

Conclusions of the SALS working party on welfare choices for incapacitated adults

by P M Harris

The latest project undertaken by a Working Party of the Family Law Working Group of the Society for Advanced Legal Studies has been an examination of the Government's proposals for legislation to improve the safeguards to the care and welfare of mentally incapacitated adults. This report concludes with a summary of the group's recommendations.

There is a considerable lacuna in the law of England and Wales in the area considered by the working party, and the Law Commission produced a lengthy report on *Mental Incapacity (Law Com 231)* which addressed the issues in considerable detail. Part of that report dealt with advance directives, that is instructions by an individual about their preferences for treatment, or its withdrawal, in the event of that individual becoming incapable of such decision making.

The withdrawal of treatment is an extremely sensitive issue. It arouses considerable public concern as evidenced by the cases earlier this year of the late Mrs Diane Pretty (who suffered from motor neurone disease and who wanted her husband to assist her to die), and an incapacitated lady whose decision to terminate her treatment by a life support machine was declared lawful by a judgment of the President of the Family Division. For a certain body of opinion advance directives smack of euthanasia, since an advance directive can be to the effect that all treatment, including life-sustaining treatment such as artificial nutrition, should be withdrawn when the person loses all cognitive ability and there is no hope of recovery. The controversy surrounding advance directives and the withdrawal of treatment has dissuaded the Government from implementing the Law Commission's recommendations in toto. However, the Lord Chancellor issued a consultation paper *Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults (Cm 3803)* in December 1997, and that was followed in due course in October 1999 by a White Paper *Making Decisions* setting

out the Government's proposals for making decisions on behalf of mentally incapacitated adults in the light of the responses to its consultation.

The Government has not yet brought forward a Bill to give effect to its proposals, though such a Bill has been stated by the Lord Chancellor to remain one of the Government's priorities. However, the Parliamentary Secretary to the Lord Chancellor, Ms Rosie Winterton MP, has initiated "a consultative forum of stakeholders in the area of mental incapacity, supported by [the Lord Chancellor's] Department, to pull together plans for action and to turn these into a shared deliverable programme" (Letter of May 17, 2002 from the Mental Incapacity Branch of the Lord Chancellor's Department to the Secretary of the Society for Advanced Legal Studies and other addressees). The Family Law Working Group's views, set out below, will be used to inform the debate in the Lord Chancellor's Department Consultative Forum.

PURPOSE AND AIMS

The working party's purpose was to review the problems which currently arise in the area of welfare decision making for mentally incapacitated adults, and the options with regard to possible legislation following the Law Commission's report on *Mental Incapacity*, the Government's consultation document *Who Decides* and the Government's proposals in its White Paper *Making Decisions*. In this field practical difficulties abound in the making of a decision in respect of another person's way of

life, which inevitably detracts from their autonomy as an individual, and the working party endeavoured to focus on these practical issues. In the light of the Government's proposals for changing the law were reviewed, and the extent to which the proposed changes would resolve problems were considered. The following commentary canvasses the possibility of alternatives and comments upon some gaps in the Government's proposals. It offers some possible solutions by way of conclusions and recommendations.

FORMAL ACTS ON BEHALF OF AN INCAPACITATED PERSON

A large number of incapacitated adults (henceforth referred as an incapacitated person, or IP) are cared for, or have their care supervised by, local authorities. One of the areas of difficulty for both individuals and local authorities is the settlement of disputes about the care of an IP in a speedy and inexpensive manner, and the carrying out of formal acts by, or on their behalf. The difficulties that local and housing authorities face in creating a contract between an authority and an incapacitated person for whom the authority was to provide accommodation is a good example of the sort of practical issue which the working party has identified.

USE OF RECEIVERS

The activity of local authorities in this area is very variable, and the extent to which they currently used receivership is random. Some had virtually no receiverships while one has upwards of 100. The way in which decisions are made on behalf of persons under incapacity in practice is very informal with no safeguards. The present practice is to leave decisions concerning welfare and minor finance to the day-to-day carers, requiring them to exercise their personal judgment as to the best interests of the individual. There is no generally accepted guidance as to the criteria for making such decisions. While the use of receivership is not justified in the large majority of cases because the individual's assets and income are small, nevertheless some state benefits may not be expended from day to day and significant sums (eg in excess of £5000) can build up over the course of time.

Receivership is not a concept or facility that is readily understood by the general public – and indeed even lawyers who are not familiar with the management of estates. The management of capital sums, therefore, is not easily accommodated within current local authority structures or by practice in the care field. The expectation is that, as a general rule, an IP's money will be looked after by his or her family. This expectation will not be met, of course, when there is no family, or where family members are distant and unwilling to concern themselves with the IP's affairs.

MANAGERS

Under the Government's proposals it would be an option to appoint a manager for the IP. This would be a less cumbersome and expensive process than the appointment of a receiver, and it is proposed that a manager may exercise more extensive responsibilities than the management of an IP's estate. While in many cases the manager would be a relative of the IP, where no relative is willing or able to become manager, there will be a question of who will pay the manager. The Government proposes that the court should be able to direct the remuneration of a professional manager out of the IP's estate, but a family member and carer manager will only be able to reclaim out of pocket expenses. This leaves a gap where there is no suitable or willing relative or carer and the IP's estate is too modest to support the fees of a professional manager. Nevertheless the appointment of a manager would be very helpful in a multiplicity of situations, eg to a housing association wishing to enter into a tenancy agreement with an IP, and similarly with other contracts. It might well be that in order to protect themselves such potential contracting parties might demand the appointment of a manager so that an effective contract could be entered into on behalf of the IP.

It can be argued that to appoint managers under the proposals in the White Paper in every case where it might be useful would swamp the courts, given the volume of appointments for which application could be made. However, if the appointment of a manager is not opposed, the matter of appointment becomes essentially an administrative act. There is already an essentially administrative function that is undertaken by courts, namely the way in which debts are collected through the county courts by the default summons system. This is now overwhelmingly an administrative process carried out through a debt collecting centre in which large scale creditors (such as mail order catalogue companies, utility companies and banks) enter process electronically and where judicial officers are only involved in the minimal number of cases where a debt is disputed. It was thought that the Court of Protection system proposed by the Government could cope with the unopposed appointment of a considerable number of managers, provided a suitable quasi administrative system is put in place for unopposed appointments.

Under the present system the Benefits Agency arranges for an appointee to receive benefit on behalf of an IP, and this may quite often be the proprietor or manager of a care home in which the IP resides. This is a semi-formal arrangement, though there are obvious risks of abuse, and many proprietors are unhappy with the responsibilities placed upon them by this system. There is no reservoir of non-relatives to draw upon for the appointment of managers. A possible solution in contracts between local authorities and companies/housing associations to provide

care services for IPs might be to include a requirement for the contractor to provide manager services as part of the overall care service. Thus when a manager was required to be appointed, an employee of the care service provider would accept appointment as part of his (or even as his main) duty.

LITIGATION ON WELFARE ISSUES CONCERNING AN IP

The Working Party was unclear who the Government proposes should act as litigation friend of the IP and how that person is to be appointed or chosen where the issue is a welfare decision. Where the dispute does not involve family issues it is usual, and sensible, for a relative to act as litigation friend, and the Civil Procedure Rules deal with such matters satisfactorily, giving rise to few problems in practice. Difficulties arise in litigation involving family and welfare issues in respect of an IP because a conflict of interest may well arise between a relative (or relatives) and the IP. However, in family litigation if a relative or family friend is prepared to take on the role, is suitable and has no conflict of interest with the IP, it would seem desirable that such a person should be recognised as having priority over others. The priority of appointment might well be considered on a similar basis to the determination of the “nearest relative” under section 26 of the Mental Health Act 1983.

Where no such person meets the criteria, and in most family cases it was thought that this would be the case, then an independent person would be required to act, eg the Official Solicitor. If a manager has been appointed with general authority, or is granted the necessary authority by a court, the manager would be the appropriate alternative to a relative. A pre-existing manager would have the advantage of some familiarity with the IP, their way of life and circumstances. This would give the manager an advantage over any other litigation friend, other than a relative, in that these matters would have to be investigated and understood by the Official Solicitor, or indeed any “stranger” suitable and willing to accept appointment. For this reason it was considered that in family welfare litigation it should be the duty of the court to consider the suitability of relatives/friends of the IP first, but in default appoint the Official Solicitor if a manager had not been appointed with the necessary authority, or was unwilling to act as litigation friend.

On the question of how representation is to be paid for it was thought to be reasonable to assume that in the majority of cases the IP will be eligible for legal aid and a litigation friend would be able to instruct solicitors on behalf of the IP under the legal aid scheme. This is not, of course, a class of litigation giving rise to a claim in damages or recovery of property that would allow a “no win, no fee” scheme to be adopted. It would continue to be the case that the Court of Protection would approve a manager

to act as a litigation friend if the IP’s affairs were made subject to the Court’s jurisdiction.

However, it was considered that entering an appearance in litigation on behalf of an IP would be outside the scope of the general authority of a person caring for an IP, although such a person might on occasion meet the criteria for appointment, and accept appointment, albeit voluntarily. It might be within the power of a manager with general powers of management, but the individual manager would have to be a volunteer in any event, and it would be generally desirable for the manager to seek the approval of the Court of Protection before entering an appearance. Where the IP had a substantial estate the costs of litigation would fall upon the IP, by way of an indemnity in respect of all action properly undertaken by the litigation friend.

Where there are family and welfare disputes concerning an IP the role of Health and Local Authorities in respect of the IP is likely to be such that a conflict of interests with the IP will arise (eg the cost funding of services for an IP will have a potential to be affected by the outcome of a dispute about where the IP should live). Accordingly it was felt that Health and Local Authorities could not, and probably would not wish to, be involved in litigation on behalf of an IP. In many cases they might be, or have the potential to become, a party to the litigation.

Mediation is an alternative means of settling family disputes. The role of the mediator in family cases involving children is well established, and mediation has a Governmentally recognised role as a means of alternative dispute resolution. The recognition that the IP is an adult whose autonomy must be promoted so far as consistent with his or her well-being makes a fundamental difference between an IP and a child. The views of the IP, whether rational or irrational, must be given weight in deciding what is in the IP’s ‘best interests’, particularly in order to decide what is required to be done in the manner which is least restrictive of the person’s freedom of action. Mediators would have to understand this factor in enabling parties to mediation to arrive at an outcome that is acceptable to all concerned – including the IP. Given that understanding (which might require some additional training) the group could see no reason why mediation could not be successfully applied to disputes about the welfare of an IP, and what was in the IP’s best interests.

DAY-TO-DAY LIVING

The population of IPs is substantial. There are many thousands of IPs in local authority care in the community, or in residential homes (perhaps some 17,000 people with registered mental illness, and a further 27,000 elderly people suffering from dementia, live in residential care). The scope of the problems concerning day to day decisions for IPs is very wide-ranging, covering all aspects of decision making to enable an individual to function as part

of a community. This frequently poses practical problems for some carers, and for local authorities which have duties to discharge with regard to the care of IPs.

Where a carer (almost invariably a relative) is caring informally for an IP, decisions about the IP are generally taken by that person who can provide consistency and continuity of decision taking based upon a close personal knowledge of, and relationship with, the IP. This may not be the case where the IP is looked after by a local authority or in a residential home. In such circumstances the IP will be cared for by several carers. They may change relatively often and as a result will not be able to establish a relationship with the IP so that his/her needs and wishes are understood. Furthermore the extent to which an IP is capable of taking decisions with some assistance, so that whenever possible the IP is enabled to make decisions for him/herself, requires those concerned with his care to have the necessary knowledge of the IP's character, personality and capacities based upon an established relationship with the IP.

In the case of the informal carer who is looking after the IP 24 hours/day, all year round, the need for some form of supervision is not thought to be very great, other perhaps than when there is a local authority assessment (eg under the Carers (Recognition and Services) Act 1995 or the Carers and Disabled Children Act 2000). However, problems are likely to arise when the carer is not acting under an informal arrangement. While in those circumstances many day-to-day decisions of a minor nature could be taken by care workers, difficulties can arise over decisions such as the continuation of medical treatment or the taking of medication, and on entering into contracts – eg for a holiday trip or a tenancy contract.

Under the Government's proposals any person with the care of an IP will have a general authority to take decisions on behalf of the IP. Nevertheless multiple carers will face problems in deciding who possesses, and should exercise, the general authority in respect of a particular IP at any time. At present such issues are glossed over for lack of any proper provision for addressing them. When it becomes possible to appoint a manager for an IP the question of who can make decisions will be capable of ready resolution since in cases of difficulty care workers will be able to refer to the IP's manager. Furthermore, those who are contemplating entering into a contractual arrangement with an IP may seek the appointment of a manager as a matter of course to safeguard their own position. Indeed, if a simple procedure can be devised for particular classes of applicant (eg local authorities) it might be a convenient course for an officer of a local authority to apply for appointment as manager of a number of IPs being looked after by the authority.

This raises the question at what point it would be desirable, or necessary, to appoint a manager. This centres

upon the nature of a contract which it might be desirable to enter into on behalf of an IP – the most obvious being a tenancy. The need to maintain a record of decisions would be important, since it might be crucial to the well being of an IP that multiple carers should be informed of what decisions had been taken, and when. This appears to point toward the desirability of a manager being appointed, to exercise a supervisory role, to act as a point of reference and to ensure consistency of decision making, in a large number of cases where the benefits of having a single carer are not available.

MANAGING THE RISK OF HARM TO AN IP

The management of risks to the IP is a matter of concern to carers, particularly where risk of self induced harm, or harm by others, would limit the freedom of choice of the IP. An obvious example is where the IP is a young woman who would like to associate with family members from whom she had been removed as a child because they sexually abused her. Risks could arise also from relatives who were known to behave physically abusively and irresponsibly towards the IP – eg by encouraging them to drink alcohol in situations which put the IP in danger. It is difficult for a local authority care worker in these circumstances to know when it is appropriate for them to intervene, unless the danger to the IP is clear and immediate, and even then the care worker may be unsure of his or her power to act. A manager empowered by the court to take decisions on behalf of the IP about associates and activities could provide protection for the IP – and clear, particularised guidance for the care worker.

The Working Party feels that there is less need for concern about money issues since the system of receivership deals quite well with money and property – though even here, where the sums in question are not great enough to justify the appointment of a receiver, a role for a manager in the management of finances might be desirable (eg where the capital in question is less than £5,000). The benefits of a manager in respect of an IP in a residential home would also accrue to the person running the home who would be relieved thereby of a conflict of interest. Some threshold of expenditure might be useful to trigger the appointment of a manager for these purposes, and a manager need not be limited in role to looking after the IP's small savings.

The facility under the Government White Paper proposals for appointing managers for different purposes, with the nature and extent of their authority being set by the court, was seen as a significant advance on the present situation. It is envisaged that in many cases such appointments would not need a hearing, and could be made by a paper procedure which could be fairly quick and inexpensive. However, the demand for such appointments might be very considerable in view of the size of the population of IPs.

The coming into being of the National Commission for Care Standards in April 2002 (under section 6 of the Carers and Disabled Children Act 2000) provides an opportunity for the need and criteria for appointment for managers to be monitored. It was also thought that a Code of Conduct for those providing care for IPs would be very useful, and that the new Commission might be able to provide an important input to such a code in the light of the standards which the Commission would establish.

UNDUE INFLUENCE

Paragraphs 1.11 and 1.12 of *Making Decisions* propose that, *inter alia*, the statutory guidance to be enacted should include as a criterion for ascertaining best interests – “...the need to be satisfied that the wishes of the [IP] were not the result of undue influence”. This criterion was added after the further consultation carried out by the Government; it was not a criterion recommended by the Law Commission. The Working Party has concerns about the application of such a criterion. Every person is subject to “undue influence” of one nature or another in many decisions which one has to take concerning one’s own well being, and decisions as a result may not be in one’s objective “best interests”, but nevertheless the predicted outcome is acceptable to the individual. Undue influence can be a difficult matter because very often decisions are made for emotional and not simply rational reasons. Where a decision is being made where the carer is a relative it is necessary to assume undue influence because of the nature of the relationship with the IP.

The use of the term “undue influence” in this context is likely to import unfortunate and unnecessary connotations from the term as a term of art in respect of the law of contract; it is unduly legalistic to import the term in this way into the assessment of best interests of an IP. It is understandable that there should be concern about the wishes of an IP being subverted by being overborne by the malign influence of a third party. Nevertheless, it is not thought to be practicable to require the court or person considering the best interests of an IP to have to be *satisfied* that the IP’s expressed wishes were not the result of *undue influence*.

It is arguably preferable to require the possibility of adverse influence by a third party to be a factor to be taken into account in assessing the *weight* to be given in all the circumstances to the expressed wishes of an IP. The nature of an influence which should give rise to concern is that it should be adverse to achieving what the IP truly wanted. In other words the issue is whether the IP’s expressed wishes are truly their own, or in effect the expression of another’s intentions for the IP. Being affected by the wishes of another, even though that may result in an objectively less favourable outcome for the IP, might be the most acceptable decision to the IP whose wishes include being able to take into account the feelings of another person.

A simple example of this is on the issue of contact with a relative who is in conflict with the IP’s carer. While contact with that relative might be acceptable to the IP, nevertheless the IP may wish to avoid distress to their carer and decide not to have such contact though it might be to their emotional, or even material, advantage. The influence of the carer in these circumstances could be regarded as “undue influence”, but the reason why the IP adopts the position of the carer in refusing contact with the relative is a perfectly proper altruistic expression of their love and concern for the carer. Rather than include undue influence as a criterion, it would be better to deal with this in the Code of Practice that the Government anticipates will accompany any legislation.

OFFENCE OF ILL-TREATMENT OF AN IP

The Government is “... not persuaded” (paragraph 1.37) that it should be an offence for a person to ill treat or wilfully neglect an IP for whom he or she has responsibility, as recommended by the Law Commission. No reason for the Government’s response on this point is given, even though it was acknowledged that many respondents to the Government’s consultation were keen to support this recommendation. No indication is given that any significant body of opinion outside Government is opposed to the recommendation. A wide variety of circumstances can be envisaged where cruel behaviour on the part of a carer would not be a crime at present. Examples which came to mind are persistently making a man with learning difficulties sit to eat all his meals outside on a kitchen step, regardless of the weather, because he was a messy eater so that he suffers physically and emotionally; or persistently leaving an elderly physically disabled IP to sit on a commode for hours at a time to her great distress and discomfort.

While some offences of cruelty might be crimes – eg common assault, occasioning actual bodily harm and various sexual offences – they do not cover every form of conduct which might properly be the subject of criminal sanctions. A parallel can be drawn with the offence under section 1(1) of the Children and Young Persons Act 1933 in respect of a child:

‘1(1) If any person who has attained the age of 16 years and has responsibility for any child or young person under that age, wilfully assaults, neglects, abandons or exposes him or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause him unnecessary suffering, or injury to health ...’ [he is guilty of an offence punishable on indictment by a term of imprisonment of up to 10 years].

Among the reported cases concerning section 1 of the 1933 Act, there are examples of general neglect such as *R v Harvey* (1987) 9 Ct App R(S) 524, and *Attorney General’s Reference (No. 57 of 1995)*[1996] 2 Cr App R (S) 159. In the latter case neglect consisted of leaving a child of 8 who was ill in an unheated car for one hour so that he suffered hypothermia.

Assault is, of course, included although it can be independently prosecuted as an offence. Common assault, which would include rough handling not causing actual bodily harm, can only be prosecuted by the complainant. An IP would be incapable of undertaking such a prosecution, and the concept of a litigation friend does not exist in criminal law, or in the Magistrates' Courts where such a prosecution would have to be instituted as it is a summary offence.

We noted that the Scottish Parliament has created an offence of ill-treatment and wilful neglect for the protection of IPs in Scotland, as follows:

'Adults with Incapacity (Scotland) Act 2000

83 Offence of ill-treatment and wilful neglect

(1) It shall be an offence for any person exercising powers under this Act relating to the personal welfare of an adult to ill-treat or wilfully neglect that adult.

(2) A person guilty of an offence under subsection (1) shall be liable-

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine, or both.'

It is highly desirable, if not essential, that there should be an equivalent offence in the law of England and Wales.

REPORTS TO THE COURT OF PROTECTION

In paragraph 4.16 of *Making Decisions* the Government proposes that the Court of Protection will have the power to call for reports as necessary. There is no discussion, however, of who will make such reports. At present in the adult welfare cases dealt with by the Official Solicitor it is the parties – and predominantly the Official Solicitor – who commission reports from mental health, social work and other experts in respect of an IP. It might be appropriate in some cases for the court to invite a local authority to provide a report, though not where the local authority was involved in any aspect of the care of the IP.

While any competent social worker should be able to investigate and make a report on the circumstances of an IP, it would be desirable to have guidance on the content and structure of reports to the court since few social workers will be familiar with the court's requirements and litigation processes. An annex to a Code of Practice, it is suggested, would be an appropriate place for such guidance. It is important that reports should be made with the necessary objectivity, and the present system does not provide for the court to commission a report (as it does under the Children Act 1989, ss 7 and 37 in child welfare cases). While there is a comprehensive country-wide service in children cases to provide the court with reports,

namely CAF/CASS, no equivalent organisation exists, or appears to be contemplated, in the Government's proposals. One possibility might be to expand the Official Solicitor's existing role in adult cases (now that he has lost most of his children responsibilities and become the Public Trustee).

CONCLUSIONS AND RECOMMENDATIONS

As the foregoing paragraphs indicate, the Working Party found that there is a lack of detail in the Government's proposals about their day-to-day application that requires to be thought through and fleshed out. The impact of the proposals upon those who have the care of IPs, particularly upon professional carers, will be more readily assimilated if the proposals are seen to provide an immediate and workable resolution of some of the issues which we have canvassed. At present it can reasonably be said that there are too many gaps and uncertainties. The proposals are welcome and will greatly improve the current situation for both IPs and their carers if implemented, but implementation must be carefully worked out.

The Government's intention to create a Code of Practice is also welcomed, and this will deserve not only wide consultation in its creation, but also promulgation and a significant training effort for professional carers if the benefits of reform in this area are to be effectively gained.

It is recommended, in the light of the foregoing, that:

1. The appointment of a manager for an IP should be encouraged, and the benefits widely promoted.
2. Consideration should be given to the procedure for the unopposed appointment of a manager to enable this to be done by a quasi administrative, quick and inexpensive process.
3. In family litigation concerning the welfare of an IP a manager should be appointed/authorised to act as litigation friend of the IP, and in default the Official Solicitor should be appointed as litigation friend.
4. Mediation services should be invited to ensure that an adequate number of mediators are trained to deal with disputes about welfare issues concerning IPs, and that the availability of mediation for such disputes should be promoted.
5. Local authorities should be encouraged to use the appointment of a manager as a means of ensuring that there is continuity of care and consistent decision making for IPs supported by the local authority.
6. Undue influence should not be included as a criterion for deciding what is in an IP's best interests, but the weight to be given to this factor in considering the IP's wishes and feelings should be the subject of guidance in a Code of Practice.

7. There should be a specific offence of wilful neglect and ill-treatment on the lines of section 83 of the Incapacity (Scotland) Act 2000, or section 1 of the Children and Young Persons Act 1933.
8. The Court of Protection should have the power to require the Official Solicitor to prepare a welfare report on an IP for the Court (the cost of preparing which should fall upon the Official Solicitor's budget). 

P M Harris

Chairman of the Family Law Working Group

The members of the Working Group who contributed to the deliberations of the Working Party on Decision making for Incapacitated Adults were:

P.M. Harris, chairman; Ms Barbara Beaton, Age Concern; Ms N Finch, barrister; Mr Francis QC; Ms Liz Humphreys, Lord Chancellor's Department; Mrs Claire Johnston, Official Solicitor's Office; Ms. Nicola Mackintosh, Mackintosh Duncan; The Hon Mrs C Renton, barrister; Dr S Sa'eed; Ms A Sogan; Mr Malcolm Thompson

The effects of the Human Rights Act 1998 on arbitration

by William Robinson

The *Human Rights Act 1998* (Act) gives 'further effect' to certain rights and freedoms guaranteed under the *European Convention on Human Rights* (Convention). The Lord Chancellor described the aim of the legislation as enabling 'people ... to argue for their rights and claim their remedies under the Convention in any court or tribunal in the United Kingdom.' The issues under consideration in (582 HL Official Report (5th Series), col.1228 (3 November 1997) paper are whether the Act affects commercial arbitration and, if so, to what practical extent.

RELEVANT PROVISIONS OF THE CONVENTION AND THE ACT

Whilst certain substantive Convention rights may arise in commercial arbitration, for example, the right to respect for private and family life, home and correspondence (Art. 8), freedom of expression (Art. 10) and the right to property (Art. 1 of the First Protocol) it is the procedural rights enshrined in Art. 6(1) of the Convention that are likely to arise most frequently, and which will be considered in this paper. Article 6(1) provides:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

As to the Act, a number of difficult points of interpretation arise. For the purposes of this paper, it is sufficient to identify three core provisions that are relevant

to the central question of the potential application of the Act to arbitration.

First, section 1 of the Act identifies the articles of the Convention that are to 'have effect for the purposes of this Act'. As to the interpretation of Convention rights, 'a court or tribunal' must take account of the rulings of the Strasbourg institutions consisting of the European Court of Human Rights (*the court*), the Commission on Human Rights (*the Commission*) and the Committee of Ministers. 'Tribunal' is defined in section 21(1) as 'any tribunal in which legal proceedings may be brought'.

Second, section 3 of the Act requires that, 'so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.' This rule of interpretation does not affect the validity of primary (and certain subordinate) legislation.