Reply to questionnaire for the country reports – England and Wales


Mr. Denzil Lush

1. What legislation is relevant for the protection of adults? (If applicable, differentiation between federal law or the law of individual federal states)

As The United Kingdom of Great Britain and Northern Ireland consists of three distinct territorial jurisdictions:

(1) England & Wales,

(2) Scotland, and

(3) Northern Ireland.

The legislation relating to the protection of adults in these three jurisdictions is as follows:

(1) England & Wales: Mental Capacity Act 2005.

(2) Scotland: Adults with Incapacity (Scotland) Act 2000.

(3) Northern Ireland: Mental Health Order 1986. The Mental Capacity Act (Northern Ireland) 2016 was enacted on 9 May 2016 but is not yet in force.

The remainder of this country report relates only to England & Wales.

2. What are the types of formal measures that exist to support people with disabilities in exercising their legal capacity? (Especially private mandates or legal representatives appointed by a court/authority)

<u>Powers of attorney</u>

There are two types of power of attorney which remain in force when the person who made them ('the donor') lacks capacity to make decisions for himself at the material time. They are the Enduring Power of Attorney ('EPA') and the Lasting Power of Attorney ('LPA').

EPAs and LPAs must be in the form prescribed by a statutory instrument. The Office of the Public Guardian ('OPG') has responsibility for registering them and for investigating complaints about the way in which attorneys exercising their powers.

It was possible for a donor to create an EPA from 10 March 1986, when the Enduring Powers of Attorney Act 1985 came into force, until 30 September 2007, which was the day before the Mental Capacity Act 2005 came into force. It is still possible to apply to the OPG to register an EPA made between those two dates.

The two main differences between EPAs and LPAs are:

(1) An EPA relates solely to the donor's property and financial affairs, whereas there are two types of LPA: one for property and financial affairs, and another for health and welfare; and

(2) An attorney acting under an EPA has a duty to register the EPA with the OPG when he has reason to believe that the donor is, or is becoming, mentally incapable of managing and administering his property and affairs. By contrast, an LPA cannot be used unless and until it is registered by the OPG. This accounts for the vastly greater number of applications to register LPAs.

According to the OPG's annual report for the financial year 2015/2016, which was published on 7 July 2016, there were 547,021 applications to register powers of attorney in the financial year from 1 April 2015 to 31 March 2016. This was a 33.73% increase on the previous financial year, and consisted of 13,792 applications to register EPAs and 533,229 applications to register LPAs. As at 31 March 2016 there were 1,870,393 current powers of attorney on the OPG's register.

If one regards an advance decision to refuse treatment (otherwise known as an 'advance directive' or' living will') as a private mandate, there are provisions in sections 24-26 of the Mental Capacity Act 2005 relating to their validity, applicability and effect. Unlike powers of attorney, there is no prescribed form of advance decision to refuse treatment and there is no procedure for their registration.

Appointment by a court/authority

(1) Appointees

Where someone who lacks capacity to manage their own financial affairs has no capital assets and no income other than social security benefits, the Secretary of State for Department for Work and Pensions may appoint an 'appointee' to exercise any rights that they may have under the Social Security Acts and related legislation. The authorisation is made under regulation 33 of the Social Security (Claims and Payments) Regulations 1987.

When the United Kingdom ratified the United Nations Convention on the Rights of Persons with Disabilities on 8 June 2009, it did so subject to a reservation in respect of the appointeeship system. The reservation stated that: "The United Kingdom's arrangements, whereby the Secretary of State may appoint a person to exercise rights in relation to any social security claims and payments on behalf of an individual who is for the time being unable to act, are not at present subject to the safeguard of regular review, as required by Article 12.4 of the Convention and the UK reserves the right to apply those arrangements. The UK is therefore working towards a proportionate system of review."

(2) Deputies

Where a person who lacks capacity to make decisions regarding either their property and financial affairs or their health and welfare, and they have not appointed an attorney to make decisions on their behalf under an EPA or LPA, the Court of Protection may either make the decision for them – if it is a single decision – or it may appoint a deputy to make decisions on their behalf and in their best interests.

In the calendar year 2015 the Court of Protection appointed 16,581 deputies for property and affairs and 205 deputies for personal welfare.

One of the functions of the Public Guardian is to supervise deputies appointed by the Court of Protection and, according to the OPG's annual report for the financial year 2015/2016, as at 31

March 2016 the Public Guardian was supervising 57,122 deputyship orders, an increase of 8% from the end of 2014/15.

Of the 57,122 deputyships which the Public Guardian supervises:

- 47 % (26,848) of the deputies are family members;
- In 33% of these cases (18,850) the deputy is the local authority's money management team; and
- 20% of cases (11,424) have a professional deputy (usually a solicitor), including the OPG's panel of 71 deputies of last resort.

If you divide the number of deputies supervised by the OPG (57,122) by the number of deputies appointed by the court each year (16,581), you will find that the average duration of a deputyship in the Court of Protection is approximately 3½ years. This is mainly because of the predominance of older people with age-related mental disorders within the court's jurisdiction.

3. Who decides on the appointment of a supporter/legal representative and what are the requirements for the respective measures?

The donor of a power of attorney decides on the appointment of a supporter or legal representative.

If there is no power of attorney, the Court of Protection can appoint a deputy to make decisions on behalf of someone who lacks capacity to make those decisions at the time they need to be made.

To apply for the appointment of a deputy, the applicant needs to send the following documents to the Court of Protection:

(1) Application form (COP1).

(2) Annex A – Supporting information for property and affairs applications (COP1A).

(3) Annex B – Supporting information for personal welfare applications (COP1B).

(4) Assessment of capacity (COP3)

(5) Deputy's declaration (COP4)

(6) Application fee of £400.

The applicant is required to serve copies of the application form on the person who is alleged to lack capacity, and on his or her close relatives.

Anyone who wishes to object to the application may do so by filing an acknowledgment of service (COP5).

If there is an objection, and it cannot be resolved by mutual agreement or mediation, there will usually be an attended hearing before a judge.

Non-contentious applications (which account for about 93% of all applications) are dealt with on the papers alone.

The Court of Protection will make an order appointing the applicant as deputy if it is satisfied that:

(a) the person to whom the proceedings relate lacks capacity to make various decisions; and

(b) there is a need for a deputy to be appointed, and

(c) the applicant is a suitable person to be appointed as deputy.

The order appointing a deputy for property and affairs sets out:

(1) The appointment of the deputy and, if there is more than one deputy, whether their appointment is 'joint' (i.e. they must act together) or 'joint and several' (i.e. they can act together and independently). The appointment expressly states that an individual or a trust corporation is appointed as deputy "to make decisions on behalf of *[name*] that he is not able to make for himself with support in relation to his property and affairs, subject to any conditions or restrictions set out in this order."

(2) The authority of the deputies - the decisions they can make. These usually include making payments for the maintenance of dependants and making small gifts on customary occasions, and delegation decisions regarding the day-to-day management of investments to the fund manager.

(3) Reports - a requirement that the deputy shall keep statements vouchers, receipts and other financial records and shall submit a report to the Public Guardian, as and when required. (The Public Guardian usually requires deputies to report annually on the anniversary of the order appointing them).

(4) Expenses and costs. The deputy is authorised to be reimbursed for out of pocket expenses he incurs during the course of the deputyship. He may also be authorised to pay a fixed level of costs (remuneration) to the solicitors who assisted him in making the application, or to pay the solicitors' costs when they have been assessed by the Senior Courts Costs Office.

(5) Security. All deputies, except local authorities, are required to obtain and maintain security in a specific sum to cover the possibility that they might contravene their authority or fail to act in the best interests of the person who lacks capacity.

The order appointing a deputy for personal welfare sets out:

(1) The appointment of the deputy and, if there is more than one deputy, whether their appointment is 'joint' or 'joint and several'; and

(2) The authority of the deputy in other words, the decisions they can make and the decisions they cannot make; and

(3) A requirement that the deputy keeps a record of decisions made and the reasons for making them and that submits a report to the Public guardian when required to do so.

4. Who is involved in the procedure of determining the need for support in legal affairs and in what capacity?

It depends on the circumstances, but the persons involved are usually:

(a) Family members; or

(b) If there is no suitable family member, and the local authority is providing services to the person who lacks capacity, a social worker; or

(c) In personal injury and clinical negligence proceedings involving a claimant with an acquired brain injury, the claimant's and defendant's legal advisers obtain expert reports to establish the need for support, and to evaluate the cost of such support over the claimant's lifetime.

5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of/limited) legal capacity?

Addendum: In essence we are asking whether there is not only an assessment by the court or authority of the adult's abilities and his/her needs for support and protection when making an order on a measure of support and protection, but also a decision on the legal capacity of the adult removing the legal capacity of the adult. This may either be a separate order, or be just the (legal or de facto) consequence of an order on a measure of support and protection.

There is a prescribed form of assessment of capacity (COP3), which has been prepared by the Court of Protection in consultation with the British Medical association, the Royal College of Physicians, the Royal College of Psychiatrists and the Department of Health.

It requires the practitioner completing it to state as follows:

(1) The person to whom the application relates has the following impairment of, or disturbance in the functioning of, the mind or brain. Where this impairment or disturbance arises out of a specific diagnosis, please set out the diagnosis or diagnoses here: ……

(2) This has lasted since: ……

(3) As a result, the person is unable to make a decision for themselves in relation to the following matters in question: ……

(4) The person to whom the application relates is unable to make a decision in relation to the relevant matter because:

    (a) he or she is unable to understand the following relevant information (please give details) ……

    (b) he or she is unable to retain the following relevant information (please give details) ……

    (c) he or she is unable to use or weigh the following relevant information as part of the process of making the decision(s) (please give details) ……

    (d) he or she Is unable to communicate his or her decision(s) by any means at all (please give details) …..

(5) My opinion is based on the following evidence of lack of capacity ……

(6) I have acted as the practitioner for the person to whom the application relates since [*date*] and last assessed him or her on [*date*].

(7) Has the person to whom the application relates made you aware of any views they have in relation to the relevant matter? If yes, please give details. ……

(8) Do you consider there is a prospect that the person to whom the application relates might regain or acquire capacity in the future in respect of the decision to which the application relates? If yes, please state why and give an indication of when this might happen. If no, please state why. …….

(9) Are you aware of anyone who holds a different view regarding the capacity of the person to whom the application relates? If yes, please give details …….

(10) Do you, your family or friends have any interest (financial or otherwise) in any matter concerning the person to whom the application relates? If yes, please give details ……

(11) Do you have any general comments or any other recommendations for future cate? ……

There is usually no need for any court order removing a disabled person's rights. The court's function is to empower, wherever possible, not to disenfranchise.

In theory, persons with mental disabilities are entitled to vote in elections, but in practice it is commonly believed that any degree of learning disability or mental health problem renders a person ineligible to vote, and so they do not apply to have their name put on the elector register.

6. What are the responsibilities of s supporter/representative and what are the obligations and principles he/she must comply with?

Responsibilities

(a) The responsibilities of an attorney under an EPA or LPA are to act with general authority in relation to all the donor's property and affairs, unless the donor has stated otherwise in the power of attorney by imposing various conditions or restrictions.

(b) The responsibilities of a deputy appointed by the court are set out in the order appointing him as deputy.

Obligations

The Mental Capacity Act Code of Practice sets out the following duties for both attorneys acting under a power of attorney and deputies appointed by the court:

(a) To act with due care and skill (duty of care)

(b) To Indemnify the person against liability to third parties caused by the deputy's or attorney's negligence

(c) To act in good faith with honesty and integrity

(d) To keep the person's affairs confidential (this can create problems where the deputy is not acting transparently)

(e) To comply with the orders of the Court of Protection

(f) To keep accounts and financial records

(g) To keep the person's money separate from their own

(h) Not to take advantage of their position (fiduciary duty)

(i) Not to delegate their functions

Principles

The principles are set out in section 1 of the Mental Capacity Act 2005 and are as follows:

(a) A person must be assumed to have capacity unless it is established that he lacks capacity.

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

(c) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(d) Any act done, or decision made, under the Mental Capacity Act for or on behalf of a person who lacks capacity must be done or made in his best interests.

(e) 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.

7. What role do family members play and what are the requirements imposed on them?

(1) As mentioned in the reply to question 2 above, 47% of deputies are family members.

(2) Where an applicant for a court order is not a family member, the applicant is expected to serve a notice of the application on family members, so they have the right to object.

(3) When the court, a deputy, social worker, healthcare professional or anyone else is making a decision as to what is in the best interests of a person who lacks capacity, they are required by section 4(7) of the Mental Capacity Act 2005 "to take into account, if it is practicable and appropriate to consult them, the views of anyone engaged in caring for the person or interested in his welfare, as to what would be in the person's best interests."

(4) There are some fairly cogent arguments against appointing a family member to be a deputy in cases where someone has an acquired brain injury as a result of personal injury or clinical negligence, and has been awarded compensation. These usually relate to actual or potential conflicts of interest and their inexperience and lack of competence in managing a substantial sum of money.

(5) Most financial abuse is committed by family members. Out of a sample of 250 cases in which complaints had been made to the OPG about the way in which an attorney acting under a Lasting Power of Attorney was exercising his powers:

(a) in 169 cases (68%), the alleged abuser was the donor's child;

(b) in 87 cases (35%), the donors were abused by their son;

(c) in 56 (22%), the donors were abused by their daughter;

(d) in 26 (11%), the donors were abused by both their son and their daughter; and

(e) in only 31 cases, one in eight cases (12.5%), was the abusive attorney not a family member.

8. What role do volunteers play and what are the requirements imposed on them?

Volunteers play hardly any role in the adult guardianship system in England & Wales. The OPG administers the panel of deputies, which the Court of Protection draws on in cases where no other suitable person is willing or able to act as deputy. In June 2015 the panel was reconstituted, and 71 deputies were appointed throughout England & Wales. Attempts had been made to encourage the not-for-profit sector to apply to join the panel, but these were unsuccessful and only one of the 71 panel deputies, Family Action, is not a solicitor (lawyer).

Personal support unit

One area is which volunteerism is successful is the Personal Support Unit ('PSU'), which helps litigants in person, their friends and families, witnesses, victims and inexperienced court users. It provides trained volunteers who give free, independent assistance to people facing proceedings without legal representation in civil and family courts and tribunals. The PSU's service is offered equally to everyone who asks and is confidential, impartial and open to all.

9. Are there professional supporters/legal representatives and what requirements/qualifications do they have to satisfy?

Professional supporters

As stated in the reply to question 2 above, in 33% of cases the deputy is a local authority. These are usually low value estates where the local authority (typically a county council or a city council) is providing social services to the person who lacks capacity to manage their property and affairs and there is no suitable family member who is willing and able to act as deputy. Essex County Council has 1,936 deputyships, which is by far the largest number of deputyships held by any one individual or organisation.

In 20% of deputyship cases the deputy is a professional person. Professional deputies are almost exclusively solicitors. Approximately 25 solicitors' firms have established trust corporations, in which the trust corporation is the deputy, rather than a named individual. The advantage in appointing a trust corporation is that there is perpetual succession and less disruption when a named individual leaves the firm or retires as deputy.

Deputy standards

In July 2015 the Office of the Public Guardian published *Deputy Standards: Professional deputie*s, which form an important part of the OPG's new, improved approach to supporting and supervising professional and public authority deputies. These standards have been developed in partnership with both professional and public authority deputies and their representative bodies. There are five standards:

(1) Standard 1: Secure the client's finances and assets

(2) Standard 2: Gain insight into the client to make decisions in their best interests

(3) Standard 3: Maintain effective internal office processes and organisation

(4) Standard 4: Have the skills and knowledge to carry out the duties of a deputy

(5) Standard 5: Health and welfare standards (for professional deputies who hold a personal welfare court order only, and deputies who hold both a personal welfare court order and a property and affairs court order)

10. Who bears the costs for procedures and what are the requirements imposed on them?

The Court of Protection Rules 2007 refer to the person to whom the proceedings relate as 'P', as does the Mental Capacity Act 2005.

Rule 156 provides that "where the proceedings concern P's property and affairs, the general rule is that the costs of the proceedings shall be paid by P or charged to his estate."

Rule 157 provides that "where the proceedings relate to P's personal welfare, the general rule is that there will be no order as to the costs pf the proceedings."

Rule 158 provides that "where the proceedings concern both property and affairs and personal welfare, the court, insofar as practicable, will apportion the costs between the respective issues."

Rule 159 provides that "the court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances including –

(a) the conduct of the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) the role of any public body involved in the proceedings.

In person injury and clinical negligence proceedings the continuing costs of having a professional deputy are recoverable from the defendant.

11. How are supporters/legal representatives supervised and what is done to ensure that the rights, the will and the preferences of the adult concerned are respected? (qv Art 12.4 UNCRPD)

<u>Supervision</u>

Deputies are supervised by the Office of the Public Guardian (OPG). The OPG is authorised to contact or visit the deputy to check that they are an effective deputy. The OPG also gives deputies advice and support.

New deputies receive a 'general' level of supervision for their first year. If they are a property and affairs deputy who manages less than £21,000, they will move to 'minimal' supervision after the first year. This involves paying a lower annual supervision fee (£35 rather than £320) and writing a shorter annual report than deputies with general supervision.

Deputies are visited by a Court of Protection Visitor to check if they:

(a) understand their duties;

(b) are receiving the right level of support from OPG;

(c) are carrying out their duties properly; or

(d) are being investigated because of a complaint.

Respect for the rights will and preferences of the adult concerned

Section 1(3) of the Mental Capacity Act 2005 states that "a person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success."

Once it is established that a person is unable to make a decision, the person making the determination on his behalf must do so in his best interests. Section 4(6) of the Act requires that person to "consider, so far as is reasonably practicable –

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors he would be likely to consider if he were able to do so."

12. Who decides on deprivation of liberty and involuntary medical measures and what requirements does this decision underlie? Is there a distinction between self-endangerment and endangerment of others?

Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards ('DOLS') were introduced as amendments to the Mental Capacity Act 2005 by the Mental Health Act 2007. They were introduced in response to the case of *HL v United Kingdom* (2005) 40 EHRR 32, and established an administrative process for authorising deprivations of liberty in a hospital or care home. In broad terms, the safeguards provide for a professional assessment – conducted independently of the hospital or care home in question – of whether the person lacks capacity to decide whether to be accommodated in the hospital or care home for the purpose of care or treatment, and whether it is in their best interests to be deprived of liberty. The authorisation is made by the local authority and can be challenged through an administrative review procedure or in the Court of Protection.

The DOLS have been subject to considerable criticism since their introduction. In March 2014 the House of Lords, in its post-legislative scrutiny report on the Mental Capacity Act 2005, described the safeguards as being "not fit for purpose" and proposed their replacement. A few days later, the United Kingdom Supreme Court, in a judgment known as *Cheshire West*, widened the definition of a deprivation of liberty to a considerable extent and the system has struggled to cope with the increased number of cases**.**

The Law Commission published a consultation paper on deprivation of liberty on 7 July 2015 ((Law Commission, *Mental Capacity and Deprivation of Liberty: A Consultation Paper* (2015), CP No 222), which puts forward a comprehensive replacement scheme for DOLS.

Perhaps the most frequent and consistent criticism made to us about the DOLS has concerned the nomenclature. In particular, the term "Deprivation of Liberty Safeguards" is viewed widely as unhelpful and it is suggested puts professionals off using the scheme. The Law Commission has called its proposed new scheme "protective care".

The new scheme of protective care will apply to:

(a) hospital,

(b) care home,

(c) supported living,

(d) shared lives, and

(e) domestic accommodation.

The nature of the safeguards will vary according to the particular setting. People who lack capacity and are living in care homes, supported living and shared lives accommodation be provided with a set of safeguards (called "supportive care"). These are intended to ensure that prevention measures are in place and existing legal rights are being given effect to. There will also be additional safeguards (which we have called the "restrictive care and treatment" scheme) which would apply if a person in such settings requires more restrictive or intrusive forms of care or treatment. This will include individuals deprived of liberty, but also some whose arrangements fall short of this. A separate scheme would apply to hospital settings and palliative care.

The Law Commission undertook a four month period of public consultation, which ended on 2 November 2015, and the next stage will be to produce and submit a report and draft Bill by the end of 2016.

Mental Health Act 1983

There are separate provisions under the Mental Health Act 1983 whereby someone can be 'sectioned' if their own health and safety are at risk, or to protect other people.

Section 2 is an assessment order and lasts up to 28 days; it cannot be renewed. It can be instituted following an assessment under the Act by two doctors and an Approved Mental Health Practitioner. At least one of these doctors must be a Section 12 approved doctor. Commonly, in order to satisfy this requirement, a psychiatrist will perform a joint assessment with a general practitioner ('GP'). A Mental Health Act assessment can take place anywhere, but commonly occurs in a hospital, at a police station, or in a person's home. If the two doctors agree that the person is suffering from a mental disorder, and that this is of a nature or to a degree that, despite his refusal to go to hospital, he ought to be detained in hospital in the interest of his own health, his safety, or for the protection of others, they complete a medical recommendation form and give this to the AMHP. If the AMHP agrees that there is no viable alternative to detaining the person in hospital, she will complete an application form requesting that the hospital managers detain the person. He will then be transported to hospital and the period of assessment begins. Treatment, such as medication, can be given against the person's wishes under Section 2 assessment orders, as observation of response to treatment constitutes part of the assessment process.

Section 3 is a treatment order and can initially last up to six months; if renewed, the next order lasts up to six months and each subsequent order lasts up to one year. It is instituted in the same manner as Section 2, following an assessment by two doctors and an AMHP. One major difference, however, is that for Section 3 treatment orders, the doctors must be clear about the diagnosis and proposed treatment plan, and be confident that "appropriate medical treatment" is available for the patient. The definition of "appropriate medical treatment" is wide and may constitute basic nursing care

alone. Most treatments for mental disorder can be given under Section 3 treatment orders, including injections of psychotropic medication such as antipsychotics. However, after three months of detention, either the person has to consent to their treatment or an independent doctor has to give a second opinion to confirm that the treatment being given remains in the person's best interests. A similar safeguard is used for electroconvulsive therapy ('ECT'), although the RC can authorise two ECT treatments in the event of an emergency for people detained under Section 3 treatment orders. ECT may not be given to a refusing patient who has the capacity to refuse it, and may only be given to an incapacitated patient where it does not conflict with any advance directive, decision of a donor or deputy, or decision of the Court of Protection.

13. Additional comments (elements of your country's system that may be of interest and are not covered above)

(1) Court of Protection Visitors

The role of Court of Protection Visitor is a historic one dating back to an Act of Parliament in 1833. There are two types of Visitor:

(1) Special Visitors, of whom there are currently 15, who is a registered medical practitioner who has special knowledge of and experience in cases of impairment of or disturbance in the functioning of the mind or brain; and

(2) General Visitors, who need not have a medical qualification, but usually have a social work background. There are about 70 General Visitors, most of whom are engaged on contracts for service on a part-time basis, though a small number of General Visitors are directly employed by the Office of the Public Guardian ('OPG').

Court of Protection visitors carried out 9,829 visits during the year 2015/2016, mainly supporting the OPG's supervision and investigations activities.

(2) The statutory will jurisdiction

Since 1970 it has been possible for a judge of the Court of Protection to make a 'statutory will' on behalf of a person who lacks testamentary capacity. This jurisdiction is particularly useful in situations where:

(a) There has been a change in the person's status or circumstances (such as a marriage, which has the effect of revoking any earlier will), or an inheritance or personal injury award which has the effect of altering the nature of the estate;

(b) A legacy in an existing will ceases to exist – for example, where a property that is mentioned as a specific gift in a will is sold in order to pay for care fees;

(c) There has been a major change in the circumstances of the beneficiaries, or a major change in the relationship between them and the person with a disability;

(d) There are concerns about the validity of the existing will;

(e) There are potential tax-planning advantages in making a new will; and

(f) There has been financial abuse, and there is a possibility that a new will may have been executed in suspicious circumstances.

(3) Investigation into whether the Mental Capacity Act 2005 is compliant with the UNCRPD

Following the publication of the General Comment on Article 12 by the UN Committee on the Rights of Persons with Disabilities in April 2014, the Ministry of Justice launched an investigation into whether the Mental Capacity Act 2005 ('MCA') is compliant with the CRPD. It commissioned the Essex Autonomy Project, based at the University of Essex, to provide technical advice and assistance, which culminated in a report, *Achieving CRPD Compliance*, published on 22 September 2014. The main findings were as follows:

(a) The Mental Capacity Act 2005 is not fully compliant with the United Nations Convention on the Rights of Persons with Disabilities, to which the UK is a signatory.

(b) The definition of 'mental incapacity' in section 2(1) of the MCA violates the anti-discrimination provisions of CRPD Article 5, specifically in its restriction of mental incapacity to those who suffer from 'an impairment of, or a disturbance in the functioning of, the mind or brain.'

(c) The best-interests decision-making framework of section 4 of the MCA fails to satisfy the requirements of CRPD Article 12 (4), which requires safeguards to ensure respect for the rights, will and preference of disabled persons in matters pertaining to the exercise of legal capacity.

(d) MCA section 2(1) should be amended to remove the following words: "because of an impairment of, or a disturbance in the functioning of, the mind or brain."

(e) The best-interests decision-making framework on which the MCA relies should be amended to establish a rebuttable presumption that, when a decision must be made on behalf of a person lacking in mental capacity, and the wishes of that person can be reasonably ascertained, the best-interests decision-maker shall make the decision that accords with those wishes.

(f) The UN Committee is not correct in its claim that compliance with the CRPD requires the abolition of substitute decision making and the best-interests decision-making framework.

(4) Digital service delivery

Since 2012 the Government Digital Service and the Ministry of Justice have each published digital strategies, both making the case for a shift to online service delivery. The OPG's strategy is aligned with the priorities set out in all those documents, while acknowledging the OPG's distinct needs. The OPG is an exemplar agency, and digital services have become an intrinsic part of how it is fulfilling its business plan. Its digital journey began with the creation of an online Lasting Power of Attorney application service, which went live in May 2013, having been the first ever exemplar service to pass the Digital by Default Service Assessment. The OPG has launched several other new digital products, all built around the needs of its service users (both internal and external). It is building a new case management system for its staff, a faster way of capturing documents and data, and a new tool for deputies to engage more easily with the agency. All of these products and services are helping it to work more efficiently and serve its customers better.