

Capacity outside the COP

Introduction

Welcome to the September 2015 Newsletters: Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: an update on the *Re X* saga, clarification over DoLS and conditional discharges, scrutiny of DoLS scrutinisers, an important decision on withdrawal of treatment, and a guest article by Dr Gareth Owen on capacity and brain injury;
- (2) In the Property and Affairs Newsletter: an important decisions on P's use of funds for school fees in the context of mutual dependency, successive deputies, adverse costs orders and interest free loans, bad LPA behaviour, and family members as deputies;
- (3) In the Practice and Procedure Newsletter: clarification over the (lack of) funding of s49 court reports, the importance of participation in proceedings, and habitual residence;
- (4) In the Capacity outside the COP Newsletter: CRPD Committee's guidelines on article 14, assisted suicide, and litigation capacity in other proceedings;
- (5) In the Scotland Newsletter: questionable policies and article 8 ECHR, the Education (Scotland) Bill, new guidance and ordinary residence, and new DOL guidance.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#).

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For all our mental capacity resources, click [here](#). Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk.

Article 14 CRPD

The Committee on the Rights of Persons with Disabilities has published [guidelines](#) on Article 14 of the CRPD. It makes fascinating reading and presents State parties with a real challenge. Explaining to the Committee why the United Kingdom has authorised the detention of hundreds of thousands of disabled people in their best interests is going to be an interesting conversation. Amongst the highlights include:

“6 ... article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or to others. This practice is incompatible with article 14 as interpreted by the jurisprudence of the CRPD committee. It is discriminatory in nature and amounts to arbitrary deprivation of liberty.

7 ... article 14(1)(b) prohibits the deprivation of liberty on the basis of impairment even if additional factors or criteria are also used to justify the deprivation of liberty....

9. Enjoyment of the right to liberty and security of the person is central to the implementation of article 19 on the right to live independently and be included in the community...

10. Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent for

health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments. Involuntary commitment in mental health facilities carries with it the denial of the person’s legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.

...

13. Through all the reviews of State party reports, the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.

14. Persons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and to others when they do not consent to and/or resist medical or therapeutic treatment. Like persons without disabilities, persons with disabilities are not entitled to pose danger to others. Legal systems based on the rule of law have criminal and other laws in place to deal with those matters. Persons with disabilities are frequently denied equal protection under these laws by being derogated to a separate track of law, mental health laws. These laws commonly have a lower standard when it comes to human rights protection, and are incompatible with article 14 of the Convention.

15. *The freedom to make one's own choices established in article 3(a) of the Convention includes the freedom to take risks and make mistakes on an equal basis with others. In its General Comment No. 1, the Committee stated that decisions about medical and psychiatric treatment must be based on a determination of the person's autonomy, will and preferences. Deprivation of liberty on the basis of impairment or health conditions in mental health institutions which deprives persons with disabilities of their legal capacity also amounts to a violation of article 12 of the Convention....*

23. *The Committee has also called for States parties to ensure that persons with disabilities are not denied the right to exercise their legal capacity on the basis of a third party's analysis of their "best interests", and that practices associated with "best interests" determinations should be replaced by the standard of "best interpretation of the will and preferences" of the person."*

Assisted Suicide in Europe

Nicklinson and Lamb v UK ([Applications 2478/15 and 1787/15](#))

The European Court of Human Rights declared that the applications to the court from Mrs Nicklinson and Mr Lamb were inadmissible.

This was the latest stage in a series of cases challenging the UK law on assisting suicide and followed a decision of the Supreme Court in 2014 (see [July 2014](#) newsletter, pg8).

Mrs Nicklinson argued that the UK Courts had failed to determine the compatibility of the law in the UK on assisted suicide with her and her husband's right to respect for private and family life (Article 8).

Mr Lamb argued that his rights under Articles 6, 8, 13 and 14 had been infringed by the failure to provide him with the opportunity to obtain the permission of the Court to allow a volunteer to administer lethal drugs to him, with his consent.

The Nicklinson application was judged inadmissible because the Court held that Article 8 does not impose procedural obligations on domestic courts to examine the merits of a challenge in relation to primary legislation. The margin of appreciation was in play and the UK state had designated to Parliament the role of assessing the merits of the law on assisted dying and Parliament had considered the law several times in recent years. The UK Supreme Court was entitled to give weight to Parliament's views and had addressed the substance of the applicant's claim (see paras 81 – 86).

The Lamb application was judged inadmissible because he had not exhausted all domestic remedies as required before applying to the Court. The argument now advanced (there should be a judicial procedure to authorise voluntary euthanasia in certain circumstances) had not been pursued before the Supreme Court.

Assisted Suicide and GMC guidance

R (on the application of AM) v The General Medical Council [\[2015\] EWHC 2096 \(Admin\)](#)

Judicial review of the General Medical Council (GMC) guidance in relation to doctors assisting suicide brought by a man (named Martin in the anonymised judgment) who suffers from 'locked in' syndrome. Martin had formed a 'long standing, considered and settled wish to end his life'. He wanted to have medical advice about

methods of committing suicide and would have liked to receive a medical report from a doctor to provide to Dignitas in Switzerland if necessary. He accepted that a doctor providing the medical report or giving the relevant advice would be committing the crime of assisting a suicide. He considered that the relevant guidance from the DPP would be likely to mean that the doctor would not be prosecuted but that the General Medical Council (GMC) guidance suggested that a doctor providing Martin with the report and/or advice would risk having disciplinary proceedings taken against him.

The judicial review application argued that the GMC guidance constituted a breach of articles 8 and 10 of the European Convention on Human Rights and that as a matter of domestic law the guidance was *Wednesbury* unreasonable.

The application was dismissed.

Article 8 encompasses the right when and how to die. However, the ECtHR had held that it was not a disproportionate interference with that right to impose a blanket ban on all forms of assistance (see *Pretty v United Kingdom* (2002) 35 EHRR 33) as the UK had done with section 2(1) of the *Suicide Act 1961*.

The GMC guidance (*Guidance for the Investigation Committee and case examiners when considering allegations about a doctor's involvement in encouraging or assisting suicide and when a patient seeks advice or information about assistance to die*) did engage article 8 as it would discourage doctors from giving Martin the advice/report he sought. The critical question was whether it was justified under Article 8.2.

Previous case law confirmed that section 2 of the *Suicide Act 1961* was compatible with article 8. If

a blanket ban on assisted suicide did not infringe article 8, it must follow that any step taken to discourage a doctor from assisting a suicide could not infringe the article. The GMC did not have to adopt the more lenient policy of the DPP in order to be article 8 compliant. It could not possibly be contrary to article 8 for the GMC to take as its starting point the principle that a doctor has a duty to obey the law and to structure its guidance accordingly.

The article 10 argument added nothing in the context of this case to the article 8 argument. The justification for interfering with the right under article 10 was the same as the justification for interfering with the article 8 right and the two arguments stood or fell together.

Elias LJ gave short shrift to the *Wednesbury* head of challenge which was that it was irrational of the GMC not to amend its policy to bring it into line with the DPP. He held that: (i) the duty to formulate guidance was by statute conferred on a specialist professional body which was far better placed than the court to decide how best to protect the interests of the profession; (ii) the argument obliges the GMC to take its lead from the DPP and there was no proper constitutional reason why it should and every reason why it should not; (iii) it could not be wrong for the GMC to adopt the position that doctors obey the law whatever views people may have about the law's merits; (iv) the GMC could not fetter its discretion by giving an assurance that it would not, in certain circumstances, take fitness to practice proceedings against a doctor; (v) it was not the function of guidance to tell doctors when they could break the law without realistic risk of fitness to practise proceedings and the courts could not require the GMC to fashion its guidance in that way; (vi) it was not self-evident that the public interest would be better served by the

adoption of a relatively lax policy towards certain breaches of the law. It was for the GMC to assess what the public interest required.

Bankruptcy and Litigation Capacity

Ellis-Carr v Levy [\[2014\] UKFTT 0987 \(PC\)](#)

Recently published, this case concerned an application for registration of a notice of home rights in the Land Registrations Division of the First-tier Tribunal. A trustee in bankruptcy had applied for an order declaring that he and a Mrs Ellis were beneficially entitled to a property in equal shares. The declaration was granted and an order made that the property be sold with vacant possession. When the trustee sought to enforce the order, it was discovered that there was a potential issue as to Mrs Ellis' mental capacity to litigate at the time of the order. When the capacity issue came to light, the trustee issued a second application in which it sought the same declaration. The outcome of the second application was that the first order was declared valid, notwithstanding that Mrs Ellis may have lacked capacity within the meaning of the Mental Capacity Act 2005. That decision was upheld on appeal. It was therefore not open to the court in this jurisdiction to reach a different conclusion and the court accepted the validity of the first order.

Litigation capacity – what to do (and not to do)

Re D (children) [\[2015\] EWCA Civ 749](#)

Litigation capacity

Summary

Click [here](#) for all our mental capacity resources

This case concerned a care and placement order made in respect of a 20-month-old girl. The parents were vulnerable young adults who had significant learning difficulties. The mother, who was 19 years old, was assessed by a consultant child psychiatrist as lacking capacity to instruct a solicitor. She was therefore represented by the Official Solicitor as her litigation friend who consented to the care and placement order on her behalf. At a subsequent hearing, the mother made an informal request to the judge for a further assessment of her capacity to litigate by another expert and the judge agreed. The expert concluded that the mother had capacity. The Court of Appeal was highly critical of the way in which the mother's capacity had been assessed and considered that it amounted to serious procedural irregularity. However, on the facts, the Court of Appeal concluded that there was no practical difference to the outcome as a consequence and the proceedings, including the care and placement order, were retrospectively validated.

Comment

It is impossible to stress strongly enough the importance of obtaining a robust capacity assessment where mental capacity is in doubt. Although the issue of capacity made no difference to the eventual outcome on the facts of this case, there are many other cases where the outcome will depend crucially on the assessment of capacity. Even if there would be no difference to the practical outcome, it is essential to ensure procedural fairness and to safeguard rights under Article 6 ECHR. It is also in the interests of all parties and the court that further time and costs are not incurred further down the line due to unresolved issues surrounding

capacity which could have been addressed at the outset.

The Court of Appeal emphasised the following points which are of significance to practitioners:

- If either party takes issue with the outcome of a capacity assessment, it is open to that party to apply to the court for a second report by a different expert. In this case, no application was made by those representing the mother for permission to put expert evidence before the court. No consideration was given to whether a further assessment was necessary.
- The purpose of the prescriptive approach to the instruction of experts found in the Family Procedure Rules 2010 (and by analogy the Court of Protection Rules 2007) was to ensure that an expert dealt with the relevant issues. Failure to provide an adequate letter of instruction, or all of the relevant documents, could lead an expert failing to apply the correct test or adequately addressing the key issues which, in turn, could lead to delay. The letter of instruction wholly failed to comply with the relevant practice direction.
- Where a report was deficient or revealed a disagreement in view as between other experts, the Rules provided for written questions to be put to the expert and for an experts' meeting with a view to reaching agreement or at least narrowing the issues between them. Absent agreement between the experts, the court would hear evidence and make a determination. In this case, one expert report made no reference to MCA 2005 and the MCA 2005 test did not feature in the report. The other conflicting report was not brought to the attention of the judge and no consideration was given

as to how to resolve the conflict, whether by additional questions, an experts meeting or by hearing short oral evidence.

- Although process should never be slavishly followed at the expense of achieving the right welfare outcome without delay, the informal course adopted in this case, which Lady Justice King called "procedural anarchy", went far beyond a pragmatic and practical approach to case management and amounted to serious procedural irregularity.

Plan Well, Die Well

The charity, Compassion in Dying, has published [research](#) that revealed that 1 in 5 dying patients receive treatment their friends and family say they would not have wanted, with 47% feeling their loved one had a bad death. The results are based upon a poll of 2000 people and an analysis of users of the charity's free information service.

Welsh MHA 1983 Code

The Welsh Government consultation on the Welsh Code to the MHA 1983 is now [open](#). The deadline for responses is **27 November 2015**.

Conferences at which editors/contributors are speaking

The Mental Capacity Act 2005 – Ten Years On

Alex will be delivering his paper, '(Re)presenting P', and Neil will be delivering, 'The (not so?) great confinement' at this major conference hosted by the University of Liverpool on 9 and 10 September 2015. For further details and to book, see [here](#).

Court of Protection Practitioners' Association National Conference

Alex will be speaking at COPPA's national conference on 24 September 2015. For further details, and to book, see [here](#).

Queen Mary University

Jill will be a discussant at the Rethinking Deprivation of Liberty in a Health and Social Care Context Conference at Queen Mary University of London on 30 September 2015.

Bromley Safeguarding Adults Board 2015 Conference

Annabel is speaking at this conference on 6 October 2015 about the role of the Court of Protection.

Jordan's Court of Protection Conference

Alex will be delivering, 'More Presumptions Please? Wishes, feelings and best interests decision-making' at Jordan's Annual Court of Protection Conference on 13 October 2015. For further details, and to book, see [here](#).

Seventh Annual Review of the Mental Capacity Act 2005

Neil and Alex will both be speaking (along with Fenella Morris QC) at this annual fixture in York on 15 October 2015, under the auspices of Switalskis solicitors. For further details, and to book, see [here](#).

Taking Stock

Neil will be speaking on 16 October 2015 at this annual fixture, arranged by Cardiff Law School and the University of Manchester, at the Royal Northern College of Music. For further details, and to book, see [here](#).

Community Care Live

Annabel is presenting a legal masterclass on the Mental Capacity Act 2005 and Alex will be on a panel discussion on deprivation of liberty at

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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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Community Care Live 2015 in London on 3-4 November 2015. For further details, and to register for this event, see <http://www.communitycare.co.uk/live/>

Other conferences and training events of interest

Our friends Empowerment Matters are hosting an IMCA conference on 12 November at the Smart Aston Court Hotel in Derby, entitled 'Interesting Times – developments for IMCAs in practice and law.' For more details and to book, see [here](#).

The charity, Living Well Dying Well, is holding its first annual national conference, 'Doing Death Differently' in London on 7 November 2015. For more details and to book, see [here](#).

Peter Edwards Law have released details of their autumn training courses on matters MCA and Care Act related. The full details of (very well received) courses can be found [here](#).

Our next Newsletter will be out in early October. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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Alex has been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, is an Honorary Research Lecturer at the University of Manchester, and the creator of 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 appears frequently in the Court of Protection and is instructed on behalf of the Official Solicitor, individuals, local authorities, care homes and health authorities. Her COP practice covers the full range of issues in health and welfare, property and affairs, and medical treatment cases, with particular expertise in international cross-border matters. Annabel also practices in the related fields of human rights and community care. **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.**



Simon Edwards simon.edwards@39essex.com

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 practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,*" he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. **To view full CV click here.**



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Jill Stavert is Professor of Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. **To view full CV click here.**