



Welcome to the July 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an appreciation of Alastair Pitblado, the Mental Capacity (Amendment) Bill, the Joint Committee on Human Rights considers DoLS reform and fluctuating capacity;

(2) In the Property and Affairs Report: the OPG mediation pilot

(3) In the Practice and Procedure Report: court fees reductions and when to join;

(4) In the Wider Context Report: Lady Hale on *Cheshire West* and the CRPD, Parliamentary debates and developments and a major Council of Europe report on attorneys and advance directives;

(5) In the Scotland Report: AWI consultation responses and Sandra McDonald reflects on her time as Public Guardian;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#).

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

Contents

Adults with Incapacity Reform	2
Sandra McDonald Reflection	4
Council of Europe report: Powers of attorney and advance directives for incapacity	6

Adults with Incapacity Reform

Responses to the most recent consultation by Scottish Government on “Adults with Incapacity Reform” closed on 30th April 2018. With commendable speed, the Scottish Government team dealing with this review of legislation (“the SG team”) crunched all the numbers, carried out an initial analysis of the content of all 316 responses to the consultation, and presented the results to a meeting in Edinburgh, hosted by the SG team, on 28th June. Of particular interest were the indications given about the road ahead for the reform process. It appears that the SG team intend to maintain the same remarkable rate of progress over the next few weeks to produce a full report on the responses to consultation, with the SG team’s own comments and analysis. It seems possible that this could even be issued in time for us to cover it in the next (September) issue of the Mental Capacity Report. Beyond that, it is intended that three short-term working groups will be established to deal with particular aspects, while the SG team will itself continue work in-house on other aspects of reform. The working groups will address (a) deprivation/restrictions on liberty, (b) graded guardianship and the forum for the AWI jurisdiction, and (c) support and training for attorneys and guardians. The balance of responses would appear to favour proceeding with all these aspects of reform, but doing much

further work on them. The SG team stress the importance of involving service users, carers and relevant professionals as being essential in order to achieve appropriate outcomes. There will be further consultation with stakeholders on proposals in the early part of 2019, with the aim of introducing legislation in the current parliamentary session. It is reasonable to comment, however, that such legislation will in some respects be the beginning rather than the end of the story. If proposals for a unified tribunal are to be advanced, that will almost certainly take significantly longer, and the ultimate aim of fused legislation for adult incapacity, mental health, and adult support and protection provisions is likely to be some years beyond that.

We are grateful to the SG team for permitting us to provide a [link](#) to the slides which accompanied their initial presentation on 28th June. As the SG team acknowledged, that presentation simply referred to numbers of responses, without any qualitative analysis of arguments presented in favour of particular views, and no differentiation between responses from individuals, and collective responses from large organisations, generated by significant numbers of people with substantial knowledge and experience. The SG team itself acknowledges that “numbers are just numbers”. For more than that, we must await the report from the SG team which is to follow.

The crude numerical approach has inevitably produced some odd results. It would appear that the highest number of responses (249 in total) replied to the question: "Should there be clear legislative provision for advance directives in Scotland or should we continue to rely on common law and the principles of the AWI Act to ensure people's views are taken account of?". The vote on this was 239 in favour and 10 against. As legislative provision for advance directives was one of the topics included in the draft Incapable Adults Bill annexed to the 1995 Scottish Law Commission Report which led to the Adults with Incapacity (Scotland) Act 2000, but which was dropped in the legislation, it is certainly to be hoped that this deficit will be made good, along with the similar "disappearance" of provisions on withholding or withdrawing life-sustaining treatment, and the requirement for specialist sheriffs – the latter is still urgently required even if the jurisdiction were to be transferred to a tribunal in due course.

Strangely, that figure of 249 contrasts with a maximum of 138 on the possibility of establishing an "official supporter" (though many alternative terms were offered); 143 on issues related to assessment of capacity; and 149 on the hugely important topic of introduction of graded guardianship. The numerical advantage was in favour of all of those proposals on a "yes/no" basis, but with many relevant comments on both sides.

Some of the largest numerical majorities were in favour of repealing access to fund provisions and management of residents' finances provisions, in favour of incorporating such arrangements in a new guardianship scheme.

Likewise, there were substantial numerical majorities in favour of a tribunal model for the forum, rather than continuation of the sheriff court, though rather oddly discussion still appears to refer to using the Mental Health Tribunal for the adult incapacity jurisdiction, whereas the original proposal from the Law Society of Scotland in response to previous consultation was for a new unified tribunal.

Another substantial numerical majority was in favour of changing the way in which guardianships are supervised, generally to a more targeted and risk-based system, though one has to point out that the Office of the Public Guardian has already made substantial moves in that direction in its supervision of financial guardianships.

Further significant numerical majorities were in favour of providing better advice and support for guardians and for attorneys.

Numerical majorities broadly favoured the overall approach in the consultation document to addressing proposed "significant restrictions on liberty" but with many qualifications and comments demonstrating the need for further work. Underlying themes included the need to find a balance between protecting and upholding people's rights, and at the same time providing a viable system of care, avoiding the major problems and drains on resources which have hampered the deprivation of liberty safeguards scheme in England. The same could be said of a general need for adjustments to provisions for medical authorisation and authorisation of research, with a clear need for further work on these topics as well.

The story appears to be broadly similar on the need for adjustment to the section 1 principles of the 2000 Act, including introduction of new principles: yet again, a clear recognition of the need for strengthening the principles in order better to achieve compliance with the requirements of the UN Convention on the Rights of Persons with Disabilities, but no consensus yet on what the adjusted and new principles should be, beyond general concerns that they should be more robust, and create enforceable duties.

For an interesting comparison with the broad sense of direction towards which we are moving in Scotland, and one which I would suggest is not incompatible with ours, see the report in The Wider Context section of this report of a speech recently given by Lady Hale, President of the Supreme Court.

This report is not intended to be a comprehensive account even of the matters addressed on 28th June. There is without doubt a clear need for substantial reform, and wide-ranging support for such reform, but the next step will be to see the fuller analysis of responses to the consultation which is now expected by way of a report from the SG team.

Adrian D Ward

Sandra McDonald Reflection

[We are very pleased to publish here an article from Sandra McDonald, who is shortly to retire as the Public Guardian for Scotland reflecting on her time in the office]

It is a privilege to have been invited to reflect on my 14 years as Public Guardian for Scotland as I face retirement, early, I hasten to add. Hopefully

it doesn't feel too much like writing my own obituary.

On 1st August 2004 I became the second Public Guardian for Scotland, I took the reins at a difficult time as my predecessor, who had established the office, had died in traumatic circumstances; I took as a credit to his character and ability the immense passion and loyalty of his team, so it was with some trepidation that I stepped into those shoes, but the team were warm, welcoming and supportive.

I was given about six weeks settling in before my first presentation, to the Law Society of Scotland – I recall feeling very green and being extremely nervous, but there was nothing to have worried about the solicitors were very gentle with me, and I can honestly say from that point forth I have had what, for me anyway, has been the most fulfilling relationship with the solicitors who specialise in the adult incapacity field – well some have been easier than others to be honest, but no names mentioned. It is with some irony that my last presentation was also for the Law Society of Scotland; a full cycle.

The Adults with Incapacity (Scotland) Act 2000 (AWI) was 4 years old when I took post, my predecessor had embedded all of the early processes, so I was thinking my main task was stabilising things after his loss – that was until Scottish Government decided to have a 5year review of the Act; so it was in at the deep end with consultation on possible amendments. As I complete my OPG career, Scottish Government has just announced further amendments to the AwI, following a public consultation exercise – another full cycle.

The 5 year review led to the 2007 changes that we have been working with since. This was my first exposure to Parliamentary process, I hadn't realised how loong it took from concept to commencement. Particularly daunting was appearing before a Parliamentary Select Committee, which I have had the 'pleasure' of three times now for various things, being challenged on the efficacy of the service we wished to develop; it feels like you against the world, but it (I) must have 'passed muster' as the developments were always given the go ahead.

Now for the stats bit – when I took up post we had 45 staff and 14,000 powers of attorney per annum, hard to credit now. Power of attorney volumes have increased year on year, totalling a 440% increase over the 14 years. Guardianship usage has also increased by 400%, although of lower volumes; with a total increase in staffing of 78%. Not surprising then that the now aged IT system which supports the OPG processes is creaking and we have just about outgrown the building – both are on the cards for a review as I vacate post.

The post of Public Guardian is unique in the country, so can be isolating and offers nothing against which to benchmark one's service. Consequently Scotland, as the first public guardianship service, established a public guardianship community with the equivalent leaders in the other home nations; I hope I can speak for my public guardian colleagues when I say we have enjoyed a very productive relationship since. The networking has grown into a biennial Public Guardianship Conference, hosted by each of the nations in turn and, judging by the numbers who wish to attend, must be filling an important role.

It has been a pleasure to work with a number of other countries to support their development of their public guardianship service, Singapore, Malta, Norway, South Korea to name a few – but it is with regret that, apart from Malta, I failed spectacularly in getting 'an away match'.

The changes that most stick in my mind are launching an electronic power of attorney registration system; facing a High Court challenge on the efficacy of the power of attorney format, which had it succeeded would have threatened about 75% of the then registered PoAs; getting a proposal for a form of graded guardianship to public consultation; developing a UN compliant tailored supervisory regime for guardianship and getting some traction on cross border recognition for powers of attorney through the arguments I suggested be advanced in 'the Airdrie case'.

I felt hugely flattered to be invited to sit as an observer member of the Law Society of Scotland's Mental Health and Disability subcommittee and to be asked to Chair the Law Society of Scotland annual conference - the down side of which was staying in one of the nicest hotels in St Andrews with what I can only assume was a privileged room for the Chair – tough job!!

I took part in the Essex Autonomy 3 jurisdictions review and am on the expert advisory group for the Centre for Mental Health and Capacity Law, a professorial led unit at Edinburgh Napier University, such a dedicated academic centre gives enormous legitimacy to the specialism.

But all this has to be for a reason – I met Jason, a 21 year old with a serious acquired brain injury, who was on a one year financial guardianship

order to enable his parents to sort his affairs out to allow him to live as independently as was possible thereafter; I asked Jason what his wishes were for his future, to which he replied “to be normal”, I asked him what that meant for him, as everyone’s idea of normal may be different, he told me he wanted a job and to have a baby (with this girlfriend, who had stood by him post-accident). Within the lifetime of the guardianship Jason gained employment, then about 5 years later, out of the blue, I received a picture of Jason holding a baby, there was no covering letter with it, simply the words on the back of the picture “Jason is normal”. To this day I have that picture in my desk drawer and on occasions when I’m totally hacked off by the bureaucracy of it all, I look at that picture and remember, that’s what it’s all about.

So on the 31st July, exactly 14 years after I started, another full cycle, I complete what has been the most challenging but, by a country mile, the most satisfying role of my career. Its only on looking back that one appreciates just how much has been achieved in that time but it’s not me, it’s we, that have achieved what we have, the many passionate and tireless people I have been so privileged to work with throughout Scotland, as well as the most dedicated and committed team, who are so regularly commended when I’m out and about, their enthusiasm and loyalty has never wavered. Fiona Brown, my current Deputy, will take over as Public Guardian for Scotland, at a time when the office is facing significant operational demands, as a result of which the role has been refocused to allow Fiona to concentrate on leading the internal operational change, for which I know she will have the support of a fantastic team and can

only hope the role is as fulfilling for her as it has been for me.

As for me, you don’t get rid of me that easily, I may be taking retirement but I’m not retiring, I’m establishing myself as an independent advisor and trainer in the capacity field, under a company name of EX-PG, so I’m a hand for hire, if you have, or know of, a piece of work for which an Ex-Public Guardian may be suitable then my contact details are Email: sandra@ex-pg.com: Tel 07503 555672: Website sandraexpg.com. I am on Twitter at [@sandraexpg](https://twitter.com/sandraexpg) and shall in due course be operating a LinkedIn site; bearing in mind that I all of these are only ‘live’ from 1st August 2018.

So I close by thanking you ALL for your support over what has been the best 14 years of my career and saying Adieu rather than farewell as I hope very much that I can continue to work with you, supporting the very obvious commitment you have to furthering the mental capacity agenda.

Council of Europe report: Powers of attorney and advance directives for incapacity

For those who come solely to the Scotland Report, we also invite you to cast an eye over the Wider Context Report for coverage of the important Council of Europe report recently completed by Adrian.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



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



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Conferences

Conferences of interest

Costs and summer drinks reception

On 26 July a training event and summer drinks reception will be hosted by London CoPPA in association with Hardwicke Chambers covering hot topics in the world of Court of Protection costs. For more details, see [here](#).

Towards Liberty Protection Safeguards

This conference being held on 24 September in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and book, see [here](#).

5th International conference on capacity: ageing, sexuality & human rights

Capacity Australia is hosting this fascinating-looking conference in Rome on 3 October. For more details see [here](#).

Advertising conferences and training events

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

We are taking a summer break (from this, but not from the world of mental capacity law, which is going to be a very busy one over the next few months). Our next edition will be out in early September. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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