



Welcome to the February 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a personal view on the Mental Capacity (Amendment) Bill from Tor, damages where the MCA has gone awry and the Supreme Court on the MHA in the community;

(2) In the Property and Affairs Report: neglect and attorneys, a speedy (and sensitive) statutory will and attorneys as personal representatives;

(3) In the Practice and Procedure Report: a challenging decision on the inherent jurisdiction, CoP statistics and guidance on anonymisation;

(4) In the Wider Context Report: the Code of Practice is being revised, guidance on CANH and the Mental Capacity Action Day looms;

(5) In the Scotland Report: a welcome change to guidance in relation to voter registration, and the death of the former Director of the Mental Welfare Commission.

Last, but very much not least, her fellow editors invite you to join in congratulating Tor on her appointment as Queen's Counsel.

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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MCA Code of Practice update

The Ministry of Justice is starting the task of updating the main MCA Code of Practice (nb, this is a task which is coordinated with, but is at this point not the same as the creation of a new Code to accompany the LPS). As part of the process, it has put out a call for evidence, which can be found [here](#). The deadline for responses is **7 March**.

Mental Capacity Action Day

This year’s action day will be held on **15 March** at the Royal College of Nursing in London. For details, and how to apply to attend, see [here](#).

CANH decision-making

The British Medical Association (BMA) and Royal College of Physicians (RCP) have [published](#) joint guidance, endorsed by the General Medical Council (GMC), covering decisions to start, re-start, continue or stop clinically-assisted nutrition and hydration (CANH) for adults in England and Wales who lack the capacity to make the decision for themselves. The guidance covers previously healthy patients in vegetative state (VS) and minimally conscious state (MCS)

following a sudden onset brain injury, as well as the much larger group of patients who have multiple comorbidities, frailty, or neurodegenerative conditions in whom decisions about CANH are needed.

The guidance is primarily aimed at clinicians but it is extremely useful for legal practitioners, advocates, carers and others seeking to understand the framework for decision-making in this important area. The recent decision of the Supreme Court in *An NHS Trust and others v Y* [2018] UKSC 46, looms large and it is apparent that the case has had a significant impact in this area. As stated in the guidance, *“there is no requirement for decisions to withdraw CANH to be approved by the court, as long as there is agreement upon what is in the best interests of the patient, the provisions of the Mental Capacity Act 2005 have been followed and the relevant professional guidance has been observed”*. The *“relevant professional guidance”* would no doubt include this joint guidance published by the BMA and RCP, and it will surely become indispensable in this field.

In addition to the clear exposition of the legal framework set out in the guidance, there are useful practical tools that can be utilised as part

of everyday good practice, such as the decision-making flowchart at Figure 1, and the checklist of evidence for best interests' decision-making in relation to CANH at Appendix 2. Although the guidance focuses on decisions about CANH, much of the general guidance for best interests' decision-making (such as who should be consulted, ascertaining P's wishes and feelings, and documenting/sharing information) can be applied across the board to all types of decisions.

Independent Review of the Mental Health Act 1983

The independent Review of the Mental Health Act has [reported](#); amongst its recommendations are both a hefty injection of MCA-style thinking into the MHA 1983 and a new approach to the interface between the MHA and the MCA. A useful summary can be found [here](#). At [Committee stage](#) of the Mental Capacity (Amendment) Bill in the Commons, the Care Minister, Caroline Dineage MP,

welcomed Sir Simon Wessely's landmark report [which] will very much set the direction for improving the way the Mental Health Act works for thousands of vulnerable people. The Government have already committed to bringing forth mental health legislation when parliamentary time allows, taking that very important report into account. We have already accepted two important recommendations,¹ which will give service users more choice and control, but it will take time for us to consider the rest of the recommendations, of which there are 152. We will respond to the

remaining recommendations in due course, but Sir Simon said that the Government would need to consider the "practical implications" of the interface recommendations, and that it would be "problematic" to introduce those recommendations in this Bill.

Real enthusiasts may wish to do a compare and contrast with the Report of the Government Inquiry into Mental Health and Addiction [published](#) a month later in New Zealand.

Article round-up

For those of you wanting more reading, we can recommend:

1. An [article](#) by Professor Anselm Eldergill asking whether all incapacitated people confined in a hospital, care home or their own home are deprived of liberty?
2. A [paper](#) (an output of the [Mental Health & Justice](#) project) surveying experiences of attitudes towards advancing decision-making amongst people with bipolar.

We are always happy to highlight open access research/articles of interest.

¹ Replacing nearest relatives with nominated persons, and creating statutory advance choice documents.

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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. To view full CV click [here](#).

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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), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). 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. 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 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](#).

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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. To view full CV click [here](#).

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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](#).

**Adrian Ward: adw@tcyoung.co.uk**

Adrian is a recognised national and international expert in adult incapacity law. 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. 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

Edge DoLS assessor conference

Alex is speaking at the Edge DoLS assessor conference on 8 March, alongside other speakers including Lord Justice Baker and Graham Enderby. For more details, and to book, see [here](#).

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, 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 edition will be out in March. 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.

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