



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

(1) In the Health, Welfare and Deprivation of Liberty Report: serious medical treatment cases and the involvement of the CoP, family members and Rule 3A and DoLS before the European Court of Human Rights;

(2) In the Property and Affairs Report: financial abuse at home and tools to combat financial scamming;

(2) In the Practice and Procedure Report: a transparency update, a guest article on welfare cases in practice before the CoP and a problematic case on capacity thresholds and the inherent jurisdiction;

(3) In the Wider Context Report: the LGO and the MCA 2005, an update on the assisted dying challenge, the Mental Health Act review and guidance for enabling serious ill people to travel;

(4) In the Scotland Report: the Scottish Public Guardian on powers of attorney problems and a sideways judicial look at the meaning of support.

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](#).

We also take this opportunity to welcome Katie Scott to the editorial team!

Editors

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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.

Contents

The LGO and the MCA 2005	2
Assisted dying challenge update	2
Mental Health Act Review	4
Vulnerability and mental health guide launched for energy sector	5
Supporting seriously ill people to travel abroad	5
End of life care	6

The LGO and the MCA 2005

The Local Government Ombudsman has published a [thematic report](#), *"The Right to Decide: Towards a greater understanding of mental capacity and deprivation of liberty,"* which looks at the common issues from investigations where a council or care provider is involved with a person who lacks mental capacity. In 2016/17, the LGO investigated 1,212 adult social care complaints. Up to 20% of these complaints concerned mental capacity or DoLS. Following investigation, the LGO upheld 69% of these cases which was much higher than the average rate of 53% across all investigations. Supported by real life examples, the common issues highlighted include:

- Failure to carry out decision-specific assessments to ascertain whether someone has capacity to make the relevant decision;
- Unnecessary delays in carrying out capacity assessments;

- Poor decision-making when deciding on someone's best interests;
- Not appropriately involving family and friends in the process;
- Significant delays in obtaining DoLS authorisations.

Assisted dying challenge update

R (Conway) v SSJ [2017] EWHC 2447 (Admin)
(Divisional Court (Sales LJ, Whipple and Garnham JJ))

Other proceedings – judicial review

Summary¹

Mr Conway is 67. He suffers from a form of Motor Neurone Disease and has been given a prognosis of 6 months or less to live. When the time came, Mr Conway wanted to be able to seek assistance from a medical professional to prescribe medication which he could self-ingest to end his life. He argued that the prohibition on providing assistance for suicide should not apply where *'the individual is aged 18 or above; has been*

¹ Alex and Annabel being instructed by Mr Conway, they have not contributed to this report.

diagnosed with a terminal illness and given a clinically assessed prognosis of six months or less to live; has the mental capacity to decide whether to receive assistance or to die; has made a voluntary, clear, settled and informed decision to receive assistance to die; and retains the ability to undertake the final acts required to bring about his death having been provided with such assistance.: the individual makes a written request for assistance to commit suicide, which is witnessed; his treating doctor has consulted with an independent doctor who confirms that the substantive criteria are met, having examined the patient; assistance to commit suicide is provided with due medical care; and the assistance is reported to an appropriate body. permission for provision of assistance should be authorised by a High Court judge, who should analyse the evidence and decide whether the substantive criteria are met in that individual's case.'

Having got permission to bring judicial review proceedings from the Court of Appeal, Mr Conway's claim was heard by the Divisional Court in July 2017 and judgment handed down on 5 October 2017. The three judges (Lord Justice Sales, Mrs Justice Whipple and Mr Justice Garnham) all contributed to the judgment which rejected Mr Conway's application for a declaration that s.2 Suicide Act 1961 as amended by the Coroners and Justice Act 2009 ("section 2") (which prohibits as a matter of criminal law the provision of assistance for a person to commit suicide) is incompatible with his article 8 rights.

Given that the case of Hass v Switzerland (2011) 53 EHRR 33 establishes that article 8 encompasses "... the right of an individual to decide how and when to end his life, provided the

said individual is in a position to make up his own mind in that respect and to take the appropriate action.....", it was common ground that section 2 represents an interference with Mr Conway's article 8 rights.

The ambit of dispute was whether the interference was justified pursuant to article 8(2). It was accepted by Mr Conway that the ECtHR would follow their decision in *Nicklinson v UK* (2015) 61 EHRR SE7 and find that section 2 did not violate article 8, accordingly Mr Conway's claim was not for a declaration of incompatibility with Convention rights as contained in the ECHR itself, to indicate that the United Kingdom is in breach of its obligations under that Convention as a matter of international law, but for a declaration of incompatibility with the Convention rights as set out as distinct provisions in domestic law under the HRA.

The court received a wealth of written evidence from a wide range of medical experts, medical associations, charities, interest groups and legal experts (setting out the position in comparative jurisdictions) as well as examining through documentary evidence Parliament's engagement with the issue.

The court defined the questions it needed to answer as "(a) *is the legislative objective sufficiently important to justify limiting a fundamental right?*; (b) *are the measures which have been designed to meet it rationally connected to it?*; (c) *are they no more than are necessary to accomplish it?*; and (d) *do they strike a fair balance between the rights of the individual and the interests of the community?*"

The court found against Mr Conway in respect of all of these questions. With respect to question

(a) the court held that the legitimate aims of section 2 were to protect the weak and the vulnerable, to protect the sanctity of life, and to promote trust and confidence between doctor and patient, which encourages patients to seek and then act upon medical advice. When considering question (b) the Court held that there was a rational connection between section 2 and all the identified legitimate aims.

When considering the question of necessity, the court gave great weight to the fact that parliament had considered it necessary to maintain section 2, and that there were therefore powerful constitutional reasons for the court to respect that assessment. As to the fair balance question, the court held that the arguments were similar to those deployed under the necessity question. Interestingly the Court also held that the fact that Mr Conway is expected to die soon together with the evidence about the palliative care available to him meant that his interests are less badly affected by the interference with his Article 8 rights arising from section 2 than was the case in relation to Mr Nicklinson, Mr Lamb and Martin in the *Nicklinson* decision (who you may recall, were expected to live for many years in a state that they found intolerable).

Comment

Of particular interest to those of in the mental capacity field is the discussion from paragraphs 98 – 105 of the judgment in which their Lordships were considering the question as to whether section 2 could be said to be necessary to protect the weak and the vulnerable where Mr Conway's proposal was that there would, in particular, be the involvement of the High Court to review any application for permission to provide assistance to a person wishing to

commit suicide so as to ensure that he or she was free of any pressure and had full capacity to make the decision to die.

The court said this:

Persons with serious debilitating terminal illnesses may be prone to feelings of despair and low self-esteem and consider themselves a burden to others, which make them wish for death. They may be isolated and lonely, particularly if they are old, and that may reinforce such feelings and undermine their resilience. All this may be true while they retain full legal capacity and are not subjected to improper pressure by others.

While the judgment doubts that the High Court on an application for permission for assistance to commit suicide would be able to pick up issues of improper external pressure (which could be subtle), the court does appear to be stating that it nevertheless remains necessary to protect the weak and vulnerable via section 2 from their own capacious and freely arrived at determination to die. This rather paternalistic view is at odds with the way the Court of Protection strives to protect the rights of those (often weak and vulnerable) to make unwise decisions, if they have the capacity to do so.

Mental Health Act Review

On 4 October, the Prime Minister Theresa May announced plans for an independent review of mental health legislation and practice “to tackle the issue of mental health detention”. The review will be chaired by Professor Sir Simon Wessely, a former President of the Royal College of Psychiatrists.

The terms of reference include by way of background governmental concern:

- rising rates of detention under the Act
- the disproportionate number of people from black and minority ethnicities detained under the Act
- stakeholder concerns that some processes relating to the act are out of step with a modern mental health system

Identified concerns include, but are not limited to, the following:

- the balance of safeguards available to patients, such as tribunals, second opinions, and requirements for consent
- the ability of the detained person to determine which family or carers have a say in their care, and of families to find appropriate information about their loved one
- that detention may in some cases be used to detain rather than treat
- questions about the effectiveness of community treatment orders, and the difficulties in getting discharged
- the time required to take decisions and arrange transfers for patients subject to criminal proceedings

Three features of the terms of reference are particularly striking:

- The review is very firmly directed to consider practice in the first instance, rather than the structure of the Act;

- There is a (welcome) emphasis on co-production with stakeholders;
- There is no suggestion in the terms of reference (or indeed anywhere else in the surrounding 'chat' coming from the government) of (1) fusion of the MHA 1983 with the MCA 2005 or (2) abolishing the MHA 1983 altogether to meet the demands of the Committee on the Rights of the Persons with Disabilities.

An interim report is expected to be produced in early 2018 and a final report with detailed recommendations by autumn 2018. We will keep our readers posted.

Vulnerability and mental health guide launched for energy sector

A new guide to help energy suppliers identify and support consumers in vulnerable circumstances has been launched by the Money Advice Trust and trade body Energy UK. In addition to covering a range of vulnerable situations, it also includes specific guidance on helping consumers with mental health problems or impaired mental capacity.

Supporting seriously ill people to travel abroad

The national hospice and palliative care charity Hospice UK launched new updated guidance for supporting seriously ill people to travel abroad: *Flying Home: Helping patients to arrange international travel*.

The guidance was initially written to help with arrangements for those who were in a palliative stage of illness and were making a 'final journey', but the updated version also considers the

issues that arise for someone who is seriously ill and wishes to take a holiday (perhaps to tick off a goal on a bucket list). It is aimed at health professionals as *'the practical anxieties of health professionals can act as barriers to people flying at the end of life, which can cause significant delays.'*

The guidance addresses what it identifies as the three key questions:

- Is the patient fit to travel safely on a commercial airline or will a repatriation service be required?
- What special arrangements need to be made for the flight?
- Are the necessary funds, equipment and support available?

It is an extremely detailed look at all the steps that need to be taken both prior to and during the flight, to make such journeys possible. It also covers the steps that need to be taken to ensure that the patient will receive appropriate medical care in the destination country as well as a summary of the possible costs that could be incurred.

In addition to its utility in relation to planning in relation to seriously ill individuals, it is also vital reading for those practitioners seeking approval from the Court of Protection of any plan that involves international travel, whether that is in order to re-patriate someone who has been removed from the jurisdiction or in order to allow someone to go abroad to fulfil a long term ambition.

End of life care

In July 2016, in response to an independent review on choice in end of life care, the

Government made 6 commitments to the public to end variation in the end of life care across the health system by 2020. These were to support people approaching the end of their lives to:

- Have honest discussions with care professionals about their needs and preferences;
- Make informed choices about their care;
- Develop and document a personalised care plan;
- Discuss their personalised care plans with care professionals;
- Involve their family, carers and those important to them in all aspects of their care as much as they want;
- Know who to contact for help and advice at any time.

One year on, the Government has now published a report setting out the progress that has made towards implementing the 6 commitments. Whilst it is clear that there is still much more work to do, the key steps that have been taken so far are:

- Supporting the roll-out of digital palliative and end of life care records to all areas by 2020;
- Inspecting and rating NHS hospital and community services for end of life care;
- Providing support to Trusts to help them improve end of life care services;
- Testing personal health budgets for people approaching the end of life to given them choice and control over their care;

- Developing metrics to assess quality and experience in end of life care;
- Working to change the nursing and medical undergraduate and postgraduate curricula to improve patient and quality of care.

The National End of Care Programme Board remains responsible for overseeing the delivery of the Government's commitments by 2020 and papers from every meeting of the Programme Board are published on the Ambitions Partnership's Knowledge Hub.

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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 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 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. She sits on the London Committee of the Court of Protection Practitioners Association. 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

Adults with Incapacity: the Future is Now

Adrian is speaking at this half-day LSA conference on 18 October in Glasgow. For more details, and to book, see [here](#).

'Taking Stock'

Neil is chairing and speaking at the 2017 Annual 'Taking Stock' Conference in Manchester on 19 October. For more details, and to book, see [here](#).

International Congress on Vulnerabilities, Law and Rights

Adrian is speaking on 7 November 2017 at the International Congress on Vulnerabilities, Law and Rights, in Coimbra, Portugal, organised by Coimbra University. For more details, see [here](#).

Deprivation of Liberty in the Community

Alex is delivering a day's training in London on 1 December for Edge Training on judicial authorisation of deprivation of liberty. For more details, and to book see [here](#).

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

Alex is chairing and speaking at this conference in London on 8 December 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.

Our next Report will be out in November. 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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