Capacity outside the Court of Protection

Introduction

Welcome to the March 2016 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: what we don’t know about the MCA and further observations on ‘using and weighing’;

(2) In the Property and Affairs Newsletter: calibrating testamentary capacity to the nature of the estate and updates from the Office of the Public Guardian;

(3) In the Practice and Procedure Newsletter: the draft Case Management Pilot, the s.49 Pilot and an update on the transparency pilot;

(4) In the Capacity outside the COP Newsletter: further follow-up from Winterbourne View, the Mental Health Taskforce report’s ‘fusion’ recommendation, and immigration detention and the MCA;

(5) In the Scotland Newsletter: the shortage of Mental Health Officers (again), total or complete incapacity in the context of homelessness, the Carers (Scotland) Act 2016 and an update on the consultation on the AWI.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. ‘One-pagers’ of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.
Short Note: Immigration Detention and the MCA

In *R (VC) v SSHD* [2016] EWHC 273 (Admin) a brave (the harsh would say misguided) attempt was made to rely upon the MCA in the context of a challenge to immigration detention to an individual with mental health difficulties. The claimant argued that: (1) pursuant to the public law duty of enquiry and in order to facilitate compliance with the MCA 2005, the SSHD was under an obligation to arrange for a detainee to have a capacity assessment where there is a reasonable suspicion that the detainee may lack capacity; (ii) where a detainee is assessed as lacking capacity in relation to areas of decision making that are the sole responsibility of the SSDH the SSDH is obliged to make those decisions compliantly with section 4 MCA 2005, namely in the detainee’s best interests; and (iii) in order to make best interests decisions the SSHD must ensure that the incapacitated detainee’s wishes and feelings are put forward, and that the detainee is supported to participate so far as is possible and that the detainee’s interests are represented.

Unsurprisingly, perhaps, these arguments ran up against the immoveable barrier of construction (clearly identified in *Re MN*) that the MCA is solely concerned with decisions done for or on behalf of a person. As HHJ Seys Llewellyn QC noted “if the Act thereby required any decision “affecting” a person without capacity to be made in his best interests it would lead to remarkable results: for instance, on his conviction in an ordinary criminal case his individual best interests would trump other interests when considering whether or for how long he should be imprisoned.” He therefore agreed with the submission of the SSHD that “the MCA 2005 is concerned with decisions which would usually be made by an individual as part of their personal autonomy and so reflect their wishes and feelings and does not purport to extend to any other type of decision such as those made under immigration powers tax powers or criminal justice powers and it cannot do so.”

Time for a Change: the Challenge Ahead

Sir Stephen Bubb, the Chief Executive of ACEVO (Association of Chief executives of Voluntary Organisations), published his final report *Time for a Change: The Challenge Ahead* on 22 February 2016, almost 5 years after the showing of a Panorama programme that exposed the abuse and neglect of residents at Winterbourne View. In the aftermath of the programme the Government made a promise to move everyone with learning disabilities and/or autism inappropriately housed in a hospital out of those settings by June 2014.

Despite Government’s promise the deadline was missed and almost three and a half years later there had been barely any change. As a result of the ensuing criticism Sir Stephen was asked by the National Health Service England (NHSE) to chair a steering group to examine services for people with learning disabilities and/or autism.

His first report, *Winterbourne View – Time for Change* was delivered in November 2014. In that report he made a number of recommendations, the key priorities being:

1. The closure of inappropriate institutions and the ramping up of community provision; and that

Both of these were accepted by NHS England and by the Government.

In his final report Sir Stephen considers the steps that have been taken by the Government since his last report and concludes that progress has been made in the last year. He reports that the NHSE has announced a major programme to move people with learning disabilities out of hospital and into their communities and that in October 2015 the Transforming Care Programme published a national plan for services for people with learning disabilities and/or autism entitled ‘Building the Right Support’. By 2019 the Transforming Care Programme intends to reduce the number of inpatient beds by up to 50% nationally and develop community-based services to prevent people from being admitted to hospital and to ensure that there are meaningful alternatives to hospital-based care across the country.

Sir Stephen is nevertheless critical of the progress. He believes that the scale of the problem has been underestimated, pointing to research suggesting that 3,500 people are currently in hospital-based settings; which is 900 more than stated by the government programme. In his view 10,000 extra members of trained staff will be needed to support people in their own community.

The report makes two key recommendations.

1. An independent evaluation of this programme. He suggested that a real-time, independent evaluation commissioned by the Department of Health with the commitment to publish all interim and final evaluation reports;

2. A Learning Disabilities Commissioner be appointed who would have a statutory duty to promote and protect the rights of all people with learning disabilities and/or autism in England’.

Specifically Sir Stephen questions whether the amount of £15 million that has been made available by NHSE to Transforming Care Partnerships for capital projects will be sufficient. The review calls on NHSE and DH to explain publically how this fund will be administered and, given £15 million is unlikely to be adequate, how it will ensure that sufficient continuing investment is available as the rate of people being discharged increases over the next 3 years.

In recommending that a learning Disabilities Commissioner be appointed he points out that the Government has yet to introduce the recommended legislation on rights. He refers to the Government’s response to the Green Paper ‘No voice unheard, no right ignored’ which does not commit to legislative change to enshrine in law rights for people with a learning disability. He comments that “nearly five years after the scandal at Winterbourne View Hospital we are still waiting to see any changes – it is time that someone is given the job that needs doing, which is making life better for all children and adults with learning disabilities and ensuring their rights are respected and enhanced, and their views taken seriously.”

The report also calls on the Transforming Care Programme to consider the accreditation of training in Positive Behavioural Support with a view to establishing an appropriate body to manage the design of a PBS Standard and tiered
accreditation systems for individuals and organisations delivering and receiving PBS.

It highlights the risk to those with learning disabilities and/or autism of the capping of housing benefits to Local Housing Allowance Rates that is to start in April 2016. He recommends that the Government makes an explicit exemption for supported housing.

The findings in Sir Stephen’s report are supported by a report published on the same day by the Royal College of Nursing (RCN) which says that many people with learning disabilities are still unable to receive the care and support they need because of issues with staffing services and strategy.

Sir Stephen accepts that “there is a commitment to closures and to developing community care [on the part of the Government] and that there is a step change in the attitudes of the national partners responsible for setting the agenda.” He believes however that “failing to deliver this new programme is simply not an option” and that “success will be recognised only when the closure of hospitals is made possible by the development of community based services, with people who have learning disabilities, their families and carers at the centre of the design.” He believes that the Transforming Care Programme can achieve changes on the ground but cautions that the challenge has been underestimated before.

Beverley Taylor

Mental Health Taskforce Report published

A report from the independent Mental Health Taskforce to the NHS in England has been published, containing numerous recommendations aimed at improving mental health services, including expanding provision, more thorough monitoring and regulation, and the inevitable recommendation for the appointment of a “new equalities champion for mental health.” For present purposes most relevantly, the report notes that:

“The Mental Capacity Act 2005 makes no distinction between the mental and physical with regard to decisions about care. But the 2005 Act’s provisions about having the mental capacity to consent to care can be over-ridden in the case of mental health care by the 1983 Act. We heard that this can act as a barrier to making parity of esteem a reality because it enshrines differences in the treatment of people with mental and physical health problems and frames care as a method of social control rather than a therapeutic intervention. The 1983 Act should therefore be reviewed as part of the continuing drive for greater parity with physical healthcare.”

The report therefore recommends that “The Department of Health should work with a wide range of stakeholders to review whether the Mental Health Act (and relevant Code of Practice) in its current form should be revised in parts, to ensure stronger protection of people’s autonomy, and greater scrutiny and protection where the views of a individuals with mental capacity to make healthcare decisions may be overridden to enforce treatment against their will.”

Rapporteur on Mental Health and Human Rights

The Joint Committee on Human Rights has taken the novel step of appointing a rapporteur, and, importantly, has appointed one on mental health and human rights. Amanda Sollaway MP has been appointed with a remit of exploring,
through informal meetings, contacts and visits, issues of concern in relation to mental health when approached through a human rights framework. Amanda will report back on each issue to the full Committee, which may then choose to seek written or oral evidence, and possibly produce a report on that subject. She will be starting her new role by looking, through a human rights lens, at preventable deaths of people suffering mental health problems, including those in detention, in the light of recent reports such as the Harris Review of self-inflicted deaths in custody and the Report of the Equality and Human Rights Commission on preventing deaths in detention of adults with mental health conditions.

The Rapporteur invites suggestions for other topics of investigation in this field to take forward in the future. All suggestions should be sent to JCHR@parliament.uk.

**IPCC report on use of force by police**

The Independent Police Complaints Commission published on 8 March a report *Police use of force: evidence from complaints, investigations and public perception*. The section on the use of force in relation to those with mental health difficulties makes particularly sobering reading. As the report notes:

“The IPCC has frequently expressed concern about the relationship between mental illness, restraint and death. One in five of those involved in our investigations into use of force were known to have mental health concerns. They were four times more likely to die after force had been used than those not known to be mentally ill. They were much more likely to be restrained, to experience multiple uses of force, and to be subject to force in a custody environment. People with mental health concerns are clearly vulnerable, but in many cases, they were also likely to present challenges to the police officers dealing with them. They were much more likely to be under the influence of drugs or alcohol and to be in possession of some kind of weapon, with risks to themselves or others. This underlines the findings in other reports: not only do police need training in recognising and communicating with those in mental health crisis, but there is an urgent need to invest in appropriate mental health services that can prevent such crises or support people through them.”
**Conferences**

**Conferences at which editors/contributors are speaking**

**Palliative Care Conference**

Alex will be speaking on the practicalities and realities of DOLS within palliative care practice at the 11th Palliative Care Congress in Glasgow on 11 March. For details, and to book see [here](#).

**Safeguarding Adults in Residential Settings**

Tor will be speaking about why capacity matters at this conference at the ORT House Conference Centre London on Tuesday 15 March 2016. For further details, see [here](#).

**Edge DOLS Assessors conference**

Alex will be speaking at Edge Training’s annual DOLS Assessors conference in London on 18 March. Other speakers include Mr Justice Peter Jackson. For details, and to book, see [here](#).

**Centre for Mental Health and Incapacity Law, Rights and Policy: Deprivation of Liberty seminar**

Jill’s Centre is holding a seminar to consider deprivation of liberty and achieving ECHR compatibility from a UK-wide perspective on 23 March, the speakers being Laura Dunlop QC, Colin McKay and Michelle Pratley. For details, and to book, [contact](#) Rebecca McGregor of the Centre.

**Operationalising Article 12.4 Safeguards: Lessons from Three Jurisdictions of the UK**

Adrian and Jill will be speaking at the Essex Autonomy Project’s (free) side event to the 15th Session of the meeting of the UN Committee on the Rights of Persons with Disabilities in Geneva on 31 March 2016. For more details and to book, see [here](#).

**CoPPA London seminar**

Alex will be speaking at the CoPPA London seminar on 20 April on the recent (and prospective) changes to the COP rules. The seminar will also

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Conferences

cover the transparency pilot. The seminar will take place at 39 Essex Chambers at 5pm and will be followed by drinks. Free to COPPA members, or £10 to non-members. To book a place or to join COPPA, or the COPPA London mailing list, please email jackie.vanhinsbergh@nqpltd.com.

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled ‘Safeguarding Adults and Legal Literacy,’ investigating the impact of the Care Act. The theme for the seminars in the first year of this three years series is ‘Making Law’. The second and third seminars in the series will be on “New” categories of abuse and neglect’ (20 May) and ‘Safeguarding and devolution – UK perspectives’ (22 September). For more details, see here.

Adults with Incapacity

Adults will be speaking on Adults with Incapacity at the Royal Faculty of Procurators in Glasgow private client half day conference on 18 May 2016. For more details, and to book, see here.

Other events of interest

Jordan Publishing’s Court of Protection Practice and Procedure Evening Seminars 2016

District Judge Marc Marin will update practitioners on the new rules within the Court of Protection and help them to understand how this will affect their day-to-day practice. For further information and to book your place (London – 7 April/Manchester – 19 April) click here.

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Our next Newsletter will be out in early April. 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 is recommended as a ‘star junior’ in Chambers & Partners 2016 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 and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. 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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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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