



Welcome to the February 2020 Mental Capacity Report, which is, even by our standards, a bumper one. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a tribute to Mr E; fluctuating capacity; improperly resisting a deputy appointment; DoLS, BIAs and RPRs, and finding the right balance with constrained resources;

(2) In the Property and Affairs Report: the OPG, investigations and costs; e-filing for professional deputies, and a guest article about the National Will Register;

(3) In the Practice and Procedure Report: the Vice-President issues guidance on serious medical treatment; an important judgment on contingent declarations; the permission threshold; and disclosure to a non-party;

(4) In the Wider Context Report: brain death and the courts; deprivation of liberty and young people;

(5) In the Scotland Report: supplemental reports from the Independent Review of Learning Disability and Autism; the Scott review consults; and relevant cases and guidance.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). 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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### Independent Review of Learning Disability and Autism in the Mental Health Act: supplemental reports

In January 2020 the Review published some supplemental reports which are a report on the Review's process, and an evidence resource for future developments. Its final report was published in December 2019. The Review's reports can be accessed [here](#) (and the final reports [here](#), at links which will not be disturbed when the Review's website ceases to exist later in 2020).

*Jill Stavert*

### Scottish Mental Health Law Review (Scott Review): Consultation and website launched

On 3rd February 2020 the Scott Review

launched a 12 week consultation seeking people's views and experiences of current mental health laws in Scotland. This includes you if you have had personal experience of these laws in Scotland because of a mental disorder or have supported, cared for or acted as a Named Person for someone in that position. It also includes any organisations or persons who work with this law. A link to the consultation website with further information on it can be found [here](#).

The Review has also launched its official website which, for information more generally about the Review, can be accessed [here](#). All future announcements about the Review will also be posted on this website which will be added to over the next few weeks (for example, to include information about the Review's Advisory Groups).

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The Review can also now be followed via Twitter @MHLRScot and emailed via its Secretariat email address: [secretariat@smhrl.scot](mailto:secretariat@smhrl.scot).

*Jill Stavert*

### Law Society sponsors World Congress

The Law Society of Scotland has committed to supporting, as a main sponsor, the 7<sup>th</sup> World Congress on Adult Capacity to be held at the Edinburgh International Conference Centre on 7<sup>th</sup> – 9<sup>th</sup> June 2022. The firm lead taken by the Society as the first supporting organisation to commit to sponsoring the event is of major significance as an endorsement of the importance and status of the event, will be the first time that such a small country will host the event, and only the second time ever that it will take place in Europe. Further financial support will be required, and it is to be anticipated that the example of confidence in the event set by the Society will encourage others. The event will showcase not only Scotland's position as a world leader in the development of adult incapacity law, but also the quality and scope of the legal contribution and legal services that Scotland can offer worldwide. Further sponsorship packages will be developed and made available shortly. Some of the opportunities, such as free exhibition space, will be necessarily limited. Any enquiries or notes of interest should be sent to Adrian or Jill, both of whom (for the purposes of this and future coverage) declare interests as members of the organising committee for the 2022 event, as President and leader of all programme aspects, respectively. Adrian is also a member of the steering group of the International Advisory Board for successive World Congresses.

See also the item in the Wider Context Report on the 2020 World Congress in Buenos Aires, Argentina.

*Adrian D Ward*

### Colin McKay moves

Scotland has benefited from a succession of outstanding Chief Executives of the Mental Welfare Commission for Scotland, none less than Colin McKay, who has announced that next month he will step down as Chief Executive of the Commission and, having been a visiting Professor at Edinburgh Napier University, now takes up a part-time post as a Professor there, working with Professor Jill Stavert, who leads the highly respected Centre for Mental Health and Capacity Law at the University. Colin will continue his work as a member of the review team on the [Scott Review](#), but intends to have time to help Jill to further develop the work of the Centre and other related activities.

Colin and Jill jointly co-organised the law reform scoping exercise which resulted in publication of "[Scotland's Mental Health and Capacity Law: the Case for Reform](#)", which substantially influenced the establishment of the Scott Review, and the significance of which was emphasised by the co-option of both to the Review's executive team.

Colin is currently a board member of JustRight Scotland and a member of the expert advisory group to the Centre for Mental Health and Capacity Law.

We aim to include a retrospective coverage of Colin's term as Chief Executive of MWC after he has stepped down. His professorship with Edinburgh Napier University is initially for a six-month period, funded by the Scott Review. The

Commission now seeks a new Chief Executive. The post has been advertised. For information about the post, see <https://www.aspenpeople.co.uk/MWCS/>.

*Adrian D Ward*

### Closure of facility halted after users sidelined

On 26<sup>th</sup> June 2019 the South Ayrshire Integrated Joint Board (“IJB”) decided to close the Kyle Adult Day Care Centre. Carers of adults attending the Centre were informed of the impending closure at a meeting on 10<sup>th</sup> September 2019. They included Mr Roy McHattie, who on 5<sup>th</sup> September 2019 had been appointed guardian to his son Craig McHattie, aged 32, who is described as having severe learning and mobility issues. He had attended the Kyle Centre five days a week for the last 13 years. He and his parents were relying on the facilities provided at the Kyle Centre. He had developed important relationships with the carers. Outings in the wider community present significant hurdles for Craig, and the facilities of the Centre provided an alternative to such outings.

South Ayrshire Council determined that Kyle Centre should close on 24<sup>th</sup> December 2019.

On 9<sup>th</sup> December 2019, Roy McHattie lodged a petition for judicial review, seeking production and reduction of the purported decision to close dated 26<sup>th</sup> June 2019; declarator that the respondent, South Ayrshire Council, by reaching that decision without consultation with the petitioner and other service users and guardians, had frustrated the legitimate expectation of the petitioner; declarator that in reaching that

decision the Council failed to perform its statutory duties under section 149 of the Equality Act 2010; and declarator that the decision dated 26<sup>th</sup> June 2019 was irrational, lacking in reasons, and unreasonable.

On 13<sup>th</sup> December 2019 Lord Woolman heard a motion for permission to proceed, for first orders, and for interim orders. He dispensed with intimation and service. Upon hearing that the respondent did not oppose permission being granted, he granted permission to proceed and made no interim order. He found the petition suitable for urgent consideration. The petition came before Lord Boyd of Duncansby for hearing on 19<sup>th</sup> December 2019. On 23<sup>rd</sup> December, the day before closure was due to take effect, Lord Boyd issued an interlocutor reducing the decision to close the Centre and making declarators as sought. Lord Boyd’s Opinion dated 27<sup>th</sup> December 2019 is available at [\[2020\] CSOH 4](#).

See that decision for a full narration of the background and for Lord Boyd’s reasons for his decision. He narrated that there was no properly minuted decision to close the Centre. The IJB had decided on 26<sup>th</sup> June 2019 to make budget savings on the budget for 2019-2020. It was not evident from the Minutes of the Meeting available to the public that in agreeing to “further efficiency measures ... not previously approved” IJB had in fact sanctioned the closure of the Centre. While at that point it was suggested that the decision to close had to be ratified by the Council’s Leadership Panel, the report to a meeting of that Panel on 29<sup>th</sup> October merely recommended “noting” the decision taken by IJB to close Kyle Day Care Centre. It appears that lost in the course of that process were the

requirements to consult and produce an Equality Impact Assessment under section 149 of the Equality Act 2010, and in accordance with the specific duties imposed on local authorities by the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012/160, and in particular the requirements under Regulation 5 to assess and review policies and practices.

Lord Boyd referred to what he described as “a useful summary of the law” in *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 and *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin). He picked out in particular that the duty upon the local authority had to be fulfilled before a policy that might affect a particular class of protected person is adopted; that the duty must be exercised in substance with rigour and an open mind (not just ticking boxes), and that the duty is a continuing duty which does not end, for example, once an Equality Impact Assessment has been completed. Lord Boyd further had regard to the guidance in two booklets from the Equality and Human Rights Commission: guides for Public Authorities in Scotland entitled ‘Essential Guide to the Public Sector Equality Duty’ and ‘Assessing Impact and the Public Sector Equality Duty’. Applying these principles and guidance to the facts of this case, he noted that when the Council’s Business Plan was developed, the indicative timescale in it recognised the need for an EIA to be carried out before the proposal for closure was put to the IJB in June 2019, but that did not happen. The only EIA that was carried out was on the budget for 2019-2020, and did not mention the Kyle Centre. While it might be assumed that the members of the IJB anticipated that their decision to make the proposed savings would be

subject to a further decision with a full EIA available, that was not the way in which the Council dealt with the matter. The Leadership Panel proceeded on the basis that the decision of the IJB was sufficient authority to close the Centre. The failure to carry out a formal EIA might have been excusable if it could be shown that in substance the duty under section 149 had been observed, but Lord Boyd was not satisfied that the Council could demonstrate that.

Lord Boyd also held that Mr McHattie had a legitimate expectation of consultation on the proposal to close the Kyle Centre, given his son’s long history of daily attending there, and the extent to which it was an integral part of his son’s life, upon which his son and the son’s parents relied. Lord Boyd did not consider the failure to consult as being “at best a procedural impropriety”. It was one which went to the heart of the decision-making process, which was fundamentally flawed by the failure to consult persons who had a legitimate expectation of such consultation.

In view of his other findings, Lord Boyd did not consider it necessary to consider the question of “Wednesbury unreasonableness” further.

Having reached those conclusions, Lord Boyd still had a discretion to determine whether the decision to close the Centre should be quashed. He was not impressed by submissions that the effective date of closure was to be 24<sup>th</sup> December; that the manager and all but three of the staff had accepted severance payments; that regulations required each such service to have a manager in full-time day-to-day charge; or that Craig McHattie was the only user of the Centre in respect of whom alternative provision had not been accepted. On the last point, he took

the view that other users had accepted alternatives only because they understood the decision to close to be a fait accompli, which was a situation entirely of the Council's own making. Lord Boyd took the view that the court should be slow to refuse to quash an illegal decision by a public authority. The onus was on the authority to make out a good reason why the decision should not be quashed. Where the decision-maker would require to re-take the decision, it would only be where it was plain and obvious that the outcome would be the same that it would be right to refuse to reduce an illegal decision. The court should not attempt to take over the decision-making process or to speculate as to what the outcome might be. Lord Boyd took the view that the fundamental principle at stake was the rule of law: "An illegal decision is an affront to the rule of law". At times a pragmatic decision might be necessary in the interests of good governance and the wider interests of society in ensuring certainty.

No enquiry had been made as to whether departing staff would be prepared to stay on if the closure decision were reversed. Alternatively, staff could be re-assigned from elsewhere. There was no suggestion that if the Centre were to remain open, other users would want to remain with the new arrangements that had been made, rather than stay there. Lord Boyd confirmed that he was not persuaded that he should exercise his discretion to refuse to reduce the closure decision.

*Adrian D Ward*

## Decisions of Glasgow City Council not reduced

In *Terri McCue as guardian of Andrew McCue* [2019] CSOH 109 the court was asked to review the refusal by Glasgow City Council to take into account, in calculating charges to be made in accordance with the Council's Charging Policy, of the full amount of the "disability related expenditure" of Andrew McCue, who was aged 24, had Down's Syndrome and lived with his parents. His mother, Terri McCue was his carer and guardian. She brought the petition as her son's guardian.

The petitioner was entitled in law to community care services from the Council in terms of section 12A of the Social Work (Scotland) Act 1968 and section 5 of the Social Care (Self-directed Support) (Scotland) Act 2013. The question in the case was whether certain items of regular expenditure incurred by Andrew should be taken into account as deductions in calculating his income in arriving at whether and to what extent he should pay charges. However, having considered relevant law on the extent of the jurisdiction of the Ombudsman, Lady Wolffe concluded that the petitioner had an available alternative remedy in the form of a complaint or application to the Ombudsman for all of the grounds of challenge contained within the petition, and she accordingly sustained the Council's plea of no jurisdiction. At this stage we do not report her decision at greater length as her Judgment narrates that it has been issued in response to intimation of an appeal against her decision.

*Adrian D Ward*

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## The Independent Inquiry into Mental Health Services in Tayside: Final Report

5<sup>th</sup> February 2020 saw the publication of the [Final Report](#) of the Independent Inquiry into Mental Health Services in Tayside.

### *Background*

The Inquiry was commissioned by NHS Tayside after serious concerns were raised in the Scottish Parliament in May 2018 about the provision and adequacy of mental health services in Tayside following reports of ill-treatment and suicides of patients. Led by David Strang (formerly Her Majesty's Chief Inspector of Prisons for Scotland with a preceding long career with the police) the inquiry's objective was to look at the accessibility, safety, quality and standards of care provided by mental health services across the Tayside region.

Following a Call for Evidence an [interim report](#) was published in May 2019 which identified six key emerging themes which were patient access to mental health services, patient sense of safety, quality of care, organisational learning, leadership and governance.

This final report follows an investigation and analysis of the issues which had been identified.

### *Final Report findings: the title says it all!*

A reading of the very detailed report is strongly recommended. However, as its title *Trust and Respect* suggests, it highlights the need for trust<sup>1</sup> and respect across the sector noting that good healthcare provision is only possible where there

are good functioning relationships between and within healthcare providers, partner organisations (such as local authorities, Integration Joint Boards, third sector agencies, and Police Scotland) and patients, their families and carers and which operate at and between all levels.

The report makes it clear that, from the evidence presented to the inquiry, whilst there have been examples of good provision there have been 'too many' breakdowns of trust in many aspects of the provision of mental health services across Tayside. Cited examples include, the shortage of consultant psychiatrists undermining patients' belief that NHS Tayside are able to deliver necessary treatment and care, perceived gaps between the stated values of the organisation and observed behaviour and some staff not trusting the organisation's motivation and experiencing a culture of fear and blame manifesting in a failure of the organisation to take responsibility, defensiveness and lack of transparency.

A mutual lack of respect was also reported as being experienced by all people affected by or involved in the provision and receipt of mental health services. As well as patients and families some staff also described a lack of respect from both patients, families and carers and their employers leaving them feeling undervalued, disempowered and therefore less inclined to contribute positively to improvements. Hostility between professional groupings and mutual blaming between managers and clinicians was noted as well as problematic relationships

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<sup>1</sup> Essentially relating to trust in the ability and reliability of those delivering the services and their motivation to act with transparency and openness.

between NHS Tayside, Integration Joint Boards and local authorities and with the Scottish Government.

The inquiry has essentially recommended a radical new approach to restore and build trust is urgently needed and this will require a change to the organisational culture. The report identifies five cross-cutting themes which will need to be addressed to improve Tayside's mental health services. These are strategic service design, clarity of governance and leadership responsibility, engaging with people, a learning culture and communication. 51 recommendations are made to assist in achieving this.

As the report states<sup>2</sup>, this:

*'...represents a major opportunity for Tayside to develop and put in place world class mental health services. Tayside's NHS Board and the Health and Social Care Partnerships, together with support from the Scottish Government, are in a position to tackle the underlying barriers to progress and to make the radical changes necessary...'*

Watch this space.

*Jill Stavert*

## New Scottish Government guidance

The Scottish Government has recently published some new guidance on self-directed support relevant to adults with incapacity:

[Managing self-directed support for adults with incapacity: guidance](#)

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<sup>2</sup> Para 1.22.

## [Self-directed support and powers of attorney: Frequently Asked Questions](#)

*Jill Stavert*

## Scottish Parliament Social Care Inquiry - Call for views by the Health and Sport Committee

As a result of residential care facilities closures and funding issues relating to independent, voluntary and council run facilities the Scottish Parliament Health and Sport Committee is undertaking an inquiry into social care for adults over 18 years with the intention of exploring future social care delivery in Scotland. Full details of the inquiry as well as details about submitting views to the inquiry (the deadline for this being Thursday 20<sup>th</sup> February 2020) can be found [here](#).

*Jill Stavert*

## Mental Welfare Commission for Scotland: Scotland's Mental Health Rehabilitation Wards: Themed Visit Report

On 30<sup>th</sup> January 2020, the Mental Welfare Commission published a new [report](#) on its visits to all 22 of Scotland's NHS rehabilitation wards. The patients on these wards are likely to have severe and complex mental health needs and remain in hospital for considerably longer than some other mental health patients. The Commission therefore reviewed standards of care in light of the impact of such prolonged hospital stays and visited 130 patients and spoke to 26 carers or family members.



The report's findings are very mixed and a read of the actual report is of course recommended. For example, treatment was being properly authorised for those patients subject to compulsory treatment, most patients were aware of advocacy, were in contact with advocacy services and found it helpful and families and carers tended to be positive about service delivery although a lack of meaningful activity on wards seems to have been an issue. There was also found to be an improvement (although this was varied) since the Commission's last visit in terms of patients having regular access to their local communities, and in assessment, care planning and reviews.

*Jill Stavert*

### **Stakeholder survey: how well is the Mental Welfare Commission doing?**

The Commission is seeking feedback on its roles and work from people who have been in touch with the Commission on either a personal or professional basis. The survey closes at 5pm on 25th February 2020 and a link to more information about it and how to respond can be found [here](#).

*Jill Stavert*

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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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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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**Simon Edwards: [simon.edwards@39essex.com](mailto: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](#).

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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; honorary membership of the Law Society of 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

### LSA Mental Health conference

Adrian will be chairing and Jill speaking at the LSA Mental Health conference in Glasgow on 13 February. For more details , and to book, see [here](#).

### The law and brain death

Katie will be chairing and Tor speaking at a seminar and discussion taking a critical look at cases concerning brain death in the High Court and Court of Protection. It will take place on 26 February in London. For more details, and to book, see [here](#).

### SOLAR conference

Adrian will be speaking on “AWI: Don’t wait for legislation – the imperatives apply now!” at the annual conference of the Society of Local Authority Lawyers and Administrators in Scotland, being held on 12 and 13 March in Glasgow. For more details, and to book see [here](#).

### Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the Mental Health & Justice project on 15 May 2020, in London. For more details, and to book, see [here](#).

## Other conferences and events of interest

### Mental Diversity Law Conference

The call for papers is now open for the Third UK and Ireland Mental Diversity Law Conference, to be held at the University of Nottingham on 23 and 24 June. For more details, see [here](#).

### Peter Edwards Law courses

Peter Edwards Law have announced their new programme of courses, covering a wide range of topics across the mental capacity and mental health field. 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.

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Our next edition will be out in March 2020. 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](mailto:marketing@39essex.com).

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