



Welcome to the October 2024 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: what to do where there is no reliable evidence of P's wishes and feelings;
- (2) In the Property and Affairs Report: gifts, attorneys and deputies;
- (3) In the Practice and Procedure Report: the perfect as the enemy of the good, and what to do when the situation changes;
- (4) In the Mental Health Matters Report: the human rights consequences of outsourcing in the mental health context;
- (5) In the Wider Context Report: the Law Commission consults on disabled children's social care law and the Grand Chamber of the European Court of Human Rights balances Articles 2 and 8 in the medical treatment context ;
- (6) In the Scotland Report: AWI legislative reform on the cards?

There is one plug this month, for a [free digital trial](#) of the newly relaunched Court of Protection Law Reports (now published by Butterworths). For a walkthrough of one of the reports, see [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
Simon Edwards (P&A)

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.

Contents

Forthcoming AWI amending legislation 2

Scottish Government’s Adults with Incapacity Amendment Act Consultation: some deprivation of liberty observations 3

Forthcoming AWI amending legislation

A Bill described as “a first step to update and modernise the Adults with Incapacity (Scotland) Act 2000” will be introduced by Scottish Government into the Scottish Parliament during the current 2024-25 parliamentary session. It will be one of 14 Bills to be introduced by Scottish Government over the course of the session, to be added to the Parliament’s legislative workload in addition to 12 Bills already before the Parliament, according to the Programme for Government 2024-25 announced by First Minister John Swinney on 4th September 2024 (too late to be covered in the September Report).

The announcement describes the proposed Bill as follows:

“The Bill will be a first step to update and modernise the Adults with Incapacity (Scotland) Act 2000 in line with developing thinking and international standards on human rights. It will ensure adults are supported to make and act upon their own decisions for as long as possible. The Bill will also introduce proposals to modernise how adults with incapacity can participate in research in Scotland, whilst continuing to ensure the rights, safety, dignity and wellbeing of these research participants are prioritised throughout the process.”

This follows upon publication on 25th July 2024 of Scottish Government’s “Adults with Incapacity Amendment Act Consultation”, on which we did report in the September Report. That

consultation closes on 17th October 2024. Any readers who have not yet responded accordingly still have time to do so.

The First Minister’s announcement also intimates that Scottish Government will continue to develop other proposals for legislative change for the next parliamentary year and beyond. Intriguingly, the announcement states that these further proposals will include:

“our commitment to ensure that the rights of neurodivergent people and people with learning disabilities are respected, protected and championed, by publishing draft provisions for a Learning Disabilities, Autism and Neurodivergence Bill. Work will also continue to develop proposals for Human Rights and Ending Conversion Practices.”

It will be interesting to see the correlation among the AWI Bill, the envisaged Learning Disabilities, Autism and Neurodivergence Bill, and the proposed human rights legislation. It will also be interesting to see what is included in the AWI Bill, and what is not. The process of updating and modernising, assuming that this will include all necessary reforms which have been “on the table” for some time during which they have become increasingly urgent, will mean that a quite massive Bill is to be expected.

In the meantime, the workload for Scottish Government officials engaged in the topic of AWI reform will increase substantially as work that

has been moving slowly or not at all must now proceed in a very short timeframe. Indeed, at a webinar on AWI reform hosted by Edinburgh Napier University's Centre for Mental Health and Capacity Law on 1st October 2024, it was indicated that we should expect an accelerated process leading up to introduction of the Bill, with less consultation (or at least less time for consultation) on the proposed drafting of the Bill before it is lodged.

We shall continue to report relevant developments as they come to our notice.

Adrian D Ward

Scottish Government's Adults with Incapacity Amendment Act Consultation: some deprivation of liberty observations

Introduction

There are only a few days left before the deadline for responses to the Scottish Government's Adults with Incapacity Amendment Act consultation on 17th October 2024.

Broadly, the consultation paper, mentioning many of the Adults with Incapacity (Scotland) Act 2000 (AWIA) relevant [Scott Review recommendations](#) and those of the Three Jurisdictions project [report](#), states that the Scottish Government is seeking views on suggestions that will improve access to justice for, and shift the focus of attention to, adults with incapacity, as well as enabling easier access to rights and ensuring supported decision-making for adults with incapacity.

This comes after well over a decade of identifying the need for changes prompted by, amongst other things, the 2004 European Court

of Human Rights *Bournemouth* ruling, followed by the 2014 UK Supreme Court *Cheshire West* ruling, highlighting AWIA Article 5 ECHR incompatibility issues relating to the deprivation of liberty ('DoL') of adults with incapacity. It has involved a Scottish Law Commission review, Scottish Government activity and related consultations in 2016 and 2018, the Scott Review (Scottish Mental Health Law Review (2019-2022)) all of which have considered ECHR and CRPD compatible approaches to the deprivation of liberty of adults with incapacity.

The proposals concerning deprivation of liberty are set out at various points in the consultation paper and these will not therefore be reiterated here. However, it might be worth considering some of these and the possible human rights questions they raise. More detailed discussion of the human rights framework in Scotland and implications for deprivation of liberty can be found in the [March 2024](#) issue of the Mental Capacity Report.

The AWIA consultation deprivation of liberty (DoL) proposals

The consultation paper proposes that welfare attorneys be empowered by the adult to authorise and consent to a DoL (when the adult has lost capacity).¹ It asks for views on this and also on how (including how often) a placement should be reviewed where the adult has been deprived of their liberty as well as views on any appeal process.

Whilst it seemed to have been accepted by the Scottish Courts that Article 5 ECHR compatibility can be achieved through relevant guardianship powers, the Court of Protection in [Aberdeenshire Council v SF](#) pointed out that the lack of ability to

¹ Having spent far too long on these issues in England & Wales, Alex, pedantically, would point out that for Article 5 purposes, consenting to a DoL is logically impossible. One either consents to confinement, or (being unable or

unwilling to consent to that confinement) is deprived of one's liberty. This confusion in language runs through the consultation, making some of the proposals conceptually headache-inducing.

challenge an unlawful DoL authorised by a AWIA guardian was incompatible with Article 5(4) ECHR there being no real review and appeal process. The consultation paper therefore proposes six monthly reviews and that there be an express right of appeal against the lawfulness of the DoL if authorised by either a welfare attorney or guardian. Further, a standalone right of appeal is also proposed, not dissimilar to that already found in the Mental Health (Care and Treatment) (Scotland) Act 2003.

These proposals – particularly when accompanied by the proposals to amend the AWIA principles to give precedence to the adult's will and preferences and the need to demonstrate, before intervening without consent, that all attempts at supporting the person's legal capacity have been exhausted – certainly bring us closer to Articles 5 and 8 ECHR compliance. This is of course, provided that in all cases the reviews are triggered automatically and regular.

There is currently no clear steer from the European Court of Human Rights as to whether advance, or proxy, consent to the authorisation of a DoL is compatible with Article 5 ECHR. However, as the Scott Review final report discussed, whilst this is not perfect, then provided the nature and extent of the DoL is specified and mechanisms are in place to ensure that any subsequent departure from the adult's advance authorisation is heeded such an approach arguably supports the adult's autonomy insofar as is possible. This, of course, does not fully address the Committee on the Rights of Persons with Disabilities General Comment No. 1 direction that guardianship be abolished, although it does suggest a framework for ensuring serious attempts are made to ensure that a DoL is the last resort, after considering how to attempt to meet the adult's needs in other ways (reflecting the adult's will

and preferences about the life they wish to lead). It also takes account of ECHR jurisprudence that makes it clear that it must not be assumed that a person who is considered to lack the ability to exercise their legal capacity (which obviously includes to consent to a confinement) are unaware, and have views about, their situation .

That being said, one aspect of the consultation which will require much more consideration going forward is that of instigating challenges, appeals, to the lawfulness of the DoL. The European Court of Human Rights ruling in *MH v UK* is clear about the fact that such processes must be 'practical and effective' for the person concerned. A statutory right of appeal of itself is meaningless if the adult does not know about and understand such a right, and/or where support to instigate such a challenge is not readily available through friends, family or professionals. The consultation paper suggests that the Mental Welfare for Scotland's role be extended to permit it to investigate any AWIA DoL placement where concerns are raised with the Commission by any person having an interest in the adult's welfare, or by the Commission itself in the course of its visiting function for those adults who are not already subject to formal authorisation and review measures. However, this arguably does not go far enough.

A word about delayed discharge

Concerns over 'bed blocking' have been raised for a long time now. Insofar as this concerns adults who may lack capacity for whom there is no immediate process to authorise the move the person from hospital to a community-based care setting, the consultation paper asks for views on using different care settings outside the NHS for persons no longer requiring acute hospital care (but who do not have guardianship in place). It specifically asks what issues should be considered here.

It is important to appreciate that if a person is in any care setting (NHS or otherwise) where there are deprived of their liberty there must be a lawful process to authorise the DoL, regular reviews and a practical and effective means by which to challenge the lawfulness of the DoL. To seek to circumvent this is likely to have serious ECHR, and CRPD, implications. When the Equality and Human Rights Commission initiated action in 2020 against NHS Greater Glasgow over a similar arrangement it became clear that there were adults who did not wish to be in a care home who were placed there against their will (see the [November 2020](#) issue of Mental Capacity Report for a discussion of these proceedings, which were eventually concluded without a reported judgment). Independent scrutiny is therefore essential here.

Conclusion

We know that there appears to remain to be an appetite within the Scottish Government to reform the AWIA. Its June 2023 response to the Scott Review indicates this, with AWIA reform being amongst the immediate priorities of its programme of mental health and capacity law reform over the next 10 years. Moreover, the introduction of an Adults with Incapacity Amendment Bill into the Scottish Parliament was expressly mentioned when it announced its Programme of Government 2024/25 in September 2024.

Many of the Scott Review recommendations were made in light of the Human Rights Bill promised by the Scottish Government which, it was envisaged, would increase the range of legally enforceable rights, including those identified in the CRPD, particularly economic, social and cultural rights, in Scotland. However, progress on this Bill appears to have stalled.

What the Adults with Incapacity Amendment Bill will look like will only become clearer when it is

introduced into the Scottish Parliament. Obviously, amending the AWIA as it stands by giving the adult's will and preferences precedence and introducing greater safeguards against inappropriate and unlawful deprivations of liberty can only secure an adult with incapacity's ability to live as unrestricted and autonomous life as possible to some extent. It is entirely possible to try to seek alternatives to deprivations of liberty and other restrictions on autonomy by identifying alternatives to getting a person's needs met. Leveraging access to the necessary support and services to achieve this is considerably enhanced by the presence of legally enforceable economic, social and cultural right together with adequate resourcing and structural and institutional change. Whilst overly bureaucratic processes can be cumbersome and, in fact, might have the opposite effect to safeguarding rights in that they become mere 'tick box exercises', expediency must not thwart the protection and ensuring of the rights of adults who fall within the AWIA remit.

Jill Stavert

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](#)



Simon Edwards: simon.edwards@39essex.com

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



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 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](#).

Adrian will be speaking at the European Law Institute Annual Conference in Dublin (10 October, details [here](#)).

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. For more details and to book, see [here](#).

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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

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

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

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

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.