Mental Capacity Law Newsletter August 2014: Issue 49

Capacity outside the Court of Protection

Welcome to the August issue of the Mental Capacity Law Newsletter family. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a very important medical treatment about life-sustaining treatment and MCS, a difficult case about capacity and pregnancy/contraception, deprivation of liberty in children's homes and the Law Commission's project on deprivation of liberty

(2) In the Property and Affairs Newsletter: cases on revocation of EPAs, capacity and tenancy agreements, and the Law Commission's project on deprivation of liberty

(3) In the Practice and Procedure Newsletter: a challenging case on capacity, undue influence, the inherent jurisdiction and care management, the end (for now) of the *Redbridge* saga with clarification of the powers of the court to evict from P's home and to revoke an LPA on the basis of duress, and news of an important appeal on nominal damages for unlawful detention;

(4) In the Capacity outside the COP newsletter: an update on the work being done to assess the compatibility of the MCA with the CRPD, news of the consultation on the draft MHA Code of Practice, news of the Northern Irish Mental Capacity Bill

(5) In the Scotland Newsletter: an update on the legal consequences of delaying reporting by MHOs in welfare guardianship applications, news of the MWC's most recent investigation, and an important case on capacity to consent to sexual relations.

We are now taking a break and will return in early October, although will send out newsflashes where necessary (including as regards the post-*Cheshire West* cases). Enjoy your summer!

Editors
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Victoria Butler-Cole
Neil Allen
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Simon Edwards (P&A)

Scottish contributors
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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

Is the MCA compliant with the CRPD? An update on the work of the Essex Autonomy Project Consultation

We are very grateful to Professor Wayne Martin, the director of the Essex Autonomy Project, for this detailed update on the work that the Project has been carrying out for the Ministry of Justice assessing (with the aid, inter alia, of Alex and Neil) whether the MCA is compatible with the CRPD.

Draft MHA Code of Practice Consultation

The Department of Health is consulting until 12 September 2014 on a revised Mental Health Act Code of Practice.

The new draft Code includes:

- five new guiding principles;
- significantly updated chapters on how to support children and young people, on the use of restraint and seclusion and the use of police powers and places of safety; and
- new chapters on care planning, equality and human rights, the interface between the MHA and the MCA (with specific reference to deprivation of liberty), and support for victims.

Details of the consultation are available here:

Ways to respond:

- Online
- Email
- In writing: Mental Health Act Code of Practice Review, Social Care, Local Government and Care Partnerships Directorate, Room 313 Richmond House, 79 Whitehall, London, SW1A 2NS

To contact the DH team:
Email: mentalhealthcode@dh.gsi.gov.uk
Phone: 0207 210 5420
Twitter: @MHCodeDH and follow #MHCodeDH #StrongerCodeBetterCode

Throwing down the gauntlet – the mental capacity revolution in Northern Ireland

Introduction

The civil provisions of a draft Mental Capacity Bill for Northern Ireland that has been published jointly by the Department of Health, Social Services and Public Safety ('DHSSPS') and the Department of Justice, and which is out for consultation until 2 September 2014, along with the proposals for those subject to the criminal justice system. We want here to flag up a few of its most radical features and a few of the features from which we can learn in England and Wales.

Background

The Bill has been long in gestation, and should be seen against a backdrop of a (current) landscape framework where questions relating to decision-making on behalf of those without capacity are predominantly determined under the common law, and questions relating to the treatment of mental disorder are determined by reference to the now distinctly venerable Mental Health Order 1986 (NI). A review commissioned by the DHSSPS into the delivery of mental health and learning disability services – known as the Bamford

Review after its original chair, David Bamford (who tragically died before it was completed) – recommended in a report published in 2007 that there should be a single comprehensive legislative framework for the reform of mental health legislation and for the introduction of capacity legislation in Northern Ireland. This was seen as vital to reduce the stigma associated with having separate mental health legislation and provide an opportunity to enhance protections for persons who lack capacity and are unable to make a specific decision in relation to their health (mental or physical), welfare or finances for themselves, including those subject to the criminal justice system.

The Bill and its key features

After a very long gestation period, that central recommendation is now one step closer to being implemented in the form of Mental Capacity Bill, the civil provisions of which have now been published in draft. The civil provisions in the draft Bill – which applies those over 16 – and which will be accompanied in due course by further measures relating to the criminal justice system – appears at first blush superficially similar to the MCA 2005. Terms such as capacity and best interests appear, and the tests for the assessment of both mirror (with variations to which we will return) the tests set down in the Mental Capacity Act. But this superficial similarity hides its truly radical nature:

- There will – if the Bill is passed during the current Assembly's mandate – be no replacement for the Mental Health Order 1986 (NI) in respect of those aged 16 and over (it will survive in respect of those aged 15 and below pending further consideration of how their position is best to be approached).

- There will therefore be no provision for the compulsory detention and treatment of those with mental disorder who have capacity to take the material decisions but refuse;

- The admission and treatment of those with mental disorder will, if they lack capacity to take the relevant decisions, be on precisely the same best interests basis as all other forms of decision-making for those without capacity.

If the civil provisions are enacted in substantially the same form as those issued for consultation – and if they are accompanied by a proper implementation programme – they will represent a truly ground-breaking shift in the approach to the care and treatment of those with mental disorder in Northern Ireland who will – in essence – disappear as a separate class of individual. We suggest that we will need to watch very carefully from this side of the Irish Sea to see how the consultation and legislative process unfolds – and in particular to see how the flesh begins to be put upon the bones of the draft primary legislation.

Like but not alike – some key comparisons between the civil provisions of the Bill and the MCA 2005

The civil provisions of the Bill also make particularly interesting reading for those steeped in the MCA 2005, because they appear both familiar and unfamiliar. In particular:

- There is far greater emphasis placed upon the provision of supporting individuals to make decisions, with an entire clause (4) devoted to fleshing out the principle in clause 1(3) that a person is not to be regarded as lacking capacity unless all practicable steps to enable them to make a decision without success. Those steps include such ones as

ensuring that persons "whose involvement is likely to help the person to make a decision are involved in helping and supporting the person" (clause 4(2)(c)). Importantly, where a formal assessment of capacity is required (for 'serious interventions' – to which we return) – the statement of incapacity completed by the assessor must specifying what help and support has been given without success to enable P to make a decision in relation to the matter (clause 12(4)(d)). In these regards, the Bill is far more obviously CRPD-compliant than the MCA 2005, which (as many have noted) falls entirely silent as regards support after the reference in s.1(3); nonetheless, as with the MCA, there remains a question mark as to whether the very presence of a capacity test is itself discriminatory (note, in this regard, that the Assisted Decision-Making (Capacity) Bill in the Republic of Ireland – that has bent over backwards to comply with the CRPD – does not contain such a test);

- Whilst the 'functional' test in clause 3 appears similar to the functional test in s.3 MCA 2005, it includes in relation to the 'use and weigh' limb an additional element of not being able to appreciate the relevance of the information and to use and weigh it as part of making the decision in question. The inclusion of 'appreciation' would on its face go some way to assist with situations where the question is less one of cognition and more one of impairments in executive functions – a particular problem in relation to those with Acquired Brain Injuries;

- The 'best interests' test in clause 6 is – deliberately – framed using the same term as in the English legislation so that benefit can be drawn from the body of case-law building up in England and Wales under the MCA 2005. In light of the current debate as to whether best interests decision-making is forbidden by virtue of Article 12 of the CRPD, those taking the Bill forward might consider that it would be prudent to think of a less loaded term. However, whatever the language used, the reality is that this Bill is, ultimately founded upon a model of substituted decision-making where the wishes and feelings (or – in CRPD terms – the will and preferences) of the individual will not in all circumstances be determinative; as such, it seems prudent to proceed on the basis that it will not find favour with the Committee on the Rights of Persons with Disabilities. Whether that necessarily means that it can be implemented without infringing the terms of the CPRD itself is a topic for another day, and no doubt something that those charged with taking the Bill forward will be considering very carefully;

- The familiar protection against liability that finds its place in ss.5-6 MCA 2005 is, in the draft Bill, developed substantially into an entire Part. In particular, the draft Bill contains a fundamental distinction between general acts done in connection with the care, treatment or personal welfare of P, to which a mirror of s.5 MCA 2005 applies, and those acts to which additional safeguards apply before reliance can be placed upon the protection. Such acts include:

    - Acts of restraint;

    - The formal assessment of capacity and the consultation of a nominated person (who, if not nominated by P, is chosen by reference to a statutorily defined list) in the case of serious interventions (which has a statutory definition

including but going beyond major medical interventions);

- Certain treatments for which a second opinion is required;
- Where authorisation is required for serious treatment where there is objection from P's nominated person or compulsion);
- Where authorisation is required for an attendance or community residence requirement, both new concepts within the Bill;
- Where authorisation is required for deprivation of liberty;
- Certain serious interventions requiring the involvement of an independent advocate;

- Unlike under the MCA, the procedure for authorising deprivations of liberty is not to be found in a Schedule, but rather in the main body of the Act. In very broad terms, the following deprivations of liberty can be authorised (initially for up to 6 months) by a panel convened by the relevant Health and Social Care Trust:
  - The detention of a person in circumstances amounting to a deprivation of liberty in a hospital or care home in which care or treatment is available for that person;
  - The detention of a person in circumstances amounting to a deprivation of liberty while being taken, transferred or returned to a hospital or care home for the purposes of the provision to that person of care or treatment; or
  - The detention of a person in circumstances amounting to a deprivation of liberty in pursuance of a condition imposed during a permitted period of absence from a hospital or care home.

    (different provisions apply in relation to short-term detentions in hospital for examinations, which can be authorised on the basis of a medical report stating that the criteria for authorisation are met)

- It is of note that the deprivation of liberty provisions in the Bill have teeth – clause 135 proposes the creation of a criminal offence of the unlawful detention of a person without capacity;

- As with the MCA, deprivations of liberty arising in other settings will have to be authorised by a court (in the case of Northern Ireland, the High Court, as the decision has been taken that the size of the jurisdiction does not warrant the establishment of a dedicated Court of Protection). One suspects that this aspect of the Bill will be likely to be revisited during the passage of the Bill through the Assembly in light of the decision in *Cheshire West* and the implications (which we would say are not-jurisdiction specific) of the clarification of the 'acid test';

- Appeals against authorisations will be heard by a Review Tribunal – which is a renamed and reconstituted version of the Mental Health Review Tribunal. This is particularly interesting reading for all those who advocated that the DOLS regime should be

brought within the ambit of the MHA 1983 in England, and it will be particularly interesting to see (assuming that this is what is brought into force) how this fares as a mechanism, especially if the numbers of individuals requiring authorisations for deprivations of liberty approaches the same proportions as in England. It is perhaps worth noting also in this regard that an individual deprived of their liberty in a care home who does not seek to exercise a right of review before the Tribunal will automatically have their case referred to the Trust after sufficient passage of time – the equivalence in the Bill between the position of those detained in hospitals and in care homes is in refreshingly stark contrast to the current major disparity between those subject to the compulsory provisions of the MHA 1983 and those deprived of their liberty pursuant to Schedule A1 to the MCA 2005;

- Other provisions adopted in England and Wales that are mirrored in the NI Bill include:
    - the replacement of EPAs by LPAs (and the creation of LPAs in relation to health and welfare matters). In respect of the replacement of EPAs, interestingly, one delegate expressed significant concerns to me about this, because of the greater expense that will be required in terms of their preparation and registration, which she considered in the particular circumstances of Northern Ireland may well lead to the unintended consequence that fewer powers will be drafted;
    - the creation of Court-appointed deputies for health and welfare and property and affairs (replacing in the latter regard controllers; the former being an innovation);
    - the creation of an Office of the Public Guardian;
    - the codification of the concept of payment for necessities;
    - provisions in relation to research upon those unable to give consent;
    - the creation of an offence of will-treatment or wilful neglect (which – no doubt reflecting the heavy judicial criticism of s.44 MCA 2005 – sets out much more precisely that the victim of the offence should lack capacity "in relation to all or any matters concerning his/her care;"
    - Exclusions in relation to best interests decision-making in relation to highly personal decisions such as sexual relations or consenting to marriage;
- As noted above, no equivalent to the Court of Protection will be created, although Part 6 of the Bill sets out the declaratory and decision-making powers of the High Court in terms broadly similar to those contained in ss.15-16 MCA 2005. It will be interesting to see in due course the extent to which the inherent jurisdiction in Northern Ireland develops along similar lines to the way it has in England and Wales to cater for the circumstances of vulnerable but capacitous adults;
- As with the position in England, those aged 16-17 will potentially continue to be considered by reference to legislation specifically referable to children and by this legislation, and similar considerations will operate to determine under which regime they will fall. Those under 16 will be

excluded, and it is clear that precisely how their circumstances are to be considered is a distinctly hot topic – but a debate from which we are likely to learn a great deal in England in due course;

- Finally, it should perhaps be noted that the Bill rather delicately side-steps the issue of advance decisions to refuse treatment by giving them statutory force as but not defining them save by the reference to the common law relating to such decisions;

The criminal justice system

The provisions of the Bill relating to the criminal law have not yet advanced to a position where they can be put out for consultation, but the consultation document provides an indication of the direction of travel. It is clear from that the Department of Justice is making a sustained attempt to introduce a fully capacity-based approach to care, treatment and person welfare in respect of persons subject to the criminal justice system. This will have effect at a number of stages:

- Removing the equivalent to s.135 MHA 1983 allowing police to remove individuals to a place of safety upon the basis of mental disorder, instead making the operation of this power contingent upon the individual lacking the material capacity and that removal being necessary to prevent serious harm to themselves or another and it being in their best interests;

- Making court powers to impose particular healthcare disposals on offenders at remand, sentencing or following a finding of unfitness to plead (a test which will, itself, be revised to be based upon capacity) contingent on that individual's capacity (and – where they lack capacity – upon their best interests);

- The operation of prison powers by which the Department of Justice can transfer prisoners for in-patient treatment in a hospital.

It is very clear from the consultation document that these proposals are predicated on a radically different model of the treatment of those with mental disorder at al stage of their involvement with the criminal justice system. It is also clear that the formulation of the precise wording of the draft legislation to carry these principles into effect will be – to put it mildly – sensitive.

Conclusion

The 'fusion' model advocated here is one that has its critics (for a succinct summary with specific reference to the NI Bill, see the comment upon Alex's post on the Bill here, and for a detailed defence see the comment by Professor George Szmukler here). There are also a number of points of detail (discussed here) in the draft Bill which can no doubt be reflected on in due course. However, as so often, we have a great deal to learn in England by looking over the borders to see how other the jurisdictions in the United Kingdom (and, indeed in close proximity – in the shape of the Republic of Ireland) approach the question of how to balance autonomy and protection. The model set down in the draft Northern Irish Bill is one that we should be paying particular attention to, not least as the United Kingdom begins the process of engagement with the Committee on the Rights of Persons with Disabilities in the run up to the consideration of the United Kingdom by that Committee, as part of which the Bill will no doubt feature heavily.

Self-neglect – a resource

We would heartily commend to all those required to grapple with problems of self-neglect the (free) e-book called *Vile Bodies: Understanding the neglect of personal hygiene in a sterile society* by Peter Bates, which explores the question from every aspect in a profoundly humane, wise and practical fashion [full disclosure, Alex was asked to and very willingly cast an eye over the section relating to the legal options].

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Conferences at which editors/contributors are speaking

Implementing the Mental Capacity Act and the Deprivation of Liberty Safeguards

Alex and Tor are speaking at this conference arranged by Community Care in London on 8 October 2014, a re-run (with variations) of the sold-out and high octane conference held in March – on the day of the Supreme Court decision in *Cheshire West*. Full details are available here.

The Mental Capacity Act 2005: Annual Review 16 October 2014

Neil and Tor are speaking at the speaking at Langley's annual multi-disciplinary conference looking at the workings of the Mental Capacity Act 2005J in York on 16 October, alongside speakers including Mr Justice Baker and Fenella Morris QC. Full details are available here.

Court of Protection Practice and Procedure 2014

Alex and Tor are speaking at Jordan's annual Court of Protection Practice in London on 21 October, alongside Mr Justice Charles, Vice-President of the Court of Protection, the Public Guardian, Alan Eccles, District Judge Marin and David Rees. For further details and an early bird discount (for booking by 8 August), see here.

'Taking Stock'

Neil is speaking at the annual 'Taking Stock' Conference on 17 October, jointly promoted by the Approved Mental Health Professionals Association (North West and North Wales) and Cardiff Law School with sponsorship from Irwin Mitchell Solicitors and Thirty Nine Essex Street Barristers Chambers – and with support from Manchester University. Full details are available here.

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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.

Chambers Details

We are taking a break over the summer; our next Newsletter will be out in October, but we will circulate a newflash in the interim with any judgments or developments that cannot wait that long. 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 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, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He 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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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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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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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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