27 January 2016

Thank you for the opportunity to provide comment on this important inquiry into the ACT Guardianship and Management of Property Act 1991 (the Act).

I also appreciate the time taken by the review panel to visit JACS and to consider input from JACS agencies and statutory office-holders on 20 April 2015.

My comments are made from my perspective as Public Trustee for the ACT (PTACT). The Public Trustee is an independent Territory Authority and statutory office-holder established to provide trustee services to the ACT Community and its government.

In that regard PTACT has responsibilities under the Act in respect to its appointment as -
- (financial) manager for persons with a decision-making disability;
- (financial and property) attorney under an Enduring Power of Attorney (EPA) made under the Powers of Attorney Act 2006; and
- examiner of accounts for persons appointed as (financial) manager, other than the Public Trustee.

I will also provide comment on -
- a current proposal by government to restructure rights protection agencies in the ACT including that the Public Guardian role of the Public Advocate be co-located (merged) with PTACT as a single entity. The government’s discussion paper may be found at http://justice.act.gov.au/protection_of_rights/ rights_and_support
- proposals for the introduction of supported decision-making.

GUARDIANSHIP AS OPPOSED TO ATTORNEYSHIP

A function of PTACT is to educate the community that everyone should make appropriate arrangements in the event of their death or disability. In respect to provision for later disability, this may be achieved through an EPA. Should a person fail to appoint an attorney, while they have capacity and subsequently lose capacity, a person may be appointed, on application by specified persons under the Act, by the ACT Civil and Administrative Tribunal (ACAT) as their financial manager, or guardian, or both.
The Public Trustee may only be appointed as financial manager under and order of ACAT or as financial and property attorney under an EPA.

The reality however is that, whilst a person may chose to appoint an attorney, the safeguards available to the person are far less than those afforded to them should an order of ACAT be made. A result is that, it is more likely that a person might chose not to have an EPA, which results in a significant cost being borne by the government and the community at large through ACAT orders resulting in dramatically increased workloads for both the Public Trustee and Public Advocate, much of cost of which is not recoverable.

**Guardianship or Attorneyship - Comparative table**

<table>
<thead>
<tr>
<th>Safeguard</th>
<th>ACAT Order</th>
<th>EPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Removal of manager/attorney by ACAT</td>
<td>√</td>
<td>✓</td>
</tr>
<tr>
<td>Supervision against abuse</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>Caveat automatically entered on person’s property</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>Regular review of manager/attorney’s actions</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>Non Public Trustee manager/attorney supervised</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>Supervision by PTACT of dealing with persons property by Manager/attorney</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>Does a fee apply where dealing with property</td>
<td>$232 fee for request for PTACT approval if dealing with property</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$112 fee for registration of EPA if dealing with property</td>
<td></td>
</tr>
<tr>
<td>Potential for elder abuse</td>
<td>limited</td>
<td>significant</td>
</tr>
<tr>
<td>Involves a finding of impaired decision making disability</td>
<td>√</td>
<td>X</td>
</tr>
<tr>
<td>May include specific limitations on manager/attorney</td>
<td>√</td>
<td>✓</td>
</tr>
<tr>
<td>Decisions made on best interests</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Decision on suitable manager/attorney</td>
<td>Made by ACAT</td>
<td>Made by person</td>
</tr>
</tbody>
</table>

I raise this as an issue because the accrued advantages of having a manager appointed by ACAT over those of an attorney under EPA are significant and are causing a greater burden on the government and community. A response may be that given this imbalance, the structure under which attorneys are appointed should be reviewed and a great amount of rigour be applied to the appointment and supervision of attorneys. This is not merely a matter for ACT but one for all states/territories given the mobility of Australian and the requirement for a degree of portability and mutual recognition.

**RECOGNITION OF ACT ORDERS BY OTHER JURISDICTIONS**

The failure of state/territory governments to mutually recognise each other’s financial management orders is a hindrance to the efficient delivery of guardianship services across borders, particularly where the person seeks to move to another jurisdiction.

**Western Australian model for mutual recognition**

Following the April 2013 National Justice CEOs (NJCEO) meeting, Western Australia prepared a paper about mutual recognition of State and Territory legislation across a number of justice sector issues. Western Australia recommended that NJCEOs consider the high level principles for mutual recognition set out in the paper in relation to a proposed way forward in particular for the succession law project.

The paper considered whether there ought to be a presumption of mutual recognition; assumes some legislative differences between jurisdictions that would not necessarily obstruct mutual recognition; and acknowledges that a presumption would not apply in some areas.

The paper provided three models for the recognition of another State or Territory’s legislation, and also discussed a presumption of mutual recognition.
Automatic mutual recognition

This option provided mutual automatic recognition expressly in the legislation. For example, “if a person makes an application for registration of an interstate order the registrar is to register the interstate order” (Restraint Orders Act 1999 (WA)).

Almost automatic mutual recognition

All jurisdictions currently use this model or a similar provision in their EPA legislation. For example, if an EPA is made in another state/territory and complies with the requirements in the other State, then, “to the extent the powers it gives could validly have been given by an EPA made under the Act”.

Mutual recognition dependent on ministerial declaration or making regulations

This option provided that an instrument be deemed an equivalent instrument under a law if the corresponding law is declared as such by the Minister or by a regulation. For example, under s16 of the Gender Reassignment Act 2000 (WA) “an equivalent (recognition) certificate issued under a corresponding law has the same effect as a recognition certificate under the (WA) Act), and a ‘corresponding law’ is defined as “…a law of another State or of a Territory...declared by the [WA] regulations to be a corresponding law”.

A presumption of mutual recognition

The Western Australian paper also discussed whether there should be a presumption that state and territory legislation contain a mutual recognition provision within the Australian federal system.

The presumption would be effective where state and territory legislation (whether enacted as individual pieces of substantive legislation or as template legislation), as part of a uniform or co-operative legislative scheme, are as a matter of substance, identical or similar.

The presumption would apply when developing and drafting a new model co-operative state/territory legislature scheme or amending an existing scheme. This may lead to the enactment of an automatic mutual recognition provision.

However, the presumptions could be rebutted or not operate where the legislative and policy differences are substantial and important, or where the legislative and policy subject matter is sensitive and therefore not appropriate to have another jurisdiction’s law, orders, certificates enforceable in another jurisdiction.

DISCUSSION PAPER – DESIGN OF A MODEL FOR THE EFFECTIVE PROTECTION OF HUMAN RIGHTS

The ACT Government has released a discussion paper on the design of a new model to oversee the protection of rights in the ACT. Supplementary to the proposed new Human Rights Commission, the Public Guardian functions currently located in the Public Advocate’s Office are proposed to be co-located (merged) within PTACT. The consultation paper takes into account feedback from justice-related statutory office holders on the review of protections of rights services conducted by Nous Group in late 2013.

PTACT is a self-funding commercial organisation that – with the exception of the Public Guardian function, provides fundamentally separate services in structure and operation from rights protection services. The proposal acknowledges that the guardianship and financial management client bases substantially overlap and that many of those clients accessing the services of the Public Guardian are also likely to require the assistance of PTACT.

In my response to the discussion paper, I concluded that, merging the function of Public Trustee and Public Guardian appears eminently achievable with many benefits and few insurmountable risks.

An alignment of the guardianship function in PTACT would allow the guardianship functions to remain separate within PTACT, with the guardianship management requiring a different focus and skill set.

A jurisdiction of the size and condensed nature of the ACT would benefit from a more co-ordinated delivery of (financial) management and guardianship services with one decision-maker instead of the current two.

There is a greater and more natural synergy between the functions of guardianship and management than there is presently between those of advocacy and guardianship. This was recognised by Nous Consulting in its review, suggesting that “the Public Advocate and Public Guardian functions...are clearly separable and
already operate independently.” There is capacity for, and demonstrable evidence of, discord between the outcomes of the two roles of guardianship and management where they exist in separate agencies.

Whilst it is accepted that there are philosophical differences in perspectives, skills and approaches taken by guardians and financial managers, it is reasonable for the community to expect that these services be delivered in a holistic, conjoined manner that places the interests of the represented person first and not those of the agencies.

The proposed model provides a more centralised and effective administration of the roles of guardianship and management, at the same time recognising the need for separation, as expressed by the Victorian Law Reform Commission in its review of Guardianship given the different ‘qualities required of an administrator (financial manager) and a guardian’.

The model also accommodates the principle that, in the community, it is common for the same individual to be appointed as both guardian and manager recognising that the person should have a degree of business acumen.

It is also a requirement that, in appointing either a guardian or manager, ACAT may only appoint PTACT or the Public Advocate as manager and guardian respectively of last resort and must prefer a capable, willing and proximate individual. The proposed model aligns with this principle in the Act, recognising that the same disciplines may exist within the one decision-maker. PTACT and the Public Advocate currently share the same decision-making principles in the Act as manager and guardian, designed to protect the represented person’s best interests and wishes as well as the family and carer’s right to be consulted.

Currently, the Act establishes that ACAT may appoint PTACT as manager only, but may appoint the Public Advocate as guardian and manager. However, if appointed as manager, the Public Advocate undertakes a trustee role, but does not have a trustee’s financial expertise. A resulting problem is that a guardian is not permitted to delegate that role to the Public Trustee. Once again, the proposed model resolves this problem as the two disciplines would be part of the same agency.

It is estimated that in excess of 130 persons are represented by both the Public Advocate and PTACT as guardian and manager respectively. Delivery of both services within one agency will generate efficiencies allowing a represented person to deal with one agency, having consistent decisions made for them. This will ultimately translate to cost efficiencies by doing away with the need for separate structures that support both functions.

Merging the two functions into one agency opens up the possibility that one enabling Act might permit the recovery of costs for the provision of guardianship and attorneyship services from the represented person in similar manner to the provision of management services. There are many persons for whom management and guardianship services are provided that can afford and should pay for both services.

As previously mentioned, economies can be gained from one agency acting as attorney under an Enduring Power of Attorney (EPA), instead of the current two agencies through separate visits, separate deeds and separate representation resulting in better access and outcomes for the community.

EMERGENCY ORDERS

Whilst this is not a criticism of the excellent work undertaken by ACAT, PTACT has concerns about the time taken to achieve outcomes through the Tribunal possibly as a result of the alarming increase in the number of orders being sought.

S.67 of the Act provides for ACAT to make emergency orders without holding a hearing. Unfortunately, there is currently an inability to obtain an emergency order within a period of 30 days, seriously impacting upon the circumstances of a person requiring guardianship or financial management services.
S.68A of the Act allows for emergency orders in respect to directions for EPAs to be made without a hearing. Perhaps we could use that provision more and make more decisions on documents alone without the time-consuming nature of full hearings.

**SUPPORTED v SUBSTITUTE DECISION-MAKING**

The use of substitute decision making and guardianship has come under increasing criticism from disability rights advocates, including the UN Committee on the Rights of Persons with Disability, who urge to replace or at least supplement it with a process called supported decision making where decisions are made ‘by’ or ‘with’ the person with disability. The United Nations Convention on the Rights of Persons with Disabilities clearly establishes supported decision-making as the first resort, the preferred alternative and, where necessary, a precursor to guardianship.

Supported decision-making places the person who is being supported at the front of the decision-making process. There is growing international and national recognition of the need to embed supported decision-making in civil society.

The Australian Law Reform Commission’s Discussion Paper (May 2014) *Equality, Capacity and Disability in Commonwealth Laws* states that supported decision-making reflects the international norm of equal recognition. The key element in equal recognition, as understood in the United Nations Convention on the Rights of Persons with Disabilities, is the embracing of a supported decision-making paradigm so that people with disability are acknowledged as having the right to make decisions on an equal basis with others and are supported in exercising that right.

It has been claimed that embedding supported decision-making in the ACT will support people with disability to exercise greater choice and control in a National Disability Insurance Scheme (NDIS) environment, which commenced in the ACT from 1 July 2014.

It is clear from papers presented at the International Guardianship Network’s World Congress on guardianship that Australia is regarded as having world best practice in supporting the rights of persons with disabilities. The UN Convention was a response to the world situation and we should not automatically assume that supported decision-making is not currently practiced in Australia and as such should pause in our rush to assume that it is not.

As a financial manager for some 52% of persons for whom management orders are made by ACAT, PTACT makes decisions for a wide range of persons. These range from persons who may have relatively normal lives and may have difficulty managing finances to persons who have advanced dementia and have no capacity to make their own decisions. In the middle there are a significant number of people who require intervention and substitute decision-making to mitigate financial difficulty.

Financial Management services are provided by PTACT then on assessment of the person’s ability to manage their own affairs. Services are then provided either in support of the person or as substitute decision-maker.

I have concerns that, in the rush to supported decision-making as the norm, the cost and effectiveness of doing so will be far greater given the proposed involvement of non-government advocates and community services agencies in the process. The reality is that few persons subject to ACAT orders have the means to fund the cost of providing financial management services to them.

I suggest that the issue here is not whether we do or don’t have supported decision-making, but in the language of the law. It is clear to me that the language doesn’t match what is being provided at ground level.

The concept of supported decision-making is being applauded principally by private advocates and community service agencies who see an emerging industry through which they might provide increased services particularly in the NDIS environment.
It is also true to say that the role of an attorney is weighted more to support than intervention whilst the role of a manager is weighted more to substitution.

The best outcome will be achieved by balancing a person’s wishes against their best interests, a daily undertaking of PTACT as a manager. The power of a decision maker must be sufficiently robust to be coercive.

I trust that this is useful in the Council’s deliberations. Please contact me on andrew.taylor@act.gov.au or by phone at 0423 268224 if your require clarification in respect to any of my comments.

Andrew Taylor
PUBLIC TRUSTEE FOR THE ACT
Addendum to the Submission of the Public Trustee for the Australian Capital Territory
to the ACT Law Reform Advisory Council

Review on the ACT Guardianship and Management of Property Act 1991
Draft General Comment on Article 12 of the Convention - Equal Recognition before the Law.

The Law Society of Scotland’s response

November 2013
Introduction

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Society’s Mental Health and Disability Sub-committee welcomes the opportunity to provide comment on the Committee on the Rights of Persons with Disabilities call for comments on the Draft General Comment on Article 12 of the Convention - Equal Recognition before the Law.

This response paper has been written by Adrian Ward (the ‘author’) Convenor to the Society’s Mental Health and Disability Sub-committee and reflects the views and comments of that Sub-committee.

Introduction

This paper commends positive aspects of two recent international reports, criticises serious and potentially harmful deficiencies, and concludes with excerpts from already published material, including suggestions of possible ways in which it might be possible to realise the apparent underlying purpose of those reports to eliminate differentiation in legal systems resulting solely from intellectual disability.

Comments

1. Grave discrimination against some of the most vulnerable people in society, and proposals which if implemented would severely violate their basic human rights and put any state which enacted them in breach of international human rights obligations, are to be found – astonishingly – in recent draft proposals by the United Nations Committee on the Rights of Persons with Disabilities (“UN Committee”). The proposals are contained in an advance unedited version of the UN Committee’s proposed “Draft General Comment on Article 12 of the Convention – Equal Recognition before the Law”, adopted by the UN Committee at its tenth session on 2nd – 13th September 2013 (“UN Report”). The UN Report proposes worldwide law reform, but unfortunately discloses serious apparent confusion and misunderstanding as to the laws of modern legal systems in their relevant provisions, and the realities which those laws address.

2. The UN Committee was established in accordance with the United Nations Convention on the Rights of Persons with Disabilities (“UN Convention”). The UN Convention was adopted by the United Nations General Assembly on 13th December 2006. The UN Convention provides for the establishment, membership and procedures of the UN Committee. It does not state the UN Committee’s objects, but it is reasonable to imply that these are primarily to further the purposes of the Convention. It is unfortunate that the proposals in the UN Report, if implemented, would have the opposite effect for many most vulnerable people.

3. Equally astonishingly, similar confusion and misunderstanding is also to be found in a report also issued in 2013 by the European Union Agency for Fundamental Rights (“FRA”) entitled “Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems” (“FRA Report”).

4. Fortunately, relevant international documents from the Council of Europe are open to no such criticisms. The UN Report mentions neither the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) nor relevant subsequent
Recommendations issued by the Council of Europe. The UN Report refers to unnamed "experts", but there is no evidence that any of the experts who assisted the Council of Europe in such matters were involved, nor that account was taken of the Council’s collective expertise. The proposals in the UN Report could not be competently enacted in jurisdictions such as Scotland where legislation incompatible with ECHR would be ultra vires of the legislature.

5. Also, the UN Report does not mention the Hague Convention of 13th January 2000 on the International Protection of Adults ("Hague Convention"). Although the purpose of the Hague Convention was to avoid conflicts of law, it has had significant influence on principles and values of substantive laws worldwide, and towards convergence, as recently demonstrated in "Rethinking Vulnerable Adults' Protection in the Light of the 2000 Hague Convention", Long, Int J Law Policy Family (2013) 27 (1): 51.

6. Neither report appears explicitly to identify the legal systems which comply, and in some cases have for some time complied, with Article 12 of the Convention without any need of law reform to achieve such compliance. That does not, of course, mean that processes of reform already far ahead of the UN Convention cannot or should not be carried further.

7. The authors of the UN Report appear to have been substantially aware neither of major processes of law reform over several decades in relevant areas of law in many jurisdictions, nor of the modern human rights-based systems which have resulted, nor that those modern systems comply with – and indeed go significantly further than – Article 12 of the Convention. Such national law reform processes have been characterised by widespread consultation with those, including (among many others) legal and medical professionals, with experience of practical engagement on a daily basis in promoting and safeguarding the rights and interests of people with intellectual disabilities, making existing laws serve those rights and interests better, and forming the principal driving force towards achieving improved legislation to serve and safeguard those rights and interests. There is no evidence of equivalent consultation and input either by the UN Committee or by FRA. In the case of this writer’s “home jurisdiction” of Scotland, it can be asserted that there has been no relevant consultation – in any way equivalent to that which is standard for any such law reform process – at all. Likewise, the inaccuracies to be found in the references to Scots law, even though they are brief, in the FRA Report demonstrate similar lack of any such consultation or engagement, even at the most basic level. When one encounters such flaws and deficiencies in relation to one jurisdiction, one can have no confidence as to the accuracy of the reports in relation to others. It is in any event self-evident that such flaws and deficiencies apply to the generalisations in both reports.

8. As far as it goes, the substance of the UN Convention is not open to criticism, except as identified in paragraphs 17 et seq below. It is worthy of wholehearted support. As regards the substantive law in modern systems, it merely re-states in relatively brief - and unfortunately incomplete - form what have been the guiding principles for decades, which already form part of the basis of more fully developed modern systems. In relation to the realities of lives of people with disabilities and public perceptions, it gives powerful re-emphasis to messages which require to be constantly stated and re-stated, probably until the end of time. The same applies to the ways in which even the most modern legal systems are operated in practice. Even the best laws provide only a framework to make it possible to achieve appropriate outcomes. They provide no guarantee that such outcomes will be achieved without careful, conscientious and understanding use of those frameworks. The comments in this paragraph apply in particular to Article 12 of the UN Convention, but also to the UN Convention generally, other provisions of which – if read in conjunction with Article 12 – help to make good the limitations of Article 12.

9. It must also be emphasised that both the UN Report and the FRA Report contain a powerful message which likewise must continually be stated and re-stated. It is a message which has
been one of the main driving forces behind law reform processes to produce modern systems. It is the message that all forms of special provision in the law, even though benignly intended to benefit people with intellectual disabilities, are by definition discriminatory and should never be applied in circumstances where they are not unavoidably necessary. There should never, in legal terms, be anything which disqualifies anyone from doing something of which that person is in fact capable. Moreover, the determination of a person’s capability must never be viewed in relation to such a person “left to their own devices”, lacking any support or help which ought to be given, placed in unnecessarily unhelpful environments, or the like. Autonomy, to the maximum extent to which it can be achieved, must be not only respected but supported.

10. However, as soon as special measures to support autonomy are employed, there may be a need for some degree of protection. The whole challenge of relevant areas of law could be summarised as the need to balance autonomy against protection. As soon as others play a supportive role for a person with some degree of intellectual disability, questions may arise in some cases as to whether to some extent we are hearing the voice of the supporter rather than that of the disabled person, whether undue influence is being exercised, or whether what is in fact occurring is the unregulated substitute decision-making (to use the terminology of the reports) of someone assuming that role without any process to determine whether that is needed, the extent of powers to be conferred, or the duration for which powers should be exercised, and no provisions for supervision or review: a situation clearly in breach of the rights of the disabled person including (in European terms) the rights enshrined in Article 6 of ECHR, and likely to lead to breach of other human rights.

11. The UN Convention recognises “the need to promote and protect the human rights of all persons with disabilities”. The obvious deficiency of the UN Report and the FRA Report is in relation to the need for such promotion and protection, in each individual case, to the extent that persons – even with the best possible assistance – are not able to act and decide for themselves to protect and assert their own rights, welfare and interests. One of the flaws of both reports is to view mechanisms for meeting that deficit in terms of what was the legal landscape (in relation to modern developed legal systems) of several decades ago, and to focus not only upon guardianship, but on outdated and unreformed notions of guardianship. There were indeed in the past forms of guardianship which, in individual cases, gave powers to guardians to deal with matters, some of which were in fact within the capability of persons under guardianship. Such a form of guardianship existed in Scotland until abolished in 1984. This grave injustice was one of the driving forces towards reform. It is unfortunate that the reports inhabit the pre-reform legal landscapes. There are still jurisdictions which require help to move beyond those outdated forms, but it does not help the process of reform in those jurisdictions to pretend that there is not worldwide experience of endeavouring to achieve necessary reforms.

12. To the extent that people, in each individual case, are not in fact capable of acting and deciding for themselves, and of themselves safeguarding their welfare and interests, and of exercising their rights, it is a fundamental breach of their human rights not to provide appropriate mechanisms to ensure that their interests are safeguarded and their rights exercised. To suggest that such mechanisms are a cause of “incapacity”, rather than a response to a disability, is as inappropriate as suggesting that a wheelchair, where needed and used, is a cause of physical disability rather than an aid to overcoming it, or to suggest similarly that a hearing aid is a cause of hearing impairment rather than a mechanism to overcome it.

13. The reports go even further back into antiquity by suggesting that legal processes involve “incapacitation”, that is to say some form of blanket declaration that a person is incapable which takes acting and deciding (in a legal sense) completely away from the person, followed by a process of imposition of “substitute decision-making”. To suggest that this is the case in all legal systems is wrong. Even to suggest that in some legal systems there were separate processes,
incapacitation followed by a resultant appointment, is wrong. In Scots law the nearest equivalent to “incapacitation” was probably the old procedure for cognition, which lasted until 1868, but even that was only applicable to what were then viewed as extreme cases of complete mental incapability (described in the old cases as persons “entirely deprived of the faculty of reason” or “without mind at all”), and even under that antiquated procedure an appointment (of a tutor-at-law) was made in the same procedure.

14. The reports suggest that there should be (in the words of the UN Report) a “shift from a substitute decision-making paradigm to one that is based in supported decision-making”, without recognising that these are not possible alternatives for meeting the same needs, but (if for the moment one uses the same label “substitute decision-making”) ways of meeting different situations, and ways which often may be required in combination. Reality is that intellectual disabilities present a huge range. At one end there are people with some degree of learning disability or brain injury, in the early stages of dementia or other progressive conditions, or suffering many forms of mental illness, who are either able to act, decide and communicate without help, or are able to do so with some facilitative assistance. Lawyers in the field are well used to optimising such abilities where they exist. At the other extreme are people in a coma or persistent vegetative state, in relation to whom past decisions may be available and still effective, but present decisions are not possible. Any adequate human rights-based regime must cover not only both extremes, fully and adequately, but all points in between. Although both reports assert simplistically that all regimes proceed on a “best interests” basis, that is in fact incorrect. Such an approach was explicitly rejected in Scotland, for example, where a principles-based approach was adopted, resulting in processes which this writer has described as “constructing decisions”, applying a hierarchy in which present competent decisions (even as regards only some elements of a matter to be addressed) always take precedence, past competent decisions come next, and there is then a gradation through decisive present choices, significant present choices, present wishes and feelings, past wishes and feelings, information from persons closest to the adult, and so forth down a hierarchy, at the very bottom of which are the norms of the society of which the adult is a member (which could perhaps be equated to a paternalistic “best interests” test).

15. The twin issues of autonomy and protection are particularly relevant to anticipatory measures such as Powers of Attorney, consideration of which demonstrates the fallacy of treating autonomy and protection as alternatives rather than as considerations to be balanced in each individual case. Powers of Attorney are rightly regarded as the preferred mechanism for people with deteriorating intellectual abilities or who wish to provide for possible future intellectual disabilities. They are described, provided for and encouraged in Council of Europe Recommendation 2009 (11) “on Principles concerning Continuing Powers of Attorney and Advance Directives for Incapacity”, and accompanying explanatory Memorandum, which remain the most modern international instrument on the topic. Such Powers of Attorney are the ultimate expression of autonomy in that they allow granter to determine the regimes to apply to themselves, the circumstances in which they should be operable, and the persons to operate them, and are always the result of unsupported or supported but competent decision-making; but which in exercise of that autonomy create for the future a regime of “substitute decision-making” (in the words of the reports). This exercise of autonomy requires protections. Firstly, it requires protections at the point of granting to ensure that this is indeed an exercise of true autonomy. Secondly, protections are required, at least in the form of being available to be triggered, once the personalised regime created by the granter is in operation, because by then the granter will not be fully able – or perhaps not able at all – to monitor and supervise.

16. If the whole range of responsive provisions, including but certainly not limited to the modern forms of guardianship ignored in the reports, were dispensed with, many people with intellectual disabilities would immediately be put at risk of exploitation, detriment and abuse. Inabilities,
even with any amount of truly neutral support, to decide and communicate decisions inevitably have such results, unless appropriate responsive measures are available and where necessary put in place. Anyone with any extensive experience of the realities of the world of people with intellectual disabilities will be well aware of the risks of financial exploitation, deprivation and all forms of physical and mental abuse. The reports nevertheless recommend the abolition of all guardianship regimes, do not address responsive provisions generally, and fail to state the essential protective need, for some people, of adequate responsive regimes including provisions (however named) equivalent to modern human rights-compliant guardianship regimes.

17. There are two deficiencies in Article 12 of the UN Convention. The first, which is a matter of expression rather than substance, is – at least in the English-language version - the rather unhelpful and (in modern terms) idiosyncratic drafting. The second is that while modern principles relating to measures responsive to intellectual disabilities are summarised in Article 12.4, the right of some people with intellectual disabilities to the protections of appropriate responsive measures is not repeated in Article 12, though of course it is inherent in many other provisions of the UN Convention, commencing with the statement in Article 1 of the purpose of the UN Convention “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”, which in the case of people who, even with support, are unable to achieve that objective in some degree themselves, require the availability and appropriate application of responsive measures, just as persons with physical or sensory disabilities may require appropriate aids.

18. There is, and one fears may always be, a tendency towards a hierarchy of discrimination producing repetitive circles of discrimination even within anti-discrimination. The UN Convention and many other international instruments would not have been required but for a tendency towards discrimination, albeit often unthinking and unintended, towards people with disabilities. Within the whole range of disabilities, there is a tendency towards discrimination against people with intellectual disabilities, compared with people with physical or sensory disabilities. Thus many of the provisions of the UN Convention are at risk of being read as applying only to physical and sensory disabilities, and not equally to intellectual disabilities (for example, the particular measures suggested in Article 23.3 appear to be relevant only to physical and sensory disabilities, with none of the many examples which would be relevant to intellectual disabilities).

19. Within intellectual disabilities, there is a tendency to discriminate against those with the greater and more disabling forms of intellectual disability, as compared with people with lesser degrees of intellectual disability. It is at that level that the UN Report and FRA Report fail. One of the worst forms of discrimination against anyone with a disability is to fail to recognise and provide for the extent and consequences of their disabilities, and to pretend that these do not exist. That appears to be exactly what both reports do in relation to people who, with any amount of support, are not capable of acting and deciding in legally significant ways (at an extreme, those in a coma or in persistent vegetative state). All of the responses in section 3.2 of the FRA Report are, inevitably, from people able – by one means or another – to communicate at the levels represented, and inevitably not from those whose intellectual disabilities prevent them from communicating in such ways. That does not mean that such people should not be listened to: absolutely, they must, but they cannot be taken as speaking for those with other degrees and kinds of intellectual disabilities, rather than those with disabilities broadly similar to their own. The impression that the reports largely disregard modern systems of relevant law rather than those not yet fully reformed, or whose reforms are not yet being applied fully, is rather reinforced by the choice of jurisdictions from which the majority of quotations in section 3.2 are taken.

20. If all acts and decisions having purported legal effect were treated as having actual legal effect, regardless of capability, there would be unfortunate consequences. A seriously
disadvantageous legal act (such as a gift) or legal transaction (such as a contract) would be binding even though the party entering it, even with any amount of support, was not able to understand it or to resist any pressure or undue influence towards purportedly granting or entering it. It would give legal effect to bizarre, disadvantageous or even unlawful acts or transactions resulting solely from the instructions of “voices in the head” of the person, or otherwise resulting solely from manifestations of mental illness. That would be so not only for a seriously disadvantageous act or decision, but for an illegal one carrying penalties, such as a money-laundering transaction. A deprivation of liberty (for example, in terms of Article 5 of ECHR) would not be a breach of human rights if purportedly consented to, even though – with any amount of support – the victim was not capable of understanding the nature and consequences of the consent. Likewise, engagement in repeated sexual activity, amounting to use as a prostitute, would not be unlawful on the part of those using the person thus if the person purportedly consented each time, even though – with any amount of support – the person was not capable of understanding the effect and consequences of such consent; and in circumstances and jurisdictions where prostitution is criminalised, such persons themselves would be guilty of such crime even though – with any amount of support - they did not understand the effect and consequences of their purported consents. These, and many more, are all things which can and do happen to people with intellectual disabilities. Any regimes which do not have and operate effective protective measures fail the victims disgracefully. That such failures amount to breaches of human rights by regimes which do not provide adequate protections is supported by a long line of authority going back, in the case of Europe, to decisions of the European Court of Human Rights such as in X and Y v The Netherlands (decision dated 26th March 1985, Application No 16/1983/72/110).

21. It is curious that the UN Report does not stress the rights of people with intellectual disabilities to have, where needed, adequate protection including through responsive measures, even though that right was recognised by the United Nations itself more than 40 years ago – see Article V of the United Nations Declaration on the Rights of Mentally Retarded Persons, adopted by the UN General Assembly in December 1971: “The mentally retarded person has a right to a qualified guardian when this is required to protect his personal wellbeing and interests”.

22. The language of the UN Convention itself (that is to say, the Convention of 13th December 2006) unfortunately may partly have opened the way to subsequent misconceptions. In modern legal usage, “incapacity” is equated to “being incapable”, that is to say in fact not capable of certain acts or transactions with purported legal effect (and, for the avoidance of doubt, not so capable even with any amount of assistance). Thus, Scotland’s Adults with Incapacity (Scotland) Act 2000 was, as a draft Bill, entitled “The Incapable Adults (Scotland) Act”, the change being suggested (as it so happens, in a discussion between this writer and an official) to avoid risks of persons being defined by their disability rather than as persons, and of incapability being seen (as in “old law”) as always a totality. The legislation, both in draft and as enacted, defined “adult” and “incapacity” but did and does not in its text refer either to “incapable adults” or to “adults with incapacity”. Any such incapacities are specific, limited, and require to be established as the factual incapacities of the individual adult. Council of Europe Recommendation (99) 4 “On Principles concerning the Legal Protection of Incapable Adults” contains, in its first paragraph, an effective definition which is reflected in law and practice (even though not expressly incorporated) in modern jurisdictions, at least in Europe. The principles set out in Recommendation (99) 4 “apply to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests”. That excludes those who can make a capable decision if assisted to do so. It focuses on the actual incapability, recognising that it may be partial and limited. It avoids the back-to-front errors of seeing measures responsive to actual incapacity as being the cause of
incapacity, and that recognition of the fact of incapacity equates to imposing “incapacitation” (as the term is used in the FRA Report).

23. This is where the language adopted at least in the English-language version of the UN Convention may have led to confusion and misunderstanding. The definition of “capacity” in the Oxford Companion to Law (OUP 1980) commences: “One of the attributes of a person or entity having legal personality, denoting legal ability to bear and exercise rights or to be affected by legal duties or liabilities”. In this definition “bear” and “exercise” reflect two meanings which can be attached to “capacity”. The first meaning covers all the rights and status attaching to the legal personality of an adult individual. Developed legal systems have for several decades taken it for granted that all adults, including those with intellectual disabilities, have the same rights and status. The second meaning covers the actual ability to exercise rights. The UN Report attempts to divide this further into the entitlement to exercise rights (normally regarded as an attribute of the first element) and the actual capability (“mental capacity” in the UN Report) to exercise those rights, which is the generally understood meaning of the second element. The UN Convention uses “capacity” in the first sense, meaning an individual’s rights and status, thus declaring in Article 12.2 that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”. At first sight this might be taken as the seriously discriminatory denial of actual disabilities in the area of the actual capability to exercise legal rights, assert legal status, and so forth. However, the sentence quoted clearly must use “capacity” only in the sense of those rights and status themselves. That this is the correct interpretation is clear from the use of the phrase “exercising their legal capacity” in Article 12.3 and in “measures that relate to the exercise of legal capacity” in Article 12.4. It is unfortunate that although the distinction between the two meanings must be clear to almost everyone engaged in any significant way with the operation of modern legal systems which accord full rights and status to everyone, however disabled; which encourage the exercise of actual capacity so far as abilities permit; and which ensure the availability and use of appropriate responsive measures to the extent (but only to the extent) necessary; that does not appear to have been understood by the authors of the UN Report and the FRA Report.

MENTAL HEALTH LAW

24. This paper addresses issues in relation to incapacity legislation. Both the UN Report and the FRA Report deal similarly with mental health legislation, and recommend its abolition. The same range of fundamental criticisms apply to those aspects of both reports. If implemented, they would deprive people whose judgement and decision-making is severely distorted by mental illness of their right to treatment when proposed treatment is demonstrably beneficial, even in cases where treatment is successful to the extent that the patient – with judgement and insight restored – welcomes the fact that such treatment was given and in effect retrospectively consents to it. The final excerpt reproduced at the end of this paper is taken from the context of mental health law reform.

THE FRA REPORT AND SCOTS LAW

25. The references in the FRA Report to Scots law are relatively few and brief. The FRA Report does not acknowledge that personal (welfare) guardianship as developed by the courts following the Morris case in 1986 (see Excerpt Six below) would have complied with Article 12 of the Convention, and that the modern Scottish regime in force since 2002 has been fully compliant. As with other regimes, there appears to be no reference to how modern regimes are actually operated in practice. As an example, not only under the current incapacity regime but following the revival of tutors-dative in 1986, in some cases powers conferred by the court have included power to explore and identify choices (such as future accommodation arrangements), to enable the adult to make the actual decision; and thereafter power to deal with the matters necessary to
implement that decision insofar as the adult is unable to do so; and as in everything, the Scottish provisions require full consultation with the adult in relation to matters where the guardian has powers and proposes to exercise them. The Scottish regime does not permit a guardian to act in a welfare matter of which the adult is in fact capable. It would have been helpful if the FRA Report had more fully recognised such ways in which the Scottish and other modern regimes already achieve compliance with Article 12 of the Convention.

26. In section 2.2.1, the FRA Report refers to the “mental disorder” definition which is a prerequisite for the definition of incapacity, but does not describe the definition of incapacity itself. It does not make clear that mental disorder of itself never results in incapacity, but conversely there can never be incapacity unless the prerequisite of mental disorder is established. It does not make clear that excluded from the definition of incapacity is any difficulty which can be overcome by any means whatsoever of assistance with communication.

27. In the last paragraph of 2.2.1 a provision which, as acknowledged in the relevant footnote, applies only to England and Wales is described as applying to the whole United Kingdom. The last paragraph of section 2.2 makes the curious assertion that Scotland “has a Public Guardian authority supported by the Mental Welfare Commission for Scotland”, which is an inaccurate description of the status and role of the Mental Welfare Commission. The first paragraph under 2.3.3 asserts inaccuracy that the code of practice under the (English and Welsh) Mental Capacity Act 2005 applies to the whole United Kingdom. The third paragraph of 2.4.1 refers to section 58(4) of the Adults with Incapacity (Scotland) Act 2000 but then purportedly quotes that sub-section in terms which are completely inaccurate. The penultimate paragraph of 2.4.2 is inaccurate, as regards Scotland, in that it implies a procedure for “incapacitation” which may be reversed, by referring (apparently) to the powers of the court under section 71 of the Act of 2000 to replace or remove a guardian, or to recall a guardianship order, as an appeal against “the deprivation of legal capacity”, when in fact the only relevant provision is power to recall a guardianship order or otherwise terminate a guardianship if either the grounds for appointment are no longer fulfilled, or needs can be satisfactorily safeguarded or promoted otherwise than by guardianship. No mention is made of other powers such as that under section 14 to appeal to the court as to any decision other than by the court “as to the incapacity of an adult” (meaning actual incapacity within the Act’s definition), not any supposed deprivation of legal capacity by way of “incapacitation”.

28. The last item in the table on page 60 states erroneously that the Mental Health Act 1983 as amended by the Mental Health Act 2007 applies to the whole United Kingdom, when in fact of course it applies only to England and Wales, the equivalent statute for Scotland being the Mental Health (Care and Treatment) (Scotland) Act 2003, which is not mentioned. It also indicates no “last significant amendment” to the Adults with Incapacity (Scotland) Act 2000, which was of course in fact significantly amended by the Adult Support and Protection (Scotland) Act 2007.

29. It is understandable, in a document seeking to cover many jurisdictions, to refer only briefly to any one jurisdiction. However, it then becomes all the more important that those brief references should be accurate. Significant inaccuracies impair the credibility of the whole document, even more impaired by generalisations which are simply not supported – at the most fundamental level – by the reality of legislation and its purposes, and the realities of the whole range of intellectual disabilities to which legislation seeks to apply.

PERSONAL

30. This paper is written by a practising lawyer, admitted as a Scottish solicitor in 1967 and engaged still, day by day, in the work of a lawyer, acting in particular for clients anticipating or
experiencing effects of “mental disorder” (as defined in Scotland) or those concerned to ensure their welfare, the proper administration of their assets, and the adequate protection of their rights, interests and welfare. In consequence this paper has been dictated in one day, at a weekend, and is not fully referenced. It is however derived from a career’s experience not only of acting as above, but of discharging the professional responsibility to seek improvement of the law, where best use of existing law is insufficient, and of sharing that experience internationally, both at international level and nationally and locally within several countries.

31. Principally to exemplify the thread of one practising lawyer’s experience of the modern development of incapacity law as apparently ignored in the UN Report and FRA Report, and to exclude any implication that they did not occur, there follow some excerpts from published material of which he is author. Excerpts THREE, FOUR, FIVE, SEVEN and EIGHT have been edited to update and generalise the terminology, but have not been otherwise altered. The texts mentioned should be referred to for the unedited versions of those excerpts and the full contexts in which all excerpts appeared. Footnotes have been removed.

32. The first two excerpts, however, suggest a way in which the commendable aspirations in both reports to end differentiation in the law specifically attributable to intellectual disabilities could be achieved. That would require a greatly more extensive process of change, inevitably over a much longer timescale, than the simplistic repeal of some legislation without anything to replace its role as an essential safeguard to human rights.

EXCERPT ONE


A central principle, which runs throughout this book, is described in section 3.9.1. It suggests a direction for the development of all areas of law, in all legal systems. Put simply, that direction goes away from putting people into fixed categories, based on diagnosis, and towards making individual provision, accurately matched to need.

Laws everywhere are based on assumptions – a norm – which do not fit everyone, in every situation. So special rules of law are needed for some people, in some situations. The category of “the norm” forces the creation of other categories, outwith the norm. The difficulty is caused by the boundary put round the category described as the norm. It is a boundary reinforced with strands of ignorance and fear, outdated but persistent. People outside the boundary may be deprived, unnecessarily, of participation in what is normal. People inside the boundary may be disqualified from receiving special help and special provision, even though they may need it.

In society, there is no need for such a boundary. There should simply be a recognition that some people, in some situations, need special help or special provision. The law must define criteria. It will do so with greater precision if the emphasis is upon identifying needs; rather than having to label people as outside the boundary of the norm, before special needs can be assessed and met. This approach requires reorientation of some legal concepts, and care in application. But it has the potential to humanise legal systems for the benefit of all, particularly those who perceive the law as threatening, rather than helpful.

EXCERPT TWO

Kindesrecht und Elternkonflikt, 2013 (pages 264-265)
In this chapter, “legal personality” is used to mean the whole rights and status attributable to a human being, and “capacity” to the ability to exercise and assert those rights and that status. Section 3 of Part II of this chapter narrated the lengthy journey which children have made over very many centuries from being treated principally as possessions towards recognition of the concept that they have legal personality, and that the function of child law is to facilitate the exercise and assertion of that personality, including the assertion and protection of their fundamental human rights; so that at last, under documents such as the UN Convention [on the Rights of the Child (1989)], we have a strengthened focus on the legal personality of children – upon their rights and status, and that they should have the same fundamental rights and freedoms as adults. In parallel, for adults with disabilities, including those with impairments of capacity, there has been similar progress – now supported by an equivalent Convention [UN Convention on the Rights of Persons with Disabilities, 2006] - towards recognition of their full legal personality, and recognition that the only differentiation in relation to their disabilities and incapacities should be the positive one of providing mechanisms to enable their freedoms and rights to be fully safeguarded and exercised.

The time has perhaps come to recognise that this trend at last brings these two areas of law closer together in a way which is potentially helpful to both, rather than potentially confusing and unhelpful as in the past. Other similarities between the two areas are emerging. It is a well-recognised problem that wishes and feelings voiced by children, and even evidence given by them, can be affected by the exercise of undue influence. The effects of undue influence are being increasingly recognised in situations of conflict involving adults with impaired capacity. Such adults may alternate between inconsistent expressions of wishes and feelings, depending upon whether they feel themselves to be within the influence of one or another of different spheres of influence in dispute with each other. This author, in his practice, has experience of such contradictions where two spheres of influence have represented two factions of a family in dispute, or where they have represented family on the one hand and professional carers on the other. The inability to resist undue influence, or even to act and decide in a manner independent of benign influence, could reasonably be regarded as an aspect of impaired capacity – impairment of the capacity to act independently of undue or benign influence, and thus give true expression to the person’s own personality and legal personality.

The factors now drawing child law and adult incapacity law closer together lead to fundamental questions. Why do we have these areas of special law at all? Why does our law treat healthy adults as the norm – indeed, historically, healthy adult males as the norm – and then deal specially with others? Why should the norm be those least in need of the law’s protections and safeguards? Should we not reverse that whole structure and start, generically, with an assumption that we should apply all protections and safeguards such as have been developed in both child law and adult incapacity law, to everyone, and then relax them by way of exception to the extent that individuals clearly do not need them? It would be impractical to seek to re-write large areas of law re-orientated in such ways. It might however be valuable in future legislative processes to address such questions, and to test proposed legislation against the answers arrived at to them.

Documents such as the United Nations Universal Declaration of Human Rights and the European Convention on Human Rights already provide a strong foundation upon which such a reversal of jurisprudence might be constructed, by declaring fundamental rights of all human beings, rather than those within circumscribed categories.

EXCERPT THREE

*Scots Law and the Mentally Handicapped*, 1984 (page 108)

In recent years there has been … a general trend towards developing the full individual potential of people with impairments of capacity, enhancing their human dignity, integrating them into the
community, and giving them as normal and independent a lifestyle as possible. …. Against this background the law is the laggard.

EXCERPT FOUR

*The Power to Act, 1990 (pages 8–9)*

Can we define, in general terms, the principles which should govern the special provision which the law makes for people with learning disabilities – the ideal towards which we would wish development of the law to lead us? I think that we can, and that the answers are valid for all those lacking full capacity, whether through learning disability or from other causes. We can apply to the law the same fundamental principles as underlie the approach of other professions in their work with people with such disabilities. Ideally, for any adult with impairments of capacity, the same general law as applies to all of us should apply fully and without differentiation, except only to the minimum extent that special provision is necessary. Where special protection or special provisions are needed, they should be provided, but limited to the essential minimum. Where the price of protection is restriction, that price must be clearly worth paying, and the restrictions should be minimised. Decision-making should be taken away from the adult to the minimum possible extent, and to that end he should if necessary be helped to make and communicate his own decisions. In areas of doubt, there should be a presumption of competence. When decision-making is transferred to others, they should still try to involve the adult in decision-making as much as possible. Anyone appointed to a supervisory or decision-making role should be appointed by legal procedure entailing careful assessment of needs and circumstances; the appointment should be subject to periodic review and, when appropriate, the appointee’s performance should be monitored. The total regime applying to the adult (made up of special rules and protections, and supervisory and decision-making appointments) should be co-ordinated to minimise doubt and conflict, and should be directed towards serving his best interests, enhancing his development and human dignity, and minimising the effects of his disability upon all areas of his life.

EXCERPT FIVE

*The Power to Act, 1990 (pages 11–12)*

The areas of decision-making in which help and guidance may be required range from mundane and everyday matters such as what to eat and what to wear, what to do and where to go, to major decisions such as where and with whom to live. There are decisions about taking part in work, training and social activities; decisions about whom to associate with and whom not to associate with. Then there are decisions about medical, dental and other health care. In these and many other matters, individual adults may be unable, at least without help, to make sound and reasonable judgements or decisions for themselves. No-one has any automatic right to make such decisions for another adult, however handicapped. In every legal system, specific procedure is required in order to appoint someone to such a supervisory role. The essential elements of such procedure will include an assessment of whether such an appointment is needed, and a decision as to who should be appointed. Such an appointment does represent a diminution of the rights of the adult, but if the powers conferred are limited to those which are necessary, the only rights lost will be those which the adult is unable to exercise for himself. **There is greater risk of infringement of the rights of the adult where there is no judicial determination that such an appointment is necessary, yet someone simply assumes such a role without any legal authority to do so.** [Emphasis added in this reprint]

EXCERPT SIX
The Power to Act (pages 43-44) (the original description of the Morris case, described in this excerpt, in which the author acted for the petitioners, appeared in Revival of Tutors-Dative, 1987 SLT (News) 69)

The Morris petition of 1986 concerned a young adult who needed a guardian. .... Two medical certificates were obtained. The certificates listed the particular matters in which the disabled person required supervision, help and guidance. The doctors certified that in their opinion the petitioners were suitable people to provide the necessary supervision, help and guidance. They also stated that there could be some improvement in the disabled person’s capability and capacity, and that his needs should be reviewed after three years – though in the course of these particular proceedings the review period was extended from three years to five years.

The court made the appointment as asked. Mr and Mrs Morris were appointed joint tutors-dative for a period of five years. The powers granted in this particular case were ...., together with power to provide general care, support and guidance. Mr and Mrs Morris were given the right to apply for variation of the court order in the event of a change of circumstances. In future cases it would probably be appropriate to give “any interested person” a similar right to apply for variation of the appointment.

The Morris case did not introduce a full modern personal guardianship code into Scots law. It refined and updated the existing tutor-dative procedure, without fundamentally altering it. Specifically, it established that if, in a petition to appoint a tutor-dative, the court is presented with medical evidence that it is appropriate to limit the appointment as to powers granted and as to duration, and if the court is asked to limit the appointment in these ways, the court will do so.

.... There has been speculation as to whether the courts would henceforth insist that the powers granted to tutors be tailored to need in each particular case. That issue has not yet been put to the test. One would hope that the courts would accept that it would be inappropriate and unjust to grant greater powers than were needed in any particular case, and would be alert to avoid such injustice. Likewise it is reasonable to suggest that it is now good practice for lawyers preparing such petitions to enquire as to the appropriate powers, and the appropriate duration, and to frame their petitions accordingly. ....

EXCERPT SEVEN

A New View, 1993 (page 26)

It is not always necessary to appoint someone else to make decisions. Some other form of legal intervention may suffice [other forms of personal and management orders are referred to]. No such legal intervention may be needed at all. A person may be able to make decisions, if given help, training or encouragement. Or the real need may be for provision of services, rather than formal intervention. Applying the principles of minimum necessary intervention, no order should be made unless shown to be necessary. If an order is required, then the least restrictive alternative should be selected. Appointment of a guardian or manager is usually the most restrictive alternative. In several countries there is now a strong movement against use of intervention which is too restrictive, and against use of formal intervention when it is unnecessary.

EXCERPT EIGHT

A New View, 1993 (pages 33-35)

Most adults with impairments of capacity can make some personal decisions for themselves. It is helpful if the law recognises this by:
safeguarding their right to make personal decisions for themselves, and
confirming the validity of those decisions

except only where it is established that they cannot validly make a particular decision, or a particular
category of decisions.

It is often necessary to balance two different types of limitations on a person’s rights and freedoms
in personal matters. Firstly, it is a limitation of a person’s rights and freedoms to impose any special
legal provisions, such as appointing a guardian. But secondly, it is also an infringement of the
person’s rights and freedoms if someone else is in fact making decisions, or exercising the control
of a guardian, without any legal authority to do so.

There should be no intervention in the form of special legal provisions, except when shown to be
necessary. Such intervention should be limited to the extent shown to be necessary, but to that
extent it should be provided.

It may be possible to meet needs without applying special legal provisions.

The adult may need facilities and services which ought to be provided, but which are not being
provided. Or the adult may be able to make decisions, but may need help in communicating them.
Or the adult may be able to make decisions if given some help in making them. If the adult’s needs
can be met by providing facilities, services or help, then these should be provided if possible. If an
authority has a duty to make such provision, then if necessary that duty should be enforced.

Adults with impaired capacity are likely to have difficulty in asking for facilities, services and help,
and difficulty in making decisions about such matters. Some may be unable to do these things. In
these matters, also, there should be the minimum necessary intervention. If possible, such adults
should be helped to do these things, rather than have someone else do them. Help can take two
forms.

[Firstly, arrangements such as self-advocacy, advocacy, and use of key workers are
described. Secondly, the importance of encouraging authorities and other providers of
facilities and services to play their part is explained.]

…. There is a danger in arrangements such as befriending and advocacy schemes. The danger is
that the views and preferences of the friend or advocate may dominate. This risk can be minimised
with trained, sensitive friends and advocates, whose minds are always open to the possibility that
sometimes they may not interpret accurately the needs and wishes of the adult. But if there is a
significant risk that someone else’s decision may be imposed, then it may be better that this be
done formally, with the requirements and protections of legal procedures, rather than informally
without those requirements and protections.

EXCERPT NINE

Adult Incapacity, 2003 (paras 1-15 et seq)

Effects on legal capacity

1-15
As has already been stressed, diseases, injuries and disorders such as those described above are
infinitely variable in the nature, degree and duration of the disabilities which they cause. Not all of
them will necessarily cause an impairment of legal capacity, and none by reason of their diagnosis
alone reverse the onus upon anyone seeking to establish incapacity. It has nevertheless been estimated that at any one time some 100,000 adults in Scotland do have significant impairments of legal capacity. Some legal incapacities are temporary, some lifelong, and some variable or progressive. Variations may sometimes be huge within short periods. Legal incapacities may reflect strengths and weaknesses in different skills, such as long-term memory, short-term memory, arithmetical competence, various areas of conceptual and cognitive functioning, communication abilities, and so on. For the same individual, such variations and diversities may affect particular legal capacities for particular purposes.

Minimising impairment of legal capacity

1-16
It is a fundamental principle of good practice, enshrined in statute in the Incapacity Act, that formal legal intervention should be the minimum necessary. One consequence of that principle is that all reasonable measures should be taken to enhance capacity and to remove obstructions to the exercise of capacity. Some potential causes of legal incapacity can be remedied altogether by appropriate treatment, or the person may in time recover. In other cases, while the underlying condition cannot be cured, appropriate treatment may restore full or substantial legal capacity. Some potential causes of legal incapacity which are irremediable may present in combination with elements which can be remedied, and the remedying of which will substantially enhance effective capacity. For example, an underlying condition may have resulted in self-neglect, leading to dehydration and inadequate diet and care, causing some temporary loss of capacity which can be substantially, and often quickly, remedied by appropriate treatment and care. Irremediable dementia or learning disability may be combined with depression or other disorders which can be addressed so as substantially to enhance effective capacity.

1-17
People who are vulnerable because of disabilities may be at a loss if brusquely presented with questions and asked for decisions. They may be able to formulate valid decisions if someone takes time to explain and to help them understand, analyse and decide. An apparent lack of capacity may be caused by communication difficulties which can be overcome by formulating questions requiring "yes/no" answers, or by using interpretative help.

EXCERPT TEN

Adult Incapacity, 2003 (paras 15-4 et seq)

15-4
Every adult has the right, circumscribed only by limitations expressly set by the law, to make whatever choices and decisions he or she wishes. Incapacity may impair the exercise of that right, but does not detract from the right itself. The purpose of incapacity law and its procedures, techniques, roles and appointments is to endeavour to make good that impairment so far as possible; never simply to take that right from the adult and pass it to another. That distinction must always be observed to the maximum possible extent. In some cases where the distinction is a narrow one, it remains critical.

15-5
One must always start with basic questions. Can the adult make and communicate a valid choice or decision in the particular matter? If so, that choice or decision applies. If not, what is the reason? Ability to communicate may be impaired; other elements of capacity may each in some degree be limited; or they may be distorted so seriously by mental illness as to raise questions as to whether apparent choices and decisions are nullified by those distortions. All of these are value judgements. They are value judgements by someone other than the adult. To question the apparent choices and
decisions of an adult is an intervention, which must be justified. The presumption of capacity, with which this book commenced, must be actively supported, encouraged and facilitated before the possibility of rebutting it is seriously contemplated. If the principal difficulty is one of communication only, the matter is relatively clearcut. Whatever assistance is required, by any party to the communication in question, should be provided. But even here the matter is only relatively clearcut, not always absolutely clearcut. Some forms of serious communication difficulty require interpretative elements based on past knowledge of the adult, or upon skilled professional judgement, or a combination of both, to an extent that involves a degree of intervention, so that aspects of the following discussion become relevant.

15-6
"Intervention", in this context, means any involvement of any third party anywhere from the initial stages of questioning and assessing the adult's capacity through to making specific choices and decisions. The principles of no intervention except for benefit, and of minimum necessary intervention, are of fundamental importance, but it is necessary to pick out some of the individual strands which combine to form those principles.

15-7
The methodology proposed below applies only in situations where appropriate professional evidence has confirmed that there is some impairment of capacity. In approaching specific choices and decisions, it is still necessary to commence with an assessment of the extent to which the adult may nevertheless be able competently to decide the particular matter, or decide elements of it. ....

EXCERPT ELEVEN

Adult Incapacity, 2003 (paras 15.15 et seq)

15-15
However, at one end of the continuum there are some situations in which a choice by an adult will be decisive even though the adult has severe impairments of capacity. Such a choice will be decisive if a similar choice, by a competent adult, would have equally decisive status. To proceed otherwise would be to discriminate against, and indeed to de-personalise, the adult with impairments of capacity, however severe. Respect for such instinctive and entirely individual expressions of one particular person's personality is one of the fundamental elements of non-discrimination. Such choices are no less valid because they are communicated with difficulty and understood only by someone who knows the adult well, or who has advanced skills in understanding non-verbal communication or otherwise establishing communication. If these are the only ways in which a severely disabled adult can have some control over his own life, then it will be a grave and cruel injustice not to facilitate the communication of such decisive choices, and to respect them.

15-16
Along the continuum from choices which are decisive (and thus equivalent in their effect to competent decisions) through choices which are significant to wishes and feelings, the weight given to the choice or to the wishes and feelings should be the same when constructing a decision for an adult with impaired capacity as it would be given to the same "level" of choice, or of wishes and feelings, by a competent person making his own decision. In other words, when constructing a decision for an adult unable to make the full decision competently for himself, within the construct the weight given to a particular "level" of choice, or of wishes and feelings, should be the same regardless of the degree of impairment of capacity. The degree of incapacity defines the extent to which other elements may require to be supplied other than by the direct contribution of the adult; not the weight to be given to those elements which the adult can supply. That weight should be determined both by objective assessment of the importance of the element in question and also by
reference to the relative importance actually attached to it by the adult, whether the adult has full competence or impaired capacity.

15-17
This is a suitable point at which to consider the potential tension between past decisions, choices and wishes and feelings, on the one hand, and present ones, on the other. Usually present views will override past views. As was observed in para.4-17, an adult's choices and views when directly experiencing the realities of a situation may differ from distantly theoretical views expressed in the past about such a situation without direct personal experience of it. Moreover, the illness or injury causing the impairment of capacity may itself have altered the adult's personality and changed the adult's views. As is suggested in para.4-17, the present adult should not be treated as unequivocally "owned" by the past adult.

15-18
Conversely, however, there are situations such as that described in para.7-3 above, where an adult has a fluctuating illness and a tendency to make decisions and choices when unwell which are regretted when well. In these cases, the adult goes through phases when capacity and judgement are impaired. The adult lacks insight during those phases, but between them well understands what was happening. In the context of imposition of compulsory measures under mental health law, the Millan Committee considered and contrasted concepts of lack of capacity, lack of insight and impaired judgement, favouring the last-mentioned as a criterion for imposition of compulsory measures. The distinctions are less relevant in incapacity law: in terms of the Incapacity Act, impairment of judgement may be a factor rendering an adult "incapable of . . . making decisions". The vociferous assertion during a phase of illness may be neither a competent decision nor a decisive choice. It seems reasonable to make a distinction between the rational decision or decisive choice of a permanently altered personality, albeit combined with significant impairment of capacity, on the one hand, with temporary distortions of the adult's known views during phases of impaired judgement, on the other: but of course not every situation will fall neatly into one category or the other. Use of the "shadow construct" referred to in para.15-8 may assist, particularly in conjunction with professional assessment, but it can be difficult to avoid subjectivity.

EXCERPT TWELVE

Adult Incapacity, 2003 (para 15-27)

15-27
So far, this discussion has not employed the term "best interests". As was pointed out in Chapter 4, that term does not appear in the Incapacity Act. In the past, those who enjoy adversarial debate have joined the camps advocating "best interests" or "substituted judgement" approaches to making decisions for people with impaired capacity. "Substituted judgement", in this context, means ascertaining and applying the choice or decision which, it is believed, the adult would have arrived at if able to make and communicate a choice or decision in the matter in question. The English Law Commission set out the alternatives of best interests and substituted judgement in its preliminary consultation paper Mentally Incapacitated Adults and Decision-making: An Overview and returned to the topic in its subsequent consultation paper Mentally Incapacitated Adults and Decision-making: A New Jurisdiction, in which the English Commission wrote (para.2.14): ". . . the best interests test is often presented in opposition to the substituted judgement test. The latter was preferred by many of our respondents, though it was conceded that it was hard to apply to persons who had never been able to form judgements of their own. We doubt that the two tests need be mutually exclusive, and favour a compromise whereby a best interests test is modified by a requirement that the substitute decision-maker first goes through an exercise in substituted judgement". The Scottish Law Commission favoured an approach based upon the principles now embodied in the Incapacity Act, rather than upon a concept of best interests. They wrote: "Our
general principles do not rely on the concept of best interests of the incapable adult. We consider that 'best interests' by itself is too vague and would require to be supplemented by further factors which have to be taken into account. We also consider that 'best interests' does not give due weight to the views of the adult, particularly to wishes and feelings which he or she had expressed while capable of doing so. The concept of best interests was developed in the context of child law where a child's level of understanding may not be high and will usually have been lower in the past. Incapable adults such as those who are mentally ill, head-injured, or suffering from dementia at the time when a decision has to be made in connection with them, will have possessed full mental powers before their present incapacity. We think it is wrong to equate such adults with children, and for that reason would avoid extending child law concepts to them. Accordingly, the general principles we set out below are framed without express reference to best interests. The general principles referred to are those now set forth in the Incapacity Act. The approach of the Scottish Law Commission is to be preferred both on its merits and because Scots law in this regard now implements the Commission's recommendations. The approach favoured by the English Commission is nevertheless helpful to the extent of identifying a "best interests" approach as a last resort. Even at that level, however, it is necessary to look more closely at what is meant by a "best interests" approach. It is an inherently subjective and paternalistic approach. Except where the choice of decision is beyond doubt, it entails a choice by someone other than the adult. If that choice is in any way reflective of the personal views and background of whoever makes it, it is to that extent flawed; but even if the person making the choice is rigorously objective, that choice will inevitably be a reflection of level (12) of the list in para.15-9. In other words, it will be a contribution from the lowest level of the list, and should be accorded no higher status than that. If inconsistent even with level (11), or with the preponderant view to be derived from higher levels, then usually it should not prevail. It is worthy of repetition that the requirement of modern Scots law is that any judge, safeguarded curator ad litem (if for some clear, good and justified reason one should ever be appointed), or appointee, or any other authority or person exercising functions under the Incapacity Act, should proceed in all respects in accordance with the general principles of the Incapacity Act, and not by simply interjecting their personal views as to the adult's "best interests".

EXCERPT THIRTEEN

Adults with Incapacity Legislation, 2008 (page 4)

UN Convention

The UN Convention on the Rights of Persons with Disabilities of December 13, 2006 seeks to address from a global perspective all disabilities, including physical, sensory and intellectual disabilities. Article 12.1 reaffirms the right of all persons with disabilities to recognition everywhere as persons before the law. Article 12.2 provides that: “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” Subsequent references to “the exercise of legal capacity” point to an idiosyncratic use of “legal capacity” to mean an adult’s rights and status themselves, rather than the ability to exercise and assert them. Under that usage “legal incapacity” refers to the diminution by law of an adult’s rights and status, similar to that which might be imposed upon some criminals, or upon bankrupts. Persons with disabilities should never have such legal incapacity imposed upon them by reason of their disabilities.

Across the great range of intellectual disabilities, human rights and fundamental freedoms can be put at risk on the one hand by ascribing incapacity to those who have capacity but may require support in exercising their legal capacity, but also on the other hand by suggesting that only support – rather than careful legal safeguards – is required by those lacking capacity, and whose apparent compliance is not a valid exercise of legal capacity. The very essence of any adult incapacity
régime is, in both creating and applying its provisions, to provide for both situations and to address in a balanced way the difficult task of drawing the delineation between them. The UN Declaration addresses the first situation in Article 12.3, which gives new authoritative force to existing best practice principles that where there is capacity but difficulty in exercising it, all necessary support should be given to facilitate, encourage and develop the exercise of capacity. Article 12.4 briefly re-states the main guiding principles applicable in the second situation where there is impairment of capacity and “measures that relate to the exercise of legal capacity” are required. However, Article 12.4 neither contains principles explicitly addressing such incapacities nor even acknowledges their existence. This lack of balance, coupled with the peculiar wording of Article 12.2, has unfortunately produced in much of the comment upon the Declaration a reinforcement of the “discrimination within anti-discrimination” which so often disadvantages people with impaired legal capacity (in the normal sense of that term). Specifically, it has become fashionable in some quarters to pretend that people in the second category above are in the first category, describing people who in fact have significant impairments of capacity as being “in need of support to make decisions”. Failure to recognise the existence of a disability and its consequences is a form of discrimination, and often leads to further discrimination. “Supported decision-making” is for those who can, albeit with assistance, make their own valid decisions, though there is always a danger that the resulting decision may be more that of the supporter than of the adult. Where there is no relevant capacity, or only limited and partial capacity, what is required is a process of “constructing decisions” such as is described in Chapter 15 of Adult Incapacity. Because of these limitations and lack of balance in the UN Convention, the Council of Europe Recommendation No. R (99) 4, referred to in the preceding section, remains the principal starting-point for the continued development in Europe of laws to ensure the protection of the human rights and fundamental freedoms of those whose capacity to make valid decisions, and effectively to exercise and assert their rights, is impaired.

EXCERPT FOURTEEN

Adults with Incapacity Legislation, 2008 (pages v-vi)

The subject is also developing internationally, with reform in many jurisdictions and continued attention from the Council of Europe and the European Court of Human Rights. A surprising apparent exception is the United Nations. The unfortunate terms of Article 12.2 of the recent UN Convention on the Rights of Persons with Disabilities are considered in the Introduction and General Note. Read literally, it declares that all persons with disabilities have full legal capacity. No, they do not, unless the dark legacies of the past are still allowed in some quarters to deny the very existence as human beings of people with serious intellectual disabilities. What requires to be emphasised is that they are entitled to full legal rights and status, and that the consequences of their incapacities must be recognised and adequately addressed. That must be stressed again and again, to counteract the forces otherwise constantly tugging back down the order of priorities, towards those dark shadows of the past, those people least able to advocate for themselves.

EXCERPT FIFTEEN

Vorsorgevollmacht und Erwachsenenschutz in Europa, 2011 (pages 203-204)

Two general concepts provide a context for this paper.

Firstly, adult incapacity law is a wide subject. It includes techniques for making decisions when people’s capacity is impaired, for validly acting and transacting on their behalf, and for protecting them. These techniques can be put into three categories: anticipatory measures, responsive measures and third party measures. Anticipatory measures are measures under which people still capable of doing so establish arrangements of their own choice to apply (or to continue to apply)
should their own capacity become impaired. Responsive measures, by contrast, are established by a court of other authority after capacity has been lost. Third party measures are relevant only to property and financial matters. They are measures under which a person wishing to provide or bequeath funds or assets for the benefit of a person with impaired capacity establishes arrangements, such as a trust, for managing them and determining their ultimate destination.

The second concept is the tension between principles of autonomy and self-determination, on the one hand, and protection on the other. Throughout that wide subject of adult incapacity, both of these principles are of vital importance. The greater the degree of incapacity, the more important it is to recognise such autonomy as is possible, and to respect past exercise of autonomy, particularly if exercised when capacity was less impaired. And obviously, the greater the incapacity, the more important is protection.

Placing these two concepts together, the starting-point for responsive measures may well be a need for protection, but it remains vital to preserve and encourage autonomy, and to respect present and past expressions of autonomy. The focus of this paper is upon anticipatory measures, the ever-increasing importance of which is driven by the principle of autonomy. In the public mind, anticipatory measures are usually equated quite simply with autonomy. That apparent simplicity is deceptive. The public’s preference for autonomy at the expense of protection, and the need nevertheless to balance autonomy against protection, are recurrent themes of this paper.

**EXCERPT SIXTEEN**

*Consensus for Change? (Conference Report), 1996*

By definition, involuntary treatment creates conflict – which must be carefully balanced in each individual case – between the right to autonomy and the right to treatment. People suffering from conditions which can be cured or alleviated have a right to be treated. This includes the right not to be left at risk of harming themselves or others. They have this right even when their illnesses prevent them from understanding that they need treatment, or cause them to believe that they ought to suffer.

But what are the limits to the principles of compulsory health? Compulsory vaccination and compulsory measures in relation to infectious and sexually transmitted diseases are not unknown in Europe, but with these there is a general public health dimension. Only Sweden, to my knowledge, yet prohibits the employment of people to entertain the public by inflicting brain damage on each other in a boxing ring, yet most legal systems have procedures to override the objections of people who believe that a particular treatment for a mental illness is not efficacious or that side effects are unacceptably damaging.

Perhaps we cannot dispense altogether with involuntary treatment provisions, but neither is it acceptable that detention should automatically remove the right to refuse consent to any treatment for mental disorder (with limited exceptions) – that is a classic example of the fixed outcome, regardless of individual needs and circumstances, which should no longer have a place in our law.

We must be clear about what the law can do, and what it cannot do. The law cannot of itself guarantee perfect answers. That was the fallacy of the old “institutionalised” pattern of fixed criteria, fixed procedure and fixed outcome. However cleverly we legislate, such a pattern can never guarantee the right answer in every case: on the contrary, it guarantees that we shall often get the wrong answers. What we can expect of the law is to provide the optimum framework for getting it right in individual cases – a process which depends upon enhancing the contributions of users and their representatives, families and professionals, a process which benefits from most of the trends which I have identified, rather than struggling in vain against them.
Our objective is to strike the right balance among competing principles in each individual case. The balance will vary from one person to another, and from time to time for each.
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