



Stephen Knafler QC, a barrister from Garden Court Chambers, reports on LAG's community care conference, which took place in London in July 2010. Stephen Knapfler chaired the opening and closing sessions of the conference.

Protecting liberties: LAG conference report

The keynote speech, 'What price dignity?', was delivered by Lord Justice Munby and started with the question: 'How to ensure individual dignity, happiness and human rights are central to decisions relating to the social welfare and affairs of those who lack capacity to make their own decisions?' After a survey of international human rights instruments, and domestic and international case-law, Lord Justice Munby advanced the following propositions:

- The proper basis for the local authority's involvement is that it is the servant of those in need of its support and assistance and not their master. 'Working together' requires much more than merely requiring carers to agree with a local authority's decision, even if, let alone just because, it may be backed by professional opinion.
- The proper functions of the local authority are providing care, help and services to those who need them and protecting the vulnerable from self-harm, and abuse or exploitation by others.
- The process by which the local authority should proceed must be one that engages meaningfully with the person (P), his/her partner, relatives and carers. The wishes and feelings of P are not irrelevant because P lacks capacity; the weight to be attached to those wishes and feelings depends on the particular context.
- The guiding principle is P's best interests and his/her welfare, but that is extended beyond safety and physical health and requires a wide range of ethical, social, moral, emotional and welfare considerations to be taken into account. Risk avoidance should not be accorded undue weight: 'What is the good



Lord Justice Munby delivers the keynote speech

of making someone safer if it merely makes them miserable?'

■ It is vital that care, in particular, feeding, toileting and other basic care, is provided in a compassionate manner: 'The compassion of the carer is itself a vital aspect of our humanity and dignity. At the end of the day we must treat P with respect, as a human being, and with the dignity we would wish for ourselves. P is not the mere passive object of paternalistic decision-making; s/he is someone like us.'

Lord Justice Munby was followed by Judge Lush, Senior Judge of the Court of Protection. Judge Lush provided an informative and witty history of the development of incapacity law, illustrated by a number of case references, including cases in which he had presided. Judge Lush focused, in particular, on the contrasting approaches to decision-making on behalf of incapacitated adults, comprised in the UK's objective 'best interests' approach, on the one hand, and the 'substituted judgment' approach (ie, based on what P wants, or would have wanted) found in other jurisdictions, notably in the United States and, arguably,

in the UN Convention on the Rights of Persons with Disabilities. He drew attention to the old case of *ex p Whitbread, in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99 (a decision that forms the basis for much American jurisprudence on substituted judgment in end-of-life decisions), the Law Commission's 1995 report *Mental incapacity* and the recent decision of *Re S and S (Protected Persons), C v V* [2009] WTLR 315; [2009] LS Law Med, all of which raised interesting tensions between the two approaches.

Professor Luke Clements of Cardiff Law School chaired the late morning session on deprivations of liberty and adult safeguarding. Counsel Paul Bowen from Doughty Street Chambers, author of *Blackstone's Guide to the Mental Health Act 2007*, spoke on 'Deprivations of liberty in the health and social care context' and examined in detail the question: 'What is a deprivation of liberty (DoL)?' Paul Bowen examined the range of factors relevant to ascertaining whether or not there is a DoL, focusing, in particular, on whether restrictions on liberty might be less likely to amount to a DoL if the purpose was to provide care. He drew attention to *Re MIG and MEG, Surrey CC v CA and LA* [2010] EWHC 785 (Fam), in which Parker J had had limited regard to the reasons for restrictions when deciding that two children with learning disabilities, placed with foster carers and in a residential home, and subject to a high degree of supervision, had not been deprived of their liberty. The key to Parker J's conclusion was probably that: 'Within those homes, they are not objectively deprived of their liberty. In neither of those homes are they there principally for the purpose of being

“treated and managed”. They are there to receive care’ (para 230).

He also drew attention to a recent decision of Mr Justice Munby (as he then was) in *A Local Authority v A (a child) and another* [2010] EWHC 978 (Fam), in which attention was drawn to the importance of taking into account the place of confinement, and the identity of the persons imposing restrictions, when deciding that restrictions placed on a vulnerable child and adult, in their own home, by their families, in their best interests, did not amount to a DoL. Attention was drawn also to the positive obligations on public authorities under article 5 of the European Convention on Human Rights, set out in *A Local Authority*, including the duty to investigate potential DoLs and to take reasonable measures to bring DoLs to an end.



Delegates at LAG's Protecting liberties conference

Michael Mandelstam, author of *Community care practice and the law* and *Safeguarding vulnerable adults and the law* spoke on the topic of ‘Safeguarding vulnerable adults: “No secrets”’. He criticised the lack of statutory underpinning for local authority safeguarding work and also drew attention to the lack of statutory guidance for the NHS. He argued that these ‘legal black holes at the centre of safeguarding’ were troubling in the light of evidence about a lack of awareness of safeguarding issues in local authorities and the NHS, the increased personalisation of care services and the retreat of the welfare state, and the overall complexity of the statutory picture. He suggested that there was a ‘wilful unawareness of state-perpetrated harm’.

After the lunch interval, there were four workshops. Counsel Bethan Harris from Garden Court Chambers dealt with ‘Personalisation: the transformation of adult social care’. She drew attention, in particular, to the new 2009 direct payments guidance (*Guidance on direct payments. For community care, services for carers and*

children's services, England 2009), the new assessment guidance (*Prioritising need*, February 2010) and the new charging guidance (*Fairer contributions guidance. Calculating an individual's contribution to their personal budget*, July 2009) as well as the forthcoming pilot schemes for *The right to control* under the Welfare Reform Act 2009.

Solicitor Anne McMurdie from Public Law Solicitors spoke about ‘Living independently: tenancies and mental incapacity’. She emphasised the legal and human importance of independent living, that tenancies can lawfully be granted to persons who lack relevant capacity, if it is in their best interests. She illustrated the arrangements that might need to be made in such cases. She also questioned whether or not it remained good law, in the light of the Mental Capacity Act 2005, that an incapacitated person was unable

to make a valid homelessness application.

Counsel Catherine Casserley from Cloisters Chambers spoke about ‘Equality and disability law and social care’. She considered the existing law under the Disability Discrimination Act 1995 and the changes pending as a result of the Equality Act 2010, focusing on reasonable adjustments and the case of *Royal Bank of Scotland Group PLC v Allen* [2009] EWCA Civ 1213. She also examined recent cases on the general disability equality duty and the potential effects of the UN Convention on the Rights of Persons with Disabilities.

Solicitor Simon Garlick from Ben Hoare Bell solicitors spoke about ‘Supporting autism’. He considered the nature of autism, the relationship between social and health care in relation to autistic people, the likely impact of the Autism Act 2009 and of the secretary of state’s autism strategy (*‘Fulfilling and rewarding lives’. The strategy for adults with autism in England* (2010), March 2010) published under the Act, DoLs involving autistic persons, and how personalisation and the Law Commission’s proposals were likely to

impact on persons with autism.

After the lunch interval, Frances Patterson QC, Public Law Commissioner, spoke about the Law Commission’s proposals for social care law reform (see ‘Reforming adult social care: Law Commission consultation’, March 2010 *Legal Action* 6). Currently, what is envisaged is a ‘policy-neutral legal framework’ capable of accommodating current and future policy changes. Thus, there would be a statutory assessment duty, but the details of the process and of any resulting care/support plan would be set out in regulations; the statute would provide for a single eligibility framework, but again the detail would be set out in regulations as would the circumstances in which a personal budget was to be provided. There would be a statutory safeguarding duty and, possibly, new co-operation duties (for example, in safeguarding cases), a single code of practice, a list of statutory principles, ordinary residence criteria for all community care services, closer integration of services under Mental Health Act 1983 s117 with community care services, duties to provide community care services in prisons and a right for young people to assessment and services under adult legislation. Consultation has closed and the Law Commission is in the process of completing its final recommendations. New legislation is possible in 2012.

The conference was brought to a close by three counsel, Ian Wise QC from Doughty Street Chambers, Zia Nabi from 1 Pump Court and Michael Fordham QC from Blackstone Chambers. Ian Wise QC summarised old and new case-law on children and human rights (including asylum-seeking children, school children and children in custody); Zia Nabi focused on the community care entitlements of families subject to immigration control in the light of new case-law developments; and Michael Fordham QC looked at the different ways in which the courts have considered the question of resources in the recent past and how practitioners should confront the problems of community care disputes in an era of economic hardship.

Spare conference packs can be ordered online at: www.lag.org.uk/careconference or telephone: 020 7833 2931, price £50 (including p&p).