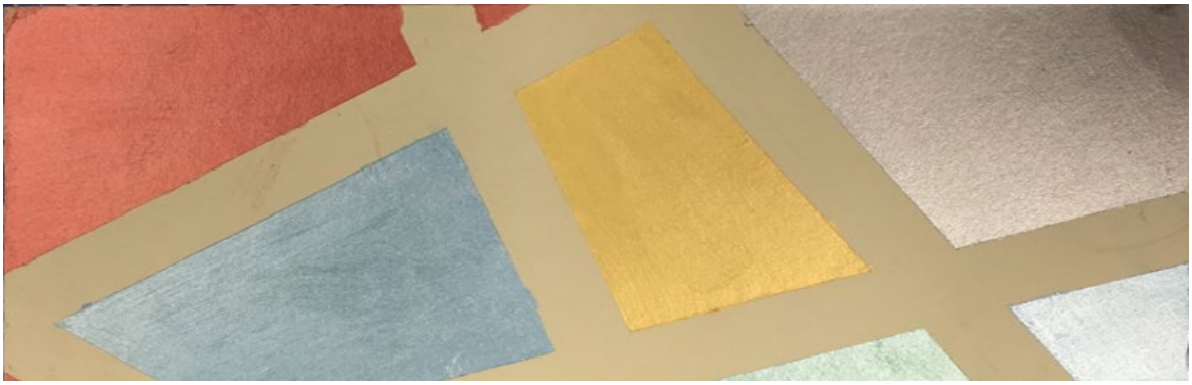

Welcome to the March 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: insight into the proper place of insight, best interests decision-making and good clinical governance, and anorexia and the changing calculus of decision-making;

(2) In the Property and Affairs Report: the Court of Protection's (international) jurisdiction over children;

(3) In the Practice and Procedure Report: fees changes relating to the Court of Protection and the OPG guidance on disclosing visitors' reports, ;

(4) In the Mental Health Matters Report: the Mental Health Bill progresses and the independent investigation into the care and treatment of Valdo Calocane;

(5) In the Children's Capacity Report: why the report is named as it is, the Court of Appeal confirms that local authorities cannot consent to the confinement of children in care, and guidance for judges writing to children;

(6) In the Wider Context Report: the updated Code of Practice on diagnosing death and restraint in Northern Ireland;

(7) In the Scotland Report: no hard news, but the way ahead for AWI reform becomes clearer, and unhelpful uncertainty about powers of attorney.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page here.

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.

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg

Scottish Contributors
Adrian Ward
Jill Stavert

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.

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AWI reform: no hard news, but the road ahead becomes clearer

Month by month, we have continued to track progress towards introduction in the Parliament of the promised Adults with Incapacity (Scotland) (Amendment) Bill. It is understood that Scottish Government adheres to its commitment to introduce the Bill before the summer recess commences on 28th June 2025. It is predicted that it will be introduced some time in June, with an aspiration rather than a prediction that it could perhaps be introduced in May. One imagines that it might be necessary for Stage 1 to be initiated and completed as soon as reasonably possible, to give maximum time for remaining procedure, with the ultimate deadline for completion of Stage 3 before the recess ahead of the 2026 elections, when otherwise the Bill will be lost, as we have already emphasised in our reporting.

We are not yet in a position to report further on the likely content of the Bill, nor upon widespread fears that, even after such long and unjustified delays on the part of Scottish Government, some essential and urgent reforms may be omitted and consigned to sometime–never further work.

We can however report a significant change of gear and change of mood, with the arrival of Amy Stuart upon her appointment as Scottish Government's Head of Unit, Mental Health and Incapacity Law. We commented in the February Report about the formidable task that faces her, on a near-impossible timescale. Hitherto, progress towards implementing reforms, most requirements well formulated many years ago, has languished while Scottish Government failed to keep its undertaking to continue in parallel with the Scott Review the urgent work of AWI reform, and to remedy its long-standing breach of its obligations to provide lawful procedures to end widespread practices of unlawful deprivations of liberty of elderly and disabled persons. Instead of moving matters promptly forward on the urgent reforms, once the Scott Report had been submitted well over two years ago now, we have had an endless process of lengthy consultations during which Scottish Government seems to have been trying to create an impression of progress by repeating the work entrusted to the Scott Review, without producing a single formulation of intended content of immediately necessary law reforms. The key change is that Ms Stuart has moved forward from consultation to collaboration: a real and significant change in approach, not simply word-play. That can be attributed to the background of her career experience and achievements to date.

It is significant that after graduating in forensic chemistry, her first job was with the Office of the Public Guardian, early in the career of Sandra McDonald as Public Guardian. That experience pointed her firmly in the direction of public service, a focus that she has retained throughout

her continuous employment with Scottish Government since 2007, with responses ranging across the economy, investment in innovation, work with Scottish Enterprise, topics of developing skills and employability including for very vulnerable people, implementing major system change, work with parliamentary committees, and most recently before this latest appointment, responsibility for addressing cladding issues and successfully driving through an expedited Bill on that topic.

She readily acknowledges her lack of experience in AWI law, practice and procedures, and is addressing that with the significant shift from consultation to collaboration. She is in a process of actively initiating collaboration of those best placed to assist her to deliver. After so long, that change of mood is to be welcomed. How much can be done in the almost absurdly short time available may be questioned, but one has confidence that it is likely to be the most that can be done. Collaboration has to be two-way, but the signs so far are positive that those with the expertise and experience to provide the substance so far missing from endless processes are welcoming the opportunity to do so at last. There has of course been discussion of the need for a major campaign for delivery of law reform, along the lines of the Alliance of some 90 relevant organisations and stakeholders that campaigned in the 1990s for delivery, by the then brand-new Scottish Parliament, of the Adults with Incapacity (Scotland) Act 2000, a campaign which achieved cross-party support for this being the first legislation in a major policy area of the Parliament. However, this is not the time to try to ride two horses at once. One trusts that collaboration will be given every opportunity to succeed, with campaigning as a fallback if necessary.

The Alliance campaign was a response to the failure of the UK Parliament to enact outstanding necessary law reform for Scotland. Hence the key provision in section 28(1) of the Scotland Act 1998: "*Subject to section 29 [defining the legislative competence of the Parliament], the Parliament may make laws, to be known as Acts of the Scottish Parliament*". It took five years from the Scottish Law Commission 1995 Report containing a draft of what is now substantially our 2000 Act, to "enactment". It has now taken more than twice that time from the 2014 Scottish Law Commission Report offering legislation on deprivation of liberty. It would be quite absurd if failure by the Scottish Parliament to perform the primary role for which it was created should necessitate a similar campaign to that of almost 30 years ago. One trusts that all parties in the Scottish Parliament will actively support necessary legislation prior to the elections in 2026 and, in the unfortunate event that there should be any overspill, will make the same commitment to act to meet the needs of our most vulnerable citizens prior to the first elections in 1999.

As we move towards drafting of the Bill, one must add a further concern that it be competently drafted. It should be possible to take that for granted, but one cannot. A relevant example of causes for concern can be found in the Debt Recovery (Mental Health Moratorium) (Scotland) Regulations 2025, as laid before the Parliament. There is, for example, a peculiar definition of "legal representative" in Regulation 2. The current drafting is unclear to the point of being meaningless, and appears to be the work of either a non-lawyer, or a lawyer without basic knowledge and understanding of the 2000 Act. Giving that role to "any guardian" would be contrary to the 2000 Act, in that no guardian would be entitled to act as such except within the powers that have been conferred upon the guardian. Section 64(3) provides that a guardian

can act as a person's legal representative "in relation to any matter within the scope of the power conferred by the guardianship order". The wording becomes plainly incompetent rather than inaccurate when it provides that: "'legal representative' means any … power of attorney". A power of attorney is a document, not a person, and cannot do anything in the role of attorney. Appointees under an intervention order are not mentioned at all. The lack of any effective inclusion of attorneys, and of any mention at all of appointees under intervention orders, points to likely challenge on grounds of discrimination, the comparator being an adult who has a guardian with relevant powers. Suitable wording for the definition would be: "Any appointee holding relevant powers under a guardianship order, intervention order or power of attorney". Also, incorporation of "foreign equivalents" in the definition is incomplete and should follow the method used in section 1(7) of the 2000 Act, and elsewhere in the 2000 Act.

Poor drafting also creates uncertainty, and the risk of avoidable dispute, by the wording of Regulation 5(2)(f)(i). Does the word "they" mean the individual, or the legal representative, or both? The legal representative, if properly defined, would not be able to act unless the individual was incapable of acting in the matter. It seems that there need to be two separate provisions here. Firstly, the individual applies on the basis that the individual can competently do so. In that case, is it considered adequate for an individual to self-assess the individual's competence to make the application, including the individual's understanding? It would be contrary to human rights requirements to presume incapacity because of diagnosis of a mental disorder, but it is doubtful whether it would be appropriate to assume capacity in the particular circumstances in which an application for a moratorium should be made. If the legal representative makes the application, then there would need to be at least an assertion, and possibly evidence, that the individual cannot competently do that. Would it really be necessary for the legal representative to demonstrate the representative's understanding, or would that be an unreasonable and potentially unlawful hurdle?

There also appears to be a drafting error in Regulation 15(1) in that the mental health criteria are defined as alternatives, so it would appear that the wording should be that none of the mental health criteria continues to be met.

Adrian D Ward

Still not Coming Home

Many readers will be familiar with the inability of the UK Government to meet its commitments, dating as far back as the Winterbourne View scandal of 2011, to reducing the number of autistic people and people with learning disabilities inappropriately in hospital settings. A similar story has played out in Scotland, and has been highlighted by two important new reports from the Scottish Human Rights Commission and the Mental Welfare Commission.

In 2016 the Mental Welfare Commission published '*No Through Road*', a report of a visit to all 18 hospital units in Scotland for people with a learning disability. It found that a third of in-patients were experiencing long waits for discharge. In 2018, the Scottish Government published '*Coming Home*', an independent report by Dr Anne Macdonald into out of area placements and delayed discharges. This found that 705 people with learning disabilities had been placed out of their home area, 453 of which were not by choice. 67 people were classed as delayed discharge, of whom 22% had been in hospital for more than ten years. In 2019 the MWC published a further visit report, covering

people with autism and complex care needs. Almost half of the people whose care the Commission reviewed were classed as having a delayed discharge.

The Scottish Government established a working group who made interim recommendations in 2020 and published the *'Coming Home implementation plan'* in 2022. This included a Mission Statement that 'By March 2024 we expect to have seen out-of-area residential placements and inappropriate hospital stays greatly reduced.'

Sadly that ambition appears to have been unrealised. In January 2025, the MWC published a further report, *'Hospital is not home'.* This reviewed the cases of 55 people who had been living in hospital for over 10 years. They found that

- Information about whether people were considered to be ready for discharge was hard to find
- Some people had been deemed clinically well enough to leave hospital 10 years previously
- Some patients were not even identified as requiring discharge planning.

In short, 'the right to live independently and to be included in the community is not being realised for a small but significant group of people.'

Also in January, the SHRC published *'Tick Tock: A Human Rights Assessment of Progress from Institutionalisation to Independent Living in Scotland'*. This found 'evidence of direct violations of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities, and also serious concerns about potential violations of the European Convention on Human Rights obligations enshrined in the Human Rights Act 1998, such as Article 5, the right to liberty, and Article 8, the right to respect for private and family life.' The SHRC found that £12.5 million of a £20 million Change Fund remained unspent, going into the final year of the fund. Perhaps even worse, some of the money had been spent on making improvements to the institutions from which people should have been moving.

More positively, the SHRC also published a *Toolkit on Measuring Change on Ending Institutionalisation in Scotland*. This draws on indicators developed by the European Union Fundamental Rights Agency, and was developed in collaboration with families and supporters of people experiencing institutionalisation. It sets out in a clear and straightforward way what human rights are in play, and provides a set of Structure, Process and Outcome Indicators which can be used to assess a State's commitment to ending institutionalisation. Although designed for the Scottish context, its approach is one that is widely applicable.

After so many false dawns, we can only hope that these latest initiatives finally lead to tangible and sustainable progress in ending institutionalisation for autistic people and people with learning disabilities.

Colin McKay

Prescription for uncertainty

Disruption of the powers of attorney regime, and its place in the overall scheme of our adults with incapacity law and practice, is threatened by the last-minute collapse of an appeal to the Inner House from the decision of Lord Braid in *MBM Trustee Company Limited v William Moultrie*, [2024] CSOH 14. Do practitioners now require to ensure that all prospective continuing attorneys are warned of the potential consequences of that case, and do granters require to be advised to take account of it? The pursuer's position was

that more than five years after the death of a granter, a continuing attorney could be required to produce a full and proper, duly vouched, accounting of his intromissions as attorney.

The case at first instance was decided, so far as it was then decided, on the question of whether any obligations of continuing attorneys to account for their actions after they have ceased acting as such, in this case by reason of the death of the granter, are or are not extinguished by quinquennial prescription under section 6 (and other related provisions) of the Prescription and Limitation (Scotland) Act 1973 ("1973 Act"). For the operation of the continuing powers of attorney regime, that question require a clear yes/no answer. Lord Braid decided to "deal briefly" with what he treated as "*the subsidiary point as to the form an accounting must take*". Though for the purposes of this case that was a subsidiary point, it is of major significance for every continuing attorney. Do they all need to keep full and detailed records – taking us back to the pre-2000 days encapsulated in the famous comment "We can't buy her an ice cream cone without obtaining a receipt"? The answers tendered by the pursuer to those two questions mean that 19 years after the death of the granter a continuing attorney could be asked to produce a full and detailed accounting of intromissions over what might well have been a lengthy period ending so long ago. What needs to be produced, by way of an accounting, equally requires clear and precise specification – not just a "full" or "proper" accounting, because those adjectives can only be applied to a clearly defined standard. Otherwise they create meaningless circularities. Unfortunately, the answer at first instance to both questions was, in effect, "Maybe, depending on examination of relevant facts". On the crucial question of whether suitable and conscientious potential continuing attorneys might be deterred from accepting office by the risk – of which they would have to be advised – of finding themselves in that position, that was the worst possible outcome. It gives rise to an immediate public policy question of whether the appropriate operation of the powers of attorney scheme, and – for example – resultant increase in guardianships, requires to be properly addressed. It would seem necessary that Scottish Government be asked to do so in forthcoming amending legislation: probably an unwelcome request, given the major workload for government in addressing in the legislation already pressing and urgent matters, but the potential consequences of not addressing it would seem likely to be more unwelcome.

Two points should be noted. Firstly, although the pursuer's action was served three months and three days after quinquennial prescription, if applicable, would have operated, the pursuer did not seek to rely on section 6(4) of the 1973 Act under which quinquennial prescription is extended by any period during which "the creditor was induced to refrain from making a relevant claim" by fraud, or by error induced by words or conduct. That raises the policy question of whether a properly advised claimant would be likely to need more than five years to make a "relevant claim"; counterbalanced by whether a former attorney should escape liability to answer challenges of alleged wrongful conduct by reason of operation of quinquennial prescription.

Secondly, the defender had not refused to produce any form of accounting at all. The defender had submitted what was described as an "expert report … which had been properly and professionally instructed and vouched the defender's transactions whilst an attorney", but not a year-by-year account as the pursuer suggested was necessary.

The debate before Lord Braid, and in consequence his decision, focused principally upon the question of whether an attorney is a "trustee" for the purpose of the list of

imprescriptible obligations in Schedule 1 to the 1973 Act, the relevant sub-paragraph of which reads as follows:

"(e) any obligation of a trustee-

(i) to produce accounts of the trustee's intromissions with any property of the trust;

(ii) to make reparation or restitution in respect of any fraudulent breach of trust to which the trustee was a party or was privy;

(iii) to make forthcoming to any person entitled thereto any trust property, or the proceeds of any such property, in the possession of the trustee, or to make good the value of any such property previously received by the trustee and appropriated to his own use;"

That links back to section 15 of the 1973 Act, which, so far as material, provides as follows:

"'trustee' includes any person holding property in a fiduciary capacity for another and, without prejudice to that generality, includes a trustee within the meaning of the Trusts (Scotland) Act 1921; and 'trust' shall be construed accordingly."

Thus the question became whether the attorney in this case was a trustee (for the purposes of the 1973 Act) "holding property in a fiduciary capacity for another". It is clear from the Adults with Incapacity (Scotland) Act 2000 ("2000 Act") that a continuing attorney acts "in a fiduciary capacity" for the granter; but does an attorney "hold" property for the granter? On the basis of the submissions before him, Lord Braid concluded that the attorney in this case may or may not have been holding any property of the granter, and that this was "*ultimately a question of fact in any given case*". He also held that the required form of account depended upon whether the attorney was "a trustee holding property for the granter". Ominously, he stated that "*Had I held that the defender did hold funds or property, I would then have found that the expert report was not a proper accounting*". It appears that he was not addressed on potential arguments that such an outcome would be inconsistent with relevant provisions of both the 2000 Act, the relevant code of practice, and indeed the original intentions of the legislation in this regard. However, a settlement agreed between the parties, upon undisclosed terms, apparently agreed on the eve of the hearing before the First Division, leaves us deprived, even in whatever might have been the particular circumstances of this case, of a clear, and no doubt clearly explained, yes/no answer. Standing the outcome and comments narrated above, such an answer is now urgently needed.

For the purposes of this Report, readers must be asked to read the Opinion of Lord Braid, incorporating his account of the submissions of the parties and of other relevant factors that were considered, in reaching those "maybe" answers. What does require comment for the purposes of this Report is the dearth of reference to the 2000 Act and Scotland's wider regime of measures relating to the exercise of legal capacity (in the terminology of the UN Convention on the Rights of Persons with Disabilities ("CRPD") – "measures"), apart from reference to provisions of section 81 of the 2000 Act, and quite baffling reference to the management of funds provisions of Part 3 of that Act; baffling as to what could be their relevance, and even more baffling because of the lack of reference to comparison between the provisions of Part 2 on powers of attorney and the provisions of Part 6 on intervention and guardianship orders. That contrast is probably explained by a practitioner somewhere to a client

contemplating granting a power of attorney on most, if not all, working days.

At least four routes other than appointing a continuing attorney are available to anyone seeking to be assured of the greater protections of guardianship, or alternatively of trusteeship. The first is simply not to grant a power of attorney, so that a guardian will if necessary be appointed. It is an alternative often discussed, but – in my experience – only rarely adopted. We do not know how many adults deliberately refrain from having that discussion with a solicitor because they do not have someone whom they might have confidently appointed to be attorney, or if they had consciously opted for the guardianship (or management of funds) regime if that should ever become necessary. I personally while practising have acted upon instructions to implement the second and third possibilities, namely an application for guardianship under section 57(1) by any person "including the adult himself"; and creating a trust for administration under which funds or assets are explicitly transferred to be "held" by trustees – normally to "put the brakes on" at times when an adult fears that funds may upon impulse be dissipated in ways which the adult might subsequently regret. That last-mentioned option was probably used more frequently prior to the 2000 Act, but would appear to remain competent. The fourth alternative is a variant of the first, namely, to nominate in advance the person whom the adult would wish to be appointed guardian should a guardian become necessary. That is explicitly recognised in Recommendation 14 of Council of Europe Ministerial Recommendation (2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity, expected in due course to lead to statutory regimes (including in Scotland) for advance directives or "advance choices", but amounting to clear statements of wishes, possibly couched as instructions, which would require judicial development, absent legislation, as to the extent to which they might be binding rather than persuasive – though unless there were clear reasons for questioning the choice, it would be difficult to see how failing to follow such a nomination would comply with the section 1 principles of the 2000 Act.

What is clear is that options indubitably providing the protections of guardianship or of trusteeship are available as alternatives to granting a power of attorney. That leads to the key question of what are the obligations of a continuing attorney under the 2000 Act, which requires consideration *inter alia* of obligations placed upon financial guardians but not upon continuing attorneys, with the clear implication that the Parliament did not intend that equivalent obligations should be placed upon attorneys. Firstly, it should be noted that an attorney (under section 21 of the 2000 Act), an appointee under an intervention order (section 54) and a guardian (section 65) are all required to keep records of the exercise of their powers. The significant differences for continuing attorneys relate to any requirements to maintain, and to produce, accounts. The following is not necessarily an exclusive list, by reference to provisions of the 2000 Act, of relevant provisions.

Section 3(3): A sheriff may give directions, which presumably would include directions from that point onwards to keep accounts in such form as might be specified.

Section 3(2)(b): A sheriff may order that reports be lodged, but there is no mention of accounts.

Section 20(2)(a): A sheriff may place a continuing attorney under the supervision of the Public Guardian, emphasising that a continuing attorney is not otherwise subject to such supervision.

Section 20(2)(b): A sheriff may ordain a continuing attorney to submit for audit by the Public Guardian "accounts in respect of any period specified in the order". This is the one provision that indicates an obligation to have kept the records necessary to produce such accounts, but that needs to be read in relation to relevant provisions of the Code of Practice for continuing and welfare attorneys, subtitled "Guidance for people who grant powers of attorney, or people who are appointed as attorneys under the Adults with Incapacity (Scotland) Act 2000", and in particular Chapter 4 of that Code, providing "specific guidance on exercising continuing powers of attorney". It is relevant that Chapter 4 at various points uses "It would be good practice to …" rather than "You must …". However, the formulation "You should …" is used in paragraph 4.35: "*You should keep all receipts for purchases of £100 or more, on behalf of the person and any guarantees or insurance policies in respect of purchases so that you can exercise the person's rights as purchaser to have property repaired or replaced*". In a typical case, many transactions will be below the £100 threshold. For example, a typical week's grocery shopping for a single adult is unlikely to exceed that threshold. That would not appear to support assertions of an obligation upon attorneys to produce detailed and fully vouched accounts. Under the heading "Possible court proceedings in the event of a complaint", paragraph 4.64 reads:

"If you are ordered to be under the supervision of the Public Guardian you should regard it as a help rather than a threat. As a first step you should have a meeting with the Public Guardian, show her your file, ask for what she wants you to record in your file from now on, and agree a deadline for the submission of the account of your activities to date. …"

This re-emphasises what is apparent on a plain reading of section 20. Any obligation upon a continuing attorney to produce accounts under the 2000 Act is an obligation to produce them to the Public Guardian, of part of a process in which the starting-point of the Public Guardian is to provide assistance to achieve the better operation of the role of attorney. It is not an obligation to submit accounts to the satisfaction of any other party, who might well be a party in conflict with the attorney.

Section 17 provides that an attorney is not obliged "*to do anything which would otherwise be within the powers of the attorney if doing it would, in relation to its value or utility, be unduly burdensome or expensive*". In appropriate cases, that could apply to questions whether a guardian should keep records and maintain accounts to the level of detail that might satisfy demands such as those of the pursuer in this case.

While the whole Part 6 regime relating to guardianship and intervention orders is a relevant comparator to show the enhanced levels of accounting and supervision applicable under Part 6, compared to the requirements upon powers of attorney, some particular provisions are worth noting in that context.

Section 62(6) provides for management by, and the respective liabilities and responsibilities of, two or more joint guardians. There are no equivalent provisions in relation to attorneys. Such provisions may be stipulated in the power of attorney document, but otherwise it must be assumed that the Parliament did not consider that an equivalent level of regulation was necessary. There are likewise potential issues where substitutes take over.

Section 64(12) puts financial guardians under the regime in Schedule 2. This includes the obligation under paragraph 7(2) of that Schedule to submit accounts for audit, and also – significantly – the discretion of the Public Guardian under paragraph 7(4)(b) to dispense

with submission of accounts. The lack of equivalent provision for attorneys could be taken as indicating that attorneys may exercise their own discretion in that matter, subject to compliance with section 82 (see below), unless they have already been specifically ordered under section 20 to prepare and submit accounts. On the question whether a continuing attorney is a trustee for the purposes of the 1973 Act, section 67(2)(a) is significant. The guardian is authorised to take possession of, manage and deal with any moveable or immoveable estate (wherever situated) of the adult. This directly engages the fundamental difference between ownership and possession, most recently emphasised in the article "Understanding ownership and possession in Scottish law: distinguishing chalk from cheese", T Odusanya, 2025, SLT (News) 29 (published clearly after Lord Braid's decision, but prior to the date on which the appeal would have been heard). If the Parliament had intended that assets subject to a power of attorney should vest in a guardian, it would have said so. Instead, it authorised the guardian to take possession. It is reasonable to assume that the same would have applied to attorneys, particularly if that were to apply to attorneys but not to guardians. Deeds of Trust as third party measures, and Trusts for Administration, typically "pay, convey and make over" specified assets to the trustees appointed, and would contain an obligation to grant a disposition of any heritable property to the trustees, to be held – of course – by them *qua* trustees. As regards trusts as third party measures, see long-standing styles still substantially in use such as those offered by Ashton and Ward in "Mental Handicap and the Law", Sweet & Maxwell, 1992. I am not aware that any continuing power of attorney has had similar effect of transferring ownership in trust to an attorney. It must be expected that if such a radical intention had applied to the continuing powers of attorney regime established under the 2000 Act, the Act would have said so. Further complications can arise from actings of the granter at any time following appointment of an attorney. Attorneys can be, and often are, asked by the granter to act regardless of technical capacity or incapacity of the granter, as an assistance for the granter, typically when the granter wishes someone else to take over the burden of aspects of management of some or all of the granter's affairs. Notably, continuing attorneys are obliged under section 1(5) to encourage the granter to exercise and develop relevant skills; and the granting or operation of continuing powers is not subject to the explicit provision in section 67(1) incapacitating an adult from acting within the scope of the authority of a guardian, except where the adult has been authorised to act by the guardian under section 64(1)(e). Such incapacitation would have to be explicit, and reasonable, in order not to violate relevant provisions of the European Convention on Human Rights and CRPD. No equivalent explicit provision applies to attorneys, although there is vagueness in the Act in that welfare attorneys are prohibited from acting except in matters where the granter is incapable or reasonably believed by the guardian to be incapable. That, however, takes us beyond the scope of this Report, for which the relevant point relates to the potential complications for accounting purposes of situations where the granter may be acting in parallel with the attorney.

Section 72(1) enables a financial guardian who has ceased acting to obtain a discharge from the Public Guardian. The Parliament did not provide such a procedure for continuing attorneys, presumably because it was not considered necessary. This points towards the accounting and liability obligations of continuing attorneys being strictly limited to explicit provisions of the 2000 Act.

Section 81 obliges all financial managers to repay funds used in breach of their financial duty or outwith their authority. That is neutral in the sense that it does apply to continuing attorneys as much as any other managers, but significant in that the 2000 Act does not place any obligation upon them to provide accounts. Accounting obligations (if any) are set out Part by Part in the Act, and vary from Part to Part.

Also significant by reason of their uniformity of application are the limitation of liability provisions of section 82. A continuing attorney, among all other persons acting under Parts 2, 3, 4 and 6 (but not Part 5) of the 2000 Act incurs no liability "for any breach of any duty of care or fiduciary duty owed to the adult" if the attorney (in the case of attorneys) has "*(a) acted reasonably and in good faith and in accordance with the general principles set out in section 1; or (b) failed to act and the failure was reasonable and in good faith and in accordance with the said principles*". It does not appear that such a limitation could be treated as disapplied in the event of complaint by the executors of a deceased granter of a power of attorney against the attorney who acted.

It is relevant to go back to Report No 151 presented to Parliament in September 1995 by the Scottish Law Commission entitled "Report on Incapable Adults", to which was annexed a draft Bill which to a large extent was adopted to form the 2000 Act, and which in particular was so adopted for most (if not all) of the provisions of the 2000 Act referred to above. On the "fiduciary duties in relation to adults", paragraphs 2.74 – 2.79 of that Report are relevant. For example, paragraph 2.77 considers situations where an appointee and an adult live together in the adult's house. Often, such appointees will have given up substantial aspects of their own lives to become resident carers. The Commission expressed the view that it would be unreasonable to expect fully detailed, vouched, accounts from an appointee doing so much for a close adult voluntarily, as well as providing at no charge what would otherwise be a costly management service. Of course, that all assumes that there is no question of the appointee acting unreasonably or dishonestly for personal advantage or gain, but that situation is addressed by sections 81 and 82 of the 2000 Act.

What we have lost by the appeal due to be heard on 17th February 2025 not proceeding is examination and determination by the Inner House of the extent to which continuing powers of attorney are a distinct species *sui generis*, created by the 2000 Act, and the extent if any to which they are a sub-species of general powers of attorney. Put briefly, one would suggest that application of any general provisions should be subject to any explicit relevant provisions of the 2000 Act, such as those referred to above, but it would be surprising if executors were not to have the same rights as the granter would have had upon regaining relevant capacity. Those also now need to be defined.

Generally, settlement of the appeal against Lord Braid's decision has deprived us of the opportunity for debate before, and consideration and determination by, the Inner House of the alternative approach focused on proper interpretation of the 2000 Act. One might suggest that such an alternative route might be preferable as providing greater certainty in the context of the realities of operating continuing powers of attorney. It has to be questioned whether the route that emerged from the hearing at first instance might have made sense in theory only, but has left too much uncertainty in matters in which all concerned are entitled to greater certainty, not predicated upon lengthy proceedings and hearings of evidence to produce different answers in different cases. It is for others to consider whether the outcome of

following that route might lead to absurdity as defined by Lord President Carloway towards the end (at [30] - [32]) of his Opinion in *Faculty of Advocates and Judicial Appointments Board for Scotland, Special Case*, 2025 SLT 171.

Quid juris if the granter strictly limits in the power of attorney document the obligations and liabilities of the attorney after ceasing to act, as to duration, extent of any accounting obligations, and so on?

Adrian D Ward

Psychiatric care and treatment of children and young people: lessons from Syke House

On 10th February 2025, BBC Scotland broadcast a documentary in its Disclosure series *Kids on the Psychiatric Ward*, currently available on BBCiPlayer, featuring the experiences of six young women who had been admitted to Skye House, a specialist NHS psychiatric unit for adolescents in Glasgow, between 2017 and 2024 [1]. These were six of 28 young people interviewed by the documentary makers. It raises and reinforces serious issues that need to be timeously and fully addressed[2].

The BBC documentary does not make for easy watching. It is impossible to remain unaffected by the accounts of the young women, who were impressive in their testimony. Their description of episodes involving nurses' conduct and behaviour around the arguably disproportionate use of restraint, forced medication and use of medication, physical handling, use of language towards and mocking of patients, patients being made to clean up vomit and blood after restraint and forced intervention sessions, and sometimes questionable accuracy of clinical notes following episodes of forced interventions is deeply troubling. Equally troubling were the accounts of a lack of supervision of young people on the unit, leading to what may well have been avoidable self-harm incidents and acute episodes, and fear of making complaints or even telling their parents in case this resulted in recriminations from staff.

Whilst Dr Scott Davidson, medical director of NHS Greater Glasgow and Clyde, was interviewed for the documentary and the health board has issued a statement that an investigation will take place, the documentary makers were unable to obtain the views of staff on the unit itself or the Scottish Government. The Mental Welfare Commission's 2023 visit report for Skye House[3] commented with concern about the over-reliance on agency staff, particularly in nursing, at the unit and how they had been told that the unfamiliarity and instability, and sometimes approaches, of agency staff might adversely impact on the quality of care, although the incidents mentioned by the young women in the documentary or similar ones were not mentioned. This may arguably be owing to the reluctance of the young people to make complaints but obviously warrants consideration.

One assumes, indeed hopes, that these incidents and behaviour are isolated and confined to a minority of staff. Several of the young women interviewed acknowledged that not all staff behaved in this way. Some also accepted that at the time they did need professional support, and that their own behaviour was occasionally

[1] Mark Daly and Jax Sinclair, 'Teenagers mocked by nurses at psychiatric unit', BBC News Alba, 10 February 2025 https://www.bbc.co.uk/news/articles/cx2kg2djkk2o

[2] Full disclosure: I was involved in the documentary, to the extent of providing some legal and human rights information to and being interviewed for it. The views expressed in this article, however, are entirely my own.

[3] Mental Welfare Commission for Scotland (2023), *Report on announced visit to Skye House, date of visit 28 March 2023*

challenging. However, they also pointed out that they were unwell and suggested that such traumatising experiences might have been avoided or reduced had earlier and more understanding approaches been adopted. The considerable pressure that mental health nurses are under should not be underestimated either, for example in terms of challenging behaviours they are required to navigate and resourcing constraints. However, irrespective of the number of patients involved, it is never alright to subject a person of any age to cruel, inhuman or degrading treatment or punishment. This is not only a moral imperative. It is also an absolute human right[4].

We have human rights-based mental health legislation: how did this therefore happen?

One has to ask how this sort of thing happens. Further, it appears that this may not be entirely confined to one psychiatric unit, or to adolescent care and treatment alone. How was the line crossed in terms of respect for human rights, notably respect for dignity and autonomy, and proportionality?

The Mental Health (Care and Treatment) (Scotland) Act 2003 (MHA) (which applies to people of all ages) after all sets out human rights informed principles and criteria [5] governing decisions about, and implementation of, compulsion under the Act. These are there to safeguard an individual's liberty, autonomy and dignity when faced with the prospect of detention and/or non-consensual psychiatric treatment[6]. They, together with related guidance and codes of practice, provide safeguards against inappropriate and disproportionate use of coercion and medication, including the use of force, in administering care and treatment[7].

The MHA principles and criteria are predominantly informed by the European Convention on Human Rights (ECHR). Practitioners must also take the Convention on the Rights of Persons with Disabilities (CRPD) and Convention on the Rights of the Child (CRC) into account. CRC rights are now legally enforceable (since July 2024) in Scotland[8] and the Scottish Government has also said that legislation will be introduced making CRPD rights legally enforceable. However, whilst the CRC and CRPD were not legally enforceable in 2017-2024 (the period covered by the documentary) they should have nevertheless been considered alongside ECHR rights, and ECHR rights interpreted according to these, insofar as the national law permits.

Children and young persons' rights

The MHA essentially requires that any detention and compulsory intervention must be necessary and proportionate, provide a benefit that is not otherwise available and be the least restrictive option under the circumstances. There must also be a significant risk to the child or young person's health, welfare or safety or the safety of another person. In other words, it must be a very last resort, and other options should be thoroughly explored first unless there is genuine

[4] For example, Article 3 European Convention on Human Rights, Article 15 Convention on the Rights of Persons with Disabilities, Article 27 Convention on the Rights of the Child.
[5] See, for example, sections 1 and 2, and sections 36, 44 and 64 Mental Health (Care and Treatment) (Scotland) Act 2003.
[6] For example, Articles 3, 5, 8 and 14 ECHR; Articles 3, 12, 19, 23 and 25 CRC; Articles 7, 12, 15, 16, 17, 19, and 25 CRPD.
[7] See, for example, amongst others, Mental Welfare Commission for Scotland (1) (2017) *Human Rights in Mental Health Services*; (2) (2021) *Rights, Risks, and Limits to Freedom*; (3) (2024) *Carers, Consent and Confidentiality*; (4) (2024) *Consent to Treatment*. They have been around for some time; these are the latest editions.
[8] United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

risk to life and health. Any detention must be in the most appropriate setting[9] and must end as soon as the therapeutic benefit provided by it has been achieved. The child or young person's wishes and feelings must be taken into account (of course, capacity assessed according to the effects of the child's condition and age) and they must be supported to do this. Any intervention must best secure their welfare as a child.

It is often said that we lose our rights when admitted under compulsion to a psychiatric unit, but that is not the case. The rights to liberty and autonomy may be limited but an element of possessing human rights is that any restriction must be lawful, necessary and proportionate (and also non-discriminatory). Moreover, even where our liberty and other aspects of our autonomy may be legitimately limited upon being admitted to a psychiatric unit (either voluntarily or involuntarily) this does not remove our right to be free from cruel, inhuman or degrading treatment or punishment. Recent Strasbourg Article 3 ECHR jurisprudence [10], reflecting increasing international human rights bodies' concern over psychiatric compulsion and institutional care, indicates that even stricter scrutiny of psychiatric care and treatment practices is now required, especially where coercion is involved, and there is more recognition that what is considered to respect our dignity is personal to the individual concerned.

Parents' rights

The MHA also requires that regard should be had to the views of a patient's family and their named person. This does not mean that parents, for example, are automatically entitled to know everything about their child's care and treatment but it does not mean that important information about their child should not be considered.

Moreover, where a parent, as is normally the case, is their child's named person, the MHA allows them to be notified and involved in discussions about care options and decisions about compulsion, including receiving relevant information and being able to make applications or appeals to the Mental Health Tribunal.

What needs to be done?

The young people and their families require answers and, where appropriate and necessary, apologies and redress. We all need to know that steps will be taken that ensure that this does not happen again. Staff and managers also need to know that there will be mechanisms to guide and support their work so incidents such as this do not occur. All such actions and measures must be in accordance with relevant legislation and be human rights based.

In relation to the prohibition of inhuman or degrading treatment or punishment, for example, the recent European Court of Human Rights *Clipea and Grosu v Moldova* ruling [11] makes it clear that Article 3 ECHR creates both negative obligations and positive obligations on the part of public authorities. This means an obligation not to treat an adult or child in an inhuman or degrading manner. It also means an obligation to adopt a regulatory framework to prevent violations and take operational measures where there is an imminent risk of violation, and to prosecute both state and private actor perpetrators of violations, with the Court emphasising that these positive obligations apply to both voluntary and involuntary patients

[9] See *Rooman v Belgium* (18052/11), ECHR Judgment of 31 January 2019 for a recent interpretation of this.

[10] *Clipea and Grosu v Moldova* (39468/17), ECHR judgment of 19 Novembre 2024.

[11] Ibid.

albeit with stricter scrutiny in the case of involuntary patients.

We are aware that mental health professionals, including mental health nurses, are under considerable pressure, not least because of resourcing limitations, which must clearly impact on day-to-day practice. I understand that around 1% or less of the budget allocated to NHS Scotland by the Scottish Government is for children and young people's mental health, and we are told that post-Covid-19 mental ill-health is increasing for this age group. We must acknowledge that, like all humans, they will have breaking points which will be tested when dealing with what can amount to patients' challenging behaviour. However, as previously stated, whatever the circumstances, there can be no excuse whatsoever for cruel, inhuman or degrading treatment or punishment or failing to respect the other rights of patients in institutional or community, and particularly in therapeutic, settings involving children and young people. Individual staff members who have exhibited such behaviours must be held to account under disciplinary processes and professional standards, and, where such behaviours amount to offences, under the criminal law.

Importantly, it is necessary to also consider the wider institutional environment and cultures which may allow for these things to happen. There are many factors here that any investigation and steps taken to remedy the flaws in the system need to address in this highly complex area of mental healthcare.

Resourcing is an obvious consideration but so is recruitment, and better and greater assurance of training, particularly around the use of restraint and focusing on up-to-date human rights interpretation of the law. More effective accountability, leadership and monitoring (there is no official inspection process around children and young persons' psychiatric units in Scotland at present, and it must be remembered that the Mental Welfare Commission's role is to monitor not or regulate) is also important. Crucially, there needs to be accessible processes whereby patients and their families, and other staff, can request and be supported to request specific support and raise to concerns and make complaints without fear of reprisal (whistleblowing arrangements at present do not seem to work), and where staff who are struggling or unclear about aspects of their practice can, without judgment and impact on their career, seek support.

It would also be highly advisable that any steps to review and address these issues – and this needs to happen urgently – take place across all Scottish health boards, not simply confined to Greater Glasgow and Clyde.

Initial next steps

As already mentioned, NHS Greater Glasgow and Clyde have stated that an investigation will take place. On 19th February, the Scottish Minister for Social Care, Mental Wellbeing and Sport, Maree Todd, announced to the Scottish Parliament that extra inspections are to be carried out at children and young persons' psychiatric units in Scotland. She has asked Healthcare Improvement Scotland and the Mental Welfare Commission for Scotland to carry out a series of joint visits to all adolescent in-patient units in Scotland and the national child in-patient unit.[12] She also stated:

[12] Scottish Parliament, Official Report: Meeting of the Parliament (draft), Session 6, Wednesday 19 February 2025. https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-19-02-2025?meeting=16261&iob=138891#orscontributions_M5669E393P730C2658199

> *"The care and treatment of young people as described in the programme are completely and wholly unacceptable. When our most vulnerable and unwell young people come forward and ask for help for their mental health, we owe them the highest standard of care and compassion. The accounts that were given by those brave young people and their families were truly harrowing. We must do everything that we can to ensure that patients are treated with the care and respect that they deserve."*[13]

The Children and Young People's Commissioner, Scottish Human Rights Commission, The Promise Scotland, and Equality and Human Rights Commission have sent a joint letter[14] dated 14th February 2025 to various Scottish Cabinet Secretaries and Ministers calling on the Scottish Government to commit to establishing a unified statutory framework which will regulate the use of restraint and seclusion on children across all state care and education settings. As the Scottish Mental Health Law Review (Scott Review) also did, this importantly recognises that the wellbeing of children and young people cannot be viewed or addressed in terms of service and support silos. It also expressed concern over a lack of action so far on this by the Scottish Government, and highlighted that the current piecemeal approach places vulnerable children at risk of harm (as well as undermining Scotland's commitment to the protection of children's rights!).

The BBC Skye House documentary was specifically mentioned in the letter as well as concern over the slow pace of implementation of the Scott Review recommendations. It also calls on the Scottish Government to undertake various steps towards this including establishing a short-life legal working group to develop a model which could be applied across the different pieces of legislation, accelerate work on the legislative elements of the Scottish Government response to the Scott Review (involving both the Adults with Incapacity (Scotland) Act 2000 and MHA).

Chapter 12 of the Scott Review's final report makes a number of human rights-based recommendations for the improvement of psychiatric care and treatment of children and young persons. In relation to restraint, the Review recommended (Recommendation 9.8) a detailed review of the treatment safeguards, with specific consideration given to independent authorisation of restraint and seclusion, except in emergencies, and a possible right of appeal. Amongst other recommendations which apply equally to adults and children, the final report (Chapter 11) also contains recommendations for better scrutiny and monitoring of mental health services. These all form a good starting point to frame any health board investigations and the development of the requested unified statutory framework to regulate the use of restraint and seclusion on children and young people.

These are all steps in the right direction, and time will tell how effective they are. However, there is no room for complacency in ensuring redress for the young women involved in the BBC documentary and others who may have had similar experiences, and ensuring it does not happen again.

Jill Stavert

[13] Ibid.

[14] See, for example, https://www.scottishhumanrights.com/publications/ for a copy of this letter dated 14th February 2025.

Editors and Contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole KC: vb@39essex.com
Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click here.

Neil Allen: neil.allen@39essex.com
Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Arianna Kelly: Arianna.kelly@39essex.com
Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click here.

Nicola Kohn: nicola.kohn@39essex.com
Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click here.

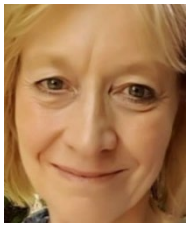
Katie Scott: katie.scott@39essex.com
Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here

Adrian Ward: adrian@adward.co.uk

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.



Jill Stavert: j.stavert@napier.ac.uk

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 regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does 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.

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Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
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clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

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