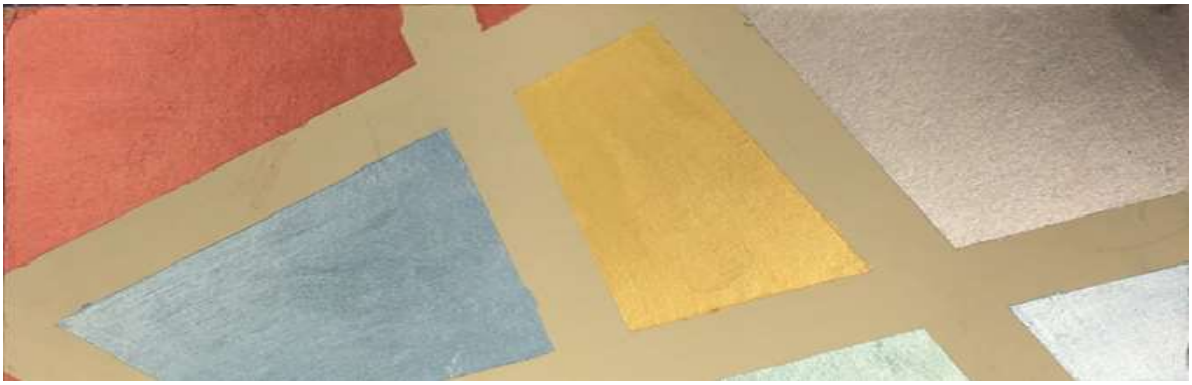
MENTAL CAPACITY REPORT: SCOTLAND

November 2020 | Issue 109



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

(1) In the Health, Welfare and Deprivation of Liberty Report: updated DHSC MCA/DoLS COVID-19 guidance, an important LPS update, and the judicial eye of Sauron descends on new areas to consider (ir)relevant information;

(2) In the Property and Affairs Report: a complex case about when the settlement of an inheritance;

(3) In the Practice and Procedure Report: for how long does a Court of Protection judgment remain binding, and helpful guidance for experts reporting upon capacity;

(4) In the Wider Context Report: challenging reports about the disproportionate effect of COVID-19 upon those with learning disability, young people with learning disability and autism under detention, and capacity and public hearings before the Mental Health Tribunal;

(5) In the Scotland Report: discharge from hospital without proper consideration of ECHR rights.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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

Contents

What does the rule of law count for?

Are the forces of institutional ageism and disability discrimination in Scotland so powerful as to exclude some people altogether from the scope of the rule of law, and from the concept of the universality of human rights and fundamental freedoms? One might have thought that all that needed to be said on that question was reported in our September and October issues, and in the materials referred to in them. Two major and contrasting developments since our October Report have, by their very differences, confronted us starkly with the question of what sort of society we are, and what is the answer to the question that I have just posed. A third occurred as we went to press.

On the one hand, on 28th October 2020 Public Health Scotland published "Discharges from NHS Scotland Hospitals to Care Homes", inhabiting a world in which elderly people, and people with disabilities, were blockages occupying hospital beds needed by others, to be shifted out of the way with no acknowledgement of the need to do so lawfully, or even of the need in terms of basic humanity to deal with them in ways that recognised not only their status as holders of the same rights as others, but also the need to safeguard their welfare, in circumstances likely to be particularly distressing and potentially confusing and damaging for them.

Then on 20th November 2020 Equality and Human Rights Commission issued their statement "Equality and Human Rights Commission reaches settlement on ending unlawful detention of adults with incapacity by NHS Greater Glasgow and Clyde", narrating the acknowledgement by NHS Greater Glasgow and Clyde and HC One Oval Limited (owners of a chain of care homes) that the practice of NHS GGC in placing patients in two care homes in Glasgow without legal authority was unlawful. The issues raised by EHRC were of long standing. They ought to have been well known to all those operating the practices described in the Public Health Scotland Report since long before the pandemic.

Growing concerns have been tracked in succeeding issues of the Report. On 1st September 2020 the Scottish Government's Interim Director-General, Health and Social Care, wrote to the Convener of the Scottish Parliament's Equalities and Human Rights Committee the letter upon which we reported under "Equalities and Human Rights Committee and related matters". On the one hand the letter asserted the urgent need for relevant reform of the Adults with Incapacity (Scotland) Act 2000, but on the other the Annex to it demonstrated apparent situations of unlawful deprivations of liberty without due process, without any comment on the lack of legality. We mentioned the court action by EHRC, and also the example

of the "blind spot" regarding potentially unlawful deprivations of liberty identified in the case of *Borders Council v AB*, which we described in the December 2019 Report.

In the October Report, in the item "… then take the other knee – Covid reveals endemic issues", we referred to the six seriously disturbing case histories narrated in the Response dated 26th May 2020 by the Law Society of Scotland to the Inquiry on the Impact of Coviud-19 by the Equalities and Human Rights Committee of the Scottish Parliament (the case histories can be seen here), and then quoted several seriously worrying narratives subsequently provided by practitioners. Any hopes that the October Report might have concluded all that needed to be said on this theme were certainly quickly dashed by the Public Health Scotland Report issued on 28th October 2020.

That Report referred to 5,204 discharges from NHS hospitals to care homes in Scotland from 1st March to 31st May 2020. Largely, these were not discharges to care homes from which the patients had been admitted to hospital in the first place, though statistics about that are not given. The circumstances are accordingly more clearcut, as regards issues of potential deprivation of liberty, than the English case reported here, where permission to proceed to a full hearing was granted, on 19th November 2020, and in which case it would appear that the discharges from hospital were back to care homes from which patients had been admitted in the first place.

For those 5,204 discharges in three months of 2020, the requirement for legality meant either the competent and well-informed consent, without being subject to undue influence, of the patient, or demonstrable compliance with Article 5 of ECHR. The Public Health Scotland Report does not acknowledge the need for legality. It tells us that patients were assessed for their ability to consent to testing for Covid, but it is silent as to whether they were tested for ability to give informed consent to the transfers to care homes. Clarification is awaited as to whether they were in fact so tested, how many were found to have adequate competence, how many of them did in fact consent, and whether such consent was property documented. It is a reasonable assumption that many of them did not have adequate capacity to give valid consent. 112 were, for one reason or another – most often lack of sufficient capacity – unable to consent to testing. The primary diagnosis of 272 was dementia. The primary diagnosis of a further 145 was delirium. Clarification is awaited as to whether, and if so how, discharge was lawfully authorised for all those lacking the ability to consent, or who cannot in fact be shown to have validly consented. That may have been achieved by an attorney, guardian, or appointee under an intervention order holding relevant powers. Even so, as exemplified by *Borders Council v AB*, adequate safeguards to ensure compliance with Article 5 of ECHR would have been required.

Neither the procedure for medical certification under section 47 of the 2000 Act, nor the procedure for "provision of services to incapable adults" under section 13ZA of the Social Work (Scotland) Act 1968, are relevant, because neither can provide a basis of legality for deprivations of liberty in accordance with Articles 5 and 6. In the case of section 13ZA, local authorities cannot use that procedure where the outcome would be a deprivation of

liberty: see "Guidance for Local Authorities (March 2007): Provision of Community Care Services to Adults with Incapacity", with which local authorities must comply under section 5 of the 1968 Act.

My further comments on the Public Health Scotland Report and related matters may be found in my paper "Every life matters: advance care and treatment decisions and planning, end of life, Covid-19", available here, following upon a lecture delivered as part of the Centre for Mental Health and Capacity Law's Autumn 2020 series on 11th November 2020. See also the press release by the Law Society of Scotland, widely reported in the Scottish press.

The announcement by EHRC of the successful settlement of their action refers to improved discharge processes, to the position of those affected having been regularised, and in particular to NHS GGC having established a "Revised Patient Pathway". Details of all of these steps are awaited. In particular, it is a matter of considerable public interest that it be demonstrated that the "Revised Patient Pathway" guarantees lawfulness for the future, and that there be public visibility that it is in fact followed. It is also essential to know that equally effective protocols are in place and are being followed throughout Scotland.

Moreover, it appears to be difficult to see what excuse relevant authorities can have had for not ensuring the lawfulness of all discharges since well before the pandemic. It appears that the practices of NHS GGC, and concerns about their lawfulness, go back to around 2017, when a solicitor acted in the cases of several adults apparently unlawfully detained in units to which they had been discharged. That solicitor made applications to the Mental Health Tribunal under section 291 of the Mental Health (Care and Treatment) (Scotland) Act 2003, which allows persons unlawfully detained in hospital, and being given treatment there primarily for mental disorder, to obtain an order requiring detention to cease. Our information is that the unlawfulness was effectively conceded by rapid steps to detain those patients under compulsory treatment orders prior to the applications under section 291 being heard. These cases were reported to EHRC, who – it is understood – were trying to have the issues addressed and resolved since then, but ultimately found it necessary to commence their court action.

It is notable that in a report dated 27th March 2019 on "Glasgow City HSCP's Delayed Discharge Performance in the Acute Hospital System", the concerns of EHRC are acknowledged, referring to "prospective legal challenges from [EHRC] in relation to the specialist AWI beds commissioned by GCHSCP on behalf of the Health Board". That report seems to assume that obtaining orders under Part 6 of the 2000 Act always has to be a seriously protracted process. Experience of practitioners in different parts of the country indicates considerable variations in that regard. I am aware of training and advice given to NHS GGC in 2012 and 2013 as to how the process of obtaining Part 6 orders can be accelerated, and the 2019 report referred to above does report substantial improvements since 2011, but also that HSCPs have "already exhausted the majority room for improvement over the period since 2011". The report nevertheless states that "an AWI-related delay may result in 200-300 bed days lost", and at another point asserts that "AWI delays place the greatest restrain on the Acute

system as they typically involve delays of many months while guardianship powers are pursued to enable a patient to be moved to another location (invariably a care home) in line with legal requirements". There is no explanation of these excessive delays. One has to suspect poor management of resources in the sense of failing to invest adequately in key staff such as MHOs when – having regard to costs of "bed days lost" – proper management of the public purse would seem to point towards an imperative on financial grounds, quite apart from patient care and human rights grounds. It would be interesting to know whether anyone can contribute information as to whether these issues are in fact being properly and effectively addressed.

In fairness, one must draw attention to the case histories at the end of the 2019 report, showing how very difficult can be situations which arise in reality. The extent of those difficulties, however, demonstrates the importance of all concerned being well aware of relevant legal and human rights issues and having access to the necessary support to ensure that they are promptly identified, and that lawful procedures are followed in every case.

Much more now requires to be done. A start has been made by Scottish Government in issuing on 24th November 2020 its document "Key actions on managing the end-to-end discharge process of adults who lack capacity including legal measures". Time does not allow us to comment in full on that document in this issue of the Report. In general terms, it is a valuable and prominent reminder of what should be done from now on. In essentials, it does not add greatly to the advice given in 2012 and 2013 referred to above. As regards two serious "pinch points" in processing Part 6 welfare applications, it is not yet accompanied with the necessary undertaking from Scottish Government to take immediate steps to redress the serious under-provision of mental health officers; nor does it provide the explicit guidance which seems to be required by some general practitioners (though not all) as to their duties in relation to issuing reports on their own patients for the purposes of Part 6 applications. On section 13ZA of the Social Work (Scotland) Act 1968, it does mention that that procedure may not be used if the outcome would be a deprivation of liberty, though it lacks clarity as to the full range of circumstances that have been held (elsewhere in the United Kingdom and in Strasbourg, if not explicitly in Scotland) to amount to deprivations of liberty, and there is room for possible debate as to whether it overstates, at least by implication, the extent to which section 13ZA can properly be used.

It would probably have been beyond the scope of that Scottish Government document to remind all concerned of their duties in relation to persons whose discharges from hospital may have resulted in unlawful deprivations of liberty, or for whom constraints applied to them in care homes (whether they were discharged there from hospital or not) have amounted to unlawful deprivations of liberty. One trusts that local authorities will fully perform their obligations under sections 53(3) and 57(2) of the 2000 Act to ensure that a Part 6 appointment is made in every case where that may be needed to investigate and if necessary address any *prima facie* situation of potential deprivation of liberty. Everyone who is deprived of liberty has the right under Article 5.4 of ECHR to have the lawfulness of detention "decided speedily by a court", and

release ordered if the detention is not lawful. Of course, a Part 6 appointee in any particular case may decide that it accords better with the 2000 Act's principles to sanction any deprivation but perhaps negotiate and agree appropriate terms for doing so. Article 5.5 gives every victim of unlawful deprivation of liberty "an enforceable right to compensation". In any particular case, a Part 6 appointee having considered the whole situation in the light of the section 1 principles in the 2000 Act, and provided that the unlawfulness has not continued, might conclude that although such action could result in acknowledgement of the unlawfulness, there would be little prospect of obtaining more than nominal compensation, not justifying litigation.

However, it should not be lightly assumed that an unlawful deprivation of liberty, if established, did not have detrimental consequences in relation to the adult's health or welfare or wellbeing, including in relation to Article 8 rights to private and family life, warranting significant compensation. Aspects of discrimination on grounds of age or disability might be aggravating factors. Common law rights to redress for unlawful imprisonment are also relevant.

It may be important in this context to recognise the distinction between official advice on the one hand, and exercise of lawful powers on the other. It might or might not have coincided with advice effectively to imprison an incapacitated adult in a care home without contact with family and friends, but that will have amounted to an unlawful deprivation of liberty if not done with competent consent by or on behalf of the adult, or otherwise with lawful authority. Persons at large in the community may overwhelmingly have chosen to abide by advice, without legal compulsion, even if only because they feared the social consequences of not doing so, but ultimately they were in legal terms free to make that choice. It is quite another matter to impose such an outcome without legal authority upon someone who could not make that choice, and on whose behalf it was not competently made. It should not too readily be assumed that they would have made that choice if they could: a noticeable element of ageism in the context of the pandemic seems to have been to impose the values of younger people on those closer to the end of life, for whom – increasingly – quality of life, and issues such as contact with loved ones, become increasingly more important than prolongation of life.

It would appear that in every case of potential deprivation of liberty, appointees will require to assess harm and damage, including to welfare, actually sustained. It is notorious that the very act of moving elderly people who might be confused by the move can be harmful. The number of moves must be minimised. The idea of moving them to a temporary "holding facility", then moving them further, would require to be robustly justified in that context. If a person contracted illness or suffered other harm as a result of being placed unlawfully in a particular care home, then regardless of overall statistics about probabilities provided in the Public Health Scotland Report, though subject to any competent defences available, significant compensation might be due.

Ultimately, proactive steps are required to eradicate the culture of institutional ageism and disability discrimination that the pandemic has revealed. *Adrian D Ward*

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He 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.

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Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Jill Stavert's Centre for Mental Health and Capacity Law (Edinburgh Napier University)'s Autumn 2020/January 2021 webinar series include a contribution by Alex on 2 December 2020 at a webinar about Psychiatric Advance Statements. Attendance is free but registration via Eventbrite is required. For more details, see here.

Advertising conferences and training events

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

Our next edition will be out in 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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