



Welcome to the June 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: standing in the shoes of P in a difficult decision as to cancer treatment, s.21A and the LAA, Welsh DoLS and Sir James Munby P on the warpath;

(2) In the Property and Affairs Report: Charles J puts statutory wills under the spotlight and new OPG guidance on travel costs;

(2) In the Practice and Procedure Report: the minutes of the Court of Protection Court Use Group;

(3) In the Wider Context Report: an election corner special report, new resources for GPs and about ADRTs, psychiatric treatment under scrutiny from Europe and moves to secure greater cross-border protection for adults;

(4) In the Scotland Report: important perspectives on supported decision-making, independent living and legislative reform;

Remember, you can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

You are also invited to our 10<sup>th</sup> birthday party for the MCA 2005 to be held on 29 June, with the keynote speech to be delivered by Baker J and a packed programme of talks and masterclasses concerned with key aspects of the Court of Protection's work and future. For details, and to book, see [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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### Election Corner

Social welfare issues have received more attention than might have been anticipated in the run up to the general election. There has been much heated debate in the media with headline grabbing stories about Theresa May’s “dementia tax” U-turn. Here we consider what the three main parties in England are promising in their manifestos that may be of interest to our readers and the implications after the next election.

In their last manifesto in 2015, the Conservative Party pledged to “cap charges for residential social care from April 2016... so no one has to sell their home”. Their commitment was to limit an individual’s lifetime liability for care costs to £72,000. It followed a report from the Dilnot Commission in 2011 which recommended a cap on care costs at £35,000. In July 2015, just two months after the general election, the Conservative government announced that the cap on care costs would be delayed until April 2020. The Conservative Party manifesto, published on 18 May 2017, conspicuously made no mention of the cap on care costs. Instead, it proposed three main changes to our system of care for the elderly:

- Means-testing for domiciliary care would include the value of the family home;

- Raising the means test threshold from £23,250 to £100,000;
- Extending deferred payments for residential care to those receiving care at home.

The Health Secretary, Jeremy Hunt, appeared to confirm on the BBC Radio 4 Today programme that the Conservative Party was indeed dropping the proposed cap on care costs. However, after days of speculation and outrage over this so-called “dementia tax”, Theresa May announced on 22 May that there would be an “absolute limit” on the amount that people would have to pay for their care. However, she did not confirm any figures but said that this would be the subject of consultation in a Green Paper after the election.

It is welcome news that the Conservative Party remains committed to introducing a cap on care costs, as well as raising the asset threshold in the means test, which were both central recommendations of the Dilnot Commission in 2011. However, the lack of detail regarding the level of the cap and when it will come into effect is unnerving. Indeed, the promise of a Green Paper after the election may suggest that earlier policies are being reconsidered.

Both the Labour Party and the Liberal Democrat Party have expressly committed to implementing the lifetime cap on care costs in their manifestos. The

Labour Party also intends to increase the asset threshold in the means test but no precise figures are given. However, the Labour Party has pledged to increase social care budgets in the short term (by £8 billion over the lifetime of the next Parliament) and to build a National Care Service alongside the NHS in the long term with joint working arrangements. Better integration between health and social care services has been an aspiration for successive governments but it remains a challenge to envisage the two systems operating symbiotically without more fundamental reforms especially to address practical problems arising from the funding crisis.

All three manifestos are varyingly vague about how the fundamental problem of funding and resources for health and social care in this country is going to be resolved. In relation to mental health, the Conservative Party manifesto commits to recruiting up to 10,000 more mental health professionals. It is not at all clear where these mental health professionals will be drawn from especially with the impact that Brexit might have on the health and social care workforce. The Conservative Party has also pledged to reform the Mental Health Act 1983 but precisely how remains unclear:

*The current Mental Health Act does not operate as it should: if you are put on a community treatment order it is very difficult to be discharged; sectioning is too often used to detain rather than treat; families' information about their loved ones is severely curtailed – parents can be the last to learn that their son or daughter has been sectioned. So we will introduce the first new Mental Health Bill for thirty-five years, putting parity of esteem at the heart of treatment.*

Community Treatment Orders (CTOs) were of course introduced by the Mental Health Act 2007 with the aim of reducing readmission to in-patient hospital care. Although parity of esteem is a laudable aim, it is not at all clear how we would get there under the new Mental Health Bill which would appear to include reform to CTOs, sectioning and the provision

of information, but provides little very little detail on complex issues of balancing patients' rights to autonomy and risks of harm.

The Labour Party has committed to ring-fencing mental health budgets and ensuring that funding reaches the frontline. The manifesto focuses particularly on the interests of children and young people by promising that children will no longer be treated on adult wards and ending out-of-area placements by 2019. There would also be access to a counselling service for all children in secondary school. There can be little doubt that achieving these aims within existing mental health budgets will be challenging and may have to come at the expense of funding for other much needed services.

The Liberal Democrat Party has committed to providing an extra £1 billion funding for mental health services which would be drawn from their 1p rise on income tax rates. The extra investment would be used to fund increase access to talking therapies, reform perinatal mental health, explore introducing a dedicated service for children and young people, roll out access and waiting time standards, and end out-of-area placements. In the long term, the Lib Dem Party would introduce a dedicated health and care tax (possibly based on reform of National Insurance) which would bring together spending in both service streams.

There are commendable proposals in all three manifestos but the biggest challenge, as ever, appears to be ensuring adequate funding to sustain these well-intentioned policies. The Labour Party, which (when in Government) signed the UN Convention on the Rights of Persons with Disabilities (CRPD), is the only one of the three mainstream parties that has committed to incorporating the CRPD into UK domestic law. Not only would such a proposal entail a large spending commitment, it would also have significant implications on substantive areas of law including aspects of the Mental Capacity Act 2005. Those interested in reading more about the substantive aspects of the MCA and CRPD may want to read this [discussion paper](#): as well as the [reports](#) of

the Essex Autonomy Project to which Alex has contributed. We recall also that the report of the UN Committee on the Rights of Persons with Disabilities in 2016 found that there had been “grave or systemic” violations of the CPRD in the UK (the report, and the follow-up, can usefully be accessed [here](#)).

### Royal College of GP Safeguarding Adults E-Learning

The RCGP has just published a very useful e-learning package on safeguarding (including MCA aspects). It is available free (on registration) [here](#).

### Advance Decisions pack published

Compassion in Dying<sup>1</sup> has launched a new free Advance Decision pack, including an Advance Decision form, supporting guidance notes, and a Notice of Advance Decision card for people to carry with them.

The new Advance Decision form was designed in collaboration with service users, clinicians and lawyers to ensure it is straightforward, concise, and clear to follow. The accompanying guidance notes explain how to complete the form and offer further information about capacity, life-sustaining treatment, and Lasting Powers of Attorney for Health and Welfare.

Importantly, the form can be personalised for each patient. By taking them through different scenarios in which they may lose capacity, such as dementia and brain injury, people are prompted to consider what treatment they would want in these situations. There is also space to include things that are important to them in relation to their health, care, and quality of life.

Once completed they will have a personalised Advance Decision to sign, witness and share with their loved ones, GP and anyone else involved with their care.

For a free pack visit [here](#), or contact or contact Compassion in Dying on 0800 999 2434 or [info@compassionindying.org.uk](mailto:info@compassionindying.org.uk)

### Update about assisted dying challenge

The challenge to the ban on assisted dying contained in s.2(1) Suicide Act 1961 being brought by Noel Conway is now proceeding to a substantive hearing listed for 5 days starting on 17 July 2017.

### European Committee for the Prevention of Torture UK report published

The Council of Europe CPT’s report following their inspection visit to the UK in 2016 has now been [published](#). Of particular interest are the Committee’s observations on psychiatric detention and treatment, including, in particular the recommendations:

1. that the relevant legislation should be amended so as to require an immediate external psychiatric opinion in any case where a patient (from context, with capacity) does not agree with the treatment proposed by the establishment’s doctors, and, importantly, that patients should be able to appeal against a compulsory treatment decision to the Mental Health Tribunal, being informed of this right in writing. The Committee expressly relied in making this recommendation (at para 175) on *X v Finland* [2012] ECHR 1371, a decision whose implications it is increasingly hard to ignore;
2. that the relevant legal provisions be amended and that in the meantime, the Mental Health Tribunal institute a practice of yearly reviews for all patients placed involuntarily in hospital, and further that patients transferred from either prison or from a less secure hospital should automatically trigger a review by the Mental Health Tribunal of the transfer measure.

### Cross-border protection of vulnerable adults: the EU en marche?

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<sup>1</sup> Full disclosure, Tor is Chair of the charity.

The European Parliament approved on 1 June a resolution urging wider EU-wide adoption of the 2000 Hague Convention on the International Protection of Adults and asking the European Commission to draft a regulation for mutual automatic recognition and enforcement of decisions by member states on the protection of vulnerable adults and mandates in anticipation of incapacity. The resolution calls upon the Commission to submit a draft regulation by 31 March 2018.

The principles and aims of the proposal merit reproduction in full as they provide a useful outline of what the European Parliament has in mind. The intention is to:

1. Foster the provision of information about the administrative and judicial decisions concerning vulnerable adults who are the subject of protection measures as defined by the Hague Convention of 13 January 2000 on the international protection of adults, and facilitate the circulation, recognition and enforcement of such decisions.
2. Set up national files concerning or registers of, on the one hand, administrative and judicial decisions setting out protection measures in respect of vulnerable adults and, on the other hand, the relevant mandates in anticipation of incapacity, where such mandates exist, in order to guarantee legal certainty and facilitate the circulation of, and prompt access by the competent authorities and judges to, information concerning the legal situation of persons who are the subject of a protection measure.
3. Implement specific and appropriate measures to foster cooperation among the Member States, drawing on the instruments available under the Hague Convention, including the designation of central authorities responsible for facilitating communication among the competent Member State authorities and coordinating the forwarding and exchange of information concerning the administrative and judicial decisions in respect of adults who are the subject of protection measures.
4. Ensure that the sharing between Member States of information concerning the protection status of vulnerable adults, and the access to files and registers containing details of protection measures and mandates in anticipation of incapacity, is organised in a manner which is entirely consistent with the principle of confidentiality and the rules on the protection of the personal data of the adults concerned.
5. Introduce single Union forms designed to foster the provision of information about administrative and judicial decisions in respect of vulnerable adults and the circulation, recognition and enforcement of decisions concerning them. The Commission could draw on the model forms recommended by the Special Commission of a Diplomatic Character of the Hague Conference on Private International Law and included in the proceedings of the session of September-October 1999 on the protection of adults.
6. Grant any person who is given responsibility for protecting the person or the property of a vulnerable adult the right to obtain within a reasonable period a certificate, which would be valid in all the Member States, specifying his or her status and the powers which have been conferred on him or her.
7. Foster the automatic recognition in the Member States of protection measures taken by the authorities of a Member State, without prejudice to the introduction, as an exception and in keeping with Articles 3 and 21 of the Charter of Fundamental Rights of the European Union, of legal safeguards to protect public order in the Member States requested to recognise such protection measures, which may justify the non-recognition and non-enforcement of such protection measures by those Member States.

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8. Foster the enforcement in the Member States of protection measures taken by the authorities of a Member State, without a declaration establishing the enforceability of such measures being required.
  9. Foster consultation and coordination among the Member States in cases in which the enforcement of a decision proposed by the authorities of a Member State could have logistical and financial implications for another Member State, so that the Member States concerned can reach agreement on the sharing of the costs associated with the protection measure. The consultation and coordination should always be conducted in a manner consistent with the interests of the vulnerable adult concerned and in full respect of his or her fundamental rights. The authorities concerned could submit proposals for alternative measures to the competent administrative or judicial authority, on the understanding that the final decision would rest with the authority in question.
  10. Introduce single mandate-in-anticipation-of-incapacity forms in order to facilitate the use of such mandates by the persons concerned, the well-informed consent for which should be verified by the relevant authorities, and ensure that such mandates can circulate, and be recognised and enforced.

### My Life Films

After several years requesting that those who wish to promote their conferences or training events donate to Mind, it is time for a change. We will now be requesting that donations are made to the My Life Films charity, which creates – free – films for those with dementia capturing and celebrating their lives. For more about this innovative charity and the excellent work that they do, see [here](#). Of course, you should also keep donating to Mind...!

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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 Trust 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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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 2009), 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 appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click [here](#).



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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. 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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## Conferences

### Conferences at which editors/contributors are speaking

#### **Essex Autonomy Project Summer School**

Alex is speaking at the Essex Autonomy Project Summer School in July, which this year has the theme *Objectivity, Risk and Powerlessness in Care Practices*. The multi-disciplinary programme will give delegates the opportunity to discuss the challenges of delivering care in a framework that supports and empowers individuals. For full details, and to apply online, please see the [Summer School website](#).

#### **Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report**

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. 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.

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Our next Report will be out in early July. 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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