



Welcome to the April 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the DHSC emergency guidance on MCA and DoLS, the Court of Protection on contact and COVID-19, treatment escalation and best interests, and capacity under the microscope in three complex cases;

(2) In the Property and Affairs Report: the Golden Rule in (in)action and the OPG's 'rapid response' search facility for NHS and social care staff to access the register of deputies / attorneys;

(3) In the Practice and Procedure Report: the Court of Protection adapting to COVID-19 and an important decision on the s.48 threshold;

(4) In the Wider Context Report: COVID-19 and the MCA capacity resources, guidance on SEND, social care and the MHA 1983 post the Coronavirus Act 2020, dialysis at the intersection between the MHA and the MCA and an important report on the international protection of adults;

(5) In the Scotland Report: the response of the legal community to AWI law and practice under COVID-19, and an update from the Mental Health Law Review.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#). Chambers has also created a dedicated COVID-19 page with resources, seminars, and more, [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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### AWI law and practice: the co-operative response of the legal community

**“The law is one of the caring professions”**

*(Retired) Sheriff Brian T Kearney*

**“We need to stick together and help each other in times like these”**

*Fiona Brown, Public Guardian*

Lawyers are unlikely to be able to save a single life in the current emergency. Collectively, they can provide support to those in the front line, help to meet the needs and anxieties of the general public, and make proactive and inventive contributions towards responding to the crisis in ways that nevertheless safeguard as far as possible our society’s core values of respect for human rights, due process, and the rule of law. The collective response of the legal community, largely in an atmosphere of complete cooperation, openness and mutual trust, and at quite astonishing speeds, has been massive. The Centre for Mental Health and Capacity Law at Edinburgh Napier University, led by Jill, has played a full role in that intensive effort, not only in contributing directly to many processes underway, but in preparing and publishing overviews, explanation and comments. More narrowly, this piece narrates some of the work of the Law Society of Scotland, through both its in-house staff and the army of those (not limited to

professional lawyers) who contribute voluntarily to the Society’s work, within the areas of legal practice covered by this Report. “In-house” has become a rather outmoded technicality, as – like most other firms and organisations – in the midst of this intense activity the Society had to manage the transfer of all its staff to home working.

The particular threads followed in this article must be seen in the context of broader issues, with many difficult and critical aspects, across a range including the administration of justice in the criminal courts, the operation of the civil courts, and the operation of the whole conveyancing system. While these aspects of the emergency have dominated, all of the “normal” responsibilities of the Society have remained. Even in “normal” times, these are sufficient to occupy fully the fit and lean in-house structure of the Society.

Practice updates from the Law Society can be found at <https://www.lawscot.org.uk/news-and-events/law-society-news/coronavirus-updates/>. Practitioners should continue to check regularly, particularly for updates relevant to their own areas of practice. For each item, the date of the most recent update is entered. It is clear that the profession generally is engaging carefully with these. Some updating has resulted from thoughtful consideration by a practitioner of a previous version of a particular item. Where

particular items are referred to in this article, the date of the most recent update when accessed for preparation of this article is shown in brackets. Of particular relevance to adult incapacity are general items on “Court: criminal and civil” (updated 18 April), “Non face-to-face identification and verification” (updated 14 April), and “Non face-to-face ID where electronic verification fails or is not possible” (updated 14 April). Most private client practitioners will also wish to pay particular attention to the “Wills guidance” (updated 25 March).

Of direct relevance to adults with incapacity practice is the guidance on “Power of attorney” (updated 08 April). Typically of the progress of such matters in these times, I was asked by the Professional Practice Department of the Law Society to join at short notice a conference call following upon receipt by the Society of enquiries from practising firms as to whether the “statutory interview” requiring to be carried out by the prospective certifier of a power of attorney document, immediately before execution, could be done remotely. Fortunately, I was able to advise that I had once done precisely that, with the full knowledge and agreement of Sandra McDonald, then Public Guardian. A UK citizen habitually resident overseas, fortunately in a country that had ratified Hague Convention 35 on the International Protection of Adults, wished to grant a Scottish power of attorney. He had been habitually resident in Scotland, and still had property in Scotland. Thus he was able to apply to his power of attorney the law of Scotland, rather than the law of his current habitual residence, because he qualified to do so under all three of the criteria listed in paragraph 4(2) of Schedule 3 to the Adults with Incapacity (Scotland) Act 2000, substantially replicating

relevant provisions of Hague 35. Having consulted with the Public Guardian, I sent the document to him and interviewed him by Skype. He introduced me to a neighbour who had called round to witness the document. I conducted the interview in the usual way. He held up the print of the document that he had received from me, showing that it had not yet been executed. He executed it, and the witness signed. He held it up again to show that it had now been executed, and then mailed it back to me. I could thus properly certify that I had “interviewed the granter immediately before the granter subscribed the document” (sections 15(3)(c)(i) and 16(3)(c)(i) of the 2000 Act) and that I could otherwise properly sign the certificate. I did so, and – accompanied by confirmation that this methodology had been followed – the application for registration was submitted and registration in due course completed. In effect, that experience was transferred into the first edition of the power of attorney guidance.

Issue of the original guidance resulted in two further developments. Firstly, a practitioner contacted the Society with a well-reasoned request as to whether interview by telephone might sometimes be possible. That was carefully considered, and resulted in the additional text in the guidance advising that the procedure recommended in it does not necessarily preclude a solicitor as certifier being satisfied by other means that the solicitor can properly certify, in circumstances carefully circumscribed in the updated guidance, and with the reminder that certifying solicitors must be satisfied in every individual case that they can properly certify, and that the decision to do so can be robustly justified if that should subsequently become necessary. It is typical of

many of the accommodating adjustments to law and practice guidance that they place enhanced reliance upon practitioners acting carefully with full professional responsibility for what they do. Practitioners will not need to be reminded of the potential “with benefit of hindsight” issues that could arise if whether they have done so is subsequently challenged.

The second consequence was that the flow of applications to the Office of the Public Guardian did not reduce. As everywhere, available OPG staff were diminished by consequences of the crisis, and transferred to home working. Careful management of systems and resources meant that OPG staff were still able to give priority to applications identified by them as urgent. However, solicitors had come under pressure from clients responding to publicity, and items from sources such as their own GP practices, urging the importance of putting in place anticipatory measures such as powers of attorney and advance directives so that they could be used at very short notice in circumstances of medical emergency. No-one granting powers of attorney in these circumstances was interested in an explanation that the document could not come into force until after it had been registered, that registration would be deferred indefinitely, but in the event of urgency the attorney could contact the solicitor acting in the application, who in turn could contact OPG to explain the urgency, following upon which OPG would process the application rapidly and then issue the certificate of registration. Emergency situations would be likely to require a much quicker response than that. Meeting these needs, in the reality of the present situation including the resources available to OPG, is being addressed as rapidly

as possible by the Society, but is more challenging. In the meantime, it is counter-productive for solicitors to bombard hard-working members of OPG staff by passing on their clients’ anxieties and frustrations, except only when genuine urgency can be demonstrated. The quotation from the Public Guardian at the head of this article accurately reflects the prompt and helpful cooperation and understanding given by her and her staff throughout. That must be reciprocated.

There have been two rounds of proposed “temporary modifications” to relevant legislation in the UK and Scottish Coronavirus Bills, both of which have now become law (as to the latter, see the comments of the Centre for Mental Health and Capacity Law [here](#) and [here](#)). That is not necessarily the end of the story. The Society’s work continues. An update will be provided in the May issue.

*Adrian D Ward*

### **Scottish Mental Health Law Review and COVID-19: we are continuing!**

Everyone has been affected by the COVID-19 pandemic but what does this mean for the Scottish Mental Health Law Review chaired by John Scott QC?

Firstly, conscious of the importance of the Review it will continue and has not been paused albeit there have been some temporary adaptations to take account of the crisis. There is a great deal of work that can still be done despite the restrictions that are likely to be in place for at least the foreseeable future. Such work includes gathering information on experiences of the operation of the law and

developing various themed workstreams to complement the work of the Communications and Engagement and Compulsion Advisory Groups which have already been established. The Review Executive Team will continue to meet online and the existing advisory groups will be kept fully informed.

Whilst face to face meetings and public engagements are not possible at the moment – and although we hope to resume these in the not too distant future – the consultation is still ‘live’. As many persons as possible with professional or lived experience of our Scottish mental health, incapacity and adult support and protection are therefore encouraged to respond to the consultation online and its deadline has been extended to 29 May 2020. However, if it is not possible to respond to the consultation before 29 May 2020 there will still be many opportunities beyond this date. It is the Review’s intention to speak to as many people as possible throughout its duration which will extend beyond the end of May 2020.

Secondly, the Review will still publish a short interim report at the end of May 2020. Bearing in mind that the current pandemic has inevitably affected information gathering this report will provide an update of the Review’s progress, reflect, in general terms, on the information collected at that stage and set out its proposed next steps.

More information on the Review and consultation can be found at [www.mentalhealthlawreview.scot/](http://www.mentalhealthlawreview.scot/)

*Jill Stavert\**

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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 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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## Conferences

At present, most externally conferences are being postponed, cancelled, or moved online. Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

### **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 May. 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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