

Scotland

Introduction

Welcome to the November 2015 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter, a decision about deprivation of liberty in hospital and the meaning of state detention under the Coroners and Justice Act 2009, and the final instalment in the Rochdale deprivation of liberty saga;
- (2) In the Capacity Outside the CoP newsletter, an introduction to the work of the new National Mental Capacity Forum from its Chair, Baroness Finlay;
- (3) In the Practice and Procedure Newsletter, an update on the regionalisation of the Court of Protection;
- (4) In the Property and Financial Affairs Newsletter, a number of decisions concerning powers of attorney;
- (5) And in the Scotland Newsletter, the annual report of the Mental Welfare Commission for Scotland.

We also take this opportunity to remind readers that where one of the Newsletter editors is instructed in an ongoing case which is summarised, that editor does not play any part in drafting the summary or comment.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#).

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Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor

Beverley Taylor

Scottish contributors

Adrian Ward
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Mental Welfare Commission Annual Report

On 29th October 2015 the Mental Welfare Commission for Scotland published its annual report for 2014-15, available [here](#). Introducing the report, Colin McKay, Chief Executive of the Commission, said:

“This was an important year in relation to the lawful and ethical treatment of people with mental health issues, learning disability and dementia.

“The Mental Health Bill will bring some positive changes, and we welcome the appointment of Jamie Hepburn as the Scottish Government’s first minister to have mental health listed in his title.

“But more than 10 years after mental health and incapacity law was reformed, there are still wide variations in understanding amongst Scottish health care staff of how the law should operate. That can lead to unlawful treatment, and to people not getting the care and support they need.”

The report notes that the Mental Health Bill is the most significant revision of mental health law since 2003. The Commission requested alterations to the Bill related to protecting patients’ rights, many of which were accepted by Scottish Government. The Bill will give the Commission new statutory responsibilities related to advance statements, and to advocacy. The Commission believes that both of these will help to promote the rights of patients and of people who use services. It is anticipated that these provisions will come into force in 2016.

During the year 2014-15 the Commission revised its aim, embedding human rights at the core of its work. As part of its commitment to increased transparency, it decided that from February 2016 it will publish all of its local visit reports to hospitals and to care services.

The annual report records that as the only organisation in Scotland which monitors the use of mental health and adults with incapacity legislation, the Commission has published national and local information about how well the legislation is being followed, particularly in circumstances where people are detained in hospital against their will.

In this Newsletter we have highlighted concerns about pressures on mental health officer services resulting in widespread breaches of statutory time limits for submission of mental health officer reports and, last month, the Commission’s statistics showing a 105% increase over five years in the number of Part 6 applications under the Incapacity Act requiring mental health officer reports. This annual report emphasises the Commission’s concerns about the capacity of mental health officer services to fulfil their statutory roles. It records that despite the massive increase in workload, numbers of mental health officers are actually decreasing.

Adrian D Ward

Where am I? Yet more complication and confusion

In our [July 2015](#) newsletter we reported on revised Scottish Government guidance as to determination of ordinary residence for purposes of social work responsibilities. We

noted that Annex A to the guidance concluded with an assertion that it would be reviewed in the light of the decision of the Supreme Court in the *Cornwall* case. We recorded concern not only at potential differences between definitions of “ordinary residence” between England & Wales and Scotland, but differences between “ordinary residence” for the purposes of social work legislation and “habitual residence” for purposes of adults with incapacity legislation (and, in cross-border situations, the Hague Convention 35 on the International Protection of Adults). Those with the stamina to try to follow these complications will have noted that “ordinary residence” may be different for different purposes, such as social work, tax, or entitlement to a particular state benefit; and they will have wrestled with whether the concept of “living in” – for example in the Care and Support (Cross-Border Placements and Provider Failure: Temporary Duty) (Dispute Resolution) Regulations 2014 - may or may not differ from residing or ordinarily residing somewhere.

The multiplicity of different concepts intended to link a person to a place continues to develop unabated. HM Revenue & Customs has now published final guidance on the new Scottish rate of income tax and the criteria for determining liability to Scottish income tax. It proposes that tax status should be determined by concepts such as a “close connection to Scotland” and “main place of residence”. It is appalling that this unco-ordinated multiplicity of concepts and definitions should develop, and particularly so that the confusion should be greatest in relation to vulnerable people with impairments of capacity to make their own choices. It is surely time for a clear decision to be made as to how many categories of linkage – beyond basic concepts of nationality and domicile – are

required; to reduce the number of concepts to those which are essential; and to define the required concepts clearly and consistently for all purposes.

Adrian D Ward

Conferences at which editors/contributors are speaking

Cross-Border Guardianship

Adrian and Jill will be participating in a half-day seminar for CPP Seminars Scotland on 4 December at Brodies LLP in Edinburgh. For further details, and to book, see [here](#).

MBL Court of Protection Conference, London, 11 December

Neil is chairing and speaking at this full-day conference on topics from deprivation of liberty to medical treatment to statutory wills. Further details [here](#).

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

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CoP Cases Online



Use this QR code to take you directly to the CoP Cases Online section of our website





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Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. **To view full CV click here.**



Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). **To view full CV click here.**



Neil Allen: neil.allen@39essex.com

Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. **To view full CV click here.**



Annabel Lee: annabel.lee@39essex.com

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.**



Anna Bicarregui: anna.bicarregui@39essex.com

Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. **To view full CV click here.**



Simon Edwards: simon.edwards@39essex.com

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



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Adrian is a practising Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,*" he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. **To view full CV click here.**



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Professor Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). **To view full CV click here.**