



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

(1) In the Health, Welfare and Deprivation of Liberty Report: important decisions grappling with the meaning of best interests in the contexts of religious practices and delusional beliefs, and (finally) detailed statistics about s.21A/*Re X* cases;

(2) In the Property and Affairs Report: a new approach to severance and gifts;

(2) In the Practice and Procedure Report: changes to – and extension of the scope of – the Transparency Pilot and comments sought on a mediation pilot project;

(3) In the Wider Context Report: post-*PJ* problems, problems with care homes and capacity assessments and are moves really under way to change mental health laws?;

(4) In the Scotland Report: draft rules from Strathclyde Sheriff's Court concerning AWI applications.

We are taking a break over summer, but will be back in early September. In the interim, 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](#). Alex will also provide updates on truly critical matters on his own [website](#) (where you can also find the [talk](#) that he gave about the big issues facing the MCA 2005 at our recent 10th birthday party for the Act – thank you to all those who attended and made it such a success).

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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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Transparency – the new approach

The Transparency Pilot approach and that previously provided for in Serious Medical Treatment cases has now been merged (in fact, the merging took place in March but the new order was only published towards the end of June).

The new order – to be used in all cases in the COP save for committal cases – can be found [here](#), with an unofficial Word version [here](#).

The Vice-President has published an explanatory [note](#), which we reproduce below:

This note is a public document.

In the schedule to my judgment in V v ANL [2016] EWCOP 21 I set out a number of points relating to the Transparency Pilot (and so the order made under it restricting reporting – the Pilot Order) and the reporting restrictions orders made in serious medical cases to which Practice Directions 9E and 13A continued to apply (RROs).

Since then the ad hoc Committee on the COP Rules has considered the amalgamation of the two approaches and as a result has recommended that a further amendment should be made to the Transparency Pilot to achieve the result that it applies to all proceedings in the COP apart from applications for

committal. I am very grateful to those who gave up their time to do this work.

This recommendation has been accepted and means that further changes will be made to the standard Pilot Order. The new version is attached.

It is hoped that the changes make it clearer by the use of headings.

The amended Pilot Order:

- 1. is still directed to those who attend or find out what happened at an attended public COP hearing, and so is not directed to the world at large which the RROs were,*
- 2. still does not contain a schedule identifying those who cannot be identified,*
- 3. contains alternatives relating to its duration (which reflect the old Pilot Order and the RROs) for selection by the judge,*
- 4. now does contain a list of what is not restricted by the order, which is modelled on, but does not replicate, the list in the RROs, and*
- 5. provides that the injunction does not apply to a public hearing of, or the listing for hearing of, any application for committal.*

A change for serious medical cases is that prior notice of the making of a Pilot Order will not be given to the media. On that topic in the Schedule to my judgment in *V v ANL* I said:

"To my mind proper notification to the media of the existence of the proceedings and of the date of the public hearing of a case relating to serious medical treatment and the terms of any reporting restrictions order made when a public hearing is directed is what really matters. And when that order follows a standard process referred to in a practice direction or rules it seems to me that:

1. *there are compelling reasons why the parties bound by the reporting restrictions order need not be notified of the application (see s. 12(2) of the HRA 1998), particularly if they are defined by reference to those who attend the public hearing (or get information from those that do), and*
2. *this view is supported by the approach of the Court of Appeal in *X v Dartford and Gravesend NHS Trust (Personal Injury Bar Association and another intervening)* [2015] 1WLR 3647 in particular at paragraphs 25 to 35.*

If those bound by the order (and so the media) have such notification they can then attend the hearing knowing, in general terms, what the case is about and the terms of the reporting restrictions order and they

can challenge that order then or at another time."

The accepted recommendation reflects those comments and other points in that Schedule relating to notification and the old Pilot Order and RROs.

This change to the Transparency Pilot is part of an important exercise that is directed to finding the best approach to achieving the result that, on a case by case basis, the COP identifies and directs the correct balance between Articles 8 and 10 and thereby correctly promotes the powerful public interests they engage and reflect.

It is recognised that it is important that cases are appropriately described when they are listed to provide information to the public at large of what they are about and when and where they will be heard. Comment on how this should be and is being done is welcomed. As is more general comment on how the public and the media can make themselves aware, or should be made aware, that certain types of case are due to be heard and a Pilot Order has been made in them. Such comments should be directed to joan.goulbourn@justice.gsi.gov.uk as The Secretariat for The Court of Protection Ad Hoc Rules Committee or to me or the President of the COP.

*The Hon Mr Justice Charles
Vice President of the Court of Protection*

Date: March 2017

Mediation Pilot

A working group in the South West is developing a COP mediation pilot, and we link [here](#) to the

working draft of the document setting out both the aims of the pilot, and detailed guidance as to how it might be implemented. The working group would very much welcome comments on the guidance, to be sent to [Katie Scott](#) at 39 Essex Chambers, as they work towards drafting a potential Practice Direction in September and taking further steps towards implementation.

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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 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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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).



Adrian Ward: adw@tcyoung.co.uk

Adrian is a Scottish solicitor and a consultant at 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, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. 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 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

Conferences

Conferences at which editors/contributors are speaking

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](#).

The Legal Profession: Back to Basics

Adrian is a speaker and panellist on “The Legal Profession: Back to Basics” at the Annual Conference of the Law Society of Scotland at Edinburgh International Conference Centre on the afternoon of Tuesday 19th September 2017. For more details, and to book, see [here](#).

JUSTICE Human Rights Law Conference

Tor is speaking on the panel providing the Equality and Human Rights Update at JUSTICE’s Annual Human Rights Law Conference in London on 13 October. For more details, and to book, see [here](#).

National IMCA Conferences

Alex is speaking on both litigation friends and a potential Vulnerable Adults Bill at the two National IMCA Conferences (North and South) organised by Empowerment Matters and sponsored by Irwin Mitchell. The [northern conference](#) is in Sheffield on 20 October; the [southern](#) is in London on 10 November.

National Advocacy Conference

Alex is speaking on advocacy as a support for legal capacity and doing a joint workshop with Jess Flanagan on advocacy and available options at the National Advocacy Conference in Birmingham on 19 October. For more details, and to book tickets 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 early September. 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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