



Welcome to the May 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; reproductive rights and the courts; capacity to consent to sexual relations; and one option in practice.

(2) In the Property and Affairs Report: an attorney as witness; barristers as deputies and a range of new guidance from the OPG;

(3) In the Practice and Procedure Report: the need to move with speed in international abduction cases; executive dysfunction and litigation capacity, and a guest article on meeting the judge;

(4) In the Wider Context Report: new capacity guidance; a fresh perspective on scamming the Irish *Cheshire West* and the CRPD and life-sustaining treatment.

(5) In the Scotland Report: two judgments in the same case relating to anonymity and the 'rule of physical presence' in the context of the Mental Health Tribunal;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our [capacity assessment guide](#)), and as promised, an updated version of our [best interests guide](#) is now out.

We trust we are also allowed to with some pride that no fewer than 5 of the editors have recently been appointed or reappointed to the Equality and Human Rights Commission panel of counsel, along with 3 other members of Chambers: see [here](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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

Scottish Government extended review.....	2
Review of the Mental Health (Care and Treatment) Act 2003: the Chair’s perspective	3
Independent review of learning disability and autism in the Mental Health Act: Stage 1 report	4
More on anonymisation – the <i>MH</i> case again	5
Visiting team from Singapore.....	5
The Independent Inquiry into Mental Health Services in Tayside: Interim Report – Inquiry update and Emergent Key Themes.....	6

Scottish Government extended review

On 19th March 2019 Ms Clare Haughey MSP, Minister for Mental Health, announced a review of the Mental Health (Care and Treatment) (Scotland) Act 2003, to encompass existing Scottish Government reviews including the review of the Adults with Incapacity (Scotland) Act 2000. We welcomed that announcement, for the reasons given in the [April Report](#). On 20th May 2019 Ms Haughey announced the appointment of Mr John Scott QC Solicitor Advocate to chair the extended review. We welcome that announcement also, and welcome John Scott’s first contribution to the Report, which appears immediately after this item, and which outlines his initial approach to the task entrusted to him.

John is a fine lawyer with a high reputation principally in criminal law practice, but with a strong background in human rights issues. He has a proven track record in discharging tasks similar to that now entrusted to him. Opinions may be divided as to whether it was appropriate to appoint someone with no great background in mental health and adult incapacity law and

practice. We welcome the appointment of someone with the qualities that John undoubtedly possesses, and the fact that he comes to the task with no preconceptions or fixed positions, open to persuasion as to how the issues should be defined, to whom he should listen in approaching them, and what best solutions may ultimately emerge from that process. To those who remain doubtful, we would simply say “wait and see”.

John qualified as a solicitor over 30 years ago. He obtained Rights of Audience before the High Court of Justiciary in 2001, and took Silk in 2011. In November 2018 he was awarded Silk of the Year in the Law Awards of Scotland, jointly with Aidan O’Neill QC. Within his criminal law specialism, he is the only person to have received on four consecutive occasions the Criminal Lawyer of the Year Award by Firm Magazine. He has appeared in several major cases, up to and including in the UK Supreme Court. His approach to self-education is reflected in the two Post Graduate Courses that he has undertaken in Forensic Medicine, in Glasgow and Edinburgh Universities

respectively, and his ensuing instructions in cases involving substantial and complex evidence in various areas of forensics. He provides continuing professional development to the profession and to others.

He chaired the Scottish Human Rights Centre from 1997 to 2005. He was involved in Justice Scotland from the early planning stages through to chairing it for a year in 2014. He was convener of the Howard League for Penal Reform in Scotland from 2006 to 2018.

In 2015 he chaired an Independent Advisory Group on Stop and Search at the request of the Cabinet Secretary for Justice. The Group's 10 recommendations were all accepted by Government and incorporated in relevant provisions of the Criminal Justice (Scotland) Act 2016. After he had given evidence to the Justice Sub-Committee on Policing, he continued to chair an extension of the Group which produced a Code of Practice which entered into force in May 2017, and review of the operation of the Code which continued through into this year. He chaired an independent review of Biometrics in Policing in Scotland, again at the request of the Cabinet Secretary for Justice. That report was published in March 2018 and led to the Scottish Biometrics Commissioner Bill, introduced at the Scottish Parliament on 30 May 2019. Most recently, yet again at the request of the Cabinet Secretary for Justice, he has been chairing an independent review into the Impact on Communities of the Policing of the Miners' Strike 1984-85 (due to report to the Cabinet Secretary in August 2019). Completion of that task has not deterred him from launching himself with enthusiasm into the work of his latest

appointment, immediately upon announcement of that appointment.

The foregoing identifies some points of particular relevance to his latest task in the field of mental health and incapacity law and practice. It is not comprehensive.

The Report will continue to follow the progress of the review, as support teams are put in place, the remit for the review agreed and announced, and a methodology for its conduct structured and announced.

Adrian D Ward

Review of the Mental Health (Care and Treatment) Act 2003: the Chair's perspective

Until a few weeks ago, I was aware of this independent review which was announced by the Scottish Government in March. Obviously, I could see the importance of the review but thought little more about it until I was asked to chair it. Since then, I have been familiarising myself with the area, including related work which is currently underway and similar reviews in England and elsewhere, as well as the latest developments and thinking around the UN CRPD.

I am well aware that there are many more qualified than me in terms of knowledge and experience in the relevant law and practice but, as one of those said to me, "When your name was mentioned, I was glad that I had never heard of you". What I hope to bring is an ability to listen and work collaboratively with key individuals, organisations and groups.

Within the field, the welcome has been extremely warm and, within days of the announcement of my role, I had benefitted from conversations with many who are leaders in the field.

The next few weeks will be taken up with finalising the Terms of Reference; establishing a group or groups to carry out the review work with me; identifying the most effective and participative method of working; preparing the terms of a Call for Evidence and, crucially, making sure that we approach our work mindful of what Clare Haughey, the Minister for Mental Health, said in March: "As part of the review we want to gather views from as wide a range of people as possible and I am determined to ensure that the views of service users, those with lived experience and those that care for them are front and centre so they can help shape the future direction of our legislation."

I look forward to this important and challenging work and hope to be able to keep you updated as the review progresses.

John Scott QC

Independent review of learning disability and autism in the Mental Health Act: Stage 1 report

During the passage through the Scottish Parliament of the bill that eventually became the Mental Health (Scotland) Act 2015 (amending the Mental Health (Care and Treatment) (Scotland) Act 2003) the Scottish Government gave a commitment to commission an independent review into the issue, also raised and left undecided in the Millan Review, of whether learning disability and autism should continue to be conditions covered by mental

health legislation. The review was subsequently established, with Andrew Rome as its chair, and full details of it can be found on its very accessible [website](#).

On 31st May 2019 the review published its [Stage 1 Report](#) containing the views of people across Scotland who have experienced care under the 2003 Act, including person with learning disabilities and autism, professionals, unpaid carers, organisations of autistic people or people with learning disability and professional organisations. It also provides summaries of the findings from various relevant reports on mental health and human rights in Scotland. The report is clearly and concisely written so rather than regurgitate its content here I would urge you to go directly to the supplied link.

Stage 2 of the review is currently ongoing and is looking at possible options for reform of the 2003 Act which in turn will form the basis of a consultation (Stage 3) that will seek comment on options for law reform and which will commence at the end of August 2019. The review's final report and recommendations will be submitted in December 2019 to the Scottish Government's Minister for Mental Health and will without doubt inform the wider 2003 Act review

Although I must confess a personal interest in the review, being one of its advisors, the [Review Team](#) must be commended for the extremely thorough, structured, wide-reaching and inclusive human rights-based approach they have adopted to date in their information gathering and analysis of such information.

Jill Stavert

More on anonymisation – the *MH* case again

In the [May Report](#) Jill and I commented on two decisions in the case *MH v Mental Health Tribunal for Scotland*, Jill upon the decision as to whether it was necessary for the convener of a Mental Health Tribunal hearing to be personally present at the hearing, and I upon the issue of whether the patient in that case – indeed patients in proceedings before the Tribunal generally – should be entitled to anonymity. The decision on personal presence of the convener has now been reported at 2019 SLT 615. That report is followed by a note relevant to the court's refusal of *MH*'s appeal for an anonymity order. The note states that the appellant remains anonymised in the reports, and in the Opinions published on the scotcourts website, because after receiving the usual copies of the Opinions upon that aspect, *MH*'s representatives provided the court with a medical report. The court determined that the report justified anonymising the appellant's name in those proceedings. In consequence the published Opinions, and the report, preserve anonymity.

Notwithstanding that particular outcome, both decisions in the *MH* case carry considerable implications. We shall endeavour to report whether leave for appeals in respect of either or both decisions to the Supreme Court is sought, and if so whether it is granted.

Adrian D Ward

Visiting team from Singapore

Scotland's adults with incapacity legislation was world-leading when first enacted, and still attracts international attention. There is also

interest in related legislation, particularly our adult support and protection legislation, and in our current review processes.

The latest in visiting teams from various continents was a visit of a team from Singapore's Ministry for Social and Family Development, accompanied by three members of NGOs providing relevant services, on 22nd – 24th May 2019. The team included Mr Desmond Lee, Minister for Social and Family Development, Ms Regina Ow, Public Guardian, and Ms Christine Ong, Assistant Director in the Office of the Public Guardian. The team arrived well informed, but keen to learn more. While Singapore's Mental Capacity Act was modelled upon the Act of England & Wales of the same name, their Vulnerable Adults Act (which came into force in December 2018) was modelled upon Scotland's Adult Support and Protection Act of 2007, which has no equivalent in England & Wales or some other jurisdictions. All members of the visiting team impressed in a series of two-way interchanges in which all concerned benefited. Mr Lee in particular listened modestly and attentively to discussions and presentations, and only in his perceptive questions and comments did he reveal not only how much he had absorbed from the discussions, but his own mastery of a massive ministerial brief, with clear understanding of overall long-term factors and trends, as well as of details.

The team was initially hosted at the Law Society of Scotland by Amanda Millar, a leading expert in relevant topics and now Vice-President of the Law Society of Scotland. I gave an overview of relevant Scots law. The team then proceeded to St Andrew's House for informative discussion

and a pleasant lunch hosted by Scotland's Minister for Mental Health, Ms Clare Haughey. St Andrew's House helpfully provided accommodation for the remainder of the first day's programme, comprising a presentation by the "mypowerofattorney" team, an overview presentation by Fiona Brown, Public Guardian, on the work of Scotland's Office of the Public Guardian, and a meeting with Kirsty McGrath and members of her team conducting review of Scottish adult incapacity legislation. The following day commenced at the usual Thursday Guardianship Court at Edinburgh Sheriff Court, preceded by a welcome and introductory discussion led by Sheriff Principal Stephen, with Sheriffs Reith and Corke also participating. Sheriff Reith conducted the Guardianship Court that morning. Discussions before and after the court itself enhanced the value for the visiting team of sitting in throughout the court itself. Most helpfully, a number of themes that had emerged during the visit were addressed and exemplified in the course of that particular court. That afternoon's sessions were hosted by the Mental Welfare Commission for Scotland, incorporating presentations by, and discussions with, Colin McKay (Chief Executive) and Yvonne Bennett of the Commission; Bob Leslie (Team Manager, Mental Health Officer Services, Renfrewshire Council); and solicitors Alison Hempsey and David McClements on the role of "professional guardians", which the visitors had explicitly asked to hear about. Mr Lee and his special assistant had to leave that afternoon. The remainder of the team spent the entire final day at the Office of the Public Guardian in Falkirk,

hosted by Fiona Brown, gaining very full experience of "how it's all done" in practice.

One is left to reflect about the extent to which trends in Asia in general, and Singapore in particular, though perhaps different when detailed figures are considered, might nevertheless have significant impact in Scotland: large increases in the numbers of elderly people as a proportion of total population, longer life expectancy of people with severe and profound disabilities, reducing birth rates, reduction in "traditional family units" with more people remaining single or entering more transient and less committed relationships, and so forth.

Adrian D Ward

The Independent Inquiry into Mental Health Services in Tayside: Interim Report – Inquiry update and Emergent Key Themes

Introduction

In May 2018 concerns were raised in the Scottish Parliament about the provision of mental health services in Tayside, notably after several suicides had occurred. This resulted in NHS Tayside commissioning an independent inquiry chaired by David Strang (former HM Chief Inspector of Prisons for Scotland) tasked with investigating the accessibility, safety, quality and standards of care provided by its services¹. The remit of this five-stage inquiry is to consider end-to-end mental health services.

¹ Recommendations had also been made in [Health Improvement Scotland](#) and [Mental Welfare](#)

[Commission](#) inspection reports concerning such services.

Following a public call for evidence in September 2018, the inquiry has published an interim [report](#) in May 2019 providing an update and information on some key themes that have emerged to date and which will require further investigation. The purpose of identifying these key themes is to assist with making specific conclusions and recommendations in the inquiry's final report.

A reading of the interim report itself is recommended for detail and greater perspective and it must be noted that analysis of the evidence is ongoing. However, the evidence gathered so far appears to reveal a long and deeply concerning catalogue of inadequate and poor provision throughout the service many of which have serious human rights implications including the rights of persons with mental disabilities to the highest attainable standard of mental health,² life,³ to rehabilitation⁴ and community living⁵, to be free from inhuman or degrading treatment⁶ and to exercise choice and one's legal capacity.⁷ It also raises questions about the equal and non-discriminatory treatment of persons with mental disabilities.⁸ Further, although the Act is not specifically mentioned in the interim report one might ask whether the principles that underpin use of the Mental Health (Care and Treatment) (Scotland) Act 2003 are being properly applied at all times, something that might be of interest in the

current review of the Act. The following, however, is simply a summary of the key themes referred to.

Key themes identified to date

Patient Access to Mental Health Services

It was reported that whilst many patients and families report receive professional and caring support from service staff during times of crisis the service struggles to respond to sudden increases in demand and there are out-of-hours crisis issues. Inadequate risk assessment at an early stage and police officers effectively having to manage patients in crisis here are also noted. There are long waits for referrals to mental health services and where referrals are rejected there is limited GP expertise or time available to support patients with ongoing mental ill-health and post-referral waiting times to Allied Health Professionals may be as long as a year.

Where children and young persons are concerned delays in referrals to and rejections by CAMHS are noted as well as difficulties in the transition from CAMHS to General Adult Psychiatry for young people.

Patients presenting to mental health services following alcohol or drug consumption are reporting rejection from crisis assessment and people with addiction to alcohol and/or illegal drugs may be refused access to mental health

² Article 12 International Covenant on Economic, Social and Cultural Rights; Article 25 Convention on the Rights of Persons with Persons (CRPD).

³ Article 2 European Convention on Human Rights (ECHR); Article 10 CRPD.

⁴ Article 26 CRPD.

⁵ Article 19 CRPD.

⁶ Article 3 ECHR; Articles 15 and 16 CRPD.

⁷ Article 8 ECHR; Article 12 CRPD.

⁸ Noting that ECHR rights must be enjoyed without discrimination based on, amongst other things, disability (e.g. *Glor v Switzerland* (Application No.13444/04) ECtHR judgment 30 April 2009) and this is promoted, without even differential treatment that can be objectively and reasonably justified being permitted, by the CRPD (see CRPD General Comment No.6).

services. Patients with multiple mental health diagnoses often find only one of their diagnosed conditions is addressed. Concerns are also expressed about patient safety both within the inpatient facilities and in community setting.

The use of restraint within inpatient facilities is also of concern to patients and staff as is the presence of illegal drugs on wards. It further seems possible for patients to discharge themselves from inpatient facilities without any support being in place for them and some subsequently being found in a heightened state of distress.

Finally, staffing levels are perceived to be low both on inpatient wards and in the community accompanied by excessive workloads and a lack of staff training.

Quality of Care

Poor communication between staff and patients, poor ward environments physically and in terms of activity and patient safety, issues about continuity and consistency of care, the availability of services and inconsistent or non-existent reference to carers in patient's care plans.

Organisational Learning

A disconnect between policy and practice and failure to learn from adverse events and critical incidents raises some important concerns.

Leadership

A lack of clarity as to leadership of the service, accountability and reporting lines are noted.

Governance

There appears to be little visibility of mental health service performance monitoring and management at all levels accompanied by poor change management.

Conclusion

As already indicated, the interim report lists some potentially serious failures in service delivery which will need to be fully addressed. It will be interesting to see what the inquiry's ultimate conclusions and recommendations are and as this interim report states: "[t]here is now a real opportunity for Tayside to transform its provision of comprehensive mental health services to meet the needs of all people living in Angus, Dundee and Perth & Kinross."⁹ If any reform - whether it is at legislative, policy and/or practice levels - is to be successful it must be accompanied by adequate and appropriate information, training and, more often than not, commensurate resourcing. It will therefore be equally interesting to see how the Scottish Government and relevant services respond to this inquiry.

Jill Stavert

⁹ p11 of the Interim Report.

Editors and Contributors

**Alex Ruck Keene: alex.ruckkeene@39essex.com**

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](#).

**Victoria Butler-Cole QC: vb@39essex.com**

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).

**Neil Allen: neil.allen@39essex.com**

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](#).

**Annabel Lee: annabel.lee@39essex.com**

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click [here](#).

**Nicola Kohn: nicola.kohn@39essex.com**

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click [here](#).

Editors and Contributors

**Katie Scott: katie.scott@39essex.com**

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

**Katherine Barnes: Katherine.barnes@39essex.com**

Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: To view full CV click [here](#).

**Simon Edwards: simon.edwards@39essex.com**

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

**Adrian Ward: adw@tcyoung.co.uk**

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

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

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

Conferences

Conferences at which editors/contributors are speaking

Medical decision-making and the law

Tor is giving a speech at Green Templeton College in Oxford on 20 June on medical decision-making and the law. For more details, and to book (tickets are free but limited), see [here](#).

Human Rights in End of Life

Tor is speaking at a free conference hosted by Sue Ryder on 27 June in London on applying a human rights approach to end of life care practice. For more details, and to book, see [here](#).

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see [here](#).

Liberty Protection Safeguards: Implementation of the Mental Capacity (Amendment) Act 2019

Alex is chairing and speaking at a conference about the LPS on Monday 23 September in London, alongside speakers including Tim Spencer-Lane. For more information and to book, see [here](#).

Advertising conferences and training events

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

Our next edition will be out in July. 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.

Michael Kaplan

Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle

Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell

Senior Practice Manager
peter.campbell@39essex.com



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



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

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON

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

MANCHESTER

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

SINGAPORE

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

KUALA LUMPUR

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

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

[For all our mental capacity resources, click here](#)