



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: the Supreme Court pronounces on confinement and 16/17 year olds and two important – and difficult – cases about sex;
- (2) In the Property and Affairs Report: attorneys and gifts, and withholding knowledge of an application from P or another person;
- (3) In the Practice and Procedure Report: the Court of Protection mediation scheme, and the inherent jurisdiction, necessity and proportionality;
- (4) In the Wider Context Report: learning from a complex case about medical treatment for a child, the Irish Bournemouth and an important shift from the CRPD Committee in the context of legal capacity;
- (5) In the Scotland Report: developments in the context of the MHTS and sentencing in the presence of disability.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also find our new [guidance note on the inherent jurisdiction](#).

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

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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.

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President of MHTS

Laura Dunlop QC has been appointed President of the Mental Health Tribunal for Scotland with effect from 12th October 2019, thus following without a break upon the retiral on 11th October 2019 of Dr Joe Morrow QC. Laura has had a long and distinguished career as an advocate, and has an unusual breadth of wider experience, including several roles of particular relevance to the task of leading MHTS, and thus following the dauntingly impressive career in that role of Dr Morrow.

Laura graduated LL.B (1st Class Honours) from the University of Edinburgh in 1983. She was called to the Bar in 1989 and took Silk in 2002. She received an honorary doctorate from the University of Stirling in 2015. She has had courtroom experience in the Sheriff Court, Court of Session, House of Lords and European Court of Justice.

A necessarily somewhat random selection of her large number of past and current roles include as a legal member of MHTS (as well as experience of membership of other tribunals). As part-time Commissioner on the Scottish Law Commission from 2009 to 2014 she was primarily responsible for the Commission’s Report No 240 on Adults with Incapacity issued in October 2014, addressing issues of deprivation of liberty

in Scots law and effectively initiating the widening process of review that has continued since then and is now encompassed by the Scott review. Her period with Scottish Law Commission was followed by convenership of the Law Reform Committee of the Faculty of Advocates from 2015 to date. She is noted for her particular expertise in relation to clinical negligence, from 2000 to 2005 was convener of the Scottish Executive Appeal Body regarding vocational training for general medical practice, and from 2004 to 2005 was a member of the Scottish Consumer Council Civil Justice Review. Earlier (1997 – 1998) she was a member of Lord Coulsfield’s working party on reform of personal injury rules in the Court of Session. It will not have escaped her notice that the Law Society of Scotland was responsible for widening proposals for a specialist personal injury court to create enabling powers to establish other specialist courts, a matter of unfinished business in relation to the adults with incapacity jurisdiction. She was familiar with the work of the Mental Health and Disability Sub-Committee of the Law Society of Scotland from her time as a Law Commissioner, and following her appointment as President of MHTS she has already engaged with that committee.

Adrian D Ward

Downgrading of Mental Health Tribunal for Scotland

In our [September Report](#) we noted the widespread concerns arising from the significant reduction in status of the role of President of the Mental Health Tribunal for Scotland in the advertisements for a new President to be appointed upon retirement of Dr Joe Morrow, and the inevitable implication of a downgrading of MHTS itself. The downgraded terms have been confirmed in the public announcement of the appointment of Ms Laura Dunlop QC as the new President (see preceding item). It is to be welcomed that Scottish Government has been able to appoint a new President of the calibre of Ms Dunlop, and it is understood that she was appointed from several impressive applicants. Concerns nevertheless remain at the downgrading of the post, and other aspects of the official announcement. For example, it was made by the Minister for Community Safety rather than the Minister for Mental Health, which could be interpreted as shifting emphasis from safeguarding the rights of particularly vulnerable people towards questions of public safety. Curiously, the official announcement does not mention Ms Dunlop's high human rights profile, exemplified by her work on deprivation of liberty for Scottish Law Commission, or her continuing law reform work thereafter. Ms Dunlop will without doubt bring her qualities and experience to her new role, but those with concerns about these issues will no doubt continue to be alert for signs of downgrading and re-focusing of MHTS – in the eyes of Scottish Government if not those of anyone else – and apparent inconsistencies with the commendable initiatives by the Minister for Mental Health.

The public announcement also confirms that MHTS is listed as one of the tribunals which will move into the First-tier Tribunal for Scotland, and that upon such transfer the Mental Health Chamber will be established and MHTS will be abolished, with the President of MHTS becoming President of the Mental Health Chamber.

Adrian D Ward

Sentencing: the relevance of disability

In *RC against HM Advocate*, [2019] HCJAC 62 HCA/2019/220/XC, the High Court of Justiciary allowed an appeal against a sentence of 20 months' imprisonment imposed at Perth Sheriff Court on 12th February 2019 upon a man with significant physical disabilities who had pled guilty upon indictment to a charge of two contraventions of the Sexual Offences (Scotland) Act 2009, the first being a contravention of sections 31 and 34 of that Act and the second being a contravention of sections 21 and 24 of that Act. The sentence of imprisonment was imposed on 1st May 2019. The opinion of the High Court was delivered by Lady Dorrian, the Lord Justice Clerk, on 2nd October 2019.

The court considered with care the significance of substantial disabilities in the context of criminal sentencing, and received detailed submissions in that regard. Two points should however be noted. Firstly, in this case the appellant had severe physical disabilities, with only marginal reference to their possible effects upon his personality and conduct. Nevertheless, the considerations addressed by the court would in principle have potential relevance in sentencing a person with "mental or intellectual

impairments” (in the language of the UN Convention on the Rights of Persons with Disabilities). Secondly, on a fair reading of the decision the principal consideration was a finding that the sentencing sheriff appeared to have concluded that a custodial sentence was necessary without giving adequate consideration to information before him as to the suitability of a community payback order. In a key concluding passage, Lady Dorrian said:

How it is that in the face of the clear identification of treatment needs, an available and suitable programme of work to address these, and to reduce the risk of future offending, with conditions designed to ensure suitable management within the community, the sheriff nevertheless was able to conclude that only a custodial sentence would serve is difficult to understand. Moreover, we say that before taking any account of the appellant’s physical difficulties. When one takes them into account, and recognises the extent to which imprisonment would constitute a heavier punishment for him than for an offender without his condition (something the sheriff appears not to have acknowledged), the position becomes even clearer.

On a fair reading of the decision, it appears unlikely that the court would have allowed the appeal by reason of the accused’s disabilities alone. The relevant statutory and human rights provisions are reviewed in the decision. It was pointed out that prison authorities, and ultimately Scottish Ministers, have obligations to make reasonable accommodations for prisoners with disabilities and that any alleged failure to meet those obligations would, so far as justiciable, be a matter for the civil courts in the

light of the actual circumstances of the prisoner. In relation to Article 3 of the European Convention on Human Rights, the court held that Article 3 requires the State to ensure: (i) that prisoners are detained in conditions compatible with respect for human dignity; (ii) that the manner and execution of the measures do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; and (iii) that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance. The court must have regard to the provisions of ECHR, but must bear in mind that the primary responsibility for meeting the State’s obligations under Article 3, as they relate to prisoners, rests with the State. The court is entitled to take into account the statutory and practical machinery that exists, designed to ensure the State’s compliance.

The court quoted with approval the observations of Hughes LJ in *R (Hall) v University College London Hospitals NHS Foundation Trust* [2013] EWHC 198 (Admin) that a sentencing court ought not to concern itself with the adequacy of arrangements to comply with Article 3 obligations except only in a situation where “the mere fact of imprisonment would inevitably expose the prisoner to inhuman or degrading treatment contrary to article 3; in other words, that there cannot be made any arrangement in prison or out of it for his care which will avoid that consequence.”

Those obligations are also relevant to the terms of Article 14 of the UN Convention on the Rights of Persons with Disabilities.

The High Court substituted a three-year community payback order with supervision, programme and conduct requirements involving participation in the “Moving Forward: Making Changes” programme, and with conditions that had been specified in a relevant criminal justice social work report. The case was put out by order for discussion of how the appellant’s consent to this disposal might be obtained.

Adrian D Ward

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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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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](#).

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. To view full CV click [here](#).

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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](#).

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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](#).

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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](#).

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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.

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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

AWI, guardianship and elder law conference

Adrian is giving the keynote address for the Law Society of Scotland's conference on this subject in Glasgow on 30 October. For more details, and to book, see [here](#).

Adult incapacity law

Adrian is delivering a lecture at Edinburgh Napier University on 13 November on "Adult incapacity law: visions for the future drawn from the unfinished story of a new subject with a long history." For more details, see the [website](#) of the Centre for Mental Health and Capacity Law.

Taking Stock

Neil is giving the keynote speech at the annual national conference on 15 November jointly promoted by the Approved Mental Health Professionals Association (North West England and North Wales) and the University of Manchester. For more information, and to book, see [here](#).

Mental Capacity Law Update

Neil is speaking along with Adam Fullwood at a joint seminar with Weightmans in Manchester on 18 November covering topics such as the Liberty Protection Safeguards, the inherent jurisdiction, and sexual relations. For more details, and to book, see [here](#).

Other conferences of interest

The Court of Protection Bar Association will be holding a seminar, open to members of the Association, on 28 October at 39 Essex Chambers in London addressing recent developments in mental capacity law. 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.

Our next edition will be out in November. 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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