



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

(1) In the Health, Welfare and Deprivation of Liberty Report: an appreciation of Alastair Pitblado, the Mental Capacity (Amendment) Bill, the Joint Committee on Human Rights considers DoLS reform and fluctuating capacity;

(2) In the Property and Affairs Report: the OPG mediation pilot

(3) In the Practice and Procedure Report: court fees reductions and when to join;

(4) In the Wider Context Report: Lady Hale on *Cheshire West* and the CRPD, Parliamentary debates and developments and a major Council of Europe report on attorneys and advance directives;

(5) In the Scotland Report: AWI consultation responses and Sandra McDonald reflects on her time as Public Guardian;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#).

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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.

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### Office of the Public Guardian – Mediation Pilot

*[We are pleased to be able to publish here an article from the Office of the Public Guardian for England & Wales about the new mediation pilot that he has launched]*

Alan Eccles, the Public Guardian for England & Wales, has launched a pilot aiming to reduce intra-familial disputes in cases where there is a lasting power of attorney (LPA), an enduring power of attorney (EPA) or a court-appointed deputy. Such disputes can risk the protection of a person who is vulnerable because they may not retain mental capacity to make all necessary decisions themselves.

Specifically, the pilot will assess whether OPG offering the service maximises safeguards.

This article is intended simply for information; the results of the pilot will be reported in due course: late 2018/ early 2019.

There is research which says the root cause of many problems is in the relationships, so repairing broken or damaged relationships is often effective and proportionate. Following a House of Lords Select Committee report on the Mental Capacity Act, which said mediation prior to court proceedings appeared beneficial, OPG ran a telephone pilot. This chimed with the alternative dispute resolution strategy of OPG’s parent department, the Ministry of Justice.

The quality of the telephone mediation provided was high and the agreements reached were beneficial; participants rated highly that mediation had allowed them to re-focus on the person they were protecting, rather than the dispute. There were some issues:

- the absence of face-to-face was judged by mediators not to be ideal
- difficulties in getting people who were in dispute to agree to be mediated was a significant challenge, meaning case numbers were lower than desired.

Overall, the telephone pilot did not substantiate long-term conclusions, further work would be necessary.

OPG’s safeguarding model looks for timely and proportionate interventions, maximising protection while minimising disruption. This chimes with the MCA principles, as well as HRA requirements to minimise state intervention. OPG sometimes sees fraught dynamics in the support network around someone who may be losing their mental capacity, someone whose personality as a senior figure in the family may be altering. This can place unhelpful additional pressure on the attorney.

Mediation removes the adversarial win/lose aspect of disputes, hones general discontent and dispute down to the core issue, and addresses that issue in the best way and in the

best interests of the person. It promises to be timely and proportionate.

OPG lawyers have reported that, when family members see each other outside the court, perhaps for the first time in a little while, they remember who they are, they remember who they are trying to protect, and they start being rational and reasonable again. Mediation seeks to engineer that meeting earlier in the process than the day of a court hearing, and to facilitate it systematically.

The new pilot will be provided by an independent mediation service which offers experienced, skilled mediators located across England & Wales. At the time of writing, the contracts were on the point of signing, so names have been omitted here. The new pilot will be face-to-face as far as possible, in a location close to the LPA donor and their family, agents and friends. Other channels will be available to involve anyone who is geographically remote.

OPG investigators will initiate the mediation, attorneys or concern raisers are not being invited to do so.

Mediation is unlikely to be appropriate if there is evidence of abuse or neglect.

OPG is bearing the cost of these pilot mediations as they are felt to offer good value safeguards. If OPG providing a long-term service is judged to be beneficial, the charging question will be decided: options include from P's assets, from the parties, from OPG's fee income.

It is anticipated that mediations in this pilot will occur where the person has been assessed as not having capacity to deal with the specific concerns raised, or to ask their attorney to

account, or to revoke, suspend or apply to cancel the EPA or LPA.

The involvement of the donor is important - the second MCA principle requires people to be supported to a decision - so their wishes will be obtained whenever possible, whether by attendance, written statements, video, or via a representative such as an independent mental capacity advocate. We seek to empower the person as far as that can be done

It is hoped that the new pilot will show that OPG investigations can safely be scaled down because the issue is a dispute rather than abuse or neglect and that this can be resolved by mediation. In turn it is hoped that OPG applying to the Court of Protection for specific performance or, in the worst case, removal of an attorney, can be less frequent. These outcomes will benefit the person, the parties, and free up the court. Finding a way to resolve issues and also preserve P's choice of attorney must be apt.

Initially, OPG does not plan to include deputyships in the pilot, because our deputyship case management can contain a degree of informal mediation already and the risks are therefore lower, but this may change.

Mediations in this pilot will not run simultaneously with court proceedings: ideally it will be either/or. In some cases, if mediation is unsuccessful, a court application may be needed.

There is a Court of Protection mediation scheme being mooted; OPG will liaise to ensure lessons are learned and that all interventions contribute to the best interests of the vulnerable person; but the OPG pilot has an explicit aim to avoid court proceedings if possible.

The detail of the mediation discussions will be confidential, and the presumption will be that professionally-facilitated agreements reached will be in best interests, but the Public Guardian will retain responsibility for judging that, and all current resolution routes will remain open.

Duration: the first referral is expected in July, and it is anticipated the pilot will run for the rest of the year – no hard deadline. Proof of long-term durability of agreements reached is unlikely to be possible during that timeline.

Success? Evaluation will be done on every case and will be pulled together as early as a meaningful picture emerges. We will seek to establish, from the mediation provider and the parties involved, whether mediation was helpful and improved protections in a good value, timely and proportionate way; and whether OPG providing a badged service, rather than simply signposting to external providers, increases effectiveness. These things will inform charging decisions.

If a long-term service is approved, this would be by a full OJEU procurement, advertised in the usual way and open to all.

### The incapacity crisis

Solicitors for the Elderly have [published](#) research that shows how few of us are preparing for the risk that at some stage we will lack the capacity to make decisions for ourselves.

SFE commissioned independent research from Centre for Future Studies ('CFS'), a specialist

think tank, to forecast the disparity between the number of people who risk developing dementia or other forms of mental incapacity, and the number of people planning ahead for this eventuality by getting a H&W LPA in place.

CFS' research shows that there are currently 12.8 million people over the age of 65 who run the risk of developing dementia, yet there are only 928,000 H&W LPAs currently registered with the Office of the Public Guardian (OPG) across England and Wales. This suggests that almost 12 million of those people that are at high risk of future incapacity haven't planned ahead to ensure their wishes are followed.

SFE highlight a number of common myths:

**Myth:** *47% of people believe that a Do Not Resuscitate (DNR) order is issued by your doctor and is placed on your medical records for every future decision.*

**Fact:** *A DNR order does not travel with you. Each time you move locations (ie. to a different hospital or to a care home), a new DNR order needs to be created.<sup>1</sup> However, if you embed a DNR request in a H&W LPA, it makes your wishes known wherever you are as your attorney can show the document to all the professionals involved in your care.*

**Myth:** *65% of people believe their next of kin can make their medical and care decisions for them, should they not be able to.*

<sup>1</sup> Editorial view: DNR orders are dreadful, and their continued use should not be perpetuated: see, instead, the [ReSPECT process](#) for how advance care planning should be done in this context in conjunction between

healthcare professionals and the person (or, where they lack capacity to participate, their proxies/those concerned with their welfare).

***Fact:** Only doctors acting in your best interest have the authority to make the final medical and care decisions for you, with or without the consent of your spouse/relatives, should you not be able to make them yourself. Any disputes will be referred to the Court of Protection.*

And some disconnects between desires and reality.

- *70% of Brits would want their family to make their medical and care decisions on their behalf if they were unable to make them themselves, and 79% of Brits haven't discussed their medical or care wishes or later life with their loved ones.*
- *58% of Britons believe that by being on the NHS organ donor register ensures that organs are donated. This is a myth; it's important to speak to family and friends about organ donation preferences – if they do not know you have opted to donate, it may not happen. Embedding your decision in a H&W LPA confirms your wishes in writing.*

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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](http://www.mentalcapacitylawandpolicy.org.uk). To view full CV click [here](#).



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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](#).



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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](#).



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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 4<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).

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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](#).



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



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Adrian is a 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.



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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 of interest

#### Costs and summer drinks reception

On 26 July a training event and summer drinks reception will be hosted by London CoPPA in association with Hardwicke Chambers covering hot topics in the world of Court of Protection costs. For more details, see [here](#).

#### Towards Liberty Protection Safeguards

This conference being held on 24 September in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and book, see [here](#).

#### 5<sup>th</sup> International conference on capacity: ageing, sexuality & human rights

Capacity Australia is hosting this fascinating-looking conference in Rome on 3 October. For more details 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.



We are taking a summer break (from this, but not from the world of mental capacity law, which is going to be a very busy one over the next few months). Our next edition will be out in early September. 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](mailto:marketing@39essex.com).

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