



Welcome to the May 2025 Mental Capacity Report. It is our 150<sup>th</sup> issue, and, to mark this, Tor and Alex have [recorded a discussion](#) reflecting on how the report (then the newsletter) came to be back in 2010, and on how the law and practice have evolved since then. The first issue of the newsletter they discuss can be found [here](#).

#### Highlights:

- (1) In the Health, Welfare and Deprivation of Liberty Report: new and updated guidance notes;
- (2) In the Practice and Procedure Report: naming clinicians (and other professionals), and cross-border deprivation of liberty;
- (3) Section 63 MHA 1983 and diabetes, and the Mental Health Bill progresses to the Commons;
- (4) In the Children's Capacity Report: the Court of Appeal explains why local authorities cannot consent to the confinement of children in their care;
- (5) In the Wider Context Report: the other party's interest in litigation capacity, how far landlords are supposed to go in hoarding cases, and a new Convention on the rights of older adults on the cards?
- (6) In the Scotland Report: AWI reform update and cross-border deprivation of liberty – Scottish reflections what is appealable in the AWI context.

As there were no developments meriting specific reporting in the property and affairs field this month, we do not have a Property and Affairs report.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the [Mental Capacity Report](#).

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The picture at the top, "Colourful," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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### Terminally Ill Adults (End of Life) Bill update

The Terminally Ill Adults (End of Life) Bill will return to the full House of Commons for Report stage on 16 May. On 2 May, the impact assessment, equality impact assessment and human rights memorandum promised by the Government to assist Parliament in its consideration of the Bill were published. They can all be found on Alex's updated [resources page](#) on the Bill.

### Independent commission into adult social care

With many hoping that they cannot hear the sound of long grass rustling, the [terms of reference](#) of Dame Louise Casey's independent commission into adult social care in England were published on 2 May 2025.

The terms of reference set out that the commission will report directly to the Prime Minister and will be split over 2 phases:

- phase 1, reporting in 2026, will focus on making the most of existing resources to improve people's lives over the medium term
- phase 2, reporting by 2028, will then consider the long-term transformation of adult social care.

### Short note: what interest does a defendant have in determining a claimant's litigation capacity?

*GRM v Liverpool University Hospitals NHS Foundation Trust* [2025] EWHC 790 (KB) concerned a claim in the King's Bench Division, which had been brought by 'GRM' against Liverpool University Hospitals NHS Foundation Trust for clinical negligence. A preliminary issue arose as to whether GRM had litigation capacity. GRM's solicitors had become concerned about his capacity to conduct proceedings in 2023, and both the Claimant and Defendant had served expert evidence on GRM's capacity. In September 2024, a judge had determined that he did not have capacity to conduct proceedings (apparently on an interim basis) and appointed the Official Solicitor as his litigation friend. The matter was listed for a further hearing (in the KBD) to consider GRM's litigation capacity and make decisions as to GRM's property and affairs.

Bright J considered whether the Defendant had an interest in the appointment of a litigation friend, and concluded that it did not:

*24. This is not a case where the Defendant has any real interest in whether or not a litigation friend is appointed. That is especially so where the proposed litigation friend is someone obviously suitable, such as the Official Solicitor. The appointment will cause no real prejudice to the Defendant. If anything, it will provide a degree of protection. Otherwise, for example, any settlement reached might*

*be subject to retrospective challenge on the basis that the Claimant did not have the capacity to agree to it. That is because any decision made now as to capacity would not be capable of establishing the Claimant's capacity in the future – in particular, at whatever date in the future the parties may come to settle (if they do).*

25. Mr Rahman, on behalf of the Defendant, tried to persuade me that the appointment of a litigation friend would or at least might prejudice the Defendant, because it would mean that any settlement would require the approval of the court and because (he said) a finding of lack of capacity might impact on quantum. Addressing these points:

*i) Approval of a settlement is not a significant burden for the parties; especially not, in most cases, for the Defendant. As already indicated, any disadvantage that may flow from that minimal burden is greatly outweighed from the certainty that arises from court approval and the protection that comes with it.*

*ii) I accept that a finding of lack of capacity in respect of managing affairs might affect quantum. However, that should and can best be decided on the evidence at trial. There is no need for it to be a preliminary issue.*

26. Mr Rahman also suggested that a decision that the Claimant does not have capacity would affect the evidence as to psychiatric injury and its consequences. I am unable to see how it could make any real difference to this aspect of the trial.

27. It follows that this is not a case where it was appropriate for the Judge to order a preliminary issue or to make

*the directions made in paragraphs 4 to 16 of the Order of 13 September 2024.*

Bright J, while expressing sympathy for the first-instance judge, stated that it was not clear how a decision was taken to appoint the Official Solicitor as litigation friend, and then also have a trial on the issue of capacity to allow the Defendant to challenge this decision. Bright J found that:

*33. In all the circumstances, it seems to me that the Judge should not have allowed the Defendant to "intermeddle" (adopting the word used by Pill LJ). On the basis of the Claimant's evidence, the court was clearly entitled to decide that the Claimant lacked capacity and to appoint the Official Solicitor; which is what the Judge did, in paragraph 2 of the judgment and at paragraph 1 of the Order.*

*34. I have noted above that the Claimant's evidence in support of the application was the report of Dr Ford, which was on the standard COP3 form. Dr Ford gave her view clearly and unambiguously, which was that the Claimant lacks capacity. The report was brief, but that is not a vice in itself. On the contrary, it is what is expected, where the standard COP3 form is used – as is entirely proper. It was undoubtedly sufficient to support a decision by the court to appoint a litigation friend. [...]*

*37. The Defendant's experts and Mr Rahman make the point that there is reason to believe that the Defendant's mental condition may improve with treatment. If so, that will be highly relevant to quantum. However, the potential for improvement in the future is not relevant to current mental capacity. At present, in the Claimant's own words, he can't cope with any bits of paper coming in.*

### Short note: hoarding, capacity and the limits of the landlord's obligations

In *Thiam v Richmond Housing Partnership* [2025] EWHC 933 (KB), Swift J considered an appeal of a March 2024 decision of HHJ Luba KC to grant an application for possession of a property where Catherine Thiam resided pursuant to a tenancy dating to 2009. Richmond Housing Partnership ('RHP') was a social landlord. The application had originally been made in October 2020, on the basis that the rent had not been paid; Ms Thiam's son – who also lived at the property – had engaged in anti-social behaviour; Ms Thiam had failed to provide access to the premises to RHP and those who were to undertake maintenance work on RHP's behalf; and that the condition of the premises had deteriorate by acts of waste, neglect and default. HHJ Luba KC found that all of these grounds were amply made out and Ms Thiam appeared to be living in a condition of considerable self-neglect. The first-instance judgment set out that Ms Thiam was considered to be a hoarder, had a differential (but unconfirmed) diagnosis of schizophrenia, and had delusional beliefs that the materials she was keeping were part of a business of selling second-hand clothes. Ms Thiam was considered to be disabled under the Equality Act, and the first-instance judge concluded that there was a causal link between her disability and the reasons possession was being sought. Her schizophrenia was untreated, and she had not engaged with the local mental health team.

The Official Solicitor represented Ms Thiam in the proceedings, and did not appear to contest these findings. The central argument of the Official Solicitor was a counterclaim that “the decision to seek possession amounted to unlawful discrimination on the grounds of disability and that for that reason either the application for possession should be refused or,

as a matter of discretion under section 7(4) of the 1988 Act, possession should not be granted. The Judge accepted that the consequences of the tenant's mental illness were such that the failures that led to RHP's reliance on Ground 13 of the Schedule 2 grounds for possession were matters that occurred in consequence of the tenant's mental illness and therefore in consequence of a disability. The outcome of the application for possession therefore turned on the issue of justification” (paragraph 8). It was accepted that RHP was pursuing a legitimate aim, and the first-instance judge found (following a contest) that the possession order was proportionate.

On behalf of Ms Thiam, the Official Solicitor raised three grounds of appeal: (1) an inadequate reasons challenge (which was rejected); (2) that the first instance judge had failed to determine the [tenant's] pleaded case that RHP had failed to seek and put in place specialist intervention; and (3) the first instance judge had erred in law when he determined that RHP did not have the power or skill to apply to the Court of Protection. RHP had referred Ms Thiam to local authority social services, but it was argued that “RHP ought to have taken steps to involve organisations with special experience of working with hoarders to tackle situations such as the one that existed in this case” (paragraph 15), or applied to the Court of Protection to seek orders to help connect Ms Thiam with support.

Swift J considered that the context of the relationship between Ms Thiam and RHP was important in determining whether its application for possession was proportionate:

17. [...] Section 15(1)(b) of the 2010 Act concerns whether what the defendant did (the unfavourable treatment) was a proportionate response in the circumstances that prevailed, when account is taken of the claimant's disability including, in the circumstances



*of this case, the contribution that disability made to the state of affairs that RHP sought to address. The proportionality inquiry that section 15(1)(b) requires must also take account of context. In this instance some relevant context is provided by the contractual relationship between RHP and the tenant, framed by the terms of the tenancy agreement. RHP has no relevant authority beyond this. It is not a local authority or a social services authority exercising statutory powers and having obligations to consider and promote the well-being of persons subject to illness or disability.*

It was established that the local authority's response had been 'inadequate' and that RHP had 'been leaning over backwards' to assist Ms Thiam. The first-instance judge found that RHP had done everything it 'sensibly and reasonably could' to assist Ms Thiam. RHP had also sought injunctions to try to manage the difficulties with Ms Thiam, without success.

On Ground 2, Swift J found that there was no obligation of the landlord to "engage specialists with expertise in assisting hoarders to help address the situation the tenant had created" (paragraph 23). It was established that RHP had made the relevant referrals for help, and had tried to persuade Ms Thiam to accept help. Swift J declined to find that:

*the obligation to act proportionally imposed by section 15(1)(b) of the 2010 Act required RHP itself to engage specialist help for the tenant. Taking such a step would go well beyond anything ordinarily or, in the circumstances of this case, reasonably within the ambit of a landlord and tenant relationship. It was entirely consistent with the section 15(1)(b) obligation for RHP to submit that interventions of that sort should be the*

*responsibility of the social services department rather than the landlord. Mr Strelitz, counsel for RHP, also pointed to the likely cost of such specialist services and the finite resources of a social landlord such as RHP (paragraph 25)*

Swift J also considered that these efforts would have very likely been futile, as Ms Thiam had a delusional disorder and was not consenting to the sort of help which was being suggested.

On Ground 3, Swift J considered that "any such application to the Court of Protection would have been speculative. Any chance of success before the Court of Protective would be contingent on a conclusion that the tenant lacked capacity in a relevant respect. Such a conclusion would not have been close to a foregone conclusion.... Even if the issue of capacity were overcome it is unclear what order might have been sought on an application to the Court of Protection made by RHP" (paragraph 30).

Swift J concluded at paragraph 31 that:

*The nature of the application to the Court of Protection that would therefore have been necessary leads to the second reason why this ground of appeal fails. The course now suggested as one required by section 15(1)(b) to the 2010 Act would have required RHP to incur significant expenditure on litigation (legal costs and no doubt also the costs of expert evidence) in pursuit of an exercise that was speculative. These were the matters averted to by the Judge at paragraph 67 of his judgment. That would go well beyond any step that could legitimately be expected of a landlord and well beyond anything that could reasonably be considered as a requirement of a proportionate approach on the facts of this case.*

### The human rights of older persons

On 3 April, UN Member States in the Human Rights Council in Geneva adopted a resolution to create a new intergovernmental working group to draft a UN Convention on the human rights of older persons. The next steps at the UN level will be to determine how the new intergovernmental working group will be resourced and organised.

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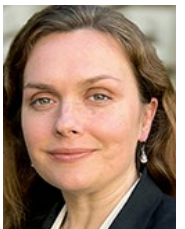
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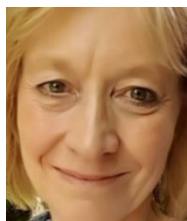
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## Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

### **Advertising conferences and training events**

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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Our next edition will be out in June. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: [marketing@39essex.com](mailto:marketing@39essex.com).

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