



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

(1) In the Health, Welfare and Deprivation of Liberty Report: updated DHSC MCA/DoLS COVID-19 guidance, the CRPD in the Court of Protection and spotting the signs of abuse;

(2) In the Property and Affairs Report: two important cases about deputies and fixed costs and how to get financial deputyship applications right;

(3) In the Practice and Procedure Report: s.21A applications and interim declarations; the limits of the court's jurisdiction; contempt proceedings and when not to recognise a foreign order;

(4) In the Wider Context Report: new GMC consent guidance, Sir James Munby returns to the inherent jurisdiction, new CQC publications and relevant ECHR developments;

(5) In the Scotland Report: a new Chief Executive for the Mental Welfare Commission, MWC publications, and what COVID-19 has revealed about ageism and disability discrimination.

We thank Katherine Barnes for all her contributions to date, and wish her well as she steps down to focus her activities on other areas; we welcome Rachel Sullivan and Stephanie David as new contributors.

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. 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 a page [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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Mental Welfare Commission Chief Executive

Julie Paterson took up the position of Chief Executive of the Mental Welfare Commission for Scotland on 3rd August 2020, after a significant period since Colin McKay stepped down from that role in March, as we reported in the [February 2020 Report](#). Although Julie had a two-year secondment to the Mental Welfare Commission more than a decade ago, she had no coordinated period of overlap with Colin. However, following a period of updating and familiarisation with the Commission, and engagement with key stakeholders, we anticipate that she will be in a position to make her own introductory contribution to next month’s Report.

Colin was the first lawyer to be Chief Executive of the Commission. Julie is now the first qualified social worker. She is in addition a mental health officer, and well aware of the needs to substantially improve the recruitment, training and retention of mental health officers; the pressures upon the existing service and the challenges from her own experience of managing it; and the factors that are adverse to

recruitment and retention.

Prior to her appointment to the Commission she was Divisional General Manager (Fifewide Division) at Fife Health and Social Care Partnership. She can be expected to bring a particular focus upon the work of Health and Social Care Partnerships. She is also well aware of the need in Scotland for greater alertness to identify situations of actual or potential deprivation of liberty, and to ensure that they are properly addressed.

I would suggest that her appointment is particularly timely against the background that figures presented by Professor David Bell at the Online Scottish Policy Conferences Keynote Seminar on “Next steps for adult social care in Scotland – quality, support and developing effective models of care” on 7th October 2020 showed that from the period 2012/2013 to the period 2019/2020 healthcare spending in Scotland increased in real terms by 7.1%, and local authority funding reduced in real terms by 13.9%.

It is expected, however, that next month’s Report

will enable Julie to speak for herself.

Adrian D Ward

Mental Welfare Commission publications

The Mental Welfare Commission has recently published its Adults with Incapacity Act monitoring report for 2019/2020. It states that there has been a 7% increase in guardianship orders (3,199) since the previous monitoring period, the majority being for people with either learning disability (49%) or dementia/Alzheimer's Disease (36%). Whilst there has been a decline in indefinite orders which is comforting in human rights terms (notably Articles 5 and 8 ECHR and 12 and 14 CRPD) the reasons for the rise in orders should be investigated. This is important in terms of the operation of the Adults with Incapacity (Scotland) Act 2000 and respect for the range of civil and socio-economic rights applicable to those subject to guardianship orders. This is brought into even sharper relief by the fact that the report contains some case studies from the Commission's visits which illustrate the views of both those subject to guardianship orders and their guardians. It notes that in most cases the experience of people subject to guardianship orders and guardians were largely positive but there were concerns indicated by some individuals subject to the orders relating to restrictions and by guardians relating to the quality and level of care provided.

The Commission has also published an advice note for practitioners who are using the Mental

Health Act and Adults with Incapacity (Scotland) Act 2000 when caring for patients during the coronavirus pandemic and updated advice relating to coronavirus for people using mental health, learning disability and dementia services and their family or carers. It has also published a position statement on the use of section 13ZA Social Work (Scotland) Act 1968 in relation to the coronavirus. Although provisions in the Coronavirus (Scotland) Act 2020 introduced a so-called 'easement' relating to section 13ZA allowing local authorities to move persons who lack capacity to residential care without the usual statutory requirement to take into account their present and past wishes and feelings¹ did not come into force and have now been suspended, there has been concern about the apparent transfer from hospital to residential care of relatively large numbers of older persons who may lack capacity without legal basis. The Commission position statement essentially makes it clear that it would never have been proportionate to use the 'easement' to s13ZA and warns that local authorities should be very careful when using s13ZA at present. It states its intention to work with Health and Social Care Partnerships to independently review the practice in recent months with specific reference to moves from hospital to care homes.

Jill Stavert

"... then take the other knee" – Covid reveals endemic issues

On 1st October 2020 Scottish Human Rights Commission published "Covid-19, Social Care

¹ Section 1(4) Adults with Incapacity (Scotland) Act 2000.

and Human Rights: Impact Monitoring Report". The report was presented a week later, in an online discussion on Thursday 8th October 2020. The report, available [here](#), is a major and important document, extending to 87 pages. It is worthy of careful consideration, preferably in full, though the nine conclusions and 24 recommendations in the final chapter are essential reading for all working in the field. Points of major concern are the significant gaps in the realisation of rights of people who rely on social care support, including unpaid carers, and the widespread experience of people who use social care support at home of reductions or complete withdrawals of support for adults who may lack relevant capacity. These occurred even where a welfare guardian or attorney had relevant powers but had not been informed, and often happened rapidly in the early months of the pandemic without either adequate communication or adequate assessment of the proportionality of such decisions. The result is that the impact of policy and practice has had a direct and detrimental effect on people's rights, including those under the European Convention on Human Rights as well as the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of Persons with Disabilities. The Commission believes that these violations include potential unlawful interferences with people's rights to physical and psychological integrity, and negative impact on rights to private and family life, without recourse to the normal assessment and review procedures.

Looking forward from now, the Commission states that it is deeply concerned about the future care support available to people whose packages were reduced or withdrawn over the

period, and the potential impact that this could have on how their rights are realised, in the future as well as in the present. Indeed, if one steps back from the immediate situation, perhaps the greatest concerns demonstrated (and for many of us verified) by the report are that the pandemic "has exposed and exacerbated the inadequacies of the ways in which social care is accessed, funded, procured and commissioned in Scotland". In its concluding remarks, the Commission asserts that: "The current social care system is unable to provide people with the support that fits their life best and most appropriately, and to ensure their rights are respected, protected and realised". In consequence, both short and longer-term change is needed. That is necessary "to ensure the level of decline in the realisation of people's rights that has taken place never happens again". The Commission expresses the hope that its research will be acted upon by the Scottish Government, COSLA, and other relevant public authorities. Most readers of the report are likely to conclude that this should be an imperative, rather than a hope.

It appears that at one point the report does not state the law accurately. In a section entitled "Processes around the reduction in care and support at home", it is suggested (pages 53-54) that decisions to reduce care packages are subject to the provision of section 1(2) of the Adults with Incapacity (Scotland) Act 2000 that: "There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention". The report asserts that: "It is not clear how the removal of

essential support could be viewed as of benefit to an adult who lacks capacity to make some decisions, particularly if they also need physical support and personal care”.

However, one must question the basis for asserting that the principles in section 1 of the 2000 Act apply to such decisions. Section 1(1) provides that: “The principles shall be given effect to in relation to any intervention under or in pursuance of this Act”. Alterations in care packages are not an intervention in pursuance of the 2000 Act. In the case of adults who have guardians with relevant powers, an order to comply with the decisions of the guardian under section 70 could be theoretically relevant. One has to say “theoretically” because at best that cumbersome procedure might be available if things had gone wrong once, the guardian had given explicit instructions to the chief social work officer requiring consultation before any further adjustment to the care package, and could persuade a sheriff that in the circumstances such an order was necessary to prevent things going wrong again: all rather cumbersome, and uncertain. Perhaps, if a particular local authority had a demonstrably bad record in this regard, it might be possible to persuade a sheriff to grant such an order on a precautionary basis ahead of anything going wrong: and it might be possible to justify an application under section 70, which provides remedies in the event of non-compliance with the decisions of a welfare guardian, on the basis of a request for an undertaking in the matter which had not been granted within a reasonable period. Section 70 procedure is not available to attorneys, and in any event better alternatives might be either a referral to the Ombudsman, or human rights-based proceedings.

Apart from that particular point, what is most likely to strike any reader of the report, or anyone listening to the presentations at the conference, is the apparent lack of reference to Article 5 of ECHR, or to the widespread concerns about apparent unlawful violations of Article 5, which are unwarranted in the circumstances that the United Kingdom is not one of the states which have notified temporary derogation from Article 5 by reason of the pandemic: see my report “Equalities and Human Rights Committee and related matters” in the [September Report](#). The answer provided in response to a question about this at the conference was in fact entirely reassuring. That answer was confirmed by email from the Commission to me that same afternoon. The Commission had in fact drafted so much text on potential deprivations of liberty, which would have added so much to an already lengthy report, that it concluded that: “This was actually an issue which requires its own focus”. That is a decision to be welcomed, provided that the evidence on this assembled by the Commission, together with the Commission’s resulting conclusions and recommendations, are given adequate prominence at the earliest reasonably practicable date.

Taking a wider and more fundamental view, the pandemic has exposed not only the inadequacies highlighted at the end of the Commission’s report, but – I would suggest – serious institutional ageism and disability discrimination, comparable in gravity to the racism currently addressed by the “Black Lives Matter” movement, particularly in Scotland, across areas including access to and administration of justice, and through large areas of national and local government. This is the place only for some brief references and the

quotation of particular experiences that have actually occurred. The delays by local authorities in producing mental health officer reports, which are essential to allow applications for guardianship and intervention orders to be presented in court, are unlawful, and no less so because they are endemic and frequently are outrageously protracted. The Parliament specifically set a 21-day limit for production of such reports, recognising that delivery of justice to people with relevant disabilities depended upon production of them taking no longer. It is rare for such reports to appear within the statutory time limit, and not uncommon for them to take months, or even in excess of a year, to be produced. That point features in some of the experience quoted below.

In contrast with the Court of Protection in England, where comparable procedures were recently reported to be up to date, there are still long delays in processing many adult incapacity actions. The fundamental rights of elderly and disabled clients are routinely violated in this way by these delays. No such application is brought unless those bringing it assert, and offer if necessary to prove, the necessity for them. Where they are shown to be necessary, they are required to avoid violation of fundamental rights; and unwarranted difficulty or delay amounts to such violation. The same comment applies to discrimination in social care, and the imposition of unlawful deprivations of liberty without regard to (or even recognition of) the applicability of Article 5 of ECHR: see again my article in the September Report referred to above.

In the article “Covid-19: the case histories” in the [May Report](#), I narrated six case histories reported by legal and medical professionals to

the Mental Health and Disability Committee of the Law Society of Scotland. They were subsequently included, with commentary, in the response dated 26th May 2020 by the Law Society of Scotland to the Inquiry on the Impact of Covid-19 by the Equalities and Human Rights Committee of the Scottish Parliament, available [here](#).

Since then, several further worrying situations have been reported to me personally. I conclude by listing them in the words reported to me:

- a. “At least 50% of my clients describe an older relative going into hospital for physical reasons, with no real cognitive impairment, and no existing diagnosis, and almost immediately being assessed as incapable. In all of those cases, family had been unable to visit their relatives, and had no means of assessing their relative’s mental state, for themselves.”
- b. “I have had a client being pressured by Social Workers to move a dying relative from a ward designed specifically to provide end-of-life care.”
- c. “I have had half a dozen clients who have been urged to seek Welfare Guardianship, only for their relative to be moved within days to a care home, using Section 13ZA. At which point, it is no longer considered urgent to allocate an MHO, and their applications have been placed on a waiting list – in all of those cases, the Adult still does not have the protection of Guardianship, and nor has there been judicial scrutiny of their situation.”
- d. “I had a Charge Nurse allow me access to visit an Adult in hospital, as Safeguarder, on

the basis that 'it might help to get him moved on quicker'."

- e. "A number of MHOs have complained to me about the extent of pressure placed upon them by senior NHS staff; the more experienced have stood up to that pressure, and taken on the fight. In one case, where the local authority and the Adult's wife were joint interim Welfare Guardians, the MHO refused to seek a Direction from the Sheriff that the Adult be moved to a care home against the wishes of his wife, on the basis that the wife's point of view was entirely reasonable. This was at the height of deaths in care homes, and the NHS had tried to move the Adult to at least six different facilities, all of which had Covid deaths. The NHS threatened to take the case to court themselves (but never did)."
- f. "I have heard of, and from, Social Workers who have been told that the coronavirus legislation has amended Section 13ZA, and who have then told my clients that their relative will be moved, even if neither they, nor the Adult, agrees."
- g. "Some local authorities bounced back very quickly, and I now have MHOs from one authority doing 'routine' AWI(2)s, for younger Adults and older Adults alike. Other authorities have used the restrictions to avoid doing 'private' AWI work, at all."
- h. "There has been a massive disregard for human rights, which cannot possibly be justified by the Covid-19 'emergency'. When [a hospital] was, at one stage, running at 50% capacity, and the empty corridors of [another hospital] echoed as you walked

through them, it is very hard to see why the discharge agenda was pursued so ruthlessly, and fatally, against such very vulnerable people. We may only be seeing the very tip of the iceberg at this stage."

Adrian D Ward

Add 176 days: latest on emergency provisions

Updated guidance from Scottish Government on 28th September 2020, available [here](#), helpfully summarises the current position on emergency provisions affecting adults with incapacity. The relevant provisions are those set out in paragraphs 11(1), (2) and (3) of Schedule 3, Part 2, of the Coronavirus (Scotland) Act 2020. Paragraph 11(1) related to section 13ZA of the Social Work (Scotland) Act 1968. Section 13ZA as it stands permits what are probably violations of human rights even without the violations which would have been sanctioned by the temporary provisions under paragraph 11(1). The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020 expires paragraph 11(1). The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020 and The Coronavirus (Scotland) Act 2020 (Suspension: Adults with Incapacity) Regulations 2020 together have the effect of providing that "stop the clock" provisions in relation to expiry dates of guardianship orders and of certificates under section 47 of the 2000 Act came into effect on 7th April 2020 and ceased from 30th September 2020, when the "stopped clock" started running again. Accordingly, 176 days require to be added to original dates of expiry affected by the "stop the clock" provisions. Further complications will arise if paragraphs 11(2) and (3) are activated

again, and the clock is stopped for a further period.

Adrian D Ward

GMC Guidance on consent updated

We note here by way of cross-reference the commentary on the GMC's new consent guidance in the Wider Context section of the report. The GMC guidance provides at the outset that: "[w]hile the law relating to decision making varies across the UK, this guidance is consistent with the law in all four countries and supports doctors to act within it. [...]. Doctors are expected to keep up to date with the law and follow our guidance and other regulations that are relevant to their work." There are, however, a number of points within the Guidance which do not sit easily with the law in Scotland, reminding readers yet again of the difficulty of producing guidance which seeks to straddle different legal systems.

Alex Ruck Keene

Is there a general right of privacy in Scots law?

What is the relevance to the Mental Capacity Report of a decision about whether messages exchanged in a WhatsApp group by 10 police officers could be produced in misconduct proceedings, or whether they were protected by the right to privacy under Article 8 of the European Convention on Human Rights? At first sight, the case of *C v Chief Constable of the Police Service of Scotland*, [2020] CSIH 61; 2020 S.L.T. 1021, a decision on appeal by the Second Division of the Inner House of the Court of Session, merely confirmed – in a modern context – the long-standing advice not to write

anything in a letter that one would not wish to hear being read out in court. However, the leading Opinion of the Lord Justice Clerk (Lady Dorrian) is of general interest for its comments on the question of whether there is "a general right of privacy" in Scots law equivalent to that under Article 8 of ECHR. In both the proceedings and decision at first instance, and the submissions in this appeal, it appears to have been assumed that there was no room for relevant dispute about the existence and scope of a common law right of privacy. Lady Dorrian regarded that as "somewhat unfortunate". As she had not been addressed at all on the point, she was unwilling to decide the case without having the benefit of detailed submissions, but on the other hand she did not feel that "the Lord Ordinary's conclusions on the matter can pass without comment". She proceeded to comment, trenchantly and (in this writer's respectful opinion) persuasively in the passage on pages 1036 et seq. of the SLT report.

At first instance the Lord Ordinary had stated that he considered there to be "a nascent recognition of a common law right of privacy in the case law". For reasons which Lady Dorrian developed, and as she carefully put it, it seemed to her "that the reasoning which led the Lord Ordinary to conclude that there is a fully developed right of privacy in Scots law concomitant in range and scope with art. 8 may be questioned". She proceeded to question it, by way of careful consideration of the terms of decisions founded upon by the Lord Ordinary. Lady Dorrian conceded that there is no doubt that the law in this area continues to evolve, and that the scope of protection given to private information has expanded considerably. However, she doubted whether that

development had reached the absolute stage suggested by the Lord Ordinary.

The purpose of this report is to draw attention to this part of Lady Dorrian's Opinion, without narrating the details of her consideration and reasoning.

Adrian D Ward

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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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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](#).

Jill Stavert's Centre for Mental Health and Capacity Law (Edinburgh Napier University)'s Autumn 2020/January 2021 webinar series will include contributions by Adrian Ward on 11 November at a webinar about Advance Care Planning: advance care and treatment planning, end of life, COVID-19, and by Alex on 2 December 2020 at a webinar about Psychiatric Advance Statements. Attendance is free but registration via Eventbrite is required. 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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