

# The National Mental Capacity Forum

## Chair's Annual Report 2016



HM Government

The National Mental Capacity Forum  
Chair's annual report  
2016



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# The five statutory principles of the Mental Capacity Act



## **One – presume capacity**

A person must be assumed to have capacity unless it is established that they lack capacity

## **Two – provide support**

A person is not to be treated as unable to make a decision unless all practicable steps to help him/ her to do so have been taken without success

## **Three – unwise decisions**

A person is not to be treated as unable to make a decision merely because he/ she makes an unwise decision

## **Four – best interests**

An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests

## **Five – less restrictive option**

Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action

## Chair's introduction



I am delighted to be publishing my first annual report as Chair of the National Mental Capacity Forum.

During this first year of the National Mental Capacity Forum much exciting work has taken place. There is a clear appetite and

enthusiasm for embedding the Mental Capacity Act across our society, from health and social care practitioners and voluntary organisations, to banks and building societies, trading standards, police, family solicitors and other professionals.

This report describes how the Forum has been set up and its early achievements. My first priority was to make sure that the voice of service users has been at the heart of our work. Rachel Griffiths has given selflessly of her time and experience to make this happen and she continues to provide an invaluable 'voice of the user' focus throughout discussions. Dedicated listening events have also helped to make this possible, and I am most grateful to all those who have contributed from their own, sometimes deeply painful, experience. Their voices have added richness and focus to the way my priorities have been determined.

The Forum warmly welcomes people whose lives have been directly affected by issues of mental capacity and their relatives, friends or carers.

With very limited budget or staff, the Forum has to be the catalyst for a national movement to bring about the rapid changes needed. As the Mental Capacity Act sets out, we must improve the way people with impaired mental capacity – whether temporary or permanent, mild or severe – are supported in all aspects of their lives, and, most importantly, empowered in decision-making.

I established a Leadership Group for the Forum, made up of a range of people from different professions who had shown an enthusiastic commitment to change attitudes and to widen knowledge about mental capacity, and to improving the implementation of the Act and its empowering ethos. This Group has identified priority areas for action, acted as a strategic sounding board, and provided reach into and leadership within their particular sector. Each member of the Leadership Group has a demonstrable track record of engagement around the Act and they have generously shared their insights, expertise and enthusiasm in the work they are undertaking. I am grateful for the support they have given me in my first year as Chair, on top of their busy day jobs, and also grateful to their employing organisations who have supported their contributions to this work.

I was delighted to welcome 150 inaugural associate members to the Forum at the National Mental Capacity Action Day in 2016. There are now nearly 200 members of the Forum, all committed to taking forward work in their area that benefits those to whom the Act applies. The Forum encourages new members to join, so that we can build together an active and engaged group across the country who are committed to sharing good practice and to championing the Act.

My work has also been made possible by the wide range of individuals and organisations who have given their time to share their insights around the Mental Capacity Act and their ideas for improvement. The time I have spent out and about hearing from people first hand has been vital in informing my priorities for the role. It has also equipped me to raise key issues in the House of Lords.

I am indebted in particular to Alan Eccles, Public Guardian, who has worked closely with me on many aspects of the implementation of the Act in relation to Lasting Powers of Attorney, and to the Royal College of Anaesthetists which generously supported the first Action Day On March 15th 2016. I am

grateful also for the interest and support of Ministers and civil servants in both the Ministry of Justice and the Department of Health.

It is a great privilege to be given this role and to be able to champion improvements for those to whom the Mental Capacity Act applies. And it is enormously rewarding to be able to find ways around some of the barriers to embedding the 'empowering ethos', that people have brought to my attention.

**Ilora Finlay**

Professor Baroness Finlay of Llandaff  
Chair of the National Mental Capacity Forum

## The Mental Capacity Act 2005

The Mental Capacity Act is a ground breaking piece of legislation which establishes a framework of protection of their rights for people who may – through disability, injury or illness – have impaired mental capacity, or who are at risk of being wrongly thought to lack mental capacity because of a diagnostic label or some aspect of their appearance or behaviour.

The Act, implemented in 2007, applies to everyone involved in the care, treatment and support of people aged 16 and over living in England and Wales who may be unable to make all or some decisions for themselves – around 2 million people.

It sets out how professionals in sectors such as health and social care, finance, policing, trading standards and legal services, should support and care for people who may lack capacity. It also describes how people can prepare in advance for a time when they may lack capacity.

The House of Lords Select Committee post-legislative scrutiny report of 2014 highlighted that the Mental Capacity Act (MCA) was a visionary piece of legislation, which marked a turning point in the statutory rights of people who may lack capacity. However, the report concluded that its implementation had not met the expectations that it rightly raised:

“The empowering ethos has not been delivered. The rights conferred by the Act have not been widely realised. The duties imposed by the Act are not widely followed”.



A person managing their money

<sup>1</sup> HL Paper 125. House of Lords Select Committee on the Mental Capacity Act 2005. Report of Session 2013–14. Mental Capacity Act 2005: post-legislative scrutiny.



# 1. The National Mental Capacity Forum

In response to the Select Committee's report, the Government established the National Mental Capacity Forum in September 2015.

## Aims of the Forum

The Forum was established with the aims of:

1. identifying and driving local actions to improve awareness;
2. improving understanding and implementation of the MCA; and
3. making possible improved outcomes and benefits for individuals who may (or may in the future) lack mental capacity.

## Leadership Group

The Leadership Group of the Forum is made up of representatives from across England and Wales, who have an interest in mental capacity. Its membership and terms of reference are in Annex A. The Leadership Group, which meets quarterly, provides expertise and reach into the wide range of sectors where the MCA often applies. It provides intelligence to ensure that work is targeted effectively.

## Associate members

The Forum is action-focused, and has a growing number – currently nearly 200 – of associate members who work to improve the implementation of the MCA in their areas of practice. They share a common aim to empower individuals and those providing services to them, and to place the person's rights and wishes at the centre of decision-making. Associate members come from health, social care, finance and legal sectors, as well as academics and voluntary organisations and, perhaps most importantly, people with direct experience of the MCA. Forum membership is gathering pace in all parts of England and Wales, and we want to continue to expand in the coming year.

## 2. Chair’s priorities

Throughout this year I have listened to people who may lack capacity, their families and carers, voluntary organisations, and professionals in health and social care, finance and legal sectors. From these conversations, I have identified priority areas for action to strengthen implementation, particularly where an ongoing lack of understanding of the Act is adversely affecting people lacking capacity or their family and carers.

These are my priorities for the year to come, based on what I have heard:

- **Hearing the voice of the person.** Active listening holds the key to understanding what a person needs and wants. This involves listening to the person and properly consulting those who know and love that person. Those directly affected by capacity impairments and their families need kindness, involvement in decision-making and feeling valued in order to empower the person as much as possible.

“The things professionals think are important about the Act aren’t always the things that matter most to those of us who rely on it to protect our freedoms, or the freedoms of people we love.”

- **Improving understanding.** The MCA is everyone’s business. Practitioners in all sectors need clear information to build their understanding of the Mental Capacity Act through clear and simple messaging that helps them take responsibility in care and decreases inappropriately risk-averse attitudes. Such messaging must cover:
  - the Principles of the Act and what they mean in practice,
  - how to assess, where necessary, whether someone lacks capacity for a decision (assessment is situation and time specific),

- recognition that capacity can and often does fluctuate, and
- the various learning styles of those we seek to influence.

- **Supporting carers.** The families and carers of people with impaired capacity need to feel better supported in their role, confident that practitioners will engage and appropriately involve them when decisions need to be taken. Carer fatigue is a widespread problem, and carers often report feeling they have to fight against bureaucratic barriers to get the right care in place. Some families have felt they are labelled as ‘difficult’ and I have been told of cases where a carer’s power under a Lasting Power of Attorney has not been recognised, or they are not being consulted and heard in the best interests decision-making process, which they should be under the Act.
- **Reducing/preventing exploitation.** Vulnerable people are often exploited by financial and other scams. Work with banks, building societies and other sectors is well under way, and will continue to raise awareness of these risks. This will better enable organisations to recognise pointers to possible exploitation and ensure that front line staff respond rapidly. There is also a need to improve protection of vulnerable people from being exploited through targeted mailing, telephone calls and other intrusive and unsolicited communications.

The Trading Standards work to expose scams and protect vulnerable people is very important. To help raise the profile of this important work, it features on the Forum website, I have highlighted its work in many presentations, and I have become a ‘Scambassador’.

### 3. Insights about implementation of the Mental Capacity Act

Through a wide variety of visits and meetings, I have gained deeper insights into how the MCA is affecting the lives of people who may lack capacity and their carers. I have been given many examples of excellent practice, but I have also heard of practical concerns, often highlighting similar dilemmas. These will, quite rightly, form a priority for the Forum in the forthcoming year.

Much is now being done to improve professionals' knowledge and understanding of the Act, and I welcome this.

Less has been achieved among people in the wider society, where awareness of the Act is low. There are often serious misconceptions about the Act – including persistent failure to recognise the importance of assessing capacity for a specific decision at a particular time – and knowledge gaps around important tools, such as failing to understand the decision-making powers given by Lasting Powers of Attorney or advance decisions to refuse treatment.

The Forum will continue to use innovative social media, and wherever possible conventional media too, as part of a strategy to raise people's understanding of how they can use the MCA to plan for their own future. We also want to raise the profile and understanding of the Act to a point where our wider society will hold professionals to account and expect to be fully part of decisions that affect them or those they care about.

On page 19 I outline the proactive and helpful initiatives that are already in progress within a range of statutory and voluntary bodies. The Forum will encourage and collaborate with these and similar initiatives.

#### Coroners' inquests

I have heard from many sources of the great distress caused by more than six thousand unnecessary and inappropriate coroner inquests that were carried out when people subject to a DoLS authorisation had died of natural causes, and where there were no suspicious circumstances around the death. This resulted from requirements under the Coroners Act 2009 when a Deprivation of Liberty Safeguards (DoLS) was in place. People reported feeling traumatised that a 'good death' became part of this little-understood process that was perceived as stigmatising. Funeral arrangements were delayed, and this was most upsetting, perhaps particularly for people whose culture demands rapid burial. Care home managers reported being reluctant to protect people's rights by use of the Deprivation of Liberty Safeguards, for fear of these consequences.

I worked with Ann Coffey, MP for Stockport, to rectify this. On 16th November 2016 the Government accepted an amendment to the Policing and Crime Bill to clarify that a deprivation of liberty authorisation, whether through the DoLS process or a Court of Protection Order should not be classified as 'state detention', and an inquest is not needed if there is nothing suspicious about the death. Subject to the outcome of discussions in the Commons, this will come into effect when the Bill is enacted.

Since this amendment has been accepted by the Government, hundreds of people, including health and social care professionals, coroner's officers and bereaved people, have expressed great relief that this unnecessary use of inquests will no longer be mandatory, leaving an inquest to be appropriately triggered whenever there is anything suspicious or unnatural about a death whether the deceased was subject to a DoLS authorisation or not.

#### *Forum priorities arising from what people tell us.*

Laws are more than regulatory instruments; they send social messages. The aim of the Act is to

empower those with impaired capacity to be able to live fuller lives than previously and to be supported to make decisions so that their capacity is maximised. This was clearly to get away from restrictive practices of the past. The Act also alters the power imbalance that traditionally supported the paternalistic and risk-averse approaches in health and social care. It does this by enabling people to create legally binding advance decisions to refuse treatment, by encouraging health and social care professionals to put people's wishes and feelings at the heart of best interests decision-making, and by insisting on proper consultation of relatives and friends.

The challenges people face in implementing the Act differ from setting to setting. The following summarises the type of challenges we hear that people face.

These are described more fully in annex B.

### Assessments

Capacity assessments can be particularly difficult if the person being assessed feels intimidated, is in a strange environment or the time available for the assessment is inadequate. The person whose capacity is being assessed for one or more decisions needs to be as fully engaged as possible and supported in whatever ways needed to maximise their own ability to make decisions.

### Power imbalance

There is an inherent power imbalance between the person who may have impaired capacity at any level, and those responsible for assessing capacity for decision making. This imbalance can lead to the person not being fully involved in the assessment and their needs, views and wishes not being heard.

### Presumption of capacity

A person must be assumed to have capacity and all practicable steps must be taken to help him/ her to make the decision. However, sometimes people still feel they are expected to prove that they have

capacity for a decision, rather than capacity being assumed until proved otherwise.

The Forum is encouraging training materials, such as the 'Hand' mnemonic logo or recent films that reinforce the Principles of the MCA.

### Fluctuating capacity

The MCA clearly lays out that capacity is decision and time specific. Fluctuating capacity – whereby some people are able to take a decision at one time, but not at another – is inadequately recognised by many professionals.

The Forum again supports materials and training tools that encourage person-centred, decision and time-specific approaches to care planning.

### 'Executive dysfunction' or impulsivity

Some people with neurological disorders or acquired brain injury, who also have impulsive or disinhibited behaviours, can sometimes appear to have mental capacity because they can quote back the information they have been given. Relatives become anxious when they are given no chance to explain why they feel the person is not safe with money, or in some social situations.

The Forum encourages professionals to recognise when there might be complex disorders that require specialist help when assessing someone's mental capacity.

### Unwise decisions

We hear that professionals can be very unwilling to accept a level of inherent risk and still support unwise decisions made with capacity.

The Forum encourages organisations to recognise that some level of risk is part of life, and do all they can to enable staff to support people towards as rich a life as is possible for an individual, rather than wrap them in 'forensic cotton wool.'

## Ethical principles in practice

In recent years important cases regarding the autonomy of people who lack capacity have arisen and the outcome of these cases show the importance the Court of Protection places on considering both a person’s autonomy and how to maximise it in working out best interests. The Forum encourages the messages from these cases to become better known among health and social care professionals.

## Times of transition

Throughout a person’s life there will be stages where they will have to make important decisions about the next stage in their life journey. This can, for example, be a child transitioning to adult services, an adult growing old and needing support, or a person making decisions about their treatment. Weighing up the unknowns about the future can be particularly difficult.

The Forum encourages professionals to be clear about the nature of the choices that people face, and try really hard to maximise their capacity so that they can make important and meaningful choices for themselves.

## Vulnerability

Vulnerability and loneliness can make people targets of deliberate exploitation, by both petty and organised criminals.

The Forum welcomes the growing priority given to this by Trading Standards officers. The Forum supports Trading Standards, police and financial services as the number of financial scams increase and ‘suckers’ lists that contain contact details of vulnerable people are valuable currency among criminals.

## Deprivation of Liberty Safeguards

As a result of the Cheshire West Judgement<sup>2</sup> in the Supreme Court, there has been a great increase in the numbers of people recognised as being deprived

of their liberty in health and care settings. I have heard concerns that the workload has diverted resources from care into the processes around assessment; this risks the processes designed to protect people’s rights being seen by some as a bureaucratic exercise of limited value.

The Forum greatly welcomes the ongoing work by the Law Commission to devise a system to protect people’s rights in a somewhat simpler way. We also encourage providers of health and social care to provide services within the framework of the wider MCA with its inherent respect for people’s rights to liberty and to a private and family life.

## Safeguarding

Safeguarding is often at the forefront of professional’s minds, but for the person the processes around safeguarding can seem unnecessarily complex. People want to be kept safe from harm by those responsible for them, without undue restriction or feeling overprotected.

The assessment of risk and the liberty of the individual need to be kept in balance to avoid the individual being unduly restricted by the power professionals can potentially exert over others.

## Financial pressures

Resolving differences between the financial costs of care and the resources available is often difficult. Sometimes a person’s known wishes and the reality of their situation can appear irreconcilable. Solicitors have reported this can create serious tensions when decision-making in a person’s best interests on behalf of someone who lacks capacity to decide, for example about their future place of care.

The Forum acknowledges these tensions and welcomes discussion on how best to resolve the underlying issues.

<sup>2</sup> Supreme Court Judgement in P V Cheshire West and Chester Council, and P and Q V Surrey County Council. March 2014.

## 4. Catalysing and supporting action – making the MCA work

If we are to realise the aims of the Act we need all sectors to support their workforce to better understand the principles of the Act and how to apply them in practice. The Forum therefore must be a national movement, with wide and flexible outreach to improve understanding across all sectors within localities and regions, as well as nationally.

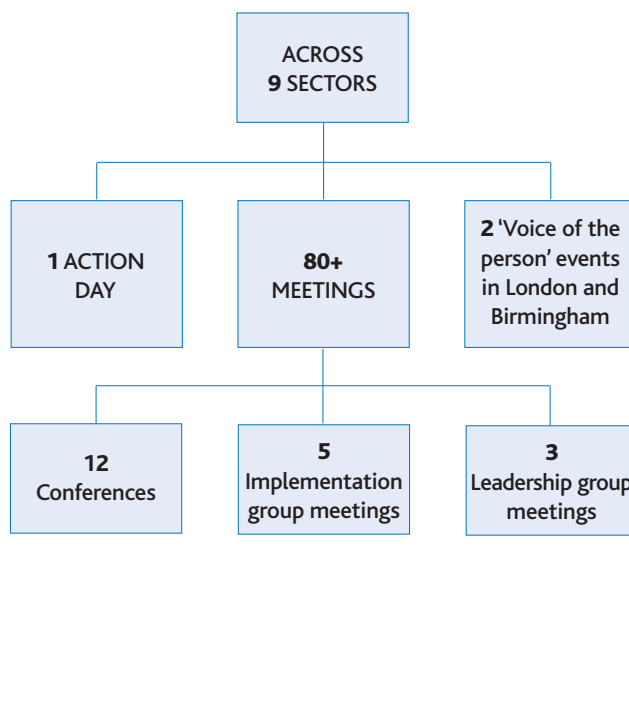
I have looked to act as a catalyst to inspire and galvanise activity across different sectors. If staff are confident in using the principles set out in the Act, then those with impaired capacity can be supported better to help them make their own decisions.

During this first year I have focussed on building a rich understanding of the opportunities and challenges around implementation of the MCA, to identify specific areas of regulation that need to be improved and to harness the energy of those committed to the MCA, to create a collective effort of national improvement by spreading good practice.

### 1. Building an understanding

The wide range of individuals and organisations I have been meeting across England and Wales, have described the challenges in putting all aspects of the MCA into practice; they have also shared many examples of good practice of which they feel rightly proud. They can inspire others to use the Act to positively impact on a person's life.

The following outlines the range and variety of meetings and events I have attended in the first year to learn about how the MCA is being implemented and to start engagement across all sectors including legal, utilities, banking, health, social care, police, charity, education, and Governments and regulatory bodies in England and Wales.



General Medical Council

Decision making when patients may lack capacity

This interactive tool will help you decide what to do when you doubt your patient's capacity to make decisions about their care.

The advice is based on the principles in our guidance [Consent: patients and doctors making decisions together](#) and [Treatment and care towards the end of life: good practice in decision-making](#).

Answer the questions and follow the prompts to move through the tool.

You'll find case studies and other useful resources which help to explain the issues. You can [download](#) key points, guidance extracts and case studies, and there's also a [reflections record](#) which you can keep open and update while you make your way through the decision-making process.

[Get started >](#)

[Downloads](#) [Other resources](#) [Feedback form](#) [Case studies](#)

[f](#) [t](#) [in](#)



I want to thank those people and organisations who facilitated these initial meetings and events, in particular: the Office of the Public Guardian, the Association of Directors of Adult Social Services, the Academy of Medical Royal Colleges, the Royal College of Physicians and the Royal College of General Practitioners, the Medical Schools Council, the National Council for Palliative Care, the Law Society, Nationwide Building Society, Care England, the Law Commission, the Chartered Society of Physiotherapy, Cartref Homes, St Thomas’ Hospital, Baked Beans theatre group and the Inclusion Choir, Alzheimer’s Society and Dementia UK, many individual solicitors, Court appointed deputies and advocates, Welsh Government, the National Learning Disability Board and in particular those who have generously shared their own experience of the Act.

There remains a great deal to learn, good practice to identify and people whose roles, in supporting others, will become more effective when they relate to the MCA.

I therefore want to continue to meet the innovators and the people whose lives are impacted by the Act during my second year as chair of the Forum.

## 2. Maintaining a person-centred approach

I am determined that the voice of people with impaired capacity and their families and carers is and will remain central to the Forum’s work. It is estimated up to 2 million people in England may lack the mental capacity to make a specific decision at the specific time required.

I met with the Learning Disability Programme Board at the Department of Health to explain the work of the Forum. The group offered insights that confirmed and endorsed all the activities of the past year and the future priorities.

Discussion in Kent and Medway with those working with offenders with learning disabilities provided further insights in to the difficulties encountered in supporting those with capacity impairments who have tendency to impulsive and irrational behaviours, and into novel ways to provide support. This meeting revealed the paucity of objective evidence and the need for scientific scrutiny of data to reveal the most effective types of support for people in this group.



Meeting members of the Include Choir

### 3. Developing a cross-sector movement

In March, the first National Action Day took place. The Royal College of Anaesthetists generously hosted a well organised event and the President gave a personal and deeply moving address, which set the tone for the day to be action-focused. The day profiled best practice to foster front-line cross-sectoral action to catalyse real improvements in the care and support provided to individuals.

Around 150 practitioners from all sectors attended. The first keynote address from the then Minister for Care and Support, Alastair Burt, brought humour and vitality to stress the importance the Government attaches to improving the lives of all those with impairments in mental capacity. I was also delighted that both the chief social workers – for children and adults – spoke about their experience of the Act in practice.

Workshops were led by members of the Leadership Group and covered topics including: barriers to frontline progress; supporting people in financial services; practical use of the MCA in emergency and elective surgery; myth-busting; and unwise decisions. The event also included a roll call of short presentations of best practice initiatives; these can be found on the Forum website<sup>3</sup>.

#### **Development of an MCA Media Resource and e-book for service users, families and staff to help embed and support understanding of the principles of the Mental Capacity Act**

A pan Lancashire MCA practice working group was convened with partner agencies across health and social care, with NHS England funding. They developed an open access video and e-book to increase understanding of MCA implementation across provider services. The video illustrates the key elements of the Mental Capacity Act 2005, using scenarios to demonstrate implementation of the MCA in practice. The e-book provides additional information and links to health and social care, websites. The E book can be found at: <http://pub.lucidpress.com/MCABLBNetwork/> and the media resource can be found at: <https://youtu.be/6mQlN6Yw03E>.

The resource was launched in April 2016, initially on a local level at a Lancashire MCA best practice conference and later at a national level via the MCA subgroup of the national Safeguarding Group of NHS England and the SCIE repository.

Within 6 weeks of its launch the resource was viewed 1,395 times and has now had 2,081 views.



Attendees on the day and many others around the country joined in on social media by tweeting examples of 'unwise decisions' they have made, to underline the right that we all have to make decisions that other people may think aren't wise. Examples of tweets from participants included:

To make a stack of 32 pancakes with 31 different fillings – & then eat it!

Starting smoking when I was a teenager

Paying for a stag do with my credit card. (Without discussing it with my wife!)

#### 4. Sharing ideas and learning from the best

The 'national conversation' around Mental Capacity has revealed many inspiring examples of good practice, some of which were brought to the National Action Day.

Every organisation has a vital role to play in providing leadership in implementing the Act. For example, in the past year, the General Medical Council has developed a decision support tool on mental capacity, the BMA has revised their teaching on line, and the OPG finance sector training package have all been launched. Also, several charities have revised their guidance on the MCA, the National Council for Palliative Care has run workshops on the MCA and produced resources aimed at palliative care providers.

Each sector has responsibility for spreading awareness of the Mental Capacity Act and many organisations have found their own way to engage people with the Act and its principles. The Forum is providing complementary support in this area.

We have produced a short film<sup>4</sup> setting out the five principles of the Act in a way that can be understood and implemented by all sectors.

This film is available on the MCA Directory<sup>5</sup>, which is hosted on the website of the Social Care Institute for Excellence and provides a wide range of guidance, tools and good practice examples for professionals and for family members and carers. Information about the work of the Forum<sup>6</sup> is also available on the SCIE website, as detailed at the end of this document.

4 <http://www.different-films.com/SCIEREVIEW/page19/page22/page22.html>

5 <http://www.scie.org.uk/mca-directory/>

6 <http://www.scie.org.uk/mca-directory/forum/index.asp>

MCA website hosted by SCIE has attracted the following number of visits:

- MCA directory was visited 10,735 times
- NMCF page was visited 2,209 times
- The MCA film was viewed 11,355 times

Several of the Medical Royal Colleges have appointed a lead on the MCA; the RCGP has established a Quality Improvement in Safeguarding (Adults and Children) task and finish group that aims to highlight the MCA as part of their adult safeguarding package. The College has also accredited the Medical Protection Society's videos for MCA training, which are open access.



Stephanie Lunn speaking at Action Day

## 5. Harnessing the reach of Leadership Group members in to their particular sector

As a catalyst for action, each Leadership Group member has worked hard over the last year to build momentum around the Mental Capacity Act in their particular sector. The following describes some examples of the work being taken forward:

- Leading an online 'call to action' across social work students, social workers, and social work employers and educators to 'walk in the shoes' of other people by reflecting on and sharing their own unwise decisions
- Establishing a working party in the financial services sector to create a shared toolkit on mental capacity
- Bringing together charities with an interest in the MCA to agree what more can be done in this key sector
- Using conference platforms and seminars to encourage professionals both to listen to the voice of the person at the heart of MCA practice, and also to work harder to empower people to make their own decisions
- Listening to experiences from relatives and friends of people lacking mental capacity, and passing on learning from where things went wrong and how to improve
- Producing a leaflet to explain clearly 'Next of Kin' and its legal status
- Launching new Guidelines for Police Training.

Individual reports from each member of the Leadership Group are included in Annex C.

## 5. MCA awareness in Wales

As someone working in Wales, I have often been aware that there are subtle but real differences in how the MCA is applied in practice, in part because the organisation of health and social care is different. There does seem to be more empowerment of those with impaired capacity across society and an inclusive community focus, often around major sporting events.

Following the House of Lords post legislative scrutiny of the Mental Capacity Act, the Welsh Government established a local health board and local authority co-chaired leadership group to drive awareness of the MCA and support organisations to fulfil their obligations under the deprivation of liberty safeguards.

In the last two years, activity has included the following:

- nationwide awareness raising conferences were held in 2014 and 2015;
- all-Wales MCA and DoLS lead network established;
- the MCA has been included and emphasised in cross-government policy and guidance, for example the Codes of Practice for the Social Service and Wellbeing Act 2014;
- all local health boards and partners have been charged with delivering training;
- all staff groups within the health board have been invited to attend the training, with bespoke sessions in some departments;
- Targeted training has been delivered to:
  - G.P’s via the NCN network;
  - residential/nursing care home providers forums;
  - The Care Home ‘Ask and Talk’ (CHAA<sup>7</sup>T) volunteer sessions;
  - Pre-registration and post graduate nursing students at University of South Wales.



CHAA<sup>T</sup> volunteer service leaflet

<sup>7</sup> CHAA<sup>T</sup> volunteer service is a unique partnership between Aneurin Bevan University Health Board (ABHB) and the NHS Retirement Fellowship (NHS-RF) offering support to patients living in nursing homes and their families.

## 6. Liaising with the statutory bodies that have responsibility for the working of the Act

### Office of the Public Guardian (OPG)

The Office of the Public Guardian has been very welcoming and engaged in discussions over areas of mutual concerns.

Health and Social Care professionals report not knowing how to recognise whether a Lasting Power of Attorney for Health and Welfare decisions is valid, and whether it has been specifically created to include the power to consent to or refuse life-sustaining treatments. These issues have been addressed by a clear guide with images now hosted on the OPG website<sup>8</sup>.

The OPG has included me in the annual Safeguarding meetings for England and for Wales, at which leaders from all relevant sectors come together. This has been an opportunity to discuss the Forum, my activities as Chair and explore what different sectors view as their priorities.

### The Court of Protection (CoP)

In two open and free-ranging discussion meetings with the Court of Protection staff and Judges, it has become clear that the public generally are unaware of the complexity of many cases that come before the Court, the ways the Judges try to ensure that the voice of the person is fully heard and their views considered, and the ways that the Judges come to their considered decisions.

I have been particularly impressed by the 'out of the box' thinking the Court has shown in making it possible for a person who lacks capacity to attend a hearing relating to them, which has now led to guidance on facilitating their participation in Court of Protection proceedings<sup>9</sup>. The model of starting from the wishes and needs of that person, rather than the agenda of professionals, is one that should be adopted by professionals in other settings.

### Other official bodies

I have discussed the working of the MCA and the Forum with the Official Solicitor, the Chairman of the Chartered Trading Standards Institute, President of the General Medical Council, and the Chief Inspector of Hospitals for the Care Quality Commission (CQC). CQC's MCA National Professional Advisor is part of the Forum Leadership Group.

Ministerial meetings include meeting with Ministers at the Ministry of Justice, the Department of Health, and the Minister for Health and Social Services in Wales.



Baroness speaking at the Office of the Public Guardian event

<sup>8</sup> <https://www.gov.uk/government/collections/mental-capacity-act-making-decisions>

<sup>9</sup> [http://www.familylaw.co.uk/system/froala\\_assets/documents/1245/Practice\\_Guidance\\_vulnerable\\_Persons.pdf](http://www.familylaw.co.uk/system/froala_assets/documents/1245/Practice_Guidance_vulnerable_Persons.pdf)

## 7. Wider work to improve implementation of the Mental Capacity Act

The National Mental Capacity Forum is a key part of the Government’s response to the House of Lords Select Committee and of ongoing work to support effective implementation of the Act across a wide range of sectors. However, it is not the only work underway to support implementation of the Act.

### MCA Implementation Group

The Forum works in parallel with the cross-government MCA Implementation Group<sup>10</sup>. This brings together officials from key government departments and relevant statutory bodies to collaborate in the effective implementation of the Mental Capacity Act. I am pleased to have been invited to be a member of the implementation group and therefore can share the intelligence from the Forum directly with these statutory partners, to provide further insights on how the Act is working.

### Select Committee Recommendations

I and other members of the Forum’s Leadership Group have been involved in some of the parallel pieces of work that are taking place following the Government’s response to the Select Committee’s recommendations. This includes:

- The Care Quality Commission has increased the profile of the Mental Capacity Act in its inspections. The aim is to encourage improvement in MCA-compliant practice among providers of health and social care, so that people who might lack capacity are empowered to make their own decisions, and restrictions on their liberty are avoided wherever possible.

CQC published its annual State of Care report in October 2016, which included this year’s report on monitoring of the Deprivation of Liberty Safeguards .

- We have seen examples of good practice in all sectors, including individual providers who have improved after we have taken enforcement action. Providers who applied DoLS well had a culture of person-centred care, robust policies and documentation of DoLS procedures, and good leadership in place.
- There is variation in the effective application of DoLS both between providers and within individual providers across the different services that we inspect.
- Not enough providers are applying capacity assessments effectively. Many providers made assumptions that individuals lacked capacity without having carried out or documented assessments.
- Lack of staff training remains a problem.

<sup>10</sup> Membership of the MCA Implementation Group includes Ministry of Justice, Department of Health, Department of Work and Pensions, Department for Communities and Local Government, Welsh Government, the Office of the Public Guardian, the Official Solicitor, the Court of Protection, Police, NHS England, Care Quality Commission, NHS Improvement, Association of Directors of Adult Social Care and the Local Government Association.



- The Office of the Public Guardian (OPG) has introduced new, simpler forms for making and registering lasting powers of attorney. An e-learning tool is being successfully piloted with a number of banking organisations to bring an understanding of lasting powers of attorney to frontline banking staff and improve customers' experiences. Revised and updated versions of OPG's supporting documents for both attorneys and deputies have also been published this year to ensure they are carrying out their duties within the requirements of the Mental Capacity Act.
- The Law Commission is currently reviewing Deprivation of Liberty Safeguards. This is the legal framework for ensuring that the health and care arrangements, for those people without the mental capacity to consent to those arrangements, are the least restrictive possible.
- An ad-hoc Court of Protection Rules Committee was convened in July 2014. This led to the Rules being updated to reflect the current practices of the court. As part of this update, the Ministry of Justice is conducting a 'transparency pilot' to test the risks and benefits of holding Court of Protection hearings in public as the majority of hearings would normally have been held in private.

## 8. Going forward – next steps

This has been a very busy and successful first year for the Forum. A great deal has been achieved in both the volume and quality of the work undertaken across each of the sectors. This is our first year, and my appointment is for a further two years. I therefore aim to build on the achievements of this year and look to expand our work so that it reaches those who we haven't managed to engage so far.

My vision for the Forum is that by the end of my term it will have helped to change attitudes and behaviours across society towards people who lack capacity and that each person will be treated with respect and dignity. Practitioners will understand how to support people with short and long term impairments of their mental capacity, and they will be supported to give valid, informed consent in all walks of life, not only the health and care system. I want everyone to understand the importance of working within the first three principles of the Act, only resorting to taking a decision on a person's behalf when capacity cannot be maximised and seeking the less restrictive option relating to that decision.

To deliver my vision I want to build on the success of the National Action Day we held in March, and the following events are being arranged:

### Action Days

A 2nd **Mental Capacity in Action Day** is planned for Monday February 27th 2016 at the Royal College of Physicians, London. This day will combine keynote lectures, presentations of novel ways of improving MCA implementation and several workshops.

A **Mental Capacity Research in Action Day** is planned for Thursday March 16th 2017 at City Hall in Cardiff. This day aims to bring together those with an interest in research into aspects of impaired mental capacity, with a view to improving the evidence base in all aspects of capacity impairments and better evaluation of possible supportive and therapeutic interventions.

My priorities for the coming two years will be to expand on the work in this first year:

- **The Voice of the User:**  
The direct experience of those affected by the MCA must continue to be heard and will inform the work of the Forum. The forum membership is being expanded and widened.
- **Supporting carers:**  
Continuing to highlight the importance of the role of carers in the Mental Capacity Act – including ensuring their insights about the person they love and know well are reflected in best interest decision-making. This will build on this year's work to support a new guide for carers about the MCA from the coalition of stakeholders – Dementia Decisions – and inform the forthcoming cross-government carers' strategy.
- **Supporting those with capacity impairments:**  
The difficulties identified in the practical implementation of the MCA will guide specific activities for the next two years to increase awareness of the need to recognise fluctuating capacity, ways to support decision-making, and the requirements laid down in the MCA about making a decision on behalf of a person who lacks capacity to make that decision.
- **Reducing/preventing exploitation:**  
Impairments in mental capacity make people particularly at risk of exploitation. This is often financial exploitation through financial scams, but can also be through fraudulent activity and through grooming.

Over the coming year, work with the Chartered Trading Standards Institute and others will be important to find better ways to protect the vulnerable. The scam busting initiative is strongly supported by the Forum and features on the website.

- **Broadening reach:**

The Forum will look to broaden its reach through conversations with the utility companies, gambling and gaming consortia and with the Prison Service.

Central to all of the Forum's activity is that the voice of service users, families and carers continues to be at the heart of everything we do.

These are important goals and we must all strive to see the level of involvement, energy and creativity from those who participated in the first year, supplemented by new participants who will bring new ideas to the Forum. It is by a national conversation and national movement that awareness of the Act will be disseminated further, and its importance to service users, their families and carers will be recognised and valued.

The MCA Directory can be found on the SCIE website at <http://www.scie.org.uk/mca-directory/>

You can get involved with the National Mental Capacity Forum by signing up on the MCA website at <http://www.scie.org.uk/mca-directory/mca-tailored-for-you/index.asp>



## Annex A

# The National Mental Capacity Forum Leadership Group

### Membership

Name	Organisation
Baroness Ilora Finlay (Chair)	National Mental Capacity Forum
Keith Brown	Bournemouth University
Michael Brown	College of Police
Sam Cox	Alzheimer’s Society
Mandy Griffin	Nationwide Building Society
Rachel Griffiths	NMCF Voice of the Person Lead; CQC National Professional Advisor on the MCA
Sam Kyeremateng	St Luke’s Hospice, Sheffield
Betsey Lau-Robinson	UCL Hospital
Stephanie Lunn	MCA Birmingham Project (NHS)
Rob Mitchell	Principle Social Worker Calderdale Council
James O’Sullivan	Building Society Association,
Gary Rycroft	The Law Society of England and Wales
Lucy Series	Cardiff Law School

The leadership group will be strengthened next year by Lorraine Currie, Principal Social Worker, Shropshire; Julie Chalmers, Royal College of Psychiatrists; Alun Thomas, Police Liaison Officer for Welsh Government, and Garry Davies, South Wales Fire and Rescue Service.

### Terms of Reference

#### Context

The Mental Capacity Act 2005 (the MCA) is fundamental legislation that both protects and empowers individuals that may lack mental capacity. It affects as many as two million people in England.

Evidence shows that awareness, understanding and implementation of the MCA are less than satisfactory. As a result, many individuals may not be benefiting from the rights afforded to them by the law.

The MCA encapsulates an approach and culture that puts the best interests of the individual first and foremost, taking account of their unique needs and preferences, wishes and beliefs. Improving implementation will have wide benefits for those with dementia, a learning disability or other mental health disorder. It will allow those with capacity to plan for a future time when they may not.

To make real progress on MCA implementation, joint action between a range of different partners is required at a local level, close to the individual concerned.

## Purpose

The ultimate purpose of the National Mental Capacity Forum (NMCF) is to advocate at a national level for the MCA and to identify and support local actions to improve awareness, understanding and implementation of the Mental Capacity Act to realise improved outcomes and benefits for individuals who may (or may in the future) lack mental capacity.

It will do this by:

- Being action-focused, developing priorities
- Bringing together a wide range of parties with a role in implementing the MCA
- Reaching out and engaging organisations where MCA implementation is poor
- Emphasising the need for collaborative working, reflecting the need for integration of services around the individual
- Providing insight to the MCA Implementation Group to inform Government policy.

## Leadership Group of the National Mental Capacity Forum

The NMCF is led by the Chair, Baroness Ilora Finlay.

The Chair is supported by the Leadership Group which comprises a range of individuals with experience and expertise in implementation of the MCA.

The role of members of the Leadership Group is:

- To advise the Chair on MCA work already underway
- To advise the Chair of specific areas for improvement in the MCA landscape
- To reach out into their respective sectors/ organisations to leverage support for the MCA
- To offer expertise to local MCA projects, to help them achieve successful outcomes.

## Management

The Ministry of Justice and the Department of Health will provide secretariat support for the National Mental Capacity Forum including: organising meetings, co-ordinating papers, holding central lists of actions and progress against these, co-ordinating the production of a quarterly newsletter.

However, actions identified will be pursued by members from within their own resources. There is no preferential access to government funding.

Membership of the Leadership Group is for one year in the first instance.

## Annex B

### Insights about implementation of the MCA

#### Assessments

For the person being assessed, the very fact of the assessment process happening can be intimidating and emphasises the power others have over that person, as if this is some kind of exam the person has to pass. The 'hello my name is ....' movement, revealed how important feeling at ease is for everyone – how much more so when capacity is impaired. It is essential that the person being assessed is as fully engaged as possible throughout. Their support worker is there to support and should not be used as a proxy.

Capacity assessments can be particularly difficult when overall workload makes staff feel that there is not enough time to do these properly or the environment makes it difficult for both the individual and the staff member. Particularly, beyond the health and social care arena the tools and confidence to carry out and capture an assessment is lacking. Yet a rushed – or missed – assessment risks the person being wrongly assumed to have the capacity to consent or refuse a procedure when they do not, or being wrongly assumed to lack such capacity, particularly when someone is refusing a suggested medical intervention, and hence their refusal is over-ridden in the name of 'best interests'.

Assessments of capacity require four principle stages. Giving information in a form that can be understood by the person is essential. But the assessment of the person's ability to retain and weigh up the information, particularly the latter step, can be difficult to confirm. Without the ability to weigh up information to be able to make a decision, the decision itself may not be underpinned by capacity for that decision.

Good social skills can mask an inability to weigh up information, and conversely difficulties in communicating a decision can be misleadingly interpreted as an impairment in capacity. Time must be allowed for processing of information. These

complexities underpin the need for assessments to be situation and time specific, within the framework of an ongoing conversation with the person being assessed.

Some Local Authorities find the requirements around assessments for those in supported living arrangements are lengthy and time consuming, both for the assessor and the person being assessed; these include robust consultation around a best interests' decision, evidence of the acid test, and why it is necessary and proportionate to deprive liberty.

#### Power imbalance

There is an inherent power imbalance between the person who may have impaired capacity at any level, and those responsible for assessing capacity for decision making who are working with the person to meet their care needs. Where this is recognised, there are often open honest conversations occurring, with the person with impaired capacity being listened to and being genuinely empowered and supported in decision making.

Listening to the needs and expressed wishes of the person required listening with all one's senses, not only listening to the words expressed. The vast majority of communication is non-verbal, meaning that visual and other cues, and the overall atmosphere around a conversation, are essential components in assessment.

The fragile nature of relationships of trust, the power differential inherent in relationships and the need for in depth knowledge of a person, all steer effective assessments of capacity to be made over time as part of an ongoing conversation, rather than as a one-off assessment. This conversation needs to involve listening to and learning from those closest to the person. Despite Section 4 of the MCA mandating that they should be consulted whenever a best interests decision is being contemplated, those who know the person best and love them the most are often excluded or ignored.

The person at the centre may often feel obliged to yield to suggestions, rather than risk upsetting care staff, especially when staffing ratios are less than ideal.

Good assessment requires honesty on the part of the person doing the assessment as to the values that they are bringing to the assessment, both for assessment of capacity and in deciding best interests. This comes through very strongly from both the *Re C* [2015] EWCOP 80 case and *Aintree v James* [2013] UKSC 67<sup>11</sup>.

### Presumption of capacity

Those with impairment of capacity can need time and a calm environment to maximise their ability to take some decisions; fear and panic can impede their ability to understand information, to retain it, to weigh it up in making a decision and to communicate the decision. Too often, people are expected to prove to a professional that they have capacity for a decision, whereas the MCA makes it clear that it is up to whoever wants to act or make a decision for the person to demonstrate that, on the balance of probabilities, and after they have been given all practicable help to make their own decision, they lack that capacity at the relevant time for the relevant decision. What is practicable will depend on circumstances. Support does not necessarily cost money; for example, a photo of a proposed care home on a mobile phone, when assessing capacity to go into the care home, can make the discussion less abstract.

### Fluctuating capacity

The MCA clearly lays out that capacity is decision and time specific. However the requirement to record a capacity assessment needs some caveats. Fluctuating capacity, which is inadequately recognised, means that some people are able to take a decision at one time, but not at another. For example, an infection, the effect of fatigue, medication side effects or ingestion

of alcohol or other substances can seriously alter capacity. Some people have recurring fluctuations in capacity, as in bipolar disorder; careful advance care planning can document their preferences for times when their capacity is impaired, but such plans are not always accessible by those who are likely to need to know about them in a crisis.

### 'Executive dysfunction' or impulsivity

A difficulty arises in those with impaired capacity and situational impulsivity of some sort. The assessor may decide that a person has capacity when away from the provoking stimulus. However, when exposed to a certain situation, the physiological changes associated with exposure to the trigger situation can override a previously expressed rational understanding of the consequences of an action.

The courts have found it difficult to navigate a path in such circumstances; sometimes this is best looked at, not through the prism of Mental Capacity, but through the prism of the inherent jurisdiction to protect capacitous (those with mental capacity for a specific decision at the time the decision has to be taken) yet vulnerable adults, recognised in the *Re DL* [2012] EWCA Civ 253 case<sup>12</sup>.

### Supporting people to make their own decisions

Within busy professional settings, such as seen in acute care or where there are serious staff shortages, the time needed to support the person may be difficult to provide without jeopardising others. Some excellent resources exist, such as books designed to help those with learning difficulties cope with a variety of situations<sup>13</sup>, person specific communication passports<sup>14</sup> and clues to how best to care for an individual<sup>15</sup>, but such resources are often not recognised or used.

11 [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2013\\_0134\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0134_Judgment.pdf)

12 <http://www.bailii.org/ew/cases/EWCA/Civ/2012/253.html>

13 [www.booksbeyondwords.co.uk](http://www.booksbeyondwords.co.uk)

14 <http://www.easyhealth.org.uk/listing/hospital-passports-%28leaflets%29>

<http://www.wakefield.gov.uk/Documents/ldpb/vip-hospital-passport.pdf>

15 <https://www.gov.uk/government/publications/learning-resources-mental-capacity-act-2005-mca-in-social-work>

## Unwise decisions

The empowering ethos of the Act is not being universally implemented, often because people are unwilling to take risks or to support unwise decisions made by individuals, and feel conflicted between their desire to protect people from harm and their wish to respect the individual’s decision.

Risk averse attitudes across health and social care can create a tension when a person makes a capacitous decision that others consider to be unwise. Fear of being unsupported or publicly criticised in the media can make staff hesitant to support the person in enacting their decision, such as treatment refusal or going home early after hospitalisation. This risk averse attitude can also apply across the other sectors as well as health and care.

This risk averse attitude is aggravated when professionals are trying to understand serial episodes of unwise decision-making by a person, to ascertain whether, or in what circumstances, the person may not have capacity for such decisions.

## Ethical principles in practice

Autonomy is sometimes spoken about as if it simply means ‘I want, therefore I should get’, whereas the meaning of self-governance came from self-governing societies in ancient Greece, which created rules of behaviour. This original meaning is still relevant today because we are not islands – we are all interrelated and the actions of one person affect others with whom that person interacts directly or indirectly. This relational nature of autonomy, in that the autonomy of one person should not be able to impair the autonomy of another, and the principle of the just allocation of resources can provide difficulties for those concerned about actions or decisions by a person that could be self-destructive or potentially harm others.

Consent is the cornerstone of clinical practice.

Consent refusal by a person taking a fully informed decision, free of coercion and with mental capacity for that decision, has been upheld in the Court of Protection. The decision confirms that life sustaining treatment can be refused when a decision is informed, capacitous and voluntary, in particular: *Kings College NHS Foundation Trust v C* [2015] EWCOP 59. When a decision has to be taken for a person unable to consent, previous knowledge of a person’s views is essential and such any best interests’ decision should be towards life preserving *Cambridge University NHS Foundation Trust v BF* [2016] EWCOP 26.

In recent years important cases regarding the autonomy of a person with impaired capacity have arisen and the outcome of these cases show the importance the Court of Protection place in considering both a person’s autonomy and best interest. Some notable examples are:

- *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20, in which the judge had to decide whether a young man with learning disabilities had the capacity to consent to sexual relations and to marry. He came from the Bangladeshi community, and his parents wished to arrange a marriage for him to secure support for him when they were no longer able to do so. The judge in reaching her conclusion that he had capacity in both regards took into account in her application of the law sensitively took into account his cultural circumstances and the approach being adopted by his family.
- *Cambridge University NHS Foundation Trust v BF* [2016] EWCOP 26, in which the judge had to decide whether it was in the best interests of a woman detained under the Mental Health Act

with a diagnosis of paranoid schizophrenia to undergo surgery to treat ovarian cancer which would leave her unable to bear children. The judge had to balance the fact that he knew that the woman wanted to have children with the fact that she had previously (when her mental health was stronger and she had had capacity) consented to the proposed surgery. He reached the decision that it was in her best interests to undergo the treatment, and ultimately it proved possible to carry out the surgery in such a way that her fertility was preserved.

- North Yorkshire CC v MAG & Anor [2016] EWCOP 5, in which the court had to decide whether to authorise (as being in his best interests) arrangements for a man with disabilities living in a placement which was too small to accommodate the use of his wheelchair, and where he was therefore forced to move around by pulling himself along the floor and up on to chairs and his bed which had resulted in painful bursitis in both knees and calluses to his knees and ankles. The court found that it had to do so. The Supreme Court will be looking in December 2016 at the extent to which best interests' decision-making is constrained by the availability of options. This is a critical area and its decision will have significant implications.
- Kings College NHS Foundation Trust v C [2015] EWCOP 59, in which the judge had to decide whether a woman had capacity to refuse the renal dialysis that she required following a failed suicide attempt. It was only after a detailed, careful and above all sympathetic analysis of the woman's own values and life story (relayed, in particular, by her children) that the judge was able to come to the clear conclusion that the woman was entirely able to use and weigh the information that failing to have the dialysis would lead to her death.
- NHS Trust v DE – DE was 37 years old with an IQ of 40. He already had a young son with his long-term partner and decided that he wanted a vasectomy as he did not want to have another child. His parents, who were very supportive of DE, and who cared for him, also felt that it was in his best interests to have a vasectomy. Experts said that he was capable of sexual consent, but did not have the capacity to make decisions about birth control. The case came to court because of evidence that DE lacked capacity to decide whether or not to agree to sterilisation, meaning that a judge would have to make a decision. The court held that it was in DE's best interests to have a vasectomy. This was a landmark legal ruling, the first reported case in which the court has found that it was in the best interests of a learning disabled adult to have a vasectomy as a method of contraception.
- Wye Valley NHS Trust v Mr B [2015] EWCOP 60, concerning the question of whether it was in the best interests of a man with long-standing mental health difficulties to undergo life-saving surgery to amputate his leg against his strong opposition. It was suggested to the judge that because the man lacked capacity to make the decision his wishes and feelings should be discounted, a suggestion that was strongly rejected by the judge on the basis that a conclusion that a person lacks decision-making capacity is not an 'off-switch' for his rights and freedoms. The judge found that there is a difference between fighting on someone's behalf and just fighting them, and that enforcing treatment in Mr B's case would surely be the latter.
- LB Redbridge v G & Ors [2014] EWCOP 485, concerning the question of whether a woman had capacity to decide whether two individuals should continue to live with her in circumstances where it was clear she perceived herself as being 'caught in a spider's web' and



others around her feared that she was being abused both emotionally and financially. The court had to consider with great care whether the real reason for her difficulties in decision-making was their coercion of her or the memory loss from which she was suffering.

### Times of transition

There are many challenges for families of children and young people with severe learning disabilities. They need support to prepare for the change in legal status of the person moving into adulthood, and particularly around the shift in responsibility for decision-making. Schools with Special Needs pupils need to address the issue of Mental Capacity; some have difficulty with the idea that parents could have Power of Attorney for their “children” once they are 18 years. Few parents have any notion about the difficulties of decision making until they encounter a problem, such as parental access to a bank account or consenting to a hospital procedure. It heightens tensions when a deadline is approaching so comprehensive planning beforehand is essential.

For the small number of those with both impaired capacity and offending behaviour, they may require clear boundaries set to help them avoid situations likely to provoke these behaviours; occasionally this may involve specific restrictions to their liberty as they transition from custody into supported living arrangements. The risks and benefits of an individual's situation mean that any deprivations of liberty must be revisited and revised as the person adapts to a new environment.

Older people are increasingly preparing for times of transition to frailty and dependency. Work by the Office of the Public Guardian has increased the uptake of Lasting Powers of Attorney for Financial decisions, and Lasting Powers of Attorney for Health and Welfare decisions, although uptake of the latter remains relatively low.

The option of Advance Decisions to Refuse Treatment (ADRTs) is being used by people who wish to ensure that their wishes have legal weight and will be followed, although some do not understand the need to specify their refusal, nor do they understand the requirements around refusal of life-sustaining treatments. However, several charitable organisations have produced informative tools and resources to help people considering what the future may hold, whether still in good health or whether they are developing dependency in a care home. Welsh Government, working with the National Council for Palliative Care, is also developing guidance in advance care planning.

Transition to a strange environment can leave people disorientated and with impaired capacity but as they settle into a new environment, which can take weeks, they regain a degree of capacity if the new environment is supportive. This makes reassessment of capacity essential in order to empower a person appropriately, ensure their own input into their care plan and revisit all aspects of their care after a major change.

### Vulnerability

Those who are vulnerable and lonely are often at risk of being deliberately exploited. This problem has been particularly highlighted by trading standards officers. Lists of consumers in vulnerable situations and their personal details are trafficked from one organised crime group to another; they are then repeatedly targeted by criminals. Some of these people are then groomed with a view to trying to take their life savings.

There are also mailing lists of individuals thought likely to give donations or who can be easily enticed in to buying items or services; these are being sold from one organisation to another; some organisations then use misleading practices to entice consumers.

This has become a priority within the National Trading Standards and in financial services as financial scams increase and 'suckers' lists, containing contact details of vulnerable people, are circulated on the dark net.

Being a victim of fraud and exploitation is, sadly, a recurrent feature in the lives of a proportion of people who have capacity impaired to some degree. The Office of the Public Guardian is detecting and investigating financial fraud when perpetrated by someone holding a position of trust, either through a Lasting Power of Attorney or through appointment as a Deputy by the Court of Protection. Evidence from charities such as Action on Elder Abuse and Age UK suggests that in the rest of the population there is far more abuse and fraud occurring behind closed doors.

### Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards (DoLS) are under review by the Law Commission following the huge increase in applications following the Cheshire West Judgement<sup>16</sup>. I have heard concerns that the workload has diverted resources into the processes around assessment, and that the real improvements experienced by individuals as a result of the process can be limited. Major protections given by DoLS include that for every person assessed for a DoLS authorisation, the care plan is subject to external scrutiny for necessity and proportionality, and all are given the opportunity to challenge a Deprivation of Liberty.

The current regulation of the Coroners Act 2009 categorises the person subject to a DoLS authorisation as being in 'state detention'. This means that, should they die when an authorisation is in force, an inquest has to be held by the Coroner, even when the death was anticipated, underlying disease was progressing, and no suspicious circumstances exist. For those whose death was

from natural causes, which was the verdict in 94% of such referrals in 2014, the bereaved are subjected to the distress caused by a coroner's inquest and funeral delays, and can feel stigmatised by the process. To rectify this while maintaining referrals to the coroner as appropriate, I was delighted that on 16th November 2016 the Government accepted my amendment to the Policing and Crime Bill to clarify that a deprivation of liberty authorisation, whether through the DoLS process or a Court of Protection Order should not be classified as 'state detention'. This was highlighted by Ann Coffey, Member of Parliament for Stockport, in the Commons and I worked with her and the Government to achieve the amendment. This will mean that thousands of unnecessary and inappropriate inquests will no longer need to be held when people have died of natural causes and there are no suspicious circumstances around the death. Subject to the Bill successfully completing its passage through Parliament this will come into effect when the Bill is enacted. Of course, when these patients die their death will need to be referred to the Coroner if there is any suspicion whatsoever of neglect, unnatural or sudden death, suicide, violence etc., just as any other person's death.

I have also had an excellent and frank dialogue around the Law Commission's consultation on revision of the processes needed to protect the rights of people deprived of their liberty to be given necessary care or treatment, including setting up small discussion groups of front-line senior healthcare staff for whom the MCA and DoLS is not the principal part of their work, but who provided insights into the practical difficulties of the DoLS processes when delivering clinical care.

### Financial pressures

Care home managers have highlighted the overall cost of the current DoLS processes, because of the time taken up completing the DoLS paperwork; it

<sup>16</sup> Supreme Court Judgement in P V Cheshire West and Chester Council, and P and Q V Surrey County Council. March 2014.



has taken staff away from front line care. Care home managers and Care England recognise the need to collate data around this, although it is difficult to collect. Care home managers have also reported difficulties in working with statutory sector partners in the NHS and in Local Authorities, as they feel there is variation in the way that mental capacity assessments are undertaken and the acuity of social care needs are recognised.

The incidence of dementia means that increasing numbers of older people are transitioning from independence to increasing dependence; the financial implications of their care needs can create serious tensions around decision-making in a person’s best interests. Particularly when looking for the least restrictive option and decisions that align best with a person’s previously expressed wishes, as the MCA requires, finance has been described as ‘The elephant in the room’, with the concept of choice being illusory when there are funding restrictions. This highlights the need to maximise capacity – so that people are making more of their own decisions – and the need to move towards a liberty-based model of care planning, which aligns the delivery of services as far as possible with the person’s wishes and feelings.

A Court of Protection appointed Deputy can be faced with managing large funds following major compensation settlements. Prior to the 2005 MCA, the Strategic Investment Board of the Lord Chancellor set standards for such powers of investment. Since 2005, the selection of investment advisers, investment strategy and investment funds has been left to the discretion of the individual financial Deputy. The level of fees charged by financial deputies is subject to close scrutiny but the charges incurred by a financial adviser or fund manager, who is instructed by the financial deputy, are not independently scrutinised. Where investment related charges are high, the value of the funds managed by financial deputies on behalf of their clients risks being seriously eroded.

## Annex C

### Reports from individual members of the Leadership Group of The National Mental Capacity Forum

#### Professor Keith Brown

National Centre for Post-Qualifying Social Work and Professional Practice:  
Bournemouth University

It was clear from early leadership group meetings that there were many misunderstandings over the term 'Next of Kin' within society and I was tasked with producing a Next of Kin document. Group members contributed to the drafting with comments and suggestions. The myth of next of kin was one of the issues that the group all felt passionately about and need people to spread the word about what the really means. The Next of Kin booklet can be found at <http://www.ncpqsw.com/free-publications/nok/>.

This document has been well received and has been widely distributed.

At the National Centre for Post-Qualifying Social Work and Professional Practice we have trained over 2,000 Best Interest Assessors in the past 3 years and written new editions of our various text books and materials in the light of the Cheshire West/Chester Supreme Court Ruling.

We have also led the national research on financial scamming on behalf of the Chartered Trading Standards Institute and the National Scams Team, including producing a guide to the definitions of terms used in the area of financial scamming, and new and updated resources responding to the wider research understanding of financial scamming. These materials were widely quoted and used in the recent Parliamentary debate on financial scamming.

I personally have given over 20 keynote conference addresses on mental capacity and financial scamming in the past year, including;

- "THE COST OF SCAMS AND FINANCIAL ABUSE: working together to protect residents from harm" Buckinghamshire and Surrey Trading Standards, Adams Park, High Wycombe. 23rd

November 2016.

- Regional Yorkshire and Humber BIA Conference, Leeds. 19th September 2016.
- CEnTSA Adult Safeguarding Conference, Aston Villa FC. 27th September 2016.
- SOLLA Conference 2016. Central Hall Westminster, London. 11th October 2016.
- CTSI SE Branch Autumn meeting. Brighton City Airport, Shoreham. 14th October 2016.
- Private Client Section: Elderly client care conference, the Law Society. 14th October 2016.
- Join the Fight Conference, Suffolk County Council, Trinity Park. 16th November 2016

We are currently working with the Safeguarding Advisory DOH Group and the Chief Social Worker (Adults) to produce a National Mental Capacity Competency Framework to compliment the National Competency Framework for Safeguarding Adults that we hope to launch before Christmas.

Finally, we are currently writing a new text – Safeguarding, Mental Capacity and Financial Scamming for all professionals working with citizens at risk of financial scamming which will be launched at the CTSI conference in June 2017 in Harrogate. This will be a comprehensive guide to support workers who work with citizens at risk of harm.

During the next 12–18 months we want to extend our research and understanding of 'E' – Crime and its impact on vulnerable citizens.

#### Michael Brown

College of Policing

In October 2016, the College of Policing formally published new guidelines (known as Authorised Professional Practice) on policing and mental health. These are accompanied for the first time by a number of national training packages for the police service. Given how much police forces vary in their structures and approaches, and how variable partner organisations and health provision are, the training packages are modular: to allow forces to combine

them as they best see fit to address the training needs of their staff. This all follows a two-year programme of research and design to understand how best to address the needs of the public during encounters by the police service with vulnerable people.

APP on policing and mental health can be found here - <http://www.app.college.police.uk/app-content/mental-health/>

Due emphasis is given within APP and training to autonomy and mental capacity. It is recognised that it is not the role of the police service, primarily, to make decisions about health and wellbeing issues but it often is the role of officers to make urgent decisions during emergencies, to support health care professionals and to protect the rights of citizens. As such, APP reflects the need for a clear understanding by officers of frameworks like the Mental Health and Mental Capacity Acts, to ensure officers are aware of the legal framework within which all support and safeguarding must occur.

In particular, the College's mental health coordinator continues to work with the College of Paramedics and ambulances services in ensuring these two emergency services under the application of the Mental Capacity to 999 responses and other emergencies. Paramedics and police officers frequently work hand in glove during incidents where mental capacity law is a vital issue to ensuring the wellbeing of vulnerable people. This work will continue in to 2017 in various ways.

Within policing, understanding of the Mental Capacity Act itself has been a focus in training police service mental health leads and general police trainers as they prepare to deliver the College APP and training, mentioned above. The real learning from the Sessay and ZH cases revealed understanding of this legislation needed to progress. One force (Nottinghamshire) has delivered bespoke MCA training to all constables, sergeants and inspectors in a 4hr session and this emphasis is

welcome progress that we hope will be replicated more widely; another (Leicestershire) has included a similar one-week training programme. This is being delivered to over fifty officers who can then act as 'tactical advisors' on mental health and capacity issues; the College have supported both of these programmes and highlighted them as good practice across the country.

## Sam Cox

### Alzheimer's Society; Knowledge Officer

This has been an incredibly active year focused on the Mental Capacity Act. Apart from meetings of the group and writing a blog for the SCIE website, my day job at Alzheimer's Society is focused on improving knowledge of the MCA and helping people affected by dementia, through staff training and our publications.

I have spoken at a number of events and conferences this year, always referring to the importance of the MCA – for some audiences it may be the first time they have heard of it, for others it may be more of a gentle nudge to get them to understand how important it is – and urging others to spread the MCA message.

Several of the Alzheimer's Society publications and MCA factsheets have been updated, and a brand new 'planning ahead' booklet is being written for people living with dementia to use to record their own advance statements of wishes. I have also worked on MCA publications for other organisations and charities; many are now at final draft stage. This increased activity around the MCA has stimulated production are new MCA tool kits and decision-making guidance, with new resources for service users and carer's now nearing completion.

I brought together other charities, and third sector providers, to discuss the MCA issues charities and service user's face, and what we can do as a group. This positive meeting has started a longer-term conversation, aiming to involve more third sector

organisations. Participants highlighted concerns around research involving people who lack capacity to consent, yet recognised that it is crucial to get the experiences of the person to improve services and evaluate their impact. Yet without consent how can we do this?

After feeding this back to the leadership group, Ilora Finlay quickly set up a very successful meeting with research and ethics leaders in Wales. From this emerged plans to produce relevant research guidance and hold a Research Action Day next year.

These are my highlights. It has been a privilege to have been involved in the MCA forum and leadership group; many people are doing amazing work to effect real improvements for the people the MCA affects, which arguably will be all of us at some point.

### Mandy Griffin

Nationwide Building Society –  
Mental Capacity Act lead

Over the course of the year, Nationwide has proactively raised awareness of the MCA. In no area has this been more important than driving understanding that the MCA applies to people as they live their day to day lives and not only in the context of health and social care. Some of the challenges this brings for financial services were highlighted at National Mental Capacity Action Day in March 2016.

To take this forward, Nationwide issued a call to action to the British Banking Association (BBA) and its members to deliver changes together. In December 2016, an industry roundtable event will take place involving key stakeholders to kick off a dedicated cross industry working group that will co-deliver a tangible toolkit to support frontline staff in supporting people with mental capacity limitations.

Within Nationwide, its dedicated Vulnerable Customers Programme is making a difference. Nationwide's approach is informed by insights and expertise from across the Society as well as

key charities, including Parkinson's UK, Alzheimer's Society and the National Council for Palliative Care, and expert bodies. 100% of frontline employees are being trained to recognise vulnerability and to support customers with decision making. Its dedicated and specialist support service for members in vulnerable circumstances has been extended to support people with learning disabilities, mental health problems and dementia. In addition to this, Nationwide is also reviewing its bereavement care and support and the scope and availability of options when customers need a trusted person to help and support them managing their finances. The National Mental Capacity Forum provides a vital opportunity to learn from other sectors and share best practice to benefit customers, their families and the community.

### Rachel Griffiths

Forum lead on 'Voice of the person'. Independent consultant on the MCA

It was a wonderful – and challenging – surprise when Baroness Finlay asked me to lead, for the Forum, on how to hear more clearly the voice of the person at the heart of the Mental Capacity Act.

Having been involved in implementing the Act since 2007, I have long been worried that it's too easy for professionals to talk among themselves about the MCA, without giving sufficient weight to the views, wishes and feelings of the people in whose lives we are, with the best of intentions, interfering.

And I have noticed how suspiciously often the MCA is brought in to provide 'evidence' for the position that those professionals want to take anyway. I hear the sighs of relief all round when the cantankerous lady is put tidily in a care home 'in her best interests', though greatly against her wishes, with her detention authorised through DoLS. I worry when I learn of the young woman with an acquired brain injury from a road accident being hung about with stigmatising labels – 'disinhibited', 'impulsive', 'sexually inappropriate' – with no recognition that most aspects of her behaviour are typical of her age group.

This is my chance to think about where we've got to in the past year. I've loved the articles and blogs that are appearing on the Forum website. They invite us so vividly into the world of people affected by capacity issues. From them, as well as from this year's Forum listening events, I am increasingly aware of how we must recognise and value people's relatives for their deep knowledge of the person. The voices of those who love and know the person so deeply will bring them alive, in all their authentic quirkiness. Only with the input of these relatives and friends can we really work out what is in the best interests of an individual person who is lacking capacity. (Our very differences are why I'm so suspicious of rows of identical care plans!)

I am slightly hesitant to praise the learned judges in the Court of Protection, for fear of appearing to patronise. But they are setting such a great example to us, and doing so much to improve practice among professionals, by the way they approach the difficult decisions they are called upon to make.

I've been moved by how rigorously yet (usually) how simply the judges use the framework of the MCA, to find the truth about an individual's capacity for the decision that her doctors think she's getting wrong, or to decide whether to keep the awkward, independent old lady in the care home she hates. I love it that they model how to go back to the principles of the Act, and that they do hold us to account when we get it wrong in the way we exercise power over the most vulnerable. And I'm so impressed by the recent detailed, practical guidance from Mr. Justice Charles on how to enable vulnerable people to be part of their own court cases: again, an approach for the rest of us to learn from, in our different settings.

During this year, I have been lucky to be given the chance to write and speak widely about the need to see people who may lack mental capacity as the rounded people they are, with their own personality and history, rather than just as professional

problems. It has been good to encourage clearer recognition of them as the people whose wishes and feelings really are of 'magnetic importance' in best interests decision-making.

This first year has set the Forum along a track of inclusivity, local decision-making in action, spreading information about the MCA, and learning from the perceptiveness of others. Challenged by enthusiastic advocates, I've even learned, belatedly and rather incompetently, to tweet about mental capacity.

For the forthcoming year, I hope local groups under the Forum banner will empower and encourage people who might lack capacity, and those who care about them, to learn more about how their rights are protected by the MCA. It is central to the present, and to the future, of the Forum that we find all the different ways, such as social media or tools we've not yet thought of, to even out the imbalance in both knowledge of the MCA and power in applying it, between the people at the heart of the MCA, and professionals.

Long live the empowering ethos!

### Sam Kyeremateng

Consultant in Palliative Medicine and Medical Director, St Luke's Hospice, Sheffield

I began navigating the complexities of applying the Mental Capacity Act Deprivation of Liberty Safeguards to the care of the incapacitous dying patient, in my clinical role. This began a journey to understand this complex critical legislation that, in its broadest sense, protects the most vulnerable in our society.

Motivated by the principles of the National Mental Capacity Forum and through the charitable mission and support of St Luke's Hospice, we hosted two national consultation events on DOLS in collaboration with Hospice UK and The Law Commission and contributed to the debate on how DOLS might evolve to become fitter for purpose.

As a member of the National Mental Capacity Forum, I turned my focus from how the MCA directly supports the individual, to how local communities can develop strategies to improve implementation of the Act in clinical practice. Our local conference, drew together professionals and organisations from across the spectrum of health and social care in Sheffield. Debate led to a consensus view that a local strategy was needed, with collaboration across health and social care, the hospice, the clinical commissioning group, finance and other public services as well as the public at large to realise the ambitions of this key piece of legislation. Suggestions, captured through graphic recordings, included a public health engagement campaign to encourage open conversations so that people can make their wishes known to their families; there is unanimous agreement that the MCA DoL Local Implementation Group could reinvigorate engagement around the MCA across our community.

This experience echoed the aims of the National Mental Capacity Forum, where collaborations can turn national lessons into local solutions, and local solutions into national ones.

### Betsey Lau-Robinson

University College London Hospital NHS Foundation Trust (UCLH)

University College London Hospitals (UCLH) is committed to supporting the National Mental Capacity Forum. It sees its leadership role in promoting and protecting the rights of people who may lack capacity to make decisions, as well as working with partners in health, to support advance decision making and appointments of Lasting Powers of Attorney, for people who wish to make arrangements before they lose capacity.

The NHS England Safeguarding Network & the NHS England (NHSE) MCA sub group have contributed to the Law Commission consultations on reform of the MCA and Deprivation of Liberty Safeguards. As a

member of these NHSE groups, I have also updated members on the National Mental Capacity Forum and, through the chair, the Next of Kin leaflet (cross ref to page x) has been disseminated to regional leads.

Opportunities to raise awareness of the National Mental Capacity Forum included: the 'Safeguarding Vulnerable Adults in Hospitals' conference, the London MCA DoLS Network, the multi-agency Camden Safeguarding Adults Board, and the annual Legal MCA Master Classes at UCLH for clinical staff to ensure they are updated on current practice. In the December 2015 masterclass, leading experts from the Law Commission<sup>17</sup> & consultant psychiatrists from the Mental Health teams were invited to discuss the challenges for the application of deprivation of liberty safeguards in the acute settings and the interface between the two legal tools.

As the Vice Chair of the London MCA DoLS Network, I have added the National Mental Capacity Forum on the agenda to provide a continuous update on its activities to generate & re-engage the MCA across partners in Adult Social care and Health, added the NMCF link to the MCA DoLS website<sup>18</sup>, disseminated the Forum's site in the SCIE link and organised a table discussion on some of the best practice developed so far nationally. This was welcomed with enthusiasm & some organisations have indicated they will adopt them.

An MCA Conference is planned for January 31st 2017 aimed at participants from England and Wales; it will include keynote speeches from Ilora Baroness Finlay of Llandaff and His Honour Judge Sir James Munby, the President of the Family Court Royal Courts of Justice.

Over the different events and encounters, the Shropshire "hand print", featured at the front of this report, and the next of kin leaflets have proven by far the most popular and accessible of resources available to staff, which have been cascaded Trust-wide. UCLH has formally endorsed the Next of Kin

<sup>17</sup> Alex Ruck Keene

<sup>18</sup> <http://londonadass.org.uk/safeguarding/mcadols-network/>



leaflet and work underway to make an A5 leaflet for patients and their families.

## Stef Lunn

### Independent Social Worker and Trainer

Whenever the authorities’ intervene in people’s lives with the intention of protecting them from harm, that person’s rights and choices come under scrutiny. Over the past few months I’ve had some great opportunities to think through these challenges and build the links between safeguarding and mental capacity, and supported others to adapt theory to practice in different settings.

My day to day social work practice takes me to safeguarding meetings with people with impaired cognition, their family and a range of professionals supporting them. This gives me the opportunity to share the usefulness of the MCA in a very practical way, as the principles of the MCA give us a simple set of rules that to check all of our ideas against. As the code of practice applies to all of us, this shared approach allows professionals and non-professionals alike the chance to challenge each other’s suggestions.

Delivering training for the Sandwell Safeguarding Adults’ Board (pictured) was a great opportunity to share some of my positive experiences, but even better, to hear from others. People as diverse as fire fighters and trading standards shared how they make safeguarding personal, using the mental capacity act principles, and strikingly how they seek to maximise capacity. And I learnt of day to day fire risks, such as the danger of leaving that mobile phone charger plugged in 24/7 by the bed! The importance of building relationships and trust was starkly illustrated by a trading standards officer spoke of her long term work with older people who have been ‘scammed’, helping them to protect themselves against fraud in the future.

Working with the NHS in Birmingham to consider deprivations of liberty in the community, the least restrictive option can be optimally championed by family members. Even where the state is providing 24 hour care for people with significant needs and, as such, depriving those people of their liberty – family members can bring the previous views of their relative to the fore, to ensure their individuality is respected in the support planning process. I’m sure that the next six months my opportunities to learn from others and spread the word on mental capacity in practice will continue.

## Rob Mitchell

### Adult Principal Social Worker, Calderdale

A national network of Principal Social Workers (PSWs) based in Local Authorities has developed. In March 2016 this network led an online Call to Action for the First Mental Capacity Action Day and we led a workshop on the day. The on line activity engaged social work students, social workers, their employers and educators in a national collective effort to examine their understanding of human rights principles and mental capacity, with a specific focus on Statutory Principle 3 of the MCA (2005), ‘A person is not to be treated as unable to make a decision merely because he makes an unwise decision’ (Section 1(4)).

Community Care online featured three articles about the MCA in practice, written and supplied by Alex Ruck Keen<sup>19</sup>, Professor Chris Hatton<sup>20</sup>, and Ian Burgess<sup>21</sup>. Related webinars and blogs emphasised the importance of the MCA in upholding human rights<sup>22</sup>. Details of the Call to Action were distributed through the Principal Social Worker Adults Network to front line social workers, social work students and social work practice educators with social workers invited to post photographs of themselves holding a card with their unwise decision recorded on it or of “walls” of unwise decisions that they could “build” in their workplaces.

<sup>19</sup> Barrister at 39 Essex Chambers

<sup>20</sup> Professor of Psychology, Health and Social Care at Lancaster University

<sup>21</sup> MCA Lead at Calderdale Council

<sup>22</sup> University of Manchester, MCA, Risk and Unwise Decisions; Rob Mitchell, Calderdale; Mark Harvey, Hertfordshire

The articles published by community care were accessed 6,000. The Adult PSW Co-Chair blogs were accessed over 1,300 times. Over 40 sites log into the University of Manchester webinar. 783 #unwisecision tweets were posted on the 15th March 2016, the Call to Action date.

### James O'Sullivan

#### Building Societies Association

The Building Societies Association (BSA) is the trade body for all UK building societies. It works closely with its members; other financial services trade bodies (particularly the British Bankers Association (BBA); Government and regulators. We also work with the charity sector to help provide the right support for customers who find themselves in circumstances where they need extra help to manage their finances. In financial services, implementing the Mental Capacity Act creates three main challenges – helping customers living with mental capacity issues to manage their own finances independently for as long as possible; supporting attorneys and others who take over managing an individual's finances when they no longer can and protecting both from crime and financial abuse.

Our sector takes the support of all customers dealing with challenging personal circumstances very seriously and has adopted a collaborative approach to develop solutions to some of the issues. Individual building societies and banks have formed partnerships with mental health charities to help them train staff and improve services. Some smaller building societies have joined forces to create regional centres of expertise.

Industry-level initiatives in 2016 included the Financial Services Vulnerability Task Force and support for mental health-related projects by the Money & Mental Health Policy Institute and Bristol University. We also continue to work closely with the Office of the Public Guardian to help firms improve the consistency of service to Attorneys and Deputies.

On the protection side, the Government launched the Joint Fraud Task Force in 2016, including a Victims & Vulnerabilities sub-group with objectives around preventing vulnerable individuals from becoming scam victims and the provision of better support for victims. The first practical step is the Banking Protocol to protect customers from scams which will be rolled out in London during 2017.

Both the BSA and BBA are supporting this work and are also working on financial crime prevention initiatives from Citizens Advice, Age UK and National Trading Standards.

However, the best asset in protecting the customer is the continued vigilance of our colleagues working on the front line. Many customers have been saved from becoming a victim of crime through prompt intervention from their building society or bank. It is vital that firms share best practice and learn from other sectors, through our participation in the National Mental Capacity Forum, to develop a consistent, supportive approach to the implementation of the Mental Capacity Act.

### Gary Rycroft

#### The Law Society of England and Wales

The Law Society is the representative body of all solicitors in England and Wales; it seeks to promote both best practice and also the role of the solicitors' profession within the Society at large. Within the structure of the Law Society, there are at least three Committees with an interest in the law relating to mental capacity issues and implementation of the Mental Capacity Act 2005 (MCA), namely the Mental Health and Disability Committee, the Wills & Equity Committee (which I sit on) and the Private Client Section Advisory Committee (which I chair).

The Wills & Equity Committee is concerned with policy and liaising with stakeholders including the Government. The Private Client Section supports



solicitors in their working lives with best practice, including publication of a bi monthly journal and organising conferences.

The creation of the National Mental Capacity Forum (NMCF) is viewed as a very positive development by the Law Society which has a long held ambition to work more closely with health care and social care professionals and the financial services sector to promote a better understanding between all concerned of the issues faced by them with regard to mental capacity, so as to support clients to the best possible standard of care within the framework of the MCA.

Individual solicitors attended the NMCF Action Day in March 2016, where I facilitated a workshop. Baroness Finlay met with the Mental Health and Disability Committee at The Law Society in April and was also the Key Note Speaker at the Private Client Section Annual Conference which took place in London in July.

In May, the Law Society hosted a round table meeting of solicitors from all regions of England and Wales and from law firms large and small to discuss particular issues around the MCA and in particular barriers to implementation and examples of best practice. Baroness Finlay attended and provided a detailed outline her findings to date. A report to include the discussion of the round table meeting and suggested actions has been prepared and will shortly be circulated to the other members of the Leadership Team of the NMCF.

The Leadership Team itself is leading to cross fertilisation between different sectors where the MCA is relevant. Keith Baron and Sam Cox both spoke at the Law Society Private Client Section Elderly Client Care Conference in October 2016

and took part in a panel session looking at LPA's for Health and Welfare and Advance Decisions to Refuse Medical Treatment.

On behalf of the Law Society, I have engaged with the Office of the Public Guardian (OPG) with regard to their idea to fully digitise the process of making LPA's and have written about concerns with regard to this proposal in the Private Client Section Journal and in other media.

On behalf of the Leadership Group of the NMCF, I spoke at a Conference organised by the Yorkshire and Humberside Best Interests Assessors in Leeds in May 2016 and at the Annual Conference of Palliative Care Nurses in Manchester in June 2016. At both the events, I spoke about the work of the Forum and gave an update on proposals by the Law Commission to reform relating to the Deprivation of Liberty Safeguards (DoLS).

I practice as a solicitor in Lancaster in the North West of England and continue to deliver regular bi monthly training on the MCA and DoLS by way of a local Hospice (St John's) for Hospice staff and those working locally in the care home sector.

I am also a Trustee of the National Council of Palliative Care (NCPC) which leads the Dying Matters Coalition. At NCPC we are exploring supporting a nationwide "Decision Day" to encourage the public to make Lasting Powers of Attorney and clearly this is something where we would like to engage the National Mental Capacity Forum.

## Lucy Series

### Cardiff University

research on Court of Protection transparency

The Nuffield Foundation has funded a major study of the Court of Protection, focusing on questions of transparency, efficiency and participation<sup>23</sup>. Our research team at Cardiff University's School of Law and Politics, headed by Professor Phil Fennell, has published a major report on transparency in the Court and estimated the costs and regional variations in the use of court proceedings.

Forthcoming reports will focus on the participation of the subject of Court proceedings, the views and experiences of professionals, and a statistical study of the court's files.

I have been awarded a Wellcome Trust research fellowship for 2017–2022 for research into questions of empowerment under the Mental Capacity Act 2005. This work will explore the Act's history, drawing from interviews with key protagonists in its development and implementation. In order to engage with the public regarding these key questions of empowerment and capacity, I will also work with a radio producer to produce a podcast exploring the history and key debates about the Act, and run storytelling events exploring experiences of empowerment and disempowerment under the MCA for people with learning disabilities, dementia, their families and professionals. This will provide an informative resource which we hope will be drawn on widely.

