



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: sexual capacity complexities, wishes and feelings in the balance, and finding the P in a PDOC case;
- (2) In the Property and Affairs Report: deputy bond provider problems and a job opportunity in the Official Solicitor's office;
- (3) In the Practice and Procedure Report: how far can the Court of Protection go to ensure its orders are complied with, and risk taking, best interests and health and welfare deputies;
- (4) In the Mental Health Matters Report: Tier 4 beds (again) and the Mental Health Tribunal and the Parole Board;
- (5) In the Wider Context Report: local authority consent to confinement, the Irish courts continue to grapple with the consequences of the framework, and Strasbourg pronounces on assisted dying;
- (6) In the Scotland Report: exasperation at the pace of the Scottish Government's Mental Health and Capacity Reform Programme.

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](#).

Alex trusts that readers will not mind a slight blowing of the trumpet at his having been awarded Outstanding Legal Achievement at the [2024 Modern Law Private Client Awards](#) for his work sharing knowledge about the Mental Capacity Act 2005 (and hence, in significant part, thanks to his fellow editors on this Report), and being appointed Professor of Practice at King's College London from August 2024 (a position which reflects the opportunities given by Chambers to him to moonlight so often away from the day job – for which he is very grateful!).

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

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

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Law reform and the paralysed Parliament

We reported the publication by Scottish Government of its Initial Delivery Plan for the Mental Health and Capacity Reform Programme in the [June 2024](#) report. The Plan was published as that Report went to press. In it, we provided a link to the [Plan](#). Coverage was limited to a quick reflection of some points picked out from the document upon its initial publication. We indicated that we envisaged further coverage of the Plan, and of ensuing developments, in future Reports.

In this article I describe in more detail the content of the Plan insofar as relevant to adult incapacity law, and the practical implications of the Plan in the context of progress in the development of adult incapacity law in Scotland over the last three decades. The scene is set by the Scotland Act 1998, section 1 of which established the Scottish Parliament, and section 28(1) of which provided that:

“Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament.”

Section 29 defines the legislative competence of the Parliament. What we now know as adult incapacity law is within the competence of the Parliament. With power comes responsibility. The Parliament has the power to legislate within its areas of competence, and the obligation to

ensure that those areas do not fall into significant disrepair. It is a truism that the quality of a society is to be judged by how it treats its most vulnerable members. The performance of a legislature can be judged by how well it makes and maintains provision for our most vulnerable citizens. Specifically in Scotland, the test is the performance by the Scottish Parliament of its obligation to keep adult incapacity law in sufficiently good order to avoid significant harm and disadvantage to those whom our adult incapacity law is primarily addressed, meaning not only those who currently have significant vulnerabilities within the scope of the legislation, but those caring for them, those significantly concerned at an immediate personal level about the adequate safeguarding of their rights, interests and welfare, including those who have taken on professional responsibilities towards them, and everyone seeking to put in place appropriate provision for themselves, against the possibility that they may in future have needs within the scope of adult incapacity law.

These responsibilities are responsibilities of the Parliament, and collectively of every member of the Parliament, whether at any particular time those responsibilities are performed in the context of government, or in the context of holding government to account.

The timetable for this overview of the Parliament’s performance begins with the lead-up to its establishment. Scottish Law

Commission issued a Discussion Paper in September 1991 which initiated a programme of consultation, and then hard work by the Commission itself, leading to publication in September 1995 of a draft Bill which in its essentials – and much of its detailed provision – became the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”). From December 1997, over 70 voluntary, professional and other organisations from across Scotland came together in the “Alliance for the promotion of the Incapable Adults Bill” campaigning initially to achieve legislation by the UK Parliament in 1998/1999. In a clear example of the need for the Scottish Parliament, campaigning, and lobbying at Westminster achieved no response from the UK Parliament. The Scotland Act received Royal Assent on 19th November 1998, whereupon some provisions immediately commenced in force, and the entire Act entered into force on 1st April 2000. With the commitment of all Scottish parties, the Parliament’s discharge of its legislative obligations was achieved with alacrity. The Adults with Incapacity Bill was introduced to the Parliament on 8th October 1999 and the 2000 Act received Royal Assent on 9th May 2000. Parts 1, 2, 3 and 7 entered into force on 2nd April 2001; Part 6 on 1st April 2002; Part 5 on 1st July 2002; and Part 4 on 1st October 2003. The “Improving with Experience” programme led to the improvements enacted as part of the Adult Support and Protection (Scotland) Act 2007. By then the Mental Welfare Commission for Scotland had already picked up on concerns that we would now categorise within the topic of deprivation of liberty, with a consultation in 2004. However the 2000 Act, as updated in 2007, gradually fell into disrepair as both Scottish society and the international human rights scene have developed. What has been the performance of the Scottish Parliament as legislature since 2007 to remedy such disrepair? The answer, to date, is nothing. What is now

promised? We shall come to that.

As has been well documented in this Report over several years, the failures to date of the Scottish legislature in general and Scottish Government in particular to meet the basic human rights obligation under Article 5 of the European Convention on Human Rights to put in place procedure to permit deprivations of liberty in terms of Article 5 to be achieved lawfully, in ways compliant with Article 5 as interpreted by the European Court of Human Rights, have remained scandalously unperformed, even though (by way of example) England & Wales has had such provision for over 15 years now. A culture of endemic discrimination against older people, and those with disabilities, has in consequence developed, on the part of government and many of those discharging statutory functions under the umbrella of government. Examples abound, but it is not necessary to look further than the unlawful discharge of hospital patients to care homes, evidenced – for example – by litigation brought by the Equality and Human Rights Commission in which such unlawfulness on a significant scale was conceded prior to the pandemic; massive unlawful dumping of elderly and disabled hospital patients into care homes during the pandemic; and since the pandemic, equally unlawful transfers of patients no longer requiring hospital treatment into other health service accommodation, and in some cases forcible retention there. There have been other manifestations of this culture of unlawfulness and discrimination, for instance the decision *Scottish Borders Council v AB* we covered in our [December 2019](#) report.

This has all occurred despite the publication by Scottish Law Commission of draft legislation in the form of a new Part 5A to the 2000 Act, with accompanying Report, in October 2014 – over a decade ago now, or, put another way, twice as long as the timescale from the Commission’s

1995 Report to the 2000 Act receiving Royal Assent, despite the lack of significant progress prior to establishment of the Scottish Parliament.

In parallel with that particular topic has been the question of accumulating needs for straightforward practical updating of the 2000 Act. These were addressed in responses to Scottish Government consultation in 2016, re-stated and updated in response to consultation in 2018. The issues are proving to be a major impediment to the operation of the legislation, and they have continued to accumulate. There is an example in the next item in this Report, followed by another item with an example of failure to remedy another substantial impediment which would not require legislation at all.

One might reasonably have expected both the issue of deprivation of liberty and the need for straightforward improvements to the 2000 Act to have proceeded at no less than the speed with which the Parliament was able to produce the 2000 Act, promptly following upon the 2018 consultation.

Instead, in 2019 Scottish Government established the Scottish Mental Health Law Review ("the Scott Review"). Adult incapacity legislation was included in the remit of the Review, despite the emphasis upon mental health law in both the title and much of the work of the Review. On 19th March 2019, in its announcement of the Review, Scottish Government expressly undertook to continue work on deprivation of liberty, and on essential AWI reform generally, in parallel with the work of the Review. The announcement by the then Minister for Mental Health of the establishment of the Review included the following:

"At the same time as the review takes place, we will complete the work we

have started on reforms to guardianships, including work on restrictions to a person's liberty, creation of a short term placement and amendments to power of attorney legislation so that these are ready when the review is complete."

So far as can be ascertained, Scottish Government did not implement that undertaking in parallel with the Scott Review, nor at all during the course of the Review. It appears to have done nothing to carry those matters forward for over five years from 2018, until it commenced work following upon the publication of the Scott Report.

It is against that background that we now have the Delivery Plan that was announced in the Parliament on 3rd June 2024 and published on the 4th. The announcement in the Parliament was as follows:

"Fulton MacGregor (Scottish National Party): To ask the Scottish Government whether it will provide an update on its plans to reform legislation on adults with incapacity, as recommended by the Scottish Mental Health Law Review.

"Maree Todd: In our response to the Scottish Mental Health Law Review, published in June 2023, we committed to establishing a Mental Health and Capacity Reform Programme. We are due to publish the first Delivery Plan under this Programme shortly. Our main priority for early law reform centres on the updating of the Adults with Incapacity Act. Work has already begun to consider options for addressing long-standing gaps in Adults with Incapacity law, to ensure stronger rights, protections and safeguards."

As we noted in the June 2024 Report, the urgent need for law reform is summarised in a table headed "Strategic Aim 1: Law Reform". That is a

table with target dates, and with 15 specific action-points referring to existing adults with incapacity provision.

All that is said about meeting the urgent need for legislation on deprivation of liberty is in a single sentence: "Ensuring there are safeguards for the adult in the event of a deprivation of their liberty, including a standalone right of appeal". One could have said that immediately following the issue by the European Court of Human Rights, 20 years ago, of its decision in the "Bournewood case". On other areas, we have:

"we will consider how to update Part 2 Powers of Attorney Scheme"

"improve the accessibility of taking out a Power of Attorney"

"consider integration of Part 3 Access to Funds and Part 4 Management of Residents' Finances into a new Guardianship Scheme"

"consider how to strengthen Part 5 of the AWI Act and enhance the safeguards for an adult to challenge a decision and introduce stronger safeguards for interventions such as the use of force"

"develop a specific provision to authorise conveying a person to hospital"

"review the provision of section 49 of the AWI Act so that the restriction on treatment is not applied widely"

"ensure there is clarification around the powers of force and detention"

"consider how to update Part 6 intervention orders to promote the rights, will and preferences of adults with incapacity"

"review the application process for interveners and guardians to see where improvements can be made whilst enhancing the safeguards of the adult"

Unsurprisingly, one hears comments that all of this could have been scribbled on the backs of a few envelopes in about half an hour some several years ago.

On the crucial issue of timescale, a column headed "Milestones (Oct 23 – Apr 25)" includes the following:

"options for possible legislative change to be considered by summer 2024" (twice)

"consideration as to how we might enhance safeguards and improve accessibility of powers of attorney will be undertaken by summer 2024"

The above are all selected quotations under the heading "Priority 1: Adults with Incapacity Law Reform". Other actions and milestones are listed, apparently with primary reference to mental health law. All are worth reading, and it will not take long to do so. Other topics addressed with similar brevity include those within the Adult Support and Protection (Scotland) Act 2007.

There is neither commitment nor even an indication as to when urgently required legislation will be introduced to the Parliament. Suffice to report that "by summer 2024", said in various tones of sarcasm and exasperation, has already become a standing joke in training sessions and similar since the Plan appeared.

We know that a substantial and able team of Scottish Government officials has been working assiduously on the whole question of law reform within the ambit of the three Acts of 2000, 2003 and 2007. It seems not unreasonable to attribute

the lack of commitment or action to members of the responsible legislature themselves, primarily those within Scottish Government, but so far – noting the lack of apparent challenge – all of them. Specifically at government level, we understand that any commitment to legislate will not appear until announcement of the next Annual Programme for Government in the autumn. To retain any credibility in this whole area, that would appear to be Scottish Government's "last chance saloon".

Adrian D Ward

Amendment of powers of attorney: OPG policy change, reform needed

With effect from 30th October 2023 the Public Guardian's previous Power of Attorney Amendment Policy 2012 was replaced with the Power of Attorney Administrative Updates Policy 2023. There have been long-running issues about the extent to which an existing registered power of attorney can be amended without the expensive and cumbersome need to revoke an existing power of attorney in whole, and replace it with a new one. Under section 6(2)(b) of the Adults with Incapacity (Scotland) Act 2000 the functions of the Public Guardian include maintaining separate registers of "all documents relating to continuing powers of attorney" and "all documents relating to welfare powers of attorney". In the respective registers, the Public Guardian must "enter any matter which [the Public Guardian] is required to enter under [the 2000 Act] and any other matter of which [the Public Guardian] becomes aware relating to the existence or scope of the power, authorisation or order as the case may be".

In the early days after Part 2 of the 2000 Act came into force on 2nd April 2001, the focus unsurprisingly was on registering newly granted powers of attorney, as the transitional provisions of Schedule 4 to the Act kept existing powers of

attorney and the appointments under them in force, and recognised that new appointments under an existing power of attorney occurring after the Act came into force should be recognised as continuing attorneys or welfare attorneys, as the case may be, but expressly disapplied the registration provisions of section 6(2)(b), so that any changes that were competent in respect of powers of attorney governed by the transitional provisions could be effected without any requirement for registration. None of this is greatly helpful regarding amendment of registered powers of attorney, and as time has gone by, and more and more time has elapsed since original granting of 2000 Act powers of attorney, issues around amendment have become more prominent. As regards the provisions of Part 2 themselves, the only procedure now available under section 22A, inserted by the Adult Support and Protection (Scotland) Act 2007, is that only an entire power of attorney, or powers conferred under it, can be revoked by notice given to the Public Guardian. The 2012 Policy sought to be more accommodating than that, whereas the 2023 Policy has followed more strictly the terms of the statute – unhelpfully but in my view essentially. This means that anything other than total revocation of the document, or of particular powers, appears to be unprovided for in Part 2. From 30th October 2023 the Public Guardian will continue to accept an "administrative update" to a registered power of attorney which will include "anything which does not change the fundamental substance of the power of attorney deed", for example: a change to the name or address of a granter, attorney, or substitute attorney. It confirms that "if a registered power of attorney needs a significant alteration which either requires a certificate of capacity or the production of a new certificate of registration", then a fresh power of attorney deed should be submitted for registration. The 2023 Policy confirms that "significant alterations would

include adding an attorney, substitute attorney or perhaps adding powers”.

Very recently, it has been necessary for the Public Guardian to confirm that simply revoking the appointment of a potential substitute attorney, under substitution provisions that have never been triggered (and may never be triggered), all the formality of revocation followed by granting a fresh power of attorney, identical to its predecessor except for removal of the relevant substitution provision, is necessary. With reference to the preceding item in this Report, this is one more item where reform is essential and would be non-controversial, to add to the substantial list already in place at the time of responses to the 2016 consultation, which as indicated in the preceding item has continued to grow. Like so many of the deficiencies affected by the failure of the Parliament to convert aspirational statements of intention into performing its obligations as legislature, this places significant blocks in the form of delay, trouble and above all expense, in the proper operation of the powers of attorney scheme.

Adrian D Ward

Reports for Part 6 applications

A long-running issue hindering proper operation of the provisions of Part 6 of the 2000 Act, principally in relation to obtaining intervention and guardianship orders, and also in relation to the renewal of guardianship orders, has been difficulty in obtaining the necessary reports. Recently, this has become acute when reports are sought from general practitioner practices. It is unlikely that it would be considered appropriate to place outright obligations in adult incapacity legislation itself, but it is necessary that obligations be clarified in one or more of (a) statute law, (b) terms of NHS appointment, and (c) the professional obligations of doctors to their patients. Only very recently have there been

reported to me cases not merely of difficulty, but of outright refusal by GP practices, refusing to see existing patients for the purpose of preparing a report as they will “only see patients for NHS matters and this is not an NHS matter”. This suggests an answer under (b) above, but provides none under (c) above. Unfortunately, revisal of the General Medical Services Contract (GMSC) in 2018 failed to provide clarity. Provision of such reports appears not to be included as a “basic duty” under the categories of “essential”, “additional”, or “enhanced” services. Local agreements with health boards could cover specific responsibilities regarding provision of medical reports, but it appears on available information (for which I am most grateful for the assistance provided in that regard) that no health boards have clarified this, nor (for example) included good practice written examples of a local contract.

Likewise, professional guidelines from professional bodies, principally British Medical Association, and including the General Medical Council, provide guidance on how GPs should handle requests for medical reports but appear not to cover the obligatory duties of GPs as to whether to provide medical reports upon request.

This is a serious impediment to the proper operation of Part 6 of the 2000 Act which could readily be addressed, without need for legislation, but where Scottish Government appears neither to have taken appropriate action itself, nor to have addressed the issue with those who could also have provided clarification.

Adrian D Ward

Mental Welfare Commission for Scotland – Annual Report 2023-24

The Mental Welfare Commission has published its [2023/24 Annual Report](#). It

demonstrates the impressive extent and depth of the work it undertakes in monitoring the implementation of the Adults with Incapacity (Scotland) Act 2000 and Mental Health (Care and Treatment) (Scotland) Act 2003. It is also encouraging to see that it continues to publish 'closure reports' which follow up on whether the Commission's recommendations in some of its earlier reports are actually implemented, its most recent one relating to its 2022 themed visit report *Ending the exclusion: Care, treatment and support for people with mental ill health and problem substance use in Scotland*.

However, the report also highlights a number of areas of concern, notably the increasing gap between supply and demand in Scotland's mental health and learning disability services. The Commission reports that staff shortages are impacting on the quality and availability of hospital and community care, and pressures on health and social care services are pushing responsibility onto other services which are arguably not as well-equipped to address the issues of the individuals involved.

It notes with concern that compulsory measures under mental health legislation which are designed to address short-term solutions are continuing into the long-term. This is particularly so for some people remaining for extended periods of time in out of NHS area placements a long way from home or on Compulsory Treatment Orders in the community.

Whilst the Commission also mentions good practice where it is found it also notes where there is a lack of understanding of relevant legislation leading to service and care failures, and distress to the individuals concerned and their families.

Importantly, Sandy Riddell, in his Chair's Foreword, states that in bringing about change:

'Finances are of course vital. I know the strain on budgets across health and care services and I will always call for budgets to be protected.'

'But along with money, there is the question of what changes can be made to our systems of care and treatment, and how to make them.'

The Commission also, once again, reiterates its support for the recommendations of the Scottish Mental Health Law Review.

More detail on the information summarised in the Annual Report can be found in individual monitoring, themed and investigation reports on the Commission's website.

Jill Stavert

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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](#).



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

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Conferences

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

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

Adrian will be speaking at the following open events:

1. The World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details [here](#))
2. The European Law Institute Annual Conference in Dublin (10 October, details [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 September. 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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