



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

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; the DoLS backlog and the obligations on local authorities; capacity and social media (again); best interests and the 'institutional echo;' and judicial endorsement of the BMA/RCP guidance on CANH.

(2) In the Property and Affairs Report: a major new report on supported will-making;

(3) In the Practice and Procedure Report: a pilot designed to get the Accredited Legal Representatives scheme further off the starting block; the need for the early involvement of the court in medical treatment cases; transparency and committal; and DNA testing and the courts;

(4) In the Wider Context Report: oral care and learning disability; important consultations on criminal procedure/sentencing and those with mental disorders; the dangers of assessing in a vacuum; and a round-up of recent useful research articles.

(5) In the Scotland Report: major developments regarding the Mental Health (Care and Treatment) Scotland Act, the Adults with Incapacity Act and the Adult Support and Protection Act and a Scottish perspective on the English MHA review and compliance with the CRPD;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our [capacity assessment guide](#)), and as promised, an updated version of our [best interests guide](#) is now out.

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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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ENGLAND AND WALES

Oral care and learning disability

In the context of cases such as that of Rachel Johnston, who died two weeks after all her teeth were taken out, it is all the more important to draw attention to the guidance from Public Health England on oral care and people with learning disabilities, together with the resources at the end for family carers, paid professionals and dental professionals.

Deemed organ consent in England

Following in the footsteps of Wales, the passage of the Organ Donation (Deemed Consent) Act 2019 means that there is now a statutory presumption in England that consent to organ and tissue donation in England has been given by a potential adult organ donor before their

death unless they had expressly stated that they did not wish to be a donor or an exception applies. One of the categories of those excepted from the presumption is those adults who *“for a significant period before dying lacked capacity to understand the effect of [the deemed consent provision].”* Interestingly, and possibly tellingly, the Explanatory Notes described this group (wrongly) as *“people who lack the capacity to fully understand the consequences of deemed consent for a significant period before dying”* (emphasis added). We also note that precisely what “significantly” means in this context is not fleshed out by the Explanatory Notes.

Caring about complaints

The Local Government and Social Care Ombudsman has issued a good practice guide for care providers. The guide shares lessons from complaints to help adult social care

providers improve their services. Common issues that arise in complaints include:

- A lack of clear information about fees, charges and contracts;
- Charges and contracts;
- Problems with billing and invoices;
- Ensuring people's belongings are looked after properly; and
- Dealing with challenging behaviour from friends and relatives.

The guide provides a number of case studies exemplifying the common problems. A few specific examples relate to people who lack mental capacity. In one case, there was no assessment of the person's mental capacity regarding residence and no discussion with the family about the person's best interests. The Ombudsman recommended (and the care provider accepted) that the care provider review its care plans and add a section to specifically address mental capacity. In another example, the care provider put in place staff training on mental capacity.

The Ombudsman's advice echoes findings from the Competition and Markets Authority (CMA) when it recently published [guidance](#) for care homes on their responsibilities under consumer law. The clarity of information given to care users about fees, funding arrangements and charging policies, is a key issue in many complaints about care providers.

Criminal proceedings and mental disorders

The CPS has published [Mental Health](#)

[Conditions and Disorders: Draft Prosecution Guidance](#). This is out for consultation until 4 June 2019, and we hope that at least some will take the opportunity to assist the CPS flesh out this passage:

Prosecutors should also be aware that reasonable adjustments may need to be made by the court in order to realise the right to access justice under Article 6 of the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and Article 13 of the United Nations Convention on the Rights of Persons with Disabilities.

At the same time, proposed guidance for sentencing offenders with mental health conditions and disorders was published in a [consultation](#) launched by the Sentencing Council, designed to give judges and magistrates in England and Wales a clear structure and process to follow when sentencing people with mental health conditions and disorders, and those with learning disabilities, autism, brain injury, substance misuse disorders and dementia. The consultation, taking into account the work of the MHA review, runs until 9 July. Of no little interest is the proposed annex containing information on common mental health conditions and disorders.

Short note – competence and the vacuum

In *CS v SBH* [2019] EWHC 634 (Fam), Williams J undertook an interesting review of the law governing the competence of a child to instruct a solicitor and to conduct an appeal without a children's Guardian, emphasising that there had been a "shift away from a paternalistic approach in favour of an approach which gives significantly more weight to the autonomy of the child in the

evaluation of whether they have sufficient understanding."

Of broader significance are the observations that Williams J made in relation to the different assessments made by two solicitors as to whether the child in question had sufficient understanding. These observations are equally applicable to assessments of mental capacity under the MCA 2005:

The views of Ms Hopkin on the one side and Ms Coyle on the other are diametrically opposed. There is however an immediate and obvious difference between them. That is not the age and experience of the solicitor conducting the evaluation but rather the extent to which the evaluation is an informed evaluation. Ms Hopkin's evaluation is based primarily on her meeting with the child supported by what she can glean from communications that she has had with the child or which she has been sent by the child and some other modest exposure to information. Although her evaluation has not taken place in a vacuum it is very much in a low pressure vessel in terms of the material that has been available to her to assist in the evaluation. Ms Coyle's evaluation has been taken with exposure to the full atmosphere of information which bears upon the issue. As Ms Hopkin accepted in submissions, an initial evaluation of a child may very well have to be reassessed the light of further information that becomes available. This is far from a simple case given the history of it. Thus initial impressions almost certainly would have to be reassessed.

Finally, this provides us with the opportunity to note that we await the decision of the Supreme Court in Re D as to (inter alia) whether competence remains the test for decision-making post-16, or whether it is the MCA 2005. The need for that decision becomes increasingly pressing as work progresses on both the LPS Code of Practice and the review of the main MCA Code of Practice, both of which will need to give guidance (endorsed by Parliament) on the approach to take to 16-17 year olds with impaired decision-making ability.

INTERNATIONAL DEVELOPMENTS

Saving the CRPD from itself?

The psychiatrist Paul Appelbaum, writing in *World Psychiatry*, the Official Journal of the World Psychiatric Association,¹ has sparked controversy with his editorial "*Saving the UN Convention on the Rights of Persons with Disabilities – from itself*". He describes the UN Convention on the Rights of Persons with Disabilities (CRPD) the "*problem child of international human rights law*"; the problem being that "*the CRPD is being interpreted by the Committee as precluding any involuntary intervention targeted at people with disabilities*". The examples he gives are striking:

...elderly persons with dementia, no longer able to care for their own needs but unwilling to accept management of their finances, health, or living situations by a guardian, could not be compelled to do so. People intending to end their lives as a result of major depression could not be hospitalized against their will, nor

¹ In an issue which has a useful set of short articles highlighting some of the key issues in this area.

could persons suffering from psychosis who are refusing to eat because their food is poisoned. Someone in the manic stage of bipolar disorder would be free to dissipate his family's savings or wreck her business. In the name of protecting these people from discrimination, they would be free to destroy their own lives and ruin the lives of their loved ones.

Appelbaum lays the blame squarely on the drafting of the CPRD:

In short, blame is due to a drafting process that was captured by some of the most radical elements of the patients' rights movement, which are willing to sacrifice the well-being of persons with disabilities to achieve what they see as their long-term political goals. It falls as well on the many governments around the world that thoughtlessly ratified the CRPD without considering its implications.

Appelbaum's answer to this "problem child" is to "ignore the CPRD, reinterpret it, or amend it". According to Appelbaum, amending the CPRD "may be the most effective long-term solution to the problems that so many governments and comments have identified" but "it will not be an easy process", considering that drafting the CRPD itself took roughly five years. For Appelbaum, "Only amending Article 12 can definitively reverse the extreme interpretation of the Committee and remove the spectre of international condemnation of any country that fails to comply with its approach."

Until such a time comes, Appelbaum suggests that governments and others responsible for the welfare of people rendered vulnerable by their disabilities will – and indeed should – "ignore the

Convention when it would interfere with a commonsense approach to protecting citizens who in one way or another are incapable of protecting themselves".

In response to Appelbaum's editorial, an [open letter](#) has been written to the editors of *World Psychiatry* "from the perspectives of those who have been denied legal capacity, whose will and preferences have been ignored and their "best interests defined by experts." The writers explain:

...we write from the perspectives of those who have been abused by forced psychiatric treatment and are traditionally and purposefully being excluded from spaces such as this journal, where our lives are being debated. Indeed, the CRPD is precisely there to ensure that what we have to say is not silenced and marginalised any longer."

The authors of the open letter take issue with the suggestion that States should openly flout international law and ignore the hard-won rights of persons with disabilities. Far from being the product of a radical movement to sacrifice the well-being of persons with disabilities, the authors describe the Convention as "a milestone achievement in our shared humanity and belief in freedom". It represents a new paradigm which is a "human rights based, non-discrimination and social approach to all disabilities".

The open letter concludes with a call to WPA members who do not agree with the call to amend the CRPD and in the meantime to ignore it, and are willing to "break from the old, controlling paradigm", to speak up.

One thing that is striking, other than the depth of the fault-lines here, is the extent to which – again – the debate in relation to Article 12 is being addressed through the prism (essentially) of the validity of psychiatry as a response to “madness and distress.”² Does this characterisation of the debate fully capture all the interests of those concerned – for instance, does it capture the interests of those with dementia, or those in a prolonged disorder of consciousness after a brain injury?

The right to independent living framework

The European Union Agency for Fundamental Rights (FRA) has published its [human rights indicators](#) to assess compliance with Article 19 of the Convention on the Rights of Persons with Disabilities. Article 19 sets out the right of persons with disabilities to live independently and to be included in the community by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community; and

(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

The EU and its 28 Member States (for the time being) have ratified the CRPD and the indicators in the report aim to assist in monitoring the extent to which EU Member States fulfil their obligations under Article 19. The human rights indicators will be used by the FRA undertaking a project to collect and analyse comparable data on the transition from institutional care to community-based support in the 28 EU Member States.

The objective of the project is to provide evidence-based assistance and expertise to EU institutions and Member States when they take measures or formulate courses of action to fulfil the right of persons with disabilities to live independently and to be included in the community as set out in Article 19. Whilst the UK may not continue to be an EU Member State for much longer, it will continue to be bound by the CRPD, having ratified the Convention in July 2009. The outcome of the FRA project will therefore continue to be of interest and highly relevant to the UK even if/when it is no longer a member of the EU. We will continue to keep our readers updated.

Austria, guardianship and the CRPD

Austria has recently modernised its guardianship system in order to bring it into line (Austria considers) with Article 12 of the UN Convention on the Rights of Disabled Persons.

² See in this regard Mohammed Rashed's fascinating book [Madness and the demand for recognition](#) (OUP, 2019)

The reforms came five years after, and in response to, the UN Disability Committee's 2013 on Austria which described its guardianship system as "old-fashioned and out-of-step with the provisions of article 12 of the Convention". Article 12 provides that persons with disabilities shall have equal recognition before the law. The Committee's experts recommended that Austria "replace substituted decision-making with supported decision-making for persons with disabilities".

The new Austrian law is significant in two ways:

- First, the traditional "best interests" rule for decision-making involving adults with intellectual disabilities is put aside. Decisions must now respect their will and preferences. Only where a decision would put their welfare in "serious and significant danger" can the adult's will and preferences be overridden.
- Second, where a person does not have the capacity to make a formal power of attorney because of an intellectual disability, they can nevertheless make their wishes known by designating a trusted relative or friend to assist and represent them in financial, legal and personal affairs (excluding important financial affairs involving real estate and investments).

The UN Disabilities Committee will soon have the opportunity to examine these new developments in Austria when it reviews Austria's second national report. It will be interesting to see whether the Committee considers that the reforms are now compliant with Article 12 of the CPRD. The greater prominence now being given to the adult's "will and preferences" certainly represents a

significant step towards the supported decision-making approach and principle of equal recognition before the law. The changes in Austria are reminiscent of the Law Commission's recommendation in this jurisdiction that 4(6) MCA 2005 2005 should be amended so that, in making any best interests determination, particular weight must be given to P's past and present wishes and feelings. The opportunity to give effect to this recommendation was not taken up in the Mental Capacity Amendment Bill.

To read more about the reforms in Austria, see this [article](#) by Andre Bzdera.

RESEARCH CORNER

In the first of a regular feature, we highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle.

Research supporting the Mental Health Act Review

Papers are now being published from research conducted to support the Mental Health Act review. So far, these include:

Barnett, Phoebe, et al. "[Compulsory community treatment to reduce readmission to hospital and increase engagement with community care in people with mental illness: a systematic](#)

review and meta-analysis." *The Lancet Psychiatry* 5.12 (2018): 1013-1022.

Bone, Jessica K., et al. "Psychosocial Interventions to Reduce Compulsory Psychiatric Admissions: A Rapid Evidence Synthesis." *EclinicalMedicine* (2019).

Rains, Luke Sheridan, et al. "Variations in patterns of involuntary hospitalisation and in legal frameworks: an international comparative study." *The Lancet Psychiatry* (2019).

Owen, Gareth et al. "Advance decision-making in mental health – Suggestions for legal reform in England and Wales" *International Journal of Law and Psychiatry* 64 (2019): 162-177.

Mental Health and Justice

The challenge to mental capacity on the basis that it is not objective is just one of the issues considered in the article by Matthew Burch and Katherine Furman. "Objectivity in science and law: A shared rescue strategy." *International Journal of Law and Psychiatry* 64 (2019): 60-70 (research supported in part by the Mental Health and Justice project).

When deprivation of liberty is ever justified in the mental health and disability context is addressed in a further MHJ supported paper: Martin, Wayne, and Sándor Gurbai. "Surveying the Geneva impasse: Coercive care and human rights." *International Journal of Law and Psychiatry* 64 (2019): 117-128.

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Conferences

Conferences at which editors/contributors are speaking

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](#).

Local Authorities & Mediation: Two Reports on Mediation in SEND and Court of Protection

Katie Scott is speaking about the soon to be launched Court of Protection mediation scheme at the launch event of 'Local Authorities & Mediation - Mediation in SEND and Court of Protection Reports' on 4 June 2018 at Garden Court Chambers, in central London, on Tuesday, 4 June 2019, from 2.30pm to 5pm, followed by a drinks reception. For more information 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 May. 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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