and climate where witnesses will be able "to testify truthfully and without fear of reprisals" is, firstly, "essential to fulfilling the goals of truth and justice", and secondly, showing care and recognition that witnesses deserve for contributing to finding the truth (both by quotes in Khan 2013: 27). Along these aims, Cooper and Grace (2016: 220-221) offer a psychiatrist's view that the court should thus take every reasonable step to facilitate the giving of the evidence of such witnesses. In fact, they suggest that judges should not limit the special measures to the ones set out in the legislation, but rather to use their wide discretion to adjust the court process with as diverse interventions as may be needed for each specific witness. This could include, for example, asking everyone to slow down and use plain language, schedule extraordinary

[40] According to O'Mahoney Coroner's and Justice Bill 2008-09 aimed to extend this to defendants with disabilities (O'Mahoney 2009: 232, 236).

breaks, allow the use of stress toys or even specific clothing that might help an autistic witness, and so forth (2016:222). Such an approach may be said to be essential to ensure CRPD compliance, as an overall strategy that (a) affords specific accommodations to persons with disabilities, and (b) does so within an overall approach of universal design that does not discriminate specifically on grounds of disability.

There does not seem to be much relevant psychological research into the role and effects of the judiciary in influencing better giving of evidence of witnesses with disabilities and other vulnerabilities. Nonetheless, judicial training and judicial intervention feature often amongst suggested strategies to prevent adversarial techniques in examination of vulnerable witnesses, which could undermine their evidence or bias the jury against them. For example, Kebbell et al. recommend prior advice to a judge in each case involving a vulnerable witness, as well as special training of judges in general, so that the judge would (and, it is implied, should) intervene when necessary in order for the trial to be conducted fairly (Kebbell et al 2001, O'Kelly et al 2003). One study that did analyse judicial interventions was by O'Kelly et al (2003). The authors of the study were surprised to find that there were currently no differences in the number of such interventions in cases of witnesses with LD, despite their greater vulnerability and well-documented problems with adversarial and confusing questions. They argue that judges should be made more familiar with forms of questioning appropriate for witnesses with learning disabilities so that they can intervene to address lawyers' questioning practices when needed.

5.8 Literature referred to in Chapter 5

Aggarwal, P. and Zhao, M. 'Seeing the Big Picture: The Effect of Height on the Level of Construal'. *Journal of Marketing Research* Vol. LII (February 2015), 120–133

Bowles, P.V., and Sharman, S.J., A Review of the Impact of Different Types of Leading Interview Questions on Child and Adult Witnesses with Intellectual Disabilities. *Psychiatry, Psychology and Law*, 2014 Vol. 21, No. 2, 205–217

Brodsky et al., 'Attorney invasion of witness space'. *Law & Psychology Review*, Vol 23, Spr 1999. pp. 49-68.

Burton, M., Evans, R., Sanders, A. Vulnerable and intimidated witnesses and the adversarial process in England and Wales. The International Journal of Evidence & Proof (2007)11,1–23

Bybee, K.J., 'Judging in Place: Architecture, Design, and the Operation of Courts'. *Law & Social Inquiry*, Volume 37, Issue 4, 1014–1028, Fall 2012

Chong, K., and Connolly, D.A. (2015) Testifying Through the Ages: An Examination of Current Psychological Issues on the Use of Testimonial Supports by Child, Adolescent, and Adult Witnesses in Canada. *Canadian Psychology*, Vol 56. (1), 108-117

The Honourable Mr Justice Cobb. 'Do the vulnerable have effective access to family justice?' *Family Law Journal***,** 2018, 36

Cooper, P. and Grace, J. Vulnerable patients going to court: a psychiatrist's guide to special measures. *BJPsych Bulletin* (2016), 40, 220-222,

Coyle, I.R., Thomson, D.M., Opening Up a Can of Worms: How Do Decision-Makers Decide When Witnesses Are Telling the Truth? (2014) Psychiatry, Psychology and Law, Vol. 21, No. 4, 475–491

Edwards, C., 'Spacing access to justice: geographical perspectives on disabled people's interactions with the criminal justice system as victims of crime'. *Area* (2013) 45.3, 307–313

Hall, E.T. (1966), *The Hidden Dimension*, New York: Anchor Books

Hall, M., 'The Use and Abuse of Special Measures: Giving Victims the Choice?' *Journal of Scandinavian Studies in Criminology and Crime Prevention* Vol 8, pp 33–53, 2007

Kaufmann, G., Drevland, G.C., Wessel, E., Overskeid, G., Magnussen, S (2003), The Importance of Being Earnest: Displayed Emotions and Witness Credibility. Applied Cognitive Psychol. 17: 21–34

Keane, A., Cross-examination of vulnerable witnesses—towards a blueprint for re-professionalisation. The International Journal of Evidence & Proof (2012) 16, 175–198

Kebbel et al. People with learning disabilities as witnesses in court: What questions should lawyers ask? *British Journal of Learning Disabilities*, 2001, 29, 98–102

Akbar Khan (2013) Victims and witnesses protection: a Commonwealth perspective, *Commonwealth Law Bulletin,* 39:1, 27-31

McKimmie, B M., Hays, J. M., Tait, D. 'Just spaces: Does courtroom design affect how the defendant is perceived?' *Psychiatry, Psychology and Law*, Vol 23(6), Nov, 2016. pp. 885-892)

Miller, K. (2011) In the Mood? Strategies for Working with Depressed and/or Anxious Witnesses. American Society of Trial Consultants. Vol 23 (4)

Milne et al., Interrogative Suggestibility among Witnesses with Mild Intellectual Disabilities: the Use of an Adaptation of the GSS. *Journal of Applied Research in Intellectual Disabilities* 2002, 15, 8–17

Mulcahy, L. 'Architects of Justice: The Politics of Courtroom Design'. *Social & Legal Studies* Vol. 16(3), 383–403

O'Kelly et al. Judicial intervention in court cases involving witnesses with and without learning disabilities. *Legal and Criminological Psychology* (2003), 8, 229–240

O'Mahoney, B.M., (2009) The emerging role of the Registered Intermediary with the vulnerable witness and offender: facilitating communication with the police and members of the judiciary. *British Journal of Learning Disabilities*, 38, 232–237

Perlman, N. B., Ericson, K. I., Esses, V.M., and Isaacs, B.J. The Developmentally Handicapped Witness Competency as a Function of Question Format. *Law and Human Behavior*, Vol. 18, No. 2, 1994

Porter, S. and ten Brinke, L., Dangerous decisions: A theoretical framework for understanding how judges assess credibility in the courtroom. Legal and Criminological Psychology (2009), 14, 119–134

Rossner, M., Tait, D., McKimmie, B., Sarre, R. 'The Dock on Trial: Courtroom Design and the Presumption of Innocence.' *Journal of Law and Society*, Volume 44, Number 3, September 2017

Turner, M. W., Forrest, A.D., and Bennett, D.M., 'Scottish provisions for vulnerable witnesses'. *The Psychiatric Bulletin*, Vol 40(6), Dec 1, 2016. pp. 347.

Wessel, E., Drevland, G.C.B., Eilertsen, D.E., Credibility of the Emotional Witness: A Study of Ratings by Court Judges, Law and Human Behaviour (2006) 30:221–230

Ward, T., Usurping the role of the jury? Expert evidence and witness credibility in English criminal trials. The International Journal of Evidence & Proof (2009) 13, 83–101

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

This chapter should be read subject to the overriding caveat that this paper represents an exploration of territory that appears to be largely uncharted. The conclusions and recommendations offered in this chapter are preliminary, partial, and subject to review in the light of the further work which we suggest should be done. CRPD has been described as introducing a "paradigm shift", and to that extent a fresh approach to matters such as those addressed in this paper is indicated.

Moreover, the work leading to the preparation of this paper has been limited principally to the remit described at the outset. Even within its remit, this paper is not exhaustive: it only exemplifies work which, we suggest, still requires to be done as a necessary background to implementation of CRPD in general and Article 13 in particular. We expect that work to require both further review of existing literature, and original research in matters which do not appear yet to have been adequately addressed in available literature.

We have concluded that the ends of justice, as well as adequate compliance with CRPD as a whole, would best be achieved by a broad approach rather than a narrow one limited only to particular categories of people. Indeed, a narrow approach might contravene CRPD, because CRPD prohibits all discrimination on the basis of disability. Any special provision for people with disabilities should accordingly be derived from policies applicable to anyone identified as likely to benefit from particular provisions which might be appropriate, having regard to individual needs and circumstances. That is necessary in order to avoid the apparent conflict between the requirements of non-discrimination and of provision of reasonable accommodation, identified in section 1.2.2 above. The purpose of such policies is to benefit not only the individual concerned, but the quality of administration and delivery of justice. Such a broad approach should go beyond the scope of the (existing) Bench Book, and should be adopted in the structure and content of training intended to achieve compliance with Article 13.2 of CRPD.

In particular, we conclude that the ends of justice will be best served, and compliance with CRPD adequately achieved, by an approach that would include:

(A) a review of all law, procedures, practices and guidance relevant to all interactions between (on the one hand) the administration and delivery of justice, and (on the other) people generally, and not limited to those with particular disabilities or other vulnerabilities;
(B) making adjustments to relevant law, procedures, practices and guidance in response to points of improvement identified by such review, and doing so in accordance with the principle of universal design wherever possible;
(C) ensuring that, to the extent that such general adjustments are inadequate to meet the needs and characteristics of particular people in particular circumstances, reasonable accommodations are made;
(D) promoting a culture of alertness to potential needs to give appropriate support and make reasonable accommodations;
(E) meaningfully consulting people, both collectively and individually, about the arrangements that may best accommodate their needs, characteristics and circumstances;
(F) rigorously excluding practices which, whether or not intentionally, are damaging to any person or to the quality, or perceived credibility, of their contributions to the processes of justice;
(G) eliminating discrimination in the assessment of credibility;
(H) coordinating the training of all categories of persons with professional or other roles in the

administration and delivery of justice, so that each know their roles and what to expect of others;

(I) in the structuring and delivery of training of the judiciary, taking appropriate account of all of the foregoing factors, and providing adequate guidance to judges upon both their own roles and what to expect of others;

(J) addressing particular issues that have arisen in relation to the jurisdiction under AWI 2000; and

(K) recognising the limitations of this paper and maps out the way ahead.

Subject to the caveat at the outset of this chapter, our specific recommendations are numbered sequentially, grouped by reference to the foregoing elements.

(A) Review of all law, procedures, practices and guidance

1. Review for inclusivity.
2. Review the language and methods of communication of all communications issued by courts, or with the authority of courts, to any members of the public.
3. Review methods and timescales of responses to concerns and queries raised by or on behalf of any members of the public.
4. In relation to each court and court building, review the journey of people with physical impairments to and through the court building.
5. In relation to each court and court building, review the journey of people with sensory impairments to and through the court building.
6. In relation to each court and court building, review the journey of people with mental and intellectual impairments to and through the court building.
7. All changes resulting from review under these and following recommendations should be evidence-based. Further research and/or literature reviews should be commissioned as necessary.

(B) Universal design

8. Review all special adjustments and accommodations recommended in the Bench Book, as to whether there is any evidence-based reason not to adopt them as standard practice.
9. In particular review, unless there are any evidence-based reasons to the contrary, whether –
   9.1 removal of wigs and gowns could be standard practice;
   9.2 all witnesses could be permitted to sit; and
   9.3 lawyers examining or cross-examining witnesses could be required to sit at a fixed and specified minimum distance from the witness.
10. All other special arrangements and accommodations listed in the Bench Book should be similarly addressed.
11. All special accommodations and arrangements used in the courts and not mentioned in the Bench Book should be listed and addressed in accordance with the preceding recommendations under this heading.

(C) Reasonable accommodations

12. All reasonable accommodations listed in the Bench Book or otherwise used in practice should, except for those adopted under heading (B) above as appropriate for universal application, be listed; but, unless unavoidable, not with reference to specific impairments or groups of people.
13. In compliance with CRPD, all such reasonable accommodations should be applied generally, and

available to all who interact with the courts, without limitation by reference to any definitions of disability, vulnerability or otherwise.

14. A comprehensive list of adjustments and accommodations found to be helpful should be maintained and regularly updated in light of experience. It should be stressed that this would not be a closed list, and that all using it should be ready to make additional special provision, and to report it for potential addition to the list.
15. The efficacy of special provisions, both generally and in individual application, should be monitored, and the list recommended above should be updated and/or adjusted in the light of regular evidence-based review.

(D) Culture of alertness to needs

16. Everyone with a role in the administration or delivery of justice should be trained –
    16.1 to be aware at all times of potential needs for special provision;
    16.2 to be aware of the requirement for individual consultation at (E) below;
    16.3 to be aware of the risks of particular special provisions being counter-productive, and of the need to apply the recommendations at (F) below;
    16.4 to address and implement the foregoing, regardless of formal allocation of roles, in any situation where that is necessary and otherwise might not happen;
    16.5 to identify adjustments that could be considered for adoption as matters of universal design; and
    16.6 to take appropriate action, or cause it to be taken, in relation to all of the foregoing.
17. Clear pathways should be established and maintained for reporting and actioning each of the foregoing.
18. Attributable duties should be established and maintained to ensure that, throughout the system of administration and delivery of justice, and on an ongoing basis –
    18.1 training in accordance with 16 above is delivered to everyone with a role in the administration and delivery of justice, and where appropriate is refreshed;
    18.2 pathways in accordance with 17 above are established, maintained and communicated to everyone with roles in the administration and delivery of justice;
    18.3 all arrangements and procedures established in accordance with the recommendations in this chapter are regularly reviewed and where appropriate updated, including in accordance with reports made in terms of 17 above; and
    18.4 a culture of alertness to needs for action in accordance with this section (D) is established and maintained throughout the system of administration and delivery of justice.

(E) Consultation

19. In compliance with Article 4.3 of CRPD, relevant representative organisations should be consulted regarding the creation of relevant policies and the structuring of training.
20. Individuals should always be consulted about special provisions which may or may not assist them, before any special provisions are applied, and in this regard their right to make their own choices in accordance with Article 3a of CRPD should be respected.
21. All such processes of consultation should be recorded, and should be reported to the judge presiding at any relevant hearing (including procedural hearings) at latest at the outset of such hearing.

(F) Exclusion of damage to people and to their perceived credibility

22. Everyone with a role in the administration and delivery of justice should be made aware of the potential for unintended or counter-productive effects of special provision. In particular, they should be made aware –
    22.1 of the potential to create further vulnerabilities by the very fact of making special provision;
    22.2 of the risk of disadvantage through inappropriate arrangements for seating, spacing and undue proximity;
    22.3 of the damage to the person's understanding of the questions and the evidence-giving that can be caused by complex, or repetitive, complexly expressed, or aggressive questioning;
    22.4 in the context of witnesses giving evidence and in other proceedings, of the importance of eliminating such damage or disadvantage before it is done;
    22.5 in the context of witnesses giving evidence and in other proceedings, of the need – as a last resort – to intervene immediately if it appears that damage is likely to be done;
    22.6 that this list is non-exclusive, and that they must be alert to the potential for any other damage or disadvantage; and
    22.7 that all such negative consequences are damaging to the interests of justice, as well as being potentially disadvantageous or harmful to individuals.
23. To the greatest possible extent, the availability of special provisions should form part of an overall policy which complies with the concept of universal design, and to that extent avoids unnecessarily focusing upon particular disabilities or disadvantages.

(G) Elimination of discrimination in the assessment of credibility

24. Everyone with a role in the assessment of credibility, at all stages of processes of delivery and administration of justice, commencing with initial interviewing of potential witnesses, should receive training in behaviours and other factors that are wholly or partly a consequence of cultural differences, disabilities, vulnerabilities or other factors, and which might otherwise adversely affect assessments of credibility.
25. Such training should be given *inter alia* to all jurors before they sit in court.
26. Prior to any relevant hearing, information and training should be given to judges and jurors as to particular factors which may discriminatorily affect the assessment of credibility of individual witnesses.

(H) Coordinated training

27. All training given to all individuals and groups in compliance with Article 13.2 of CRPD, and all other relevant training, should be coordinated so as to ensure consistency.
28. Such coordination should also include an understanding of all relevant roles, so that all persons with any such roles know what to expect from others.
29. Training should include general awareness of all matters addressed in this paper, and should encompass the recommendations in this chapter, with particular reference to sections (D), (E), (F) and (G).
30. The categories of persons who require to receive training in compliance with Article 13.2 should be identified. In each case, the individuals or bodies responsible for providing such training should be identified.
31. Responsibility for implementing 30 above, and generally overseeing and coordinating implementation of all recommendations in this chapter, should be allocated (perhaps to Judicial

Institute, or to a body or committee constituted for the purpose).

32. In accordance with the principle of cascading relevant training down from judicial training, Judicial Institute should be accorded a lead role in the coordination of all training in accordance with 27 above.

(I) Judicial training

33. A fundamentally revised Bench Book should be prepared. It should contain the background information presented in this paper; and particulars of the review of all law, procedures, practices and guidance suggested under (A) above. It should include and from time to time update particulars of implementation of such of the recommendations in this chapter as are accepted for implementation. It should present information likely to be required by judges in the course of discharge of their functions in quickly and readily accessible form.

34. The Bench Book should be regularly reviewed and, as may be appropriate, further revised.

35. Judicial training should –

35.1 be linked to revised law, procedures, practices and guidance (in accordance with (A) above);

35.2 be linked to the revised Bench Book;

35.3 include general awareness of all matters addressed in this paper, and encompass the recommendations in this chapter, with particular reference to sections (D), (E), (F) and (G);

35.4 include information about what to expect from others with roles in the administration and delivery of justice; and

35.5 be focused in particular on matters addressed in sections (D), (E), (F) and (G) above which are likely to arise in the course of conduct of proceedings in court.

36. Judicial Institute should –

36.1 be accorded a lead role in implementing recommendations 33 and 34 above; and

36.2 in accordance with its existing remit, be responsible for planning and delivery of training in accordance with 35 above.

(J) Jurisdiction under AWI 2000

37. Action should be taken to improve the quality and consistency of administration and delivery of justice by the courts under AWI 2000, whether or not that jurisdiction is ultimately to be transferred to a tribunal.

38. The recommendation by Scottish Law Commission in Report No 151 (September 1995) on Incapable Adults that allocation of the jurisdiction under AWI 2000 should be predicated upon matters under that Act being dealt with by specialist sheriffs, should be implemented forthwith.

39. Insofar as practicable under existing legislation, steps should be taken to improve the efficiency and consistency of administration and delivery of justice under AWI 2000, including –

39.1 that regard should be had to information available and to become available in the course of the review by Scottish Government of the adults with incapacity jurisdiction; and

39.2 that measures be explored and taken to improve supervision and consistency (such as appointing a designated specialised Sheriff Principal to discharge, in collaboration with other Sheriffs Principal, such functions as can best be performed on a Scotland-wide basis.

(K) The way ahead

40. Steps should be taken to establish mechanisms to identify, define and commission the further research required in order to improve the administration and delivery of justice, in particular in relation to people with disabilities and other vulnerabilities.

APPENDIX: EXCERPTS

Item A: Excerpt from CRPD

Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Item B: Excerpts from General Comment No 1

Paragraph 7
"Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others."

Paragraph 21
"Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others."

Paragraph 27
"Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; **[and?]** (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; **[and/or?]** (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences."

Versions of paragraph 27
(i), (ii) and (iii)
(i), (ii) or (iii)
(i) and (ii) or (iii)
Eventually clarified March 2018 as (i), (ii) or (iii)

Item C: Excerpt from Chapter 15 ("Constructing Decisions") of Ward, *"Adult Incapacity"*

"15-9 The possible elements of the construct can be stated hierarchically as follows:

(1) The adult's present competent decision.
(2) The adult's past competent decision.
(3) The adult's decisive present choice.
(4) The adult's significant present choice.
(5) The adult's present wishes and feelings.
(6) The adult's past wishes and feelings.
(7) Information about the adult from, and the views of, the persons closest to the adult.
(8) Input of others with significant personal or professional knowledge of the adult, or specific appointments or roles in relation to the adult.
(9) The shared views and ethos of the adult's family.
(10) The shared views and ethos of any other grouping with which the adult is immediately and substantially associated.
(11) The shared views and ethos of any religious, ethnic or other group of which the adult, or the adult's family, is a member.
(12) The norms of the society of which the adult is a member."

"15-10 In general terms, an element higher in the list will prevail over an element lower; and at each step down the hierarchy, lower elements will only impinge upon a higher one if and to the extent that they strongly and persuasively indicate that it would be appropriate for them to do so. However, the steps are not equal. For example, there are qualitative differences between competent decisions, past and present, and the other elements. There are also qualitative differences between elements (1)-(6), which all relate to the adult's own input, and the subsequent elements which do not. On the other hand, in some circumstances and for some purposes consecutive elements represent points along a continuum, rather than separately definable steps."

Item D: Choice of forum for adult incapacity cases: summary of Law Society of Scotland response (March 1992)

The following is a brief summary of the submission from the Law Society of Scotland. The selected forum should have comprehensive jurisdiction; adequate and appropriate for all, not merely the majority, of matters likely to be referred to it; user-friendly, sensitive and approachable, but also capable of balancing conflicts between and among professionals, relatives and carers, and able to take account of the views and contribution of each without being unduly swayed by any; capable of adjudicating effectively in situations of conflict which may involve questions of law as well as of fact; clearly seen to have sufficient judicial competence, authority and independence "bearing in mind that most persons subject to its jurisdiction will have impaired ability to safeguard their own interests, and that the forum will accordingly require to be vigilant in protecting them"; sufficient authority to ensure that its requirements are met and that professional input is comprehensible to lay participants; seen to be clearly independent of social work authorities, health boards, etc; able to respond quickly in cases of urgency; locally available; have or develop knowledge and expertise in relation to all categories of mental disability; ensure that parties are not deprived of appropriate assistance and representation where necessary (including availability of

ABWOR); capable of issuing clear and comprehensible written decisions, with adequate explanation of reasons, speedily; have the competency to produce a fully adequate stated case (or similar document), speedily, in the event of an appeal; and must be able to achieve public acceptability, not only by having all of the above attributes but by being perceived to have them. After full discussion of alternatives, the Law Society submission concluded that if the courts were to be the forum "a new régime for mentally disabled adults could most effectively and efficiently be concentrated upon a small number of sheriffs who would then become 'designated sheriffs' for their sheriffdoms in respect of such procedures". Such sheriffs would specialise and develop expertise. "….. Of all options available, such a system of designated sheriffs would best meet all of the requirements identified above."

Item E: Excerpt from submissions by Law Society of Scotland (April 2018) to Scottish Government regarding proposed bureaucratic processing of guardianship applications

"It would violate both ECHR and UNCRPD, and be unacceptably discriminatory against some people with relevant disabilities: a) to have such decisions made under an anonymous bureaucratic process, with no identified decision-maker of judicial status; b) to have welfare matters dealt with by staff in OPG who have expertise in property and financial matters, but none in personal welfare matters; c) to disqualify people on grounds of poverty (because they are below a particular financial limit) or on grounds of more serious disability (because they lack the capability to express objection) from proper judicial consideration of their cases, even in relation to personal welfare matters; d) to impose policies deterring the involvement of legal expertise in advising regarding applications and formulating them; e) to create a process susceptible to abuse under which applicants could, by tick-box, select whatever powers they wanted and would even be responsible for intimations. On the last point, intimations under even provisions for miscellaneous applications currently require to be given by OPG. That should be the minimum standard in all cases. The only alternative should be intimation by professionals, such as solicitors, who have enforceable responsibilities to the court (or tribunal, as the case may be). The concept of bureaucratic processing which underlines grade 1 must be rejected. As noted above, we have concerns that the concept of grading itself could lead to much dispute, debate and difficulty over the simple question of which grade is appropriate for any particular application."

Adrian D Ward
adrian@adward.co.uk
22nd August 2018

Polona Curk
polona.curk@gmail.com
22nd August 2018