39 Essex Chambers

MENTAL CAPACITY REPORT:
THE WIDER CONTEXT

December 2019 | Issue 100

Welcome to the December 2019 Mental Capacity Report – our 100th*. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an important guest article from Inclusion London, and reflections from Tor and Alex on 100 issues;

(2) In the Property and Affairs Report: a report of an interview with HHJ Hilder and deputyship refunds;

(3) In the Practice and Procedure Report: the administration of appeals, and important judgments shedding light by analogy on fact-finding, costs and vulnerable witnesses;

(4) In the Wider Context Report: assisted dying, Article 2 obligations and informal patients, and reports of developments in Northern Ireland, Jersey and wider afield;

(5) In the Scotland Report: an important judgment on guardianship and deprivation of liberty, a judicial review of conditions of excessive security and further observations on the operation of 'foreign' powers of attorney in England & Wales from the Scottish perspective.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

Happy holidays, and we will return in February 2020.

* Confession: there was a numbering glitch a long way back which means that this is no.99 in this series, but in our defence no.1 in fact represented the formalisation of informal updates Tor and Alex had been doing for several months.

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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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Short note: secure accommodation and deprivation of liberty

On the heels of the Supreme Court's deprivation of liberty ruling in *Re D (A Child)* [2019] UKSC 42, A Local Authority v B's father et al [2019] EWCA Civ 2025 is an important decision in childcare law. It concerned an application for a secure accommodation order under s.25 of the Children Act 1989 in respect of a 15-year-old girl. The judgment is given in the context of a notable crisis in the provision of secure accommodation in England and Wales, with a significant shortfall in the availability of approved secure accommodation. This is coupled with a growing number of children now viewed as deprived of liberty following the *Re D* decision.

The issues and conclusions were as follows:

1. What is the meaning of "secure accommodation" in s.25? It means "*accommodation designed for, or having as its primary purpose, the restriction of liberty… [and] premises which are not designed as secure accommodation may become secure accommodation because of the use to which they are put in the particular circumstances of the individual case*." (para 59)
2. What are the relevant criteria for making a secure accommodation order under s.25? The criteria are not limited to the conditions in s.25(1) and include whether the proposed placement would safeguard and promote the child's welfare.
3. What part does the evaluation of welfare play in the court's decision? Their welfare is not paramount but is an important element in the criteria (para 72).
4. When considering an application for an order under s.25, is the court obliged, under Articles 5 and 8 of the ECHR, to carry out an evaluation of proportionality? Yes, it is one of the relevant criteria which must be satisfied

before a secure accommodation order is made (paras 88, 93).

Thus, the Court of Appeal concluded that in determining whether the "relevant criteria" under s.25(3) and (4) for a secure accommodation order are satisfied, a court must ask the following questions:

1. Is the child being "looked after" by a local authority, or, alternatively, does he or she fall within one of the other categories specified in regulation 7?

2. Is the accommodation where the local authority proposes to place the child "secure accommodation", i.e. is it designed for or have as its primary purpose the restriction of liberty?

3. Is the court satisfied (a) that (i) the child has a history of absconding and is likely to abscond from any other description of accommodation, and (ii) if he/she absconds, he/she is likely to suffer significant harm or (b) that if kept in any other description of accommodation, he/she is likely to injure himself or other persons?

4. If the local authority is proposing to place the child in a secure children's home in England, has the accommodation been approved by the Secretary of State for use as secure accommodation? If the local authority is proposing to place the child in a children's home in Scotland, is the accommodation provided by a service which has been approved by the Scottish Ministers?

5. Does the proposed order safeguard and promote the child's welfare?

6. Is the order proportionate, i.e. do the benefits of the proposed placement outweigh the infringement of rights?

(In the rare circumstances of the child being aged under 13, Regulation 4 of the 1991 Regulations require that the placement must also be approved by the Secretary of State.)

It was noted that s.25 does not cover all the circumstances in which it may be necessary to deprive a child of their liberty and that a judge exercising the inherent jurisdiction of the court has the power to authorise detention. Thus:

> *101 … Where the local authority cannot apply under s.25 because one or more of the relevant criteria are not satisfied, it may be able to apply for leave to apply for an order depriving the child of liberty under the inherent jurisdiction if there is reasonable cause to believe that the child is likely to suffer significant harm if the order is not granted: s.100(4) Children Act. As I have already noted, the use of the inherent jurisdiction for such a purpose has recently been approved by this court in Re T (A Child) (ALC Intervening) [2018] EWCA Civ 2136. In Re A-F (Children) (Restrictions on Liberty) [2018] EWHC 138 (Fam), Sir James Munby P, in a series of test cases, set out the principles to be applied. It is unnecessary for the purposes of this appeal to revisit those principles in this judgment. Last week, Sir Andrew McFarlane, President of the Family Division, published guidance, focusing in particular on the placement under the inherent jurisdiction of children in unregistered children's homes in England*

> *and unregistered care home services in Wales.*
> *102. Where, however, the local authority applies under s.25 and all the relevant criteria for keeping a child in "secure accommodation" under the section are satisfied, the court is required, by s.25(4), to make an order under that section authorising the child to be kept in such accommodation. To exercise the inherent jurisdiction in such circumstances would cut across the statutory scheme."*

This decision clarifies the relevant criteria for secure accommodation orders and recognises the hinterland of the inherent jurisdiction for authorising detention where those criteria are not met. The relevance of proportionality was very much a key issue in this case, in particular whether proportionality is a part of Article 5 ECHR. It may be worth noting that in *Re D*, to which considerable reference was made by the Court of Appeal, the Supreme Court was considering proportionality in a slightly different context. In that case, the question of proportionality was being looked at primarily through the prism of whether it was acceptable to limit the scope of Article 5 ECHR so as to secure the legitimate aim of upholding the Article 8 rights of parents. In Re D, Lady Arden made clear that the answer was no: "*Article 5 is not a qualified right and there is no scope for holding that the denial of a person's liberty engages Article 5 but does not amount to a violation because it serves a legitimate aim and is proportionate and necessary in a democratic society.*" But as the current case confirms, any court considering whether circumstances that amount to a deprivation of liberty is justified must consider whether that deprivation of liberty is a proportionate response to the circumstances.

Short note: assisted dying before the courts again

On 19 November 2019 the Divisional Court refused permission at an oral renewal hearing for an application for judicial review seeking to challenge the criminalisation of assisted suicide. A written judgment was handed down, presumably because of the importance of the issues: *R (Newby) v Secretary of State for Justice* [2019] EWHC 3118 (Admin).

The Claimant sought a declaration of incompatibility under s.4(2) of the Human Rights Act 1998 that s.2(1) Suicide Act 1961 (which makes it a criminal offence to assist or encourage a person to commit suicide) on the basis of a conflict with Articles 2 and Article 8 ECHR.

As readers will be aware, there have been a number of cases in recent years in which the courts have considered the extent to which s.2(1) Suicide Act 1961 is compatible with human rights legislation: *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; *R (Conway) v Secretary of State for Justice* [2018] and *R (T) v Secretary of State for Justice* [2018] EWHC 2615 (Admin). In short, the Claimant relied on the following:

(a) In *Nicklinson*, a majority of the Supreme Court found that there was no institutional bar on the courts making the declaration of incompatibility sought, but that it was inappropriate to do so at that time because Parliament was giving active consideration to the issue via Lord Falconer's Assisted

Dying Bill (however, such consideration had since stopped without any resulting reform of the law);

(b) *Conway* could be distinguished because in that case the Claimant's prognosis left him with only six months to live, whereas Mr Newby's life expectancy is longer and, because he is not receiving non-invasive ventilation, he cannot request the legal withdrawal of his treatment (unlike Mr Conway);

(c) An application for the court to hear evidence of the "legislative facts", understood as the mixed ethical, moral and social policy issues which have a bearing on a proportionality assessment under Article 8. Such material had not previously been considered by the court and in *Nicklinson* the lack of evidence was one of the reasons given for not making the declaration of incompatibility sought.

The Divisional Court rejected these arguments, and declined to distinguish *Conway* on the basis of the "minor" factual differences identified. More fundamentally, it restated the orthodox view that while the courts cannot shirk the responsibility of considering applications for declarations of incompatibility in difficult cases, in such cases the views of Parliament will weigh heavily in the human rights justification balance. Applying those principles here at:

> *40. In the context of repeated and recent parliamentary debate, where there is an absence of significant change in societal attitude expressed through Parliament, and where the courts lack legitimacy and expertise on moral (as opposed to legal) questions, in our judgment the courts are not the venue for arguments which have failed to convinced Parliament.*

Further, Article 2 was not found to assist the Claimant's case given that, even if it was engaged in the circumstances, the considerations which would need to be taken into account in any balancing exercise are the same as those applicable to Article 8.

Short note: Article 2 obligations and informal patients

In *R(Lee) v HM Assistant Coroner for the City of Sunderland* [2019] EWHC 3227 (Admin), HHJ Mark Raeside QC has held that a Coroner has to consider whether the operational duties that arise under Article 2 ECHR apply to the factual circumstances of a young woman who was an outpatient under the care of an NHS Trust at the point when she took her own life. In so doing, he considered that the Coroner not only needed to consider the question of the degree of control over the woman the Trust might have been exercising, but also her vulnerability and risk. He also recognised that this potentially represented a (significant) extension of the duties imposed by Article 2 ECHR, as most recently discussed in *Fernandes de Olivera v Portugal* [2019] ECHR 106.

Short note: resisting criminal behaviour

In *Humphreys v CPS* [2019] EWHC 2794 (Admin), Stuart-Smith J had to consider when it is appropriate to make a Criminal Behaviour Order in the face of evidence that a person may not be capable of understanding or complying with its terms. A CBO may be made under Section 22 Antisocial Behaviour Crime and Policing Act 2014, where a person is convicted of an offence, and where:

(1) The court is satisfied beyond reasonable doubt that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person;

(2) The court considers that making the order will help in preventing the offender from engaging in such behaviour.

Stuart-Smith J, having considered authorities from related areas, held that:

> *25. [...] when deciding whether making the proposed CBO will help in preventing the offender from engaging in such behaviour, a finding of fact that the offender is incapable of understanding or complying with the terms of the order, so that the only effect of the order will be to criminalise behaviour over which he has no control, will indicate that the order will not be helpful and will not satisfy the second condition.*
>
> *26. The authorities have not expressly considered the question where a person's condition may mean that an order would generally be helpful, but that there might be occasions when, because of his condition, he is incapable of complying with the terms of the order. In my judgment the question in such a case remains: is the second statutory condition satisfied on the facts of the particular case? In other words, on the facts of the particular case, can it be said that making order will help in preventing the offender from engaging in such behaviour, even though it is anticipated that he might engage in it on one of more occasions, because he is at that time incapable of complying with it?*
>
> *27. In principle, the answer to that question will depend upon the precise factual circumstances and prognosis of the case in hand, and no a priori answer can be given. If the conclusion is that making an order would be helpful, despite the complexities of the factual findings, protection for the offender may, in such circumstances, be provided by the opening words of Section 30, which provide that the breaching behaviour will be an offence if it is done 'without reasonable excuse'. In my judgment if a person does or fails to do something in breach of a CBO, because they are incapable of complying, the proper conclusion should be that their incapacity is a reasonable excuse within the meaning of Section 31.*

Northern Ireland Mental Capacity legislation now partially in force

After an abortive attempt in October, Northern Ireland's Mental Capacity Act has come partially into force, on 2 December, to address deprivation of liberty. More details can be found here.

Best interests in Jersey

In *In the matter of B (Medical)* [2019] JRC 158, a decision in August 2019, the Royal Court in Jersey had cause to consider for the first time the provisions of the Capacity and Self-Determination (Jersey) Law 2016 in the medical treatment context. This legislation, bearing a strong resemblance to the MCA 2005, came into force on 1 October 2018.

The case concerned a 29 year old man with substantial cognitive and physical impairments. The question before the court was whether he had capacity to consent to the fitting of a PEG feeding tube, and, if he lacked that capacity,

whether it was in his best interests to do so. The Minister for Health and Social Services, who brought the application, submitted that the procedure was in B's best interests; his parents agreed that he lacked capacity, but submitted that the procedure was not in his best interests.

The Royal Court undertook a review of relevant case-law from England & Wales, indicating it to be "very helpful" (paragraph 18) in the application of the 2016 law. It then undertook a detailed consideration of the evidence before it relating to B's capacity and best interests, concluding that there:

> *in this case there is one feature which is of "magnetic importance" in influencing or determining the outcome. This was the expression adopted by Thorpe LJ, where he contrasted peripheral factors in the case from the central factor or factors. The central or magnetic feature is that the overall risk, while it is there and exists, is small compared with both the risks of continuing indefinitely with the NG tube and the substantial gain to be achieved if the procedure is successful as the medical authorities predict, a gain which will be reflected in a marked improvement in the First Respondent's quality of life. Accordingly, we make the determination requested by the Minister that the insertion of a PEG is in the best interests of the First Respondent.*

The judgment is also of no little interest for the fact that the Royal Court felt it necessary to highlight its criticisms of the process adopted by the Minister, noting that:

> 52. […] *the medical authorities did not follow closely the guidance which the 2016 Law sets out, nor did they have regard to the guidance which is to be found in English case law on similar statutory provisions. Indeed, Dr Gibson* [in charge of B's care for the previous 5 years] *had not read the 2016 Law. The impression we are left with is that the professionals made a best interests decision on objectively rational best interests grounds, without having sufficient regard to the wishes of the patient. They knew best what was good for him - so they might, but that is not what the 2016 Law requires. An important part of ascertaining the patient's wishes was to identify the views of the parents. Unfortunately, we are left with the impression that there was a tick-box approach to obtaining the parents' views, perhaps in the knowledge that the parents would be unlikely to acquiesce in what was proposed. We understand that possibly the mother had expressed her reservations about a PEG process during the closing months of 2018, and indeed there was some difficulty from time to time between her and the medical staff in the hospital when she expressed her views, perhaps rather forcefully, in relation to the treatment which her son was getting. It seems to us that it would have been better if the parents had been invited to the best interests decision meeting. It would have enabled the medical authorities to express carefully the reasons for their recommendations, and it would have enabled the parents to have expressed carefully their objections including both the medical and emotional points which they wished to raise. It would seem from the paperwork that for all practical purposes the best interests decision had been taken several weeks before, and it was then simply a question of completing the paperwork.*

> *53. In making these criticisms, we do wish to make it clear that we are not advancing any professional criticism in terms of the rationality of the decision or indeed of the advice and care for the patient which lay beneath it. Indeed, if we had any such concerns, we would not have authorised the procedure in question. The issue is more one of internal hospital administration and process so that it is consistent with the letter and the spirit of the legislation which requires the views of the patient to be identified where possible, which almost certainly will involve identifying and respecting the views of the immediate family. Proceeding in that way does not necessarily mean that the best interests decision will reach a different conclusion, but it should mean first of all that the family is better placed to understand what is being proposed and secondly that at least in some cases the medically based best decision will not in fact turn out to be the best decision in the interests of the patient in accordance with the 2016 Law. This is very difficult territory, but we earnestly recommend that the hospital authorities give some further thought to these comments for use in the future.*

Whilst these comments are, on one view, Jersey-specific, it would be remiss not to ask whether they may not equally be applicable in many situations in England & Wales, some 12 years after the MCA 2005 came into force.

The 4th Asian International Congress on Adult Guardianship

Having ceased practising three years ago frees me up to accept invitations to participate in events overseas. At the 5th World Congress on Adult Guardianship in Seoul, Korea, in October 2018, I was approached by Professor Li Xia of the East China University of Political Science and Law, well known to me as the most prominent representative of the People's Republic of China at previous international events. She was responsible for organising the 4th Asian International Congress on Adult Guardianship ("ACAG 2019") in Shanghai on 28th – 30th November 2019. She invited me to attend and contribute. I did so.

ACAG 2019 was combined with the 3rd Chinese Seminar on Guardianship Law, and adopted the title theme "From Guardianship to Supported Decision-making: Inclusive Asia". Unusually but in my view helpfully, all sessions were conducted in plenary session, averting the need to make difficult choices among parallel breakout sessions. After an initial introductory session, Session 1 was entitled "Legal capacity of persons with disabilities in CRPD 12"; Session 2 addressed "Supported decision-making: exploration, experience and challenges"; Session 3 was on "The role of courts and social organisations in adult guardianship and supported decision-making"; Session 4(1) on "Enabling citizens to plan for future incapacity"; and Session 4(2) on "Other issues". Professor Li Xia herself then spoke at the closing session. The main participating nations, which also provided most of the speakers, were China, Japan, Singapore and South Korea. Speakers from beyond those countries were Daniel Rosch from Switzerland, and Professor David English and Tina Minkowitz from the United States, who all spoke in Session 2. I made a short contribution to the opening session; then spoke in Session 1 on "What Article 12 of the Disability Convention actually requires is support for the

exercise of legal capacity", drawing in particular on all that I learned when participating in the Essex Autonomy Three Jurisdictions Project; and in Session 4(1), in which my own title deliberately dropped the word "future" which appeared in the session title, so that I spoke on "Enabling citizens to plan for incapacity: the European experience and developments", obviously drawing on my work for Council of Europe reviewing implementation of the Council's Ministerial Recommendation (2009)11 on principles concerning powers of attorney and advance directives for incapacity, and subsequent developments – though I did manage to conclude by "pushing" the need for more countries to ratify Hague Convention 35 on the International Protection of Adults.

Unsurprisingly, I was "captured" for many other involvements, most of them relatively informal, though they included a half-day lecture session at Shanghai University of Political Science and Law, hosted by Professor Wang Kang of that university.

Some current trends in the People's Republic of China were of particular general interest. The foregoing account demonstrates the considerable interest in achieving compliance with UN CRPD and in developing supported decision-making. A second main area of development, about which I learned only when I was in China, was that China has independently developed a concept equating to enduring powers of attorney, falling within the definition of "continuing powers of attorney" in Recommendation (2009)11, but the significance of which is somewhat masked by the adoption of the English-language descriptions of "independent guardianship" or "self-determined guardianship" (the latter being in my view more appropriate). Put simply, this is an arrangement under which, in anticipation of impairment (or further impairment) of their capabilities, people can enter a contract with a prospective guardian to become guardian in the event that guardianship is required.

A third area of innovation, also about which I learned only when in China, is the development of use of trusts for provision, including family provision, in cases of impairment of relevant capabilities. My presentation in Session 4(1) of ACAG 2019 was immediately followed by Dr Yuanlong Li on "Exploration of the guardianship trust service development in China". This led to follow-up discussions with representatives of Citic Trust Co, Limited (a state-owned enterprise) which took me back to the days when Gordon Ashton and I developed various styles of trust deed and associated documentation, which were published in our book "Mental Handicap and the Law" (Sweet & Maxwell, 1992). My secretary emailed to me in China some styles of document as developed into my final years in practice. In follow-up discussions they were received and discussed, clause by clause, with considerable interest.

Finally, at least at the academic level, China is assessing the possibility of ratifying Hague Convention 35 on the International Protection of Adults. Quinyu Liu, a doctoral student of Private International Law at East China University of Political Science and Law, spoke in Session 4(2) on "Research on law application of foreign-related voluntary guardianship". As the title indicates, this also picked up on the development of what amount to continuing powers of attorney, and had already drawn this

researcher into the difficulties, well known in Europe, posed by the status of powers of representation under Hague 35. Interestingly, her work so far appears to have focused mainly on the "internal relationship" (as it is termed particularly in Germanic nations) between granter (donor) and attorney (donee), and the consequences of that relationship straddling borders, rather than – yet – the "external relationship" with third parties.

Adrian D Ward

RESEARCH CORNER

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.

We highlight this month a recent article published in the International Journal of Law and Psychiatry by Janet Weston, "*Managing mental incapacity in the 20th century: A history of the Court of Protection of England & Wales*"" provides an interesting and comprehensive overview of the courts have historically dealt with making financial and welfare decisions on behalf of those deemed incapable of doing so themselves. Starting with the laws of 'lunacy' in the early 1880s (a term which was later prohibited from any statutory enactment by the Medical Treatment Act 1930), the article traces the development of the Court of Protection through to the modern day under the Mental Capacity Act 2005. The article provides an insightful read for those wishing to better understand the background and origins of today's mental capacity jurisdiction.

The MCA: values, practice and policy

For those wanting something to watch, rather than read, relating to capacity, Alex recently recorded an interview with Co-Produce Care about mental capacity and the MCA 2005, available on Youtube here.

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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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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. 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 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). 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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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. 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; honorary membership of the Law Society of 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

Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the Mental Health & Justice project on 15 May 2020, in London. For more details, and to book, see here.

Other conferences of interest

Safeguarding and the Care Act 2014 - Self-neglect

Continuing the SALLY (safeguarding and legal literacy) series, this day-long seminar at Keele University on 31 January focuses on self-neglect. For more details, and to book a free ticket, 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 February 2020. 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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