University of Essex

THE ESSEX AUTONOMY PROJECT

THREE JURISDICTIONS REPORT

Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK

AN ESSEX AUTONOMY PROJECT POSITION PAPER

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AUTHORS:

WAYNE MARTIN, SABINE MICHALOWSKI, JILL STAVERT, ADRIAN WARD,
ALEX RUCK KEENE, COLIN CAUGHEY, ALISON HEMPSEY, REBECCA MCGREGOR

Arts & Humanities Research Council

tc young solicitors effective legal solutions

Edinburgh Napier UNIVERSITY

E·S·R·C ECONOMIC & SOCIAL RESEARCH COUNCIL

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EXECUTIVE SUMMARY

The *Essex Autonomy Project Three Jurisdictions Report* is a contribution to an ongoing process of legal reform across the UK and around the world, the broad aim of which is to ensure respect for the rights of persons with disabilities.

The report is the culmination of a collaborative sixteen-month project undertaking an assessment of capacity/adult incapacity legislation in the three legal jurisdictions of the United Kingdom: England & Wales (which together comprise one jurisdiction for these purposes), Scotland, and Northern Ireland. It is intended (i) to provide technical research support to UK officials who will be involved in the forthcoming UN review of UK compliance with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD); (ii) to make recommendations in support of ongoing efforts across the UK to reform capacity/adult incapacity legislation in order to achieve CRPD compliance; and (iii) to provide analysis, both of current legislation and possible alternatives, that will be useful to those around the world who are involved in the reform of mental health and mental capacity legislation in accordance with the human rights requirements of the CRPD.

Compliance with the CRPD is a work-in-progress in the three jurisdictions of the UK, and this work must continue. We identify a number of recent legislative innovations that have the potential to bring the UK closer to compliance. We consider measures commonly employed in the three jurisdictions but hitherto hardly addressed in discussion of CRPD compliance, in particular autonomous measures such as powers of attorney and advance directives, which present particular challenges and opportunities in the context of CRPD compliance. We also identify a number of other areas in which the statutory arrangements in the UK still fall short of compliance with CRPD Art. 12. We advance a series of recommendations about how the three UK jurisdictions can remedy these areas of non-compliance.

The main recommendations of the report are as follows:

Recommendation 1: Respect for the full range of the rights, will and preferences of everyone must lie at the heart of every legal regime. That must be achieved regardless of the existence and nature of any disabilities. Achieving such respect must be the prime responsibility of anyone who has a role in taking action or making a decision, with legal effect, on behalf of a person whose ability to take that action or make that decision is impaired. The role may arise from authorisation or obligation. The individual with that role should be obliged to operate with the rebuttable presumption that effect should be given to the person's reasonably ascertainable will and preferences, subject to the constraints of possibility and non-criminality. That presumption should be rebuttable only if stringent criteria are satisfied. Action which contravenes the person's known will and preferences should only be permissible if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests.

Recommendation 2: All three UK capacity/adult incapacity statutes should incorporate an attributable duty to undertake all practicable steps to determine the will and preferences of persons with disabilities in applying any measure designed to respond to impairments in that person's capabilities.

Recommendation 3: In any process that impacts upon the ability of a person with disability to exercise their legal capacity, the primary obligation of an independent advocate shall be to support the person to overcome obstacles to such matters as comprehension or communication so as to enable them to exercise that capacity for themselves. If such support does not secure the independent exercise of their legal capacity, the duty of the advocate shall be to support the person by identifying and articulating, insofar as it is practicable to do so, the will and preferences of the disabled person in the matter.

Recommendation 4: Statutory advocacy services should be funded at a level that ensures genuine and effective access to independent advocates by persons with disabilities in any matter that impacts upon their ability to exercise legal capacity.

Recommendation 5: The scope of statutory requirements regarding the provision of support should be expanded to encompass support *for the exercise of legal capacity*, not simply support *for communication* (as in AWIA s1(6)) or support *for decision-making capacity* (as in MCA s1(3)).

Recommendation 6: Statutory provisions regarding support in the exercise of legal capacity must be attributable. For example, statutes that state only that support *should be provided* must be supplemented with clear guidance about who bears the responsibility for providing that support.

Recommendation 7: Existing measures such as powers of attorney and advance directives should be recognised for their potential as instruments of support for the exercise of legal agency in circumstances where decision-specific decision-making capacity is impaired, intermittent or absent. In order to fulfil this potential, however, such measures must be embedded in robust Art. 12.4 safeguards.

Recommendation 8: The three jurisdictions should develop definitions (and related guidance) on the concepts of undue influence and conflicts of interest which will be suitable for providing robust safeguards across all aspects of exercise of legal capacity, and in so doing should include consideration of weaving in aspects of related concepts such as "facility, circumvention, lesion" in Scots law and "unconscionable bargains" in English law.

Recommendation 9: Principal capacity/adult incapacity legislation should be structured to ensure that provisions and procedures necessary to ensure CRPD compliance apply throughout each respective legal system, and not only to measures relating to the exercise of legal capacity contained within the principal legislation.

Recommendation 10: A regular programme of monitoring and review should be maintained to review compliance with capacity/adult incapacity legislation in all three jurisdictions of the UK.

ABBREVIATIONS

Art. 12: Article 12 of *The United Nations Convention on the Rights of Persons with Disabilities*: "Equal Recognition Before the Law"

AWIA: *The Adults with Incapacity (Scotland) Act 2000*

CPRD (also: "The Convention"): *The United Nations Convention on the Rights of Persons with Disabilities*

DPO: Disabled Persons Organisation

EAP: The Essex Autonomy Project

GC1: *General Comment No. 1: Article 12: Equal Recognition Before the Law*

ICCPR: *International Covenant on Civil and Political Rights*

IDC: International Disability Caucus

ILA: International Law Association

IMCAs: Independent Mental Capacity Advocates

MCA: *The Mental Capacity Act 2005 (England & Wales)*

MCA (NI): *The Mental Capacity Act (Northern Ireland) 2016*

OSF: Open Society Foundations

PoA: Power of Attorney

UK: The United Kingdom of Great Britain and Northern Ireland

The UN Committee: The United Nations Committee on the Rights of Persons with Disabilities

UNOHCR: The United Nations Office of the High Commissioner for Human Rights

VCLT: *The Vienna Convention on the Law of Treaties*

§1 INTRODUCTION

§1.1 BACKGROUND

In 2009, the United Kingdom ratified the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), along with its *Optional Protocol*. Under Art. 35 of the Convention, the UK has a responsibility to report regularly to the United Nations Committee on the Rights of Persons with Disabilities ('the UN Committee') on measures undertaken to fulfil its obligations under the CRPD. Under Art. 36, the UN Committee in turn will regularly review UK progress towards CRPD compliance, and offer "suggestions and general recommendations" for realising the aims of the Convention in the UK.

At the time of the preparation of this report, the UK has yet to undergo its first review by the UN Committee. The UK Government submitted its *Initial Report* to the UN Committee in 2011,[1] but as yet the UN Committee has not undertaken its formal review process, which will culminate in a "constructive dialogue" between a UK delegation and the UN Committee in Geneva, followed by the adoption of "Concluding Observations" by the UN Committee.

§1.2 AIMS AND SCOPE

The primary purpose of this report is to support those who will be involved in this forthcoming review of UK compliance with the CRPD. However the scope of our report is limited. The provisions of the CRPD cover a wide array of activities and statutes within the UK, from the accessibility of public transport to discrimination in employment. Our concern in this report is with CRPD requirements as they apply specifically to mental capacity legislation (or "adults with incapacity" legislation, as it is known in Scotland) across the UK. However, while our focus is narrow in this dimension, it is at the same time broad in another. Capacity/adult incapacity legislation is decentralised in the UK, with significantly different legal provisions in each of the separate legal systems of England & Wales (which comprise one jurisdiction for these purposes), Scotland, and Northern Ireland. When appearing before the UN Committee in Geneva, the UK delegation will need to be prepared to

[1] Office for Disability Issues 2011.

report on each of these different legislative arrangements. Accordingly, an important aim of the present report is to offer a systematic analysis of both the common features and divergent arrangements in these three jurisdictions, and to assess their compliance with the CRPD, so as to ensure that both the UK delegation and the UN Committee have the information that they require for the conduct of the forthcoming review. In assessing the compliance of these legislative arrangements with the CRPD, much of our attention will be addressed to their compliance with Art. 12 of the Convention: "Equal Recognition Before the Law."

In addition to this primary aim, the present report has two subsidiary aims. The preparation of this report has coincided with an unprecedented law reform movement across the UK in the area of capacity/adult incapacity legislation. Earlier this year, the Northern Ireland Legislative Assembly passed its own *Mental Capacity Act* (MCA (NI)); Scottish Government has recently completed a consultation about possible reform of the *Adults with Incapacity (Scotland) Act* (AWIA); and the Law Commission of England and Wales is preparing its recommendations about reform to the *Mental Capacity Act* for England & Wales (MCA). In each case these law reform initiatives have made reference to the aim of achieving compliance with the CRPD. It is our hope that this report will be useful to those across the UK who are involved in these efforts, both through the comparisons across the three jurisdictions, and through our analysis of the requirements for compliance with Art. 12.

Our final aim is to provide analysis – of Art. 12, of current legislation and relevant legal concepts, and of possible alternatives – that will be useful to those around the world who are involved in the truly global movement to reform mental health and mental capacity legislation in accordance with the human rights requirements of the CRPD. While the CRPD has provided a powerful impetus for reform, those involved in the process have frequently complained that we lack a clear understanding of what a CRPD-compliant approach would look like with regard to persons with impaired decision-making capacity. While we certainly do not claim to have answered this question definitively, we believe that our analysis of current UK legislation and relevant legal concepts, together with our analysis of the requirements of CRPD Art. 12 and our proposals for reform, will serve to advance this vitally important international effort by offering a detailed analysis of how the ideals of Art. 12 can be operationalised in law.

This combination of primary and subsidiary aims gives rise to certain challenges in writing a report that would be readable, accessible and useful to the several audiences for which it is intended. Our strategy in meeting these challenges has been to divide the report into two discrete parts. Our hope and intention is that the main body of the report, comprising §§1-8, is accessible to an international as well as a specialist domestic audience, and conveys our main conclusions and arguments regarding the requirements of CRPD compliance in this area of law. This is followed by a set of technical appendices, in which we provide substantiating evidence in support of particular claims advanced in the main text, and in which we provide a more detailed analysis of the relevant provisions of law in the three jurisdictions, in each case with a view to achieving CRPD compliance.

§1.3 METHODS

The research presented in this report is the product of a sixteen-month, cooperative, multi-disciplinary research effort conducted by the eight authors, who together comprised the core research team. A critical component of our working method was to convene a series of consultation roundtables, held under the Chatham House rule, involving experts from the three jurisdictions, together with a range of academic and professional experts from a variety of different disciplines, and representatives of advocacy groups who work with and on behalf of persons with disabilities. One consultation roundtable was held in Belfast and two in Edinburgh, with each devoted to a particular topic covered in this report. These roundtables built upon the work carried out in a series of three earlier EAP roundtables that were held at the Ministry of Justice in Westminster in 2014. Members of the core research team prepared briefing documents in advance of each roundtable, and these were reviewed by the multi-disciplinary experts present at the meetings.

In addition to these consultation roundtables, members of the core research team met a variety of professional and service-user groups to solicit their input, particularly on the matter of support for the exercise of legal capacity – a theme that we discuss in §6, below.[2] This round of meetings included consultation with three

[2] The term "legal capacity" appears frequently in this report, and figures centrally in Art. 12. It is a term that has proven difficult to define and has been used in different ways in different jurisdictions. The Convention itself provides no definition, and we shall not attempt to provide one. Historically, the concept has often been

organisations that meet the UN Committee's definition of a "Disabled Persons Organisation."[3] Particularly in facilitating this round of meetings, but also in many other aspects of the project, we were greatly aided by researchers at the Mental Health Foundation (a UK social research, service development and public affairs voluntary sector organisation), which has been a project partner throughout. In addition to these planned consultations, a representative from our team was invited to participate in an extraordinary four-day meeting organised by the Open Society Foundations (April, 2016). The OSF meeting brought together the leaders of a dozen OSF-funded initiatives from around the world to review and assess pilot projects in supported decision-making.

Key findings of the project were presented to the UN Committee in Geneva on 31 March 2016, at a "side event" to the Committee's 15th Session. Critical feedback was solicited at this side event, and also in conjunction with a Westminster conference on 12 May 2016, for which a complete draft of this report was circulated to all delegates.

§1.4 Relation to Earlier Work

The research presented in this report is closely related to an earlier Essex Autonomy Project position paper, which was the culmination of a similar round of research and consultation undertaken in 2014. That earlier report bore the title: *Achieving CRPD-Compliance: Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If not, What Next?*[4] As its subtitle indicates, the 2014 report focused not on three

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introduced with a set of canonical examples. A person with full legal capacity may for example: positively assert any right, enter a transaction, consent to healthcare treatment or to sexual relations, marry, vote, make a will, instruct a solicitor, participate in legal proceedings (including as a juror), etc. But this list must be viewed as a first approximation, and as essentially open-ended. A person who is denied the right to drive on the basis of gender does not enjoy full legal capacity, neither does a person who is barred entry to a public venue because of their race. A series of individual denials of autonomy in seemingly minor matters can also amount, cumulatively, to a similar denial of legal capacity. Metaphorically, we can think of a person with full legal capacity as a 'player in society.' To enjoy full legal capacity one must both have rights before the law (legal standing) and the ability to exercise those rights (legal agency). See Essex Autonomy Project 2014, §5.

[3] UN Committee on the Rights of Persons with Disabilities 2014b.

[4] Essex Autonomy Project 2014.

jurisdictions but on one. It also provided a rigorous analysis of the requirements of CRPD Art. 12, an analysis that itself provides the foundations for the present report.

The principal findings of the 2014 report were, first, that the MCA in its present form is *not* compliant with the CRPD. In particular, the 2014 report showed that the MCA's reliance on a "diagnostic threshold"[5] as a component of the test for mental incapacity does not comply with the anti-discrimination requirements of CRPD Art. 5, and that the current configuration of its best interests standard fails to incorporate the safeguards required by CRPD Art. 12.4. But the 2014 report also showed that the MCA's basic legal architecture could be retained in a fully compliant statute. In short: its non-compliance is *remediable*. This in turn was related to the final conclusion of the 2014 report, viz., that compliance with the Convention *does not require the abolition of substitute decision-making*, nor the repudiation of the best interests decision-making standard.[6] In making this last point, the 2014 report directly rebuts a claim that has been advanced by the UN Committee in GC1, and by a range of academic authors whose views were discussed in detail in that report.

We shall not, in the present report, reiterate the analysis provided in the 2014 report.[7] The authors of the two reports only partly overlap, but the authors of the present report endorse the findings of the earlier one. Our aim here is to expand on those earlier findings, principally by providing analysis of the statutes in Scotland (AWIA) and Northern Ireland (MCA (NI)) respectively. The Scottish Act did not fall within the scope of the earlier report; the Northern Ireland Act did not yet exist.

But while expanding the jurisdictional scope of the earlier report, we also seek here to take up two matters that were left incomplete in the earlier report. The 2014 report recommended amendment of the best interests standard in MCA s4 through the adoption of what in that report was described as a *rebuttable presumption approach*. On such an approach, a best interests decision-maker must start from the presumption

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[5] s2(1) MCA stipulates that "For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter *because of an impairment of, or a disturbance in the functioning of, the mind or brain*" (emphasis added). In subsequent academic discussion, guidance and case law, the italicised phrase has come to be known as "the diagnostic threshold." See Essex Autonomy Project 2014, §8.

[6] On the meaning of the term "substitute decision-making," see §3 and Appendix B, below.

[7] We provide a brief indication of the main arguments concerning substitute decision-making in §3, below.

that, when a decision must be made on behalf of a person lacking in mental capacity, and the wishes of that person can reasonably be ascertained, the best interests decision-maker shall make the decision that accords with those wishes. But while recommending a rebuttable presumption approach, the 2014 report did not develop a specific proposal as to how the rebuttable presumption approach could or should be built into a revised statute, and under what conditions the presumption might be rebutted. In the present report we shall consider these problems in further detail. Finally, our earlier report said relatively little about how the requirements of CRPD Art. 12.3 and 12.4 might be fulfilled. Art. 12.3 concerns the requirement upon States Parties to provide *support* to persons with disabilities in the exercise of legal capacity. In the present study we devote a full section (§6) to this topic. We likewise devote a full section (§7) to the Art. 12.4 safeguards and how they might be operationalised.

§2 The Convention, the General Comment, and the *Travaux*

In seeking to determine the requirements for compliance with the CRPD, it is important to distinguish clearly between the requirements of the Convention itself (together with its *Optional Protocol*), and the interpretation of those requirements put forward by the UN Committee, particularly in its General Comment on Art. 12 (GC1). This report is concerned specifically with the requirements of the Convention. Both in our research and consultation activities, and in this report itself, we have taken into account the interpretation of the Convention offered in GC1, but we do not consider ourselves to be bound by it. In ratifying the CRPD, the UK agreed to be *bound* by the Convention, and to be *monitored* by the UN Committee; it did not agree to be bound by the UN Committee's interpretation of the Convention. For an analysis of the legal status of General Comments by UN treaty bodies, see Appendix A. We nevertheless welcome the fact that GC1 has stimulated the rigorous and critical audit of UK legislation and the manner in which it is delivered, which forms the bulk of the subject-matter of this report.[8]

[8] See also §4, below.

In addition to the two sources just distinguished (the Convention and GC1), a third source should also be mentioned: the CRPD *travaux préparatoires*, which comprise the formal record of the public sessions of the committee that originally drafted the CRPD.[9] The 2014 Essex Autonomy Project report[10] followed Art. 31 of the *Vienna Convention on the Law of Treaties* (VCLT) in arriving at its interpretation of CRPD Art. 12. That is, it offered a "good faith" interpretation of the text of Art. 12, "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The 2014 EAP report did not appeal to the *travaux*. However VCLT Art. 32 provides for appeal to the *travaux* in order to determine the meaning of a treaty in circumstances where Art. 31 methods leave its meaning "ambiguous or obscure," or where they lead to a result which is "manifestly absurd or unreasonable."

We shall not undertake in this report to determine whether Art. 32 methods should be invoked in the interpretation of CRPD Art. 12. Is Art. 12 ambiguous? Certainly it has generated well-developed but sharply divergent interpretations. Do VCLT Art. 31 methods yield results which are "absurd or unreasonable"? These are matters that could be debated. But one thing is clear. If we do look to the portion of the *travaux* that bear on what ultimately became CRPD Art. 12, what we find is substantial evidence that the States Parties representatives who originally drafted Art. 12 did *not* intend for it to require the abolition of substitute decision-making. At least six states' representatives explicitly held that substitute decision-making should be permitted, and the compromise language that was finally agreed upon was explicitly introduced by those who had drafted it as language that *neither prohibits nor endorses* the practice. For a summary of the portion of the *travaux préparatoires* that pertain to what became Art. 12, see Appendix B.

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[9] The Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities was created by UN General Assembly Resolution 56/168; the record of its proceedings can be found at http://www.un.org./esa/socdev/enable/rights/adhoccom.htm.

[10] Essex Autonomy Project 2014.

§3 BEYOND AN IMPASSE: SUBSTITUTE V SUPPORTED DECISION-MAKING

Much of the debate about compliance with CRPD Art. 12 has centred around a contrast between two distinct approaches in this area of law. We must choose, it is said, between "old paradigm" regimes of *substitute decision-making* and a "new paradigm" approach which abandons substitute decision-making in favour of *supported decision-making*.[11] Before turning to the details of our review of the three UK jurisdictions, we explain in this section why we find this framing of the issues to be unhelpful, and we propose an alternate framing which we have found to be both more fertile and more faithful to the language and intentions of the Convention itself.

We begin with the negative point. Why is it best to avoid framing the issues in terms of a dichotomy between substitute and supported decision-making? We offer five reasons.

First: the Convention itself does not call for the abolition of substitute decision-making, and there is ample evidence that the absence of such a call was quite deliberate.[12]

Second: no sound legal arguments have been advanced to show that the abolition of substitute decision-making is entailed by other requirements of the Convention.[13]

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[11] This framing of the issues finds its most important statement in GC1, and in a large and ever-growing corpus of academic literature that has grown up around it. See for example, Dhanda (2007), Booth-Glen (2012) and Flynn and Arstein-Kerslake (2014a). Note that the term "substitute decision-making" is not to be confused with the notion of "substituted judgement" that figures in the *Explanatory Notes* to the MCA (Department of Health [England and Wales] 2005).

[12] See Appendix B.

[13] The 2014 EAP Report identified two main lines of argument that have been advanced in support of the GC1 contention that Art. 12 requires the abolition of substitute decision-making. One argument appeals to the requirement of Art. 12.2 that States Parties recognise "that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." Since substitute decision-making circumscribes the exercise of legal capacity (either by recognising its factual absence or by removing it consequent upon some assessment), it is held to be inconsistent with the universalist requirements of Art. 12.2. The second argument appeals to the safeguarding requirements of Art. 12.4, specifically in connection with the safeguards pertaining to "respect for the … will and preferences" of persons with disabilities. Insofar as regimes of substitute decision-making can authorise actions contrary to the known will and preferences of a disabled person, it is argued, regimes of substitute decision-making are precluded under the requirements of Art. 12.4. Neither argument withstands critical scrutiny. As regards the first argument, it is true that substitute decision-making circumscribes legal capacity. That is, it draws certain limits beyond which legal agency is not recognised. But this in itself does not violate Art. 12.2, which does *not* require States Parties to recognise *universal* legal capacity. What it requires is the recognition of legal capacity *in all matters on an equal basis*. Hence a legal regime that resorted to substitute decision-making for all and only those who are unable to make a decision for themselves could in principle satisfy the requirements of Art. 12.2, insofar as its circumscribing of legal capacity is carried out on the basis of a

Third: despite sustained efforts to clarify its meaning, the term "substitute decision-making" remains mired in ambiguity. Intuitively, we might speak of substitute decision-making as taking place whenever one person "substitutes" their own decision-making ability for that of another person whose decision-making ability is impaired or absent. Understood in this intuitive sense, however, substitute decision-making is unavoidable. Where there are circumstances where a decision has to be made (e.g., about a discharge plan following a hospital stay, or about whether to accept or reject an insurance settlement) and the person involved lacks the ability to make that decision themselves (reviewing the options, processing the various pros and cons, settling on one choice) then it is self-evident that someone else will have to make the decision – substituting their own decision-making skills for those that are lacking in the person. It is therefore not a matter of *whether* substitute decision-making takes place, but rather *when*, and *on what basis*. So if we rely on this intuitive understanding of substitute decision-making, then substitute decision-making is inevitable, and it is practised in all three UK jurisdictions. At the other extreme, some authors use the term to refer to arrangements in which "guardians … make all decisions on behalf of, and without consultation with, their ward."[14] In this sense, substitute decision-making is not inevitable; it is also a long way from anything we would regard as acceptable in any of the three UK jurisdictions. GC1 undertakes to provide a more refined definition of "substitute decision-making," but that definition is beset by a series of serious logical flaws. For an analysis of the problems with the GC1 definition, see Appendix C.

Fourth: the reason for avoiding the entrenched framing of the issues pertains to the term "supported decision-making," and is closely connected to our proposal for an alternative framing. While the term "supported decision-making" has proven itself as a powerful rallying cry in international attempts to reform and reinvent practices

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standard that applies to all on an equal basis. The second argument also fails, insofar as it presupposes an absolutist and decontextualized interpretation of one clause of Art. 12.4; such an interpretation is legally indefensible. We return to this point in our discussion of safeguards in §7, below.

[14] "Substitute decision-making is premised on the incapacity of the person with a disability. Consequently, once made, these arrangements allow guardians to make all decisions on behalf of, and without consultation with, their ward." Dhanda 2007: 446.

affecting persons with disabilities, care must be taken when making use of the concept in interpreting the requirements of Art. 12. Here, once again, we have a term that features centrally in GC1 and the surrounding discussions, but is wholly absent from the Convention itself. But there is also a more serious problem. The term "supported decision-making" is naturally understood to mean *support for decision-making*. That is, it is natural to understand the task of supported decision-making as that of providing support to persons *to make their own decisions*. But this leads to an unduly narrow understanding of States Parties' obligations under Art. 12. To see the issue, it is crucial to remind ourselves that Art. 12.3 speaks not of support *for decision-making*, but rather of support *for the exercise of legal capacity*:

> States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require *in exercising their legal capacity*. (emphasis added)

Support for the exercise of legal capacity *can* take the form of supporting persons to make their own decisions, and it is imperative that States Parties provide such support. But we must be alive to the possibility that it may take other forms, particularly as regards persons who are incapable themselves of making one or more decisions, even when all means of support have been provided.

Fifth: decision-making is but one aspect of the exercise of legal capacity. Exercise of legal capacity frequently commences with recognising a need for some legally significant action, and initiating that action. Decision-making may follow, but will generally be preceded by a need to identify and formulate the decisions which are required. Undue focus on processes of decision-making can distract attention from the need to ensure the exercise of all aspects of legal capacity in situations where capabilities to act as well as to decide are impaired.

With this we are in a position to propose our alternative framing of the issues which are fundamental to achieving compliance with Art. 12. Rather than asking whether a particular legal regime has successfully eliminated substitute decision-making in favour of supported decision-making, we propose to keep to the language and conceptual apparatus of the Convention itself. Our overarching question can then be reformulated as follows: *What measures should be taken to support the exercise of legal capacity, <u>both</u> by supporting persons with disabilities to make decisions themselves wherever possible, <u>and</u> by supporting their ability to exercise their legal*

agency even in circumstances when they lack the ability to make the requisite decisions themselves?

It is important to be clear that this approach to the challenge of compliance with Art. 12 does not preclude substitute decision-making – understood in the intuitive sense that we articulated above. As we have already indicated, substitute decision-making in this intuitive sense is unavoidable as a practical matter. It is therefore crucial that the law recognises this fact and ensures that appropriate and effective safeguards are in operation whenever substitute decision-making takes place. We consider this matter in detail in §7. In doing so, we are guided by a second overarching principle of interpretation. Although much of the discussion of the CRPD has understandably focused on the requirements of Art. 12, it is crucial to remember that Art. 12 is not the whole of the Convention, and that Art. 12 rights are not the only rights that States Parties must respect in achieving compliance. The Convention reaffirms a whole panoply of rights; an important part of the challenge for legislatures is to devise strategies for realising the ideals of Art. 12 while also respecting the full range of rights that are implicated in circumstances where the ability to act or make decisions is impaired or absent. Our application of these two overarching principles is guided throughout by the purpose of the CRPD and the approach to definitions in the Convention explained in the next section.

With these elements of our interpretative approach in place, we can now anticipate the broad outlines of our conclusions regarding capacity/adult incapacity legislation in the three jurisdictions of the UK. We shall argue that none of the three jurisdictions has as yet achieved compliance with Art. 12. But we shall also argue that the legislative arrangements in the three jurisdictions include strategies and resources that can be adapted and repurposed to establish a clear pathway towards CRPD compliance. Before we turn to explain and defend those claims in detail, we address one further point of importance as regards the interaction between the CRPD and the legislation in each of the three jurisdictions.

§4 AUTONOMOUS MEANING OF WORDS WITHIN THE CONVENTION

It is "part of the alphabet"[15] of customary international law that terms in international treaties and conventions are intended to have an autonomous meaning – in other words, they take their meaning from the treaty rather than from any meaning that they might have in the national laws of the States Parties. This is particularly important in the context of human rights conventions "where the principle requiring an autonomous interpretation of convention concepts ensures that its guarantees are not undermined by unilateral state actions."[16] This has a number of important consequences for the task upon which we are embarked. In particular, it means that we should not assume that a term that appears in the Convention means the same as it does in any of the three jurisdictions with which we are concerned. There is a further significant consequence when it comes to concepts of "undue influence" and "conflicts of interest" as part of the safeguards required by Art. 12.4. In our work across the three jurisdictions, we have become keenly aware of the potential for variation in the definition of key terms, both within and across jurisdictional boundaries.

We are aware of criticism of the UN Committee that it has offered neither precise definitions, nor precise instructions as to how safeguards within Art. 12 should be operationalised. We could either regret this, or we could see this as an opportunity. We have sought, where possible, to see this as an opportunity, and set out in §7 (amplified by Appendix G) a number of existing provisions in the law of the three jurisdictions which, either as they stand or through suitable modification, provide ways in which to put flesh upon these important concepts..

In so doing, we have taken the first sentence of Art. 1 of CRPD as our starting-point:

> The purpose of the present Convention is 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.

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[15] *R (Adan) v SSHD* [2001] 2 AC 477 at 515.

[16] *Ibid*.

For that purpose to be achieved, it must become the shared objective of the whole of human society. Within each jurisdiction, to achieve that purpose in relation to particular provisions of CRPD must be the shared task of legislators and others within that jurisdiction. Indeed, this aim, which we share, has itself guided developments in capacity/adult incapacity statutes in the three UK jurisdictions for many years. We see the current review of those statutes in light of the UK's obligations under the CRPD as an important opportunity to advance that aim as part of an ongoing process of critical reflection and reform. Achieving the aim of drawing up and implementing effective safeguards is not a responsibility to be thrust back upon the UN Committee, whose role is to consider, and make suggestions and general recommendations.[17] Referring to the terms of Art. 12, and taking account of the views of the UN Committee, we therefore in §7 seek definitions and solutions for the purpose of operationalising the Art. 12 safeguards which appear most likely to deliver practical compliance within the UK jurisdictions, and may indeed be of wider application.

§5 Overview of the Three UK Jurisdictions

§5.1 Introduction

This section sets out – deliberately in summary form – the broad outlines of the capacity/adult incapacity legislation in each of the three jurisdictions so as to provide an introductory "primer" for those unfamiliar with one or more of the different jurisdictions. The reader who requires more detail is directed to Appendices D and E to this report, which provide respectively details of (and the statutory references for) the legislation in each of the three jurisdictions.[18] It also includes a summary assessment of the compatibility of that legislation with the CRPD – deliberately summary because the primary purpose of this report is to move beyond such analysis into developing models to bring the CRPD home both to the three

[17] CRPD Art. 36.

[18] The Northern Ireland legislation "fuses" mental capacity and mental health legislation, which remain distinct in both Scotland and England & Wales. This report does not specifically address the position in relation to those whose care and treatment needs predominantly arise from mental health needs, or how their position is catered for in that context. This is also covered by the Northern Ireland legislation.

jurisdictions and further afield. It would however be artificial to limit discussion to the principal capacity/adult incapacity legislation of the three jurisdictions when many measures to which Art. 12 of CRPD is relevant are not at present governed by the principal legislation; and when very many people with disabilities in all three UK jurisdictions are currently subject to such measures. We address the generality of such other measures in the last part of this section.

§5.2 LEGAL CAPACITY

Each of the jurisdictions with which we are concerned is predicated upon models in which mental capacity is systematically linked to legal agency, both in entering into legally binding relationships with others and in taking actions with legally effective and binding consequences. They each, further, contain legislation designed to respond to situations where a person is said to be incapable (by reason of mental incapacity or incapability) of acting or deciding: the AWIA (in Scotland), the MCA in England & Wales and the MCA (NI) in Northern Ireland.[19]

The Scottish regime does not (in the AWIA) provide express formal mechanisms for the stand-alone determination of a person's legal capacity to act or make decisions.[20] However, under the Act, a person may be authorised by a court (or under parts 3 and 4, the appropriate authority) to take an action in relation to or to act on behalf of a person where there is a determination (under parts 3 and 4, certification) that they are incapable of acting or deciding.[21] The Act also provides that the person himself may authorise another to act on his behalf under a power of

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[19] Two points of clarification are in order here. First, it will be noted that the statute in Scotland uses the term "Incapacity" in its title, whereas the statutes in England & Wales and in Northern Ireland use the term "Capacity." In and of itself, this difference is incidental; indeed the 1995 Law Commission report in England & Wales that led to the MCA itself carried the title *Mental Incapacity*, in keeping with the Scottish precedent. (The change from the negative to the positive title came during the political process of preparing a bill to be introduced in Parliament.) Moreover, the statute itself defines the negative trait ("incapacity") rather than the positive one. A more significant divergence among the statutes pertains to the question of how incapacity is conceptualised. Under the two MCAs, incapacity is defined in terms of an inability to make one or more *decisions* at the time when such a decision or decisions need to be made. See for example s2(1) and s3(1) MCA. Under the AWIA, incapacity is conceptualised more broadly. s1(6) AWIA defines the term "incapable" in terms that include not only an incapability *to decide* but also an incapability *to act*. When referring collectively to the three statutes in this report, we frequently make reference to an incapability/incapacity to act or decide. Readers should keep in mind, however, that the concept of "incapability to act" figures, strictly speaking, only in the Scottish statute.

[20] The AWIA applies to those aged 16 and above.

[21] s2 AWIA.

attorney when he cannot himself do so.[22] Outside the court arena, the AWIA does not set out a mechanism by which professionals or others can act or decide on an informal basis, but there are mechanisms which enable medical treatment to be delivered (either on an emergency basis or, following a statutory certification procedure, in less urgent circumstances) to an adult who is incapable of giving the requisite consent that is otherwise required in order for medical treatment lawfully to be given. In addition, the person does not, of course, require court authorisation to grant the PoA.

The two MCAs are predicated upon a slightly different model. A court can make a stand-alone decision as to whether a person[23] has or lacks the mental capacity to make the decision(s) in question; if they do, they can then go on either to make a decision on behalf of the individual or appoint a proxy decision-maker.[24] Outside the court arena, both the MCA and the MCA (NI) provide the ability for others to take actions in respect of a person on the basis of their incapacity which would amount to criminal or tortious acts if they were carried out in the face of their capacitous refusal. They do so not by granting express powers, but rather by establishing a defence to liability where certain steps are taken by the relevant person to establish the person's incapacity and what is in their best interests. The statutory defence in the MCA (NI) is considerably more circumscribed than that in the MCA, and is calibrated (in broad terms) to the nature of the actions that are contemplated – the more serious the intervention, the more rigorous the steps that are required to be taken before the person taking action can rely upon the defence.[25]

In all three jurisdictions, those who lack the mental capacity/capability to enter into contracts[26] can incur legal liability for the costs of so-called "necessaries" – i.e.

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[22] Part 2 AWIA.

[23] The MCA applies to persons of any age in respect of the management of their property and affairs where their impairment of capacity is anticipated to be life-long (except that a statutory will cannot be made in relation to a person aged under 16), but primarily apply in relation to those aged 16 and above. The MCA (NI) applies to those aged 16 and above.

[24] ss15-16 MCA; ss112-113 MCA (NI).

[25] Compare s5 MCA with Part 2 MCA (NI).

[26] In England, Wales and Northern Ireland, a contract entered into by a person lacking the capacity to do so is voidable; in Scotland, it is void from the outset.

necessary goods and services provided to them by others, and there are informal mechanisms by which others can incur financial obligations on their behalf.

Further, in all three jurisdictions, mental capacity/capability is a necessary (but not sufficient) prerequisite to such personal matters as consenting to sex and marriage. In both the MCAs, there is an absolute prohibition upon substitute decisions being taken (either formally or informally) where a person lacks the requisite mental capacity in certain contexts, including marriage and consent to sexual relations.[27] The AWIA does not express the position in express terms, but in the interaction between the AWIA and other relevant criminal and civil statutes an equivalent bar could be said to arise.[28]

§5.3 Mental Capacity/Capability

All three Acts are founded upon a decision-specific and functional approach to mental capacity/capability. In other words, a person cannot be said simply to be "incapacitated" or to "lack capacity." They must lack mental capacity/capability in relation to particular action(s) or decision(s) at the particular time in question. All three Acts are also founded upon a model where there must be some underlying (either permanent or temporary) mental impairment causing the person to be functionally unable to take the action(s) or make the decision(s) in question.[29] Reflecting the influence of the CRPD, the MCA (NI) is clear that it is irrelevant that the impairment relates to a disorder or disability; however, under all three Acts, a person could be said to lack capacity to take a particular decision on the basis of (for instance) a temporary impairment such as the influence of drugs or alcohol causing them to be functionally incapable of acting.

All three Acts sit within legislative regimes predicated upon different protections being available in relation to those who have the requisite mental

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[27] s27 MCA; s285 MCA (NI).

[28] As in *Application for directions by West Lothian Council in respect of LY* (Livingston Sheriff court, 30th May 2014), in which Sheriff Kinloch concluded that he could not encourage a Welfare Guardian to permit continuation of the Adult's sexual relationship. The application was predicated upon the Adult's incapacity and as such, any encouragement of the relationship may constitute a crime under Section 1 of the Sexual Offences (Scotland) Act 2009.

[29] All three also provide for the (separate) position where a person may be capable of making their own decision but unable, despite provision of all practicable assistance, to communicate it, such a person being deemed, for purposes of the relevant legislation, to be incapable of acting or deciding.

capacity/capability for purposes of the Acts, but who are prevented from exercising their independent powers of action or decision by reason of the influence of third parties. Considerable importance is therefore placed in practice upon identifying whether the real reason for a person's inability to act is due to their own impairment or to the actions of a third party.

Each Act provides, in a different way, for the provision of support to a person before it can be said that they lack capacity/are incapable in relation to a particular act or decision. The most developed of the Acts in this regard is undoubtedly the MCA (NI), which sets out a series of steps that must be taken prior to any determination (formal or informal) that the person lacks the capacity to take the decision(s) in question, including ensuring that persons whose involvement is likely to help the person to make a decision are involved in helping and supporting the person.

§5.4 Constructing Decisions

The most substantial formal difference between the Scottish regime and that of the other two jurisdictions is in relation to the approach to acting or deciding in relation to a person lacking capacity/capability in relation to a particular matter. The Scottish regime explicitly rejected a best interests test in favour of a set of general principles, none of which is stated to take precedence or priority over any other. Both the MCAs, on the other hand, are expressly predicated upon the principle that actions done or decisions made under the Acts for or on behalf of a person who lacks capacity must be done, or made, in their best interests, coupled with a series of factors that must be taken into account by the decision-maker in determining what may be in the person's best interests.

The significance of this formal difference between the AWIA and the MCA should not, perhaps, be exaggerated given the way in which both Acts have been interpreted by the judiciary in their respective jurisdictions. As analysed by two of the authors of this report, it can, in practice, be said that there has been a journey in England & Wales towards considerably greater focus being placed upon the person's

wishes and feelings; conversely, there has been a journey in Scotland towards a focus solely on benefit, which has been conflated with "best interests" in certain decisions.[30]

There is a potentially important difference between the MCA (NI) and the MCA, in that MCA (NI) requires "special regard" to be given (so far as they are reasonably ascertainable) to (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity); (b) the beliefs and values that would be likely to influence his decision if he had capacity; and (c) the other factors that he would be likely to consider if he were able to do so.[31]

It should, finally, be noted that the Law Commission of England & Wales has provisionally proposed that the MCA should be amended to establish that decision-makers should begin with the assumption that the person's past and present wishes and feelings should be determinative of the best interests decision.[32] The final report of the Law Commission and draft legislation is anticipated by the end of 2016.

§5.5 Compatibility with the CRPD

The 2014 EAP report found (and the present authors remain of the view) that the MCA is remediably non-compliant with the CRPD in that (1) its reliance on a "diagnostic threshold" as a component of the test for mental incapacity is a violation of the anti-discrimination requirements of CRPD Art 5; and (2) the current configuration of the best interests standard fails to incorporate the safeguards required by CRPD Art. 12.4.[33]

In the view of the authors, the MCA (NI) introduces significant innovations on both of these issues – in the attempt to "de-link" incapacity from identified disorder or disability, and as regards the introduction of the "special regard" test in relation to the construction of any decision on behalf of a person lacking the requisite capacity. In assessing how close the MCA (NI) comes to full compliance, much will turn on how the statute (which has yet to come into effect) is operationalised. Two issues will

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[30] See Ward 2015; Ward and Ruck Keene 2016.

[31] The English legislation requires these matters to be "considered" (s.4(6) MCA).

[32] Law Commission 2015, para.12.47.

[33] Essex Autonomy Project 2014.

require careful monitoring, in our view. First, it will need to be determined whether the statutory "de-linking" of incapacity from disorder/disability is realised in practice, or whether it is only or overwhelmingly those with disorder or disability who are subjected to the functional test. Secondly, it will be crucial to monitor how the Act's pioneering use of the concept of "special regard" is operationalised and adjudicated. Insofar as this concept is applied in the form of a rebuttable presumption approach, as we shall argue that it can and should be, it will represent an important step forward in the construction of a CRPD-compliant capacity statute. We return to these matters in §7, below.

Finally, we consider that the AWIA is vulnerable to essentially the same charges as the MCA, both in its reliance on a "diagnostic threshold" and in light of the way in which the approach under the AWIA to constructing decisions has been subverted by judges in the application of the Act to produce a result that does not comply with CRPD Art. 12.4. Indeed, as regards the "diagnostic threshold," the AWIA is arguably even more vulnerable because (aside from physical disability rendering a person incapable of communicating their decision), it expressly provides that incapacity must derive from mental disorder. "Mental disorder" is, in turn, defined by reference to its meaning in the Mental Health (Care and Treatment) (Scotland) Act 2003 as any mental illness, personality disorder or learning disability however caused or manifested.[34]

§5.6 Measures not Covered by Principal Legislation

As indicated in the introduction to this section, there exist in all three jurisdictions measures and techniques which are neither contained in, nor governed by, the principal capacity/adult incapacity legislation but which nevertheless come clearly within the scope of Art. 12 of CRPD. One of the most frequently used examples is appointeeship to receive and administer Department of Work and Pensions benefits. Ward (2003) reviewed the range of such other measures and techniques then applicable in Scotland in Chapter 12 ("Other responsive measures") and Chapter 13

[34] Subject to the proviso that a person is not to be considered mentally disordered by reason only of any of the following sexual orientation; sexual deviancy; transsexualism; transvestism; dependence on, or use of, alcohol or drugs; behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; or acting as no prudent person would act. Section 328 Mental Health (Care and Treatment) (Scotland) Act 2003.

("Trusts and other third party measures"). CRPD compliance requires that the existing processes and safeguards under existing capacity/adult incapacity legislation, and the improvements which we recommend, be applied to all such measures and techniques. The following sections of this report, and the Appendices, should accordingly be read on the basis that provisions and safeguards there described as necessary for CRPD compliance will be applied to all such measures and techniques.

With this summary of the current legal approach across the three jurisdictions in hand, we turn now to consider key requirements of CRPD Art. 12, particularly as regards support (§6) and safeguards (§7).

§6 Support for the Exercise of Legal Capacity

§6.1 Interpreting the Support Requirements of Art. 12.3

It is widely agreed that the principle of support is one of the animating principles of Art. 12. Given its importance, the actual text devoted to articulating the principle in the Convention is remarkably short. Art. 12.3 reads as follows:

> States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

GC1 forcefully articulates a vision of what these "appropriate measures" must amount to. The main elements of the GC1 approach to support can be summarised as follows:

1. Support must respect the rights, will and preferences of persons with disabilities. There must be safeguards that ensure this.
2. It should be entirely within the discretion of persons with disabilities whether to seek and accept support, and what support (and from whom) should be sought and accepted.
3. Support must be diverse and must be available to all on an equal basis.
4. Access to support must not be dependent on assessments of mental capacity.

5. Support must never amount to substitute decision-making and must take place outside substitute decision-making regimes.[35]

In our own thinking about the support principle of Art. 12.3, we find it useful to begin by asking the question: *Support for what*? Art. 12.3 provides the answer: *Support for the exercise of legal capacity*.[36] But in coming to terms with this answer, it is important to distinguish at least two categories to which that support can belong. The first form of support is that provided to help a person make decisions for herself, and to implement those decisions with legal effect. Consider a perfectly mundane example. Joan needs to make a decision between two medical therapies, or two financial settlements from an insurance company following an accident at work. Some of the details of the proposals are complex, and the documents in which they are presented are difficult for her to follow. On her own she finds herself unable to understand the options in sufficient detail to weigh up their respective pros and cons. She therefore consults a doctor, a solicitor, an accountant, or simply a trusted friend with some experience in the relevant matters. With their help in digesting the options and associated risks and benefits, she comes to understand better what is at stake between them, and she makes an informed choice. Crucially, that choice may or may not be what the medical, legal or financial adviser would have chosen for her. She genuinely makes her own choice, but she is able to do so only consequent upon the support provided by others.[37]

But we should also recognise a fundamentally different kind of support for the exercise of legal capacity. Whereas the first form of support succeeds where the individual is able to make their own decision, the second form comes into play in cases where the individual simply cannot make their own decision – regardless of how much support is provided. The challenge, in these cases, is to find ways of

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[35] GC1, paras. 17, 26, 28 and 42.

[36] GC1, para 13 defines "legal capacity" as "the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)." We agree with GC1 in emphasising that legal capacity requires these two components, sometimes referred to as "passive" and "active" legal capacity. But we think it is important to hold open the possibility that the GC1 definition is in fact too narrow, and that legal capacity may involve further important components. Even in as basic a matter as exercising my right to free movement, I need to be able to distinguish between a public right-of-way and a private property. The ability to draw that distinction is neither an instance of holding rights nor of exercising them, but it is a *precondition* of exercising them, and might therefore aptly be understood to be a component of legal capacity.

[37] Martin and Hickerson 2013.

supporting the exercise of legal agency, despite this irremediable absence of decision-specific decision-making capacity.

To some, this way of framing the challenge may smack of paradox. How can a person exercise their legal agency in a matter, if they cannot make the relevant decisions required to do so? To dispel the air of paradox, we find it useful to invoke the GC1 definition of legal agency, or "the legal capacity to act under the law." According to GC1, para. 12, that capacity is to be understood as "the power to engage in transactions and create, modify or end legal relationships." The crucial point to recognise is that a person can possess such a power, despite lacking the capacity to make the relevant decisions.

Once again it will help to have an example. Suppose that John's dementia makes it difficult for him to keep track of his financial affairs. Efforts to support him in making financial decisions for himself fail. But John has a trusted family member, and works with a specialist solicitor to set up a power of attorney regarding his financial affairs. John cannot himself understand all the financial matters over which decisions are required, but he does understand what a power of attorney is, and what it means to set up the family member to make financial decisions on his behalf. John's dementia then continues to deteriorate, and reaches a stage where any discussion of financial matters is well beyond John's reach. But over the years he has made it clear to his attorney that he wishes to make a gift to each of his grandchildren when they respectively complete their education, while retaining enough of his assets to provide for his own increasing care needs. When the time comes, John is incapable of understanding that the time has come to consider whether to implement his previous intentions, or of determining an appropriate amount for the gifts. He lacks decision-making capacity. But through the mediating support of his attorney, he is indeed able to "engage in transactions, and create, modify or change legal relationships." He has managed to exercise his legal agency, with support, realising his own intentions, despite his inability to make his own decision.

In thinking about the challenge of fulfilling the support requirements of Art. 12.3, therefore, we need to think about the measures and strategies of support that are available at both of these levels: supporting decision-specific decision-making capacity wherever possible, but then adapting legal instruments such as powers of attorney and advance directives in order to extend legal agency where possible, even

in the absence of decision-making capacity. In practice, of course, there will be cases that require a strategic combination of both forms of support.

In the two subsections that follow (§6.2 and §6.3), we provide an overview of the state of play in the UK at each of these two levels. Fuller details of the relevant statutory provisions are provided in Appendix F. In §6.4 we consider some of the limitations and operational challenges faced in achieving compliance with Art. 12.3.

§6.2 Support for Decision-Making Capacity

The capacity/incapacity statutes in the UK have focused in varying degrees on support for decision-making capacity (in Scotland, the broader concept of both acting and deciding). All three Acts (the MCA and MCA-NI expressly and the AWIA by application of the s1 principles) require that support for the exercise of legal capacity is provided prior to the legislation becoming applicable to the individual. Notably, the MCA includes as one of its headline principles the statement that:

> A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.[38]

In practice, however, this principle has proven to be of limited efficacy. Although the principle appears at the head of the Act, it receives no elaboration or articulation in the remainder of the statute. Perhaps a more serious problem is that the principle is expressed in the passive voice. It indicates that steps to help should have been taken, but it fails to indicate anyone in particular who has the positive obligation to take them!

In light of these features of the statutory language, it is perhaps unsurprising that this provision of the MCA has had limited impact in practice. As part of our consultation activities, we asked one local authority to examine a random sample of an administrative pro-forma used by Best Interests Assessors in reviewing deprivations of liberty of persons lacking mental capacity in care home settings. One field on the form asks what practicable steps had been taken to help the assessed individual in making a decision for themselves. 18% of the sample left this field entirely blank; 9% reported on modest support that had been given to enhance the

[38] s1.3 MCA.

ability to communicate; the remainder (73%) either (i) focused exclusively on steps that had been taken to optimise the *assessment* of decision-making capacity, rather than on *support* for decision-making capacity, or else (ii) simply reported on the lack of functional decision-making capacity that had been identified in the course of the interview. The sample size in this randomised review was fairly modest (n=22), but the basic pattern was repeated in a much larger (n>300) series of informal focus groups in which Best Interests Assessors and clinical professionals were asked to report on concrete steps they had taken or observed in fulfilment of MCA s1(3).

Further study of this matter would certainly be welcome, but our own conclusion is that MCA s1.3 remains a largely unfulfilled promise.

The situations with respect to AWIA and MCA (NI) are divergent. Details of their respective statutory provisions are provided in Appendix F, but two details merit comment here. The explicit principle of AWIA that corresponds to MCA s1(3) is if anything even weaker than the provision in England & Wales. The key difference pertains to the question: *Support for what?* As we have seen, Art. 12.3 calls for support *for the exercise of legal capacity*; MCA s1(3) calls for practicable steps in support *of decision-making capacity*. The corresponding requirement of the AWIA pertains only to support *for communication*.[39]

The new Act in Northern Ireland follows the MCA in many of its details, but on the matter of support it represents a clear improvement. It includes a version of MCA s1(3), but this provision is followed up with a whole section elaborating upon the "practicable support" that is required. Moreover, the MCA (NI) adopts an innovative strategy in compensating for the problem we identified in the passive grammatical construction of the MCA provision. Under MCA (NI), protection from liability for actions carried out under the authority of the Act is forfeited by anyone who has failed to undertake the defined steps required in order to support the person in making a decision for him- or herself.

[39] s1(6) AWIA: "a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise)."

§6.3 Support in the Absence of Decision-Making Capacity

The three UK statutes provide for a variety of measures that have the potential to facilitate the exercise of legal capacity by persons who lack decision-specific decision-making capacity at the material time, even when all practicable support has been provided. The relevant details for each statute are provided in Appendix F. In our example in §6.1, above, we have already given the example of powers of attorney; other measures include advance directives (given statutory recognition in England, Wales and Northern Ireland)[40] and provisions for independent advocacy. But the efficacy of these support provisions has been limited. Some of the limits concern the concrete and timely availability of support mechanisms that are provided for in statute.[41] Some limits pertain to the failure to fund mechanisms intended to provide support. But some limits also derive from the statutory provisions themselves, together with a lack of appreciation of the principles underpinning such provisions by those providing such support.

In surveying these obstacles, we begin with a few remarks about independent advocacy arrangements. In principle, independent advocates can serve critical support functions in accord with Art. 12.3. In particular, in circumstances where a person with a disability lacks the ability to make a decision for himself, an independent advocate can play a vital role in ensuring that the person's will and preferences in a matter are identified and articulated, and that the voice of the disabled person is heard in the decision-making process. This of itself does not suffice to ensure that the person can exercise legal capacity, but it has the potential to play a vital role in a larger process. However, there are limits to the availability of such advocates both within the relevant statutes, and also by financial constraints.[42] If the UK is to achieve compliance with Art. 12.3, these issues about the funding and availability of advocacy services must be addressed as a matter of urgency. We therefore recommend full funding of statutory advocacy services, and a review of the

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[40] In Scotland, not in AWIA

[41] In the different context of mental health legislation, but agreeing with us on this point, one service user reported: "I was given a pamphlet that informed me of my right to an advocate, but no one told me how to access one. When I was finally able to find that out for myself, I was told that there would be a three-week wait to see my advocate. I was looking for help in challenging a 28-day detention order."

[42] For example, in England & Wales the provisions of the Care Act 2014 have never been fully funded.

procedures for undertaking contracts with providers of such services, to ensure that the contractual arrangements are not compromised by conflicts of interests.[43] In addition, although non-statutory guidance on the role of independent advocates exists in some contexts, we recommend that this be clarified in the governing legislation itself in all cases. Specifically, we recommend that where advocates play a role in supporting the exercise of legal capacity, their primary function should be to identify and articulate the will and preferences of the person whose legal capacity is being supported.

Attentive readers will have noticed that in this last recommendation we have referred to the role of the advocate in articulating the "will and preferences" of the person, but that we have not used the full clause that appears in Art. 12.4: "rights, will and preferences." This is not in any way to dismiss the importance of respect for the rights, as well as will and preferences, of a person facing a decision. But we envision a form of independent advocacy where the only duty of the advocate is to ensure that the person's will and preferences in a matter are made known. Some – but not all – models of advocacy under the various legislative provisions applicable across the three jurisdictions already provide for this model,[44] but we recommend that this model be adopted across the board. An independent advocate is never the decision-maker, on this model. That, indeed, is part of what is meant by her *independence*. The decision-maker should either be the person himself (if he is capable of making the decision, with support as needed) or someone else who takes the decision on his behalf (if he is not). So while the advocate should certainly be concerned to identify the person's rights, her primary role should be to support the person in their exercise of legal capacity specifically by ensuring that voice is given to

[43] For instance, one potentially troublesome feature of the funding of IMCA services in England & Wales is that the IMCAs themselves sometimes need to play a "whistle-blowing" function as regards the activities of the very same agency which has to decide whether to renew the contract of the service-provider by whom they are employed. In consultations held under the Chatham House Rule, we have heard first-hand reports of threats of non-renewal of contracts when IMCAs have suggested that a case needs to be referred to court. We believe that this is a matter that should be investigated by an appropriate body, and that consideration needs to be given as to whether adequate safeguards are in place to manage the potential conflicts of interest that arise.

[44] For instance the role of a person reporting to the court under s3(5) AWIA, appointed where the sheriff considers it inappropriate that the safeguarder also conveys the views of the person safeguarded. Such a person is appointed solely to relay the views of that person. We are, however, unaware of any case where any such appointment has been made. This may or may not be an independent advocate whose expression of an adult's views must be taken into account by the court under s3(5A) AWIA regardless of such appointment, an arrangement increasingly applied in practice. Advocates appointed under the Care Act 2014 in England have functions much closer to the model outlined here.

the will and preferences of the person in question. We shall return to the respect for *rights*, will and preferences in greater detail in §7.2, below.

This recommendation concerning the role and function of independent advocates is informed by two important lessons that emerged in our consultation activities. In a series of focus groups held with frontline professionals in England and Wales, we asked practitioners to reflect on ways that they and/or their colleagues were providing support to persons with disabilities in making decisions for themselves. Many participants indicated a readiness to provide such support *if they knew what to do*. It was striking that in the case of support *for communication*, the existence of "communications specialist" *as a recognized professional role*, with associated professional bodies, research, training, etc., had served an important function both in establishing support-for-communication as a recognised form of support, and in pushing the boundaries in developing new techniques.

The second lesson emerged in our participation at an OSF meeting in the USA, the purpose of which was to review and assess a set of international OSF-funded pilot projects in supported decision-making. One of the lessons that came out powerfully from that meeting, in particular from an influential pilot project in South Australia, concerns the importance of teaching supporters about having a *well-defined and limited role*. Cher Nicholson, who has directed the South Australian model, and trains supporters, explained that she emphasised to her trainee supporters that it was not their job to make the decision, nor even to try to determine whether it was possible to do what the person wanted. She reported that this delimitation of the role is liberating for the relationship. The supporter does not have to take on the job of explaining what is or is not possible, or too risky, or unrealistic. The supporter can just focus on helping the person understand and interpret and articulate what it is that they are wanting, and to think through what would be involved in concretely working towards that goal. That may sound simple, but it is not. For persons with significant intellectual disabilities (and sometimes for the rest of us as well!) there is a distinctive *task* involved in trying to *work out* what it is that is wanted. Moreover, there is a real (and growing) specialist knowledge-base and set of concrete skills and techniques to master in carrying out that work.

As we have illustrated above, a second form of support for those who lack decision-specific decision-making capacity is the established instrument of the power

of attorney. Once again, we refer the reader to Appendix F for details of PoA arrangements in the three jurisdictions. But as a general observation, we note that PoA arrangements in their current legal form often fail to fulfil their considerable potential as a mechanism of support for the exercise of legal capacity by persons lacking in decision-making capacity. The provisions of the MCA (which also appear in a similar form in the MCA (NI)) serve as a powerful example of the problem.[45] Sections 9-14 of MCA provide for what the Acts calls "Lasting Powers of Attorney." For our purposes, one key detail of these statutory provisions appears in MCA s 9(4):

> The authority conferred by a lasting power of attorney is subject to: (a) the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests), and (b) any conditions or restrictions specified in the instrument.

The critical restriction here is the requirement that an attorney act in accordance with the best interests provisions of MCA s4.

Now in one sense this may seem a perfectly obvious and unobjectionable requirement. Surely we should expect – indeed require – an attorney to act in the best interests of the individual who has appointed her! But the provision is not as innocent as it first appears, and in fact represents a significant obstacle in adapting the PoA provisions of the MCA as a support instrument under Art. 12.3. As we have already noted, and as has been documented in detail in the 2014 EAP report on the MCA,[46] the current best interests provisions of MCA s4 require only that the wishes and feelings, beliefs and values of a person be *considered*, not that they be *given priority* in any decisions taken in the best interests of the person. If the various PoA provisions across the three jurisdictions are all equally to fulfil their potential as Art. 12.3 support measures, then they must be embedded in robust safeguards to ensure that the attorney not simply *considers*, but *respects* the rights, will and preferences of the individual who has appointed her. We return to this issue in §7, below.

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[45] Analogous issues arise in relation to the differently framed provisions of the AWI which we do not explore here but which likewise require to be investigated and addressed.

[46] Essex Autonomy Project 2014.

In all three jurisdictions, a granter/donor can revoke a power of attorney when they have capacity to do so;[47] where they do not, then termination will be a matter for the requisite judicial authorities.[48] In determining whether or not to terminate a power of attorney, the court will have regard to the views of the granter/donor (for instance as to whether or not they wish the appointment of a particular attorney to continue), but they will not be determinative, and, at least in England, Wales and Northern Ireland, the focus will primarily be upon whether the attorneys are discharging their functions appropriately.

There are no specific provisions in the MCA or AWIA for the provision of supporters (and hence the ability to dismiss a supporter). The MCA (NI) provides for a person with capacity to appoint a 'nominated person,' who fulfils a number of functions under the Act, most relevantly being a person who must be consulted where a serious intervention is contemplated.[49] If they have the capacity to do so, they can revoke the appointment of the nominated person.[50] If they do not have the capacity to revoke the appointment, then termination of the appointment and appointment of another nominated person would be a matter for the Tribunal, which would proceed by reference to whether or not the person previously nominated was "suitable."[51]

There are no provisions in relation to independent advocates under the AWIA, MCA or MCA(NI) allowing for them to be dismissed at the behest of the individual concerned, although in practice it would be likely that an advocate who had lost the trust of the individual concerned would be unable to discharge their role, such that it would be necessary for an alternative to be appointed.

All three jurisdictions at present, therefore, do not provide a direct ability for a person to dismiss their attorney, supporter or advocate at a time when they do not have the capacity to take the necessary steps identified under the relevant statutory provisions. In order to move closer to compliance with Art. 12.4, it may well be

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[47] s22A AWI, s13(2) MCA, s106 MCA (NI).

[48] s20(e) AWI, s22(4) MCA, s110(4) MCA (NI).

[49] ss70 (appointment) and 15 (consultation) MCA (NI).

[50] s71 MCA (NI).

[51] ss80 and 81 MCA (NI).

necessary to amend the relevant provisions in order - as a minimum - to enable an indication by a person that they no longer wish a person they have previously appointed to act for or support them to be a trigger, in and of itself, to potential termination of the relevant appointment.

Finally, a few remarks are in order concerning advance directives (or "advance decisions"). As set out in Appendix F, these have statutory recognition (in different forms) under the MCA and the MCA (NI), but no statutory recognition under the AWIA, although it is likely that the Scottish courts would adopt a similar approach to them as provided for under the two statutes. Once again, these are measures which have the potential to serve as Art. 12.3 support instruments, extending the power of persons with disabilities to give effect to their will and preferences at a time when their decision-making abilities are substantially impaired or absent. We acknowledge, however, that advance directives also have significant limitations, and moreover raise a set of thorny legal and ethical issues concerning the potential for conflict between a person's past and present wishes and feelings. Under current legal arrangements, an advance directive can only be made by a person with capacity, and can therefore only extend the power of persons with disabilities to the extent that at a time when they have capacity they can make binding arrangements for a time when that is no longer the case.

A particularly contentious ethical issue is that advance directives can be formally withdrawn by a person only if they have the mental capacity to undertake the withdrawal. This creates a much-discussed potential for circumstances where the incapable person at a later date becomes "trapped" (so to speak) by their own prior will and preferences, as recorded in an advance directive which, at this later date, they no longer endorse. In that case, the persons should be able to avail themselves of the full range of support mechanisms in order to exercise legal agency, effecting real legal changes in accordance with their reasonably ascertainable will and preferences. One such real legal change might be the withdrawal of an earlier advance refusal of treatment. This should not be understood as an invitation to second-guess all advance directives, which after all reflect a conscious and capacitous decision to determine the content of those future decisions it makes reference to. It should apply only to those limiting situations where a person's clearly ascertainable

present wishes stand in demonstrable contrast to the advance directive determining the decisions to be made.

§6.4 When Should Support Be Provided?

As already noted above, GC1 directs that the provision of support to exercise legal capacity should not be dependent on assessments of mental capacity.[52] This, however, raises the important question of at what point it is necessary, and appropriate, to provide access to such support.[53] Bach and Kerzner's suggestion of a "functional assessment" of decision-making capacity to determine which decision-making status a person would come under arguably offers a potentially CRPD-compatible solution. Such an assessment of decision-making capability would be required:

> to deal with situations where there is reasonable question as to whether a person has the capability to understand and appreciate, even with assistance, the nature and consequences of a decision; or if a person meets the minimum threshold for supported decision making.[54]

In this connection, 'fair and just arrangements' should be 'in place to determine the nature of a person's decision-making abilities and their particular needs for decision-making supports and accommodations.'[55] On Bach and Kerzner's proposal, such determinations should not occur purely because an individual is presumed to have a disability and should only be conducted in order to assess the type of support that is required.[56] On the other hand, this proposal has been challenged on the basis of GC1's claim that Art. 12 allows for no 'functional' assessment of decision-making capability.[57] We consider, however, that this challenge highlights the inherent difficulty of ensuring that there is adequate access at all times to support for the exercise of legal capacity as required by Art.12.3. Our approach therefore seeks

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[52] GC1, para.29(i).

[53] Richardson 2013, 95.

[54] Bach and Kerzner 2010, 98.

[55] Bach and Kerzner 2010, 25.

[56] Bach and Kerzner 2010, 25.

[57] Flynn and Arstein-Kerslake 2014a, 89.

to recognise that practicable support must be provided whenever needed by the individual and that such support will have been demonstrably provided before any legislative intervention is permitted.

§6.5 The Limits of Support

Our discussion of support cannot be complete without raising the problems that arise in connection with what are often referred to as 'hard cases.'[58] These include, for instance, those in comas, those who are in states of advanced dementia, with severe brain injury or those who have been born with profound learning disabilities resulting in an inability to meaningfully communicate even with considerable support. It also includes situations involving self-harming or suicidal tendencies where persons are actually or potentially placing themselves at serious risk.

Without doubt, an inability to meaningfully communicate, or otherwise make a valid decision, poses serious challenges to deducing, understanding or giving effect to the will and preferences of the individuals involved. It might be asserted that making decisions 'for' people in such situations is justifiable and recognises the reality that it may not always be possible to determine or interpret a person's true will and preferences in every circumstance. On the other hand, however, it has been suggested that deeply held beliefs that some people are beyond communication is possibly the greatest obstacle to full implementation of Art. 12[59].

GC1 states that a 'best interpretation of will and preferences' approach should be employed in situations 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual'.[60] Flynn and Arstein-Kerslake suggest that in such circumstances the person making the decision should 'do so in a way which attempts to draw out the imagined will and preferences of the person.'[61] In addressing situations involving a person in a coma or otherwise apparently beyond meaningful communication, it has been suggested that the 'best interpretation of will and preferences' should be based on the 'perceived wishes' of

[58] Flynn and Arstein-Kerslake 2014a, 13-16; Flynn and Arstein-Kerslake 2015, 12-14.

[59] Booth-Glen 2012, 165-167.

[60] GC1, para.21.

[61] Flynn and Arstein-Kerslake 2014a, 94.

the person.[62] On this approach, support persons would be directed to look for 'indications' of will and preferences by speaking to those who know the individual, considering the person's values and beliefs, and taking into consideration any past expressions that the person has made which are relevant.[63]

It is, however, certainly not unanimously accepted that these 'facilitated decisions' can be accurately characterised as '100% support' in which the individual is deemed to be personally exercising their legal capacity.[64] Indeed, it may have to be accepted that the 'best interpretation' approach does not lend itself to some situations[65] and that some boundaries must be set regarding the extent of use of the best interpretation approach whilst at the same time giving due consideration to rights, will and preferences.[66]

Risk-taking behaviour presents a particular challenge in implementing the principle of support, as do the accompanying moral dilemmas, where the person rejects support and/or intimates a wish to place themselves in a situation of danger, exploitation, abuse or undue influence. The dignity of risk is a common theme in the academic literature, with commentators noting that individuals with disabilities are often denied the right to take risks[67] and that the denial of the ability to take risks may negatively impact on a person's sense of self.[68] However, whilst some commentators have argued that support with decision-making is possible in such situations, provided it is appropriately pitched,[69] the idea that support can always be sufficient in crisis situations has been met with a certain amount of scepticism by others who consider that the principle of support does have its limits.[70]

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[62] Gooding 2015, 54.

[63] Flynn and Arstein-Kerslake 2014b, 141-142.

[64] Series 2015; Quinn 2010; Booth-Glen 2012. This was also evident during our roundtable discussion on supported decision-making.

[65] Gooding 2015, 54.

[66] Gooding 2015, 55.

[67] Gooding 2013, 435-436.

[68] Dhanda 2007, 436; Morrissey 2012, 428.

[69] Gooding 2013, 436; Flynn and Arstein-Kerslake 2014a, 98.

[70] Del Villar 2015; Richardson 2013, 96.

Our own approach incorporates the frank admission that the exercise of legal capacity may not always be possible, even when all possible supports are provided. In such circumstances, the law must provide for someone else to take the decisions that the affected individual is unable to take, while establishing the methodology to be employed (see Appendix E), and the safeguards to protect persons who find themselves in that vulnerable position. We turn in the next section to consider how such safeguards should be designed and operationalised.

§7 ART. 12.4 SAFEGUARDS

§7.1 INTERPRETING THE SAFEGUARDING REQUIREMENTS OF ART. 12.4

It will already be clear from the foregoing section that proper safeguards provide the key to any CRPD-compliant legal arrangement for persons with impaired decision-making capability. In considering the form that such safeguards should take, we begin by citing in full the relevant clause of Art. 12.

> Art. 12.4: States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

In the extensive public discussion of this provision of the Convention, the overwhelming majority of attention has focused on a single clause of Art. 12.4: "respect the rights, will and preferences of the person." Moreover, this clause itself has very often been truncated, so the focus becomes very narrowly on "respect for the … will and preferences of the person" (omitting the vital mention of *rights*). We believe that it is imperative to avoid a myopic focus on any one clause in Art. 12.4, or indeed on any one provision of the Convention as a whole. In an effort to balance the

discussion, we begin with a broader analysis of Art. 12.4, in order to set the oft-repeated phrase in its context, as required by VCLT Art. 31.

The first point to make here is about the general purpose of Art. 12.4: it is concerned with the obligations of States Parties to establish *safeguards*. These safeguarding obligations are themselves divided into three categories: (a) safeguards concerned with respect for the rights, will and preferences of the person; (b) safeguards concerned with undue influence; (c) safeguards concerned with conflicts of interest. But in constructing our interpretation of Art. 12.4 requirements, we cannot stop there. For the text of the Convention introduces these three categories of safeguards in quite a specific form and context. In analysing this broader context we distinguish the following six features:

> a) The Overarching Aim of the Safeguards: "to prevent abuse in accordance with human rights law."
>
> b) The Duration Constraint: Measures relating to the exercise of legal capacity by persons with disabilities must apply "for the shortest time possible."
>
> c) The Review Requirement: Measures relating to the exercise of legal capacity must be "subject to regular review by a competent, independent and impartial authority or judicial body."
>
> d) The Proportionality Requirements: The word "proportional" occurs twice in Art. 12.4. Safeguards must be "proportional and tailored to the person's circumstances," and the overall package of safeguards must be "proportional to the degree to which such measures affect the person's rights and interests."
>
> e) The Effectiveness Requirement: The safeguards must be "effective" in achieving their overarching aim.
>
> f) The Plurality of the Safeguards: Art. 12.4 does not require one safeguarding provision, but a multiplicity of safeguards, each with their own objective.

Each of these formal features of the Art. 12.4 safeguarding requirements merits close consideration. It will not be possible to undertake a complete analysis here, but it is critical to keep them firmly in mind in considering how to comply with Art. 12. It is worth noting, for example, that the explicit inclusion of *the duration constraint* would seem to reflect the assumption that at least some measures relating to the exercise of legal capacity might take the form of limitations or constraints on

such exercise. We find this difficult to square with the position of GC1, which appears to envision only support measures relating to the exercise of legal capacity, precluding any imposition of support. But the most important lesson to be drawn here is that, whatever safeguards are put in place with respect to the will and preferences of persons with disabilities, they must conform to this broader set of requirements. The *plurality of the safeguards* entails that respect for will and preferences cannot be assured at any cost; compliant safeguards must concern themselves with respect for rights, as well as will and preferences, and safeguarding requirements regarding undue influence and conflict of interest must also be satisfied. The *proportionality requirements* make it clear that autonomy rights do not stand ascendant over all other rights. Safeguards ensuring respect for will and preferences must at the same time respect the other rights of persons with disabilities, and any overall framework of compliant safeguards must "be proportional to the degree to which such measures affect the person's rights and interests."

In the remainder of this section, we offer analysis of each of the three categories of safeguards, advancing recommendations for operationalising safeguards in compliance with Art. 12.4 as we proceed. More detailed analysis of specific safeguarding regimes in each jurisdiction is provided in Appendix G.

§7.2 Respect for Rights, Will and Preferences

Art. 12.4 requires safeguards to 'ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.' The CRPD is silent as to the meaning of the concepts of will and preferences and as to what safeguards to prevent abuse in this respect could and should look like.

In GC1, the UN Committee asserts that '[t]he "best interests" principle is not a safeguard which complies with Art. 12 in relation to adults.'[71] The Committee goes on to claim that the best interests paradigm must be replaced with a "will and preferences" paradigm.

> Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best

[71] GC1, para.21.

> interpretation of will and preferences" must replace the "best interests" determinations.[72]

As we have noted, the UN Committee goes even further and suggests that compliance with Art. 12 requires States Parties to abolish substitute decision-making and replace it with supported decision-making.[73]

Our position on this critical issue is a development of the position defended in the 2014 EAP report.[74] CRPD-compliant safeguards regarding the rights, will and preferences of disabled persons must occupy the middle ground between a mere requirement that will and preferences be *considered* and any requirement of unqualified *deference* to will and preferences. Mere consideration of will and preferences (or "wishes and feelings") falls short of fulfilling a requirement of *respect*. Unqualified deference to will and preferences is impossible in circumstances where a person's will conflicts with her preferences, or where there are conflicts among the preferences themselves. But more importantly, it is a policy that would fail to satisfy the proportionality requirements that frame the safeguarding requirements of Art. 12.4. Under the proportionality requirements, the state has an obligation to consider whether there may be exceptional circumstances where limited actions contrary to the will and preferences of a person with a disability may in fact be the most proportionate way of protecting the full range of rights and freedoms reaffirmed under the CRPD.[75]

We recommend that the best way to occupy this critical middle ground is to adopt a *rebuttable presumption approach*. That is, wherever an individual is authorised or obligated to construct a decision with or on behalf of a person whose

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[72] GC1, para.21.

[73] GC1, para.28.

[74] Essex Autonomy Project 2014.

[75] Anyone who continues to find themselves tempted by a policy of unqualified deference to the will and preferences of a person who is lacking in the ability to make their own decisions (even when support is provided) must ask themselves the following question: Is there *any* circumstance in which action contrary to even a weakly held and trivial preference which is not itself informed by decision-making capacity might in fact be *required* in order to protect someone's right to life (Art. 10), right to protection and safety in situations of humanitarian emergency (Art. 11), right to freedom from exploitation, violence and abuse (Art. 16), right to respect for mental and physical integrity (Art. 17), or right to enjoy the highest attainable standard of health (Art. 25)? If the answer is yes, as we believe it self-evidently is, then a policy of unqualified deference to will and preference in all circumstances is not CRPD-compliant, for it fails to leave room for the state to consider how to balance the person's rights and interests in a proportional and effective manner.

decision-making is impaired or absent, that individual should operate with the rebuttable presumption that the reasonably ascertainable will and preferences of that person should be given effect in the matter (subject to the obvious constraints of possibility and non-criminality). Where appropriate, an independent advocate and/or a trusted friend[76] of the person should be involved in order to identify and articulate the person's will and preferences, using all practicable methods for doing so. In the vast majority of cases, we should expect that this presumption should stand.

It is crucial to emphasise, however, that no presumption is absolute. The full articulation of the "will and preferences" principle in Art. 12.4 gives prominent place to respect for the person's *rights*, as well as their will and preferences. Moreover, the proportionality requirements of Art. 12.4 explicitly require States Parties to adopt safeguards that are "proportional to the degree to which such measures affect the person's *rights and interests*" (emphasis added). In some exceptional circumstances, a proportional and effective strategy for protecting the full range of the person's fundamental rights, freedoms and interests may require action contrary to the person's known will and preferences. Taking all these matters together, we therefore suggest that Art. 12.4 requires that where such an individual lacks the ability to exercise legal capacity, even after support is provided, the person making the decision should adopt the course of action which, on stringent application of a balance of probabilities test, achieves a proportional and effective protection for the full range of the individual's fundamental rights, freedoms and interests.

Within the three jurisdictions, the MCA (NI) represents the most important attempt to date to adopt a legislative framework that would comply with the safeguarding requirements of Art. 12.4 regarding respect for the rights, will and preferences of disabled persons. The key concept here is that of *special regard*. This concept has yet to be tested in practice or adjudicated in this context by the courts. Insofar as the principle of special regard is operationalised as a rebuttable presumption approach along the lines recommended above, we believe that it could satisfy the relevant requirements of Art. 12.4. For our analysis of the concept of special regard, see Appendix H.

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[76] Or others with a similar role, such as a person appointed to convey an adult's views to a court under s 3(5) AWIA.

In our consultations concerning respect for rights, will and preferences, we found considerable support for the rebuttable presumption approach that we are here recommending. But that support was not unanimous. One expert with whom we consulted expressed support for the rebuttable presumption approach, but preferred a different strategy for articulating the standard under which the presumption might be rebutted. The key concept under this alternate approach is *authenticity*. Action contrary to a person's will and preferences would be permitted only insofar as the expressed will and preferences were determined not to be "enduring or authentic."[77] The second form of criticism was more far-reaching, rejecting the adoption of the rebuttable presumption approach altogether in this area of law.

As regards the first of these points, we encountered three concerns about reliance on authenticity in developing a rebuttable presumption approach. Concern was expressed about the vagueness of the concept of authenticity, which is difficult to define or characterise precisely, and hence could be difficult to apply and adjudicate objectively. A second concern was that the standard of authenticity might be too stringent. Authenticity is sometimes viewed as a rather high ethical standard. Human beings often act *inauthentically*; indeed philosophers and moralists writing about authenticity have often concluded that most human actions are in fact based on *inauthentic* preferences. But we expect the law to respect our will and preferences nonetheless. A safeguarding strategy that gave respect only to authentic will and preferences in the case of persons of impaired capacity would therefore raise concerns about discrimination. Even if these concerns were met, however, reliance on the concept of authenticity might result in a safeguarding strategy that is too narrow to satisfy the requirements of Art 12.4. Here we are cognisant of the proportionality requirements of Art 12.4, specifically with their requirement that safeguards are *proportional to the degree to which such measures affect the person's rights and interests*. A rebuttable presumption approach that focused narrowly on the authenticity of will and preferences would run the risk of paying insufficient heed to the ways in which even authentically held will or preferences might have significant

[77] "'Involuntary' (if that remains the right term) interventions could be justified when a person is unable to express their will and preferences or when their currently expressed will and preferences are not their 'enduring' or 'authentic' will and preferences (as might occur during a confusional state). The appropriate 'best interests' intervention in such cases would be to give expression to what has been determined to be the person's 'authentic' will and preferences." Szmukler 2014: 276. See also Flynn and Arstein-Kerslake 2014a.

adverse consequences as regards the protection of the full range of rights, freedoms and interests.

The more fundamental critique of our proposed approach questioned the suitability of *any* rebuttable presumption approach. This critique has recently received forceful articulation in a Court of Protection case under the MCA, so it will be useful to respond to the criticism as it was developed there.

In his judgment in *Wye Valley NHS Trust v B*, Mr Justice Peter Jackson wrote as follows:

> 18. Having commented on the process of evaluating wishes and feelings, I refer to the Law Commission's current consultation paper No. 222: *Mental Capacity and Deprivation of Liberty*. It proposes [Proposal 12.2] that s.4 of the Act might be amended so that an incapacitated person's wishes and feelings should be assumed to be determinative of his best interests unless there is good reason do depart from the assumption. It is said [12.42] that there is insufficient certainty about the weight to be given to a person's wishes and feelings and that prioritising them would reflect to some degree the approach of the *United Nations Convention on the Rights of Persons with Disabilities*.
>
> 19. In the above discussion, I have identified some of the circumstances in which the wishes and feelings of incapacitated individuals might be unjustifiably undervalued. However, my respectful view is that the Law Commission proposal would not lead to greater certainty, but to a debate about whether there was or was not "good reason" for a departure from the assumption. To elevate one important factor at the expense of others would certainly not have helped the parties, nor the court, in the present case. All that is needed to protect the rights of the individual is to properly apply the Act as it stands.[78]

In responding to Mr Justice Peter Jackson's judgment, we find it useful to distinguish three lines of objection. The first objection is that a rebuttable presumption approach would not lead to greater *certainty* in best interests decisions. The second is that it would lead to *debate* about what constitutes good rebuttal of the presumption. The

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[78] *Wye Valley NHS Trust v B* [2015] EWCOP 60. For an excellent discussion of the issues raised by this case, see Series (in press).

third is that due respect for the wishes and feelings of a person requires only that the MCA be applied as it stands.

By way of reply to these objections, we would observe the following. First, the aim of the rebuttable presumption approach is not to obtain *certainty*, which is certain to remain elusive in this area or law. The aims are rather (i) to achieve protection for the human rights of persons with impaired capacity, and (ii) to fulfil the UK's international treaty obligations. Second, we recognise that adoption of a rebuttable presumption approach will lead to debate about what constitutes a good rebuttal. But this is as it should be. Any just and reasonable system of law adequate to the practical challenges of this domain of practice will lead to debates. The aim should not be to avoid debate, but to establish a framework for having the debate in terms that are respectful of the rights, will and preferences of persons with impaired capacity. A debate about "whether there was or was not 'good reason' for a departure" from a person's ascertainable will and preferences in a matter is, in our view, exactly the sort of debate that is appropriate. Finally, we cannot agree with Mr. Justice Peter Jackson's claim that the MCA as it stands suffices. As we have argued here and in the 2014 EAP Report, the MCA as it stands requires only that a person's wishes and feelings be *considered*, and it establishes no hierarchy in the matters that must be considered. It therefore fails to satisfy the requirements of CRPD Art. 12.

§7.3 Undue influence

Art. 12.4 requires safeguards that ensure that measures relating to the exercise of legal capacity are free from undue influence, without going into more detail on the matter.

In its General Comment on Article 12, the UN Committee on the Rights of Persons with Disabilities addressed this question as follows:

> All people risk being subject to "undue influence", yet this may be exacerbated for those who rely on the support of others to make decisions. Undue influence is characterized as occurring, where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation.

The UN Committee did not elaborate on what safeguards against such undue influence could and need to look like, and how to strike the right balance between

detecting and protecting from abuse, on the one hand, and non-interference in the support relationship, on the other. What 'signs of fear, aggression, threat, deception or manipulation,' and what degree of manipulation would justify intervention?[79]

There are many uncertainties around the operationalisation of the concept of undue influence and safeguards against its occurrence. In particular, given that the influence of others when making decisions is in and of itself not just a normal occurrence, but might be regarded as positive, beneficial and autonomy-enhancing, and therefore as a necessary feature of any supported decision-making regime, it seems important to gain more clarity on what makes influence undue; how we can identify it in the context of acting and deciding, how we can prevent it, and how to react to its occurrence. Here we may need to distinguish between the situation where a *particular* act or decision seems to be made under undue influence and that where a person seems to be under the undue influence of another more broadly so that their actions and decision-making might be generally impaired because of that.

To date, there is very little academic discussion of what form the protection of the individual from undue influence can and should take in order to be CRPD-compliant. The most helpful analysis seems to be that of Lucy Series[80] who recognises the problems with supported decision-making in the absence of procedures for 'monitoring the conduct of supporters and holding them accountable,' a problem which to some extent could be mitigated through the introduction of a formalised support framework. Nevertheless, she rightly points out that 'there will be "troubling" situations where a person's acts or choices place them at serious risk, risks that they do not understand,' and the acceptance of which might not be based on the individual's freely formed and/or expressed will and preferences.

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[79] GC1, para.22. This passage in the General Comment did not appear in the original draft text, but was added following the comment period. The form of words used in the added passage closely echoes the language used by Lucy Series, in her comments on the UN Committee's original draft. In particular, the list of features (fear, aggression, threat, deception, manipulation) is taken directly from Series' submission. Notably, however Series did not herself propose this list in the context of a *definition* of "undue influence." Series wrote: "It would be useful to have guidance on how to tell apart situations of undue influence and situations where a supporter merely has a very influential role in helping a person to make decisions, or interpreting or communicating them. Guidance on this issue might, for example, consider the quality of the interaction between the support person and the person being supported and look for signs of fear, aggression, threat, deception or manipulation." Series 2014

[80] Series 2015.

Among the open questions in this respect are the following: Does the state's obligation to provide safeguards end with ensuring that the individual has the necessary support to understand the options open to him/her, but where the individual nevertheless chooses, freely or not, to stay in the situation that exposes him/her to the undue influence and ensuing risks, that decision must be respected?[81] Or do 'exceptional cases [require] stronger legal tools for intervention', such as the exercise of the courts' inherent jurisdiction (in England and Wales) 'to restrain the actions of others who might impede a person's autonomous choices'?[82]

This shows that many questions regarding an approach to safeguards that protect the individual from undue influence are still unanswered and require further research. Some of the undue influence cases elucidate the complexities of scenarios where persons with serious mental impairments or other conditions that might make them particularly vulnerable are subject to the strong influence of others. They also highlight the difficulties of addressing the problems that arise in such a context without adding to the disempowerment of the individual. It is maybe surprising that the ill-defined inherent jurisdiction invoked by English courts over potentially competent adults is regarded by Series as a potential way forward to resolve the problem. More research might be needed to analyse how to make such an approach both ECHR and CRPD-compliant.

In our consultation roundtable regarding undue influence, concerns were expressed by a number of participants about (i) the difficulty of *defining* what constitutes undue influence, and (ii) the difficulty of *proving* that undue influence has indeed taken place. On the definitional point, dissatisfaction was expressed as regards the GC1 proposal, which seems too broad.[83] Within the legal systems of the three UK jurisdictions, the predominant definition of undue influence has appealed to the notion

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[81] Arstein-Kerslake 2016, 11.

[82] Series 2015.

[83] Suppose, for example, that Q has invited P to visit for the Christmas holidays. P accepts the invitation, but later adds that she will only go through with the visit if Q cleans up the room where P will be staying. There is in this case a degree of manipulation of Q by P; indeed there is in the exchange an implicit threat: the visit will be cancelled unless a certain action is performed. If in fact Q would not have tidied the room without P's manipulation and threat, then we would seem to have a circumstance which meets the conditions set out in the GC1 definition. But it would be an exaggeration to say that P's influence upon Q was undue. She set out the terms under which she was willing to go through with the visit, and Q made his decision in light of that information, but still had and exercised a choice in the matter.

of "overbearing the will." Participants in the consultation found this definition conceptually more satisfactory, but it has been widely acknowledged that this construct is difficult to apply, and in practice makes undue influence difficult to prove in court. One participant in the consultations with experience in England & Wales urged that reform was required in order to establish more effective safeguards, in part by establishing a clearer schema of legal argument whereby undue influence could be legally proven.

On both of these concerns, we found legal constructs from other areas to be of assistance. In Scotland, the notion of undue influence (generally interpreted, as elsewhere in the UK, in terms of overbearing the will) sits alongside a second legal construct known as "facility and circumvention." Using this construct, a transaction can be set aside by the courts if it can be established that (i) the adult was liable to be intimidated, misled or imposed upon, significantly impairing the adult's ability to resist such tactics [facility]; (ii) someone has taken unfair advantage of the facility by means such as "solicitation, pressure, importunity, even in some cases, suggestion"; and by these means caused or induced the act or transaction [circumvention]; and (usually) that (iii) the resulting act or transaction was to the detriment of the adult [lesion] (see further Appendix G).

A similar – but not identical – construct to that of facility and circumvention can be found in the English doctrine of "unconscionable bargain," which, as with facility and circumvention, sits alongside the doctrine of undue influence. The doctrine applies where "one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive."[84] It is clear from the case-law that the relevant bargaining weakness of the party can arise from a broad range of circumstances rendering them vulnerable, including but not limited to disability. The doctrine being a judge-made one it can, like the equivalent Scots doctrine of facility and circumvention, be moulded to meet circumstances as they arise and evolving conceptions of vulnerability (again, for further details, see Appendix G).

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[84] *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB) at para. 36.

We believe that each of the jurisdictions might usefully have regard to the constructs developed in parallel across their internal borders, with the aim of strengthening Art. 12.4 safeguards as regards undue influence, broadly understood. Further, in line with the approach set out above in §4, we believe that it would be useful in fleshing out the autonomous concept of "undue influence" within the Convention to have regard to these two constructs. We should note in this regard that if "undue influence" is not - for purposes of the Convention - broadened to include these constructs, then they would, by definition, fall outside the scope of the safeguards that the Convention requires, as would any other concepts which - in any particular jurisdiction - are treated as separate grounds upon which apparent acts or transactions may be vitiated. Thus in Scotland concepts such as force, fear, extortion, deliberately induced error, and fraud would all be excluded, these being some of the very concepts mentioned by Series.[85]

In developing these concepts within the framework of "undue influence," we note that, whilst both the Scots and English doctrines are usually predicated upon the person concerned suffering harm in the shape of measurable loss or damage, under some circumstances the Scots doctrine applies where facility and circumvention alone have occurred (see Appendix G). The question of whether - more broadly - it should be necessary that there be harm in addition to the violation of autonomy inherent in the manipulation of the person's will is not a straightforward one, and one where there are arguments that can be advanced on either side. We do not seek within this report to reach a concluded view upon this matter, but rather suggest it as an area where comparative work between the three jurisdictions of the United Kingdom, and more broadly, is likely to be of considerable assistance in implementing recommendation 8.

§7.4 CONFLICTS OF INTEREST

While not elaborating on the concept of conflicts of interest, in effect the CRPD recognises that there will be conflicts of interest and requires that States Parties recognise such conflicts and institute safeguards for coping with them. This means that safeguards should not be looking to *eliminate* conflicts of interest; we should be

[85] Series 2015.

looking for safeguards to *manage* conflicts of interest – and to design safeguards that will be effective in the face of the risk of abuse to which they give rise.

GC1 does not offer any views on how the UN Committee sees the concept of conflicts of interest and what safeguards it regards as necessary to avoid such conflicts.

Several ways of approaching this problem are possible. One possibility would be to design conflicts of interest legislation governing specific activities identifying types of relationships which are especially prone to giving rise to such conflicts, and stipulate the consequences where such a conflict is found to exist.[86] However, such an approach raises several problems. First, no list could exhaust all possible relationships that could give rise to potential conflicts of interest. Human relationships are infinitely diverse, and the potential for conflict is in-denumerable so that any list will inevitably fail to identify some actual conflicts.

One solution to this problem can be found in non-enumerative definitions of "conflict of interest" such as s7 of *The Public Services Pension Act* which defines conflict of interest for the purposes of restricting membership on certain statutory bodies as 'a financial or other interest which is likely to prejudice the person's exercise of functions as a member of the board (but does not include a financial or other interest arising merely by virtue of membership of the scheme or any connected scheme).'[87] On these non-enumerative approaches to the specification of conflict of interest, the conflict is not confined to any specific form of relationship between two persons, nor does the existence of such a relationship per se suffice to establish such a conflict. On the contrary, these definitions recognise that conflicts of interest can be found anywhere in human affairs. More importantly, this approach acknowledges that a conflict of interest is most likely to be found where a person's interest interferes with (or has the potential to interfere with) the exercise of his/her duties and role obligations.[88]

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[86] See, for example, The Mental Health (Conflict of Interests) (Wales) Regulations 2008; Statutory Welsh Instruments 2008 No. 2440 (W.213). http://www.legislation.gov.uk/wsi/2008/2440.

[87] See also Managing Conflicts of Interest: Statutory Guidance for CCGs (NHS England: 2014); para. 13.

[88] This observation about the definitional matter is made forcefully in Thomas Carson, "Conflicts of Interest," *Journal of Business Ethics* 13:5 (1994), 387-404.

A second problem pertains to the presumptive response to a perceived conflict of interest, which is often recusal.[89] While recusal may indeed be an appropriate response in some circumstances, we have to recognise that it is quite a blunt instrument for dealing with potential conflicts of interest, for example in the context of measures introduced in order to support a person's exercise of decision-making capacity, in keeping with the provisions of s1(3) of the MCA or s5 of the Northern Ireland Mental Capacity Bill. A policy designed to safeguard against conflicts of interest by recusal could have the effect of excluding precisely those individuals who are best placed to support the disabled person in the exercise of legal capacity. There must be policies to *identify* potential for conflict of interest. In some cases it will be better to *manage* that potential.[90]

Our own view is that effective mechanisms for identifying actual and potential conflicts of interest must of necessity be distributed across a variety of state functions, while also ensuring that oversight and monitoring mechanisms are in place to ensure effective communication and regular review across multiple agencies.

The preliminary notes contained in this document do not suffice to determine whether existing safeguards in the UK satisfy the requirements of CRPD Art. 12(4). Certainly there can be no doubt that abuse of persons with disabilities persists, despite existing safeguards, and that some of that abuse – particularly financial abuse – arises from conflicts of interest. There is evidence to suggest that the scale of financial abuse of persons with dementia, for example, is vast. But we should hesitate before concluding on this basis that the UK lacks sufficient safeguards to prevent such abuse. Existing safeguards may or may not be sufficient. In order to determine their sufficiency, we would need to consider whether and how existing safeguarding measures might be reformed or replaced by a successor regime that would be more effective in preventing abuse while remaining proportionate with respect to the affected person's rights and interests. This is a matter on which further research –

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[89] See, for example, The Mental Health (Conflict of Interests) (Wales) Regulations 2008; Statutory Welsh Instruments 2008 No. 2440 (W.213). http://www.legislation.gov.uk/wsi/2008/2440.

[90] Recent examples were described to us where a person living in a house belonging to a relative was granted a lease to ensure the protection of tenants' rights: the relative was nevertheless the best person to provide support and was appointed guardian subject to a requirement that any matters concerning the tenancy be referred to the Public Guardian for approval; and where supportive relatives were also paid carers, and similar conditions were applied.

including comparative research across culturally similar jurisdictions – is undoubtedly required.

§8 Conclusions and Recommendations

The forthcoming review of UK compliance with the CRPD represents a moment of historical significance in the ongoing struggle to achieve equal recognition before the law for persons with disabilities. Already the prospect of that review has provided valuable opportunities and occasions for critical reflection, research, and democratic debate over current policy and practice. The human rights commitments reaffirmed in the Convention have provided a standard by which proposed reforms are assessed, while also providing a set of challenges that we are all committed to meet. Our hope is that the material in this report, along with the consultation process that produced it, will contribute to this vitally important and ongoing work.

One principal conclusion of this report is negative. Among the three jurisdictions of the UK, none is yet in a position to say that its capacity/adult incapacity legislation is fully compliant with CRPD Art. 12. Both England & Wales and Scotland have established statutes; the basic legal architecture of these statutes is in each case sound, but they will need to be amended for the UK to comply with its international human rights obligations. Northern Ireland is in a different situation, having adopted but not yet implemented a pioneering piece of legislation. Unlike the other UK statutes, the Northern Ireland statute was framed and debated with explicit reference to the CRPD, and also with the benefit of lessons learned from experience in applying the two other UK statutes. The task of achieving Art. 12 compliance in Northern Ireland now depends on the manner in which the new legislation is interpreted, implemented, and applied in practice.

It has now been five years since the UK submitted its *Initial Report* to the UN Committee, reporting on its progress towards compliance with the CRPD.[91] We note that CRPD Art. 35.2 requires States Parties to submit subsequent reports "at least every four years and further whenever the Committee so requests." An update to the

[91] Office for Disability Issues, 2011.

2011 *Initial Report* is therefore overdue – and not only because more than four years have passed. A great deal has happened in the three jurisdictions in the intervening years, with a new statute now adopted, and significant developments in the implementation of the statutes that already existed. We would therefore urge the UK to prepare and submit a new report to the UN Committee, drawing fully on experience and developments in all three jurisdictions, and charting a path towards achieving full CRPD compliance across the UK. The positive conclusions of this report are intended as contributions towards the charting of that path. We do not offer these recommendations as a formula for reaching the destination, but as a contribution towards establishing a clear direction of travel for the UK in the ongoing project of ensuring equal recognition before the law for persons with disabilities.

Recommendation 1: Respect for the full range of the rights, will and preferences of everyone must lie at the heart of every legal regime. That must be achieved regardless of the existence and nature of any disabilities. Achieving such respect must be the prime responsibility of anyone who has a role in taking action or making a decision, with legal effect, on behalf of a person whose ability to take that action or make that decision is impaired. The role may arise from authorisation or obligation. The individual with that role should be obliged to operate with the rebuttable presumption that effect should be given to the person's reasonably ascertainable will and preferences, subject to the constraints of possibility and non-criminality. That presumption should be rebuttable only if stringent criteria are satisfied. Action which contravenes the person's known will and preferences should only be permissible if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests.

Recommendation 2: All three UK capacity/adult incapacity statutes should incorporate an attributable duty to undertake all practicable steps to determine the will and preferences of persons with disabilities in applying any measure designed to respond to impairments in that person's capabilities.

Recommendation 3: In any process that impacts upon the ability of a person with disability to exercise their legal capacity, the primary obligation of an independent advocate shall be to support the person to overcome obstacles to such matters as comprehension or communication so as to enable them to exercise that capacity for themselves. If such support does not secure the independent exercise of their legal capacity, the duty of the advocate shall be to support the person by identifying and articulating, insofar as it is practicable to do so, the will and preferences of the disabled person in the matter.

Recommendation 4: Statutory advocacy services should be funded at a level that ensures genuine and effective access to independent advocates by persons with disabilities in any matter that impacts upon their ability to exercise legal capacity.

Recommendation 5: The scope of statutory requirements regarding the provision of support should be expanded to encompass support *for the exercise of legal capacity*,

not simply support *for communication* (as in AWIA s1(6)) or support *for decision-making capacity* (as in MCA s1(3)).

Recommendation 6: Statutory provisions regarding support in the exercise of legal capacity must be attributable. For example, statutes that state only that support *should be provided* must be supplemented with clear guidance about who bears the responsibility for providing that support.

Recommendation 7: Existing measures such as powers of attorney and advance directives should be recognised for their potential as instruments of support for the exercise of legal agency in circumstances where decision-specific decision-making capacity is impaired, intermittent or absent. In order to fulfil this potential, however, such measures must be embedded in robust Art. 12.4 safeguards.

Recommendation 8: The three jurisdictions should develop definitions (and related guidance) on the concepts of undue influence and conflicts of interest which will be suitable for providing robust safeguards across all aspects of exercise of legal capacity, and in so doing should include consideration of weaving in aspects of related concepts such as "facility, circumvention, lesion" in Scots law and "unconscionable bargains" in English law.

Recommendation 9: Principal capacity/adult incapacity legislation should be structured to ensure that provisions and procedures necessary to ensure CRPD compliance apply throughout each respective legal system, and not only to measures relating to the exercise of legal capacity contained within the principal legislation.

Recommendation 10: A regular programme of monitoring and review should be maintained to review compliance with capacity/adult incapacity legislation in all three jurisdictions of the UK.

APPENDIX A: ON THE LEGAL STATUS OF GENERAL COMMENTS

In assessing UK compliance with the CRPD, the question has arisen as to the legal standing of the General Comment on CRPD Art. 12 (GC1) that was adopted by the UN Committee in 2014. This in turn implicates the broader question of the legal authority of General Comments by UN treaty bodies. We undertook a survey of published views expressed on this matter, consulting academic discussion as well as UK and UN source material. The results of the survey showed a remarkable consistency: all the published materials that we were able to identify agreed in holding that General Comments issued by UN treaty bodies are *not legally binding*. We were unable to identify any published statements of the contrary view. We found a range of opinion as to the proper positive characterisation of the standing of General Comments.

A 2004 report of the International Law Association addresses the impact of findings of UN human rights treaty bodies. ILA summarised their finding on General Comments as follows:

> Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of body expert in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty. While States will give them careful consideration, they may not give effect to them as a matter of course.[92]

This position is echoed in an array of published academic papers that address this question.[93] The ILA report goes on to emphasise that:

> None of the human rights treaties explicitly confers on the relevant treaty bodies the power to adopt binding interpretations of the treaties, and the practice of at least some States suggests that this power has not been conferred implicitly, as part of the implied power that a body established by treaty is considered to possess in order to carry out the functions conferred on it by the States Parties.[94]

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[92] International Law Association: Committee on International Human Rights Law and Practice 2004, para 16.

[93] Examples: O'Flaherty 2006, 35; Keller and Grover 2012 in Keller and Ulfstein (eds.) 2012, see p.129; Ulfstein 2012 in Keller and Ulfstein (eds.) 2012, see p.115; Rodley 2013 in Shelton (ed.) 2013, see p.639.

[94] International Law Association 2004, para.18.

While there is agreement on the non-binding nature of General Comments, their legal status is not entirely clear. Keller and Grover have described General Comments as 'non-binding norms that interpret and add detail to the rights and obligations contained in the respective human rights treaties.'[95] Alston describes their function as 'a means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises.'[96] It is frequently asserted that they contain authoritative interpretations of the relevant treaties.[97] However both the USA and the UK, in their submissions on the UN Human Rights Committee's draft General Comment 33, rejected the contention that the UN Committee is the authoritative interpreter of the ICCPR.[98]

It is also controversial whether, to the extent that States Parties did not contest their content, General Comments constitute subsequent practice under Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* (VCLT).[99] This provision states that, when interpreting a treaty, account needs to be taken of '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.' However, this view has been contested by several States Parties, including the UK.[100] It is moreover doubtful that even to the extent that General Comments reflect practice in the sense of article 31(3)(b) of the VCLT, they can be said to 'reflect an agreement among the States Parties to the covenants on the interpretation of the treaty.'[101]

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[95] Keller and Grover 2012, 129.

[96] Alston 2001 in de Chazournes and Debbas (eds) 2001, 775n49.

[97] See for example *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) 6 BCLR 625 (High Court Witwatersrand, South Africa, Local Division); HR Committee General Comment 33 2008 para.13; International Law Association 2004, para.11; Keller and Grover 2012, 132.

[98] For the US position, see *Comments of the United States of America on the Human Rights Committee's "Draft General Comment 33: The Obligations of States Parties Under the Optional Protocol to the International Covenant Civil and Political Rights* (October 17, 2008); electronic version available at: http://www.state.gov/documents/organization/138851.pdf. The UK position is reported in Keller and Grover 2012, 133.

[99] See. e.g., International Law Association 2004, para.22.

[100] Keller and Grover 2012, 131.

[101] Ulfstein 2012, 97; see also Schluetter (2012) in Keller and Ulfstein (eds) 2012, page 292.

This is not to say that General Comments do not have legal significance. They can, for example, 'contribute to community expectations of appropriate state behaviour under human rights treaty obligations.'[102] Moreover, they 'can assist legislators who are trying to draft laws in compliance with a Covenant.'[103] However, states are not bound by these interpretations and can, in fact, challenge their correctness 'by registering their formal disapproval, which some have done.'[104]

Nevertheless, the non-binding nature of treaty interpretation by a UN treaty body does not mean that states are free to ignore the treaty bodies' views. Indeed, states are under a legal obligation to engage with and attach great weight to the findings of the treaty bodies, even though they 'ultimately have the right to reject such findings.'[105] This applies not just to General Comments, but also to concluding observations and findings in individual complaints procedures which are likely to be based on the relevant Committee's General Comments.

Just like General Comments, concluding observations and findings in individual complaints procedures are not legally binding.[106] Unlike the discussion on the legal status of General Comments, however, there is a growing literature asserting that, even though concluding observations are not strictly legally binding, this does not mean that they are mere recommendations. Instead, 'a finding of a violation by a UN human rights treaty body may be understood as an indication of the State Party being under a legal obligation to remedy the situation.'[107] The UN Human Rights Committee suggests in this respect that its views 'under the Optional Protocol represent an authoritative determination by the organ established under the Covenant

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[102] Rodley 2013, 639.

[103] Keller and Grover 2012, 129.

[104] Keller and Grover 2012, 130, citing examples.

[105] Ulfstein 2012, 115.

[106] See, for example, Rodley 2013, 639; Ulfstein 2012, 115; O'Flaherty 2006, 33; International Law Association 2004, paras. 15-18. In *Jones v Saudi Arabia* (2006 UKHL 26), the House of Lords held that the Concluding Observations of the UN Committee Against Torture were mere recommendations, Lord Bingham stating that '[w]hatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight' (at para.23) while Lord Hoffman declared that it had no value as a statement of international law (at para.57).

[107] Scheinin 1999 in Hanski and Markku (eds.) 1999, 444.

itself charged with the interpretation of that instrument'[108] and that, '[b]y becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established.'[109]

Some have concluded that '[t]he granting of competence to a treaty body to make determinations on questions of breach and reparation, even though non-binding, necessarily limits the pre-existing room for auto-interpretation.'[110] 'Generally there exists a presumption in favour of substantive correctness of such views,' and States that disagree with the treaty body's interpretation need to engage with it and present good counter-arguments.[111]

To summarise, while states that ratified a treaty and entrusted a UN Committee with certain functions regarding the interpretation and application of the treaty provisions have an obligation to engage with the UN Committee's views and interpretation in good faith and give it important weight, states are not bound by General Comments or their applications in concluding observations or individual complaints procedures and will not necessarily be in breach of their treaty obligations if they reject an interpretation adopted by a UN Committee.

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[108] UN Human Rights Committee General Comment No 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33, 5 November 2008, at para.13.

[109] Id., at para.14.

[110] Van Alebeek and Nollkaemper 2012 in Keller and Ulfstein (eds.) 2012, see p.385.

[111] Tomuschat 2008, 220; Van Alebeek and Nollkaemper 2012, 385. For an overview of the discussion, see Ulfstein 2012, 92-94.

APPENDIX B: THE ART. 12 *TRAVAUX*

The drafting process that produced the CRPD was contentious, and one of the most contentious set of discussions concerned the framing of Art. 12. The relevant source material can be found in the official summaries of the Third, Fourth, Fifth and Seventh Sessions of the Ad Hoc Committee.[112] Those summaries, reporting on meetings held between May 2004 and January 2006, reflect a wide-ranging discussion. The participants are mainly States Parties (identified in the *travaux* only by country, not by the name of the representative), with the discussion supported by a Coordinator, a Facilitator and the Chair. The Facilitator for the discussion of what would ultimately become Art. 12 was the Canadian representative, who at several stages took the lead in drafting specific language, with input from civil society organisations, several of which gave evidence at the Seventh Session, at the final stages of public discussion. A full reconstruction of the drafting process is certainly not possible here; we therefore confine our comments to the evidence most directly relevant to the issues discussed in this report.

A useful place to begin is with the one instance in all of the recorded evidence in which a speaker clearly calls for the abolition of substitute decision-making. The speaker in question is a representative from the International Disability Caucus (IDC), speaking near the end of the discussion in the Seventh Session. Notice, however, that in the very same paragraph in which the speaker calls for the ban on substitute decision-making, he/she goes on to endorse a compromise proposal *that neither prohibits nor endorses it*:

> Substituted decision making[113] is based on the premise of incompetence and must not be legitimized. Supported decision making is based on the premise of competence. The two cannot exist together … . Nonetheless, hearing the concerns that have been expressed, the IDC recognizes the major step forward of Canada's proposal, which has created silence on this issue *by neither prohibiting nor endorsing*

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[112] All quotations in this Appendix are taken from the CRPD *travaux préparatoires* ('the *travaux')*, which comprise the formal record of the public sessions of the committee that drafted the CRPD. http://www.un.org./esa/socdev/enable/rights/adhoccom.htm

[113] In this and in other passages from the *travaux* we find the term "*substituted* decision-making," as opposed to "*substitute* decision-making," which is the term used in GC1. In this report we have used the latter term, except in direct quotation from sources where the former is employed.

> *substitutive decision making*. This is an approach that the IDC can accept. (emphasis added)

The "Canadian Proposal" to which the IDC representative refers was the last of a series of drafting proposals made by the Canadian representative as regards what was at various stages referred to as Article 8, Article 9, or Article 12. The first of these Canadian proposals, introduced at the Third Session, had explicitly allowed for the possibility that an adult can, through a procedure allowed by law, and with appropriate safeguards, be found *not* to have legal capacity. In the course of the discussion in the Third Session, this first Canadian proposal was explicitly endorsed by, *inter alia*, Argentina, Costa Rica, Kuwait, India and Lichtenstein. It was not endorsed by IDC.

Between the first Canadian proposal at the Third Session, and the final Canadian proposal at the Seventh Session, there unfolded a very extensive debate about the meaning of "legal capacity" in different legal jurisdictions and languages, and about the relationship between legal capacity and "the capacity to act." In the course of this extensive discussion, the Facilitator on several occasions asked explicitly whether the Convention should or should not permit substitute decision-making. *No state representative addressed this question by saying explicitly that substitute decision-making should be abolished*. The Brazilian and Costa Rica representatives came the closest to stating such a position. In the Fifth Session, the Costa Rican representative stated that "Article 9 is based in the premise that everyone has legal capacity, and that some need assistance." The Brazilian representative supported language proposed by Costa Rica on the grounds that it "does not contain any exceptions to the exercise of legal capacity." By contrast, many representatives made statements insisting that some version of substitute decision-making would be essential. Here are six examples from the Fifth Session:

> **Japan**: The Convention should affirm the general equality of PWD [persons with disabilities], but it should also accommodate exceptional situations where PWD are adjudicated to be incompetent and unable to exercise their legal rights.

> **Kenya [speaking on behalf of the] (African Group)** proposed 9(b) be changed to read: "Accept that PWD have full legal capacity on an equitable basis with all others except as provided by law."

New Zealand agreed with Canada and supported its first paragraph to replace 9(b), because the Canadian proposal makes a distinction between assisted decision-making and substitute decision-making and is preferable to the African Group's proposal to add "except as provided by law." At one time guardianship was seen as a benign way to protect PWD; now it is seen as an intrusion into people's basic human rights. Therefore, there should be careful protections around substitute decision-making. Canada's proposal does this.

Thailand supported New Zealand's and Canada's proposals.

Norway: A person who is blind or deaf should have full legal rights, however some PWD need some assistance to exercise legal capacity. But there are certain disabilities, for example serious learning disabilities, developmental disabilities, and major mental illness, which may prevent the person from representing his own interests and may create a need for protection. Norway cannot agree that everyone has legal capacity. Neither the WG [Working Group] text nor the Canadian text take into account the great diversity of disabilities and the need to assist or protect certain groups. It will be difficult to balance the need for protection with the necessity not to undermine the scope of the Convention. It supports the EU's proposal for 9(b): "Recognize PWD as individuals with equal rights before the law and guarantee equality before the law without discrimination against PWD."

Serbia and Montenegro agreed with Norway in many ways … . Serbia-Montenegro appreciates understanding the difference between having full legal capacity and exercising it; there are times that some PWD will be unable to exercise it. … In response to the Coordinator's question about whether some PWD have no legal capacity, Norway has said that the presumption should be for full legal capacity, but there should be legal safeguards and exceptions. Serbia-Montenegro noted that other countries' delegations also have reservations about all PWD having full legal capacity.

At the beginning of the Seventh Session, the Canadian representative introduced its compromise language for what was by this stage numbered as Article 12. The representative reported that the language was the product of its attempts to take into account input from NGOs, and incorporated language worked out in discussions with IDC. The Canadian compromise proposal reads as follows:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

> 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> 2bis. States Parties shall take appropriate legislative and other measures to facilitate access by persons with disabilities to any support they may require in exercising their legal capacity, as well as to provide appropriate safeguards to prevent abuses in the provision of support.
>
> 3. States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities, inter alia, to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

The *travaux* record that, upon introducing this proposal, "Canada clarified that its proposal was not a prohibition of substitute decision-making, but an encouragement of supported decision-making." This was also the language that the IDC representative endorsed on the basis that it "neither prohibits nor endorses substitute decision-making."

At the final stage of what by then had become a very lengthy debate, the Chair of the Ad Hoc Committee summed up the discussion of Article 12. He reported that there was good support of the working text, and that "good progress had been made on the issue of legal capacity." He noted that "fundamental differences remain," but that "Canada's proposal commanded the most support from delegations." He went on to call for "more consultation …, including informal discussions, to balance promotion of a support-based approach *while retaining substitution as a last resort mechanism with safeguards*" (emphasis added). He concluded his summary by calling on colleagues to "work hard and be willing to compromise in order to find a solution in which neither side 'loses'."

The foregoing is far from the complete story about the complex development of the language that would become CRPD Art. 12, and of course much of the process of compromise and final framing took place outside the formal proceedings recorded in the *travaux*.[114] However, based on our survey of the evidence, we submit that there

[114] For discussion, see Dhanda 2007.

is no warrant in the *travaux* for the claim that the framers of the Convention intended to abolish substitute decision-making. On the contrary, many members of the Ad Hoc Committee insisted at the time on the *necessity* of substitute decision-making, while a handful argued for positions that would entail its abolition. Those who actually wrote the final language for Art. 12.2 did so with the explicitly stated intention of preserving the possibility of substitute decision-making. Why did the opponents of substitute decision-making support such language? It was abundantly clear by that stage of the proceedings that a ban on substitute decision-making would not be acceptable to many members of the Ad Hoc Committee, so the best compromise available to the opponents of substitute decision-making was language that "neither prohibits nor endorses it."

APPENDIX C: THE GC1 DEFINITION OF "SUBSTITUTE DECISION-MAKING"

The process which led to the adoption of GC1 unfolded over some time.[115] Following the first round of 'country reports' issued by the UN Committee, a number of States Parties sought clarification from the Committee about its repeated recommendation that States Parties should move to replace substitute decision-making with supported decision-making. These terms do not occur in the Convention itself, and clarification was sought as to their meaning.

It was in part in response to these requests that the UN Committee appointed a working group to draft a General Comment on Art. 12. After a series of consultations, the Working Group produced a Draft General Comment, which was widely circulated for public comment. Paragraph 23 of the Draft General Comment included the following definition of 'substitute decision making' (emphasis added):

> Regimes of substitute decision-making can take many different forms, including plenary guardianship, judicial interdiction, and partial guardianship. However, these regimes have some common characteristics. Substitute decision-making regimes can be defined as systems where 1) legal capacity is removed from the individual, even if this is just in respect of a single decision, 2) a substitute decision-maker can be appointed by someone other than the individual, and this can be done against the person's will, **and** 3) any decision made by a substitute decision-maker is bound by what is believed to be in the objective "best interests" of the individual – as opposed to the individual's own will and preferences.

There is much of interest in this definition, but for present purposes we have highlighted the key word: 'and'. The definition is a conjunctive definition: all three features must be present in order for a regime to meet the definition.

In April 2014, the UN Committee met to review comments that had been received from States Parties, civil society organisations and individuals. A number of proposed amendments to the draft were accepted and the amended General Comment was adopted by the UN Committee. At the time of its adoption, the revised General Comment was widely circulated to stakeholders. The paragraph numbering in this circulated version had not yet been revised to accommodate the amendments.

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[115] The material in this Appendix draws on Martin 2016.

Significantly, in the circulated version of the adopted General Comment, the definition of 'substitute decision-making' had changed. Specifically, the word 'and' had been replaced by the word 'or'. This second definition therefore has a disjunctive character. Hence a statutory regime could meet the definition of 'substitute decision-making' without exhibiting all three features enumerated in the definition.

Following the April 2014 meeting of the UN Committee, a 'cleaned up' text of the adopted General Comment was produced, with revised paragraph numbers, and made available on the UNOHCHR website in six languages. In this, the final and official version of the General Comment, the 'or' has been removed and the 'and' restored.

As of this writing, the conjunctive definition remains the official definition in the text of the General Comment, and the conjunctive 'and' appears in all six languages. To the best of our knowledge, the disjunctive definition does not appear anywhere on the UNOHCHR website, although it does appear in research publications authored by members of the Centre for Disability Law and Policy, NUI Galway.[116] In August 2014, a letter from the Essex Autonomy Project was delivered to the Secretary of the UN Committee, seeking clarification as regards these two versions of the definition. At this time, no response has been received.

It should be clear that the two definitions are logically inconsistent. Under the conjunctive definition, a statutory regime that included one or two but not three of the enumerated features would not satisfy the definition. Under the disjunctive definition, such a statutory regime would satisfy the definition.

Consider now the disjunctive definition of 'substitute decision-making', which does not currently appear on the UN website, but which has been widely disseminated and discussed. What we find is that it suffers from a serious logical flaw. To bring the problem into view, consider the following propositions:

> P: The statutory regime of a state party (SP) permits legal capacity to be removed from the individual, even if this is just in respect of a single decision.

[116] See Gooding 2015, 51.

Q: The statutory regime of a state party (SP) allows for a substitute decision-maker to be appointed by someone other than the individual, and this can be done against the person's will.

R: The statutory regime of a state party (SP) allows at least one decision to be made by a substitute decision-maker who is bound by what is believed to be in the objective 'best interests' of the individual – as opposed to the individual's own will and preferences.

Taking these propositions as atomic, we can present the logical form of the disjunctive definition as follows: 'SP has a regime of substitute decision making if and only if (P and Q or R).'

But now this is a classic example of scope ambiguity. Does it mean that substitute decision-making requires P and either Q or R? Or does it mean that substitute decision-making requires either P and Q together, or R alone? Symbolically, the definition is ambiguous between the following two interpretations:

$$P \,\&\, (Q \,\wedge\, R)$$

$$(P \,\&\, Q) \,\wedge\, R$$

The text in which the disjunctive definition appears simply does not suffice to choose between these readings. It therefore remains fatally ambiguous.

A final flaw in the UN Committee's definition(s) of 'substitute decision-making' features in both the conjunctive and the disjunctive definitions: they are threatened with vicious circularity. Both the conjunctive and the disjunctive definitions define 'substitute decision-making' by using the concept 'substitute decision-maker'. But this term is not defined in either version of the General Comment. It is natural to suppose that a substitute decision-maker is someone who is empowered to make decisions under a regime of substitute decision-making. But if 'substitute decision-making' is defined by appeal to 'substitute decision-maker', and 'substitute decision-maker' is then defined by appeal to 'substitute decision-making', then both definitions are irredeemably circular.

The foregoing remarks have been critical of the GC1 definition(s) of substitute decision-making. But we conclude this Appendix on a more constructive note. Having now had an opportunity to discuss the GC1 definition(s) with a number

of individuals who were involved in the drafting process, we believe that we have come to have a better understanding of the intended definition. This was strongly reinforced in our exchanges with current members of the Committee who attended the Essex Autonomy Project side event held during the 15th Session of the Committee (31 March 2016). On the basis of these conversations, we offer the following as an attempt to capture the definition that was intended by the drafters of GC1, while resolving the ambiguities and logical defects of the two versions of the text that have been in circulation:

> A *substitute decision-maker* is anyone who is empowered to make a decision for or on behalf of a person with a disability. But a legal regime which provides for substitute decision-makers is not itself a *substituted decision making regime* unless (1) legal capacity is removed from the individual, even if this is just in respect of a single decision, and (2) at least one of the following further conditions are met: (2a) a substitute decision-maker can be appointed by someone other than the individual, and this can be done against the person's will, (2b) any decision made by a substitute decision-maker is bound by what is believed to be in the objective "best interests" of the individual – as opposed to the individual's own will and preferences.

APPENDIX D: OVERVIEW OF UK JURISDICTIONS: MENTAL CAPACITY/CAPABILITY

§D.1 INTRODUCTION

All three Acts are founded upon an act/decision-specific and functional approach to mental capacity/capability, and within legislative regimes predicated upon different protections being available in relation to those who are "vulnerable": i.e. who, whether or not they have the requisite mental capacity/capability for purposes of the Acts, are prevented from exercising their independent powers of action or decision by reason of the influence of third parties.[117] This Appendix outlines in more detail how each legislative regime identifies whether a person has or lacks the material capacity/capability, and therefore the basis upon which a decision-maker may be authorised (either by judicial determination or by operation of law) to act or take decisions in relation to them.

§D.2 AWIA

The AWIA is predicated upon interventions in the affairs of adults[118] and includes provision for measures applicable in circumstances where such adults are incapable of taking an action or in relation to a material decision.[119] It contains no equivalent 'screening' principles to those found in the MCAs (as to which see further below).

For purposes of the AWIA, 'incapable' means (factually) incapable of (a) acting; or (b) making decisions; or (c) communicating decisions; or (d) understanding decisions; or (e) retaining the memory of decisions by reason of mental disorder or of inability to communicate because of physical disability. "Mental disorder" is, in turn, defined by reference to its meaning in the Mental Health (Care and Treatment)

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[117] There is a separate statutory regime in Scotland addressing the steps that may be taken in regard to such vulnerable individuals, the Adult Support and Protection (Scotland) Act 2007. This applies to persons at risk, including risk created by themselves. There is no equivalent in England & Wales (or Northern Ireland) but the Court of Appeal in England & Wales has confirmed that the High Court retains an inherent jurisdiction to take the necessary steps to secure the interests of such individuals: *L (Vulnerable Adults with Capacity: Court's Jurisdiction), In re (No 2)* [2012] EWCA Civ 253; [2013] Fam 1.

[118] s1 AWIA.

[119] See e.g. s53(1) AWIA in relation to intervention orders and s58(1)(a) AWIA in relation to guardianship orders.

(Scotland) Act 2003 as any mental illness, personality disorder or learning disability however caused or manifested.[120] 'Incapacity' for purposes of the AWIA is construed accordingly. The AWIA makes clear that a person is not to be considered incapable by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise).[121]

It should be noted that the AWIA principles, and many other provisions of the AWIA, simply apply to 'an adult'. To that extent they are arguably not discriminatory on grounds of disability. The principles can thus apply to an adult whose relevant capacity is not impaired, if something done under or in pursuance of the AWIA results in an intervention in the affairs of that adult.[122]

§D.3 MCA AND MCA (NI)

The MCA and MCA (NI) are predicated upon acts being done or decisions being made on behalf of an individual lacking mental capacity in relation to a matter.[123]

The MCA and MCA (NI) have three 'screening' principles, namely a presumption of capacity, a requirement to provide all practicable assistance before a person is treated as lacking capacity in the material regard(s), and a declaration that a person must not be treated as lacking capacity 'merely because he makes an unwise decision.'[124] Both also confirm (in slightly different terms) that a lack of capacity must be determined by reference to the terms of the relevant Act, and that is not to be

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[120] Subject to the proviso that a person is not to be considered mentally disordered by reason only of any of the following sexual orientation; sexual deviancy; transsexualism; transvestism; dependence on, or use of, alcohol or drugs; behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; or acting as no prudent person would act (Section 328 Mental Health (Care and Treatment) (Scotland) Act 2003).

[121] s1(6) AWIA.

[122] See Ward 2013, 239-242.

[123] ss1(5), 4 and 5 MCA; ss2, 7 and Part 2 of MCA (NI).

[124] ss1(1)-(3) MCA; ss1(2), 1(4) and 1(5) MCA (NI).

determined merely by reference to a condition or characteristic that might lead others to make unjustified assumptions about their ability to make a decision.[125]

The MCA contains a statutory definition of when 'a person lacks capacity in relation to a matter'.[126] That definition is carried back to MCA s1(5) (which provides the basis for determining what decisions or actions can be taken on behalf of the individual lacking capacity). For purposes of the MCA, a person lacks capacity in relation to a matter if:

1. an impairment or disturbance of the mind or brain **is an effective, material or operative cause**[127] of
2. the person being unable to (a) understand the information relevant to the decision; (b) retain that information;[128] (c) use or weigh that information as part of the process of making the decision; or (d) communicate his decision, whether by talking, using sign language or any other means.[129]

For purposes of the MCA (NI), a person lacks capacity in relation to a matter if:

1. an impairment or disturbance of the mind or brain **is an effective, material or operative cause**[130] of
2. the person being unable to (a) understand the information relevant to the decision; (b) retain that information for the time required to make the decision; (c) appreciate the relevance of that information and to use or weigh that information as part of the process of making the decision; or (d) communicate his decision, whether by talking, using sign language or any other means.[131]

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[125] s2(3) MCA; s1(5) MCA (NI).

[126] s2, amplified by s3 MCA.

[127] *NCC v NCC v PB and TB* [2014] EWCOP 14 [2015] COPLR 118 at para 86 per Parker J.

[128] It does not matter that they cannot only retain that information for a short period: s2(3) MCA.

[129] s2(1) read together with s3(1) MCA.

[130] The Act not yet being in force, there is no jurisprudence on this, but we suggest it is likely the same approach will be taken.

[131] s3(1) read together with s4(1) MCA (NI).

Both the MCAs make clear that it does not matter whether the impairment or disturbance is permanent or temporary;[132] the MCA (NI) further provides that it does not matter what the cause of the impairment or disturbance is; and, in particular, it does not matter whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disorder or disability.[133]

Both the MCAs provide that a person cannot be regarded as unable to understand the information if they can understand an appropriate explanation of the information.[134]

The MCA (NI) provides considerably more detail than does the MCA to flesh out the principle that practicable help and support must have been provided to a person without avail before they can be regarded as incapable of making a decision. It sets out specified steps that must be taken so far as practicable, including (a) the provision to the person, in a way appropriate to his or her circumstances, of all the information relevant to the decision (or, where it is more likely to help the person to make a decision, of an explanation of that information); (b) ensuring that the matter in question is raised with the person at a time or times likely to help the person to make a decision and in an environment likely to help the person to make a decision; and (c) ensuring that persons whose involvement is likely to help the person to make a decision are involved in helping and supporting the person.[135]

The determination of mental capacity is under both MCAs on the balance of probabilities.[136]

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[132] s2(2) MCA; s3(2)(a) MCA (NI).

[133] s3(2) MCA(NI).

[134] s3(2) MCA; ss4(3) and (4) MCA (NI).

[135] s5 MCA (NI).

[136] s2(4) MCA; s6 MCA (NI).

APPENDIX E: OVERVIEW OF UK JURISDICTIONS: CONSTRUCTING DECISIONS

§E.1 INTRODUCTION

All three jurisdictions provide (in different ways) for authorised decision-making in relation to or on behalf of an individual on the basis of their incapacity/incapability. This Appendix identifies the basis upon which such decision-makers are required to act under the AWIA and the two MCAs in constructing decisions.[137]

§E.2 AWIA

Section 1 identifies a number of principles which must be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of the AWIA, including any order made in or for the purpose of any proceedings under the Act for or in connection with an adult. They are as follows:

> There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.[138]
>
> Where it is determined that an intervention is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.[139]
>
> In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of: (a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult; (b) the views of the nearest relative, named person and the primary carer of the adult, in so far as it is reasonable and practicable to do so; (c) the views of: (i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the

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[137] The term “constructing decisions" does not appear in any of the Acts. It was coined in Ward 2003 (see ch. 15) to describe the methodology which he there proposed for implementing the requirements of AWIA, a methodology for operationalising a broadly similar purpose to that of making a "best interpretation of will and preferences" suggested in GC1.

[138] s1(2) AWIA.

[139] s1(3) AWIA.

> proposed intervention; and (ii) any person whom the sheriff has directed to be consulted, in so far as it is reasonable and practicable to do so;[140] (d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.[141]
>
> Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.[142]

A 'best interests' test was explicitly rejected for the purposes of the AWIA.[143] Instead of focusing the basis for acting and deciding on behalf of a person/adult upon the single concept of 'best interests' (as do the two MCAs) the AWIA provides a set of general principles, none of which is stated to take precedence or priority over any other. There is however one subsidiary principle in s17 of AWIA under which attorneys (only) are not obliged to do anything within their powers 'if doing it would, in relation to its value or utility, be unduly burdensome or expensive'

The AWIA accordingly has no principles serving the subsidiary purpose of guiding how to determine the application of any one dominant principle, except to the limited extent noted in the next paragraph.

AWIA s3(5A) was added to the AWIA by the Adult Support and Protection (Scotland) Act 2007 ('ASP'). It provides a principle which is subsidiary to AWIA

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[140] s1(4) AWIA.

[141] s1(5) AWIA.

[142] s1(6) AWIA.

[143] '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. (Scottish Law Commission Report 1995, para.2.50)'.

s1(4)(a), for the purpose of assisting the ascertainment of the adult's wishes and feelings for the purpose of sheriff court proceedings, by requiring the sheriff to take account of them as expressed by an independent advocate (as defined). In addition, the AWIA authorises the sheriff, in addition to appointing a safeguarder, to appoint a person to ascertain and convey to the court the views of the adult (s3(5) AWIA).

There is a deliberate inequality among the various principles in AWIA s1(4) to the extent that the obligation to take account of the adult's wishes and feelings, if ascertainable, is absolute. That is emphasised by the inclusion of 'by any means of communication …' and by the exclusion of the qualification, which appears in the other paragraphs of AWIA s1(4): 'insofar as it is reasonable and practicable to do so'.

It should be reiterated that the principles set out in AWIA ss1(1) – (5) can, in principle, apply equally to an adult whose relevant capacity is not impaired, if something done under or in pursuance of the AWIA results in an intervention in the affairs of that adult.

How the judiciary in Scotland have, in practice, applied these principles is discussed in Ward and Ruck Keene (2016), which describes a journey that in the eyes of the authors represents a significant departure from the principles elaborated above.

§E.3 MCA

As regards the basis for acting or deciding on behalf of a person lacking the material decision-making capacity, the MCA states, and in this regard is predicated upon, two overarching principles: (a) an action done or a decision made under the Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests;[144] and (b) before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.[145] It should perhaps be noted that that requires consideration of whether there is a need for any action or decision at all.

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[144] s1(4) MCA.

[145] s1(6) MCA.

The two principles quoted immediately above apply only to 'a person who lacks capacity.' The first is then fleshed out by MCA s4, which identifies the steps to be taken in determining what is in the best interests of the person, a process which requires the consideration of all the relevant circumstances.[146] Section 4 MCA includes negative provisions, namely that the decision-maker (a) must not make the determination merely on the basis of the person's age or appearance, or a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests;[147] and (b) where the determination relates to life-sustaining treatment must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.[148] It also includes positive injunctions upon the decision-maker, namely to:

> Consider (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and (b) if it appears likely that he will, when that is likely to be;[149]
>
> So far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him;[150]
>
> Consider, so far as is reasonably ascertainable (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity); (b) the beliefs and values that would be likely to influence his decision if he had capacity; and (c) the other factors that he would be likely to consider if he were able to do so;[151]
>
> Take into account, if it is practicable and appropriate to consult them, the views as to what would be in the person's best interests and, in particular, as to the matters set out in the … point immediately above,

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[146] s4(2) MCA, reasonable circumstances being defined in s4(11) MCA as ones (a) which the person making the determination is aware; and (b) which it would be reasonable to regard as relevant.

[147] s4(1) MCA.

[148] s4(5) MCA.

[149] s4(3) MCA.

[150] s4(4) MCA.

[151] s4(6) MCA.

> of (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind; (b) anyone engaged in caring for the person or interested in his welfare; (c) any donee of a lasting power of attorney granted by the person; and (d) any deputy appointed for the person by the court;[152]

Those exercising powers under lasting powers of attorney and any person exercising powers under the Act on the basis of a reasonable belief that another lacks capacity are required to comply with the duties set out above.[153] A failure to comply with the duty to consult where consultation is practicable and appropriate means that the decision-maker cannot then rely upon the defence contained in s5 MCA.[154] In the case of any person other than the court, it suffices that the steps set out above are taken and the person then reasonably believes that what he does or decides is in the best interests of the person concerned.[155]

On the face of the statute, no one of these factors is to take priority. Indeed, the Report of the Joint Committee on the Draft Mental Incapacity Bill[156] was clear that this was deliberate: determining the best interests of the individual 'required flexibility' and was said to be best achieved by 'enabling the decision-maker to take account of a variety of circumstances, views and attitudes which may have a bearing on the decision in question.' It was for this reason that they did not recommend any weighting or giving priority to the factors involved in determining best interests. In a similar vein, as the Government identified, there was a deliberate policy decision that 'a prioritisation of the factors would unnecessarily fetter their operation in the many and varied circumstances in which they might fall to be applied.'[157]

This approach was carried through into the Code of Practice accompanying the MCA. While the individual's wishes and feelings, beliefs and values 'should be

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[152] s4(7) MCA.

[153] s4(8) MCA.

[154] *Winspear v City Hospitals Sunderland NHS Foundation Trust* [2015] EWHC 3250 (QB).

[155] s4(9) MCA.

[156] HL 189-1, HC 1083-1 (TSO, 2003).

[157] Department for Constitutional Affairs, Government Response to the Scrutiny Committee's Report on the Draft Mental Incapacity Bill 2004.

taken fully into account', they will 'not necessarily be the deciding factor.'[158]

There is now an extensive body of case-law interpreting s4 MCA, the most important decision to date being that of the Supreme Court in *Aintree University Hospital NHS Foundation Trust v James*,[159] in which Lady Hale (giving the sole reasoned judgment) emphasised that the purpose of the best interests test was 'to consider matters from the patient's point of view.'[160] The case-law is discussed in detail, and compared with that decided in relation to the AWIA, in Ward and Ruck Keene (2016).

It should also be noted that the Law Commission of England & Wales has provisionally proposed that s4 should be amended to establish that decision-makers should begin with the assumption that the person's past and present wishes and feelings should be determinative of the best interests decision.[161] An interim statement was published on 25 May 2016 in which reference was made to making amendments which "would also aim at giving greater priority to the person's wishes and feelings when a best interests decision is being made."[162] The final report of the Law Commission and draft legislation is anticipated by the end of 2016.

§E.4 MCA (NI)

The MCA (NI) is similar in approach to the MCA. It has an overarching principle that an act done or decision made for or on behalf of a person lacking the material capacity must be done or made in their best interests.[163] It does not have the same overarching "less (or least) restrictive" principle, identified at the outset, but the same requirement is imposed upon the decision-maker elsewhere in the Act.[164]

Section 7 then sets out how the decision-maker is to approach making the

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[158] Department of Constitutional Affairs, Code of Practice to the MCA 2009, para.5.38.

[159] [2013] 3 WLR 1299, [2013] COPLR 492.

[160] Para. 45.

[161] Law Commission 2015, para.12.47.

[162] Law Commission 2016, para. 1.41.

[163] s2 MCA (NI).

[164] s7(8) MCA (NI).

determination of best interests. This is broadly equivalent to MCA s 4, but with the following two key differences:

> 1. The decision-maker must not just consider but have **special regard** to (so far as they are reasonably ascertainable) (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity); (b) the beliefs and values that would be likely to influence his decision if he had capacity; and (c) the other factors that he would be likely to consider if he were able to do so;[165]
>
> 2. The decision-maker must, in relation to any act that is being considered, have regard to whether failure to do the act is likely to result in harm to other persons with resulting harm to P.[166]

There is at present no Code of Practice to amplify the provisions of s7, nor (by definition) any case-law to interpret "special regard." The Explanatory Notes (as they stood when the Bill was at final consideration stage) do not shed any light either. On the legal construct of "special regard," see Appendix H.

[165] s7(6) MCA (NI).

[166] s7(9) MCA (NI).

APPENDIX F: SUPPORT FOR THE EXERCISE OF LEGAL CAPACITY IN THE THREE JURISDICTIONS

§F.1 INTRODUCTION

This Appendix addresses the key existing provisions in the legislation in the three jurisdictions that have the potential to act as supports for the exercise of legal capacity. It does not address provisions for supports in the absence of decision-making capacity, which are addressed in Appendix E, by reference to the different models adopted by each of the jurisdictions for constructing decisions in the absence of decision-making capacity.

§F.2 ADVANCE PLANNING PROVISIONS

Each Act formally recognises distinct types of support for the exercise of legal capacity which can be established in advance of a loss of capacity (either temporary or permanent).[167] Informal additional forms of supported decision-making exist and operate in the absence of, and in tandem with, the legislation.

First, and most important, all of the Acts make provision for any individual with the requisite capacity[168] to put in place arrangements for the management of their property and financial affairs and/or personal welfare by appointing an individual or organisation to act on their behalf as their attorney when they do not have the capacity to do so.[169] A donor/granter can revoke a power of attorney when they have capacity to do so;[170] where they do not, then termination will be a matter for the requisite

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[167] For a greater discussion of the methods of advance planning identified under Scottish legislation, including the AWIA, in the context of UNCRPD see Stavert 2015

[168] That capacity is not to be equated to capacity to make all the decisions that the attorney may be required to make: see *Re K, re F* [1988] 1 All ER 358, concerning the pre-MCA position in England & Wales, but followed in Scotland. It may be that the level of functional ability to grant a power of attorney has now been raised in England & Wales subsequent to the passage of the MCA and the introduction of lasting powers of attorney.

[169] The Scottish provisions are to be found in Part 2 of AWIA, the English & Welsh in ss9-14 of and Sch 1 to the MCA, and the Northern Irish in Part 5 of MCA (NI). The Northern Irish regime is complicated by the fact that the new Act introduces lasting powers of attorney which can be granted in respect of both property and financial affairs and welfare matters by any person aged 16 and above (subject to certain limitations); enduring powers of attorney (which relate solely to property and financial affairs) can still continue to be granted under the Enduring Powers of Attorney (Northern Ireland) Order 1987.

[170] s22A AWIA, s13(2) MCA, s106 MCA (NI).

judicial authorities.[171] In determining whether or not to terminate a power of attorney, the court will have regard to the views of the donor/granter (for instance as to whether or not they wish a particular attorney to continue), but they will not be determinative, and, at least in England, Wales and Northern Ireland, the focus will primarily be upon whether the attorneys are discharging their functions appropriately.

Second, both the MCA and the MCA (NI) provide statutory recognition for the right of a person over 18 to make a decision that they do not wish to receive medical treatment(s), which must be respected where it is valid and applicable. The conditions for creating an effective advance decision are set down in statute in the MCA,[172] and are left to the common law in the MCA (NI).[173] Both statutes provide for advance decisions to take precedence over the authority of an attorney to act.[174] The presence of such an advance decision cannot prevent a person providing life-sustaining treatment, or doing any act he reasonably believes to be necessary to prevent a serious deterioration in the person's condition while a decision regarding any relevant issue is sought from the court.[175] Advance statements or directives are not formally recognised under the AWIA[176] and in Scotland there is an absence of relevant case law on these. However, it seems likely that the English approach will be followed in that advance refusals regarding treatment relating to physical health will be upheld, although specific treatment preferences will not.[177] It is also likely that the same approach would be taken as to the ability of healthcare professionals to act in the face of an advance decision to preserve the status quo pending judicial consideration.

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[171] s20(e) AWIA, s22(4) MCA, s110(4) MCA (NI).

[172] s24 MCA.

[173] s11(1) MCA (NI).

[174] s11(7) MCA; s99 MCA (NI). In both cases, which will take precedence will depend on which instrument was made first – granting the authority to an attorney to consent to or refuse medical treatment will supersede any advance decision made.

[175] s26(5) MCA; s11(4) MCA.

[176] Advance statements are recognised under the Mental Health (Care and Treatment) (Scotland) Act 2003 (ss275-276) to the extent that clinical staff and the Mental Health Tribunal for Scotland must have regard to such statements. Specific duties requiring the recording of such advance statements and steps taken to encourage their making will be imposed on Health Boards, and monitored by the Mental Welfare Commission for Scotland, when amendments to the 2003 Act, inserted by the Mental Health (Scotland) Act 2015 (s26), come into effect.

[177] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at para 103 per Lord Donaldson MR; *Re C (Adult: Refusal of Medical Treatment) [1994]* 1 WLR 290; *Airedale NHS Trust v Bland* [1993] AC 789.

A specific feature of the Northern Ireland legislation is the ability of a person aged 16 or over to appoint a 'nominated person.'[178] This appointment will remain effective even where the appointer no longer has capacity to make decisions about his or her nominated person.[179] A person with capacity can also make a declaration stating that a person or persons named in the declaration is not to be appointed their nominated person. A nominated person has an important role to play in a number of matters under the Act, but most crucially where a serious intervention is under contemplation, when they must (save in an emergency) both have been in place and be consulted.[180] If they have the capacity to do so, the individual in question can revoke the appointment of the nominated person.[181] If they do not have the capacity to revoke the appointment, then termination of the appointment and appointment of another nominated person would be a matter for the Tribunal, which would proceed by reference to whether or not the person previously nominated was "suitable."[182]

§F.3 Independent Advocacy

In each of the three jurisdictions, there is provision (to greater or lesser extent) for independent advocacy, in the sense that there are either statutory duties or powers to appoint someone to assist a person to speak up for themselves or, if the person is unable to do so, to communicate and represent their views, wishes and feelings. Independent advocacy should be contrasted with the role of a supporter (such as the 'nominated person' appointed by a person under the MCA (NI)) because the person will not – usually – have the choice of who they wish to appoint as their advocate.

§F.3.1 AWIA

Independent advocacy is available across Scotland, although its provision is variable. Section 3(5A) of AWIA requires the court to take account of the wishes and feelings of the adult who is the subject of an application or proceedings 'so far as they are expressed by a person providing independent advocacy services.' That is the only

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[178] s70 MCA (NI).

[179] s77 MCA (NI).

[180] s15 MCA (NI).

[181] s71 MCA (NI).

[182] ss80 and 81 MCA (NI).

reference to independent advocacy in AWIA. It should however be noted that the *Mental Health (Care and Treatment)(Scotland) Act* 2003[183] identifies the right to independent advocacy for every person with mental disorder and as such is not therefore confined to those who are subject to compulsion under the 2003 Act. There is also a corresponding duty on health boards and local authorities to secure the availability of such advocacy.[184]

Scottish Government guidance states that independent advocacy has two main themes – "speaking up for and with people who are not being heard, helping them to express their views and make their own decisions and contributions" and "safeguarding individuals who are at risk."[185] Guidance produced on the use of independent advocacy[186] specifies that a principle of independent advocacy is that services should be directed by the individual concerned and should assist the person in exercising control over their life.

§F.3.2 MCA

The MCA provides for support in the form of 'independent mental capacity advocates' (IMCAs), who are available to represent and support persons in the cases of provision of serious medical treatment by the NHS or accommodation by the NHS or local authorities.[187] Under the MCA, the involvement of an IMCA is envisioned primarily at the stage when a best interests decision is being considered, with their role being in the first instance to involve the person as much as possible in the substitute decision-making process.[188] The MCA Code of Practice states that the IMCA function is designed to support persons "who have no family or friends that it would be appropriate to consult about those decisions."[189] The MCA also –

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[183] s259(1).

[184] Mental Health (Care and Treatment) (Scotland) Act 2003, s259(1)(a) and (b). This obligation will be enhanced through Mental Welfare Commission monitoring after provisions in the Mental Health (Scotland) Act 2015 (s26) come into force.

[185] Scottish Government 2013.

[186] Scottish Independent Advocacy Alliance 2008, p.14-16. See also Mental Welfare Commission for Scotland 2015.

[187] ss35 and 37-39 MCA.

[188] s36(2)(a) MCA.

[189] Department of Constitutional Affairs, Code of Practice to the MCA 2009, p.178.

separately[190] – provides for the appointment of IMCAs in conjunction with the scheme set down in the Act for the authorisation of deprivation of liberty of individuals unable to consent to arrangements amounting to their confinement in hospitals and care homes. The functions of IMCAs in such situations is primarily to secure the ability of the individual to exercise their rights under Art. 5.4 ECHR to challenge the lawfulness of their detention before the Court of Protection.

It is also important to note a development since the 2014 report that is formally outside the MCA but has the potential significantly to impact upon decision-making in relation to those with asserted impairments of capacity. Under both the Care Act 2014 (in England) and the Social Services and Well-Being (Wales) Act 2014 (in Wales), advocates must be appointed where local authorities are discharging certain social services functions (most obviously assessment of care needs and the development of care plans) in relation to those whose participation in the process would be substantially impaired without such an advocate (and there is no appropriate person to assist them informally). The precise basis upon which advocates are appointed varies as between England (where it is on the basis of the Care Act and regulations made thereunder) and Wales (where it is on the basis of the Social Services and Well-Being (Wales) Act 2014 and accompanying statutory guidance), but in both cases the trigger for appointment is that, without them, the individual in question would otherwise have substantial difficulties in understanding, retaining, using or weighing information, or communicating.[191] The Law Commission in its consultation paper provisionally proposed consolidating advocacy as between the Care Act and the Mental Capacity Act and modelling such advocacy on the Care Act model which, importantly, is aimed at securing that the individual in question is supported to participate in the relevant decision-making process as a full (capacitous) participant.[192]

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[190] Ss39A-E MCA.

[191] See (in England) Care Act 2014, s67.

[192] See Law Commission 2015, chapter 9.

§F.3.3 MCA (NI)

The MCA (NI) provides that independent advocates must be instructed by health and social care trusts 'to represent and provide support to a person ("P") in the determination of whether a particular act in relation to which P lacks capacity would be in P's best interests'.[193] The Department of Health may also make regulations[194] that, amongst other things, require certain steps to be taken by an independent advocate such as providing support to P so that P may participate as fully as possible in any relevant decision, obtaining and evaluating relevant information, ascertaining P's past and present wishes and feelings, and the beliefs and values that would be likely to influence P's decision if P had capacity, ascertaining what alternative courses of action are available in relation to P, informing persons responsible for determining what would be in P's best interests of the independent advocate's conclusions and informing P's nominated person (if any) of matters relevant to the nominated person.

[193] s86 MCA (NI).

[194] s87 MCA (NI).

APPENDIX G: UNDUE INFLUENCE, CONFLICT OF INTEREST AND RELATED CONCEPTS IN THE THREE JURISDICTIONS

§G.1 INTRODUCTION

As noted in §4, the concepts of 'undue influence' and 'conflict of interest' are intended to have an autonomous meaning for purposes of the Convention. Both of them, though, are concepts which have long histories in the three jurisdictions. The purpose of this Appendix is to set out in brief terms how they are understood in those jurisdictions, as well as two related (but for domestic law distinct) concepts that sit alongside them in Scottish and English law. For purposes of this Appendix, England & Wales and Northern and Ireland are treated together because the same legal principles apply equally to both jurisdictions.

§G.2 UNDUE INFLUENCE

§G.2.1 SCOTLAND

Scots law operates with a concept of undue influence that is similar to that established in English law, as discussed in the next subsection of this Appendix. In Scots law undue influence renders an act or transaction voidable. However, in Scots law there is a concept of facility and circumvention, in addition to undue influence. Where facility and circumvention is established, a purported act or transaction may be set aside. Firstly, there must be facility, rendering the adult liable to be intimidated, misled or imposed upon, and significantly impairing the adult's ability to resist such tactics. Secondly, someone must have taken unfair advantage of the facility by means such as "solicitation, pressure, importunity, even in some cases, suggestion"; and must thus have caused or induced the act or transaction: there must have been circumvention. Thirdly, the resulting act or transaction must have been to the detriment of the adult: there must have been lesion. It is the detriment to the adult which is relevant, rather than the advantage secured by another party.[195]

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[195] Ward *Adult Incapacity*, Greens, 2003 at paragraph 1-37. Note that in the case of challenges to Wills based upon this doctrine, it is not necessary to establish lesion, the very fact of a new Will having been made where a facile individual has been pressurised to make a new Will by way of circumvention being regarded as sufficient: Pascoe-Watson v Brock's Exr 1998 SLT 40 at 47K-L.

In *Smyth v Rafferty and others*, Lord Glennie explained the concepts as follows. With regard to undue influence as the abuse of a relationship of trust, he stated that:

> The word abuse may tend to give a misleading flavour of what is involved. The person exercising the influence may genuinely believe that the course which he is persuading the other party to pursue is desirable and for the benefit of that party; and, indeed, may even believe that is in accordance with that party's real wishes. The mischief lies not in the act induced by the application of pressure being itself objectionable in some way, but in the fact that it results from the undue exercise of influence by the person in the position of trust.[196]

Regarding the pressure that might amount to facility and circumvention, he explained:

> That pressure may, at one extreme, be direct, forceful and overpowering or, at the other, be more subtle or insidious, working by solicitation or importuning. Fraud is one example of the way in which a facile mind may be subverted but it is not an essential part of the principle. Bullying or browbeating may equally amount to circumvention. A robust individual will usually be able to resist pressure, or at least decide whether or not he wants to resist it. A facile person may not. But facility is a spectrum; it comes in degrees. A deed will only be at risk of being reduced (or set aside) if the pressure applied is unacceptable having regard to the extent to which the person on whom it is exerted is facile.[197]

It is also worth noting that the majority of powers of attorney are prepared by certifiers, and the AWIA contains an express provision requiring certifiers to ensure that the person instructing them to prepare the document is not subject to undue influence.[198] Moreover, the Law Society of Scotland states that the reference to being 'incapable of acting' as an indicator of the adult's incapacity[199] may include, amongst other things, acting to resist undue pressure. Similarly to the functions noted below of the Public Guardian (E&W), in Scotland the Public Guardian and local authorities have functions including investigating where finances and property, or personal

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[196] *Smyth v Rafferty and others* [2014] CSOH 150**,** at para.45.

[197] Para. 49.

[198] ss15(c) (iii) and 16(c)(iii) AWIA.

[199] s1(6) AWIA.

welfare, respectively may be at risk, which can be triggered by apparent exercise of undue influence.[200]

§G.2.2 ENGLAND, WALES AND NORTHERN IRELAND

The law in England & Wales does not provide a uniform definition of the equitable concept of undue influence. Its meaning is essentially context-specific. In the context of personal welfare decisions, undue influence has been discussed only in very exceptional circumstances. Here the leading concept has been "overbearing of the will." On this approach, P's influence on Q is undue only if P overbears the independence of Q's will in reaching a decision.[201] This is not the case if, despite being under severe pressure, the individual still retains a choice in the matter, even though the individual might dislike having to make such a choice.[202] The courts identified two factors as particularly relevant to the question of undue influence: the strength of will of the person and the relationship between the decision-maker and the person exercising the influence.

MCA s22 stipulates that lasting powers of attorney can either be revoked, or their registration denied, if fraud or undue pressure were used to induce P to execute an instrument for the purpose of creating a lasting power of attorney, or to create a lasting power of attorney.[203] The term "undue pressure" is not defined in the Act, nor is the term "undue influence" used. According to the Act's *Code of Practice*:

> Anyone supporting a person who may lack capacity should not use excessive persuasion or 'undue pressure'. This might include behaving in a manner which is overbearing or dominating, or seeking to influence the person's decision, and could push a person into making a decision they might not otherwise have made. However, it is important to provide appropriate advice and information.[204]

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[200] ss 6 and 10 AWIA.

[201] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95(CA), at 113 per Lord Donaldson, MR

[202] At 113-114 per Lord Donaldson, MR, and at 119-120 per Butler Sloss, LJ.

[203] Similarly, under MCA (NI) s110, the High Court may direct that an instrument purporting to create a lasting power of attorney is not registered or terminate the appointment of a person appointed as attorney if it is satisfied that fraud or undue pressure has been used to induce a person to create a lasting power of attorney.

[204] At para.2.8.

This is a rather vague concept and it is not clear at what point influence crosses the fine line between empowering the person to make a decision, and overpowering her so that a free decision can no longer be made. Nevertheless, court involvement is one of the safeguards against undue influence in this context.

Judicial intervention further serves as a safeguard because it can result in the invalidation of a contract or decisions such as the refusal of consent to medical treatment. Such invalidation will in the case of contracts only – by definition – take effect retrospectively.[205] However, it nevertheless functions as a safeguard, as it protects the individual from having to assume the consequences of transactions that they did not enter into as an expression of their free will. Furthermore, invalidation has the potential of serving as a preventative measure, as it might deter the exercise of undue influence in the future.

While the MCA applies a presumption of capacity[206]and is based on the principle that no-one is 'to be treated as unable to make a decision merely because he makes an unwise decision,'[207] the *Code of Practice* advises that there may be cause for concern if somebody:

> repeatedly makes unwise decisions that put them at significant risk of harm or exploitation or makes a particular unwise decision that is obviously irrational or out of character.[208]

In that case, 'there might be need for further investigation, taking into account the person's past decisions and choices,' one question in need of exploring being whether the person is 'easily influenced by undue pressure.'[209]

The MCA therefore, by its legislative framework, provides the potential to secure against undue influence. This includes the provision of support to make a capacitous decision. In some circumstances, it may also include the judicial determination that the person lacks capacity to make the decision in question because

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[205] In the context of a declaration that refusal of consent to medical treatment was vitiated by the exercise of undue influence, it could have future consequences because it would enable the treatment to be provided: see *Re T*.

[206] s1(2) MCA.

[207] s1(4) MCA.

[208] At para.2.11.

[209] Ibid.

of a combination of their own impairments and the influence of a third party. A Court of Protection judge could therefore take the decision on behalf of the individual,[210] or appoint a deputy to do so. By definition, such a decision should be free from the undue influence of the third party.

A third safeguard against undue influence is the so-called *inherent jurisdiction* of the High Court.[211] Historically, this is a tool that has been used to safeguard against undue influence where the individual in question has the capacity (according to the terms of – now – the MCA) to make the decision in question but is, or is reasonably believed to be, vulnerable. The leading definition of those in respect of whom the "great safety net" of the inherent jurisdiction can be deployed was given by Munby J in *Re SA*.[212]

> 77. It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.
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> 78. I should elaborate this a little:
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> i) Constraint: It does not matter for this purpose whether the constraint amounts to actual incarceration. The jurisdiction is exercisable whenever a vulnerable adult is confined, controlled or under restraint, even if the restraint is only of the kind referred to by Eastham J in Re C (Mental Patient: Contact) [1993] 1 FLR 940. It is enough that there is some significant curtailment of the freedom to do those things which in this country free men and women are entitled to do.

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[210] *London Borough of Redbridge v G & Others (No 2)* [2014] EWHC 959 (COP); *NCC v PB and TB* [2014] EWCOP 14.

[211] *In re L (Vulnerable Adults with Capacity: Court's Jurisdiction) (No 2)* [2012] EWCA Civ 253; *In re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867.

[212] *In re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867.

> ii) Coercion or undue influence: What I have in mind here are the kind of vitiating circumstances referred to by the Court of Appeal in In *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, where a vulnerable adult's capacity or will to decide has been sapped and overborne by the improper influence of another. In this connection I would only add, with reference to the observations of Sir James Hannen P in *Wingrove v Wingrove* (1885) 11 PD 81, of the Court of Appeal in *In re T (Adult: Refusal of Treatment)* [1993] Fam 95, and of Hedley J in *In re Z (Local Authority: Duty)* [2004] EWHC 2817 (Fam), [2005] 1 WLR 959, that where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss LJ put it, be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.
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> iii) Other disabling circumstances: What I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others.

The fourth safeguarding mechanism in current practice finds its centre of gravity in public officials such as Public Guardians. Public Guardians and their designees have a (limited) ability to investigate cases of suspected undue influence. Independent Mental Capacity Advocates (IMCAs) may also play a role in bringing instances of suspected undue influence to light. The simple fact of their presence in a decision-situation may itself play a role in disrupting undue influence by introducing a new dynamic in an asymmetrical relationship.

Finally, a similar – but not identical – construct to that of facility and circumvention described above can be found in the equitable doctrine of "unconscionable bargain." A contract can be set aside where it is oppressive to a person in a particular state of bargaining weakness, and where the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant. As was put in one case: "one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be

overreaching and oppressive."[213] The bargaining weakness of the party taken advantage of can stem from a number of causes, one Australian case listing as examples of disabling circumstances " … poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary."[214] The doctrine being a judge-made one it can, like the equivalent Scots doctrine of facility and circumvention, be moulded to meet circumstances as they arise and evolving conceptions of vulnerability.[215]

§G.3 Conflicts of Interest

§G.3.1 AWIA

AWIA s 59(4)(c) specifies that, in determining who should be appointed as a guardian, a sheriff should have regard to whether there is likely to be a conflict of interest. This is supplemented by the AWIA Code of Practice for persons authorised under intervention orders and guardians,[216] which specifically highlights the potential for conflicts of interest (although the term is not defined) to arise in connection with the application for, or exercise of authority under, intervention orders and guardianship orders. Whilst it is acknowledged that it might sometimes be reasonable and proper for such persons to take action that benefits both herself or himself and the adult, the Code of Practice specifically directs that the AWIA principles must always be applied, in particular ascertaining the adult's wishes and feelings where it is possible to do so. Where in doubt, the actual or proposed intervener or guardian should seek professional advice and/or seek independent advocacy to support the adult.

The AWIA Code of Practice for continuing and welfare attorneys exercising their powers[217] contains similar provisions for those exercising powers under such powers of attorney. Moreover, Law Society of Scotland guidance on acting for

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[213] *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB) at para. 36.

[214] *Blomley v Ryan* (1956) 99 CLR 362 at 405.

[215] See Herring 2016 at 250-1.

[216] Scottish Government 2011a, paras. 2.22-2.26, 4.52-4.58. 5/84-86 and 6.70-6.72.

[217] Scottish Government 2011b, paras. 4.47-4.49 and 5.49-5.51.

vulnerable clients[218] specifically reinforces the obligation on solicitors (who prepare the majority of powers of attorney in Scotland) not to act where there is a conflict of interest[219] or to exercise caution where there is potential for this between two existing clients, and not to act without express consent from both clients where the risk is significant.[220]

§G.3.2 MCA AND MCA (NI)

The MCA is silent on the question of conflicts of interest. However, the Code of Practice contains some useful considerations in this respect. In the context of capacity assessments, it suggests that professional involvement might be necessary 'where there is a conflict of interest between the assessor and the person being assessed.'[221] While no explanation of what a conflict of interest could consist of is provided here, in the context of advocacy the Code of Practices states that

> An advocate might be useful in providing support for the person who lacks capacity to make a decision in the process of working out their best interests, if: … there is a conflict of interest for people who have been consulted in the best interests assessment (for example, the sale of a family property where the person lives).[222]

It can thus be seen that one potential safeguard against conflicts of interest is to bring in an independent third party.

The *Code of Practice* also contains suggestions on how to avoid conflicts of interest of deputies:

> Paid care workers (for example, care home managers) should not agree to act as a deputy because of the possible conflict of interest – unless there are exceptional circumstances (for example, if the care worker is the only close relative of the person who lacks capacity). But the court can appoint someone who is an office-holder or in a specified position (for example, the Director of Adult Services of the relevant local

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[218] Law Society of Scotland 2013, para.17.

[219] Law Society of Scotland Rules and Guidance 2011, Rule B 1.7.1.

[220] Law Society of Scotland Rules and Guidance 2011, Rule B 1.7.2.

[221] Para.4.53.

[222] At para.5.69.

> authority). In this situation, the court will need to be satisfied that there is no conflict of interest before making such an appointment.'[223]

Paragraphs 8.58-8.60 state in turn that:

> 8.58 A fiduciary duty means deputies must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. For example, deputies should not buy property that they are selling for the person they have been appointed to represent. They should also not accept a third party commission in any transactions. Deputies must not allow anything else to influence their duties. They cannot use their position for any personal benefit, whether or not it is at the person's expense.
>
> 8.59 In many cases, the deputy will be a family member. In rare situations, this could lead to potential conflicts of interests. When making decisions, deputies should follow the Act's statutory principles and apply the best interests checklist and not allow their own personal interests to influence the decision.
>
> 8.60 Sometimes the court will consider appointing the Director of Adult Services in England or Director of Social Services in Wales of the relevant local authority as a deputy. The court will need to be satisfied that the authority has arrangements to avoid possible conflicts of interest. For example where the person for whom a financial deputy is required receives community care services from the local authority, the court will wish to be satisfied that decisions about the person's finances will be made in the best interests of that person, regardless of any implications for the services provided.

In the context of the MCA, particular relationships or roles (paid care worker, family member, representatives of relevant local authorities) are identified as potentially giving rise to conflicts of interest. In particular, the worry seems to be that certain relationships or positions give rise to financial or personal interests that can be in conflict with the interests of the person for whom the deputy (equivalent of guardian) is appointed. Nevertheless, the Code of Practice does not suggest a schematic approach by excluding the relevant parties automatically from being appointed as deputies, to avoid all possibilities of conflicts of interest. Rather, it acknowledges the reality that often those who are the most obvious choices for deputies, in particular family members, might have conflicts of interest, and suggests

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[223] At para.8.41.

safeguards to ensure that in carrying out their role they will not act based on their own interests by recognising the potential of conflicts of interest and drawing this to the attention of the courts that make the deputy appointments. The focus seems to be less on attempting to avoid the conflict, and more on ensuring that a potential conflict does not interfere with the person's exercise of his/her duties towards the person he/she represents as a deputy.

The courts have recognised that "[c]onflicts of interest are ubiquitous in any mental capacity jurisdiction and it would be unrealistic, if not impossible, to eradicate them entirely."[224] Rather, the courts have sought to set in place mechanisms to manage them, including (in the context of the MCA) using the provisions of s19 to limit the powers conferred on court appointed deputies as well as to their remuneration entitlements.[225]

With regard to powers of attorney, the courts can use their power to deny registration or to revoke them[226] as safeguards where conflicts of interest become apparent at registration stage or any time thereafter.[227] The provisions of MCA s23 can also be used to monitor the activities of the donee (the attorney).

Like the MCA, the MCA (NI) is silent on the issue of conflicts of interest. The Code of Practice required under MCA (NI) is yet to be developed. However it is likely to reflect provisions with the Code of Practice in England & Wales. MCA (NI) does contain a number of provisions which relate to suitability, for instance at s82, the Tribunal is empowered to disqualify a person who is not suitable from being the default nominated person.

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[224] *GGW v East Sussex County Council* [2015] EWCOP 82, a decision of Senior Judge Lush, in which he had specific regard to the provisions of Art. 12.4 of the Convention.

[225] See, for example, *GGW v East Sussex County Council* [2015] EWCOP 82.

[226] ss22(4)(a) and (b) MCA.

[227] See, for example, *The Public Guardian v AM* [2015] EWCOP 86.

APPENDIX H: SPECIAL REGARD

§H.1 THE HISTORY OF THE BEST INTERESTS SECTION OF MCA (NI)

In the early version of the MCA (NI) that was distributed for public comment, s6 MCA (NI) (which became s7 in MCA (NI) as enacted) specified a best-interests procedure that closely echoed the approach and language of the MCA. For present purposes, the crucial passage came in s6(6) MCA (NI) (emphasis added):

> That person [i.e., a person who must determine what is in the best interests of another person] must *take into account*, so far as they are reasonably ascertainable—
>
> (a) P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity);
>
> (b) the beliefs and values that would be likely to influence P's decision if P had capacity; and
>
> (c) the other factors that P would be likely to consider if able to do so.

Following a period of public consultation, this section of the MCA (NI) was altered. In the version of the Bill that was ultimately introduced to the Northern Ireland Assembly, s7.6 reads as follows (emphasis added):

> That person [i.e., a person who must determine what is in the best interests of another person] must *have special regard to* (so far as they are reasonably ascertainable)—
>
> (a) P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity);
>
> (b) the beliefs and values that would be likely to influence P's decision if P had capacity; and
>
> (c) the other factors that P would be likely to consider if able to do so.

But what exactly does it mean to have "special regard for" wishes and feelings? How, if at all, would such a requirement differ from a requirement that such matters be "considered" (as in the MCA) or "taken into account" (as in the original language in the draft of MCA (NI))? In this Appendix we gather some material that may help in addressing these questions, which will be of considerable importance in applying the MCA (NI) in practice and adjudicating its provisions in the courts.

§H.2 "SPECIAL REGARD" IN EXISTING LEGISLATION

The expression "special regard" has been used in at least twenty-five pieces of legislation in the UK.[228] Three indicative examples help suggest the range of uses.

§H.2.1 THE VIDEO RECORDING ACT 1984 (REV. 1993)

Section 4 of the Video Recording Act 1984 pertains to the classification system (i.e., ratings) for video recordings. Section 4(1)(a) pertains to the specific question about which recordings should be issued with classifications. It specifies that in making a determination as to whether a classification certificate should be issued, *special regard* should be given to the likelihood of the video works in question being viewed in the home. Here is the relevant extract from the statute (emphasis added):

> 4. Authority to determine suitability of video works for classification.
>
> (1) The Secretary of State may by notice under this section designate any person as the authority responsible for making arrangements—
>
> (a) for determining for the purposes of this Act whether or not video works are suitable for classification certificates to be issued in respect of them, having *special regard* to the likelihood of video works in respect of which such certificates have been issued being viewed in the home,
>
> (b) in the case of works which are determined in accordance with the arrangements to be so suitable: (i) for assigning a unique title to each video work in respect of which a classification certificate is to be issued; (ii) for making such other determinations as are required for the issue of classification certificates, and (iii) for issuing such certificates, and
>
> (c) for maintaining a record of such determinations (whether determinations made in pursuance of arrangements made by that person or by any person previously designated under this section)

§H.2.2 THE BROADCASTING ACT 1990

Section 7 of the *Broadcasting Act 1990* concerns the obligations of the Independent Television Commission in creating a code with guidance to broadcasters

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[228] We are grateful to Alison McCaffrey for her assistance in identifying these examples.

concerning programming that includes violence. Here is the relevant extract from the statute (emphasis added):

> (1) The Commission shall draw up, and from time to time review, a code giving guidance—
>
> (a) as to the rules to be observed with respect to the showing of violence, or the inclusion of sounds suggestive of violence, in programmes included in licensed services, particularly when large numbers of children and young persons may be expected to be watching the programmes; …
>
> and the Commission shall do all that they can to secure that the provisions of the code are observed in the provision of licensed services.
>
> (2) In considering what other matters ought to be included in the code in pursuance of subsection (1)(c), the Commission shall have *special regard* to programmes included in licensed services in circumstances such that large numbers of children and young persons may be expected to be watching the programmes. …

§H.2.3 PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) ACT 1990

Section 66 of the *Planning (Listed Buildings and Conservation Areas) Act 1990* pertains to applications for planning permission which may affect a listed building. The statute requires the local planning authority, in consideration of such applications, to have *special regard* to the desirability of preservation of listed buildings. Here is the relevant extract from the statute (emphasis added):

> 66 General duty as respects listed buildings in exercise of planning functions.
>
> (1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have *special regard* to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

Similar language appears in s91 of *The Planning Act (Northern Ireland)* 2011:

> In considering whether to grant planning permission for development which affects a listed building or its setting, and in considering whether to grant listed building consent for any works, a council or, as the case may be, the Department must have *special regard* to the

> desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

§H.3 A SCHEMA FOR SPECIAL REGARD

The reliance on the notions of "special regard" threatens to introduce a degree of vagueness into the foregoing statutes. Frontline practitioners require guidance in determining exactly what the requirement prescribes as regards particular cases. As regards existing legislation, this guidance has sometimes been provided by government bodies in Codes of Practice and Guidance Books. In thinking about the meaning of "special regard" in MCA (NI), we found one example to be particularly instructive.

In the case of *Planning (Listed Buildings and Conservation Areas) Act 1990*, guidance has been provided by the Department of Communities and Local Government, in *Planning Policy Statement 5: Planning for the Historic Environment* (also known as the PPS5 Guidance Book). The PPS5 Guidance book offers the following guidance as regards the requirement of special regard:

> There should be a *presumption* in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be.... Substantial harm to or loss of a grade II listed building, park or garden should be *exceptional*. Substantial harm to or loss of designated heritage assets of the highest significance, including scheduled monuments ....grade I and II* listed buildings and grade I and II* registered parks and gardens....should be *wholly exceptional*. (PPS5 Guidance Book, Policy HE9.1; emphasis added)

As regards the possibility of discharging this presumption, *The Guidance Book* advises that:

> Where a proposal has a harmful impact on the significance of a designated heritage asset which is less than substantial harm, in all cases local planning authorities should:
>
> (i) weigh the public benefit of the proposal (for example, that it helps to secure the optimum viable use of the heritage asset in the interests of its long-term conservation) against the harm; and
>
> (ii) recognise that the greater the harm to the significance of the heritage asset the greater the justification will be needed for any loss. (PPS5 Guidance Book, Policy HE9.4)

The PPS5 guidance still leaves considerable scope for the exercise of judgement in the concrete application of the "special regard" requirement. But it exemplifies the parameters for what we might call a *special regard schema*. We can analyse its core elements as follows:

> a) Where special regard is to be afforded to a particular matter, there exists a legal presumption with regard to that matter;
>
> b) The presumption is not absolute, but can be rebutted in particular circumstances;
>
> c) The circumstances which might suffice for such a rebuttal are specified by indicative example, rather than by exhaustive enumeration;
>
> d) The application of special regard requires application of a proportionality test, weighing benefits against harms, with significant harms being justifiable only exceptionally, on the basis of very significant benefits.

§H.4 ADJUDICATING "SPECIAL REGARD" IN THE COURT OF APPEAL

The proper interpretation and application of the requirement of special regard was the focus of a 2014 ruling in the Court of Appeal.[229] The case concerned a planning application for a set of four wind turbines in the vicinity of "heritage assets" in Northamptonshire. Planning permission had initially been granted, but later quashed on the grounds that the local authority had failed to give special regard to the impact of the wind farm on "heritage assets with significance of the highest magnitude."[230] This ruling was appealed, with one of the grounds of appeal being that the judge in the lower court had misinterpreted the requirement of "special regard."

The Court of Appeals was presented with two rival interpretations of the requirement. The judge in the lower court (Lang J), had interpreted the requirement as follows:

> In order to give effect to the statutory duty under section 66(1), a decision-maker should *accord considerable importance and weight* to

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[229] Barnwell Manor Wind Energy Ltd v (1) East Northamptonshire District Council (2) English Heritage (3) National Trust [2014] EWCA Civ 137.

[230] East Northamptonshire District Council and others v Secretary of State for Communities and Local Government and another company [2013] EWHC 473 (Admin).

> the "desirability of preserving… the setting" of listed buildings when weighing this factor in the balance with other 'material considerations' which have not been given this special statutory status.[231]

She concluded that the inspector for the local authority had failed to meet this standard, as he "treated the 'harm' to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance."[232]

On behalf of the appellant, Mr. Nardell QC presented a different interpretation of the requirement of special regard. In his ruling for the Court of Appeal, Lord Justice Sullivan summarised Mr Nardell's interpretation as follows:

> He [Mr Nardell] submitted that section 66(1) did not require the decision-maker to give any particular weight to that factor. It required the decision-maker to ask the right question – would there be some harm to the setting of the listed building – and if the answer to that question was "yes" – to refuse planning permission unless that harm was outweighed by the advantages of the proposed development. When carrying out that balancing exercise the weight to be given to the harm to the setting of the listed building on the one hand and the advantages of the proposal on the other was entirely a matter of planning judgment for the decision-maker.[233]

The Court of Appeal firmly sided with Lang J, and against Mr Nardell, on this matter. In support of this conclusion, Lord Justice Sullivan framed the question as follows:

> Was it Parliament's intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision-maker thought appropriate; or was it Parliament's intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the

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[231] *ibid*.; para 27; emphasis added.

[232] *ibid*.; para 46.

[233] Barnwell Manor Wind Energy Ltd v (1) East Northamptonshire District Council (2) English Heritage (3) National Trust [2014] EWCA Civ 137; para 13.

> decision-maker should give particular weight to the desirability of avoiding such harm?[234]

He answered this question as follows:

> I agree with Lang J's conclusion that Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise.[235]

[234] *ibid*., para 17.

[235] *ibid*., para 29.

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ABOUT THE AUTHORS

Wayne Martin is Professor of Philosophy at the University of Essex. He is co-founder and Director of The Essex Autonomy Project, a multi-disciplinary research and public policy initiative investigating the ideal of self-determination in care contexts. He is also a member of the Essex Human Rights Centre.

Sabine Michalowski is Professor of Law at the University of Essex, member of the Essex Autonomy Project and the Essex Human Rights Centre.

Jill Stavert is Professor of Law at Edinburgh Napier University. She is the founder and Director of the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University.

Adrian Ward is a consultant with T C Young LLP, solicitors in Glasgow and Edinburgh; convener of the Mental Health and Disability Committee of the Law Society of Scotland; and consultant to Council of Europe carrying out a review of implementation of Council Ministerial Recommendation (2009)11 (on powers of attorney and advance directives for incapacity).

Alex Ruck Keene is a barrister at 39 Essex Chambers, an Honorary Research Lecturer at the University of Manchester and a Visiting Research Fellow at the Dickson Poon School of Law, Kings College London.

Colin Caughey is policy lead in the Northern Ireland Human Rights Commission. He is responsible for monitoring implementation and compliance with the UNCRPD in Northern Ireland and is a member of the U.K. Independent Mechanism secretariat.

Alison Hempsey is a partner with T C Young LLP, solicitors in Glasgow and Edinburgh. She leads the firm's adult incapacity team and is a member of the Law Society of Scotland's Mental Health and Disability Committee.

Rebecca McGregor holds an LLM in Human Rights Law from the University of Strathclyde and is Research Assistant with the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University.