



# HOUSE OF LORDS

Unrevised transcript of evidence taken before

## **The Select Committee on the Mental Capacity Act 2005**

Inquiry on

### **MENTAL CAPACITY ACT 2005**

*Evidence Session No. 12*

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*Questions 247 - 269*

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10.40 am

Witnesses: Alex Ruck Keene, Alex Rook, Julia Lomas and Michael Mylonas QC

Elmari Bishop and Mark Neary

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Members present

Lord Hardie (Chairman)  
Baroness Barker  
Baroness Browning  
Lord Faulks  
Baroness Hollins  
Baroness McIntosh of Hudnall  
Baroness Shephard of Northwold  
Lord Swinfen

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**Examination of Witnesses**

**Alex Ruck Keene**, 39 Essex Street Chambers, **Alex Rook**, Partner, Public Law Department, Irwin Mitchell LLP, **Julia Lomas**, Partner, National Head of Court of Protection Department, Irwin Mitchell LLP, and **Michael Mylonas QC**, Barrister, Serjeants' Inn Chambers

**Q247 The Chairman:** Good morning and welcome to Mr Mylonas, Mr Keene, Mr Rook and Ms Lomas. Thank you for your written submissions. This session is intended to supplement them with matters that the Committee wishes to explore further. I should tell you, as you are probably aware, that the session is being recorded and transcribed, and is being broadcast on the parliamentary channel. We have a lot of ground to cover in the limited time available, so could I ask the witnesses—I am sure you will do this anyway—to answer the questions as directly and succinctly as possible? If you agree with another witness, it would be useful that you say so but not repeat their evidence.

I start by saying that when the Act was in contemplation, the reason why primary legislation was preferred to codes of practice or government guidelines was to provide the prospect of redress against bad practice. We have heard a lot of evidence that the law is frequently not complied with, with no sanctions being applied and breaches seldom prosecuted. Could I ask: has the Act been as effective as anticipated in changing practice? Is the answer to that

question different when one thinks about health and welfare issues, as opposed to financial matters? Can I start first with health and welfare, and start with Mr Mylonas?

**Michael Mylonas:** Insofar as health and welfare are concerned, we thought that the decisions were being taken very adequately by the judges exercising their inherent jurisdiction previously. There has been an advantage in that the new legislation codifies the way in which the courts approach it, so there is perhaps more uniformity about the way in which decisions are taken. Certainly in terms of the acute decisions, end-of-life cases or cases where one is providing treatment against a patient's stated desires, we think that the system has provided a codification to it that has not necessarily improved it.

**Alex Ruck Keene:** What I would say is that, purely limiting myself to the Court of Protection, which is really the area I know most about, as opposed to speaking more generally about a culture change, there is only so much that the Court of Protection can do to bring about the culture change—all the witnesses, almost without exception, have used that phrase—that the Act embodies. It is incredibly important not to underestimate the power of judgments such as the Neary judgment. Of course, you will be hearing from Mr Neary later on. There has been a great deal of publicity about those judgments. It seems to me that the aspect of publicity of judgments such as Neary cannot be underestimated and emphasises how important it is that the current president focuses on transparency in the Court of Protection, and trying to increase the amount of knowledge of the Court of Protection and of the consequences, to put it negatively, for instance to public bodies if they get decisions wrong, but also of how complex and difficult decisions can be made on behalf of people without capacity.

The only other point I would make in that regard is to emphasise the importance of the recent Supreme Court decision in the *Aintree v James* case, which, as I am sure the Committee knows, was the first case in which the Supreme Court has considered the

Mental Capacity Act. The judgment of Baroness Hale is one that I think we will be studying for a very long time. The fact that she emphasised that the purpose of the best-interests test is to consider matters from the patient's or from the person's point of view is something that has come down from the highest court in the land. I know that all those who practise in the area will be emphasising that message loud and clear. That is how important the Court of Protection is, which is all I can really speak to in this area.

**Alex Rook:** Part of the problem with the Court of Protection is that it is a forward-looking court, which is generally a good thing. When you come to the court, the question before it is: what is in this person's best interests? The court is often described as being inquisitorial rather than adversarial. You do not win or lose: you just establish what is in this person's best interests. That almost acts as a disincentive to look at what has happened in order to get there in the first place. I am sure as well, partly due to resources and time, that the court is quite often quite reluctant to look at what has gone wrong rather than at how we solve it. That is perhaps in contrast to a lot of other civil proceedings, where you are generally looking backwards and saying, "What has happened there? Was it right or was it wrong?".

As a case example, we acted for an elderly lady who went from her own home into hospital and was then moved from hospital into a care home. Then, once she was in the care home, her authorisation of the deprivation of liberty was made. That was plainly too late. The court tends to say that is too late to express some disappointment at that, but it does not go much further, because the court is actually looking at the primary question: should she be in that care home or should she go home? There is not really emphasis in the court to actually look at that; non-compliance has already taken place, if that makes sense.

**The Chairman:** Do you regret that?

**Alex Rook:** Yes, I do. The counterargument to that is that we want the court to be accessible and user friendly and we want to encourage its use. In most civil proceedings, the remedy where a body does something wrong is an order against them in costs. The normal rule is that the loser pays the winner's cost. In welfare proceedings in the Court of Protection, that is not the normal rule; the normal rule is no order. The unfortunate consequence of that is that where there is non-compliance, cost orders do not flow from that quite often. That means that there is an element of getting away with it, rather than a brighter light being shone on that authority, saying, "Look, that was not right", and therefore encouraging better practice going forward.

Alex referred to the Neary case, which is a classic example of that light being shone, but that is quite an unusual case, and quite an extreme case frankly. A lot of the examples that the Committee has heard before, from charities for example, tend to be about more day-to-day issues, where families feel they are not being consulted or their views are not adequately being put. Those are not the kinds of things that are likely to end up in a cost order.

**Q248 The Chairman:** Could I ask about the financial aspect of the question, Ms Lomas?

**Julia Lomas:** Absolutely. I have practised in this area both under the old legislation and the new. Therefore, I have managed my clients' affairs both under a receivership and under a deputyship. From my point of view, the Mental Capacity Act has taken matters a huge step forward, inasmuch as under the old system there was no welfare jurisdiction. Now, there are occasions when I do need to think about things other than the property and affairs of my clients. In those situations, I will consult my colleague on my right. It is extremely helpful to have access to that particular jurisdiction.

The majority of my clients, I have to say—although not exclusively—are clients who have an acquired brain injury and have received large damages awards. That does not, however, mean that I do not have clients on my list of much more modest means. We have quite a

lot of referrals through from charities such as Age UK. In those situations, it is usually families making inquiries about the need to take over perhaps an elderly relative's affairs, because mum has gone into a nursing home, for example. They cannot access bank accounts in order to be able to pay fees and the like. I think that for people of more modest means it can be hugely difficult. I do not think that the banks, for example, are always as helpful as they could be. Sometimes it is because of other conflicting legislation; sometimes it is through lack of understanding and awareness. Very few banks actually have somebody in branch who understands the workings of the Court of Protection Act, and will frequently ask, "Have you got a power of attorney?".

It is not easy and costs are prohibitive, because for modest estates you are talking about a £400 application fee. Even if you can get a solicitor perhaps to weight their fees, you still have a court fee to pay. There is means-testing but, of course, there can be money in the bank account that you cannot get at, so you are in a catch-22 situation. That is also a difficulty.

In terms of financial abuse, unfortunately I have had instances on my case list where I believe there is evidence of financial abuse and I have tried to take that forward. Again, there can be difficulty with organisations such as the banks giving the evidence, and with the police perhaps not understanding this area, and then the Crown Prosecution Service actually declining to bring a prosecution because of the difficulties, sometimes, of the evidence, where perhaps your main witness lacks capacity. It is not easy and it is quite encouraging to have seen the recent cases that have hit the news where successful prosecutions have been brought.

**Q249 Lord Faulks:** Julia Lomas, may I ask you this? You have a perspective, first of all, as acting as a receiver and as a deputy for people who have received large sums of money by way of damages. I have seen, and perhaps you could comment on this, statements from

solicitors acting as a receiver, claiming very large sums of money in order to discharge their duties to look after somebody who lacks capacity, on the basis that they have to be involved a great deal because the Mental Capacity Act requires capacity on a specific basis, so the fees involved are very large. Is that a danger? Although one wants, of course, to adhere to the Mental Capacity Act, it could rather bring the whole thing into some disrepute.

**Julia Lomas:** There is no doubt at all that the costs of running a deputyship have increased proportionately, as opposed to the costs of receivership. Partly the fees themselves have increased. Obviously hourly rates have increased. However, it is the fact that you have to consult. That is right; you should be consulting P on the decisions that are affecting them on a day-to-day basis, whereas receivership is much more paternalistic and you could use substituted decision. I would not like to go back to that. I think that the ethos of the Mental Capacity Act is correct, but there has to be a recognition that the whole thing slows down, particularly if you have a difficult client, as in my situation, where I have a number of acquired brain injury clients who actually have quite a high level of functioning but impaired cognitive ability and very little insight into their difficulties.

In that situation, if I sat a client in front of me, asked them a question and got the right answer, is that enough? No, not really, because if I then asked that client over a period of time and had evidence of a pattern of behaviour, that pattern of behaviour might demonstrate to me that actually that client did not have the capacity to make that decision in the way that perhaps that first conversation might have suggested.

**Q250 Baroness Hollins:** Many of the submissions to this inquiry have asked for clarification of the types of decisions that should be ruled on by the Court of Protection. Do you think that such clarification is both possible and necessary?

**Alex Ruck Keene:** If I may just pick up on that, prior to the coming into effect of the Mental Capacity Act, there was a practice note that the official solicitor had issued with the

endorsement of the court, explaining the sorts of decisions that should be taken to the High Court for a decision under the inherent jurisdiction and, rather importantly, who should be taking that sort of decision to court. For instance, it outlined in terms of serious medical disputes who should be taking it to court, but it also outlined welfare disputes. That practice note has not been reissued. There is some reference in the code of practice to what sorts of decisions should go to the Court of Protection, but it is not in very concrete language. On the rules review committee, which was convened several years ago to consider changes to the Court of Protection rules in the light of the first years of our experience of it, we suggested that it would be a jolly good idea, to use a technical term, to revisit and reissue that sort of practice note by way of practice direction. Yes, it would be possible and, in my submission, very helpful to have a document that set out clearly that these are the sorts of decisions that should be taken to the Court of Protection and this is who should be taking them.

One of the big dangers is that where you have a person without capacity who has no family member to kick up a fuss and no one else really to take any issue, if there is a real problem they are entirely reliant on the local authority, if it is that sort of welfare issue, to make sure that the matter is brought to court. Of course, we have the supporting regime IMCAs and relevant person representatives, but at the end of the day those cannot properly be said to be entirely disassociated from the local authority. If something very clearly says, "In these sorts of circumstances this needs to go to court", I would certainly be very much in favour of that.

**Alex Rook:** If I could add to that, the only point from any of that that I would slightly disagree with is the way in which it is done. Things like practice notes, practice directions, et cetera, are all very accessible to us as lawyers, but I am not sure they are to the members of the public. It seems to me a classic thing that the public should know about: "This is the

kind of decision that is liable or is able to go to a resolution at the Court of Protection”. That seems to me to have to go through the code, and I know there has been quite a lot of debate before the Committee already about whether or not there needs to be a redrafting of the code or a tweaking perhaps of the code. I agree entirely with Alex that there need to be some clarity on it.

At the moment, the code says “serious decisions affecting healthcare and personal welfare matters”. If you are a layman of the public, that is pretty general. What one person thinks is serious is not necessarily what another person does. Also, part of the problem that underpins all this is what happens if this is not a decision that should go to the Court of Protection. If you have a more mundane, day-to-day type of issue and there is a dispute between you and a public body, for example, but it is not an issue that is thought to be sufficiently justiciable to go to the court, how is that resolved? That is a difficult one, because quite often what happens in practice is that the public body thinks of themselves as the ultimate decision maker when in fact that is not right. That has a difficulty. What flows from the question, “Should there be some clarity?”, is, “Yes, I think there should be”, but I also think there needs to be some clarity about what happens if it is not a matter for the Court of Protection.

**The Chairman:** What would you suggest in that situation?

**Alex Rook:** Again, the code gives some kinds of suggestions, but it was described before the Committee as motherhood and apple pie. Things like advocates, mediation and genuine engagement with families are really the only way to try to resolve that. There has been some suggestion, again before the Committee, that there should be a tribunal that could look at things, rather than the Court of Protection, although I have to say it is not something of which we would be in favour. I am not sure what it would achieve, because decisions are

already taken at district judge level that are fairly accessible. It is probably equivalent to a Mental Health Review Tribunal already.

**Q251 Baroness McIntosh of Hudnall:** I am interested in this issue in relation to the question of non-compliance and a lack of sanction, which appears to be a problem with this Act. Obviously, what you are saying, Mr Rook, about the issues that are not going to be resolved in the court is true. I would suppose that most such issues are going to be of that nature. If the Act itself is insufficiently robust to put pressure on local authorities in those situations, it appears that it is not really doing what it was originally intended to do. Can you reflect on that for a moment and tell us, any of you, whether you think there is something about the law itself and/or the code of practice that can address that matter?

**Alex Rook:** What is inherently difficult about the Mental Capacity Act is that it sets itself, as a piece of legislation, an incredibly difficult task. On the one hand, you have the absolute most complex decisions, like the case of James that we have referred to. On the other hand, you have decisions about what clothes an incapacitated person should wear on a day like today and whether, if you left them to their own devices, they would go out in a T-shirt or something like that. All of it is dealt with in exactly the same piece of legislation with the same approach.

Again, I know that the Committee heard from Mencap, and we drafted a document with them addressing the exact concern that they were raising to us about parents or carers feeling like they were not being consulted about decisions, which quite often can be low level-type decisions. The only answer to that can be better explanation within the code about how those types of decisions are resolved.

**Baroness McIntosh of Hudnall:** I might put it to you that the problem is that the Mental Capacity Act just is not frightening enough. Is that the case?

**Alex Rook:** It might well be, yes. The answer to that is partly in the cost rule that I talked about previously. The consequence of not acting in compliance with the Act should perhaps be that that public authority is then going to face cost consequences, whereas at the moment the way the rules are drafted means that they rarely do.

**Baroness Hollins:** Can I just follow this up slightly further? It seems to me that one possible difficulty of specifying the types of decisions is that the consequences of the type of decision vary according to the individual. For one person, going out in a T-shirt might be a very small decision, but for another it might be a really major health-limiting decision. In a sense, the type of decision cannot be separated, can it? I just wondered. I can see the point of trying to specify the types of decisions that should be considered, but you are right: it is the whole set of decisions that are being considered.

**Alex Ruck Keene:** One difficulty—well, is it a difficulty?—is that the Mental Capacity Act, unlike lots of pieces of legislation, does not state outcomes. It is about processes. Section 4 of the Mental Capacity Act is very firmly not saying, “In any given case, this is going to be what is in P’s best interests”. It is very firmly saying, “This is what you need to do in order to come to a decision”, so it makes it terribly difficult then to have, as it were, a measurable outcome against which you can say that this local authority or this decision-maker has or has not acted in compliance with the law.

For instance, the only bit of the Act that really provides a clear sanction in a prosecution sense is Section 44, which is the offence of committing neglect or abuse of someone without capacity. That is a clearly measurable thing that the law says thou shalt not do, but the rest of the Act is so much more subtle. It is incredibly important, but it does make it terribly difficult then to say how one then goes about bringing really measurable outcomes. I think that is one of the reasons, reflecting on all of the transcripts of the evidence that has been given so far, why so many people have been saying that it is a cultural change.

Of course, lurking in the background, as the Committee is incredibly well aware, we have the Convention on the Rights of Persons with Disabilities, which is telling you, by the way, that we probably have not even got it right with the Mental Capacity Act. That is even more of a culture change. As a lawyer practising in the area, when I am confronted with the Convention and what it really means my first instincts are, "I cannot see how that can possibly be right". As people have helped me to think through cultural changes, I can see what the point is. Those sorts of things are incredibly difficult and take a great deal of time, which goes back to resources, which goes back to training, which goes back to publicity of decisions.

**Q252 Baroness Shephard of Northwold:** Many submissions to the inquiry have also asked for a statutory definition of what constitutes a deprivation of liberty. Do you think that such a clarification is possible? Is it necessary even?

**Michael Mylonas:** A number of the submissions that we have read so far have highlighted the different judicial interpretations and the onward march. We are all waiting, as I know the Committee is aware, for the Supreme Court's decision in *Cheshire West*. I do not know when that will be out, but that will provide, we hope, some helpful analysis. The problem with deprivation of liberty, as with so many of the areas we have discussed this morning, is not what is issued in a practice direction or what clarification is provided by the Supreme Court to advocates, to solicitors, perhaps to heads of legal departments in primary care trusts and the heads of local authorities. The problems are that the people who are responsible for taking these decisions at ground level are healthcare assistants and social workers. With appropriate training, they may be empowered and they may be sufficiently confident to take the right decision.

One of the areas where I perhaps disagree with Alex on my left is that, yes, it is right that the MCA sets out a process. There is no harm in that; it is a very good thing. For once,

instead of having to look at reams of judicial authority, there is, in Section 4, what you have to do, with appropriate guidance from the code as well. What is wrong is that people at the ground level are not actually taking the decision at all. That is where we have cases coming to court where there has been no assessment, or even consideration, of whether there has been a deprivation of liberty. Those are the problems. I am not sure that a wholesale rewriting of the Act or sections of it is necessarily required, rather than an approach to training of the people at the ground level, at the grass-roots level, who are going to be enforcing it.

Lord Justice Munby refers to “nuanced decisions” that have to be taken in a particular context. For example, a patient is out for a walk, appears to be going back to the unit of their own volition and then suddenly stops and wants to go off. You are asking a healthcare assistant to decide whether that patient can be allowed out. Are you expecting that healthcare assistant suddenly to decide whether or not there is a deprivation of liberty? It is an extraordinary requirement of them in a very uncertain field at the moment. Yes, it would be helpful to have a definition of deprivation of liberty and further clarification of it, but of paramount importance is the training of those who are applying, enforcing and interpreting it.

**Q253 Lord Faulks:** Baroness McIntosh, although she put it more elegantly than this, was saying that perhaps we need a bigger stick. Do you think, in view of what you have said, that there is a danger that if you have a big stick you are going to paralyse the process of decision-making in just the way you have described?

**Michael Mylonas:** As I heard that, I could see exactly why the suggestion was there. If there is a little more fear, will it coerce authorities and trusts to provide more training? I am not sure at the moment that that is the way forward, but equally I do not have any answers to deal with the issue of how to compel the state, or the various embodiments of the state

that are providing employees, to provide training down the line. To give a personal example, my own father was recently in a home, and it is quite clear from the late-night, frenzied telephone calls that they are terrified of what I, as a barrister specialising in the field, am going to make of what is being done to him. They are extraordinary telephone calls. One speaks to the people treating him when I go at the weekend, and one offers to go and speak to them because it is clear that they have no idea. On a daily basis, there is a team of them; he is receiving excellent one-to-one care. The one area that really worries them is, “Am I actually depriving him of his liberty? Should I be making an application?”. That is where advice and training needs to be given.

**Alex Ruck Keene:** One really important thing is that quite often it seems to require, in my experience on the deprivation of liberty side—doing lots of training for deprivation of liberty—the light-bulb to go on for one person in the relevant organisation to go, “Actually, these DoLS safeguards are jolly useful. I can use them as a stick internally to try to push my agenda of trying to empower, for instance, the people in care homes”. I know you heard evidence from Lorraine Currie earlier. What she has done in her area is incredibly helpful and incredibly important. They have a very good DoLS team up and running, and they really push DoLS as empowerment. From a definitional point of view, yes, we will get a definition from Cheshire West, and from the Supreme Court ultimately, but I could not agree with Michael more that it is so much more about the training.

Just to pick up on evidence that was given to you at least in writing by the Mental Health Alliance, this is also about recognising the really critical issue. It is not just Article 5, it is not just deprivation of liberty, it is wherever the state has a degree of control over the incapacitated and making sure that those decisions are taken with a proper degree of scrutiny and a proper degree of respect for P’s best interests. If we focus too narrowly on whether it is a deprivation of liberty or not, although of course we have to because that is

what Strasbourg tells us we have to, we risk losing sight of a very important class of person, about whom we really need to make sure proper decisions are being made.

**Q254 Baroness Browning:** The submissions that we have received, including the one from Serjeants' Inn Chambers, have flagged up the possibility of opening up a new Bournemouth gap. The case of the gentleman who was detained under the Mental Health Act, under a Section 3 order, and decided to go on hunger strike but then presented the problem of whether he could be force-fed or not appears to be quite critical in this. I just wondered whether you would like to elaborate on this new Bournemouth gap and whether you could see any solutions to it.

**Michael Mylonas:** I will not go into the background of the specific case, because that is set out in our submissions. The issue only arose because a patient was detained under section under the Mental Health Act, as you have identified, and because of the operation of Section 16A and Schedule 1A he was ineligible to be detained. Those in my chambers, on the instruction of the official solicitor, suggested that in that case justice could be done by including into the reading of Section 16A a provision that allowed a deprivation of liberty for treatment that was unrelated to the mental health disorder.

The judge, Mr Justice Baker, said, "I am not prepared to go that far in this case, but what I will do is use the court's inherent jurisdiction". It is a way to get around that issue, where you have a patient detained under the Mental Health Act but who requires treatment not for his or her mental health disorder. It is a way of getting around that situation and all the difficulties with the current legislation. I think the solution is straightforward. I hope we have provided one option in our submission, which is simply to include a small revision to Section 16A.

**Baroness Browning:** Can I just clarify this? Are you saying that in the decision on the part of the patient to go on hunger strike he was regarded as having the capacity to make that decision?

**Michael Mylonas:** The court's decision was that the decision to go on hunger strike did not arise out of the mental health issue; it arose because of decisions to try to repatriate him.

**Baroness Browning:** Do you think there is anything we should change now in the existing legislation to close this gap?

**Michael Mylonas:** Just for the purposes of the record, we set out in paragraphs 14 and 17 of our submissions proposed revised wording for Section 16A. We think that might be helpful for those contemplating any redrafting. That should close off what might otherwise be a worrying gap. In the interim, we would hope that Mr Justice Baker's approach could be adopted by any other judges faced with a similar situation.

**Q255 Lord Swinfen:** Are there sufficient protections within the Mental Capacity Act, the operation of the Court of Protection and the Office of the Public Guardian against financial or other abuse of those who lack capacity?

**Julia Lomas:** This comes down to whistleblowing. The Office of the Public Guardian has an investigative section. It also sets security levels and effectively risk assesses particular deputies. Now, at the moment, I know that the Office of the Public Guardian has just started on a consultation exercise to look at whether or not those are effective at the present time. I would say that they are possibly not as good as they could be. They made some adjustments a couple of years ago, and you then had type 2 and type 2A. However, it is very hard to see, other than through the visitors who the Office of the Public Guardian sends out, any particularly robust and effective supervision. That can then lead to financial abuse.

When a professional deputy receives an order, frequently that order is extremely wide. One would hope that that professional knows what they are doing. If they do not, they have the bond and they have their indemnity insurance. I am not saying that things do not go wrong, but at least on the professional side if it goes wrong it tends more to be from negligence rather than abuse. I would have concern in some instances, and I would hope that they are the minority rather than the majority, where you have lay deputies acting. I do think that in that situation the supervision ought to be much more robust than it is. Again, I will be contributing to that review with the Office of the Public Guardian.

Alex on my right made the point about publicity. There is an awful lack of understanding and information out there about the Court of Protection, what it can do and how it can be used to help P. I would like to see leaflets in every doctor's surgery, for example, because the majority of clients under the Court of Protection who have property and affairs deputyships actually do not have acquired brain injuries; they have illness, dementia or whatever. For the ordinary members of the public, there needs to be more information, which in turn would then help people to whistleblow. If they have heard of the Court of Protection, if they think they see that something is not right, they would have the ability and the information to know what to do about it. I do not think that it is as robust as it could be. It could be better.

Also, as far as the Office of the Public Guardian is concerned, one also has to acknowledge that they are extremely short of resources. The population is getting older and living longer, so its workload is obviously going to increase proportionately, yet its resources are not. That is a problem.

**Lord Swinfen:** How would you improve it? Do you think, for instance, that two people should act together rather than a single person?

**Julia Lomas:** That can be difficult. The court will appoint joint deputies, but if you are acting jointly and severally, you could have one at the other end of the country, because families these days do not live within a mile of each other anymore. It could be a safeguard, but it can also slow the process down.

**Q256 Baroness Barker:** Several of our witnesses have talked about the difficulties people have in accessing the court. What do you think are the causes of lack of access to the court or the things that hinder people in making freer use of the court services?

**Julia Lomas:** In relation to property and affairs, again it is volume. It would help to have the courts regionalised. Some recent changes that the court has made have helped. I know that they are increasing the number of judges. Better training would help, because better consistency would help. We do have to recognise this increase in volume.

**Baroness Barker:** Is the Court of Protection always the most effective way for somebody to seek enforcement of the Mental Capacity Act, or are there other ways in which they could do it?

**Michael Mylonas:** Do you mind if I deal with that from the health perspective? We deal in chambers with a large number of medical decisions, and they always arise when there is an intractable dispute between clinicians and family members. They inevitably are in the most sensitive cases, often involving the withdrawal of treatment from children, the decision not to provide life-sustaining treatment to children or, as yesterday, the conclusion of a two-day case where a family required a trust to provide aggressive resuscitation to a 72 year-old father. That was a case where we were much helped by Lady Hale's judgment in the James case.

In terms of accessing that, there is more publicity, which means that families are empowered to approach the Court of Protection. There is a problem with that. Instead of taking decisions themselves, they feel, particularly with infant cases, "I don't have to take that

decision. I can give it to the judge to deal with". It is a shame that decisions such as that are now being taken more frequently in the courts when in fact they should better be taken by a team of clinicians. The corollary to that and the answer to your question is that in the course of this last hearing, when we were contemplating the costs of an extremely sensitive High Court judge, of experts from around the country, of clinicians from the north of the country, of and the family having to go through two days of hearing, one wonders about a mediation process that has to be kicked off early on in these disputes, not late on.

The problem that we have and one of the issues that was raised yesterday was the delay in bringing proceedings to the court. By the time they arrive, it is very difficult in fact to give sufficient time, perhaps because somebody's life is ebbing away. We hear about cases being dealt with in extreme urgency, overnight, over weekends, at two or three o'clock in the morning. We can do that, but decisions like that should be taken when all the parties have more time to collect their evidence, and I remember—I think it was mentioned in the submissions—a case that was brought so late that we had to take evidence over a mobile phone in the middle of a court in London from a family who were running a shop in a town up north. Whilst important evidence as to what their family member would have wanted in their dying moments was being taken, we heard the ding-dong of the doorbell of the shop as the door open and shut and the mother was continuing to serve.

Cases like that should be brought to court much earlier, but fewer cases should be brought, and fewer cases can be brought if there is an alternative mediation process. That will only work, and I am conscious that it is another avenue or workstream, if mediators—trained, emotionally intelligent mediators—are brought in early on, and not brought in by families, because one cannot expect them to go off when they are dealing with all the issues, but are brought in, as in the cases we deal with, by the trust. For the case that we were dealing with yesterday, it was flagged up in June that there would be an issue. Early on, mediation would

save an enormous amount of money. Of course, it would be difficult for whichever organisation is funding it, because it would be an added cost to them, but the saving generally to the country and public's purse would be very significant.

**Alex Ruck Keene:** Can I just echo that plea from the welfare side? I have seen a number of cases where a good mediator has brought about a truly astonishingly good outcome, especially in the sorts of cases where the underlying issue is a breakdown in trust between a family and a local authority, and the family feeling that people are not listening to them. If you get the mediator and you get the structure, so the family does feel that someone has listened to them—sometimes the local authority wants to feel that someone has listened to them too, but it is really from the family's perspective—that is incredibly powerful and effective.

This also picks up on a point that Alex Rook made earlier. The thing about the Court of Protection is that by and large it is not a backwards-looking court, it is forward-looking. It is trying to make decisions about what should be happening going forwards. One of the really important things about mediation is that it is, apart from anything else, trying to salvage relationships that need to be in place. The judge has made the decision about where P should live. The judge then disappears from the case. All the lawyers disappear, but the social workers and the family on the ground have to carry on working together. To divert people off down that course saves money; it saves relationships. It is an incredibly important alternative, which is really just not well publicised enough and not utilised enough.

**Alex Rook:** Could I just add one more point as well? Again, I agree with every word of that. One other issue that really hinders people's access to the court is who should bring this to the court in the first place. There is a real lack of clarity. Again, it was one of the issues that was raised in the Neary case. It should be clear in the code that where there is a dispute, it

is incumbent upon that public authority to bring that issue, if it is justiciable, to the court. I do not think that happens quite a lot at the moment.

We hear from a lot of the charities that we work with that, again, families feel that the public authority thinks that it is the decision-maker. If the code was clear that, “Where you have a dispute on these types of issues, you, the public authority, need to take that to court”, that would make it much clearer.

I agree 100% with everything that was just said about mediation. The only caveat to all that—the elephant in the room—is funding. Of course, mediation itself still needs to have a paid mediator, and families will often feel, particularly if they are in dispute with a public authority, that they want to have the benefit of legal advice before they go to that mediation. It is definitely something that without question should be encouraged, and again it needs to happen earlier on in the process, but there is still a legal aid question mark there, which we may be about to come to.

**The Chairman:** The costs would be offset by the savings in the court systems.

**Alex Rook:** It would definitely end up being more cost-efficient, without question.

**Michael Mylonas:** Could I just add to that? In terms of what is in effect a case management decision, it is perhaps putting the burden on the trust or the local authority to take the case to court, in the same way that in civil proceedings we now have rigid case management, which requires the parties to confirm that alternative dispute resolution has been considered and rejected, and, tellingly, to require the solicitor who says, “It won’t work”, to draft a witness statement explaining why. If as a precursor to bringing a matter to court a local authority, a primary care trust or NHS England is required to take a decision about mediation and perhaps approach a mediator, that would be one way of kicking that mediation process off.

**Q257 Lord Faulks:** Just following on from that, the principle in the civil jurisdiction generally is that getting to court means that you have failed. All other avenues ought to be exhausted before you get to court. I suppose one of the problems with having an inquisitorial system, which is the way the Court of Protection works, as opposed to an adversarial one is that people might not quite feel the same incentives to exhaust all alternative remedies before going to the Court of Protection.

**Alex Rook:** The code is quite clear that you should try to do that. The Court of Protection is where you have failed to try to resolve this in other ways. Mediation is referred to already. The problem is probably more that people feel slightly unempowered, if that is the right word. There probably needs to be more work with the Legal Aid Agency to make sure that there is funding available for people before you go to court, in order to give that the best chance of succeeding.

**Lord Faulks:** That leads me to the question: do you think the lack of legal aid, or generally the costs of going into the Court of Protection, are preventing people from accessing the Court of Protection?

**Alex Rook:** “Yes” is a simple way of responding to that. I know that the Committee has already heard from Nicola Mackintosh, who appeared on behalf of the Law Society but is also a community care lawyer. She raised a number of points about positive legal aid, every word of which I entirely agree with. When I was considering the question, I had six separate points where there are problems with legal aid, which I might be able to rattle through.

The first is that changes were brought about in April that mean that people who are on a passported benefit income support, for example, still have to pass a capital test, which is proving a real hindrance to people being able to access the court. We hear, often, of where you have a caring family who have saved up an incapacitated person’s benefits for a rainy day,

and then find either that they do not qualify for legal aid or that they are going to have to pay those savings over to a lawyer before they can get legal aid. That is the first one.

The second point is that the Legal Aid Agency will only fund cases that engage Article 8, if it involves a family life rather than a private life. The classic example of that would be if you have somebody who is in care home X and there is a dispute about whether they should move to care home Y. The Legal Aid Agency will say that that involves your private life and not your family life, so you will not qualify for legal aid.

The third problem is a real, practical one. It seems almost not worthy of being raised here, but actually it is probably the largest of all of them. It is the need for evidence. The Legal Aid Agency takes a very rigid box-ticking approach to providing three months' bank statements and providing a benefit letter from within the last month. These are the kinds of things that incapacitated people could often find very difficult to get hold of. In a number of these cases, the person who will have those—their parents, et cetera—may be another party in the proceedings and it is in their interest not to provide it. It causes a huge logjam in getting people to get legal aid and to be able to try to resolve the issues.

My fourth point is about paying for experts, where again the Legal Aid Agency now takes the approach that every party should pay their share of an expert, regardless of whether they have legal aid. You will quite often have family members who may not even want to be in court in the first place, who are then being told, "You are going to have to contribute to the cost of this expert".

My fifth one, which is slightly more technical and relates to the paper that I sent in advance, is about the availability of legal aid in DoLS cases. There is what seems to me to be an illogical position that is adopted at the moment, which is that where a standard authorisation is in place and somebody wants to bring a challenge to that, a Section 21A challenge, they will get non-means-tested benefits. You can challenge that regardless of whether or not

your finances take you outside the legal aid threshold. Where the court authorises the deprivation, as opposed to a standard authorisation, you do not. If you have too much money, you will not benefit from legal aid. Similarly, if you are saying, “My family member, et cetera, is being deprived of their liberty”, and the public authority says, “No, they’re not”, you do not get non-means-tested benefit. Again, that acts as a real bar to them being able to challenge that, because you either have to do it yourself or pay for a lawyer.

The last point about that again comes back to a lot of the points that have been made previously about whether or not there is a stick. Where there has been an unlawful deprivation of liberty, the damages that are awarded in those cases tend to be relatively modest—a few thousand pounds. These cases are often told by the Legal Aid Agency that they do not meet the cost-benefit criteria, which means that the amount of money that it is going to cost to bring this to court does not make it worth while in terms of the amount of money that is successfully claimed on behalf of that person. Of course, we would all say, and I am sure everyone in the room would agree, that a lot of this is not about money but about saying that you have deprived that person of their liberty and it is highlighting bad practice. It means that it is difficult to get legal aid and that there is something called the statutory charge. That means that if you get legal aid and you recover money, you have to pay that back to the Legal Aid Agency. Again, if you are awarded £10,000 in damages because you have been unlawfully deprived of your liberty but your legal fees are either that much or more than it, all that money will then go to the Legal Aid Agency. The actual person who has been deprived of their liberty will get no benefit from it either.

**Julia Lomas:** Just to add very succinctly, there is no legal aid as far as property and affairs are concerned. The result is that I have no doubt that there are a lot of family members out there who as a result are put off making applications to the Court of Protection, where one

is warranted. As a result, I suspect that there are all sorts of creative accounting going on, with banks and post offices and the like.

**Q258 Baroness McIntosh of Hudnall:** On the question of whether there are other ways of making justice under the Act accessible, you understandably stress mediation as a very important issue. Do any of you think that an intermediary tier of a tribunal-like nature would be a useful way of stepping the process, which eventually might wind up in the Court of Protection?

**Alex Ruck Keene:** The slight difficulty is, as Alex Rook mentioned earlier, that we have the nominated district judges, who sit pretty much all the way around the country. At least in theory it is very accessible. I know that the current president is really trying to push the regionalisation of the court. From my part, that seems to me an incredibly important aspect. I suppose the question you would have to ask yourself is: what exactly would it be achieving? If the ultimate point is that you need to get to an independent body or independent person who can take a decision, because there is a dispute, the reality is that one is into a judicial arena very quickly, unless you are going down a mediation route. For my part, I do not think that trying to put in a tribunal layer would necessarily add anything.

We do, though, need much more aggressive time limits on how quickly a case needs to be progressed through the system and how quickly the court would be expecting to see evidence being produced by people. That would then allow decisions to be made quickly. One of the problems is that at the moment, especially on the welfare side, there are quite a lot of cases where there is a lot of evidence-gathering going on but not necessarily in the quickest way possible. Some of it is very important, some of it is perhaps slightly Rolls-Royce. You then end up in a position where really what you needed was a relatively quick decision from a judge about a dispute, without having had umpteen expert reports or independent social workers going out and visiting. Each time one gets an expert report, that

is by and large another three months' delay, because there are so few experts who are able to report.

It is really a question of calibrating to the nature of the dispute what the judge is being asked to do and the timeframe in which they are being asked to do it. That is something that, on the welfare side, people have been feeling their way with. I know that the president is very keen to take a grip and to say, "We have to sort this out and to get it more efficient".

**Baroness McIntosh of Hudnall:** In the sorts of circumstances you are describing, what would be the legitimate sources of evidence, for example, that a judge would have access to if he or she were not going to be able, because of time constraints, to go through the whole process of seeking independent expert testimony?

**Alex Ruck Keene:** I am not for one second saying that you just dispense with the whole thing. It is a question of calibrating what the judge needs. There are incredible powers in the Court of Protection in the Mental Capacity Act, for instance Section 49, to direct reports to be produced by NHS bodies or by local authorities. Then the Court of Protection has the power to require a visitor to report—either a general visitor or a special visitor with a psychiatric qualification. The court already has, in the Mental Capacity Act, a wide range of tools that it can use. It is a slight cultural issue in the way in which welfare proceedings were brought initially and conducted initially. People were finding their way in a new jurisdiction and saying, "We can't really move without expert evidence on absolutely everything". I am not for one second—please do not get me wrong—saying that independent evidence is not vital and that expert evidence, where necessary, is not important. However, it is a question of calibrating it, and we are getting there on that.

**Julia Lomas:** From the point of view of property and affairs deputies, I do not think that tribunals would be helpful. Under receivership, the court had something called nominated officers, and those disappeared when the Mental Capacity Act and deputyship came in. It

was realised that that perhaps was not a good decision, and as a result they have arisen out of the ashes like a phoenix and are now called associated officers. I would like to see the number of those increased, particularly if there is regionalisation of the courts, simply because they can cut through so many of the standard decisions that are needed on property and affairs, such as permission to purchase a property, as a very easy example.

**Lord Swinfen:** Many submissions to the inquiry have raised the issue of delay in proceedings, particularly those concerning non-controversial decisions affecting finance and property. Is this your experience? What proposals do you have to improve the situation?

**Julia Lomas:** Yes, it is. I think I have already touched upon this in one of my answers previously, inasmuch as there is a real resource issue. The workload is increasing. There are procedures whereby you can make an urgent application if something is required. Of course, the trouble is that the system becomes abused. If the system is slow and you are not receiving your order through in a timely manner, too many people will try to access the urgent procedures and it will then get clogged up. Generally speaking, and again I think that this is the difference between an experienced professional deputy and the layperson, the experienced professional deputy will know what buttons to push in an urgent situation. A lay applicant will not. That is simply again one of resource.

**Q259 The Chairman:** Finally, could I ask what your expectations are of the reforms proposed by the president of the Family Division? Will they have a positive impact, in your experience of individuals with families, as far as the Court of Protection is concerned? I am really interested in the fact that although there has been a suggestion of various recommendations or suggestions for improvement, and we have touched upon them—increased regionalisation and what have you—the only one that has been committed to so far is greater transparency.

**Alex Ruck Keene:** I take this slightly personally, in the sense that I sat on the rules review committee, which was convened two presidents ago, of the Family Division, where we did an awful lot of work essentially recognising that the Court of Protection was trying to weld two very different cultures together—the health and welfare side, and property and affairs—and had done so in one set of rules. We were recognising that that perhaps had not entirely worked and trying to come up with a better system that would resolve the matters of calibration of evidence and of getting things on the right track in the right way. The previous president accepted those recommendations. With the exception of the associated officers absolutely, frankly nothing was done. I know that was not due to any default on the part of the judiciary; I am afraid that was the Ministry of Justice and a resources issue.

There are a lot of recommendations that are already sitting there, waiting to deal with the problems that have been raised now. At least from the court perspective, or from a practitioner's perspective, they really are not very different from those that we were already aware of back in 2009. There is a suite of recommendations that are ready to go, as it were. I know that the current president has indicated he wants to take those forward as quickly as he can.

The other aspect that I understand he wants to take forward or consider is tied into the two cultures. It is recognising on the welfare side that practitioners and the judiciary have been finding their way, and it recognises we need to be tighter about how we manage this so that we can do this more quickly, more efficiently and more proportionately, in a similar sort of way to the way in which he has dealt with or he is seeking to transform the adoption and the care order proceedings in the Family Division, which has really put in a big cultural change in setting very strict time limits and very strict sorts of evidence and controls. My understanding is that he would like to translate that at least into the welfare side. It is totally different on the property and affairs side, which is 94% of the court's work. It is the welfare

side that takes up an awful lot of the court's time, because when one gets into that one is quite often into the big, heavy, disputed cases.

**Julia Lomas:** For that part, I would see it very much as the curate's egg: good in parts. I would welcome the efficiencies that might be introduced as a result of bringing it under Family, but I would be concerned that we do not simply give Court of Protection property and affairs matters to family judges. We have a great deal of expertise in our Court of Protection judges and I would like to see that preserved, enhanced perhaps, or increased, but nevertheless that core specialism preserved.

**The Chairman:** Thank you very much to each and every one of you for your evidence. It has been very helpful indeed.

### Examination of Witnesses

**Elmari Bishop**, Statutory Development and Training Lead, MCA and DoLS, South Essex Partnership University NHS Foundation Trust (SEPT), and **Mark Neary**, parent of adult son found to be unlawfully deprived of his liberty by London Borough of Hillingdon in 2010

**Q260 The Chairman:** Good morning and welcome to this second part of today's Committee. As with the previous witnesses, I would like to thank you for your written submissions. This session is intended to supplement the submissions and to go into more detail about issues that the Committee wish to explore. Could I ask you to be as concise as possible in your answers? We have a lot to cover and there is limited time available. As I said to the other witnesses, if you agree with the other witness, simply say so and do not repeat the evidence, because it does not make it any better. I should remind you that the session is being recorded, transcribed and currently broadcast on the parliamentary channel. Could I start by asking the first question of this session? There has been a lot of evidence about non-compliance with the Act. Both of you have experience of poor practice of the Act in relation particularly to deprivation of liberty, but from different perspectives. Despite that, in each of your written submissions you are supportive of the Act. Can you explain why?

**Mark Neary:** In my case, my son Steven was held unlawfully under a deprivation of liberty for a year, and for all the way in which the Act was turned on its head, as the judge said, I am in no doubt that without the Act Steven would now be in that care home in Wales that Hillingdon intended to send Steven to. It was due to the Act being in place that we were able to get an IMCA to act as support for Steven and me, and then bring the matter before

the courts. I have no idea whatever, if the Act had not been in place, how on earth we would have been able to have challenged that.

**Elmari Bishop:** The Mental Capacity Act and Deprivation of Liberty Safeguards are quite a vital piece of legislation. If it is applied correctly, it provides really valuable safeguards, as in Steven's case, to a very vulnerable group of people. However, the problem is that it is not always applied in the spirit that was intended, and this is the main reason why we see so many failures. For me, the Mental Capacity Act is a piece of legislation that professionals should use to empower and protect people who cannot make decisions for themselves and to involve the person and the family, look at all available options and consider what would be the best for that person. However, in my experience, not necessarily in my organisation but more nationally, the cases that I come across where there has been particularly poor practice are ones where it was used not to empower or to protect but to compel and to coerce and for professionals to get their way in doing what they want to do. Many families have told me, "The social worker said they are using Section 4 of the Mental Capacity Act to do this", and families do not seem to quite understand that there is no such power, especially like in Steven's case, to just override the person or family's wishes without going to court. If the Mental Capacity Act is applied correctly, it should protect people, and I find that a lot of professionals still apply it as a way of getting what they think would be best.

**The Chairman:** Thank you. Why do you think the non-compliance is so widespread?

**Elmari Bishop:** A lack of understanding amongst professionals, not a lack of awareness. Everyone knows there is a Mental Capacity Act and there are Deprivation of Liberty Safeguards, but people do not always understand how to apply it in practice and to individual cases. Many professionals blame the Mental Capacity Act for being overcomplicated, but you have quite a simple piece of legislation, a very workable piece of legislation, that you are trying to apply to very complex situations. Professionals do not always understand how to

apply it in different cases, and specifically how to resolve conflict. When they are trying to make best-interest decisions and there is a lot of conflict, they do not always understand how to deal with that, and then they blame the Mental Capacity Act or DoLS. It is just a very complex situation and professionals do not quite understand how to maybe adapt or apply it in different situations.

There is also another reason for the failings: a lack of support for individual practitioners from managers and organisations, maybe because the organisation or the manager does not understand it that well either. What has worked pretty well in our organisation is the fact that from board level through to front-line staff they understand the importance of it, they are supportive of it and their managers are supportive of it. We have invested so much resource, time and effort into getting the message across. It is not just about a half an hour, face to face training session or e-learning; it is really about investing in a co-ordinated effort.

The other big problem is if you do not comply with the Mental Capacity Act or DoLS, there just does not seem to be a lot of repercussion or penalties. Some organisations are really good at it and drive it forward, while other practitioners or organisations might not comply and they are not auditing it—they are not looking at what they are doing. There just do not seem to be enough external drivers to impose penalties. At the end of the day, this is about protecting a person's basic human rights and you are making decisions about very vulnerable people. The Mental Capacity Act and Deprivation of Liberty Safeguards are saying that this is how you should be doing it, but if you do not follow them, there just does not seem to be a lot of repercussion.

**Mark Neary:** Sadly, the Mental Capacity Act is like most things in the adult social care world: at some point it is going to be hijacked. Like lots of initiatives within social care—personalisation, inclusion, person-centred planning—all those things seem to start with a brilliant idea but at some point seem to become misappropriated for cost-cutting or other

agendas. As I said, sadly, it seems inevitable that the Mental Capacity Act will be used in the same way.

**Q261 Baroness McIntosh of Hudnall:** We have covered, to some extent, what this question is trying to clarify, but you said, Ms Bishop, that your perception is that the Act is a good Act. It is capable of being applied and people just do not do it, for a variety of reasons that might include not being properly trained and informed. I find it very difficult to understand why this particular Act, which has so much support, appears to be so hard to enforce. You suggested that it is because not enough sanctions are attached to it or that that might be a reason. Mr Neary has a rather more broadly cynical view, I think it would be fair to say, that it is inevitable because of the area in which it is being applied. Do you think the law itself has any inherent shortcomings that make it difficult to apply, or is it just about the amount of time and resource that is being put into making sure that people understand it and are able to apply it?

**Elmari Bishop:** When it comes to the Mental Capacity Act, it is not only about applying a relatively new piece of legislation. There is a lot of change and cultural change that needs to happen alongside, and that is one of the biggest problems here. I honestly do not think there is anything wrong with the Mental Capacity Act. The Deprivation of Liberty Safeguards could perhaps be simplified, but the Mental Capacity Act, in essence, is a very good piece of legislation. However, it is not just about teaching professionals how to do it; there is a cultural change. Historically, doctors, nurses and social workers would base an assessment of a person's capacity or what would be in their best interest on their own professional judgment, which would be informed by years of training and experience. They knew that when a person with dementia reached a certain stage and lacked capacity, the best thing would probably be for them to go into a care home. This was all their professional judgment, and now we are asking those professionals, especially doctors, to apply their

professional judgment within this different legal framework. In my experience, many of them see that as an attack on their professional judgment: “Do you think I cannot make this decision? Why do I need to do it in this way?”. Quite often, the outcome is more or less the same, but it is the process that they do not follow.

I find the biggest problem is that they still do not involve the family and they still do not look at the person and what their views and wishes would be. In the past, they would say, “You have dementia and therefore you lack capacity. Therefore you need to go into a care home”. That was the process that professionals would follow. The Mental Capacity Act now says that you need to stop, you need to look at the person, you need to look at their views, listen to the family, listen to what everyone is saying, look at what has worked, consider the least restrictive options, and then you need to base your professional opinion on what would be best for them and not just what you have always done for a person in that situation. That is where the real challenge comes. It is not just about saying that this is a new piece of legislation, it is about changing cultures and changing the way professionals make decisions and challenging the way professionals make decisions that are really hard. Some of them are quite precious about it: “This is my professional opinion. I am a doctor. I have been a doctor for so many years”, or “a nurse for so many years”. That is where the real challenge comes. It is about getting them to take ownership of it, and getting them to make sense of it. Changing the Act will not really change that. It is about changing the cultures.

**Mark Neary:** I do not think there is enough in the Act about scrutiny, in the case of the DoLS, of the supervisory body. Who checks that they are doing the right thing by the Act and the right thing by the person who is under a DoL? That seems to me quite a big hole in the Act, but I also agree with Elmari that there is a big cultural shift as well. In all the meetings I attended in the year Steven was away, there was absolute certainty from the

professionals that their decision was right; it was just impossible to get them to reflect on that, and that is a big cultural thing.

**Q262 Baroness Barker:** Assessment of capacity under the Act is decision-specific rather than a one-off statement. Do you think that is part of the problem with the Act and its implementation, or do you think that front-line staff fully understand that and have the capacity to implement that? I notice that you said in an earlier answer that DoLS perhaps needs to be simplified. Could you expand on that in your answer?

**Elmari Bishop:** For me, the problem is not so much around assessment of capacity. Most professionals now seem to understand that you need to assess capacity. They seem to understand the process. The quality of the assessments is not always that good. Some people will spend two or three minutes with a person and not look at the practical steps to help the person to make their own decision or understand that unwise decisions are not always good. Therefore, people understand that they need to assess capacity and seem to understand the process now, but it is not always applied within the principles of the Mental Capacity Act or to the quality. We audit a lot of capacity assessments and the evidence to support decision-making is not always there. That leads to the next problem that if you do not assess capacity properly, your best-interest decisions probably will not be based on the proper process or evidence either.

Once professionals understand it, I think they can assess capacity and they are properly equipped to do that. Initially, there were a lot of cases where lack of capacity was still presumed, whereas now that is less—people are assessing capacity. However, the problem then comes when you are trying to make best-interest decisions or trying to make decisions around DoLS. For me, that is where the biggest problem lies, not in the assessment of capacity but the subsequent decision-making power.

In terms of DoLS and simplifying the process, everything from the application process to how you challenge it is sometimes quite complicated. The biggest complaint I hear from managing authorities, care homes and hospitals is about the paperwork. To request an assessment under DoLS, you need to complete 18 pages of paperwork. Normally, you would do the urgent authorisation, which is six pages long. The request for the standard authorisation is 12 pages long. I work within psychiatric settings. If you are working on a ward for people with dementia, it is very busy. It is really hard to find time to sit down and complete 18 pages of paperwork. On some of our wards, I have gone in and said, "I will help you with the application". I do not work on the ward, and even for me just to find three or four hours to sit and do the paperwork is hard if you constantly have people needing certain things. The application process is complicated. The whole understanding of when you need to apply and what their deprivation of liberty is is a problem. I know that it should be case-specific, and you need to look at individual circumstances and you have case law and guidance, but it is just too open to interpretation. You have professionals struggling to understand best-interest decisions and how to assess capacity, and now you are asking them to interpret very complex pieces of case law as well. As in the Neary case and many others, they talk about objection and family objection, but then if you place a person in a different setting, like a psychiatric ward, there are different criteria that apply. Therefore, care homes and hospitals struggle to just understand when they need to apply it.

One of the other questions is a simplified definition, and that would make a huge difference. You would still then have the best-interest decision coming in and maybe saying that this is or is not a deprivation of liberty, but for the people having to apply the process needs to be simpler. They need to understand clearer guidance on when you need to apply and when you need somebody to be assessed, and then it should be much easier to do. There is another big problem. I know that you can challenge it through the Court of Protection and

there are ways of challenging it, but that could be simplified. Therefore, those are the things that I would like to see change.

**Mark Neary:** Of course the people assigned to do a capacity assessment are able to carry them out, but I have three “buts”. The number one “but” is that it seems that often the cart is put before the horse, so the best-interest decision is made and then they think about assessing capacity. That seems problematic.

I know that the Act says that the person should be supported through the decision-making process, and that calls on drawing upon the people who know the person best to have an active involvement in the assessment. Steven has had five mental capacity assessments in the last three years. The very first one he had was when he was away in the unit, and the decision then was whether he had the capacity to decide where he wanted to live. I went to that assessment with him with two of his support workers, but it was made very clear to us that we were not allowed to have any input at all. Steven was doing fine during the assessment, and then he was asked a comparative question by the psychiatrist: which is better, the unit or his home? I could see Steven was very thrown by this because, for him, it is the word “better”. For Steven, “better” is what you become after you have been ill, so he was really struggling to understand the question. I chipped in to try to help him understand the question and was asked to leave the room. That was the end of my involvement in the assessment.

Steven has had two this year. The first one was after he was awarded damages for the unlawful deprivation, so that was about whether he had the capacity to manage his damages. The second one was about whether he had the capacity to manage the tenancy. The first assessment was about 15 minutes and the second one was probably about half an hour. That is my third “but”: it is very difficult to assess somebody who is experiencing something for the first time. Steven had never even had to think about managing a tenancy before, and

all of a sudden he was being put in a position where he was being tested and examined on his understanding of that when it was not something he has ever come across in his life before, so it felt very, very unweighted.

**Q263 Lord Swinfen:** Many submissions to the inquiry have asked for a statutory definition of what constitutes a deprivation of liberty. Would you agree with that proposal and what difference would it have made, in your experience?

**The Chairman:** I think you have dealt with that, Ms Bishop.

**Elmari Bishop:** I have said that it would be really useful, Lord Chairman, yes.

**Mark Neary:** I think the name is very problematic. I am pretty sure that the care home that Steven was in did not like the name “deprivation of liberty”. Something like “appropriate care safeguards” would seem less threatening. A statutory definition would be brilliant. I also think it should be weighed against what the person’s life was like before the deprivation took place and then afterwards, as a gauge. I know it is a very thin line between restriction and deprivation, but I would like to see a bigger comparison made with what the person has lost through the situation they now find themselves in.

**Lord Swinfen:** Do you think it would be possible to produce a definition that suited everyone? I think everyone is inclined to be different.

**Mark Neary:** No.

**Elmari Bishop:** There definitely needs to be clearer guidance and clearer indicators of when you should be thinking of requesting further assessment. Clearly defining what a deprivation of liberty is could still be left to the best-interest assessor and a judge in the Court of Protection. However, the care home and the hospital need clearer guidance. You possibly could revise the DoLS Code of Practice, but there needs to be clearer guidance. In case law, there is a distinction between the care home and the psychiatric hospital setting, for instance, and that needs to be made clear as well. Care homes and hospitals are really

struggling to understand when they are depriving a person of their liberty, and they hear so many conflicting messages. We will go to our hospitals and care homes and say, “This is what you need to look out for”, and then a best-interest assessor might come and assess someone and give them a completely different message. Even amongst best-interest assessors, amongst professionals, there are so many different ideas of what is and is not a deprivation of liberty, and that is causing a lot of confusion. It is excluding a lot of people from the Deprivation of Liberty Safeguards who could benefit from that. Therefore, in my mind, it would be better to give clearer guidance or a clearer definition and get more people assessed. It should still be left to the best-interest assessor to decide in the end whether it is a deprivation of liberty or not, but from the start there needs to be much clearer guidance for the care home manager or the hospital manager. They do not get the training in case law that best-interest assessors receive, so they need much clearer guidance about when it needs to be requested.

The name is quite problematic. One of the biggest obstacles that we had when we started visiting our psychiatric units trying to identify people who were being deprived of liberty was that you would talk to a psychiatrist who thought that they were providing a high standard of care, and they were, but they would see a person with dementia or with learning disabilities who they were looking after and treating to the best possible standard, and we would call it a deprivation of liberty. That was quite hard for them. They think that they are providing good care and we are saying, “You are depriving a person of their liberty”. That is problematic, because there is a very negative connotation to the phrase “deprivation of liberty”.

**Q264 Baroness Hollins:** My question is for Mr Neary and it is about IMCAs, who are commissioned by the local authority. Some of the submissions that we have received

suggested that there could be a conflict of interest in that IMCAs may not be able to adequately challenge local authorities. Has that been part of your experience?

**Mark Neary:** I can understand how that could happen, but in our case it was the absolute opposite. The judge said that Steven's IMCA produced the first best-interest assessment that deserved the name. She was completely independent. I never had any sense at all that she felt under pressure to follow the local authority line, and the report that she produced was completely different from all the other best-interest assessments that had gone before.

I would love it to be the situation that the person detained or the family could approach the IMCA service direct and not have to wait for the local authority to refer them. In our case, Steven was coming up for the fourth renewal of his deprivation of liberty before we got an IMCA. It took from April to November, and the judge said if we had had an IMCA back in April, Steven would have been home within weeks, but there was no access whatever for me or Steven to approach the advocacy service direct.

**Baroness Hollins:** You have to wait for referral by the local authority.

**Mark Neary:** Yes.

**Baroness Hollins:** That is one change you would recommend. Are there any other challenges that might facilitate access?

**Mark Neary:** No. That is such an important one. For me, that is the big one.

**Elmari Bishop:** I have a slightly different experience with IMCAs. I think they are quite good and a really valuable resource, but they do not always have enough power to challenge. I have been involved in a few cases, not in our organisation but externally, where IMCAs have become involved. They have challenged professionals' decisions, mainly professionals working within local authorities—social workers who probably wanted to move somebody to somewhere else and the family objected and the person might have been objecting. IMCAs have challenged the social workers' decision-making and what they wanted to do,

and in some cases social workers have made official complaints about IMCAs and the IMCAs have been told to back off. There are cases where IMCAs try to challenge, but the social workers just seem to be more powerful. In many cases, the IMCAs are commissioned, as you are aware, through the local authorities that the social workers work for and there is a bit of a power imbalance there. The IMCAs should be commissioned completely independently and there should be easier ways of accessing them. It is very much down to the social workers to refer for IMCAs or for independent best-interest assessors to request that an IMCA becomes involved.

**The Chairman:** That is the same point as Mr Neary was making.

**Elmari Bishop:** Yes. There are certain points where there should be access where there is none.

**Q265 Baroness Browning:** Ms Bishop, you have outlined quite a few of your concerns about the need for cultural change, and that it is really the culture change that is going to make a difference. You have also identified, I think I am right in saying, clinicians where there is a weakness. I do not know if I have interpreted what you were saying correctly, but what lessons have you learnt about how to improve implementation? What recommendations would you make to the Committee about how this should be promulgated more widely?

**Elmari Bishop:** The biggest thing that we have learnt is not just about implementing new legislation; it is about managing change, managing resistance to change and getting support from all levels. When we started the work in our organisation, we did a big audit, we realised we had a problem and we went to our board of directors. We received a lot of support from them because they also saw what the potential risks were in the organisation of not assessing capacity and not making best-interest decisions in accordance with the law and potentially depriving people unlawfully. We got sign-up from our board of directors,

and we thought that that would be all that we needed: we had support from the top level and we had the resources. We encountered so much support from all professionals, not just doctors, and we quickly realised it was not just, as I said, about implementing new legislation; it was about managing change and resistance to change. The main source of a lot of the resistance was, as I mentioned before, that the professionals felt that you were challenging their professional decision-making. We had to explain it to them in terms that they could understand. I work for an NHS trust, and we started to explain to them that it is about consent to treatment, at the end of the day: you need a person's consent. If they cannot consent because they lack capacity, you use the Mental Capacity Act to gain that consent. When it came to Deprivation of Liberty Safeguards, especially in our psychiatric settings, we had to explain to staff that this is about their legal authority to keep a person on the ward and treat them. We had to find ways to explain to them in terms that they understood. We had to get all the different professional groups on board and take ownership of it. We particularly struggled with certain groups, one of them being doctors. However, as soon as we got our medical director and some of the key doctors in our organisation on board, they started to take the message forward. Indeed, the change that we saw was not because of the work that we did but because of the support we started to get from different professional groups, and they then carried the message forward. It was only then that we saw any real improvement, so that was key.

The other thing that really helped was a few bad CQC inspections. We were doing all this work with doctors, nurses and ward managers within the organisation, trying to get them to take it on board and take ownership, but what really gave us that final push was a few bad CQC inspections. There were two in particular where our CQC inspector seemed to be quite clued up on this whole issue of deprivation of liberty in psychiatric settings, and that

gave us the final push. It was not just us saying, “This is what you need to do”, it was the CQC saying, “This is what needs to happen”.

Our commissioners then also caught on to the whole idea of the Mental Capacity Act and DoLS, and they started asking us every three months to report on what we were doing in that regard: what training we were doing, how many assessments we had done, what we had done to improve staff understanding, how we were monitoring it, and how often we were auditing it.

We started off thinking that we were just going to implement the legislation, but we then had to create a robust action plan to implement the change and get everyone on board, and then we had a few external drivers that really pushed it forward. For us, we learnt that it is not just the internal support but the external drivers that you need as well.

**Baroness Browning:** Thank you. That is very useful to know.

**Q266 The Chairman:** Was the risk of facing substantial damages a feature as well that encouraged the trust to move forward?

**Elmari Bishop:** That is how we got the initial support, because we did an audit and looked at how many potential cases we had of people who either were not assessed properly or who might be deprived of their liberty. We took that information and presented it to our board of directors. We quoted cases such as G v E, the Manchester case, where the person was paid substantial damages, so it was about the risk of litigation as well as the risk to the organisation from the CQC inspecting and finding these things on our wards. The CQC is now looking at compliance around the Mental Capacity Act and it has also been set as one of their corporate objectives, if I am correct. Therefore, the CQC is becoming more aware, and that really does help, because in the health setting especially the CQC has a lot of power to reinforce these messages.

**Baroness McIntosh of Hudnall:** That is a really interesting response, because it begins to indicate that perhaps the external sanctions that you were referring to do not necessarily have to come through the courts but can come through inspection regimes and other forms of pressure that have a very direct bearing on how people work in their own professional settings.

Mr Neary, I imagine by now that you have acquired almost as much knowledge as most professionals, but you do not start from a professional perspective. Therefore, can you answer the same question from the point of view of families and other supporters of people who lack capacity and what lessons you have learnt through your own experience about how the DoLS can be better and less riskily applied?

**Mark Neary:** I had never heard of the Act or DoLS at all before the first urgent seven-day authorisation took place, and that is probably the case for most families. I set up an internet group when Steven was away, more out of desperation really, to try to get some help. The group is still going, and I will be regularly contacted by a family member who has a son, daughter or another family member in a home. The question is always, "Where do we start with this?". More often than not, a DoL is not in place. The person will tell me the story, and it seems to me pretty obvious there should be an authorisation or at least an authorisation should be considered. My advice is always the same, and it is to speak to the care home and talk to them about doing a best-interest assessment. Is it really in the person's best interests to be in this place? As Elmari said a while ago, there is often resistance to that, I think because of the power imbalance. There are normally a lot of professionals making those best-interest decisions against one or two family members and the person being deprived of their liberty. That is my starting point, because people do not know that the Act exists.

**Baroness McIntosh of Hudnall:** Just on that point, do you think that there is enough investment in public information about the Mental Capacity Act or about the issues that could arise that the Mental Capacity Act is there to try to help with? Some of our evidence suggests that compared with, say, other kinds of risk that people face, the risks that come with incapacity, both to the person incapacitated and the families of that person, are relatively poorly understood through public health information, for example. Would you agree with that?

**Mark Neary:** One thing I experienced and I know lots and lots of others do, because it is a conversation that takes place all the time, is that the shift from children's services to adult services is enormous. The input from the family, which is quite high when the person is in children's services, suddenly evaporates when the person hits 18. I do not remember being given any information at all when Steven entered adult services about the Mental Capacity Act. I may have been, but I do not remember it at all. I think that is a prerequisite really, because your thinking, as a parent, as a carer, when your son or daughter reaches 18 has to completely change. You have made decisions on their behalf up until now. Now every decision that is needed about your son or daughter has to go through that best-interest funnel, and it is not something you would think about unless you knew the Act existed. Therefore, it should be an important part. As the person is being transitioned from children's services to adult services, their families, who are going to continue to be looking after them, also need some transition stuff around the Mental Capacity Act.

**The Chairman:** On that point, I seem to recall evidence some time ago from a witness who suggested that there should be education and information at the stage that a child was maybe 14, or just going on, to the child and the parents about the Mental Capacity Act and about the difference in responsibilities that the parents might have. Would you go along with that?

**Mark Neary:** Yes, absolutely. I take for granted most of the day-to-day decisions I make on Steven's behalf. Steven has just been allocated his new home and in the last two weeks we have moved, and I have probably made hundreds of little decisions over the last three or four weeks about how Steven is going to live in his home. Now, because I know about the Act, I know that they are best-interest decisions, but three years ago I would not have had the first clue on that.

**Q267 Baroness McIntosh of Hudnall:** I just want to follow that up one tiny step further. Clearly, in your case, Mr Neary, you have been aware of your son's needs over a long period of time, and you have correctly identified the difficulty in transitioning from child to adult services. There are other forms of incapacity that come either very late in life or as a result of a sudden intervention, like an accident or stroke or something of that kind. People are not going to have been thinking before those things started to be an issue for them about the possibility of the Mental Capacity Act ever being relevant to them. Therefore, I am wondering, from both your points of view, whether some of the difficulty is simply that the Act itself is understood by the people who need to understand it but it has no public profile. Is there something that we should be thinking about in respect of that?

**Elmari Bishop:** One big factor probably when it comes to the Mental Capacity Act is that families are not told what their rights are. The process is not explained to them. Looking at older people, a person will be living at home independently on their own without any support apart from their family. They will have a minor fall or an infection and go on to a general ward. On the ward, the staff will realise that they are confused and they might have dementia, and they will automatically say that the person cannot be discharged back home; they have to be discharged to a care home. The family are just told, "It is in their best interests. We are making this decision under the Mental Capacity Act", and they simply do not know any better. Many of these family members track me down and ask me for advice,

and when you explain to them that a best-interest decision will involve looking at the person, their views and wishes and talking to the family and looking at the least restrictive options, this is complete news to them. It is almost as though you need a statutory duty placed upon professionals to inform the family of their rights and what powers they do and do not have. Unlike under the Mental Capacity Act, if you want to detain somebody under the Mental Health Act the professional has a statutory obligation to explain to the nearest relatives their rights—that they can appeal, and what can and cannot be done. I think it needs something similar. What professionals will explain to a family about the Mental Capacity Act is that that is what they are using to move the person or to make their decisions, and I am sure in Mr Neary's case as well they never explained to him from the start that he needed to be involved or he could object or take it to the Court of Protection. They never explain any of that. Family members hear this from Mencap or organisations like that. Voluntary organisations are very good at explaining it to them, but the family needs to access Mencap and they do not always know that is even available.

**Baroness Hollins:** Mr Neary, just a quick question to pick up on something you said. Are you aware of any very good, straightforward, practical information that you can recommend to families so they understand how best-interest decisions need to be made? What do you recommend to people?

**Mark Neary:** The guidance manual is pretty good, although I know the cost of that, and most families are not going to go out and buy a copy. There are some really useful internet sites, particularly for carers. There is some wonderful stuff around the Mental Capacity Act.

**Baroness Hollins:** Could you possibly write to us and tell us what you think is the best?

**Mark Neary:** Yes.

**The Chairman:** Yes, that would be quite useful. It will give you time to reflect and if there are several, let us know.

**Mark Neary:** Okay.

**Q268 Lord Swinfen:** The Government currently monitor the number of deprivation of liberty applications across England and Wales, and we know that there are regional variations, but we do not know why. How do you measure whether the DoLS scheme is being properly implemented, and do you think that there would be a more effective form of quality control?

**Mark Neary:** I cannot make head or tail of the figures at all. If you have two neighbouring boroughs and, say, one has authorised two DoLS and the next borough has authorised 52, I am not quite sure, if it is a broad statistic like that—is two good, or is 52 good? I do not think we can get any strong message from the figures as they are presented at the moment. This may exist and I have just never seen it, but a starting point would be how many people fall under the scope of the DoLS scheme. I do not know whether that is recorded anywhere, but then there would at least be a comparison between the number of DoLS that have been authorised and the people who are in the DoLS realm, so to speak.

**Elmari Bishop:** It is really hard to quality control DoLS because it is specific to individual cases. You cannot say you need a 20% increase in DoLS applications year on year. There is no way of doing that. You need to look at it case by case and look at people who potentially fall within the scope of DoLS and whether that has been considered. That is what we do in our organisation. For everyone on our psychiatric wards who lacks capacity, we ask staff to complete what we call an informal admissions checklist, so we know how many patients we have, how many have capacity and how many lack capacity. Of those who lack capacity, for each of them there will be a written consideration of whether you are depriving them of their liberty or not and whether you have considered these factors.

**The Chairman:** People can lack capacity for some things but not others.

**Elmari Bishop:** These people lack capacity to consent to the admission and to the treatment. That is how we try to do it. We look at all our patients and at the ones who might fall within the scope and see whether DoLS have been considered for them. That is the only way we have found that we can do it, because you cannot really say you need X amount of DoLS or a certain percentage increase every year, because it is so case by case.

What has really worked for us is the strong internal drive to keep an eye on it. We have quite a robust monitoring system in place now, which I have talked about, where every week our wards will feed back to us how many patients they have and how many lack capacity. They will say to us, “Out of the group who lack capacity, this is the amount who would be DoLS and these are the ones who are not”, and they will give us quite clear reasons for that. We have an internal mechanism to monitor quality, and we also have yearly audits to make sure no one is falling through the net.

Apart from that, we also have the strong external drivers, the CQC and our commissioners, who also keep an eye on what we are doing. That is what has driven up the quality in terms of how we have implemented DoLS. It is the internal and external drivers, as I mentioned earlier.

**Q269 Lord Swinfen:** I know that groups of magistrates and groups of judges get together to discuss cases and to see if they would come up with the same punishment, to see that there is consistency throughout the country. Do groups of local authorities get together and discuss cases to see whether they would agree on a deprivation of liberty or is there no such cross-fertilisation throughout the system?

**Elmari Bishop:** Some local authorities do peer reviews, where they will look at each other's DoLS applications.

**Lord Swinfen:** Within the same authority?

**Elmari Bishop:** No, the neighbouring local authorities. I know some neighbouring local authorities will do peer reviews.

**Lord Swinfen:** Just neighbouring ones, though. You would not discuss this with someone from Northumberland or Cumberland or Cornwall or anything like that.

**Elmari Bishop:** Not as a standard procedure, no. In the east of England, for instance, we have a regional implementation network where we discuss guidance and cases. We also do a lot of regional training events, where case discussions will come up, but there is no formal process or obligation to do this. It is quite often local authorities taking the initiative, thinking that they would like someone else's opinion on what they are doing. A lot of local authorities have also brought external auditors in to look at everyone in their care home and hospital settings to see who might potentially be deprived of their liberty, but it is very much down to individual organisations realising that it is important, taking the initiative and finding the resources to do it.

**Lord Swinfen:** Therefore, there is no method of ensuring consistency throughout the whole nation.

**Elmari Bishop:** No, it is down to the organisation to realise the importance.

**Lord Swinfen:** I realise that it would cost the ratepayers money, which no one wants to do, but I was just wondering about it.

**The Chairman:** Thank you very much. That ends this session. We are very grateful to both of you for your evidence and for coming along today.

**Elmari Bishop:** Thank you.