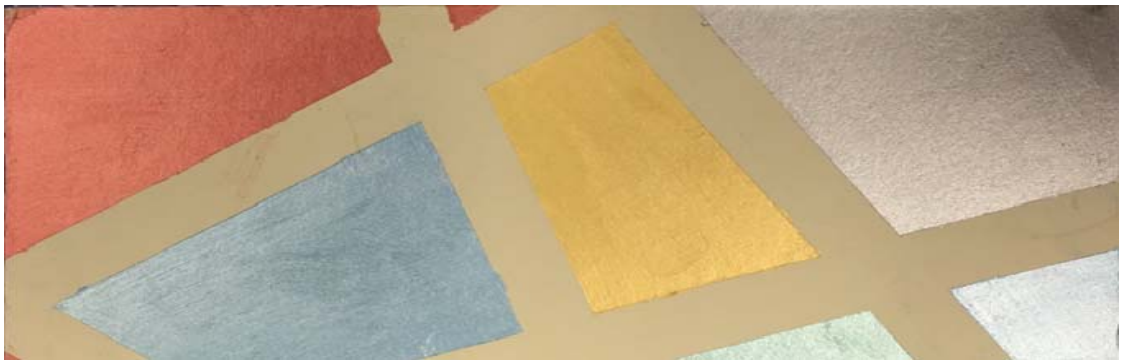
Essex CHAMBERS

MENTAL CAPACITY REPORT:
THE WIDER CONTEXT

May 2018 | Issue 85



Welcome to the May 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: CANH withdrawal on the papers and DOLs statistics;

(2) In the Property and Affairs Report: variation of trusts and the Court of Protection, and Charles J's last hurrah;

(3) In the Practice and Procedure Report: a new President for the Court of Protection and a regionalization update;

(4) In the Wider Context Report: the interim report of the independent MHA review, capacity and housing, covert medication and capacity in the MHT context, and a guest article on autonomy and mental capacity;

(5) In the Scotland Report: an appreciation of the Public Guardian and an update on the AWI consultation;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Independent Mental Health Act Review – interim report

The independent review of the Mental Health Act 1983 (MHA), commissioned by the Government in October 2017, has just published its interim report.[1] It is tasked with looking at the rise in the use of the MHA over the last 10 years, the racial disparities in detention, and concerns that the MHA is out of step with a modern mental health system.

Amongst the review's preliminary conclusions are:

- The MHA needs to change;
- Improvements cannot be achieved by legislation alone;
- The MHA could be improved to do more to enable a person's wishes;
- Advocacy is an impactful safeguard;
- Experiences of people from block African and Caribbean heritage are particularly poor;
- The MHA is possibly being used inappropriately in relation to people with a learning disability or autism, potentially linked to lack of appropriate provision in the community;
- Service users are left too long in prison when they should be in hospital.

Being at an interim stage, the report does not reach any firm conclusions or make any recommendations about these important issues. However, it does provide a useful sense of direction as to where the review is going. In particular, it identifies the priority issues that will be considered in detailed as part of the review:

Before detention

- Addressing the rising numbers of detentions under the Mental Health Act

[1] Alex is the lawyer on the Review working group; in the spirit of seeking to give a dispassionate view, this note is prepared by Annabel.

- Decisions to detain under the Mental Health Act, and renewals
- Interfaces with the Mental Capacity Act
- Police role

During detention

- Dignity and respect of the service user
- Autonomy of the service user
- Procedural safeguards
- Tribunals and hospital managers' hearings
- Advocacy
- Family and carer involvement
- Use of restraint and seclusion

Leaving hospital

- Community Treatment Orders
- Discharge and aftercare

Issues for particular groups

- Black, Asian and minority ethnicities
- Children and young people
- Learning disabilities and autism
- Criminal justice system
- Compatibility with human rights
- Wales

In relation to the MCA/MHA interface, there is significant criticism about the effective use of DoLS. In an area which causes MCA practitioners much angst, there are concerns about those who are confined for the purposes of assessing or treating mental disorder but do not have capacity to consent to that confinement, and are therefore deprived of their liberty. The independent review has identified that there are "*significant practical difficulties and confusion caused when making decisions about whether or not the MHA or the MCA should be applied, particularly in the context of general hospitals*." The Government's final response in March 2018 agreed with the Law Commission's recommendations in principle, leaving the "interface" issues to be considered by the review in the first instance.

The Law Commission suggested that the "fusion" of mental health and mental capacity legislation potentially represented the future direction for mental health law reform in England and Wales, noting that the current relationship between the two regimes was extremely complex. The review, however, has indicated that it is unlikely to be recommending "fusion" between the MCA and MHA in the short term, but will be considering this as a longer-term option.

The independent review is keen to hear from anyone with specific evidence or experiences relevant to the issues and topics above. They can be contacted via MHActreview@dh.gsi.gov.uk.

The final report of the independent review with recommendations for change is expected in autumn 2018. The editors (with the exception of Alex, who will be invited in writing it!), look forward reading the final report and, of course, will keep our readers posted. In the interim, readers may also be interested to read the briefing document prepared by the King's Policy Institute and the Mental Health and Justice project on the *Future of the Mental Health Act*.

Capacity and housing – a strange relationship

WB v W District Council [2018] EWCA Civ 928 (Court of Appeal (Arden, Lewison and Asplin LJJ)

Mental capacity – tenancy agreements

Summary

WB is a woman who applied to the W Council under Part VII of the HA 1996 in 2013 for accommodation on the basis that she had a priority need as a result of her mental disability. The W Council considered that she was in priority need but she had become homeless intentionally. WB appealed against that decision to the County Court. During that appeal she was found to lack capacity to litigate and to manage her property and affairs. The Official Solicitor was instructed to act as her litigation friend.

The procedural history of the proceedings before the County Court were somewhat complex, and need not detain us here, but ultimately her appeal was rejected on the basis that the Court was bound by the decision of *R v Tower Hamlets LBC ex parte Ferdous Begum*, reported under the name of a conjoined appeal about child applicants, *R v Oldham Metropolitan Council ex parte Garlick* [1993] AC 509. This was a decision which set out that the priority need for housing for the disabled is set out in statuate "*a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside*'

The judgment itself held as follows:

> *Other people although vulnerable are nevertheless able to lead an independent existence, albeit sometimes in sheltered accommodation, these people also have the status of priority Judgment Approved by the court for handing down. WB v W DC need and can apply for assistance if they are homeless but not intentionally so. When they are made the offer of accommodation they can decide whether or not to accept it. But I can see no purpose in making an offer of accommodation to a person so disabled that he is unable to comprehend or evaluate the offer. In my view it is implicit in the provisions of the Act that the duty to make an offer is only owed to those who have the capacity to understand and respond to such an offer and if they accept it to undertake the responsibilities that will be involved. …* [Emphasis added]

In consequence Ms Begum was not eligible for housing assistance as a homeless person.

The decisions in Re *Garlick and ex parte Ferdous Begum* are reflected the 'Homelessness Code of Guidance for Local Authorities' published on 22 February 2018 ("2018 Code") which at paragraph 18.8 provides that *'An application can be made by any individual who has the mental capacity to do so.'*

WB ran three arguments as two why the CA were not bound by the decision in *ex parte Ferdous Begum*: (1) that the exclusion of persons lacking mental capacity can be classed as an obsolete statutory provision ("the obsolescence argument"), or (2) that HA 1996, s 189(1) can be interpreted, using HRA, s.3 in a manner which puts applicants for priority housing with mental disability, which currently prevents them from being an applicant for priority housing, on the same footing as those by persons with no such disability (the "Human Rights Interpretation" argument), or (3) the effect of *ex parte Ferdous*

Begum is simply to prevent a person from signing a tenancy agreement but allows them to make an application (the "Narrow Ratio" argument.)

The Court of Appeal rejected the obsolescence argument and the Human Rights interpretation argument on the basis of the doctrine of precedence and statutory interpretation (with Lord Justice Lewison dissenting).

Of most interest for our purpose sis the Narrow Ratio argument. It was argued (para 37) that "*Convention jurisprudence would look with disfavour on any blanket exclusion of an application without taking account of their particular circumstances. In any particular case, it may be possible for the applicant to show that she has capacity to make an application and consider an offer of housing, but not capacity to enter into a tenancy agreement carrying legal obligations over a period of time*."

This is of course correct, as capacity is issue specific. Lady Justice Arden was unimpressed by this argument, primarily because it had not been run below. In refusing to consider the argument for that reason she stated:

> [39]. *I accept that a person may have capacity to decide where to live but lack capacity to enter a tenancy. Indeed, the Court of Protection has issued guidance for cases where it is desired to enter into a tenancy agreement on behalf of a person who has capacity, for example, to apply for social security payments but not to enter into a tenancy agreement: see Applications for the Court of Protection in relation to tenancy agreements (updated February 2012).*

Lord Justice Lewison engaged with the argument more substantively. He held that the question, was whether it is "*possible to interpret the Housing Act 1996 as enabling an application to be made by or on behalf of a person without mental capacity*?" Butler-Sloss LJ in the Court of Appeal in *ex parte Fergus Begum* (with whom half the House of Lords Judges agreed) had considered this aspect holding that an application could be made "*by someone on behalf of a person who is entitled to make an application but is unable through mental incapacity to make or consent to the making of an application. In the latter case the writer or maker of the application on behalf of another must demonstrate reasonable grounds for making the application and for acting on behalf of the actual applicant and that he is acting bona fide in the interests of the person unable to act without such help. An application by a well-meaning busybody would not be an acceptable application under section 62"*

Lord Justice Lewison posed the question as to whether WB fell "within Butler-Sloss LJ's description of how an application by or on behalf of such a person may be made?" At paragraph 68, he held as follows:

> *Lady Justice Arden has adverted to the possibility of the appointment of a deputy or the execution of a lasting power of attorney. A deputy may make decisions on behalf of the person without capacity to the extent that his or her appointment allows. As Lady Justice Arden points out those powers may include a power to decide where a person is to live (section 17 (1) (a)) and a power to acquire property on his or her behalf (section 18 (1)). If authorised to do so by his or her appointment a deputy could make the application, decide whether to accept*

> *offered accommodation, and enter into a tenancy on behalf of the person without capacity. However, the mere fact that the Court of Protection authorised a council official to sign a tenancy agreement is not, in my judgment, enough. That is no more than an administrative act; and does not amount to decision making. There is, therefore, no one in this case who has the power to make such decisions on WB's behalf.*

Comment

It is somewhat unsatisfactory that the Housing Act, which specifically provides that those with a mental disability qualify for priority need housing, then disqualifies a whole category of those people on the grounds of capacity. We suggest that this issue requires consideration in the Supreme Court were the consideration in respect of the precedent value of previous case law will of course be different.

That point aside, we note that the Court of Appeal appear to have been somewhat influenced by the procedure for applying to the Court in respect of tenancy agreements by the guidance put before them entitled *Applications for the Court of Protection in relation to tenancy agreements (updated February 2012)*. However:

- This guidance was withdrawn in the autumn of 2016;
- In any event, the guidance simply set out the procedure that was to be adopted in relation to tenancy agreements, and was a pragmatic solution to the difficulty of getting tenancy agreements signed by third parties on behalf of P without having to appoint a deputy to do so (the other alternative being to get the Court to sign it). The guidance did not therefore not limit the powers a third party (i.e. a deputy) can be granted by the Court of Protection in respect of housing. It is plain that a Deputy can be given 'decision making' powers in respect of Housing Act applications. This would then mean that a P with a deputy whose powers extended to making applications pursuant to the Housing Act, would come within the category of those for whom such an application could be made for priority need.

For those who want to read more about this thorny issue, we recommend also the blog post by Nearly Legal.

Covert medication and capacity – the MH context

M v ABM University Health Board [2018] UKUT 120 (AAC) (Upper Tribunal (Administrative Appeals Chamber (UTJ Mitchell))

Mental Health Act 1983 – interface with MCA

Summary

With the Legal Aid Agency having taken more than a year to determine the patient's funding application, this appeal finally reached the Upper Tribunal to consider the disclosure of covert medication to patients lacking the mental capacity to appoint a legal representative. It had to be determined against a somewhat concerning evidential backdrop. For it seemed highly likely that the tribunal had not been informed that the covert medication had ceased three months before the hearing (para 88). The second opinion certificate that would have authorised the covert medication, addressed the patient's capacity, and contained the consequences of not administering it covertly,

had not been supplied to the tribunal and should have been requested (para 89). Moreover, the mental incapacity evidence was absent (para 90).

Rule 17(1) of the Welsh Tribunal rules positively requires the tribunal to give a direction prohibiting the disclosure of a document or information to a person if satisfied of two matters:

(a) such disclosure would be likely to cause that person or some other person serious harm; and

(b) having regard to the interests of justice it is proportionate to give such a direction.

It was stressed that these are independent tests; not to be merged (para 35). The English equivalent (rule 14(2) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008) confers a power rather than a duty to direct non-disclosure. With regard to the first limb of 'serious harm', UTJ Mitchell held that some types of 'serious harm' are more severe than others and its nature must be set out: "*To take a dramatic example, a likelihood of certain death is a more significant form of serious harm than a likelihood of a drastic but temporary deterioration in a patient's mental health*" (para 87).

Previous guidance had been given by the Upper Tribunal in *RM v St Andrew's Healthcare* [2010] UKUT 119 (AAC) which concerned a patient who, during earlier tribunal proceedings, had been informed that he had been covertly medicated and appeared to have capacity to appoint a legal representative. In the present appeal, the patient had not been informed and was found to lack such capacity: "*To some extent, therefore, Mr M's mental condition impaired his ability himself effectively to challenge his detention*" (para 93). UTJ Mitchell went on to hold:

> *94… In a case involving a patient who has capacity to appoint a legal representative, I can well understand why the failure to disclose information about covert medication may be considered so great a rupture in the fairness of proceedings that it could not be proportionate to withhold the information.*
>
> *95. The fact that a patient lacks the mental capacity to appoint a legal representative does not mean the patient has no relevant wishes and feelings about his detention nor that any wishes and feelings fall out of account…*
>
> *96. Throughout, the Tribunal in Mr M's case remained under an obligation to ensure, so far as practicable, that Mr M was able to participate fully in the proceedings (rule 3(2) of the Rules)… The Tribunal's participative duty did not disappear upon the appointment of a legal representative for Mr M on the ground that he lacked capacity to appoint a representative. For this reason, the Tribunal was required to turn its mind to the extent to which Mr M was capable of participating in the proceedings. Only then could it properly answer the key question, that is whether the obstacles placed in the way of Mr M's participation in the proceedings by non-disclosure of information about covert medication, including the difficulties this would cause for his solicitor, were such that, having regard to the interests of justice, it would nevertheless be proportionate to withhold the information from Mr M.*
>
> *97. In conclusion, I decide that the Tribunal's decision involved an error on a*

> *point of law. In deciding whether it would be proportionate to withhold covert medication information from Mr M the Tribunal failed to take into account its ongoing obligation to ensure, so far as practicable, that Mr M was able to participate in the proceedings.*
>
> *98. It is, of course, important not to introduce unnecessary complexity into mental health tribunal proceedings. I do not suggest that a patient's lack of capacity needs to be calibrated. In fact, the precise issue is the extent to which a patient's mental condition allows him or her to participate in the proceedings rather than some determination of 'residual' capacity. However, it is necessary, in a case like Mr M's, to seek submissions from the parties as to the patient's ability to participate in the proceedings. A Tribunal may also decide it is necessary for this purpose to require the detaining authority to supply it with any formal mental capacity assessments that have been carried out.* (emphasis added)

Accordingly, the case was remitted to the tribunal to determine whether it should set aside or vary its non-disclosure direction in light of this guidance.

Comment

Requiring tribunals to first consider the patient's ability to participate in the proceedings before determining whether it was proportionate to withhold covert medication information is a welcome development. Not only does it stress the importance of the participative duty on tribunals (Welsh rule 3(2)(b), English rule 2(2)(c)); it also reflects the broader point that those unable to make decisions must still have their wishes heard, feelings felt, beliefs considered, and values respected.

The judgment also illustrates the careful line that is being drawn between requiring necessary evidence of mental incapacity (and best interests), without unduly complicating the inherently informal nature of tribunal proceedings.

The relationship between autonomy and adult mental capacity in the law of England and Wales

[*We are very pleased to be able to publish here a summary of forthcoming article by Paul Skowron in the Medical Law Review. We are always keen to disseminate research of relevance to practitioners (of all hues), including by way of guest articles. If you have research that you would like to disseminate in this fashion, in particular where the research will otherwise be behind a paywall, please contact one of the editors*]

I began working on this article because I noticed that judges tell three conflicting stories about the relationship between autonomy and mental capacity. As I worked, though, I realised that each of these stories predictably appears in response to certain situations. In other words, the accounts that judges give of the relationship between autonomy and capacity conflict; but judicial behaviour, taken as a whole, implies a single, coherent account of that relationship. This situation is strange, but there is not necessarily much wrong with it. The apparent conflicts emerge because judges are giving partial accounts, tailored to suit the case before them; and, after all, a court is not 'a general advice centre'. All the same, extracting the underlying relationship between autonomy and

capacity from the partial stories that judges tell about it does take a little work.

The gatekeeper account

The simplest story that judges tell about the relationship between autonomy and mental capacity is the 'gatekeeper account'. On this view, if someone has mental capacity with regard to a particular decision, then they so are autonomous with regard to the matter that the state should not interfere with their decision. If, however, they do not have the relevant mental capacity, then the state need not exercise such restraint. Mental capacity is the gatekeeper to the state treating a person's autonomy as an overriding reason not to interfere with their wishes.

The gatekeeper account appears in two characteristic situations. The first is when someone is found to have capacity, but is making an unwise decision. For example, in *PC v City of York Council*, "*unless they lack mental capacity to make that judgment, it is against their better judgment . . . the statute respects their autonomy so to decide*" (McFarlane LJ, emphasis in original). Legally, this is unobjectionable, but it gives only a partial account of the relationship between autonomy and capacity, for it omits any discussion of undue influence. The gatekeeper account is also given when it is believed to be in the best interests of someone without capacity to act contrary to their expressed wishes. For example, in *An NHS Trust v CS*, "*it seems to me impossible for this court to attach any significant weight to* [her *current wishes] bearing in mind her patent lack of capacity*" (Baker J). This, too, gives only a partial account of the relationship between autonomy and capacity. After all, sometimes the court does attach significant weight to the current wishes of someone with a 'patent lack of capacity'.

The insufficiency account

The gatekeeper account conflicts with a second judicial story, the 'insufficiency account'. On the gatekeeper account, if you have capacity about a matter, then you are autonomous with regard to it. Sometimes, though, judges hold that capacity is not enough to be autonomous. Freedom from coercion and undue influence is also needed. On this view, capacity is necessary for autonomy, but it is not sufficient. Lady Hale gives a version of this account in *R v Cooper*: 'autonomy entails *the freedom and* the capacity to make a choice' (emphasis added).

It is significant that *Cooper* is a criminal case, but the insufficiency account has a broader range. It appears, unsurprisingly, whenever coercion or undue influence are felt to be live issues. For instance, it underwrites some (and only some) uses of the inherent jurisdiction. *DL v A Local Authority* is an example. In that case, 'Mrs L' had capacity and did not wish to bring proceedings for a non-molestation order against her son. Nevertheless, she was found to be "*a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity*" (McFarlane LJ, emphasis added), so a wide range of injunctions were made restraining him. This case cannot be made to fit the gatekeeper account: Mrs L was found both to have capacity and to lack autonomy. The same is true of cases decided under the equitable doctrine of undue influence, which allows someone's transactions to be rendered voidable when 'the influence has invaded the free volition of the donor' (Lewison J), regardless of mental capacity.

The survival account

The insufficiency and gatekeeper accounts conflict about people who have capacity, but that is not the end of the story. There is also a 'survival account', and this clashes with both the others about people who do not have capacity. Its name is taken from *W v M*. In that case, Mr Justice Baker states that "*personal autonomy survives the onset of incapacity*." Care is needed here. The survival account does not hold that everyone, regardless of capacity, is so autonomous that the state should not act against their wishes. It merely holds that some people without the relevant capacity might be so autonomous, and that the issue is decided as part of the best interests decision. Even this conflicts with the gatekeeper account, which takes the issue of autonomy as decided by the capacity assessment. It can also seem to conflict with the idea that wishes and feelings carry 'great weight' but are not 'determinative' of best interests (Lewison J in *Re P*). This latter conflict, though, is more apparent than real. Wishes and feelings are not *necessarily* determinative of best interests, but they *can* be determinative of best interests: as seen, for instance, in *Wye Valley*, *Ms X*, and *SAD v SED*.

The survival account raises the question of exactly when the wishes and feelings of a person without capacity will be determinative of their best interests. When answering, the list of factors in *ITW v Z* (at 35(iii)) is the best place to start. It brings several broad considerations, which draw on diverse ideas about autonomy, together in one place. For example, one factor is 'the strength and consistency of the views being expressed by P', and this was important in *Wye Valley*. In that case, it would have contradicted s3(1)(a) of the MCA to hold that 'Mr B', who did not 'understand the reality of his injury', had capacity to make decisions about treatment for it. Mr B did, however, demonstrate autonomy in another sense: an authentic 'fierce independence' that ultimately determined his best interests. This responsiveness to wider ideas about autonomy than the gatekeeper account can accommodate is characteristic of the survival account. Fairly often, people without capacity know what they want, want it for intelligible reasons, or would be utterly distraught if what they wanted was disregarded. By softening the link between autonomy and capacity, the survival account allows these things to be taken into account.

A coherent account

On the face of things, the gatekeeper, insufficiency, and survival accounts appear to conflict about the relationship between autonomy and mental capacity; but there is no need to pick sides between them. Instead, they can be combined into a coherent account as follows:

> *An adult in England and Wales has a legal right to be treated as autonomous with regard to a particular matter if:*
>
> *1. They have capacity and are not a vulnerable person subject to coercion or undue influence (from the insufficiency account); or*
>
> *2. They lack capacity but the character of their wishes and feelings is such that it determines their objective best interests (from the survival account)*

On this account, mental capacity is not autonomy's gatekeeper. It is, however, still part of the legal threshold for a right to be treated as autonomous. A person's capacity or incapacity creates one of two presumptions. If someone has capacity, then they will be presumed to be autonomous, but that presumption may be rebutted if they are found to be vulnerable and subject to undue influence or coercion. If someone is found to lack capacity, then they will be presumed not to be autonomous, but that presumption will be rebutted if their wishes and feelings determine their best interests.

A disclaimer is in order here. Even this coherent account simplifies the relationship between autonomy and capacity: in particular, the Mental Health Act 1983, criminal law, and law pertaining to children all complicate matters further. The sheer complexity of this relationship has its own implications. One of the original aims of the MCA was to simplify the law, but it does not appear to have done so. More than this, the wide range of factors that judges are responsive to when assessing a person's autonomy are all things that it is appropriate to be responsive to. Capacity is relevant; but so, for example, is coercion. In other words, it may be good that the MCA has not simplified the law.

Paul Skowron
Research Associate on the Wellcome Trust funded Mental Health and Justice project, working at the York Law School. This is a summary of an article that will appear in Medical Law Review. An advance copy of the full article is available here (paywalled)

The Learning Disabilities Mortality Review Annual Report 2017

The Learning Disabilities Mortality Review (LeDeR) programme, led by the University of Bristol and commissioned by the Healthcare Quality Improvement Partnership (HQIP) on behalf of NHS England, has published its most recent report, which makes thoroughly depressing reading.

From 1st July 2016 to 30th November 2017, 1,311 deaths were notified to the LeDeR programme. Key information about the people with learning disabilities whose deaths were notified to the LeDeR programme includes:

- Just over half (57%) of the deaths were of males
- Most people (96%) were single
- Most people (93%) were of White ethnic background
- Just over a quarter (27%) had mild learning disabilities; 33% had moderate learning disabilities; 29% severe learning disabilities; and
  11% profound or multiple learning disabilities.
- Approximately one in ten (9%) usually lived alone
- Approximately one in ten (9%) had been in an out-of-area placement

The full 2016/2017 report is available here.

The third largest category of the learning and recommendations related to the need for a better understanding and application of the MCA. Reviewers identified problems with the

level of knowledge about the MCA by a range of professionals, and concerns about capacity assessments not being undertaken, the Best Interests process not being followed, and Deprivation of Liberty Safeguards (DOLS) not being applied. National recommendations include that:

> *local services strengthen their governance in relation to adherence to the MCA, and provide training and audit of compliance 'on the ground' so that professionals fully appreciate the requirements of the Act in relation to their own role. The findings from the LeDeR mortality reviews echo the House of Lords post-legislative scrutiny of the Mental Capacity Act conclusion that there is a lack of awareness and understanding about the MCA, principally within the health and social care sectors. They commented: 'For many who are expected to comply with the Act it appears to be an optional add-on, far from being central to their working lives…the prevailing cultures of paternalism (in health) and risk-aversion (in social care) have prevented the Act from becoming widely known or embedded….The duties imposed by the Act are not widely followed.' (p.6).*

Extension of personal healthcare budgets

The government's recently opened consultation into extending personal health budgets closes in a month's time, on 8th June 2018. The Department of Health and Social Care and NHS England are inviting views on the proposed extension of personal health and integrated personal budgets to wider patient groups.

Definite entitlement to having a personal health budget is currently limited to two groups: adults in receipt of NHS continuing healthcare ("CHC") and children receiving continuing care. There is provision in some parts of the country for personal health budgets to be offered to additional groups based on local need, including people with a learning disability and/or autism but this is at the discretion of individual CCGs. Single integrated personal budgets are also available in some areas, combining personal health budgets and personal budgets in social care.

The consultation is about extending the "right to have" a personal health budget. The consultation is proposing widening the group with entitlement to include:

- People with ongoing social care needs who regularly use NHS services;
- People eligible for mental health aftercare under s.117 Mental Health Act 1983, and those with ongoing mental health needs who regularly use community based NHS mental health services;
- People leaving the Armed Forces, who are eligible for ongoing NHS services;
- People with a learning disability and/or autism who are eligible for ongoing NHS care;
- People who access wheelchair services whose posture and mobility needs affect their wider health and social care needs.

This extension could have far-reaching implications for people with mental health needs and learning disabilities. Disability Rights UK and a number of other bodies will be responding. The government is seeking views, particularly on

whether the right groups have been identified and whether or not they will benefit – as the government believes they will – from the extension of the scheme.

Vulnerable adults – another opportunity for change?

As many will know, Alex spent a considerable part of 2017 seeking to persuade the Law Commission to take forward a project on vulnerable adults as part of their 13th programme of Law Reform. Alex was, ultimately, unsuccessful, although the material that was sent to me in response to various calls for help – for which he is very grateful – reinforced me in my belief that the intensely complex issues that arise are crying out for proper consideration (and you can hear Alex talk about them here).

The reason that Alex (together with the Association for Real Change and Autism Together, who joined in my bid) did not succeed was, as the Law Commission explained, that the *"for any project the Commission wishes to undertake we must have support from the Government under a Protocol agreed in 2010. This states that the Government must have a serious intention to take forward law reform in the relevant area of work. In the case of your project, the Commission was unable to secure Protocol support from Government*."

However, law reform is now being proposed by Government that is so closely related that Alex will be trying again, and, again, invites your help, although in a slightly different fashion to before.

As we reported on before, the Home Office and Ministry of Justice are consulting on "Transforming the response to domestic abuse," the consultation closing on 31 May. Alex's proposal, in response to this consultation, is a modest one, namely to suggest that alongside domestic abuse should be recognised a concept that he is (perhaps inelegantly) calling "proximity abuse." Alex should emphasise that he is not, in this, seeking to distract from the vitally important work that is being done in relation to domestic abuse. Rather, he is asking us to recognise that the work that has been done over time to recognise the patterns and consequences of this abuse and the insights that have been gained can – and should – be applied in the context of those vulnerable adults who are subject to abuse and exploitation at the hands of those who are either living in close proximity to them, or who have been groomed or otherwise manipulated into believing that the perpetrator has their interests at heart when the opposite is self-evidently the case.

Alex's draft answer to the consultation question on the proposed statutory definition of statutory abuse is here. If you agree with its basic thrust, do please feel free to adopt / adapt it for purposes of putting in your own response, whether personal or corporate (but do please note that Alex may well be refining this over before he submits, so you may want to check back every so often to make sure you've got the most recent version).

Editors and Contributors

Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole: vb@39essex.com

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

Neil Allen: neil.allen@39essex.com

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

Annabel Lee: annabel.lee@39essex.com

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click here.

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click here.

Editors and Contributors

Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes, and is chair of the London Group of the Court of Protection Practitioners Association. To view full CV click here.

Simon Edwards: simon.edwards@39essex.com

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

Adrian Ward: adw@tcyoung.co.uk

Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

Jill Stavert: j.stavert@napier.ac.uk

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

Conferences

Conferences at which editors/contributors are speaking

Medical treatment and the Courts

Tor is speaking, with Vikram Sachdeva QC and Sir William Charles, at two conferences organised by Browne Jacobson in London on 9 May and Manchester on 24 May.

Other conferences of interest

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

International Arbitration Chambers of the Year 2014 Legal 500

Environment & Planning Chambers of the Year 2015

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.