



Welcome to the January 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: vaccination; life-sustaining treatment decisions and the limits of the court processes; capacity and unusual sexual practices; and the lockdown regulations and care in the context of incapacity;

(2) In the Property and Affairs Report: removing attorneys and Child Trust Funds in the context of those with impaired decision-making capacity;

(3) In the Practice and Procedure Report: party status and restricting the provision of information; a rare judgment on transparency, and the police and the Court of Protection;

(4) In the Wider Context Report: DNACPR decision-making under scrutiny, safeguarding and the MCA – SARs under scrutiny; and important decisions relating to different aspects of childhood;

(5) In the Scotland Report: the interim review of the Scott Mental Health Law Review under scrutiny and recent developments from Scottish Government.

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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Scott Review Interim Report

On 18th December 2020 the Scottish Mental Health Law Review (“the Scott Review”) published its second Interim Report, extending to precisely 100 pages. Here we do not attempt to summarise everything of significant interest in it. Also, our comments are derived from what actually appears in the Report, not what else might have been done or be planned.

Despite the impact of the pandemic, the Review has adhered to its commendable strategy of surveying the landscape, listening and learning, before moving forward to formulate and test out possible proposals and solutions. As is acknowledged in the opening pages of the Interim Report, the pandemic has not helped that process. Interactions with consultees generally have been more difficult; and that applies in particular to many of those with lived experience, and other direct personal experience, for whom even in normal times maximum contact and sympathetic interaction is necessary in order to elicit the full value of what they are able to contribute. The Review has nevertheless persevered, finding ways to accommodate those sensitivities, and as is evident throughout the Interim Report has been able to learn a great deal

that is of relevance, but more slowly. While the Review Team have hitherto been careful not to commit to a target date for issue of their Final Report, they had in fact been working towards Spring/Summer of 2022. They now propose to issue their Final Report in September 2022, but there are positive reasons for adopting that timescale, which will give the Review Team, in the words of the Report, “a unique opportunity to test out draft recommendations on an international stage before finalising the Review’s Final Report”. In particular, it will be possible to take full advantage of the 7th World Congress on Adult Capacity in Edinburgh from 7th to 9th June 2022, which now forms one of three significant international events in June and July 2022, all of which are likely to provide similar opportunities, the others being the UK and Ireland Mental Diversity Law Network Conference and the International Academy of Law and Mental Health XXXVII Congress in Lyon. In the meantime, a further Interim Report is proposed for “in or around June 2021”.

The Interim Report confirms that the Review received 264 responses to its Call for Evidence (issued prior to its previous Interim Report dated May 2020): 157 from individuals; 74 from

professionals and organisations; and 33 without indication of the capacity in which they were responding. Full information on the responses is available [here](#). The number of Advisory Groups has been increased from two to five. They represent the main workstreams of the Review to date. After discussing the recommendations from the Independent Review of Learning Disability and Autism in the Mental Health Act (“the Rome Review”) and briefly noting other relevant current Reviews, the Interim Report proceeds – as its main content – with chapters devoted to each of those workstreams.

Although the Advisory Group on Children and Young People is described as one of the “new” Advisory Groups, it is impressive that the work of that Group has proceeded so far as to be able to produce the comprehensive and valuable survey in the first of these “workstream” chapters. However, although the dominant issues are better, and more comprehensively and usefully, articulated than hitherto, they are familiar. They include the long-standing failures to resource adequately mental health services for children and young people, resulting in wholly inefficient and unacceptable delays even in commencing necessary treatment. Apart from the human cost, the under-provision is a false economy, because much time and effort is absorbed in coping with the consequences of the delays and, sadly, often over much longer timescales with damage which could have been at least partially averted by treatment within a reasonable timescale. The failure to resource provision for mental health needs to a similar standard to provision in other spheres is an aspect of the endemic and institutionalised disability discrimination, at the level of Government and other authorities, highlighted in relation to the

elderly and adults with disabilities in the [November Report](#). Across all of its work, it would be helpful if the Review Team could be explicit as to whether its work is or is not to be circumscribed by acceptance of under-provision of necessary resources. If that is not to be accepted, then Government will require to commence immediately to allocate adequate resources, for the obvious reason that – particularly in the sphere of recruiting and training skilled personnel – they cannot be “switched on” overnight simply by making money available.

The other constant refrain is the lack of coordination among different services, resulting from unduly hierarchical organisation and lack of “lateral” arrangements to ensure coordination and continuity, not only when a combination of services is required, but when people cross particular artificial but rigid age-related thresholds.

Many matters have not yet been addressed by this workstream, including that 16 and 17 year-olds are adults for the purposes of age of legal capacity and adults with incapacity legislation, adding complications as well as additional possibilities; with the further issue that needs to be addressed because human rights documents generally classify persons as children up to age 18, raising questions of whether adult or child provisions should apply to “young people”. That is also one element in the need to address the serious doubts and difficulties when children with disabilities are placed across borders, particularly the internal borders of the UK, to receive necessary care and provision, then later transferred back, often having established habitual residence in another jurisdiction and

become subject to the regimes in that jurisdiction.

A cause for potential concern about the work of the Review so far, across the range of its remit, is that consultation to date has focused primarily upon the narrow issues of mental illness rather than those of general disabilities as a whole, and has focused upon experience of existing provision rather than consultation on issues that are important but not so visible to those with lived experience, in particular those where there are lacunae or inadequacies in Scots law. It would appear that the Review does now intend to move forward into such areas, and to “take up the slack” on needs to review adult incapacity and adult support and protection legislation – both of which have only brief mention in the Interim Report. Notwithstanding those brief assertions as to what may happen in the future, in the meantime that continues to leave much of the Review’s remit unexplored. Even for people with mental health issues it appears to omit relevant issues beyond those arising directly from the care and treatment of mental illness.

The Communications and Engagement Advisory Group is one of the “original” Groups. That Group has continued to do useful work, but this workstream appears still to suffer from a particularly narrow focus upon mental health/illness, and a consequential medicalised approach, even to the extent of referring to people within the scope of the Review as “patients”.

More generally, this latest Interim Report still does not appear to provide adequate reassurance that the Review will extend its work significantly beyond issues of mental illness to address the full range of disabilities likely to

impair people’s ability to exercise unaided their legal capacity; the experience and needs across the range of provision of all people with a significant interest and potential to contribute; and the whole legal environment relevant to people with such disabilities, not limited to mental health law nor to law which happens to be contained within the three principal Acts. Worryingly, in its introduction, though in relation to consideration of how people’s economic, social and cultural rights can be met, is the statement that the relevant Advisory Group “has focused on mental illness, but it will in the next phase also consider the implications for people with learning disability and autism”. That excludes people with ageing conditions; those with long-term brain injury; those incapacitated temporarily by illness or injury; those with fluctuating conditions; and many others. Indeed, any diagnosis-based or “label”-based approach is the opposite of a human rights-based approach addressing holistically and inclusively the whole range of relevant disabilities and their legal environment. There are indeed throughout the Interim Report multiple references to limited groups of people, all differing, without any explanation as to why – in each case – some are included and others excluded. Going forward, it would appear to be essential that the Review adopts terminology linked to appropriately inclusive definitions of both the people whose circumstances are addressed and the areas of law comprising the relevant legal environment, and keeps to that terminology except where there are explained reasons for departing from it.

In its findings again, the work of the Communications and Engagement Advisory Group provides impressive articulation of issues already well known and well understood,

including lack of involvement of carers, yet again inconsistent coordination among services, inconsistent provision of information, including as to advocacy services, and lack of use of advance statements in the mental health sphere (clearly to be linked by the absence of appropriate provision for advance directives generally in Scots law, even to the extent of not yet implementing the 1995 recommendations of the Scottish Law Commission in that regard).

The Compulsion Advisory Group has done impressive and well structured work learning about people's experience of compulsion within mental health legislation, but that is of course only the tip of the iceberg in the context of compulsion of people with relevant disabilities more generally, and in particular the serious failure of Scots law to fill the gap created by lack of provision generally for situations of deprivation of liberty; now a full six years after Scottish Law Commission offered a regime. Worryingly, even in its section on "What will we do next?", the Group does not signal an intention to explore the remit of the Review beyond matters narrowly within mental health law (and related criminal law).

The work of the Capacity and Support for Decision-making Advisory Group very obviously requires to go beyond mental health law, and to a significant extent does so, albeit with a primary focus so far on the mental health concept of "SIDMA" (significant Impairment of decision-making ability). So far, the Review has concentrated on a "survey of clinician and practitioner views on capacity/SIDMA assessments" as "an existing baseline"; on relevant human rights treaties; on a literature review; and on consideration of "Values-Based

Practice". The reference to a literature review is somewhat tantalising, in that it points to a much broader exploration of the Review's remit than is indicated elsewhere, but the review is not appended to the Interim Report and no link is provided to access it, so the external reader is rather "left guessing" as to the extent of it, the lessons learned from it, and the further consultation that will in consequence be required. Likewise, it is reported that "a working glossary has ... been established", but it is not disclosed, nor – as noted above – does any consistent and appropriately inclusive terminology appear to have been adopted generally across the work of the Review.

Practitioners in the adult incapacity sphere will look forward with particular interest to this Group's work as outlined in its: "What will we do next?" section, including the creation of "test scenarios" and consultation; clarification of the concept of "will and preferences"; establishment of a sub-group on "Support for Decision-making" (though not, apparently, on the wider concept under CRPD of support for the exercise of legal capacity, to include the important element in Scots incapacity law of acting as well as deciding (see the definition in section 1(6) of the 2000 Act); continuing communication and linkages with the other Advisory Groups; and the establishment of a "Wider UK and International Reference Group" (though it is to be hoped that this last item will be complemented by full consideration of the development and underlying principles of existing Scots law, including – for example – the prominent place of requirements for support ever since the introduction of a modern form of guardianship into Scots law 35 years ago).

Finally, the Advisory Group on Economic, Social and Cultural Rights has made an important start on its work, highlighting that: “There was a clear message from the evidence we received that, for many people with mental illness, although the provisions of mental health law were very important, economic, social and cultural rights were even more significant”. Unsurprisingly, needs identified included a focus on prevention and supportive communities, with better primary care; more and better support; and more holistic support for people with severe and enduring illness. This chapter also addresses the “strong mutually reinforcing relationship between poverty and poor mental health”. The chapter asserts that the Review has been tasked with making recommendations which ensure that people’s economic, social and cultural rights are reflected in mental health law. Here again, the limitation to mental health law and implied exclusion of all other aspects of the Review’s remit causes concern, somewhat allayed by the references in the “What will we do next?” section to “people and organisations with expertise in relation to particular protected equality characteristics (including sex, race and sexuality), and dementia, learning disability and autism to identify particular rights of importance to them”. It will be noted yet again, however, that this is still a list of particular groups by diagnosis, rather than an inclusive list of all relevant disabilities.

One must conclude, however, by emphasising that this account does not do justice to the full content of the Interim Report or all the work that has been done to take the Review this far in difficult circumstances. It is essential reading.

Adrian D Ward

Registration of powers of attorney

In recent weeks practitioners have once more raised concerns about delays in registering powers of attorney.

There are three factors. Firstly, registrations of powers of attorney have increased year on year ever since the present regime commenced almost 20 years ago (on 2nd April 2001). Over the second of those decades, applications for registration rose from 1,106 in 2011/12 to 2,975 in the complete year 2018/19, then to 3,284 in the nine months April-December of 2019.

Secondly, OPG have a long record of increasing staff and other resources, and of successive innovative improvements in processes and internal working methods, in response to these increases.

Thirdly, both of those long-term trends have been disrupted by the pandemic. On the one hand, applications for registration dropped markedly in the period March-May 2020, but on the other hand not only was the working of OPG substantially impacted, particularly initially, but the timing was awkward in relation to latest agreed recruitment, and improvement to systems, in response to the increase.

I am grateful to Fiona Brown, Public Guardian, for providing in response to my enquiries the information upon which this article is based, and her permission to include the quotation with which it concludes.

Immediately before the pandemic processing time for power of attorney applications already exceeded the target processing time of 30 working days, so that OPG were processing deeds received in early December 2019. This

was a direct consequence of the continued increase in applications during 2019, as a result of which Scottish Courts and Tribunal Service had already increased OPG's operational budget, to permit a large number of additional permanent staff to be recruited, and other resources to be deployed as and when required.

Additional permanent staff were recruited early in 2020, but taking up post and then being trained was delayed by the pandemic.

By mid-March, with the pandemic having struck, OPG was closed for a short period, then opened to a very limited number of staff, with some additional staff working from home. Resource levels did not return to the pre-pandemic numbers until July/August 2020 (when schools and nurseries were permitted to open). This significant operational impact resulted in further delays to POA processing times. By mid-December, OPG was registering deeds received in March/April 2020, but at least the low volume received March-May has permitted a fairly rapid catch-up. If current restrictions are continued, they may impact manual processing, rather than (with staff working from home) electronic processing.

OPG stress that they have continued throughout to offer their expedited registration service (registration within five working days) where genuine emergency is demonstrated. The application form and criteria for expedition are published on OPG's website, and promoted each week in a news article.

The following further information has been provided to us by the Public Guardian:

"We appreciate that solicitors and their clients will be frustrated by the further

delays. I would like to assure you/them that we are taking various steps to recover the position, namely:

- *12 Administrative Officers are taking up post (phased between November 2020 and January 2021) with recruitment for a further 5 on-going.*
- *Throughout 2020-21 SCTS will scope and introduce a new and innovative case management system for the OPG. This new system will provide efficiencies within the current registration process, allowing additional PoA deeds (and other work) to be processed each day.*
- *The Public Register (of Adults with Incapacity cases) which is maintained by the OPG, will be made available online during 2021, making it easier for parties to search the register themselves to confirm if e.g. an Attorney or Guardian has been appointed, making the process more effective and freeing up OPG resources to tackle PoAs and other critical work.*
- *Weekend overtime commenced mid-December, and will continue for the foreseeable future.*

"I hope the above information will reassure your readers that SCTS/OPG remain committed to improving/maintaining performance and will continue to take whatever steps are required to deliver a fast, efficient and reliable service."

Adrian D Ward

Add 176 days - clarification

In the [October 2020 Report](#) we explained the effects of the “stop-the-clock” emergency provisions under which 176 days required to be added to the duration of time-limited guardianship orders, after the “clock stopped” on 7th April 2020 and started running again on 30th September 2020. We quoted the relevant statutory provisions and regulations in October, and gave a link to the helpful explanation of the consequences provided by Scottish Government (available [here](#)). We are aware of some doubt and confusion about whether the additional 176 days apply to the duration of time-limited guardianship orders which were not due to expire until on or after 30th September 2020 (as well as those which were otherwise due to expire during the period that the clock was stopped). The clear answer is that the additional 176 days does apply to all guardianship orders current on 7th April 2020, regardless of when they were originally due to expire. We have seen at least one official communication to a solicitor asserting that because a particular guardianship order was not due to expire prior to 30th September 2020, the original expiry date would still apply. That was incorrect. The correct position is clearly explained in the guidance from Scottish Government, and has been confirmed to us by the Public Guardian.

The Public Guardian has explained that OPG’s electronic systems do generate warning letters ahead of expiry geared to the original expiry dates, but when these are issued they are accompanied by a leaflet explaining the effect of the “stop-the-clock” provisions and advising guardians to take advice of a solicitor if they require assistance. It is of course possible that

the leaflet may become separated from the automatic letter at some point prior to the letter being presented by a lay guardian to a solicitor!

Adrian D Ward

Scottish Government: recent developments

Initiatives from Scottish Government relevant to practitioners in the adult incapacity field have come thick and fast. Some of them are mentioned selectively in this item. It does not attempt to be comprehensive.

An “AWI Emergency Legislation Commencement Consideration Group” has been established with a remit to consider evidence for continued suspension of temporary amendments to adults with incapacity legislation within the Coronavirus Act 2020; to consider the human rights issues that arise should emergency AWI provisions be reinstated or in connection with “ordinary” AWI provisions as they relate to the crisis; to consider issues around physically distant use of existing legislation, with reference to current and future practice; to consider the continued operation of the 2000 Act during the coronavirus pandemic; and to consider issues arising in relation to changes in practice, not necessary specifically requiring legislative change. The Group has met frequently and has been commendably open to practitioner input. (Disappointingly, the equivalent Group established to consider mental health legislation does not include membership representative of, and with direct access to, equivalent practitioner input.)

The National Task Force for Human Rights Leadership has established a “UN CRPD

Reference Group” to consider incorporation of the Convention on the Rights of Persons with Disabilities into Scots law. This faces the formidable task of converting human rights principles into law which is not merely aspirational and declaratory, but which is effective law that complements rights with enforceable duties, and a clear and accessible mechanism for enforcing them.

Finally in this quick round-up, following various pressures that have arisen – principally in the context of the pandemic – for at least some updating to the 2000 Act without waiting for yet further years for the outcome of the Scott Review to generate eventual legislative change, there are suggestions that Scottish Government be invited to make a commitment to at least some updating of the 2000 Act in the first parliamentary session following the elections in May 2021. A specific proposal is for a “short-term placement certificate” procedure. That is the subject of discussion, as is the question of what other interim improvements to the legislation could be proposed at the same time.

Adrian D Ward

Disability discrimination in a tribunal process

The definition of “discrimination on the basis of disability” in Article 2 of the UN Convention on the Rights of Persons with Disabilities expressly includes “denial of reasonable accommodation”. Article 6 of the European Convention on Human Rights provides that: “In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ...”. Due to conduct during a hearing that Mr Eric Hamilton attributed to “mental health difficulties”, a First-tier Tribunal

(“FtT”) excluded him “from presenting submissions or arguments or questioning witnesses in person at any future hearing”. He appealed to the Upper Tribunal. The Upper Tribunal did not refer to the human rights documents quoted above. It dealt with the matter by reference to more detailed provisions to similar effect in the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (No 328) (“the Regulations”), by which the proceedings were governed.

The case of *Eric Hamilton v The Glasgow Housing Association Limited*, [2020] UT37 UTS/AP/19/0041, FTT Case Reference FTS/HPC/PF/18/3124, was decided by the Upper Tribunal on 8th September 2020. Mr Hamilton raised a claim before the FtT in relation to an alleged breach by the respondents of the Code of Conduct for Property Factors. The FtT hearing took place on 19th March 2019 at the Glasgow Tribunal Centre. Mr Hamilton represented himself. An issue arose about the entitlement of the respondents’ solicitor to act as their representative. It took two hours to resolve. The hearing continued for almost another hour before it was adjourned for lunch. By then Mr Hamilton had verbally interrupted proceedings three times. On the third occasion, the FtT Chair warned him against further interruption. The Chair warned that if there were to be any further interruptions the Tribunal would require to consider excluding him from the hearing. Later that day he interrupted again. The FtT noted that he suffered from poor mental health and that he had “endeavoured to control himself but had been unable to do so”. It nevertheless decided to exclude him from presenting submissions or presenting arguments or questioning witnesses

in person. It stated that the decision would apply to any future hearings. It issued the Interlocutor to that effect. The FtT adjourned the hearing to a date to be fixed to allow him to “find and instruct a representative in light of his exclusion from appearance as a party”. He was unable to obtain representation, and reported that to the FtT. He sought leave to make a late appeal to the Upper Tribunal. Leave was refused by the FtT, but was eventually granted by the Upper Tribunal. At that hearing he was accompanied by his brother, Mr Ian Hamilton, who provided support to him.

The Rules provide (Rule 2(1)) that the overriding objective of the FtT is to deal with proceedings justly *inter alia* by “(c) ensuring, so far as practicable, that the parties are on equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party’s case without advocating the course they should take”; that (Rule 25) the chairing member must take reasonable steps *inter alia* to “(c) ensure that the parties to the hearing – (i) understand; and (ii) can participate in, the proceedings”; and (Rule 34(2)) that in deciding whether to exercise its power of exclusion the FtT must *inter alia* have regard to “(b) in the case of the exclusion of a party or a representative of a party, whether the party will be adequately represented and whether alternative measures could be put in place.”

It would appear that the FtT failed to implement those duties. In the Decision Notice of the Upper Tribunal, Sheriff Iain Fleming wrote: “... the decision to exclude a party is one which should be taken with considerable restraint and discretion. While no criticism can be made of the

FtT’s decision to admonish the appellant about his repeated interruptions, it rather appears that at no time prior to the decision to exclude the appellant was any enquiry made as to whether the appellant would have benefited from regular breaks in proceedings, or whether a supporter for the appellant could be obtained. There does not appear to have been enquiry into whether a short break in proceedings to allow the appellant to marshall his equilibrium such that he could have briefly absented himself before being invited back into the hearing room and enquiry made as to whether the hearing could continue without further interruption. Further, no enquiry appears to have been made as to whether there were any alternative ways in which the appellant could participate. For instance, video or telephone conferencing does not appear to have been considered, nor was the possibility of written submissions in respect of some or all of the issues. In addition, it appears that adjourning the hearing until a later date to allow the appellant to recover his composure was an option that does not appear to have been considered.”

It is disappointing that these fundamental failures to deliver justice to a party before a Tribunal should have occurred in the Glasgow Tribunals Centre, which at least in relation to children with additional support needs has world-leading facilities and procedures to maximise their participation despite difficulties far more serious and demanding than Mr Hamilton’s inability, due to mental health difficulties, and despite his own efforts, to contain his occasional outbursts during long, uninterrupted sessions. One wonders whether such facilities could have been made available to Mr Hamilton.

Adrian D Ward

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consequences.”



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**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](#).

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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 February. 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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