



Welcome to the July 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: what to do when an advance decision to refuse treatment may be in play, and the consequences of the gaps between services for those with disordered eating;

(2) In the Property and Affairs Report: capacity in the rear view mirror: how does the presumption work?;

(3) In the Practice and Procedure Report: disclosing position statements to observers; habitual residence, moving jurisdictions and 'lawful authority;' and the impact on P of being assessed;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the tort consequences of a finding of Not Guilty by Reason of Insanity;

(5) In the Children's Capacity Report: a depressing snapshot from the national DoL court, human rights of children in the social care system and capacity and gender-affirming treatment;

(6) In the Wider Context Report: the Oliver McGowan statutory learning disability and autism training, and the pitfalls of facilitated communication

(7) In the Scotland Report: joint attorneys in dispute: appropriate remedies and; "If at first you don't succeed ...": res judicata in tribunal proceedings.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page [here](#).

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](#).

Editors

Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg

Scottish Contributors

Adrian Ward
Jill Stavert

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.

Contents

Mental Health Bill progress 2

Victim Impact Statements before the Mental Health Tribunal..... 3

The tort consequences of a finding of Not Guilty by Reason of Insanity 4

Mental Health Bill progress

The Mental Health Bill has now completed committee stage in the House of Commons, with Report stage and Third Reading yet to come. Tim Spencer-Lane has prepared excellent summaries of each day, available here: [first day](#); [second day](#); [third day](#); [fourth day](#); [fifth day](#).

The Joint Committee on Human Rights conducted legislative scrutiny on the Bill, its report being [here](#). The Government has now [responded](#) to the JCHR report, essentially justifying decisions to make no further changes to the Bill in light of that scrutiny. One section may be of particular interest to readers of this Report, on the interface between the MHA and the MCA. The JCHR expressed the view that:

It is disappointing that the Mental Health Bill has not taken the opportunity to provide greater clarity to the interface between the Mental Health Act and the Mental Capacity Act and to make clear when detention and treatment under one or the other should be authorised. In a legislative scrutiny inquiry like this one, we are not in a position to conclude which of the possible alternative approaches to the interface between the Mental Health Act and Mental Capacity Act would best provide the necessary human rights protection.

The Government should, however, carry out an urgent review of the interface between the Mental Health Act and Mental Capacity Act and take prompt

action to provide the clarity that is currently lacking.

The Government’s response was as follows:

Both the Mental Health Act and Mental Capacity Act provide appropriate procedural safeguards to ensure that the individuals Article 5 human right to liberty and security is protected during their detention. The nature of the safeguards provided under the two Acts are however different. We note the concerns raised regarding the complex nature of the interface between the Mental Health Act and Mental Capacity Act and recognise that in some cases, this may present challenges for decision makers. We will provide guidance on this in the Mental Health Act Code of Practice. We will engage with stakeholders to understand what support and guidance could help clinicians when deciding which of the two Acts must be used or where there is a choice, is most appropriate for individual patients as part of our consultation on the new Code of Practice. We have committed to keep the interface and the matter of fusion legislation under review.

In relation to the (to many) vexed question of the impact of removing learning disability and autism from s.3 MHA 1983, the Committee noted that:

There is an inherent lack of justification for detaining a person for treatment

based only on their learning disability or autism, giving rise to clear concerns over compatibility with Article 5 European Convention on Human Rights (ECHR). We welcome the Bill's attempts to remove autistic people and people with learning disabilities from the scope of detention for treatment under the MHA. We recognise that the change in the law would leave open a possibility of these groups being detained on other grounds. We are pleased to see that the Government has committed to monitoring the number of autistic people and people with learning disabilities who are detained under the Mental Capacity Act. The Government should report these numbers to Parliament within a year of the relevant clauses of the Bill coming into force, and stick to their commitment to take action if they indicate that the Mental Capacity Act is being used inappropriately.

The Government's response is as follows:

The Department has been clear that we do not want to see people detained in hospital through alternative legislative routes, where this is not appropriate. We therefore do accept this recommendation in part. Through the national Assuring Transformation dataset, NHS England currently collect data on the number of people with a learning disability and autistic people in inpatient settings under different legal frameworks. As the Committee has noted, the Government has committed that ahead of the changes to Part 2, Section 3 we will monitor and publish data on the number of detentions of people with a learning disability and autistic people under the Mental Capacity Act and will include a line on this in our standard publications. As part of standard practice to avoid risk of disclosure of personal information, any figures below five would be suppressed in publications (represented with an

asterisk). Should detentions rise to five or more in future, we will publish the number rounded to nearest five. If there is evidence of inappropriate use of the Mental Capacity Act, action will be taken. This must be tailored to and informed by the data and intelligence from local areas.

Victim Impact Statements before the Mental Health Tribunal

With effect from 25 June 2025, victims of certain offenders subject to hospital orders with restriction orders (sections 37 and 41 of the Mental Health Act 1983) are able to make a Victim Impact Statement (VIS) to the Mental Health Tribunal or the Mental Health Review Tribunal for Wales ("the Tribunal"). A [statement](#) from the Ministry of Justice gives more detail:

Section 21 of the Victims and Prisoners Act 2024 introduces this new entitlement when the Tribunal receives an application or referral for discharging the patient. The entitlements apply to victims of offenders convicted of a sexual, violent or terrorism offence, and victims can opt into the Victim Contact Scheme (VCS) at any point, even if they have previously opted out.

Where a tribunal hearing is due to take place and the victim has applied to attend the hearing (remotely) to read their VIS aloud, section 21 also requires that application be granted by the Tribunal, unless there are good reasons not to.

Victims who are eligible for, and engaging with, the VCS will be invited by their Victim Liaison Officer (VLO) to submit a VIS. The VLO will support the victim throughout this process.

The VIS allows the victim to explain the impact the crime has had on them and provides the Tribunal with context for

any discharge condition requests they make. For example, it may cover:

- any physical, financial, emotional or psychological injury the victim has suffered and/or any treatment they may have received as a result of the crime;

- if they feel vulnerable or intimidated;

- if they no longer feel safe; Title 2 ·

the impact on their family;

- how their quality of life has changed on a day-to-day basis.

The VIS must not include the victim's views on whether the restricted patient should be discharged because the Tribunal cannot take it into account. The VIS will not have any impact on the Tribunal's consideration of whether to discharge the patient; that decision will continue to be made using the existing criteria under the Mental Health Act 1983. The Tribunal will only consider the VIS at the point that they are considering which discharge conditions to apply.

A victim who is within the victim contact scheme does not have to apply to attend the Tribunal or lodge a victim impact statement. They can continue to make representations on the conditions the Tribunal may make if the patient is conditionally discharged.

The tort consequences of a finding of Not Guilty by Reason of Insanity

The Supreme Court heard the appeal against the decision of the Court of Appeal in *Lewis-Ranwell v G4S Health Services (UK) Ltd & Ors* [2024] EWCA Civ 138 on 15 and 16 July 2025. Alex's summary of the case can be found [here](#) – the CRPD point noted in it then featured before the Supreme Court, and he for one will wait with interest to

read the judgment when it is handed down in due course.

Editors and Contributors



Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com

Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



Victoria Butler-Cole KC: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click [here](#).



Neil Allen: neil.allen@39essex.com

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).



Arianna Kelly: Arianna.kelly@39essex.com

Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click [here](#).



Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click [here](#).



Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click [here](#)



Adrian Ward: adrian@adward.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

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.

Our next edition will be out in September. 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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

clerks@39essex.com • **DX: London/Chancery Lane 298** • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

[For all our mental capacity resources, click here](#)