

Big issues for the next 10 years

Perhaps the biggest issue for the next 10 years is the question of whether we should even have a Mental Capacity Act at all, and, if so, what it should look like. When the Act was but a glimmer in the eyes of Brenda Hogg, as she then was, at the Law Commission in the 1990s, it was cutting edge. It was still cutting edge when introduced in 2005, and when it came into force a decade ago. It is still a tremendously important piece of legislation, but it is one which is, at a minimum, in need of a midlife upgrade, and at a maximum, in need of a complete rewrite.

To take the minimalist approach first, the Act undoubtedly needs redoing to deal with the DoLS conundrum. I will return to this, but I do not want to dwell on it now because there is more to life than deprivation of liberty. It also, in my view, requires upgrading to deal with two pressing issues.

The first is to cement into the law what those involved on the front line of social and health care already seek to implement as good practice: namely to start in the process of best interest decision making from the person themselves and to work upwards and outwards. What does this mean? In my view, this means two things, the first actually taking steps to seek to find out the individual's wishes and feelings, and the second being to place particular weight on them in the decision-making process. This is not, I should emphasise, the same as saying that their wishes and feelings are determinative in all cases: rather, it is saying that if we do have reliable wishes and feelings upon which to proceed, we should follow them unless we have a good reason not to. Such an obligation can be spelt out of legal instruments including the ECHR, but I would argue that it is actually nothing more than common decency and respect for a person, as an individual not an object.

The second pressing issue is to address what it seems to me sometimes like the Wild West of s.5 MCA 2005, the part of the Act deployed most on a day-to-day basis. Lady Hale has recently (*N v CCG* [2017] UKSC 22, para 38) described it as “*giv[ing] a general authority, to act in relation to the care or treatment of P, to those caring for him who reasonably believe both that P lacks capacity in relation to the matter and that it will be in P's best interests for the act to be done.*” It is perhaps a Freudian slip on her part to use the term authority, when of course Parliament very deliberately declined to follow the Law Commission's recommendation in the draft Mental Incapacity Bill to create such a general authority, instead creating a defence. However, the reality is that it is treated as such authority, and it seems to me clear that it has been treated in such a way as to bring about significant interferences with the autonomy of individuals without the requisite and commensurate protections required by Article 8 ECHR. I am, for instance, perennially concerned at restrictions being placed on contact without any proper thought being given as to whether there are less restrictive ways in which to secure the well-being of the individual concerned. Similar issues arise in relation to the administration of covert medical treatment and treatment against the wishes of the person concerned – and, of course, in relation to the movement of individuals from their own home.

Remedying this issue seems to me a delicate balancing exercise. On the one hand, we need to ensure that public bodies (in particular) know what they can do. On the other hand, we need to ensure that when they do take steps they do so having properly thought matters through. It seems to me that a solution is to identify categories of decision which do require additional procedural protections, and then to make clear that if those additional steps are not taken, those implementing them cannot benefit from the s.5 defence. Identifying the categories and the steps would also have the benefit of “flushing out” when there are either (1) disputes as to either capacity or best interests which properly require resolution by the Court of Protection; or (2) the best interests balancing exercise is so finely balanced

that it is right and proper that the Court be asked to choose on behalf of the individual and shoulder the consequent responsibility for any (objectively) adverse outcomes that may arise.

I should at this stage come clean and say that the two improvements outlined above – ‘MCA 1.5’ – are ones contained in the Law Commission’s draft Mental Capacity (Amendment) Bill, on which I have spent much of the past year and a half working. It seems to me that if these improvements were enacted, the core legal framework of the Act would be dramatically improved. Of course, enactment is one thing and implementation another. However, for my own sanity, I have to believe that law reform does in fact serve a purpose!

The maximalist view is that even with these improvements we are seeking to shore up a fundamentally flawed model, based on an outdated view that there really is such a thing as mental capacity. On this view, we should rip up the MCA (and, indeed the Mental Health Act 1983) and start again from a legislative model which takes as its core principle that all individuals have legal capacity, differing only in the extent to which they require support to exercise it. This challenge comes from the Committee on the Rights of Persons with Disabilities, framed most expressly in their General Comment 1 on Article 12 of the Convention on the Rights of Persons with Disabilities (‘CRPD’). I say the Committee deliberately, because there is still a hotly contested argument as to whether the CRPD itself makes this demand upon us. This is an argument explored at length elsewhere, most easily accessed in the Essex Autonomy Project’s reports on compliance of UK capacity legislation with the CRPD, and I do not want to dwell on it here. I would, though, make the following short observations:

1. Whatever the outcome of the argument, it has served as an extremely important wake-up call for those complacently believing that the MCA was still at the cutting edge;
2. It has, or should have, made us think very much more carefully about how and why we can justify steps being taken on a person's behalf on the basis that they lack the material mental capacity;
3. It has, or should have, brought a very much greater focus upon the very concept of mental capacity and what constitutes satisfactory - or defensible - determinations that an individual lacks such capacity, in particular in the context of the contention that they cannot use or weigh relevant information;
4. It has, or should have, made us focus on whether a diagnostic element is really required, such an element, in and of itself being prima facie discriminatory;
5. Linked to point 4, it provides the opportunity to think again about the interaction between the MCA and the High Court’s inherent jurisdiction to protect capacitous but vulnerable adults. Put another way, do we want to maintain a bright line between incapacity and vulnerability?
6. It has arguably sharpened the focus of the discussion as to whether it is really right to seek to continue to maintain separate regimes to respond to physical health/care needs and mental health needs.

So much for the very big picture. Coming a bit closer back down to earth, we need to do something about DoLS. That much is obvious, and I would venture to commend to your approval the solution proposed by the Law Commission. It does not, because I would say it cannot, grapple with the issue of what does constitute a deprivation of liberty. That issue is still being thrashed out by the courts. Whilst

we have had an unexpected end to the *Ferreira* saga concerning deprivation of liberty in the intensive care setting, the Supreme Court having refused permission to the appellant to appeal, big battles still live at the point of this talk include: (1) the meaning of deprivation of liberty in the domestic context; (2) how we look at deprivation of liberty in the context of children. Being involved in both of those battles at the moment, it would not be appropriate for me to comment further, save to say that they throw up titanic clashes of principle – as between the family and the state, and as between a rights model focused on the parent and a rights model focused on the child.

Equally big issues of principle are being thrown up, too, as the courts circle around and around the issues of both, substantively, when the continuation of life-sustaining treatment is no longer in a person's best interests, and how, procedurally, we can ensure that robust decisions are taken in this regard. We will, I anticipate, see significant shifts in the latter in the form of reforms to PD9E (the practice direction governing serious medical treatment cases). The former will continue to exercise the courts, and wider society, as indeed it should, because we are testing the limits of the doctrine of double effect when we have a case such as *Briggs*.

A final issue of principle which will, I hope, be taken seriously and to continue to provoke and to challenge us, is how we secure the participation of P in proceedings before the Court of Protection. That is being looked at in detail in one of the masterclasses which follows this talk, and I do not want to steal the thunder of those leading it. What I would say, though, is that heroic efforts are often being made by many to make the Court of Protection more accessible to both Ps and witnesses and parties who may themselves have their own vulnerabilities and requirements for support. However, and, as detailed in the recent Cardiff Law School report on the participation of P, we are arguably starting from the wrong place. If we take our duties to empower and protect individuals with impaired capacity seriously, we should not be trying to support P to take part in proceedings designed for the men and women in suits. Rather, we should be designing our proceedings to meet the needs of Ps. That takes creativity and empathy on the part practitioners and the judiciary. It also, bluntly, takes resources, and a commensurate need for us to bang the drum for the Court of Protection in front of a wider society which is either indifferent or, when the Daily Mail is on the case, actively hostile to the work it does.

All in all, therefore, we have much to do as the MCA leaves its infancy and becomes a tweenager. I certainly hope that you will all be here in 10 years' time to have more cake and reflect on our progress!

Further reading

I have written more about some of these issues, either by myself or in collaboration with others, in the following articles:

When past and present wishes collide: the theory, the practice and the future *Eld. L.J.* 2016, 7(2) 132-140

"Is mental capacity in the eye of the beholder?." *Advances in Mental Health and Intellectual Disabilities* 11.2 (2017)

Litigation friends or foes? Representation of "P" before the Court of Protection *Med. L. Rev.* 2016, 24(3), 333-359

Powers, defences and the "need" for judicial sanction *Eld. L.J.* 2016, 6(3), 244-251

More presumptions please? Wishes, feelings and best interests decision-making *Eld. L.J.* 2015, 5(3), 293-301

