

Compendium

Introduction

Welcome to the February 2015 Newsletters, revamped to reflect our new name of 39 Essex Chambers. We have taken the opportunity of the launch of our new Chambers website to bring together all our mental capacity resources in one [place](#).

Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: a further chapter in the saga of consent to sex; unlawful removals from the family home; and the new DOLS forms;
- (2) In the Property and Affairs Newsletter: failed attempts to prevent the OPG/COP having oversight over an attorney and to get costs against the OPG and the OPG's review of deputy monitoring;
- (3) In the Practice and Procedure Newsletter: an important case on declarations and contempt; a rare decision on permission;
- (4) In the Capacity outside the COP Newsletter: the new Practice Note for representation before the MH Tribunal; the new MHA Code of Practice; and the new offences of ill-treatment and wilful neglect;
- (5) In the Scotland Newsletter: detailed coverage of the Special Case that has resolved the question mark over the validity of powers of attorney raised by Sheriff John Baird, as well as important guidance on vulnerable clients and Practice Rules relating to powers of attorney and an update on the Mental Health (Scotland) Bill.

We also bid temporary farewell and all best wishes to Anna Bicaregui as she goes on maternity leave, and a very warm welcome to Annabel Lee who joins the editorial team in her place.

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Stop press: Rochdale appeal allowed by consent

In what may count as a rare bit of good news in the battle for clarity as to exactly what constitutes a deprivation of liberty¹ we can confirm that the appeal in [Rochdale MBC v KW](#) [2014] EWCOP 45 – listed to be heard on 4 or 5 February – has been allowed by consent. It is unfortunate, perhaps, that this means that there will be no judgment.

However, the Court of Appeal could, in principle, have followed Mostyn J in refusing to follow the agreed position of the parties that KW's position amounted to a deprivation of liberty. The Court of Appeal's endorsement of the consent order therefore means – we suggest – that practitioners can now proceed on the basis that Mostyn J's conclusions as to what freedom to leave mean can be treated with extreme caution at best, if not consigned to history entirely. That does not mean that the philosophical questions that he raised as to the meaning of liberty will necessarily go away, but they will fall perhaps better to be considered in the wider-ranging Law Commission review of the area.

For those after further assistance, we also note that the Guidance commissioned by the Department of Health from the Law Society (to which both Alex and Neil are contributing) is on track to be published before the end of February. Alex will make sure that it is publicised as soon as it is published on his [website](#), and we will no doubt be highlighting key features next month.

You can refuse – capacity to consent to sexual relations revisited

LB Tower Hamlets v TB and ors [\[2014\] EWCOP 53](#) (Mostyn J)

Mental capacity – sexual relations

Summary

This is the latest judgment in long-running proceedings concerning the best interests of a Bangladeshi woman with a moderate learning disability. In 2010 and 2011, orders were made in the family court providing for the permanent adoption of TB's four children. In those proceedings, TB's husband had been found to have physically assaulted TB.

In 2012, the Court of Protection made interim declarations that it was in TB's best interests to live in supported accommodation rather than with her husband and his (polygamous) second wife, and their child. TB's placement did not prove successful – much as in the property she lived in with her husband, she spent hours lying on the sofa watching TV. Supervised contact took place between TB and her husband, which the court found was generally worthwhile for TB, although her husband had attempted to induce her to say she wanted to return to live with him.

¹ And with gratitude to Jola Edwards of Peter Edwards Law and Simon Burrows, solicitor for the appellant and Counsel for the respondent respectively for letting us know and confirming that we may circulate this information.

The court held that it was not in TB's best interests to return to live with her husband, and directed the local authority to use its best endeavours to find an alternative placement for her, in line with the recommendations of the court-appointed expert, or, if that was not possible, to replace TB's care team with people able to promote TB's social life and integration into the community.

The court also made a final declaration that notwithstanding TB's previous pregnancies, she lacked capacity to consent to sex. In doing so, Mostyn J reviewed the authorities addressing what the relevant information is that must be understood, retained and used to make a decision whether to consent to sexual relations. Mostyn J concluded that understanding the risk of pregnancy was not a separate issue, as previous authorities had stated, but that it formed part of understanding "*that there are health risks involved.*" He did not appear to accept an argument that since TB had an IUD fitted (the same having previously been authorised by the court), there was no need for her to understand the risk of pregnancy. Mostyn J further rejected the analysis of the Official Solicitor that the ability to say yes or no to sex is not a concept that must be understood as part of the relevant information, preferring the approach of Hedley J in [Re H](#) [2012] EWHC 49 (COP), who had held that a relevant question was "*does the person whose capacity is in question understand that they do have a choice and that they can refuse?*"

Thus, Mostyn J held, the relevant information was:

1. the mechanics of the act; and
2. that there are health risks involved; and
3. that he or she has a choice and can refuse.

In adopting this approach, Mostyn J both made clear that he had been persuaded that the more nuanced approach adopted by Hedley in *Re H* was to be preferred to the approach that he himself had adopted in [Re AB](#), and that this more nuanced approach aligned the civil and criminal law (see in this regard [R v Azanzi](#)).

Mostyn J also took the opportunity to comment on his decision in [Rochdale Metropolitan Borough Council v KW](#) [2014] EWCOP 45, saying that "[t]he state is obliged to secure the human dignity of the disabled by recognising that 'their situation is significantly different from that of the able-bodied.' Thus measures should be taken "to ameliorate and compensate for [those] disabilities," and that characterising those measures as state detention was "unreal."

Comment

There are three interesting features of this case.

1. First, the court made a negative best interests declaration – that it was not in TB's best interests to live with her husband – rather than a positive choice between two identified alternatives. The court

felt able to rule out the option of a return home, even though the current living arrangements for TB were not ideal, and to direct the local authority to improve them. It will be interesting to see how that approach fits into what the Court of Appeal says in the [ACCG](#) appeal in due course.

2. Secondly, there is now yet another statement about what the information relevant to a decision about sexual relations is. Although a consensus seems to be emerging, difficult questions such as what the extent of knowledge about health risks must be, and whether a risk that does not exist in the particular factual scenario is relevant, remain.
3. Thirdly, the judge's further comments on the vexed issue of deprivation of liberty explain in more detail the difficulty many people have in seeing how the intensive support and care that a person requires to meet their needs could engage Article 5 ECHR. With the abrupt end to the *Rochdale* case, these questions will remain unanswered by the higher courts at this stage.

Not so fluffy: counting the cost of non-compliance

Essex County Council v RF & Ors [\[2015\] EWCOP 51](#) (Mostyn J)

CoP jurisdiction and powers – Damages

Summary

This judgment from District Judge Mort provides some useful guidance on the level of damages to be awarded in Court of Protection proceedings for unlawful detention.

P was 91 year old gentleman, a retired civil servant, who had served as a gunner with the RAF during the war. He had lived alone in his own house with his cat Fluffy since the death of his sister in 1998. He was described as being a very generous man ready to help others financially if he believed they needed it, as well as making donations to various charities.

He had dementia, and other health problems including difficulty in mobilising, delirium and kidney injury caused by dehydration.

In May 2013 P was removed from his home by the local authority and placed in a locked dementia unit. It was not clear that P lacked capacity at the time and he was removed without any authorisation. The local authority eventually accepted that that P had been unlawfully deprived of his liberty for a period amounting to approximately 13 months. A compromise agreement which included £60,000 damages for P's unlawful detention was agreed between the parties.

In considering the level of compensation to which P was entitled, District Judge Mort made a distinction between cases involving procedural breaches and those involving substantive breaches:

“72. Procedural breaches occur where the authority’s failure to secure authorisation for the deprivation of liberty or provide a review of the detention would have made no difference to P’s living or care arrangements.

73. Substantive breaches occur where P would not have been detained if the authority had acted lawfully. Such breaches have more serious consequences for P.”

This case involved a substantive breach of P’s rights. If it hadn’t been the unlawful actions of the local authority, P would have continued to live at home with support arrangements in place. The deprivation of P’s liberty during given the late stage of his life compounded its poignancy.

District Judge Mort considered two previous cases involving damages for unlawful detention. In *London Borough of Hillingdon v Neary* [2011] EWHC 3522 (COP), a period of 12 months’ detention resulted in an award of £35,000 (no judgment being made public to accompany the consent order approved by the High Court). In [A Local Authority v Mr and Mrs D](#) [2013] EWCOP B34, District Judge Mainwaring-Taylor approved an award of £15,000 (plus costs) to Mrs D for a period of 4 months unlawful detention (together with £12,500 to her husband, together with costs). In *Mr and Mrs D*, District Judge Mainwaring-Taylor had noted that this was towards the lower end of the range if the award in the *Neary* case was taken as the bench mark.

Taking these cases into account, District Judge Mort gave an indication that the level of damages for the unlawful deprivation of an incapacitated person’s liberty was between £3,000 and £4,000 per month.

District Judge Mort was also invited to consider the other terms of the compromise agreement, which included:

- A declaration that the Council unlawfully deprived P of his liberty for period of approximately 13 months;
- The Council would waive any fees payable by P to the care home in which he was detained for the period of his detention (a sum of between £23,000 and £25,000);
- The Council to exclude P’s damages award from means testing in relation to P being required to pay a contribution to his community care costs;
- The payment of all P’s costs, to be assessed on the standard basis.

The judge approved the compromise agreement as representing a fair and reasonable award so far as a monetary award can compensate him for the loss of his liberty in the circumstances.

Comment

There are currently very few public judgments giving guidance as to the level of damages to be awarded for unlawful deprivations of liberty. This judgment is a welcome addition to the sparse examples available. The

guideline of £3,000 to £4,000 per month is a useful indicator for COP practitioners seeking to advise on quantum of damages likely to be recovered for an unlawful deprivation of liberty and for parties seeking to agree a compromise agreement where liability is admitted.

In this case, the approved award appears to lie at the higher end of the spectrum. P was unlawfully deprived of his liberty for a minimum of 13 months (which was conceded by the local authority) and arguably for 17 months. The £60,000 award would place the level of damages at between £3,500 and £4,600 per month. There were a number of factors which made this case particularly serious. P was removed from his home of 50 years and locked in a dementia unit against his wishes. Subsequent assessments concluded that P had capacity to return home and should be assisted to return home but were ignored by the local authority. Moreover, the local authority maintained their resolute opposition to P returning home until the last possible moment. The local authority's actions were – entirely understandably on the basis of the judgment – described by the judge as “reprehensible,” “substandard” and “inexcusable.”

When informality is inappropriate

Summary

The Local Government Ombudsman [report](#) into the case of Mr N, a complaint against Cambridgeshire County Council makes, yet again, depressing reading. We take what follows from the summary on the LGO website, but the report should be read in full, and indeed used as a case study for training.

An elderly man, Mr N, who had been diagnosed with dementia in 2011, lived with his wife at home until April 2013, attending a day centre one day a week. His needs began to increase substantially at the start of 2013, and by June 2013 his case was a high priority. The LGO's report sets out in admirable detail the entirely inadequate process of assessment as regards whether he should be placed in a nursing home (and if, so which) that ensued thereafter.

In consequence of this, Mr N was moved to a nursing home some 14 miles away from his marital home after his needs increased considerably in June 2013, against both the man and his family's wishes, who wanted him closer to home. This meant that his wife had to take two buses there and back to visit him.

The man's wife, daughter and brother were told the police would be called if they tried to move him from the home. Because the man and his family made repeated requests for him to return home, the Council's Deprivation of Liberty Safeguarding (DoLs) team should have been contacted, but never were.

Social workers completed a Mental Capacity and Best Interest Decision Record in July 2013, but the LGO found that the record was incomplete, failed to include some formal requirements and did not go into adequate detail to explain the reasoning behind the decision.

Following the investigation, the LGO found that the Council failed to consider properly whether the man's placement in the nursing home amounted to a deprivation of liberty. The LGO also noted that Mr N's

family were never given information about how they could appeal [sic] the decision to the Court of Protection.

The LGO asked Cambridgeshire County Council to apologise to the family to acknowledge the impact the faults have had on them and assure them that the situation will not happen again. The LGO also recommended that the Council should also provide refresher training for social care staff on mental capacity assessments, best interest decisions, deprivation of liberty, and the role of the Court of Protection and how to advise people of their rights. This may involve the council reviewing the current status of residents who may be deprived of their liberty without proper authorisation. It finally recommended that the Council should pay the family £750 in recognition of the distress and time and trouble they had been put to in making the complaint.

Comment

Reading this report alongside the judgment in *Essex County Council v RF*, it is difficult not to have the impression that Cambridgeshire County Council escaped very lightly, at least in financial terms. This was undoubtedly a *Neary* case, and the lawfulness of the deprivation of Mr N liberty is – at best – highly questionable (as was the lawfulness of the undoubted interference with his Article 8 rights, and those of his wife).

For present purposes, we want to pick out the following points of particular wider importance:

1. The LGO was highly critical of the informality of the decision-making process (both as to capacity and best interests) an informality that the Council continued to defend even during the course of the LGO investigation. The LGO emphasised the importance of complying not merely with the principles of the MCA 2005 but also the provisions of the Code of Practice in undertaking a structured approach to these vital questions;
2. The LGO rejected the Council's contention that it was the care home's responsibility to notify their DOL team of the potential deprivation of liberty (which the Council considered only arose where the person continued to express a desire to return home). The LGO noted that "*under s25(7) of the Local Government Act 1974 [relating to authorities under investigation by the LGO], any action taken by the home is considered to be taken on behalf of the Council and in the exercise of its functions. Furthermore, the DoL Code is clear that 'if a healthcare or social care professional thinks that an authorisation is needed, they should inform the managing authority.'* In this case, the Council was acutely aware of the circumstances of and objections to the placement."
3. The LGO was highly critical of the Council's – acknowledged – failure to give information to Mrs N about her options in terms of taking matters to the Court of Protection;
4. The LGO was also at pains to point out the importance of the Choice of Accommodation Directions even in a case said to be of urgency, and criticised the Council by reference to these Directions for its

failure both to give sufficient consideration to closer options and to give written reasons for rejecting them.

In part because we are getting somewhat depressed ourselves by reporting upon cases such as these (especially ones where the excuse of the novelty of the MCA 2005 cannot properly be given), we would like to invite our readers to submit examples of good practice in circumstances such as these that we can highlight in a subsequent newsletter. They can, of course, be anonymous.

New DOLS forms

An Adass DoLS project group, led by Lorraine Currie, has carried out the unenviable task of simplifying the DoLS forms. From 32 to now 13, the new versions, available [here](#), will hopefully reduce the bureaucracy surrounding the protective regime whilst improving the quality of the assessments. Explanatory Guidance to accompany the forms is due out shortly.

The impact of *Cheshire West*

The latest statistics [reveal](#) that DoLS applications reached their highest level in October to December 2014. And this is only on the basis of an 83% response rate from supervisory bodies in England: the final number will be higher.

With the shortfall in best interests assessors, the government has [approved](#) a scheme which enables the College of Social Work to vet and approve BIA training courses on a temporary basis, pending the outcome of the Law Commission's project to review the law in this area.

CQC Report on DOLS in 2013-4 (and over the past 5 years)

The CQC [published](#) on 26 January its fifth annual report on the use of the DOLS regime, covering the period 2013-4. It also takes the opportunity to reflect upon the past years since the regime came into force, as well as reporting specifically upon practice in 2013-4.

The report paints a distinctly depressing picture in many ways, although there are rays of sunshine, in particular in the examples that are given from practice where DOLS has been used to bring about positive change in a care regime.

The headline statistics as regards the impact of the *Cheshire West* decision (taken from an analysis of the [HSCIC figures](#)) are that the number of applications reported by most (but not all) local authorities in the first two quarters of 2014/15 (55,129) already greatly exceeds the number made by all local authorities in 2013/14 (13,220). At the end of September 2014, there were 19,429 applications where a decision was still to be made, while at the end of 2013/14 there were just 359 where a decision was still to be made.

We identify a few key points from the report below.

As the CQC notes:

“It is both striking and concerning that we have seen the same themes recurring in our reports over the last five years.

- *From 2009 until the Supreme Court judgement on deprivation of liberty in March 2014, there have been consistently low numbers of Deprivation of Liberty Safeguards applications compared to the 21,000 initially predicted by the Government. This could suggest, as we highlighted in last year’s report, that providers were not recognising when someone was being deprived of their liberty, so not seeking authorization*
- *We continued to see regional variations in application rates. This could indicate a lack of understanding about the Mental Capacity Act (MCA). Over the last five years we have also found a wide variation in practice and training in health and social care organisations.*
- *Lack of understanding about, and awareness of, the wider MCA continues to be a barrier to good practice.*
- *Providers are failing to notify CQC when they apply for authorisation to deprive someone of their liberty [as required by Regulation 18 (4A) (4B) and (5) of the Care Quality Commission (Registration) Regulations 2009; these Regulations are not affected by the introduction of the new fundamental standards]. Since 2011, we have received notifications for just 37% of applications to supervisory bodies. This is unacceptable and we will be taking action where this problem persists.”*

In respect of 6 areas, the rate of under-reporting would appear to exceed 80% for 2013-4, which is frankly astonishing. Given regional variations in applications for DOLS, it may well be that a partial explanation in respect of areas which appear to do better as regards under-reporting may not be entirely positive – it may be that providers are simply not applying in the first place.

The CQC draws attention to a number of developments, including the [Chief Coroner’s Guidance](#) issued in December 2014. The CQC does not directly comment upon the accuracy of the Guidance, which suggests that inquests are only required where there is an authorisation in place, but notes that:

“Part of the challenge in responding to the Supreme Court judgement is in raising awareness with our partners of the true nature of the Deprivation of Liberty Safeguards. For example, it is not the authorisation that causes a deprivation of liberty, rather the authorisation makes sure that any deprivation of liberty is in the best interests of the individual concerned, can be challenged, and will be regularly reviewed.

We recommend that local authority leads for the MCA and Deprivation of Liberty Safeguards create good working relationships with their local coroners. This is likely to be of great benefit to ensure that a consistent message is given to providers and so that they can work together in dealing with the considerable extra activity as a result of the Supreme Court judgement.” (emphasis in original)

Another particularly important – and depressing – area where improvement is required is in relation to the role of IMCAs challenging authorisations. As the CQC notes:

“Under section 39D of the MCA, an IMCA must be offered to the person or their unpaid RPR if they, or the local authority, feel they need support to exercise their rights and to challenge an authorisation that has already been granted. Some unpaid representatives also need support to fulfil their role and can ask the local authority to provide an IMCA to support them when required.

Local authorities told us of a range of practice in IMCA referrals, with some saying they would only instruct an IMCA if recommended by a best interests assessor. Even where there was disagreement between the person and the representative, some said they did not instruct an IMCA. This practice is to be deplored as if the RPR does not help them to challenge an authorisation, it is hard to see how many people subject to an authorisation can exercise their right to challenge it.

These differences in practice echo the findings of the most recent Department of Health report into IMCA use. These found that about a third of local authorities had not made a single section 39D referral all year, including some with over 100 Deprivation of Liberty Safeguards authorisations. The report also showed that there had been a 17% reduction in referrals for a section 39D IMCA (to help challenge an authorisation). Twenty-three percent of IMCAs in our survey said that they had been involved in appealing against an authorisation to the Court of Protection and 46% had been asked to act as a litigation friend.

IMCAs found the process lengthy and dauntingly complex. They felt that there was generally a lack of guidance for IMCAs about taking cases to the Court of Protection and because of this there were unnecessary delays. They felt that they would benefit from clear guidance about the process and how it should be used. We note that even before the rise in requests for authorisation some local authorities were not always providing the support of an IMCA or promoting their vital role in supporting the person to exercise their rights.

We recommend that local authorities and IMCA providers work together to enable IMCAs to carry out their role to support the person or unpaid RPR to challenge an authorisation to the Court of Protection when it is the person’s wish, whatever the IMCA’s views on the rightness of the authorisation.” (emphasis in original)

The CQC analysed what enforcement actions we had taken during 2013/14 with providers who were not complying with the regulations associated with the MCA and Deprivation of Liberty Safeguards. With the caveat that the statistics may not represent the entirety of the enforcement activity because of difficulties with variation in reporting by inspectors on the MCA and DOLS (a problem that itself requires work), the CQC noted that:

- Over half (19 out of 34) of all enforcement action taken under Regulation 18 (Outcome 2 – consent) contained some evidence that the provider had not complied with the MCA, including the Deprivation of Liberty Safeguards.
- Almost a quarter (23 out of 94) of all enforcement action taken under Regulation 11 (Outcome 7 – safeguarding) contained some evidence that the provider had not complied specifically with the Deprivation of Liberty Safeguards.

The CQC “also found some common themes emerging:

- *People’s capacity to make a specific decision was not being assessed.*
- *Decisions were being made on behalf of people without following the best interests decision making process.*
- *Relatives were asked to give consent without legal authority.*
- *The person and other people concerned with the person’s care were not always being consulted when making best interest decisions.*
- *There were examples of unlawful use of restraint and unauthorised deprivation of liberty.*
- *Lack of staff training in the MCA including the Deprivation of Liberty Safeguards.”*

The CQC summarised its recommendations thus:

- Local authorities should continue to consider using advocacy services for all those subject to the Deprivation of Liberty Safeguards.
- Local authority leads for the MCA and Deprivation of Liberty Safeguards should create good working relationships with their local coroners. *“This is likely to be of great benefit to ensure that a consistent message is given to providers and that they can work together in dealing with the considerable extra activity as a result of the Supreme Court judgement.”*
- Local authorities and Independent Mental Capacity Advocacy (IMCA) providers should work together to enable IMCAs to support the person or their unpaid relevant person’s representative to challenge an authorisation to the Court of Protection when it is the person’s wish, whatever the IMCA’s views on the rightness of the authorisation.
- Hospitals and care homes should continue to request authorisations when they think that people are being deprived of their liberty based on the new ‘acid test’. *“However, they must also continue, within the provisions of the wider MCA, to seek less restrictive options to meet the needs of each person.”*

Use of the Court of Protection’s welfare jurisdiction by supervisory bodies in England and Wales

With grateful thanks to Lucy Series, we reproduced here with permission the summary of the report that Cardiff University Law School have just published into the use of the CoP’s welfare jurisdiction by supervisory bodies in England and Wales. The report, funded by the Nuffield Foundation, is available in full [here](#), and an article based upon it will appear in a forthcoming issue of the Elder Law Journal. We would

thoroughly recommend reading it as an evidence base against which to test urban legends about the use of the CoP in welfare cases and as a basis upon which to consider wider reforms to the procedures of the CoP in terms of the management of the cost and complexity of welfare proceedings.

“The Court of Protection (CoP) was established by the Mental Capacity Act 2005 (MCA) to adjudicate on issues relating to mental capacity and best interests. It can also determine questions relating to MCA deprivation of liberty safeguards (DoLS) authorisations issued by supervisory bodies, and authorize deprivation of liberty in hospitals and care settings. We requested information from local authorities about their involvement in CoP welfare cases during 2013-14 using the Freedom of Information Act 2000.

Key findings:

- *81% of authorities in England reported at least one welfare case, the average number for a local authority in England was three and 4% of authorities had been involved in more than ten.*
- *In Wales, 56% of local authorities reported at least one welfare case, the average number was one and none had been involved in more than three.*
- *Variations in the number of cases between local authorities could not be explained by population size alone, and neither could lower patterns of use of the court in Wales.*
- *Almost three quarters of applications to the court were made by local authorities; applications by the relevant person, their family or an advocate were rarer.*
- *Applications from the relevant person or an advocate were more common where the relevant person was subject to a deprivation of liberty authorization under Schedule A1 to the MCA 2005.*
- *In 62% of cases the relevant person was deprived of their liberty, either by an authorization under Schedule A1 (25%), by order of the CoP (43%) or both (15%).*
- *Half of all completed cases reported in our study lasted nine months or longer; half of all ongoing cases lasted twelve months or longer.*
- *Some cases had lasted as long as seven years; these are likely to be situations where a person is deprived of their liberty but its continuation must be regularly authorized by a court because it is in a setting where the DoLS administrative procedures do not apply.*
- *Half of all cases reported in our study were estimated to have cost local authorities £8,881 or more, but this figure is likely to be an under-estimate. One case was estimated to have cost a local authority £250,000.*
- *The greatest cost to a local authority was the time of in-house legal staff - costing £8,150 or more. The next greatest cost was fees for counsel, with half costing £3,198 or more, followed by the local authorities' contributions to independent expert reports, with half costing £1,357 or more.*

Recommendations and conclusions

Those responsible for monitoring health and social care in general, and the deprivation of liberty safeguards in particular, should ensure that authorities understand and comply with obligations to refer cases to the CoP in line with legal guidance.

The high cost of CoP proceedings is a matter of serious concern, especially in light of the ruling in Cheshire West which is predicted to lead to an exponential increase in applications in 2014-15.

The underlying reasons for the high cost and lengthy duration of CoP proceedings requires urgent investigation.”

Inquest into the death of Nico Reed

With thanks to Yogi Amin of Irwin Mitchell for bringing this case to our attention, we note the important conclusion of the Coroner in the inquest into the death of Nico Reed, a young man who died in supported living accommodation privately funded under the auspices of Southern Health NHS Foundation Trust.

The Senior Coroner for Oxfordshire ruled that Article 2 of the European Convention on Human Rights was engaged on facts of Nico’s case. As the press release prepared by Mencap at the time indicates:

“This inquest is believed to be one of the first in which a Coroner has relied upon the Cheshire West Supreme Court judgment from earlier this year to find that Article 2 of the European Convention on Human Rights (the right to life) applies. This reflects the fact that although Nico was in supported living he was in effect under the care of the state. It clarifies the obligations on those caring for vulnerable adults with learning disabilities to take steps to protect the right to life of those in their care.”

Short Note: trying to exclude the OPG and COP

Can a LPA have provisions limiting the rights of the OPG and COP?

Senior Judge Lush considered this question in *The Public Guardian v VT* [\[2014\] EWCOP 52](#). In that case the Public Guardian had applied for the revocation of a LPA (it was duly revoked). Senior Judge Lush remarked that a clause in the deed that the donee had inserted that stated, "I do not want any public authority or body or their employees or contractors to handle my money, financial affairs or property at any time and I do not want them to obtain any information about these at any time" should have been severed pursuant to paragraph 11 of Schedule 1 to the MCA 2005 before the LPA was registered. Senior Judge Lush held that the clause was contrary to public policy because it sought to stifle any investigation into the donee's misconduct, prejudice the administration of justice and oust the jurisdiction of the court.

Short Note: CFAs and incapacity

In *Blankley v Central Manchester and Manchester University Children's Hospitals NHS Trust* Phillips J at held ([\[2014\] EWHC 168 \(QB\)](#)) that supervening incapacity of the client did not frustrate a solicitor's retainer so that when a deputy was appointed, the retainer (in that case a conditional fee agreement) continued. See our Short Note in the December 2014 [Newsletter](#) (at page 2)

The Court of Appeal dismissed the defendant's appeal [\[2015\] EWCA Civ 18](#). The Court of Appeal did so on (1) the narrow ground of the precise wording of the CFA that had been entered into; (2) the slightly wider ground that, on the facts of the case, the claimant and her solicitors must have intended that in a repeat of her incapacity, the retainer would continue until a deputy was appointed. The Court of Appeal also made clear that they agreed with the entirety of the reasoning of Phillips J. Obiter, the Court of Appeal also stated that it was time for a re-examination of the principle in *Yonge v Toynbee* [1910] 1 KB 215 (to the effect that an agent's authority is terminated by the supervening incapacity of the principal exposing the agent to potential liability for an action for breach of warranty of authority).

Costs against the OPG?

The Public Guardian v CT and EY [\[2014\] EWCOP 51](#) (Senior Judge Lush)

COP jurisdiction and powers - Costs

Summary

Rules 156 and 159 Court of Protection Rules 2007 provide for the general rule in property and affairs cases that costs come from P's estate with rule 159 stating the matters that may lead to a departure from that rule (principally conduct).

In this case, Senior Judge Lush considered those rules and the guidance in [G v E \(Costs\)](#) [2010] EWHC 3385 (Fam) 2010 COPLR (Con Vol) 454 in determining the proper costs order to make on the dismissal of an application the Public Guardian brought to determine the capacity of CT.

CT suffered a stroke. Upon discharge from hospital in November 2013 he went to live with his daughter EY. He executed a LPA in her favour on 18 June 2013 and an application to register it was made the same day and it was duly registered.

CT's son raised concerns with the OPG and the local authority's social services also had safeguarding concerns. In January 2014, the OPG commissioned a Court of Protection Special Visitor to visit CT but EY would not let him examine CT.

Hence the application. Eventually, the parties (EY and the Public Guardian) agreed that Professor Jacoby should prepare a capacity report (EY vehemently stating that CT had capacity and that she had not exercised her powers under the LPA).

Professor Jacoby concluded that CT probably suffered from vascular dementia and had periods of delirium when he did not have capacity but other periods when he did. He emphasised that CT needed disinterested advice, into which emphasis the Senior Judge read that EY was not giving such advice.

EY ambitiously asked for her costs against the OPG on the grounds that the OPG had wrongly assumed the CT did not have capacity when he should have assumed to the contrary, that he did not communicate with CT direct and had failed to act fairly in the proceedings. The Senior Judge rejected all the criticisms holding that the OPG had ample grounds for concern and that in fact it had been EY who had behaved poorly characterising her attitude as "aggressive and disingenuous."

In those circumstances, Senior Judge Lush ordered that EY should bear her own costs rather than being able to recover them from CT's estate.

Comment

This is of some note as the first reported case in which costs have been sought against the OPG. It is perhaps noteworthy that Senior Judge Lush – rightly – did not exclude the possibility that a costs order might be made against the OPG; on the facts of the case, it is no surprise that the application by EY failed.

The case is also of some interest for the approach adopted by Professor Jacoby to capacity, and the repeated references of a them which (Senior Judge Lush) "*like Ravel's Boléro, rises in a continuous crescendo,*" namely CT's need for disinterested advice in order to assist him in making capacitous decisions. This was very clearly a case where questions of capacity and influence were extremely closely entwined, and might, again, serve as a cautionary tale as we seek to move closer to the CRPD vision of supported decision-making. If we do get closer to such a model, identifying when support shades into coercion will become ever more important – and ever more subtle as an exercise.

Relevance of resolution 1859 of 25 January 2012 of the Parliamentary Assembly of the Council of Europe on protecting human rights and dignity by respecting the previously expressed wishes of patients

Senior Judge Lush took this resolution into account when deciding whether to retain one of two attorneys when revoking the attorneyship of the other on grounds of unsuitability.

In Re RG [\[2015\] EWCOP 2](#) Senior Judge Lush dealt with an application the Public Guardian made for the revocation of the attorneyship of one of two joint and several attorneys under an EPA.

The attorneys were brother and sister and had fallen out. P was their step father. The brother excluded his sister from the attorneyship and refused, despite court orders, to keep or give accounts. The Senior Judge had little difficulty in deciding to revoke his attorneyship.

Senior Judge Lush then had to consider whether to accede to the brother's contention that the attorneyship should be revoked in its entirety and a panel deputy appointed.

Senior Judge Lush decided to continue with the sister's sole attorneyship despite the inter sibling hostility and the fact that the brother still lived in P's house with P living in a nearby nursing home. Factors that swayed him were that appointing a deputy would be more restrictive and expensive and that the Public Guardian was confident in the sister's ability to discharge her functions.

The judge also considered that his order would better coincide with P's previously expressed wishes (in the EPA) and therefore comply with resolution 1859.

The resolution can be seen in full [here](#). It deals mainly with advance expressions of wishes regarding medical decisions.

Fundamental Review of the Supervision of Court Appointed Deputies by the Public Guardian

In October 2012, Parliament sought a review into the way in which the Public Guardian supervises deputies. The review was published in December 2014 and can be found [here](#). The review was prompted because:

- Customers and stakeholders described some dissatisfaction with the standard of OPG's customer service
- Some Members of Parliament were concerned at the charges being levied by professional deputies in specific cases
- The supervision caseload had more than doubled since the commencement of the MCA and growth is predicted to continue

- Digital technology opportunities became available
- A new Public Guardian provided the vision to address the customer and business imperatives

The review has prompted a number of changes and others are planned.

The most fundamental change that has taken place is the move to supervising according to deputy type, so that staff may specialise in one of the deputy types: lay, local authority or professional/ panel.

In order to provide better control of professional deputy charges, the OPG will implement several new measures, such as requiring annual plans, with work and cost estimates, which can be scrutinised both before-hand and after the fact, and a comparison made.

The OPG maintains a panel of deputies to whom the court can refer any last resort cases, i.e. where there is no-one who is willing, suitable, or able to act as deputy. The OPG aims to include a wider diversity of organisation types on the panel so that there are more options when considering how to protect people lacking capacity.

There will be a move towards digital reporting to lessen the paper burden. There will be a pilot scheme in 2015. There will be a consultation about fees later this year.

Short Note: Declarations and contempt

In *MASM v MMAM & Ors*, [\[2015\] EWCOP 3](#), Hayden J was required to determine the legal status of declaratory orders in the Court of Protection and the consequences, if any, for deliberate defiance of them, in circumstances where P had been removed from the jurisdiction by a party to proceedings despite a court order declaring that it was in P's interests to remain in a residential care home in this country.

Hayden J held that acting in a way that is not compatible with a best interests declaration, rather than a court order or injunction, does not expose an individual to contempt proceedings:

48. Ultimately, a declaration of best interests connotes the superlative or extreme quality of welfare options. It by no means follows automatically that an alternative course of action to that determined in the Declaration, is contrary to an individual's welfare. There may, in simple terms, be a 'second best' option. For this reason, such a declaration cannot be of the same complexion as a Court Order. It lacks both the necessary clarity and fails to carry any element of mandatory imperative...

49. Moreover, though my order of 20th February 2015 was expressed to have been made pursuant to section 16, it was drafted in declaratory terms. As such, for the reasons I have set out above, it cannot, in my judgement, trigger contempt proceedings. There cannot be 'defiance' of a 'declaration' nor can there be an 'enforcement' of one. A declaration is ultimately no more than a formal, explicit statement or announcement.

Comment

This is but an initial comment upon this case, because the question of whether (and when) the Court of Protection should grant declarations is under consideration by the Court of Appeal in *ACCG v MN*, and we hope by the time of the next Newsletter to have judgment in that case (the hearing having been in December), and we will then consider the two cases together.

The status of a best interests declaration was raised but not conclusively answered as long ago as *A v A Health Authority* [\[2002\] EWHC 18 \(Fam/Admin\)](#), when Munby J (as he then was) noted that 'unless carefully qualified by suitable language, any declaration the court grants...will in principle be conclusive as to the legal rights and presumably also the legal obligations of the...authorities' but did not decide whether an unqualified declaration in itself would have coercive effect. Hayden's J judgment, which includes an extensive review of authorities outside the Court of Protection, is clear that contempt proceedings cannot be brought in relation to acts that go against a declaration. Careful thought will need to be given to the wording of orders in cases where there is a risk that attempts will be made to thwart the implementation of a best interests declaration.

We should also note that this case could have gone a very different way – there must, at a minimum, have been a very good argument that the Court of Protection retained jurisdiction over P given the fact of his removal from the country in the face of the Court's decision as to where he should reside. In principle, therefore, the local authority could have sought injunctive or other relief directed to bringing about the return of P to this jurisdiction (see, by analogy, *Re PO* [\[2013\] EWCOP 3932](#), *Re HM* [\[2010\] FLR 1057](#), the discussion in Alex's paper [here](#), and – for the enthusiasts – the new book on the International Protection of

Adults co-written by Alex to be [published](#) imminently by OUP). It is not on the face of the judgment clear why the local authority did not do so. It may – speculating – be in part because, in practical terms, absent the cooperation of MASM’s grandson in returning her, that would have required the cooperation of the Saudi authorities, which (in the children context) is sadly not often forthcoming. We would very much hope, though, that the message is not taken from this judgment that the Court of Protection necessarily loses any jurisdiction over an incapacitated individual improperly removed from England and Wales: that is very far from the case.

A rare contest as to permission

LB Hillingdon v PS and CS ([unreported](#), 4 December 2014) (District Judge Marin)

Practice and Procedure – Other

Summary

The dispute in this case concerned whether it was in PS’s best interests to have no contact with a friend, M. The local authority had become involved through its safeguarding procedures, and had attempted to resolve the dispute without recourse to the court. The local authority had concluded that it was in PS’s interests not to have any contact with M, a view that was recommended by PS’s doctor. M did not agree with that view, and the local authority issued proceedings so that the question of contact to be resolved. PS’s son and PS’s attorneys under an Enduring Power of Attorney opposed the grant of permission to the local authority, arguing that:

- the local authority had no role in PS’s life, and since M had not issued an application, it had no standing to bring proceedings;
- the application was an abuse of process, since the local authority was attempting to use the Court of Protection to insure its own best interests decision;
- that there was no benefit to P of the application, and
- that it was a disproportionate use of P’s funds.

District Judge Marin rejected these arguments and granted permission to the local authority to bring proceedings, holding that it had a sufficient connection with P for the purposes of s.50(3)(a) MCA 2005, and that there was obviously a dispute which required resolution. It was to P’s benefit for that dispute to be resolved, but that should be done in a cost-effective way, through the filing of witness statements, no fact-finding hearing, and the instruction of a Court Visitor to report on P’s wishes and feelings, followed by a final hearing.

Comment

This decision is of interest in view of the very small number of judgments addressing the question of

permission (the only other one of which we are aware being [NK v VW](#)). It is perhaps unsurprising that the court would grant permission where there was an unresolved dispute as to whether P could have contact with a long-standing friend. One can sympathise with the concerns of P's son and attorneys as to the likely costs of proceedings, particularly where the only contact in fact sought by M was a weekly social visit – but, as DJ Marin observed, there was an obvious way for those costs to be avoided – through further discussion and negotiation.

A litigation friend is not a guardian

Re M (Republic of Ireland) (Child's Objections)(Joinder of Children as Parties to Appeal) [\[2015\] EWCA Civ 26](#)
(Court of Appeal (Richards, Black and Ryder LJ))

Practice and Procedure – Other

Summary

This case concerning the 1980 Child Abduction convention is of note for the discussion of the Court of Appeal as to the role of a litigation friend when acting for a child. The discussion was framed in the context of the FPR 2010, but is of potentially wider application, including to the Court of Protection.

At paragraph 153, Black LJ said (in a statement that may possibly have been intended to be drily tongue in cheek): “[t]he functions of a litigation friend are no doubt fully understood in the usual civil context in which the system operates although the researches of counsel did not produce any authorities to enlighten us further about how they actually carry out their functions or as to the principles that the court should apply when deciding whether to order that a litigation friend is not necessary.”

Noting the absence of guidance as to how a litigation friend should proceed when acting on a behalf of a child in 1980 Convention cases, Black LJ laid down a statement of seemingly wider principle:

“155. Children need to know that their views are being listened to and that their particular concerns are not being lost in the argument between their parents but it must be recognised that direct participation in proceedings can be harmful for children. As Lord Wilson said in §48 of [Re LC](#), “[t]he intrusion of the children into the forensic arena....can prove very damaging to family relationships even in the long term and definitely affects their interests”. I therefore contemplate that it may be necessary for a litigation friend to guide and regulate the child's own participation in the proceedings, just as a guardian would. He or she will no doubt determine which documents filed in the proceedings should be shown to the child and take decisions, in consultation with the child, about whether the child should attend the court hearing. In the very unlikely event that an intractable issue arises between the litigation friend and the child, there may be no alternative but to ask the court to give directions, but I would expect such a situation to be extremely rare. What I do not think a litigation friend can do is provide a welfare assessment for the court in relation to the child as a guardian would do. However, where the litigation friend is the child's solicitor, as I anticipate will be so in the vast majority of cases, he or she will no doubt assess the case and guide and support the child in their approach to the litigation, as any solicitor would do for an adult client.”

Comment

A guardian cannot be appointed to act for a child in proceedings in the Court of Protection (or, indeed, under the CPR, save, possibly in the circumstances considered in *Re M*, where a child had not been joined at first instance to proceedings under the FPR but was to be joined on appeal, where Black LJ contemplated that such might potentially be allowed by CPR r.52.10(1)). However, the distinction between a litigation friend and a guardian outlined by Black LJ is of some importance in outlining what a litigation friend cannot do when acting on behalf of a child under the CPR – and, it is suggested, the COPR.

Whether it can also be said that a litigation friend acting on behalf of either P or an adult protected party before the Court of Protection should be guided by the same principles set down by Black LJ at paragraph 155 is a rather different question. We suggest, though, that whatever else a litigation friend can and cannot do, it is clear that they cannot provide a welfare assessment for the court in relation to P as if they were the guardian appointed for a child joined to proceedings under the FPR.

We would suggest that a careful eye is kept by practitioners on the question of the role of litigation friends in light of:

1. the appeal in the *Re X* litigation to be heard in the middle of February before the Court of Appeal; and
2. the deliberations of the Court of Protection Rules Committee on these (and other topics) which should bear fruit in the very near future now that Royal Assent to the Criminal Justice and Courts Bill is imminent, resolving, inter alia, a technical problem with appeal routes from decisions before the Court of Protection.

Cross-examination and the unrepresented litigant

Re K and H (Children: unrepresented father: cross-examination of child) [\[2015\] EWFC 1](#) (HHJ Bellamy)

Practice and Procedure – Other

Summary

This judgment concerned the provision of legal aid for legal representation limited to cross-examination.

The proceedings related to M and F's two children, K and H. M's other daughter (Y) alleged that she had been sexually abused by her F. F denied those allegations. The court needed to consider F's future contact with K and H. M was legally aided whereas F was a litigant in person because F was financially ineligible for legal aid. There were two issues in respect of F's representation:

1. Who should cross-examine Y – the victim of F's alleged sexual abuse?

2. Did the court have power to order Her Majesty's Courts and Tribunals Service (HMCTS) to pay for legal representation for F limited to cross-examination?

The judge considered that it would be wholly inappropriate for F to cross-examine Y himself. Y's allegations of sexual abuse against F were pivotal to determining the welfare issues. Where a party is unrepresented, HHJ Bellamy held, the court has a duty to assist that party and the court will itself put questions to a witness if it is satisfied that it is 'necessary and appropriate' to do so. It was not appropriate for the judge, who must determine the facts, to cross-examine the key witness upon the reliability of their evidence on which the fact finding exercise so heavily depends. Cross-examination by the judge would be incompatible with the Art 6 and 8 ECHR rights of the respective participants.

The judge held that whilst the legal aid scheme provided a single, comprehensive, unitary code for the funding of litigation, the comprehensive nature of the scheme did not preclude the State from providing, or the courts from requiring the State to provide, aspects of 'representation' where it was necessary, appropriate and proportionate in order to safeguard Convention rights. The judge set out the following principles for cross-examination where the litigant is in person:

"74 The following principles of approach emerge from the discussion above:

- (a) It is the first duty of judges sitting in the Family Court to ensure that proceedings are conducted fairly (FPR 2010 rule 1.1). Failure to do so may lead to the court itself acting unlawfully (s.6(1) of the Human Rights Act 1998).*
- (b) Where a party is unrepresented (whether because legal aid is not available or by choice) and is 'unable to examine or cross-examine a witness effectively' the court has a duty to assist that party (s.31G(6) of the Matrimonial and Family Proceedings Act 1984). This requires the court 'to put, or cause to be put' questions to a witness.*
- (c) The court will itself put questions to a witness if it is satisfied that it is 'necessary and appropriate' to do so. It will not normally be appropriate to do so when the case involves issues which are grave and/or forensically complex.*
- (d) Where the court is satisfied that it is not 'appropriate' for the judge to put questions to an alleged victim, the court must arrange for (cause) a legal representative to be appointed to put those questions.*
- (e) The court may direct that the costs of the legal representative be borne by HMCTS.*
- (f) The court may nominate the legal representative who is to be appointed to undertake that task.*
- (g) The extent of the work to be undertaken by a legal representative so appointed should be made clear at the outset and should be proportionate.*
- (h) In those limited cases where legal aid is still available in private law Children Act proceedings there is a detailed regulatory framework governing the calculation of costs payable to (claimable by) a solicitor for undertaking such work. The fees payable by the Legal Aid Agency are less than a solicitor might charge a*

privately paying client for doing the same work. That has always been so. I can see no cogent argument for suggesting that a legal representative appointed by the court should be entitled to a higher rate of remuneration than if that work were undertaken under the legal aid scheme.”

Comment

The approach set out in this judgment is potentially welcome news for litigants before the Court of Protection suffering under the heavy burden of continued cuts to legal aid. Although limited to ‘an order of last resort’, the judge was absolutely clear that, in his judgment, the court possessed the power to direct that the cost of certain activities should be borne by HMCTS.

The court could therefore direct that funding be provided for activities that fell within the scope of legal aid, even where the litigant was in fact ineligible for legal aid. The test was whether the work is “necessary, appropriate and proportionate” in order to safeguard Convention rights.

The question for those appearing before the Court of Protection, in which issues of similar gravity of those before HHJ Bellamy may well arise, is whether that the principles derived in this case can be applied directly notwithstanding the absence of an equivalent provision to s.31G(6) Matrimonial and Family Proceedings Act 1984. Given that HHJ Bellamy expressly – and right – framed the duty by reference to the Human Rights Act 1998 and the ECHR, logic suggests that the same principles should also be applicable, and that practitioners and judges in the Court of Protection should be astute to consider when such an order would be appropriate.

Short note: the LAA must shape up

In *Re D (No 2)* [\[2015\] EWFC 2](#) (a saga that we have reported upon previously), Sir James Munby P (sitting as the President of the Family Division) had further strong words about the delay in the process for obtaining legal aid. Although this is not a COP case, the same concerns will apply equally to COP proceedings.

The parents of D were facing care proceedings from the local authority to decide whether D should live with his parents or family or be adopted. D was removed from his parents on 25 April 2014 and because of ongoing delays in obtaining legal aid, the final hearing would not take place until 9 February 2015.

D’s mother suffered from learning disabilities and D’s father lacked capacity. The complexity of the process involved in obtaining legal aid for D’s parents was manifestly beyond their capabilities. There was no assurance that legal aid would be in place for the final hearing and to require the parents to face the local authority’s application without proper representation would involve a breach of their rights under Articles 6 and 8 ECHR.

*“20 I have set out the parents’ legal aid position in paragraph 14 above. It will be noticed that there is, as yet, no assurance that legal aid will be in place for the final hearing. This causes me some disquiet. Whatever view may be taken as to their prospects of success at the final hearing, a matter on which I express no views whatever, though recognising, as I have earlier noted (*Re D*, para 9), that the report of the independent social worker is unfavourable to the parents, I would view with the very gravest concern any suggestion that they*

should be denied legal aid on 'merits' grounds. Given the extreme gravity of the issues at stake and their various problems and difficulties, it is, as I said before (Re D, paras 3, 31), unthinkable that the parents should have to face the local authority's application without proper representation. I repeat what I said in my earlier judgment:

'To require them to do so would be unconscionable; it would be unjust; it would involve a breach of their rights under Articles 6 and 8 of the Convention; it would be a denial of justice.'

A parent facing the permanent removal of their child must be entitled to put their case to the court, however seemingly forlorn, and that must surely be as much the right of a parent with learning disabilities (as in the case of the mother) or a parent who lacks capacity (as in the case of the father) as of any other parent. It is one of the oldest principles of our law – it goes back over 400 centuries to the earliest years of the seventeenth century – that no-one is to be condemned unheard. I trust that all involved will bear this in mind."

The President was at pains to emphasize the human element of this case and the grave issues which were at stake:

"21 This is a case about three human beings. It is a case which raises the most profound issues for each of these three people. The outcome will affect each of them for the rest of their lives. Even those of us who spend our lives in the family courts can have but a dim awareness of the agony these parents must be going through as they wait, and wait, and wait, and wait, to learn whether or not their child is to be returned to them. Yet for much of the time since their son was taken from them – for far too much of that time – the focus of the proceedings has had to be on the issue of funding, which has indeed been the primary focus of the last three hearings. The parents can be forgiven for thinking that they are trapped in a system which is neither compassionate nor even humane."

Comment

All too often, the issue of funding takes away the focus from the very serious substantive issues at stake. This judgment can (and we hope) will be read as a stern warning to the Legal Aid Agency and, more importantly, the Government to ensure that sufficient legal funding is provided in order to safeguard Convention rights. This is particularly relevant where the court is dealing with vulnerable individuals such as the mother, who was suffering from learning disabilities, and the father, who lacked capacity.

The Protection Measures Regulation

The [Protection Measures Regulation](#) (Regulation (EU) 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters) came into effect in the UK on 11 January 2015.

The Regulation enables certain protection measures made in one Member State to be applied and enforced directly in another Member State without the need for registration or a declaration of enforceability of for any 'mirror' order. These measures are, in essence, those aimed at protect individuals

where there are serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion.

The Family Procedure Rules 2010 were amended from 11 January 2015 to provide for the procedure for dealing with matters in relation to incoming and outgoing protection measures. The principal amendment is the introduction of a new Part 38. A related practice direction has also been made; see PD 38A.

Similar provisions are made in relation to protection measures in civil proceedings: see SI 2014/3299, which inserts a new Section VI in CPR Part 74.

The implementation of the Regulation is supported by regulations under s 2(2) of the European Communities Act 1972 dealing with jurisdiction and enforcement: see SI 2014/3298.

And there is also an amendment to the Family Court (Composition and Distribution of Business) Rules 2014 to cover allocation: see SI 2014/3297.

The Regulation does not apply to protection measures made in criminal proceedings, which are the subject of separate provision in an EU Directive (Directive 2011/99/EU on the European Protection Order).

It is important to note that, whilst many of the 'incoming' measures that fall within the definition of 'protection measures' could well have been made in relation to those who might fall within the scope of the Court of Protection's jurisdiction, the intention is that any steps required for enforcement of such measures should be taken before the Family Court, rather than the Court of Protection.

It is also important to note that there is now – unfortunately – a somewhat confusing overlap between 'protection measures' that fall within the scope of this Regulation, and 'protective measures' falling within the scope of Schedule 3 to the MCA 2005 (i.e. measures falling within the scope of the 2000 Hague Convention on the International Protection of Adults).

Short Note: getting creative with the inherent jurisdiction

In a case that received wide media coverage at the end of 2014, *Birmingham City Council v Sarfraz Riaz* [2014] EWHC 4247 (Fam), Keehan J granted civil injunctions under the inherent jurisdiction of the High Court to prevent any further contact or association by 10 men with a vulnerable 17 year old, AB or with any female under the age of 18 years, previously unknown to them, in a public place.

The case is significant in that it was the first time that the inherent jurisdiction had been deployed in this way; Keehan J confirming at paragraph 46 that:

“the use of the inherent jurisdiction to make injunctive orders to prevent [child sex exploitation] strikes at the heart of the parens patriae jurisdiction of the High Court. I am satisfied that none of the statutory or the ‘self imposed limits’ on the exercise of the jurisdiction prevent the court from making the orders sought by the local authority in this case.”

It will be very interesting to see whether Birmingham seek continuation of the orders made in respect of the protection of AB when she turns 18, and whether the ‘great safety net’ (*Re DL*) of the inherent jurisdiction is equally apt to be deployed in this regard in respect of those over 18.

New Mental Health Act Code of Practice

The new Mental Health Act Code of Practice has been [published](#), to come into force in April subject to Parliamentary approval.

The main changes to the 2008 version are:

- 5 new guiding principles
- new chapters on care planning, human rights, equality and health inequalities
- consideration of when to use the Mental Health Act and when to use to the Mental Capacity Act 2005 and Deprivation of Liberty Safeguards and information to support victims
- new sections on physical healthcare, blanket restrictions, duties to support patients with dementia and immigration detainees
- significantly updated chapters on the appropriate use of restrictive interventions, particularly seclusion and long-term segregation, police powers and places of safety
- further guidance on how to support children and young people, those with a learning disability or autism

We focus here on the new chapter (13) specifically on mental capacity and deprivation of liberty. The chapter title is actually slightly misleading, as it includes a useful rehearsal of the key principles of the MCA 2005 as they apply in the mental health context including such matters as the importance of the MCA 2005 in care planning.

The Code of Practice makes a heroic stab at explaining Schedule 1A, including a useful 'options grid.'

We note, though, that the Code continues to peddle the canard that, where a patient can (and must) be the subject of an authorisation either under the MCA 2005 or the MHA 1983:

"13.59 Both regimes provide appropriate procedural safeguards to ensure the rights of the person concerned are protected during their detention. Decision-makers should not therefore proceed on the basis that one regime generally provides greater safeguards than the other. However, the nature of the safeguards provided under the two regimes are different and decision-makers will wish to exercise their professional judgement in determining which safeguards are more likely to best protect the interests of the patient in the particular circumstances of each individual case."

We respectfully suggest that the first sentence of this paragraph does not stand up to close analysis, and anticipate that the day is not too far off where a claim will be made that Schedule 1A is incompatible with Article 5 and/or Article 5 in conjunction with Article 14 in light of: (1) the very differing outcomes that a patient will face depending upon whether they are deprived of their liberty under the MCA 2005 or the MHA 1983; and (2) the near impossibility of identifying in advance which route will be adopted.

New Practice Note for Mental Health Tribunals

The Law Society² has issued an updated [Practice Note](#) for those representing patients before Mental Health Tribunals. It represents a significant revision of the previous version (from 2011). For present purposes, we highlight the guidance given to those representatives who have been appointed under Rule 11(7) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (or the equivalent rules in Wales) where a patient does not have capacity to appoint a representative, but the Tribunal believes that being represented is in the patient's best interests.

As the Practice Note indicates:

Once appointed by the tribunal you have a heightened responsibility to identify and then to act in the interests of the client. The duty to act in the client's best interests is set out in Principle 1 of the SRA Code 2011 and applies to clients with or without litigation capacity. In our view the client's interest in a fair hearing to determine the lawfulness of their detention is paramount. When your client lacks litigation capacity, you will not take instructions in the same way that you would in respect of a client with capacity. Instead you must do your best to ascertain their wishes and feelings. You must give weight to the wishes that your client expresses. The closer the patient is to having capacity, the greater the weight you must give to their wishes in seeking to formulate and advance submissions on their behalf. Nonetheless, you remain under the same duty to the

² Full disclosure, Alex is a member of the Law Society's Mental Health and Disability Committee, which had responsibility for preparing the updated Note.

tribunal to advance only submissions which are properly arguable as if your client had capacity (see [Buxton v Mills-Owen](#) and section 4.1 Clients with capacity). There are likely to be few cases where a client who is able to express their wish to be discharged by a tribunal will be assessed as lacking capacity to instruct you. Similarly, where a client without litigation capacity tells you they wish to be discharged from hospital, there will be few cases it will not be appropriate to argue for their discharge. This is because of the over-riding importance of the client's right under Article 5(4) to challenge the lawfulness of their detention - a right that exists without the detained individual needing to show that they have any particular chance of success in obtaining their release - see [Waite v UK \(2003\) 36 EHRR 54](#). Where the client lacks the ability to express their wishes you should:

- *ensure that the tribunal receives all relevant material so that it can determine whether the criteria for continued detention are satisfied*
- *test the criteria for continued detention*
- *remember your client's right to treatment in the least restrictive setting and alert the tribunal to possible alternatives to detention under the MHA 1983 such as Community Treatment Orders (CTOs) and guardianship*

In the case of a patient who is unable to consent to be detained for purposes of assessment or treatment in hospital but appears to be compliant, you may wish to consider whether the DoLS regime under Schedule A1 to the MCA 2005 might provide a better and less restrictive way of ensuring that your client receives treatment or assessment in hospital: see [AM v SLAM NHS Foundation Trust \[2013\] UKUT 365 \(AAC\)](#). You should not automatically argue for discharge if you are unable to ascertain the patient's wishes, but you are obliged to test the criteria for detention.

The Guidance also addresses the various different shades of meaning in the phrase 'best interests,' pointing out the difference between what has been termed the patient's 'legal best interests' and their 'clinical best interests,' and the potential that the two might clash, as in [RM v. St. Andrew's Healthcare \[2010\] UKUT 119 \(AAC\)](#), where the Upper Tier Tribunal ruled that documents revealing the patient was being covertly medicated should be disclosed to the patient because his fair trial rights (which the Upper Tier Tribunal referred to as his best legal interests) required it, even though it was accepted it was likely to affect his health adversely (which the Upper Tier Tribunal referred to as the patient's best clinical interests).

One final important change of note here is in the relation to is in relation to confidentiality. As the Practice Note indicates:

"This duty is covered in Chapter 4 of the SRA Code of Conduct. You must achieve Outcome 4.1 which requires solicitors to keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or the client consents. Practitioners should be aware that the previous version of the code provided for specific exceptions to the absolute duty of confidentiality. These do not appear in the current version of the code and we recognise that this may give rise to difficult questions for practitioners. For example, you are speaking to a client on the ward and as you are about to leave they tell you they have been saving up their medication. They know the ward will be short-staffed tonight and intend to take an overdose and end their life. You know that they have attempted to take their own life before. You suggest that the two of you speak to one of the nurses to tell them this but they will not agree. In this situation, as the client has

refused consent to disclose their intentions, any subsequent disclosure by you would appear to be a technical breach of Outcome 4.1 yet not to do so could also potentially be said to conflict with your duty to act in the best interests of your client. For guidance as to how you should approach situations such as this you should contact the SRA Ethics Helpline."

Review of ss.135-6 MHA 1983

A joint [review](#) by the Home Office and the Department of Health of ss.135-6 MHA 1983 has concluded that there was:

- Widespread variation in the frequency of use and the extent to which police stations were used as places of safety, access to health-based safe places being a key factor in avoiding police cells.
- A lack of clarity as to whether workplaces, private car parks, and railway lines were public places.
- Support for a reduction in the maximum period of detention.
- Mixed views as to whether there should be a power to remove someone needing help from their home without a warrant.

The following legislative recommendations were made:

- Ensure no-one under 18 is ever taken to a police cell under MHA ss.135-6
- Only use a police cell as a place of safety for adults if the person's behaviour is so extreme that they cannot otherwise be safely managed
- Extend the list of places of safety to anywhere which is considered suitable and safe
- Amend MHA s.136 to apply anywhere except a private home (and therefore include railway lines, private vehicles, hospital wards, rooftops, hotel rooms, workplaces.
- Reduce maximum period of detention from 72 to 24 hours in any place of safety (with some scope for extension in limited circumstances)
- Requiring police to consult a suitable health professional prior to detaining a person under s.136 if feasible and possible to do so (e.g. street triage arrangements)
- Making it clear in legislation that an assessment can take place in the person's home when a s.135 warrant is used and that police, paramedics, and AMHPs can remain present while this is carried out
- Potential new power for paramedics to convey a person to a health-based place of safety from anywhere other than a private home

There were also a number of non-legislative recommendations to improve commissioning arrangements and guidance.

Self-neglect

A very useful [report](#) by Suzy Braye, David Orr and Michael Preston-Shoot has been published by SCIE as regards policy and practice in self-neglect adult social care. Entitled “Self-neglect policy and practice: building an evidence base for adult social care,” the work built on in-depth interviews with practitioners and service users.

Key themes emerging from the in-depth interviews were around the areas of creating a strategic and operational infrastructure for self-neglect practice and using approaches that resulted in positive outcomes. Issues discussed include the inter-agency governance regarding policies and protocols (such as LSAB or other mechanism); improved inter-agency training and support; referral pathways and better data collection on self-neglect. Approaches to practice that helped achieve positive outcomes by those involved included the importance of relationship-based and person-centred practice; considering the whole person; an understanding of the Mental Capacity Act 2005; the use of creative interventions; and the value of multi-agency working.

We would also recommend that those concerned with the area also read [Vile Bodies: Understanding the Neglect of Personal Hygiene in a Sterile Society](#), a free resource published by Peter Bates.³

Choices at the end of life

A useful booklet giving information about choices at the end of life has been published by Compassion in Dying. Likely to be of use for advocates and providers of care to the elderly, as well as individuals, the resource gives information about topics including lasting powers of attorney for welfare decisions and advance decisions to refuse treatment. Copies can be downloaded or ordered in hard copy [here](#).

Winterbourne View – an update

In December 2012, in the aftermath of the Winterbourne View abuse scandal, the Government published a report “[Transforming Care: A National Response to Winterbourne View Hospital](#)” setting out a programme of action to transform services so that vulnerable people no longer lived inappropriately in hospitals. Two years on, the Government published on 29 January a report entitled “[Winterbourne View: Transforming Care 2 Years On](#)” setting out its progress to date.

This latest report is frank. It readily acknowledges that the system has not delivered what was set out to be achieved two years ago. The central ambition was to reduce the number of people with challenging behaviour inappropriately placed in hospitals. This has not been achieved.

³ Full disclosure, Alex had some very modest input into the section relating to the law.

There is still much to be done – just how much being emphasised by the damning [NAO report](#) on progress (or lack thereof) published on 4 February, indicating – for instance – that of the 48 patients resident at Winterbourne View at the time of its closure in June 2011, 10 were still in hospital in January-June 2014.

The DH report notes the growing calls from multiple sources – including families, national experts and statutory agencies – that the current statutory framework is not sufficient to transform care for people. The report looks ahead to the impending changes which will soon be brought in by the Care Act 2014 to improve safeguarding. From April 2015, all providers of health and adult social care must meet certain standards and the CQC will also be able to take enforcement action where breaches are found. There are two new statutory offences of “ill-treatment” and “wilful neglect” which will apply across all healthcare settings (see the next article). Going forward, the *Transforming Care* programme has been revised which will hopefully lead to faster and better progress.

Ill-treatment and wilful neglect – the Criminal Justice and Courts Bill

Although Royal Assent has yet to be given to the Criminal Justice and Courts Bill, all outstanding issues on the Bill were resolved on 21 January 2015, thereby clearing the way for the enactment of the Bill. The Bill covers much ground, including (controversially) significant limitations upon judicial review. It will also introduce amendments to appeals in relation to decisions of the Court of Protection and, importantly, new offences of ill-treatment and wilful neglect.

When the Bill becomes law, it will be an offence (under s.20) for an individual who has the care of another individual by virtue of being a care worker to ill-treat or wilfully to neglect that individual. A “care worker” is an individual who, as paid work, provides health care for an adult or a child (with certain exceptions), or social care for an adult. Significantly, a care worker also includes those with managerial responsibility and directors (of equivalents) of organisations providing such care.

There is also a separate offence (under s.21) relating to care providers. A care provider will commit this offence where:

- an individual who has the care of another individual by virtue of being part of the care provider’s arrangements ill-treats or wilfully neglects that individual,
- the care provider’s activities are managed or organised in a way which amounts to a gross breach of a relevant duty of care owed by the care provider to the individual who is ill-treated or neglected, and
- in the absence of the breach, the ill-treatment or wilful neglect would not have occurred or would have been less likely to occur.

It should perhaps be noted in relation to what will be s.21 that this does not include those who are receiving direct payments.

Whilst we anticipate that use will be made wherever possible of the potential for using these new charges, the offence under s.44 MCA 2005 will remain of importance to cover instances of ill-treatment or wilful neglect by family members or others falling outside the category of paid care workers. In the circumstances, it is to be regretted that the opportunity was not taken in this Bill also to revisit s.44 MCA 2005 and the [extremely flawed](#) approach adopted there to capacity.

Monitoring of OPCAT

The UK is a signatory to the Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and, as such, is required to establish an independent National Preventive Mechanism (NPM) to undertake inspections and other preventive activity.

The fifth annual report of the NPM on monitoring places of detention in 2013-4 is now [available](#). This includes – very brief – consideration of deprivation of liberty under the MCA 2005, noting the effect of the *Cheshire West* judgment (but not then considering, for instance, the extent to which the definition of ‘places of detention’ may need to be extended in consequence).

The CPRD comes to the rescue

The Mental Disability Advocacy Centre [reports](#) an important success in the Czech Supreme Administrative Court, winning a case concerning the obligation of public authorities to enable mentally disabled children to live with their families rather than in institutions. The Czech court relied on the UNCRPD, holding that:

“When the Czech Republic signed and ratified this international convention [CRPD], it was also obliged to adhere to it (Article 1, Paragraph 2 of the Constitution of the Czech Republic) and the effective fulfilment of this convention is an obligation of authorities of the legislative, executive and judiciary....Therefore it is necessary to take into account the provision of the UN Convention on the Rights of Persons with Disabilities when identifying the concrete content of the social right claimed by the applicants, since it must be considered as a law which is executing this social right ... The same applies for ... the European Social Charter. ... Other documents claimed by applicants that are considered as international soft-law must be also taken into account, particularly the General Comment of the UN Committee on Economic, Social and Cultural Rights.”

Summary of Strasbourg case-law relating to disability

With thanks to Lucy Series for bringing this to our attention, we note a very useful [summary](#) that the ECtHR has prepared of cases in which the rights of those disabilities have been considered by the Court, across the whole gamut of rights protected by the Convention.

Special Case between Great Stuart Trustees Limited and Sandra McDonald, Public Guardian

“Detailed judgment to follow but decision of Inner House is that POA containing the same wording as that in the bank's style in NW does comply with s15(3)(b)”. This message sent by Alison Hempsey of TC Young from outside the Court of Session at 16.10 on 10th December 2014 arrived while Adrian was giving a seminar to Wigtown Faculty of Solicitors, including coverage of the topic which had created more interest than any other in his autumn series of Faculty seminars. With the permission of his audience, and on the basis of ensuring that material presented was as up to date as possible, he opened it up and read it out. The many relieved smiles from the audience were no doubt replicated as the news rapidly spread across Scotland.

It was appropriate that the first news came from Alison, who had returned to the office on 29th April 2014 with the startling news that although she had been successful in having her clients appointed guardians to NW in the face of opposition from a bank holding (they thought) a continuing power of attorney, Sheriff Baird had (in her words) “bowled a curved ball” in that his ratio decidendi was that the document held by the bank was not a valid continuing power of attorney at all in terms of the Adults with Incapacity (Scotland) Act 2000 (“the Act”, references in this item to sections being sections of the Act except where otherwise indicated). Alison provided the information for our initial coverage of the decision [here](#) and readers of the Newsletter will be familiar with the story through our ensuing coverage in the [June](#) and [October](#) issues up to our [report](#) in our last issue of the Special Case about to be lodged. The Special Case was lodged on 2nd December 2014. Exemplifying best practice of a modern legal system focused upon the needs which it exists to serve, within one week an Extra Division of the Inner House of the Court of Session was assembled, the hearing was fixed for 10th December 2014, and appearance arranged of James McNeill QC for the attorney, James Wolffe QC (Dean of Faculty) for the Public Guardian, and Kenneth McBrearty QC as amicus curiae. While this may have seemed like an appeal from Sheriff Baird’s Decision, it was not, and Alison’s presence was simply as an interested observer, thanks to courteously prompt and helpful communications from the parties’ solicitors and the Dean of Faculty himself.

As we have already narrated, Sheriff Baird’s decision at Glasgow was followed by Sheriff Murray at Forfar reaching the opposite conclusion upon a similar document. Also as we have narrated, those two decisions are now reported as W, 2014 SLT (Sh Ct) 83 and B v H 2014 SLT (Sh Ct) 160. We have already provided readers with the terms of the documents before the courts in those two cases, so far as material. Similarly, the material terms of the document before the court in the Special Case were as follows:

“I, JS, [address] appoint [the granter’s sister-in-law], whom failing whether by reason of death, declinature or incapacity, Great Stuart Trustees Limited, [address] to be my continuing attorney in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000 (which Act and any subsequent amendment thereof is referred to as the ‘Act’).

“My continuing attorney is referred to as my ‘Attorney’. My Attorney may manage my whole affairs as he/she thinks fit with full power for me and in my name or his/her own name as my Attorney to do everything

regarding my estate which I could do myself and that without limitation by reason of anything contained in this power of attorney or otherwise.

“Without prejudice to these general powers my Attorney shall have the following powers: [19 specific powers including giving receipts and discharges for any part of the granter’s estate, receiving transfers and payments to his estate, receiving all forms of income due to the granter, arranging the granter’s tax affairs, purchasing or selling stocks, shares and other investments and taking up rights issues and the like, operating bank accounts, administering and managing any heritable property in which the granter might have an interest, purchasing, selling or leasing any property, heritable or moveable, conducting legal proceedings, carrying on business, and borrowing or lending; also a number of more personal specific powers including authorising expenditure for services to the granter or the purchase of any item that is required by him, and making gifts to a range of persons.]

“All decisions which may be made and all documents which may be granted by my Attorney shall be equally valid and binding as if made or granted by me. This continuing power of attorney shall subsist until it is recalled in writing.”

The deed was signed by the granter, and certified by a solicitor in the usual way, on 8th July 2004. The judgment of the court delivered by Lord Drummond Young narrated the material terms of the certificate incorporated in the document, albeit standard, because of their relevance to the view arrived at by the court.

The granter’s sister-in-law (erroneously referred to in the judgment as his wife – we thank Susan Oates of Murray Beith Murray WS, one of the instructing solicitors, for drawing our attention to this) had died. The trustee company had been acting as continuing attorney. They would shortly require to sell the granter’s house, but had been advised by Senior Counsel that W cast doubt upon whether they could competently sell the house and grant good title. They were concerned whether, in the granter’s interests, they ought to cease acting and apply for guardianship, even though that would impose an additional burden on the granter’s estate. They sought the advice of the Public Guardian, whose functions under section 6(2)(e) include providing information and advice to continuing attorneys, as to the validity of the document. On the basis of advice which the Public Guardian had received, she informed the trustee company that the document should continue to be treated as a valid continuing power of attorney, and that an application for guardianship would not accord with the section 1 principles. Nevertheless, recognising the widespread uncertainty caused by the decision in W, she considered it to be in the public interest that the conflict of authority between the two decisions referred to above be authoritatively resolved as soon as possible. As Lord Drummond Young narrated “Following discussions between the first and second parties it was decided that a special case would be the easiest and most expeditious means of resolving the problem”. The question of competency of the Special Case is covered separately in the following item of this Newsletter.

The substantive issue before the court was whether the document complied with the requirement for validity as a continuing power of attorney, set forth among other requirements in section 15(3)(b), for a document which “incorporates a statement which clearly expresses the granter’s intention that the power be a continuing power”. In terms of section 18, unless compliant with all of the requirements of section 15 it would “have no effect during any period when the granter is incapable in relation to” relevant decisions.

The judgment of the court traces the background to section 15, particularly that provided by Report No 151, dated July 1995, of the Scottish Law Commission on “Incapable Adults”, noting:

- that the main advantage of contractually conferred powers of attorney is that they are relatively cheap and flexible compared with court-appointed guardians;
- that at common law the appointment of an attorney lapsed in the event of the subsequent mental incapacity of the granter (Adrian has always questioned that assertion in relation to documents specifically stating that they should continue beyond incapacity);
- that section 71(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 created a presumption in favour of continuation unless the granter opted out;
- that this was reversed by the Act, which created a requirement to opt in, and thus the requirement for section 15(3)(b);
- that the Commission rejected the use of a prescribed style of document, as that could create difficulties if there were any deviation, or in unusual cases; and
- that accordingly: “the only requirement should be that the document clearly shows that the granter intended the attorney to have continuing power”.

Against that background, the Extra Division held:

- that section 15 must be construed purposively;
- that the clear policy was that the creation of a continuing power should not be a matter of implication but should be done expressly, but the use of a prescribed style was rejected, indicating that no particular significance should be attached to the precise wording used, as long as the intention is sufficiently clear;
- that section 15(3)(b) is concerned solely with the expression of the granter’s intention, and should be construed accordingly; and
- that on the foregoing basis the document granted by Mr JS “is unquestionably a valid continuing power of attorney for the purposes of section 15”.

The court held that the terms of the operative clause, quoted above, were sufficient to reach that conclusion. As this Newsletter noted in its first commentary on W, “continuing attorney” is defined in section 15(2) as a person on whom a continuing power of attorney is conferred. The court also noted that the document contained express reference to section 15 and commented that: “It is difficult to imagine what function that reference would have served if there had been no intention to create a continuing

power of attorney within the meaning of that section”. These elements were sufficient to “clearly express the granter’s intention”.

The court noted further characteristics of the document which were not essential to the court’s decision, but which reinforced the court’s conclusion. These included various of the specific powers conferred; the concluding reference (quoted above) to “this continuing power of attorney”; and the incorporation of the certificate in terms of section 15(3)(c). Upon comparison of the two Sheriff Court Decisions, the Extra Division declared a preference for the reasoning of Sheriff Murray.

In *W*, Sheriff Baird had also taken the view that the document before him in that case failed to comply with section 15(3)(ba), which requires a document which “where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, states that the granter has considered how such a determination may be made”. That requirement was introduced by the Adult Support and Protection (Scotland) Act 2007 and therefore was not relevant to the document before the court (granted in 2004). The Extra Division nevertheless helpfully addressed obiter the issues concerning section 15(3)(ba) raised by the decision in *W*, pointing out that that provision is concerned only with “springing” powers of attorney. In the opinion of the court the document before the court, and also the document before the sheriff in *W*, conferred continuing powers which were immediately exercisable. Although the decision in *W* narrated that the attorney in that case had accepted an argument that it was never intended that the attorney should act while the granter retained capacity, that was irrelevant because the wording of the document appeared to be to the contrary.

Following the Decision in *W*, the Public Guardian has been commendably proactive in taking her own advice and expressing her own views, giving general guidance, identifying Special Case procedure as an appropriate means to resolve the issues given that the appeal in *W* was (as we have narrated) withdrawn, and playing her part in bringing this Special Case before the court. It is therefore appropriate that the concluding words to this saga should be her modestly understated comment to the Newsletter that: “I appreciate that there was some anxiety about the validity of the standard form of power of attorney. It is helpful that we now have a clear and authoritative position which supports the validity of the standard style”.

Adrian D Ward

Special Case (2) - Competency

On the question of competency, the Opinion of the Extra Division of the Court of Session delivered by Lord Drummond Young in the case described in the preceding article is studiously (and unsurprisingly) couched as following precedents already established. One suspects, nevertheless, that it may in future be referred to in support of any future request to the court to allow Special Case procedure to be used to resolve matters of considerable and/or urgent public importance.

As we noted in December’s [article](#), Special Case procedure is now provided for in section 27 of the Court of Session Act 1988, which allows a Special Case to be presented to the Inner House of the Court of Session

“where any parties interested, whether personally or in some fiduciary or official capacity, in the decision of a question of law are agreed upon the facts, and are in dispute only on the law applicable to those facts”. We anticipated, correctly as we now know, that the parties would be the Public Guardian in her official capacity and an attorney acting in that attorney’s fiduciary capacity. However, in the case heard on 10th December 2014 both parties to the case were agreed that the document before the court was a valid continuing power of attorney in terms of section 15. There was thus a *prima facie* question of competency. In *Mackinnon’s Trs v MacNeill*, 1897, 24 R 981, Lord Kinnear (at 987-988) said: “It is not the purpose of special cases to obtain an opinion of the Court on questions which are not brought before it in such a way as to enable the Court not only to express an opinion but to give a decisive judgment on them. we are not in the practice of deciding questions which are not disputed, or which counsel for the respective parties have declined to argue”.

Again in *Mitchell Innes’ Trs v Mitchell Innes*, 1912 SC 228, Lord Kinnear emphasised that the court’s decision must be *res judicata* if it is to be properly binding. However in that case, in circumstances close to the present case, at issue was whether trustees had power to sell certain heritable subjects, it being agreed that a sale would be expedient. Accordingly, although there was no real contention between the parties, a Special Case was competent because a prospective purchaser would have a clear interest to take action. Similarly in *Turner’s Trs v Turner*, 1943 SC 389, the disposal of an estate was a practical issue for trustees, and was the basis upon which that Special Case was held to be competent. In the present case Lord Drummond Young derived two principles from *Turner’s Trs*: “first, if another form of action would be competent, a special case will normally be competent; and secondly, the underlying principle is that the court will decide questions that are practical, not questions that are hypothetical or academic”. In the present Special Case the court noted that the questions raised were certainly not hypothetical or academic, given the imminent need to sell the house. In consequence, other forms of action, such as an action for declarator, would be competent, even if the merits of the case were conceded by the defenders in the Special Case. Declarator would not bind third parties, but “it is obvious that others who practice or carry on business in the area in question are likely to follow the court’s decision”. A Special Case was no different.

Three aspects of the Decision in the present Special Case may well be seen as helpful guides in future. Firstly, the court noted that “the fundamental issues raised are of great general importance”, even although that factor was “not technically relevant to the competency of the Special Case”. In other words, that point was not “technically relevant”, but nevertheless worthy of mention.

Secondly, the court appointed an *amicus curiae*, expressly to ensure that “while our decision cannot bind third parties, it has been reached following proper argument, and is therefore likely to command greater authority than a decision reached without a contradictor”.

And thirdly, the court provided its Opinion – albeit *obiter* – on a point which clearly did not meet either of the tests derived by the court from *Turner’s Trs*, namely the issues concerning section 15(3)(ba) of the Adults with Incapacity (Scotland) Act 2000. The court did so by reason (only) of points firstly and secondly above, namely the “great general importance” of those issues and the fact that an *amicus curiae* had acted as contradictor. The conclusion to be drawn, in relation to matters arising in respect of adult incapacity or any other area of law, is that the Court of Session might reasonably be invited to appoint an *amicus curiae*

and – having heard argument – to provide an *obiter* Opinion on a matter which by itself would not qualify for Special Case procedure if that is combined with another question which does so qualify, but which is nevertheless of great general importance.

Appeals under the adult incapacity jurisdiction are relatively rare. It is understood that the withdrawal by the bank of its appeal in *W* may well have been motivated at least in part by consideration for *W* and her family, and a desire not to cause them further difficulty or uncertainty. This effective widening of the potential scope for use of Special Case procedure (if that is what has occurred) may in consequence one day be helpful in particular in relation to adult incapacity matters.

Adrian D Ward

The Development of Strategic Litigation in Scotland

“Perhaps the most fundamental point is that strategic interest litigation is in the public interest. And in sharp contrast to litigation about private rights, public interest litigation extends to issues that are of interest to the public at large, or at least to a section of it.”

That excerpt from the address by Lord Hope to a conference in Edinburgh on “The Development of Strategic Litigation in Scotland” on 24th November 2014, and the shift in judicial attitudes which Lord Hope narrated, perhaps resonates somewhat with the preceding item. The conference was organised jointly by the Equality and Human Rights Commission and the Faculty of Advocates. The contributions by Lord Hope, entitled “A Judicial Perspective on Strategic Litigation”, and by Ailsa Carmichael QC entitled “Intervention: Practical Tips”, both available [here](#), have instantly become required reading for anyone contemplating a public interest intervention in litigation in Scotland. For reasons only of space, we here concentrate on Lord Hope’s contribution with the warning, however, that as usual every word of it is relevant, rendering it almost impossible to précis!

Practitioners of adult incapacity law in Scotland still remember and value the immensely careful and helpful Judgment by Lord Hope, while still Lord President and shortly before he moved to the House of Lords and thence to the Supreme Court, in the *Law Hospital* case (1996 SLT 848), on the question of withdrawal of life support in the case of severe brain injury. The one regret was that Lord Hope dealt with the matter so well that this allowed the Scottish Parliament room to drop from the Adults with Incapacity (Scotland) Act 2000 proposed provisions on the withholding or withdrawal of life-sustaining treatment, on the basis that the law in this area could safely be left to the courts to develop.

Lord Hope’s address on 24th November 2014 was no less impressive. Having modestly expressed anxiety lest he be thought “to be trespassing on what is the preserve of the judges here”, he proceeded to narrate how during his time, and with his full participation, the Supreme Court has dragged the Scottish judiciary away – in the case of public interest litigation – from a requirement of title and interest to sue, to a consideration of standing. He went through relevant precedents, and then effectively summed them up with a charming personal anecdote, to be found in his Judgment in *Walton v Scottish Ministers* [2013] UKSC

44, 2013 SC (UKSC) 67 at paragraph 152: “Drawing on my own experience of a local planning inquiry when objecting on environmental grounds to a wind farm close to my cottage in Perthshire, I said that an osprey which I had been observing, whose route to and from its favourite fishing loch was at risk of being made much more dangerous by the presence of 16 turbines on our neighbour’s hillside, had no means of taking that step on its own behalf. If its interests were to be protected, someone had to be allowed to speak up on its behalf”.

As to interveners he pointed out that: “The main criterion for an intervention is whether the would-be intervener, through its expertise or access to information that it is best placed to provide, would be likely to be able to assist the court in understanding either the legal issues in question or the factual basis for a given line of argument”. He also warned of the effects of the range of perceptions of frequent interveners from his own tribute to the helpful written intervention by JUSTICE in the Supreme Court in *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13 at paragraphs 47-49, to one “frequent intervener’s Counsel” whose name on the last page of an application moved Lord Rodger to comment: “We do not want yet another lecture from him!”.

Lord Hope concluded with his clear concerns about the consequences of governmental exasperation with judicial review processes, and summed up matters in his concluding paragraph as follows: “There is a nice balance to be struck if strategic litigation is to prosper in Scotland. It is to be found by being careful that you really do have something to say before you apply for leave to intervene and, if you are allowed to do so, by being as succinct and as economical as possible. You must get your priorities right too – as to when it is really worth intervening, and when it is better not to do so. In my experience, if an intervener had a useful point to make, the judges were not slow to pick it up – usually at the stage of reading through the printed cases before the hearing began, so that we were ready for it when it came to a brief submission during the oral argument. And you need to be aware that the government will be watching you and that, if they think that our system is operating against what they judge to be in the public interest, they may follow the English example to make the use of the jurisdiction much more difficult”.

Adrian D Ward

Vulnerable Clients – Addition to Guidance

Amanda Millar of McCash & Hunter LLP, Solicitors, Perth, is an energetic member of the Council of the Law Society of Scotland who, through her membership of both the Mental Health and Disability Sub-Committee and the Professional Practice Committee, provides a link between those committees which is valuable, including in the updating and development of the Society’s “Vulnerable Clients” guidance, which Amanda continues (in practical terms) to oversee. The guidance has now been extended to cover children with two scenarios which have been added to those provided by Adrian when he first drafted this guidance, and the related guidance on Powers of Attorney. The two new scenarios are:

“Type G: Client aged 15 years wishes separate legal advice about a matter that concerns them; client dominated by parents, nevertheless capable and parents competent and motivated to act properly. (Capacity and influence, influence not undue or malign)”

“Type H: Client aged 13 years wishes to appeal detention to the Mental Health Tribunal for Scotland; supported by independent advocacy worker to contact solicitor, which worker is present during the meeting with the client and speaks regularly for the client. Client of limited but sufficient capacity, vulnerable to undue influence but not unduly influenced. (The solicitor must respect and if necessary support the client’s capacity, without discrimination on grounds of the client’s mental disorder. Care needed to ensure the instructions are clear)”

Adrian D Ward

Powers of Attorney: New Rules and Guidance

New Practice Rules relating to powers of attorney duly made on behalf of the Council of the Law Society of Scotland and approved by the Lord President, and related guidance, came into operation on 1st January 2015. They are essential reading for anyone preparing power of attorney documents, and any “regulated person” (including solicitors) acting, or invited to act, as an attorney. Concerns prompting the formulation and issue of the new Rules and guidance include the status of a solicitor appointed attorney by a relative or friend, possibly for personal rather than professional reasons, including in particular such a solicitor in employment other than a practice unit and thus unable to comply with previous accounting rules; the extent to which granters of powers of attorney in favour of regulated persons might or might not be protected by the Guarantee Fund (and might expect or not expect to be so protected); and the position where regulated persons acting as attorneys might cease to be such, including through being struck off.

The Law Society of Scotland Practice Rules 2011, as amended by the Law Society of Scotland Practice Rules (Amendment No 2 Rules) 2014 should be referred to for their terms. This note draws attention to them but should not be relied upon for their content or effect. Subject to that, the Rules now in effect distinguish a situation where a power of attorney is granted in favour of a regulated person not in the course of his or her practice and where no fees are chargeable, nor any remuneration received, in respect of the power of attorney. In that situation, any monies which are intromitted with under the power of attorney, and any money of the granter not held or received by a practice unit with which the regulated person is associated, is not “clients’ money” in terms of the Rules. Note however that this interpretation is the converse of the new Rules, which state the circumstances in which monies held or intromitted with are “clients’ money”.

The provisions regarding lists to be delivered to the Council of the Law Society of powers of attorney held now apply to all powers of attorney held by or granted to a regulated person who is associated with a practice unit, during the relevant accounting period. The list need only include powers of attorney granted in favour of such regulated person taken in a professional capacity.

The Rules cover powers of attorney in favour of any entity in which the regulated person participates in any way and which carries on activities in the course of the regulated person’s practice. Exclusions include powers of attorney for the sole purpose of making tax (including LBTT) returns and land registration and other submission of electronic or non-electronic documentation.

Main points under the guidance (which again should be referred to for its terms) include an explanation of the new requirements and of when a regulated person might be treated as acting in a private capacity. The presumption is that any regulated person will have agreed in their professional rather than private capacity to any appointment to be an attorney. However, a private appointment by a person related by blood, adoption, marriage or civil partnership will be automatically deemed non-professional, while a private appointment by a personal friend would not be automatically deemed non-professional and the onus of proving that it was private would rest upon the regulated person. In either case, it is important to ensure that the granter is aware of the repercussions of a private appointment, and good practice would dictate that there is written evidence that the granter has been informed that Guarantee Fund protection will not be available, and has accepted that. It is recommended that whether the appointment is professional or private should be included in the power of attorney document, if the granter consents to that. Power of attorney files should be retained until the power of attorney has come to an end.

We thank Alison Attack, Solicitor, for her assistance in the preparation of this item.

Adrian D Ward

Practice Note – Edinburgh Sheriff Court

The Sheriff Principal at Edinburgh has issued a Practice Note which will apply from 2nd February 2015 to all applications in Edinburgh Sheriff Court under the Adults with Incapacity (Scotland) Act 2000. The Practice Note is available on the Scottish Courts website [here](#). An electronic version of the Practice Note may also be obtained by emailing the AWI mailbox at Edinburgh Sheriff Court, which is edinburghawi@scotcourts.gov.uk. That mailbox is also the contact point for the AWI Clerk at Edinburgh.

The Sheriff Principal has also directed that with effect on and after 5th February 2015 there will be a Guardianship Court every Thursday, which will deal with all applications under the 2000 Act at Edinburgh Sheriff Court. The Sheriff Principal has nominated Sheriff F L Reith QC, Sheriff D S Corke and Sheriff P J Braid to deal with all such applications as from 2nd February 2015, failing whom any other sheriff at Edinburgh Sheriff Court. We are grateful to Sheriff Reith for drawing this information to the attention of the Newsletter, and we welcome this further significant move in the trend towards specialisation in the AWI jurisdiction. Sheriff John Baird has for many years specialised in the jurisdiction in Glasgow Sheriff Court. The changes in Edinburgh come at a time of transition in Glasgow in consequence of Sheriff Baird's forthcoming retirement (he will actually sit in Glasgow Sheriff Court for the last time on 24th March 2015). His retirement will be the subject of future coverage in the Newsletter.

Adrian D Ward

Update on the Mental Health (Scotland) Bill: Stage 1 Report by Committee on Health and Sport

After taking evidence the Committee on Health and Sport, as Lead Committee, [published](#) its Stage 1 report on 30 January 2015.⁴

As previously mentioned in the [July 2014](#) issue of this newsletter, the Mental Health (Scotland) Bill seeks amend the Mental Health (Care and Treatment)(Scotland) Act 2003 and to the Criminal Procedure (Scotland) Act 1995. It also proposes the introduction of a victim notification scheme in relation to mentally disordered offenders.

Giving evidence to the Committee, Jamie Hepburn, Minister for Sport, Health Improvement and Mental Health, stated that the key objective of the Bill is to effect some changes to current practice and procedures in order to “ensure that people with a mental disorder can access effective treatment in good time.”⁵ He also stated that “In doing so it seeks to build on the principles of the 2003 act.”⁶

The Committee found that responses to the call for evidence were broadly supportive of the policy intentions behind the Bill. However, whilst this is noted and the Bill’s contents are not entirely problematic, several aspects of the Bill require particular attention to ensure that Scotland’s mental health legislation remains patient-centred and human rights-based.

The following are some brief preliminary observations on the report as time between publication of the report and of this newsletter will allow. For greater detail one should refer to the report itself.

1. Extension of existing automatic 5 working day extension between the end of a short term detention certificate and the Mental Health Tribunal hearing to 10 working days (s1, Bill)

This was recommended by the McManus Review as a means of reducing multiple hearings. There has, however, been mixed support for this provision although it has been universally agreed that reducing the stress on patients associated with multiple hearings is clearly desirable. The Minister also stated to the Committee that it is patients’ interests rather than administrative convenience that is driving this proposed amendment⁷. Notwithstanding this, concern has been expressed about the extent to which such amendments will actually reduce multiple hearings (despite the Tribunal working hard to reduce the number of multiple hearings in recent years). Moreover, the risk of parties simply working towards the new deadline may mean that some patients are subjected to disproportionate periods on short term detention

⁴ Scottish Parliament Committee on Health and Sport, *Stage 1 Report on Mental Health (Scotland) Bill*, 3rd Report, Session 4 (2015) (“Report”)

⁵ Para 11, Report.

⁶ Para 1, Report.

⁷ Para 42, Report.

(which in some cases could mean up to seven weeks) and there is reduced ability to challenge detention and treatment decisions during this period. This has clear Articles 5 (right to liberty) and 6 (right to fair trial) ECHR implications. Moreover, it should not be forgotten that there may be instances when the Tribunal determines that the patient no longer requires to be detained.

There has also been concern expressed about exactly how the proposal that time spent on this extended period of detention will be offset against the overall time spent on detention under a subsequent CTO.

The Committee recommends⁸ that (a) the Scottish Government provides a detailed plan of the estimates of reduced multiple hearings that will result from the amendment and likely average number of days detained following its introduction; (b) this provision is supported by a monitoring regime the aim of which being the improvement of user experience and that it does not result in an overall longer period spent in pre-hearing detention; and (c) the Scottish Government responds to concerns about clarification on calculation of the deducting of the proposed extension time from the continuous period of detention.

These recommendations are welcome. However, as the proposed amendment currently stands there will have to be constant monitoring to ensure that such automatic extension is used proportionately at all times. Whilst such monitoring is important one could argue that the existence of a maximum period of 10 working days is placing temptation in the way of a very busy system and the onus to challenge disproportionality will be on individuals who are likely to be very unwell and vulnerable.

2. Additional duties on Mental Health Officers (MHOs)

The Bill imposes various new duties on MHOs and the Committee appears to have accepted the resourcing and workload issues faced by them at present (see in this regard also Jill's article in our [July 2014](#) newsletter). It has therefore sought further assurances from the Scottish Government regarding resourcing and a strategic review of MHO provision to improve the recruitment, training and retention⁹. Given the integral role that MHOs play in decisions regarding involuntary care and treatment for persons with mental disorder these recommendations are welcome and it is sincerely hoped that the Scottish Government will implement them.

3. Orders regarding level of security (ss11-12, Bill)

In *RM v The Scottish Ministers*¹⁰ the Supreme Court made it clear that the necessary regulations must be made to ensure that the right not to be detained in conditions of excessive security in non-state hospitals can be effectively exercised. The Bill addresses this to a degree by clarifying who may appeal against detention in conditions of excessive security in a hospital other than in the State Hospital but confines this category of patients to those only in medium secure settings. Moreover, the regulations are still absent.

⁸ Paras 49-51, Report.

⁹ 72-73, Report.

¹⁰ *RM v The Scottish Ministers* [2012] UKSC 58.

The Committee has recommended¹¹ that the Scottish Government provides a proposed timetable for bringing the regulations into effect. Given concerns that the amendments do not extend the ability to challenge the level of security in detention in low secure settings, and that there may be occasions where an individual in a low secure setting could appeal still remain in low-secure accommodation elsewhere, the Committee has also asked the Minister to respond as to whether this scenario might not be an appropriate one to merit the inclusion of the right of such an appeal¹². It goes without saying that both these issues have important Article 8 (right to private and family life) ECHR (and corresponding Articles 17 and 23 CRPD) implications.

4. Nurses holding power (s14, Bill)

It is proposed to extend the existing maximum period during which nurses may detain patients pending examination by a medical practitioner from two to up to three hours. As previously mentioned, no justification as to the proportionality of such an extension has been provided. Clearly, this raises issues regarding restriction of liberty (Article 5 ECHR). The Committee has therefore asked the Scottish Government to justify why this is necessary, namely, how often has it actually been necessary to resort to emergency detention measures because a registered medical officer's attendance has been delayed¹³.

5. Time for appeal, referral or disposal (s15, Bill)

The Bill proposes reducing the period within which an appeal can be made against a decision to transfer to hospital (state or otherwise) from 12 weeks to 28 days. Again, the Committee is seeking justification from the Scottish Government as to why this is necessary and also, given that it appears that the provision allowing the Tribunal to order the transfer of the patient whilst an appeal is pending, an assurance that the place that the patient had come from would be held until the appeal had been determined¹⁴.

6. Opting out regarding appointing Named Persons (ss18-20)

It would appear that both the Committee and the Minister accept that requiring the patient to expressly opt out of appointing a Named Person does not entirely respect the patient's right to autonomy¹⁵. It will now be necessary to wait and see how this is approached.

7. Advance statements (s21, Bill)

Recognising the value of advance statements but potential barriers to their being used the Committee recommends that the Scottish Government considers placing a statutory duty on health boards and local authorities to promote them¹⁶. This is an important and welcome recommendation both in terms of

¹¹ Para 89, Report.

¹² Para 90, Report.

¹³ Para 102, Report.

¹⁴ Paras 110-112, Report.

¹⁵ Paras 121-122, Report.

¹⁶ Paras 157-158, Report.

reinforcing the requirement for patient participation under the 2003 Act, and under Article 8 ECHR, but also in terms of moving towards the April 2014 UN Committee on the Rights of Persons with Disabilities *General Comment on Article 12 CRPD: the right to equal recognition before the law*. Of course, how exactly this is approached in any amendments to the Bill remains to be seen.

8. Cross-border transfer of patients and dealing with absconding patients (s24, Bill)

In essence, concerns were raised that this provision could potentially permit treatment and loss of rights regarding treatment that the individual would otherwise have possessed in the other jurisdictions. Again, the Scottish Government has been asked to respond to such concerns¹⁷.

9. Mental health disposals in criminal cases (s29, Bill)

It will be recalled that the Bill seeks to extend the period a court is able to extend an assessment order from 7 to 14 days. The Committee has asked the Scottish Government to comment on the necessity and justification for this¹⁸. As previously mentioned¹⁹, this has implications in terms of timeous determination of a patient's case under Articles 5 and 6 ECHR.

10. Victim Notification Scheme (s44, Bill)

The Committee welcomes the introduction of such a scheme but states that a balance must be struck between the rights of the patient and of the victim. For this reason it is seeking clarification from the Scottish Government as to why it considers it necessary to include a Ministerial power to amend the provision, under delegated legislation, so that it applies only to persons subject to compulsion orders given that this could potentially apply to persons who have only committed minor offences. It has also asked the Scottish Government for information on how it will monitor the scheme to ensure that mentally disordered offenders are not discriminated against as well as when information about such offenders subject to compulsion or restriction orders can be withheld in 'exceptional circumstances'²⁰.

11. Independent advocacy

The Committee acknowledges the importance of advocacy in improving user experience but also notes that its provision may be inadequate across Scotland and often targeted at persons subject to compulsory proceedings. It therefore believes that there is a need to assess to the adequacy of advocacy services and that strengthening of the line of local authority accountability for delivering such services may assist here. The possibility that such assessment could fall within the remit of Care Inspectorate's review programme has been noted. The Scottish Government has therefore been asked to provide further information on how it will ensure that, as well as monitoring the local authority provision of advocacy services, it will assess

¹⁷ Paras 164-165, Report.

¹⁸ Para 176, Report.

¹⁹ See Mental Capacity Law Newsletter, Scotland, September 2014 Issue.

²⁰ Paras 193-196, Report.

advocacy provision in secure settings and hospitals, as these lie outside the Care Inspectorate's responsibilities²¹.

Further information is also sought from the Scottish Government as whether planned Scottish Government guidance on advocacy for carers will strengthen the rights of carers to access independent advocacy²².

Independent advocacy is integral to patient support. Whilst it is appreciated that it is difficult to fully address provision of such services within legislation it is disappointing that the Committee has decided that the current provision for advocacy in the Act is "quite strong"²³ and therefore does not recommend further reinforcing s.259. Such reinforcement of section 259, along with its recommendations (which are very welcome), would, however, maintain and enhance the spirit of the Act in terms of promoting autonomy and equal partnership in shared decision-making. It would also go some way to addressing the requirements of the UN Committee on the Rights of Persons with Disabilities General Comment on Article 12 CRPD. It should be noted that research indicates that at any one time in Scotland around 1.2 million people (representing 21% of the population) have a right to independent advocacy²⁴.

12. Learning disabilities, autistic spectrum disorders and wider review of legislation

Recognising that the Bill is not seeking to provide a wholesale review of the 2003 Act the Committee has, however, noted the calls for a wider review of legislation. This would involve considering removing people with learning disabilities and autism spectrum disorders from the remit of mental health law and a wider review of mental health and incapacity legislation in general. It invites the Scottish Government to provide its view on this at the same time as supporting Scottish Government comments that it is currently considering the Scottish Law Commission's long term review of incapacity legislation together with the wider issues of restriction of liberty and capacity.

13. The use of force, covert medication and restraint

It will be recalled that at present there is no mention of these matters in the 2003 Act and little in the Act's Code of Practice. The Committee has accordingly asked the Scottish Government "to respond to the comments made by witnesses for a greater reference to the use of force, restraint or covert medication in legislation and in the 2003 Act's Code of Practice"²⁵.

Conclusion

It appears that the Committee has genuinely listened to much of what has been conveyed during its taking of written and oral evidence. However, it is disappointing that it has fallen short of recommending

²¹ Paras 208-211, Report.

²² Para 21, Report.

²³ Para 209, Report.

²⁴ See Scottish Independent Advocacy Alliance, *Mental Health (Scotland) Bill: SIAA Briefing for the Health and Sport Committee*, November 2014, p2.

²⁵ Para 229, Report.

amendments in some respects, for example, at the very least in relation to extension of the existing automatic 5 working day extension after the end of a short term detention certificate, bolstering s.259 regarding independent advocacy and placing an absolute obligation on MHOs to advise patients of their rights (including that to independent advocacy). That being said, cognisant of the fact that the legislation deal with compulsory treatment and that the rights of persons with mental disorder must only be restricted in limited circumstances where it is lawful and proportionate to do so, it has rightly has asked the Scottish Government to justify many elements of the proposed amendments as proportionate measures. Additionally, it seeks assurances regarding resourcing issues that have been raised during Stage 1.

The 2003 Act has been generally regarded internationally as an example of good legislative practice in terms of being patient-centred and human rights compliant. It is to be hoped that the current Bill will ultimately seek to maintain and reinforce this. Stage 2 is awaited with interest.

Jill Stavert

For the next issue

The Mental Welfare Commission for Scotland will shortly be publishing its updated guidance on *Deprivation of Liberty*. There will be discussion of this, along with further discussion of the Scottish Law Commission report *Adults with Incapacity*, in the next issue. Meanwhile, if anyone would like to make a contribution to the ongoing debate in this newsletter concerning adults with incapacity and deprivation of liberty in Scotland please contact [Adrian Ward](#) and [Jill Stavert](#).

The next issue will also contain an update on the Assisted Suicide (Scotland) Bill.

Conferences at which editors/contributors are speaking

Grasping the Thistle: A Discussion about Disabled People's Rights within the United Nations Disability Convention and Scottish Public Policy

Jill will be speaking at this roundtable arranged by Inclusion Scotland on 6th February.

Capacity and consent: complex issues

Jill is chairing, and Adrian will be speaking at, the next workshop of the Centre for Mental Health and Incapacity Law, Rights and Policy on 11th February, which will be addressing complex issues in capacity and consent. For further details, see [here](#).

Royal Faculty of Procurators in Glasgow

Adrian is speaking at conferences convened by the RFPG on 11 February (Private Client) and 25th February ('Demand-led' – i.e. on topics selected in advance by attendees). Details available [here](#).

The National Autistic Society's Professional Conference

Tor will be speaking at this conference, to be held on 3 and Wednesday 4 March in Harrogate. Full details are available [here](#).

DoLS Assessors Conference

Alex will be speaking at Edge Training's annual DoLS Assessors Conference on 12 March. Full details are available [here](#).

Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson's Annual Elderly Care Conference in Manchester on 20 April. For full details, see [here](#).

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see [here](#).

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Neil Allen
Anna Bicarregui
Simon Edwards (P&A)

Scottish contributors

Adrian Ward
Jill Stavert

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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. **To view full CV click here.**



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



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