



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](#).

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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

The Terminally Ill Adults (End of Life) Bill passed Third Reading in the House of Commons, and is now progressing to the House of Lords, where having had its First Reading, Second Reading is now understood to be in September 2025.

Progress of the Bill can be followed on Alex’s [website](#), including, most recently a [discussion](#) of the interaction between the NHS Ten Year Plan in England and the Bill.

The Oliver McGowan statutory learning disability and autism training

On 19 June 2025, the Government [published its response](#) to the consultation on the [Oliver McGowan draft code of practice](#) on statutory learning disability and autism training, as well as [the final code of practice](#). The draft code of practice was published in June 2023. We would note a few points regarding the guidance:

- The Guidance follows a requirement created in the Health and Care Act 2022 that health and adult social care staff at CQC-registered providers must undertake training around learning disabilities and autism. This followed a campaign by Paula McGowan OBE for this legislative change.
- The Oliver McGowan training is not the only form of permitted training, but the Code notes that it is the Government’s ‘preferred

and recommended’ training, and it has been trialled with over 8,000 participants. A long-term evaluation is now underway, to take place over the next three years.

- There are a series of standards for training, including the minimum level of one hour of ‘live and interactive’ training which must be co-produced and co-delivered by people with a learning disability and autistic people and a 90-minute e-learning module.
- There are three ‘tiers’ of training:

The core capabilities frameworks defines 3 tiers of capabilities for health and social care staff:

- *tier 1: for staff who require a general awareness of people with a learning disability and autistic people and the support they need*
- *tier 2: for health and social care staff and others with responsibility for providing care and support for a person or people with a learning disability or autistic people, but who would seek support from others for complex management or complex decision making*
- *tier 3: for health and social care staff and other professionals with a high degree of autonomy, able to provide care in complex situations and may also lead services for*

people with a learning disability and autistic people

The core capabilities frameworks are incremental. This means that someone acquiring a tier 3 capability must already possess the relevant tier 1 and tier 2 capabilities.

- The CQC will hold responsibility for monitoring compliance with the training requirements, and may be subject to enforcement activities if they fail to do so.
- The code is to be reviewed at least once every five years.
- DHSC has commissioned Skills for Care to develop and maintain a list of quality assured training providers that can deliver the training to the adult social care workforce.

Facilitated communication – the pitfalls

Facilitated communication is described in the [NICE Clinical Guideline on Autism spectrum disorder in adults: diagnosis and management](#) as:

A therapeutic intervention whereby a facilitator supports the hand or arm of an autistic person while using a keyboard or other devices with the aim of helping the person to develop pointing skills and to communicate.

The Guidelines expressly provides (at paragraph 1.4.3) “[d]o not provide facilitated communication for autistic adults.”

In the [most recent issue](#) of the Challenging Behaviour Foundation’s newsletter, Mary [Busk] and her husband relay how problematic facilitated communication can be in relation to their (adult) autistic son.

Short note: Care Act support and employment status

In *Scully v Northamptonshire County Council (Contract of Employment for Provision of Care - Direct Payments - Identity of Employer)* [2025] EAT 83, the Employment Appeal Tribunal considered a claim by a Mr Scully of race and disability discrimination and claims for arrears in payment arising out of his work as a carer for ‘S,’ an adult with a learning disability.

Mr Scully was paid through a Care Act direct payment administered by S’s sister, ‘V’; S had an employment contract which was arranged with S’s family. S was listed as the employer on both the contract and payslips, despite the finding of incapacity in relation to S. The payroll functions of the direct payment were carried out by a charity commissioned by the local authority, and Mr Scully arrangements around working hours, holiday, etc, were arranged by S’s family. It was concluded in the Tribunal that Mr Scully had never received instructions from the local authority in his work.

However, Mr Scully argued that he was in fact an employee of the local authority, Northamptonshire County Council due to the payments they made to S’s brother, and brought the claim in the employment tribunal against the local authority. The local authority denied this, and Mr Scully was unsuccessful before the First-Tier Tribunal, which concluded that he was employed either by S, or by S’s brother acting on behalf of S. The FTT expressed significant doubt that S had capacity to enter into an employment agreement, and ‘that little or no thought was given by the claimant, [V] or S to the employment law implications of the arrangements put in place from 2013.’ [14] However, in the absence of evidence, the judge did not make findings on this point.

Mr Scully argued that the Tribunal had erred in law *'by failing to consider...the underlying statutory purpose of the arrangement whereby the claimant was paid for his caring services provided to S, in particular the Care Act, 2014, as well as the possibility of how the employment contract with S might have been vitiated due to lack of capacity. Had he done so, he would have concluded that the respondent was the claimant's employer given that control over S's care was always a function of the respondent's statutory duty (however it chose to discharge that duty)'* (paragraph 16). He argued that the local authority was ultimately in charge of the care provided, and this made the local authority his employer; the contract did not reflect the reality of the situation. Mr Scully argued that V was not lawfully receiving the direct payments as the process in s.32 Care Act had not been followed. He was opposed by the local authority.

The Employment Appeal Tribunal rejected Mr Scully's argument, finding that:

- a local authority could discharge a duty to provide care and support by making a direct payment;
- The making of a direct payment 'neither requires nor implies' direct employment of a carer by a local authority or through an agent (paragraph 35).
- S had taken control of the budget from 2013, and '[t]he arrangements for the care and support of S were fully and accurately reflected in that contract of employment and were consistent with the statutory scheme.' (paragraph 35).
- Mr Scully had not proven any irregularities with the direct payment on the facts, and the burden to do so rested with him.

- In the absence of medical evidence on S's capacity, it was not open to the Tribunal to conclude that S lacked capacity to enter into the contract (which would have in any event been voidable rather than void).

Notably, the EAT made a finding that personal assistants employed by the person receiving direct payments were exempt from CQC registration requirements for those who provide personal care:

41. The appellant's submission that the provision of care by him other than as an employee of the respondent would have contravened the provisions of the Health and Social Care Act, 2008 and the Health and Social Care Act 2008 (Regulated Activities) Regulations, 2014 is not correct. In terms of regulation 3 of the 2014 Regulations, read with Schedule 1 (in particular, paragraphs 1(3)(c) and 13(2)(c)), the services provided by the appellant to S were excluded from the scope of regulated activities.

Royal College of Emergency Medicine Learning Disability Toolkit

We have only just come across the [Learning Disabilities Toolkit](#) from the Royal College of Emergency Medicine. It contains lots of useful information and resources including signs and symbols for typical medical procedures. There is also a very important section on 'soft signs' that someone is unwell, which family or carers are able to pick up on but which could easily be missed by health professionals who don't know the patient. Practical advice is given, including a list of resources and equipment that emergency departments should have, including ear defenders, dimmer light switches, sensory toys, Makaton cards and communication boards. The Toolkit also says that patients with a learning disability should be prioritised for clinical assessment within their triage category, and

flags up additional steps and monitoring that should be undertaken. Lots of the information in the Toolkit will be useful in other settings such as preparing a patient with a learning disability for a planned visit to a GP or hospital.

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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](#).



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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.

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.

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