MENTAL CAPACITY REPORT: SCOTLAND

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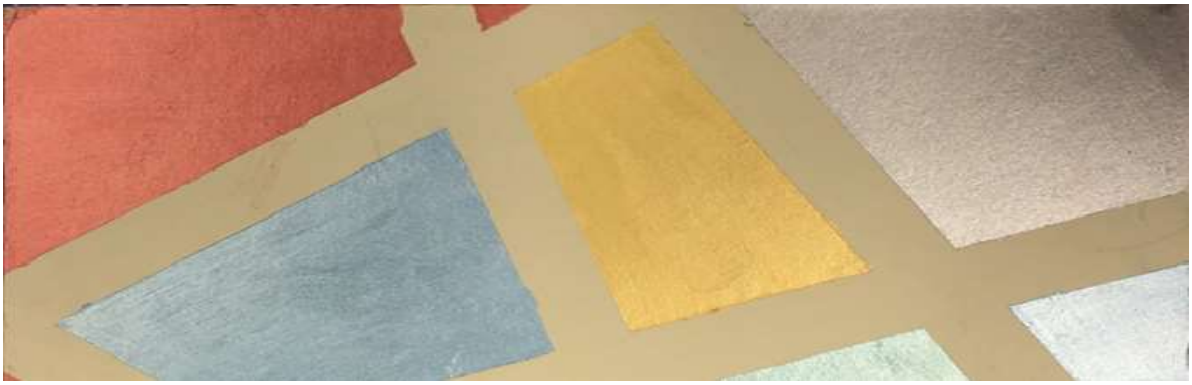

Welcome to the September 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: updated MCA/DoLS guidance, the anorexia Catch-22, and two important cases on deprivation of liberty;

(2) In the Property and Affairs Report: remote witnessing of wills, professional deputy remuneration and the OPG annual report;

(3) In the Practice and Procedure Report: CoP statistics, short notes on relevant procedural points and the UN principles on access to justice for persons with disabilities;

(4) In the Wider Context Report: the NICE quality standard on decision-making and capacity, litigation friends in different contexts, and a guest piece giving a perspective on living with a tracheostomy and a ventilator;

(5) In the Scotland Report: the human rights blind spot in thinking about discharge from hospital in the context of COVID-19.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report, not least because the picture continues to change relatively rapidly. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here and Neil has resources on his website 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.

Contents

Decision on Judicial Review jurisdiction overturned

In the February 2020 Report we covered a decision by the Outer House in *Terri McCue as guardian of Andrew McCue* holding that the court had no jurisdiction to hear an application seeking judicial review of a refusal by Glasgow City Council to take into account, in calculating charges to be made in accordance with the Council's Charging Policy, the full amount of the "disability-related expenditure" of Andrew McCue. Lady Wolffe held that the jurisdiction of the court was excluded because 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.

That aspect of Lady Wolffe's decision has now been overturned on appeal. The Judgment of the Inner House, delivered by Lady Dorrian, the Lord Justice Clerk, was issued on 21st August 2020 and is available here. The court held that this question turned upon the interpretation of section 7(8)(c) of the Scottish Public Services Ombudsman Act 2002, under which the Ombudsman must not investigate any matter in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law. The court held that this wide reference covered proceedings by way of judicial review. Where proceedings for judicial review had been presented, and there remains the possibility of a successful remedy thereby, the jurisdiction of the Ombudsman is ousted, at least insofar as it relates to any complaint which asks the Ombudsman to address the same matter as addressed in the judicial review. Where the complainer elects not to pursue judicial review, the Ombudsman has a discretion to decide whether to accept the complaint. This however does not mean that the court may never decide to dismiss a petition for judicial review on the basis that it is a matter more appropriate for the Ombudsman. The court may do so, either at the permission stage or later, if it becomes clear that the matter is not one amenable to the supervisory jurisdiction. But the jurisdiction of the court was not thereby excluded.

However, in this case the applicant had failed to demonstrate that the issues raised by her were amenable to judicial review, so her appeal failed on those grounds, notwithstanding that she was successful on the question of jurisdiction.

Adrian D Ward

Equalities and Human Rights Committee and related matters

On 1st September 2020 the Scottish Government's Interim Director-General, Health and Social Care, wrote to the convener of the

Scottish Parliament's Equalities and Human Rights Committee. The letter is available here. Annex A to the letter is headed "Lessons learned from reducing delayed discharges and hospital admissions". One positive aspect is a strongly-worded assertion that reform of the Adults with Incapacity (Scotland) Act 2000 is required by 2021. That must be right. The widespread "blind spot" in Scotland in relation to issues of deprivation of liberty, contrary to Article 5 of the European Convention on Human Rights, was addressed as long ago as 2014 by Scottish Law Commission, but the pace of urgently required law reform has slowed more and more ever since, and while we have welcomed the measured approach of the Scott Review, into which AWI reform has been incorporated, that is a consequence of the decision to sideline AWI reform while mental health law aspects of the Scott Review's remit catch up.

The blind spot is evident in Annex A. Circumstances which appear to amount to deprivations of liberty without due process leap out from the pages, but the topic of deprivation of liberty and how it should be addressed does not feature once. "Successes" in reducing the incidence of delayed discharge appear to treat human beings as statistics, without reference to basic human rights. Annex A states that: "*When people were discharged from hospitals into long stay care home beds, this was because they had been assessed as needing a care home place and went with their agreement and that of their families. As much as possible this was directly to their first choice of home. A few areas reported moving some people to interim care home beds in advance of a bed in their choice of care home becoming available, but noted that this could result in other problems, so over time they did this less. More commonly people were only being moved once, when their care home of choice became available.*" If such a patient had adequate capacity to consent to the move competently, the agreement of families is quite irrelevant. If families were deciding the matter without lawful authority, that was clearly wrongful. If, as appears to be implied, people lacking capability to agree competently were being moved to a care home rather than returned to their own home without due process compliant with Article 5, that was a violation of Article 5; all the more so if they were moved to somewhere other than their own choice of placement.

The report states that: "Powers of attorney and anticipatory care plans/DNACPR: Individuals admitted to hospital with existing cognitive impairment and difficulties with decision making were identified early by health and social work staff, who then engaged with individuals and families to promote power of attorney and anticipatory care plans." That raises serious concerns as to what authority existed for decision-making upon admission to hospital. Starting the process of granting a power of attorney or making an anticipatory care plan will not help at that point in time; the references to cognitive impairment and difficulties with decision-making point towards lack of adequate capacity to do either; and – yet again – the reference to involvement of families is seriously problematical, suggesting either unauthorised decision-making or a failure to recognise lack of capacity and to guard against the risk of undue influence. There is no reference to utilization of section 47 of the 2000 Act, or of any other lawful procedure to authorise treatment.

This all arises against the background of evidence provided by the Law Society of Scotland to the Equalities and Human Rights Committee of known cases where DNACPR notices have been permanently applied to the records of patients for no reason other than that facilities to treat them were not available when they first presented to hospital; and cases where notices had been attached to the records of all the residents of particular care homes that they should not be admitted to hospital in any circumstances.

We understand that it has been admitted in the context of current proceedings before the Court of Session by *Equality and Human Rights Commission against Glasgow Council and others* that transfers of patients from hospital to a particular facility were unlawful deprivations of liberty.

It is perhaps unfortunate that failures in provision unrelated to the pandemic seem to be either ignored altogether or impliedly blamed upon the pandemic. For example, there is no reference to the long-term failure on the part of local authorities to recruit, train and retain adequate numbers of mental health officers, so that breach of the explicit statutory obligation upon local authorities to produce MHO reports within 21 days of intimation of intention to seek a guardianship order with welfare powers is almost universal, with the statutory time limit regularly exceeded by many months; all prior to the pandemic.

The "blind spot" in relation to Article 5 was clearly demonstrated in the case of *Borders Council v AB* which we described in the December 2019 report. It was plainly obvious that implementation of the order sought in that case would amount to a deprivation of liberty, yet the mental health officer suggested that it would not, until the sheriff put him right. Moreover, to ensure lawful compliance with Article 5, the sheriff imposed a strict six-month time limit on the guardianship order, yet it is understood that in that and other similar cases the "stop the clock" provisions mean that deprivation of liberty has continued unlawfully beyond time limits explicitly set by sheriffs.

Some countries have notified temporary derogation from Article 5 by reason of the pandemic. The United Kingdom has not done so. Article 5 contains explicit rights to redress. One trusts that Scottish Government and relevant local authorities are budgeting for this; though it would be far better if they were to recognise the fundamental human rights of people involved in their decision-making, including their focus upon arithmetical "success" in reducing delayed discharges.

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 Visiting Professor 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 and created the website www.lpslaw.co.uk. 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 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). 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. 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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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

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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 October. 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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