



Welcome to the January 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, a further round in the *Re X* saga, a briefing note on PJ/MM, the Chief Coroner's annual report and Manuela Sykes' obituary;

(2) In the Property and Affairs Report: case-law and OPG guidance on gifts, and whether its effect on a will is information relevant to the test of whether a person has capacity to marry;

(2) In the Practice and Procedure Report: fluctuating capacity in the face of the court, Court of Protection statistics and a useful case for human rights claims arising out of the misuse of the MCA;

(3) In the Wider Context Report: interim guidance on CANH withdrawal, the NICE consultation on decision-making and capacity, an important study on everyday decision-making under the MCA and a book corner with recent books of interest;

(4) In the Scotland Report: Court of Protection orders before the Scottish courts and an update on the Scottish Government consultation on adults with incapacity;

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](#).

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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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### Mental Health Act review update

The independent Mental Health Act Review continues apace, with, in particular, a [call for evidence](#) from service users and carers (by way of an online or paper survey) with a deadline of **28 February**.

### CANH withdrawal: interim clinical guidance

Given recent legal developments (both in case law and the withdrawal of Practice Direction 9E) the BMA, RCP and GMC published [joint interim guidance](#) entitled '*Decisions to withdraw clinically-assisted nutrition and hydration (CANH) from patients in permanent vegetative state (PVS) or minimally conscious state (MCS) following sudden-onset profound brain injury*' (the Interim Guidance) on 11 December 2017.

The guidance provides an update on the law (in particular following *Briggs* [2017] EWCA Civ

1169, *M* [2017] EWCOP 19 and *Re Y* [2017] EWHC 2866 (QB)) to set out what constitutes good practice in making decisions to withdraw CANH from patients in PVS or MCS following sudden-onset brain injury. This is the first time that these three organisations have put their name to the same guidance. It is essential reading for anyone practicing in this area.

The guidance recommends practitioners take the following steps:

1. Ensuring that the RCP guidelines "*Prolonged Disorders of consciousness*" have been followed to establish the patient's level of responsiveness and awareness;
2. Assessing the patient's best interests by consulting all relevant people and holding a formal documented best interest meeting to consider clinical information and the patient's wishes and feelings, values and beliefs;

3. Seeking a second clinical opinion from a consultant with experience in PDOC who has not been involved in the patient's care, preferably from a different organisation to that treating the patient. This is consistent with the GMC's 2010 guidance "*Treatment and care towards the end of life: good practice in decision making*;"
4. Keeping detailed records of discussions and detailed clinical records;
5. If it is agreed that CANH should be continued, keeping this decision under regular review;
6. If it is agreed that CANH should be withdrawn, ensuring that this takes place as soon as possible after a withdrawal and end of life plan has been drawn up.

The guidance makes clear that, if these steps have been followed, and in line with the cases set out above, the view of the GMC/BMA and RCP is that good clinical practice does not mandate an application to court where clinicians and families are in agreement.

The guidance is expressed as being interim pending the promulgation of updated and in-depth guidance on good clinical and professional practice for making decisions about CANH in a much wider range of categories, with an intended publication date of May 2018.

### NICE Guidelines on decision-making and mental capacity: consultation

NICE has published for consultation [draft guidelines](#) on decision-making and mental capacity, with a deadline of **5 February**

(consultation responses have to be given by registered, institutional, stakeholders). The guidelines cover supported decision-making, advance care planning, assessment of mental capacity and determination of best interests. We would urge responses from those who are concerned to ensure that the guidelines (1) reflect the law accurately; and (2) add value to what is already out there in a multiplicity of sources.

### Advance decisions: paying the price

Widely reported in the [news](#) was the substantial settlement made in respect of a woman whose advance decision to refuse medical treatment had not been honoured (because it had been lost) for 22 months. Two points are worth particular note here: (1) the claim was, in fact, not a human rights claim, but a claim for negligence and assault; and (2) it was the woman's GP who alerted the woman's family and argued alongside them that it should be honoured.

### 'Everyday Decisions'

The Everyday Decisions project led by Professor Rosie Harding at Birmingham University has [published](#) its report (and an easy read version). The project explored how people with intellectual disabilities make everyday decisions about a wide range of life choices and issues, and how care professionals support them to make their own decisions. This research explored how mental capacity law works in practice to support decision-making through qualitative interviews with intellectually disabled people, and care professionals.

The report contains a number of important findings, not least that there is – often

unrecognised – considerable facilitation of individuals with learning disabilities to make a wide range of both everyday and life choices, although the same strategies are deployed more rarely in respect of more difficult decisions. Echoing findings from other research, the report found that there was a tension between supported decision-making and mental capacity assessment. Sometimes people are found to lack capacity when they might have been able to make their own decision with the right amount of support. Sometimes people are considered to have capacity when they were actually unable to make particular decisions.

The report contains a series of recommendations which we reproduce in full given their significance:

1. Whilst there is general awareness of the basics of the Mental Capacity Act, there is scope for ongoing, and potentially more detailed, training for frontline care staff about the importance of supporting decision-making under the MCA as a way of supporting legal capacity.
2. A public awareness raising campaign on the UN Convention on the Rights of Persons with Disabilities might help to increase general understandings of the CRPD within the care sector.
3. Care professionals would both be interested in, and benefit from specific training and continuing professional development on the UN CRPD and generic Human Rights issues.
4. Implementation of the changes to the best interests in the MCA proposed by the Law Commission in 2017 may help to embed supported decision-making more fully in practice, and bring the MCA closer to full CRPD compliance.
5. Intellectually disabled people and care professionals with experience of best practice in supporting legal capacity should be involved in any review and revision of the MCA Code of Practice.
6. Appropriately resourced support services, including self-advocacy groups run by and with disabled people are vital mechanisms for fostering a CRPD compliant culture of supported decision-making for people with intellectual disabilities.
7. Nuanced support and communication approaches, building on strategies developed for everyday and life choices, should be utilised for more complex life choices and legal decisions.
8. More research is needed into how banks and financial institutions engage with customers with intellectual disabilities, effective support frameworks for everyday financial management, and managing bills and payments.
9. More research is needed into how the MCA is used in medical consent processes for people with intellectual disabilities.
10. Given the importance of future planning, further research is required into how best to support people with intellectual disabilities in making wills, advance decisions and granting Power of Attorney.
11. A shift in social attitudes about intellectually disabled people, relationships and friendships is required to better support the

relational lives of people with intellectual disabilities, particularly those living in care homes and supported living environments.

12. Policy makers should give serious thought to simplifying the benefits and sanctions regime in order to better support people with intellectual disabilities to enjoy an adequate standard of living and to access their communities.
13. Disabled people's self-advocacy organisations should be funded and supported to provide additional sources of advocacy, support and empowerment for intellectually disabled people that reaches beyond the statutory minimum requirements under the MCA and Care Act 2014.
14. Frontline care professionals must be given time to complete paperwork that does not detract from their practical care giving. Local and central government investment in care services should recognise the need for both high quality care-giving and care planning.
15. The Code of Practice on the Mental Capacity Act 2005 should be revised to take account of developments in practical approaches to supported decision-making and capacity assessment.

### Short note: restitution and s.117 MHA 1983

The case of *Richards v Worcestershire CC* [2017] EWCA Civ 1998 concerned a claim brought by a deputy on behalf of Mr Richards who had suffered a head injury in a road traffic accident and had obtained approximately £2 million in

damages. Mr Richards had been detained under s.3 Mental Health Act 1983 and was therefore entitled to aftercare under s.117 MHA 1983. His deputy sought to recover the costs which had been paid for his care which, the deputy argued, ought to have been paid by the local authority and CCG under s.117 in restitution. The public bodies argued that the claim should be struck out as it ought to have been brought by way of judicial review rather than restitution. The Court of Appeal held that the deputy could, in principle, claim against the public authorities but there were hotly contested facts which could not be resolved on a strike out application such the local authority's argument that the services arranged by the deputy were extravagant and more extensive than Mr Richards needed. The court having decided, the legal point of principle, we would be interested to learn the outcome in this case and to see whether other deputies follow suit in attempting to recover costs from public authorities for care which has been privately funded in circumstances where there is a statutory duty on the authorities to provide services.

### Safeguarding in (variable) practice

Action on Elder Abuse published a [report](#) entitled 'A Patchwork of Practice: What adult protection statistics for England tell us about implementation of the Care Act 2014' in December 2017. The report is based on an analysis of the Safeguarding Adults Collection (SAC) Annual Report for England 2016-17, published by NHS Digital on 15 November 2017. The report notes the huge differences in how abuse is reported and investigated in different local authorities. Of particular interest to mental capacity practitioners is the fact that for 19% of

those subject to a safeguarding enquiry there was a failure to take account of their mental capacity (it being noted down as either “don’t know” or “didn’t record”). This affects a staggering 22,050 people. Fifteen local authorities had a failure rate in this regard of 50% or more, with two having a rate greater than 90% (Calderdale 94% and Bournemouth 97%). This is despite the issue of capacity being critical to understanding how best to support and respond to victims of abuse.

### Capacity and mental health in the criminal court room

Justice published its [report \*Mental Health and Fair Trial\*](#) on 27 November 2017. It makes 52 recommendations on aspects of the criminal justice process including the investigative stage, decisions as to charge or prosecution, pre-trial and trial hearings and disposal and sentencing. Of particular interest to mental capacity lawyers and the part of the report we explore below is that concerned with legal capacity tests and the recommendations made on that issue.

The report makes recommendations to ensure that *“vulnerability is properly identified, and where identified, properly approached so that the person either receives reasonable adjustments to give them the capacity to effectively participate in their defence, or if appropriate, is not prosecuted.”*

The legal capacity tests the report considers are those for fitness to plead, insanity and diminished responsibility. The report makes a number of specific recommendations in respect of these legal capacity tests. These are:

- (1) that there should be a capacity based test of fitness to plead and fitness to

stand trial, placed on a statutory footing and applied in magistrates’ courts and the Crown Court;

- (2) Where the psychiatric assessment indicates that a defendant is fit to plead, this opportunity should be offered, subject to legal advice, in order to avoid an unnecessary trial.
- (3) Evidential and procedural changes are needed to ensure that this process and the fact-finding procedure that may follow are fair.
- (4) The insanity defence should be amended to a defence of “not criminally responsible by reason of a recognised medical condition” available in magistrates’ courts and the Crown Court.
- (5) In a clear case, for example when the prosecution and defence are agreed that the facts are completely made out and that the expert evidence demonstrates the defendant lacked capacity at the time of the offence, the case should not proceed to trial, and a judge should be able to pronounce a special verdict.
- (6) A further review should take place of what defences should be available in cases where mental capacity will be in issue, taking into account the range in degree of diminished capacity that might exist for defendants with vulnerabilities. The amended test of diminished responsibility is very similar to the proposed test for not criminally responsible – the difference being either a substantial or complete lack of capacity. It is difficult to identify which

ingredients would satisfy one test and not the other.

- (7) Consideration must also be given to whether the defence of diminished responsibility by substantial lack of capacity should be available for all specific intent crimes and not just murder.
- (8) Primary legislation and amendment to the Criminal Procedure Rules will be necessary to give effect to these amended tests and their procedures. (ix). Better instructions must be provided to clinicians assessing capacity under these tests, who would benefit from a standard template to follow on preparing their reports.

It should, finally, be noted that the Justice working group examined, with some care, the implications of the CRPD for criminal justice, and noted there were some situations where the *"current approach of the CRPD Committee would create results that are perverse to what we consider to be the CRPD's intention, i.e. where we believe that the person would in fact be indirectly criminalised and discriminated against for having a disability"* (1.19). The working group therefore departed from its guidance in such cases, believing that the approach used in the report *"meets the overarching aims of the CRPD."*

### International developments of interest

In international developments of interest:

1. The Republic of Ireland is consulting upon a deprivation of liberty regime to be inserted into their (yet to be commenced) Assisted Decision-Making (Capacity) Act

2015, with a deadline of 9 March. We are sure that they would welcome any assistance with (1) squaring the ECHR/CRPD circle in this context; and (2) avoiding the DOLS elephant traps;

2. Gibraltar has introduced a Lasting Powers of Attorney and Capacity Bill.

### Book corner

We include here three book reviews by Alex, who acknowledges with gratitude that copies were provided to him – he is always happy to review works in or related to the field of mental capacity (broadly defined).

The first is the most recent (8<sup>th</sup>) edition of Cretney and Lush on Lasting and Enduring Powers of Attorney (LexisNexis, £85). Caroline Bielanska has now taken over this work from former Senior Judge Lush, and has done an excellent job of updating this authoritative work to ensure that it covers all the bases concerning these powerful instruments. It, rightly, remains the standard work in its field. Perhaps unusually for a new edition of a legal textbook, it received considerable media coverage upon publication in November, thanks to the foreword contributed by his former Senior Judge Lush, which was widely reported. Former Senior Judge Lush explained why he had never made an EPA or LPA himself, as:

*In a nutshell, I have seen so much of the pathology associated with powers of attorney and the causes and effects when things go pear-shaped, that I find it difficult to recall cases where powers have operated smoothly and to the credit of everyone involved.*

Former Senior Judge Lush made clear that he had greater confidence in deputyship as a means of managing someone's property and financial affairs, and that LPAs could have a "devastating effect" it can have on family relationships: "[t]he lack of transparency and accountability causes suspicions and concerns, which tend to rise in a crescendo and eventually explode." Finally, he explained that he had not made an LPA for health and welfare "because, in most cases, I don't think they're necessary."

*The people, who, according to LPA9, don't know you" and "could end up making crucial decisions for you, such as whether to accept medical treatment to keep you alive" are usually qualified health-care professionals, who will make these decisions in your best interests after consulting you and your nearest and dearest.*

Finally, former Senior Judge Lush expressed his concerns that what safeguards there are in respect of LPAs have been consistently eroded in recent years because of the Public Guardian's drive towards creating and registering LPAs online. Caroline Bielanska raises similar concerns in her preface to the work (and has, usefully, also created a safeguarding guide for legal professionals which is available from her [web site](#) to download. It includes precedents, and template documents aimed at reducing the risks potentially posed by LPAs).

We discussed some of the issues raised by both Lush and Bielanska in our September 2017 [Property and Affairs report](#). It was particularly striking re-reading this foreword alongside Rosie Harding's new book *Duties to Care: Dementia, Relationality and the Law* (Cambridge University Press, £75), a socio-legal work of the highest

calibre examining the regulatory and legal dimensions of caring for a person with dementia. *Duties to Care* is grounded in a detailed empirical study of the experiences of carers looking after individuals at different stages of dementia, and the world she describes is an almost entirely different one to that depicted by Lush and Bielanska. Put very shortly, the world that they describe is one in which the family is, in essence, the problem; the world is described by Harding is one where embattled families are doing their best to navigate an extraordinarily complex landscape when seeking to care for a loved one with advancing dementia. Powers of attorney only play a small part in her study, and the experiences she relays do indicate some of the same tensions identified by Lush and Bielanska; however, more often, the tension is between the donor and the attorney in circumstances where the donor is uneasy and uncomfortable about having handed over power.

The more that we distrust families to 'do the right thing' (whether in the context of potential abuse of powers of attorney, or by extending the tentacles of Article 5 ECHR into private family settings to secure against the risk of potentially arbitrary deprivation of liberty), the more there will be a drive to regulate and inspect. *Duties to Care* is a hugely important book for identifying so clearly, and with the benefit of data drawn from both surveys and interviews, both how heavily society relies upon informal carers, and how the effect of those burdens (which are both social and, increasingly, legal) weighs upon the carers themselves. It therefore serves not just as a valuable and thoroughly researched contribution to the academic literature, but a vital contribution to a debate about the extent to which we do or should trust families and

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informal carers – and, in consequence, to whether we should shape the law to seek to support or constrain them.

The third book makes a contribution to a very different debate, namely why we have a mental health law which allows medical treatment under coercion. George Szmukler's *Men in White Coats: Treatment under Coercion* (Oxford University Press, £29.99) provides an elegant, and extremely readable, overview of the core issues concerning involuntary admission and treatment, grounded in his own clinical practice and the experience of service users. It then provides an equally elegant overview of the 'fusion' solution that he proposes, to create a law that does not discriminate against people with mental illness, and reduces, insofar as possible, the shadow of coercion which hangs over the practice of psychiatry. Whilst he has written about this before, this represents an extremely helpful, and updated, version of the proposal, at a time when the Independent Mental Health Act Review is grappling with the two major currents in mental health policy that he – rightly – identifies as conflicting: namely (1) the move to empower patients as collaborators, not subjects, in research and policy developments; and (2) the risk agenda portraying all individuals with mental health issues as, per se, dangerous. Whether or not one agrees with the proposed solution, the book admirably serves its purpose by sharpening the issues in so clear and cogent a fashion and should be widely read by all those remotely concerned with these pressing issues.

### World Guardianship Congress

A reminder that the 5<sup>th</sup> World Congress on Adult Guardianship to be held in Seoul, Korea, on 23<sup>rd</sup> – 25<sup>th</sup> October 2018 (with an additional day of

workshops, principally for Asian countries, on 26<sup>th</sup> October 2018). The website for the 2018 Congress is [here](#), and we would encourage anyone interested in sharing experiences in the mental capacity field to consider both travelling to and potentially presenting at the conference.

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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

#### 5<sup>th</sup> UCLH Mental Capacity Conference

Alex is speaking at the 5<sup>th</sup> University College London Hospital mental capacity conference on 20 February, alongside Sir James Munby P and Baroness Ilora Finlay. For more details, see [here](#).

#### Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see [here](#).

### Other conferences of interest

#### SALLY seminar

The next seminar in the ESRC-funded seminar series on Safeguarding Adults and Legal Literacy will be held on 16 February at the University of Bedfordshire's Luton campus, the topic being "Safeguarding Adults Boards and Reviews." See [here](#) for more details.

#### COPPA seminars

The Court of Protection Practitioners Association have a packed programme of seminars coming up, including (in the North West) a seminar on differing perspectives on proceedings on 31 January and (in London) a seminar on financial abuse on 7 February. For more details, and to book, see [here](#).

#### Finder's Deputy day

The Third Finder's International Deputyship Development Day is taking place on 1 March in York. It is a free event open to all local authorities carrying out deputyship and appointeeship work, and includes a specific focus on hoarding. 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 late February. 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](mailto:marketing@39essex.com).

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