MENTAL CAPACITY REPORT: SCOTLAND

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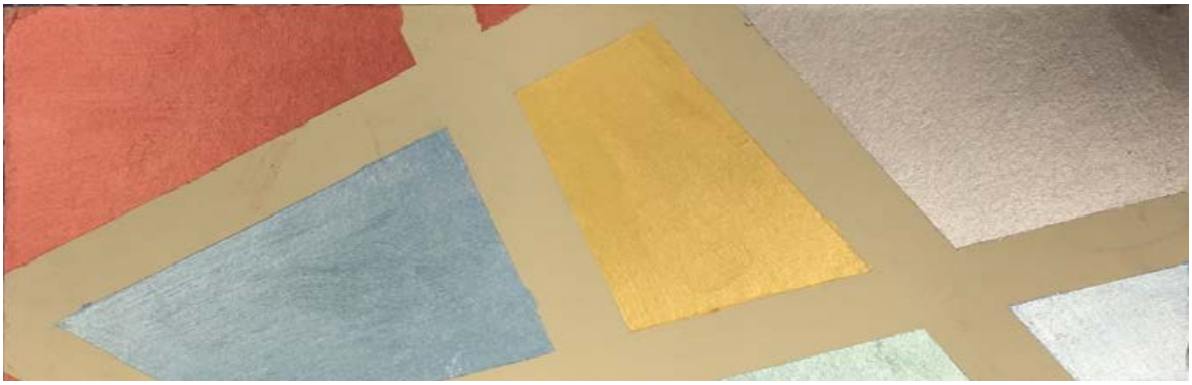

Welcome to the November 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: reasonably adjusting to disability in the context of dialysis and identifying will and preferences across a spectrum of difficult medical cases;

(2) In the Property and Affairs Report: the Law Commission's further consultation on wills;

(3) In the Practice and Procedure Report: two sets of 'Ps' and the costs of welfare appeals;

(4) In the Wider Context Report: the CQC's State of Care report, deprivation of liberty and those under 18, litigation capacity and access to court, and the inherent jurisdiction in Ireland;

(5) In the Scotland Report: bureaucracy vs justice and a tribute to Adrian upon his retirement from one of his posts.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

Bureaucracy v Justice

The description "bureaucracy v justice" does not overstate the significance of a landmark decision by Lord Sandison in the Court of Session (Outer House) on 22nd August 2023 in the case of *DML, Petitioner* [2023] CSOH 55; 2023 S.L.T. 921. "Bureaucracy" has a range of meanings. Sadly, I use it at the opposite end of that range from the most benign, indicating a rising trend in recent years by more than one bureaucracy towards obstructing, rather than supporting, the ends of justice, particularly for our most disadvantaged and vulnerable citizens.

In this case, David took the form of DML, a party litigant before the court, a 50 year-old at the time of the hearing, who had been the victim of sexual assaults at the ages of 11 and 12 and on whose behalf it had been stated that he "had been the victim of a horrendous crime of violence at a very young age which had affected him throughout the rest of his subsequent life, [and] that he had been traumatised and continued to suffer from a range of psychiatric conditions" (narrated at paragraph [7] of Lord Sandison's judgment). Lord Sandison recorded that "Although the petitioner had had some background pro bono assistance from a person with experience of judicial review proceedings in the English courts, he represented himself throughout the course of these proceedings, ultimately accompanied by a lay supporter who provided him with moral support and who, with the court's permission, read out part of his pre-prepared submissions when he became too affected by emotion to do so clearly himself." [24]

Goliath on this occasion was the criminal injuries compensation mechanism, including both the Criminal Injuries Compensation Authority ("the Authority") and the First-tier Tribunal (Social Entitlement Chamber) ("the Tribunal") to which DML, through solicitors at that stage, had taken an appeal against the Authority's refusal of compensation. Goliath was unsuccessful and, one hopes, duly chastened.

General Issue

On the general issue of principle upon which this commentary on the decision focuses, Lord Sandison found it necessary to quote from the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 the terms of Rule 2(1), headed "Overriding objective and parties' obligation to co-operate with the Tribunal": "The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly." [40]

Lord Sandison commented that:

> *"It is difficult to see how the petitioner's case before the Tribunal was dealt with justly. It was a case which was important not only for him, but for the public interest in seeing to it that the victims of serious crime, especially child victims, receive appropriate compensation as a societal mark of condign sympathy for their suffering. Rule 2 required the case to be accorded a treatment proportionate to that importance …" [41].*

He subsequently pointed out that:

> *"… any set of statutory rules which does not proclaim itself to be a comprehensive and entirely self-contained code for the disposal of a particular kind of dispute (and the 2008 Rules do not so seek to classify themselves) is subject to supplement by common law principles of fairness …".*

He referred to the decision of the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [35]:

> *"The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in Cooper v Wandsworth Board of Works (1863) 14 CBNS 180, 194, 'the justice of the common law will supply the omission of the legislature.' In Lloyd v McMahon [1987] AC 625, 702–703, Lord Bridge of Harwich regarded it as well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness. …" [42].*

Lord Sandison referred to, and quoted from, several other relevant judgments, in subsequent paragraphs which (this author would submit) helpfully outline where the law stands on what I have characterised as the "bureaucracy v justice" issue.

An earlier quotation from the judgment sets the tone of the view taken by Lord Sandison of the Authority's conduct: "… It is rather disappointing that a public authority should seek to take a technical pleading point against a party litigant, particularly one of such vulnerability. …" [26].

Perhaps readers of this Report could suggest other "Goliaths" who might profitably read the foregoing account of what I describe as the "general issue" in this case, as well as the "particular issues" to follow.

Particular Issues

Narration of the particular issues relevant to this case takes up several pages of the judgment. A brief summary hardly does them justice, but in essence they were these. The Authority refused to compensate DML for two reasons, both referred to by reference to relevant paragraphs of the Criminal Injuries Compensation Scheme 2012, as laid before Parliament under section 11(1) of the Criminal Injuries Compensation Act 1995 and amended under section 11(3) of that Act. Paragraph 26 refers to an Annex which "*sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions. …*". Paragraphs 88 and 89 set out the "normal" time limits for lodging an application; with authority to the Claims Officer to extend those periods where the Claims Officer is satisfied that, due to exceptional circumstances, the applicant could not have applied earlier, and the evidence presented in support of the application means that it can be determined without further extensive enquiries by a Claims Officer. In the judgment, and in the materials referred to in the judgment, these two grounds of refusal are dealt with by reference to those paragraph numbers. The link between them is that, as the Authority submitted, consideration of possible exceptional circumstances for delay is not relevant if

entitlement to compensation is in any event blocked by paragraph 26.

The Authority relied on paragraph 26 on the basis that DML was ineligible for compensation because he had an unspent conviction that had resulted in a community payback order. It had not. Solicitors then acting for him produced an email from the relevant court advising that a community payback order had initially been imposed on 7th November 2019, but had been revoked in favour of a 30-day restriction of liberty order on 5th March 2020. The significance of the difference is that a restriction of liberty order did not disqualify DML from compensation. Solicitors then acting for DML pointed this out, in writing, by emails to the Authority on 30th March 2021 and 19th May 2021, and yet again on 7th December 2021 forwarding an Opinion of Counsel that a restriction of liberty order was not the equivalent of a community payback order, together with a Minute from the relevant court confirming the change. Notwithstanding this, the Authority wrote on 17th August 2021 continuing to adhere to the paragraph 26 ground. After solicitors then acting had intimated an application to the Tribunal, a Legal Officer for the Authority issued a directions notice on 3rd October 2022 which included: "*Parties are reminded that the only issues before the Tribunal in this appeal are those contained in the CICA's review decision, dated 17 August 2021, which concern the refusal of the application under paragraphs 88, 89 and 26 of the Scheme.*" This was despite the fact that on 22nd December 2021 the Authority had made a written submission to the Tribunal conceding that a restriction of liberty order did not disqualify DML from eligibility. That concession appears to have been obscured, or at least not noticed by the solicitor then acting, perhaps by reason of the continuing references to paragraph 26 thereafter, leading to the consequences summarised below.

Also apparently obscured was that if the blockage under paragraph 26 no longer applied, then the Authority intended to support the refusal by reference to paragraphs 88-89.

There was also an issue before the Tribunal as to whether that hearing should be postponed because of a change of solicitor.

It is relevant to narrate that the Authority's own guidance on "exceptional circumstances" under paragraph 89 of the Scheme included:

> *"Exceptional circumstances are more likely to exist in cases involving sexual abuse, especially where the applicant was a child at the time of the offence. This is because the silence of the victim, and ongoing psychological and emotional trauma, are well known to be direct consequences of such crimes. These effects continue into adulthood. Further, the process of a criminal investigation and trial in such cases will often increase the psychological impact of the crimes. For these reasons, where you are dealing with a case involving sexual abuse in which the applicant did not apply until criminal proceedings concluded, you should accept that exceptional circumstances exist unless you consider there are compelling reasons not to do so. …"*

It appears that that guidance was not addressed before the Tribunal. DML's solicitor concentrated entirely on the paragraph 26 issue, and neither addressed the "exceptional circumstances" issue, nor questioned DML about the circumstances leading to the delay. DML himself attended by telephone, separately from his solicitor. In his submission to the court, as narrated in the judgment [19]:

> *"In these circumstances he found it difficult to follow. He was floundering and nervous. He had been told by his solicitor that the issue at the hearing*

was the nature of his 11 previous convictions, and that in light of the opinion of counsel provided to him, the Authority was not going to oppose his appeal to the Tribunal. He was not aware of any separate issue about the lateness of his application, and did not understand that his solicitor was aware of any such issue either. His solicitor did not address the Tribunal about that issue. Mr Kelly started asking him questions about it. He was taken by surprise by that, as he had been told that he would only have to state his name and date of birth, and then there would be legal argument in which he would not be expected to participate. He was extremely agitated when matters transpired otherwise, and in something of a haze. He remembers briefly saying that he had been suffering from terrible anxiety and other mental health symptoms since the sexual assaults and that the last thing on his mind had been making a compensation claim. He had explained that he had gone to the police only because a friend had effectively forced him to do so. He maintained that, even on the telephone, it would have been obvious that he was finding it difficult to answer the questions being asked, and not much was asked of him about the state of his mental health at the relevant time. In retrospect, he feels that he was not given any real opportunity or time to explain his circumstances, and that no one wanted to understand the gravity of what he had endured or the impact it had had on him. Whenever he has to confront what happened to him, he becomes distressed and confused."

On this situation, Lord Sandison said:

> *"… the petitioner was not able to participate fully in the proceedings. It is true that he was on the end of a telephone and could have said whatever he wanted to say when asked questions about the paragraph 88 and 89 issues. However, that was participation in point of form only. It lacked substance, because he had no idea that he was going to be asked about those issues, was (because of his ongoing mental health issues and understandable reticence to speak about times which had been extremely difficult to live through) singularly ill-prepared to be asked about them, and had not had the benefit of lodging any material about them to which he could have been referred and on which he could have made comment in the course of the presentation of his case. Further, and importantly, it must (or at the very least ought to) have been apparent to the Tribunal during the course of the hearing that the petitioner's case on the paragraph 88 and 89 issues was not merely being badly presented, but that it was not being presented at all. …" [41].*

Lord Sandison dismissed any suggestion that because DML's then solicitor ought to have known what was to be addressed before the Tribunal amounted to fair notice to DML himself by reference to *Majorpier Ltd v Secretary of State for the Environment and Others* [1990] 59 P and CR 453 at 466, "*… when one is considering questions of natural justice, one ought to have regard to the position of the lay client personally and not simply to that of his legal advisers as his representatives.*"

The concluding, and commendably succinct, summary by Lord Sandison [50] is as follows:

> *"1. The proceedings before the Tribunal were of particular sensitivity and of importance not merely for the petitioner but for the public interest.*
>
> *"2. The petitioner was, to the knowledge of all concerned, a victim of childhood sexual abuse and, as such, particularly vulnerable in connection with*

proceedings requiring that abuse and its consequences to be canvassed.

"3. No clear express notice of the matters to be dealt with by the Tribunal was given by it to the petitioner; in context, such prior indication as was given was capable of being misunderstood and was in fact misunderstood by the petitioner's agent.

"4. That misunderstanding resulted in the petitioner being totally unprepared for the questioning he faced by the Authority and the Tribunal at the hearing, to the extent that he was not given a substantively fair opportunity to present his case on the paragraph 88 and 89 issues.

"5. The Tribunal ought to have appreciated from the nature of the appeal and the way that matters were transpiring before it in the course of the hearing that something had gone badly wrong in the presentation of the petitioner's case, and should have stepped in to ascertain the reason for that and used the powers of adjournment available to it to provide a remedy for what had occurred, instead of carrying on regardless."

He reduced the relevant judgment of the Tribunal and required the Tribunal to re-hear DML's appeal before a differently-constituted panel within a reasonable time.

Remaining Concern

One is left with at least the strong whiff of a potentially more serious concern that the Authority may, throughout, have abandoned any realistic attempt to do justice to an applicant as vulnerable as DML obviously was. The Authority's whole approach to the matter was clearly dominated by the supposed "unspent conviction", and the fact that it rendered irrelevant any reasonable enquiry into the "exceptional circumstances" issue. There is nothing to show that, even after dropping the paragraph 26 argument, the Authority got as far as its own guidance (quoted above) under which DML's application plainly accorded with a situation in which its guidance instructed acceptance that exceptional circumstances existed except where there were "*compelling reasons not to do so*". It is regrettable that the Authority seems not to have made enquiry into the conviction, that – one would suggest – ought reasonably to have gone beyond identifying that the sentence did not disqualify DML from compensation, rather than leaving it to solicitors then acting for DML to unearth even that.

All that we know about the offence is that DML was convicted "for threatening and abusive behaviour on 13th June 2019". Given the background, and in particular DML's entirely understandable and (in his circumstances) normal reticence to unearth his horrendous childhood experiences, were those experiences disclosed before he was convicted and sentenced? What were the circumstances that provoked his "threatening and abusive behaviour"? Anyone with any understanding of the consequences of the trauma from childhood, with which DML had been living for the rest of his life, would immediately have wanted to know whether the "threatening and abusive behaviour", went beyond what would otherwise be regarded as acceptable in the circumstances because it was a manifestation of the consequences of that trauma. Did the Authority not think to eliminate, beyond the technicality of the nature of the sentence, the possibility that it risked refusing compensation because of a manifestation of the consequences of the appalling trauma for which compensation was sought?

A potentially most grievous injustice was averted in this case, principally by an example of the essential requirement of any "free and

democratic society" (as Nelson Mandela described it) of a fully independent judiciary, capable if need be of ensuring that justice can be done where one party is vulnerable and unrepresented, yet ensuring a fair balance between both parties for both respective cases to be heard and duly considered.

Adrian D Ward

From Guardian to Ward - A Tribute

When I was Public Guardian, Adrian Ward and I frequently found ourselves speaking at the same events and most regularly with consecutive sessions, he always first, of course. In handing the floor to me Adrian would oft quip that they had heard from 'the ward' now they would hear from 'the guardian'. Well, for once we have it the other way round, here we have from guardian to ward - a tribute.

On 25 October 2023 Adrian Ward, convenor of the Mental Health and Disability Committee (MHDC) of the Law Society of Scotland, chaired his last MHDC meeting. Why is this worthy of note? Well, his first meeting as convenor was 34 years earlier, 9th November 1989. (well 34 years if we overlook 14 days)! In those 34 years he has missed less than a handful. When people say Adrian is hugely committed to the mental health and capacity agenda you need only look at this one statistic.

MHDC first met in April 1989, albeit then classed as a 'Mental Health Working Party' as it was considered the time may be right for a review of mental health law in Scotland – it seems everything is cyclical, as this will sound terribly familiar to colleagues today who have recently emerged from the Scottish Mental Health Law Review (SMHLR). Even more so when I say that the said working party had firmly in its sights an England and Wales consultation document entitled 'Decision Making and Incapacity'. I wonder how far we have come in 34 years?

I have seen a letter from Adrian in which he warns the Working Party facilitator that the arena is "huge" and of the significant amount of work that a review will entail – having been involved with the SMHLR that's all sounding terribly familiar too.

Adrian accepted the invitation to be a member of the MHDC founding working party but commented that he would have to be mindful of the time pressures it would entail and the potential impact on business and family life. One would never know that Adrian had this initial reservation about time commitment given the gusto which Adrian has 'attacked' any and every aspect of the mental health and capacity agenda over his 34 years as convenor.

In 1991 the MHDC hosted a seminar to launch the Scottish Law Commission's Consultation on adult with incapacity (AWI) "Reform" (really one could say "creation") and were part of a steering committee which campaigned so effectively for what ultimately became the 2000 Adults with Incapacity (Scotland) Act. Thus, under the leadership of Adrian and the MHDC, we went, in a decade, from no real relevant statutory law at all, and far behind the world leaders, to delivering a regime that was then itself seen as a world leader.

In 1995 MHDC started the process of mental health law reform, pioneering the organisation of the seminal "Consensus for Change?" conference which created an irresistible drive towards establishing the Millan Review and the 2003 Mental Health (Care and Treatment)(Scotland) Act.

MHDC had similar involvement with the Scottish Law Commission's "Vulnerable Adults Report", again driving that through to actual legislation in

the Adult Protection (Scotland) Act 2007. A key achievement of the MHDC in this was proposing, and ensuring the implementation of, the concept of removing the problem from the adult, rather than always removing the adult from the problem.

In more recent years MHDC has in some ways had the even more challenging role of trying to sustain necessary progress, playing a significant role in the Scottish Law Commission's proposals for deprivation of liberty, and with the membership of the committee providing half the UK-wide team that produced the Three Jurisdictions Report on Compliance with Article 12 of CRPD.

Along the way, there has been much more. An early, but highly significant example, is the success of the MHDC in getting what became section 71 of the 1990 Law Reform (Miscellaneous Provisions) (Scotland) Act – a section which would revolutionise our law on powers of attorney, explicitly permitting them to survive incapacity of the granter. This set Scotland on a trajectory, which it still maintains, as a world leader, with our substantial involvement in developing voluntary provisions for future incapacity, initially powers of attorney and now advance directives/advance choices as well.

This joint work on advance choices, with the Health and Medical Law Committee, has been promoted worldwide, including in the current European Law Institute's project. The by now international reputation of Adrian, as a founding father of adult incapacity, led to the approach for Scotland to host the 7th World Congress on Adult Capacity, a successful event held in Edinburgh in 2022, which brought world leaders in this field together in person, for the first time in 4 years (thanks to an interruption from a global pandemic).

At the outset of Adrian's time as convenor mental health and incapacity was not a recognised legal subject, there were no legal textbooks on it, and no group of lawyers specialising in it. To build from that zero base must certainly have been a challenge. The achievement can be seen in what we have today with it being a recognised specialism, with a significant number of highly accomplished lawyers practicing in this field, many of whom are authors or co-authors of a range of legal textbooks on the subject and are, or have been, members of the MHDC.

As an aside, I recognised a number of names when researching historic papers for this article, including Colin Mackay. Scottish readers will know Colin well: he too was on the original working party and has recently served on the Executive Team of the SMHLR. A definite full circle in mental health and capacity law for Colin. The names of David McClements and May Dunsmore also appeared in early correspondence, both still involved, David as Vice Convenor of the MHDC. The other name on the very first of Adrian's letter is the initial "EB". EB is Adrian's secretary Evelyn. To this day Evelyn is still Adrian's secretary. We think of Adrian as a prolific correspondent, let us too respect the 'right hand' role Evelyn has played over all these years. You may wonder why, in a reflection on Adrian's time as convenor, I mention these other names, well, it's because I've heard Adrian, a-plenty, thanking and acknowledging the support of others. We tend to think of Adrian as a one man 'power house' [as he was recently described to me] but I know he is only too aware that whilst he may be the face of success it is a team effort. Out of respect for him I don't think he would wish such a Tribute to him to not recognise the support of so many others over the years.

What of the man himself, here's a few of adjectives I've heard, "tenacious" " "motivated"

"passionate" "enthusiastic" "committed" "loyal" "dogged" "driven" "determined" – it's like a thesaurus, but it's certainly sums Adrian up. If I may indulge in some personal reflection, I don't deny that over my time as Public Guardian (14 years) I may have been heard to use other words to describe Adrian's "dogged determination", a formidable force to be reckoned with, but at no time did I have anything other than the utmost respect for his drive and ambition. It was a huge privilege to be invited, as Public Guardian, to be an observer on the MHDC and now, as an independent advisor on adult capacity issues, to have been appointed as an official [lay] member of such a key and influential committee, "Adrian's committee" as many refer to it.

At the outset I wondered how far had we come in 34 years; my goodness, I hope this narrative is sufficient to answer that question. It is perhaps best summarised by the close of Adrian's initial letter, accepting a place on the working party, "In this country we really do not have a proper body of law dealing with mental disability at all if we're talking about law reform then British law is so backward in this area that it is almost an advantage that we can start with a fairly clean slate". The fact that for 20 plus years [in Scotland] we have had statutorily enshrined rights for persons with mental health and incapacity and we have a willingness to update these to ensure such people have equal rights in an ever-changing modern society demonstrates just how far, significantly so, we have come. But Adrian was right when he recognised the size of the agenda, promoting mental health and capacity issues remains a massive task. At the time of writing we have yet to hear who has been appointed as Adrian's successor, that person has enormous shoes to fill but as an MHDC committee member and someone who has been hugely invested in capacity issues for 20 years now that person will have my full support.

But what of the future for Adrian, well he has not retired (despite nearing 80! I hope he won't mind me saying) nor slowed down (I told you, a force to be reckoned with); Law Society of Scotland regulations require his term of office as convenor of MHDC to complete but he has applied for ordinary membership, we have yet to hear if he has been successful. He too has undertaken to support the new convenor in whatever way he can and I'm sure will continue to be as prolific as ever both nationally and internationally. He will continue to be a Scottish contributor to this Newsletter, so will very much continue to be at the forefront of mental health and adult capacity law for, we hope, many years to come.

This has made me think of our late Queen Elizabeth II, who, on her 21st birthday, devoted her whole life, be it long or short, to our service, and the Paddington Bear sketch on her platinum jubilee which concluded with Paddington's words "Thank you Ma'am … for everything". Well, it strikes me that Adrian has devoted his life to the service of the vulnerable in our society. So it seems only fitting to close this tribute by stealing Paddington's line: "Thank you, Sir … For everything".

Sandra McDonald

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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 regularly present at seminars and 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 December. 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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