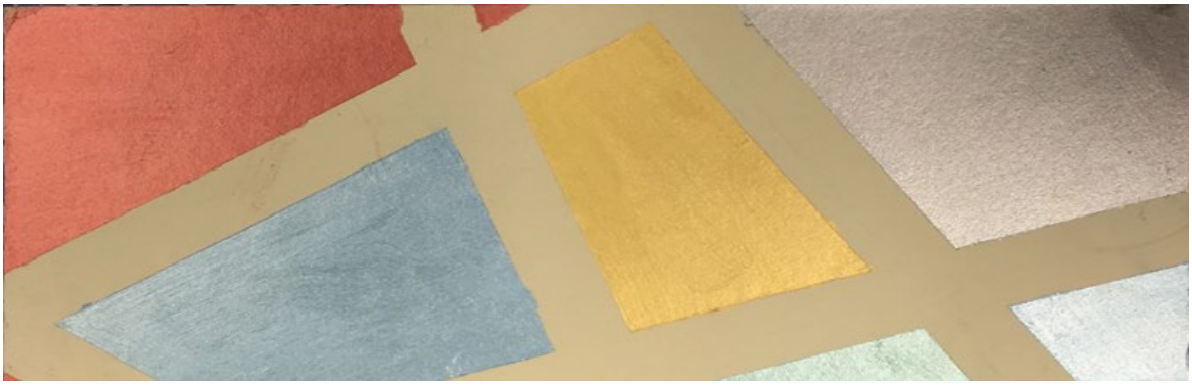


Welcome to the June 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the court is not a rubber stamp for clinicians and what does it mean to represent P's interests;

(2) In the Property and Affairs Report: Professional Deputy Costs, and paying drug debts for P;

(3) In the Practice and Procedure Report: capacity to conduct proceedings and the costs of inadequate disclosure;

(4) In the Mental Health Matters Report: capacity to conduct Tribunal proceeding, and the independent investigation into the care and treatment of Valdo Calocane;

(5) In the Children's Capacity Report: looking at other options before using the inherent jurisdiction to authorize a deprivation of liberty;

(6) In the Wider Context Report: what happens if you never had litigation capacity and new books;.

(7) In the Scotland Report: AWI reform and the UK Protocol on Judicial Cooperation.

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

AWI reform into the long grass – but still rolling

In the May Report we explained that the First Minister was due to announce the 2025-2026 Programme for Government on 6th May 2025, after the May Report went to press. In May, we reported that it was anticipated that the First Minister would cover the Scottish Government's policy and legislative ambitions for the period until the parliamentary recess ahead of the elections to the Parliament on 6th May 2026. We suggested that while it was entirely for Ministers to decide what to include in the announcement, it might reasonably be anticipated that this would provide the First Minister with the opportunity to offer an update on the promised AWI Amendment Bill. We did cover the announcement on 2nd May 2025 by Maree Todd MSP, Minister for Social Care, Mental Wellbeing and Sport, that the promise by the First Minister in the Programme for Government for 2024-2025 to introduce an AWI Amendment Bill during this current session would not be fulfilled, but the Minister indicated her "expectation of bringing forward an Amendment Bill early in the next parliamentary term". In a massive understatement, she acknowledged that "this decision may be disappointing", but she did re-affirm her commitment "to modernising the legislation, to reflect international standards on human rights in particular", indicating that more time would be needed to get it right.

While her acknowledgement that her decision "may be disappointing" was a massive understatement, it has been equally massively overshadowed by the outrage caused by the First Minister's statement on 6th May. The major human rights issue facing Scottish Government has been, and is, the massive violation of basic human rights of people with relevant disabilities, coupled with the vast amounts of expensive professional and managerial time – almost all of it at direct or indirect costs to public funds – arising from unconscionable failures to implement increasingly urgent updates and reforms ever since the last updating in 2007, and throughout that period from failure to implement governments' clear obligation to make clear and efficient provision enabling deprivations of liberty to be effected lawfully. More shocking than anything that the First Minister might have said is that in fact, on these topics, he said absolutely nothing; creating the clear impression for many that the endemic discrimination against people with relevant disabilities, on which we have commented previously, has extended to these urgent needs dropping out of the consciousness of Scottish Ministers altogether, with the topic consigned into the long grass.

Such a conclusion, however, would have been inconsistent with the statement a few days earlier by Maree Todd, the Minister responsible, despite the curiosity that her title does not in any way encompass the topic of adult capacity/incapacity (remembering that responsibility for the original 2000 Act correctly rested with the Parliament's Justice Committee, with input from the Health Committee only in relation to Part 5).

In these circumstances, it is particularly helpful that Amy Stuart, Head of Mental Health and Incapacity Law, Scottish Government, has issued to me the following statement, with authority to share the points in it as I see helpful. It is also much appreciated that she was aware that I

wished to use it in this Report, and cooperated to ensure that I had it ahead of the deadline for this Report. To make clear the distinction between the Scottish Government's position, and my comments in the light of it, I have given those two aspects separate headings.

The statement

1. *The Minister for Social Care, Mental Wellbeing and Sport confirmed to the Scottish Parliament on 2 May 2025 that that further work must be taken forward ahead of bringing forward an AWI Amendment Bill. In practice, this means that an AWI Bill will not be introduced this year as had been expected. I am aware that the Minister wrote to you directly on this matter, but the links below will also take you to a letter issued to relevant parliamentary committees and a written parliamentary question.*

Adults with Incapacity (Scotland) Act 2000 | Scottish Parliament Website

Written question and answer: S6W-37425 | Scottish Parliament Website

2. *The First Minister announced his Programme for Government for the coming year on 6 May 2025, including the 2025-26-year 5 legislative programme. Following the Minister for Social Care, Mental Wellbeing and Sport's communication to Parliament on 2 May 2025, an AWI Bill is not included.*

3. *I do appreciate the disappointment and frustration that this decision will cause, and I would stress that whilst a Bill is not being introduced at this time we are not standing still. The Minister has set out a number of actions already to ensure that the further work required is prioritised with a view to a Bill being introduced early in the next parliamentary term.*

4. *This will see us move from consultation to collaboration, working with key partners on not only the policy aspects of reform but the practical considerations essential to ensure that future legislative change is operationally feasible and fully impacted in terms of resources and system capacity. We are establishing both an AWI Expert Working Group (to advise and collaborate with government on the policy and operational detail required to bring forward, and successfully implement, future legislative change) as well as a Ministerial-led Oversight Group (to monitor and drive progress, bringing both the pace and priority needed). Invites for both groups are expected to issue ahead of summer recess (end-June 2025), with initial meetings to take place in September 2025.*

5. *It will be important that the groups, when established, can inform both the membership and scope of development required but I am happy to share our initial thoughts on the key areas that we wish to collaborate on:*

- *Deprivation of Liberty*
- *Definition of an Adult (UNCRC compatibility)*
- *Forced Detention and Covert Medication*
- *Supported Decision Making / Support for Exercise of Capacity*
- *Powers of Attorney*
- *Access to Funds*
- *Managing Residents' Finances*
- *Guardianships*
- *Medical Treatment*
- *Data Collection*

Within my Unit, we will be working over the summer to prepare initial papers on these areas for discussion with the groups. I should also say

that whilst we recognise that legislative change will be required, we would also want to consider any more immediate actions that could be taken in advance of this to deliver shorter -term improvements.

My comments

I stress that these are my own comments, formed from conclusions that I have reached in the light of the total information made public by Scottish Government, as reflected in successive Scotland sections of the Mental Capacity Report. It seems to me that unacceptable outcomes could have included one or more (in combination) of the following:

- An under-prepared and inadequate Bill completing its parliamentary process within the current session.
- An under-prepared and inadequate Bill completing its parliamentary process before the recess ahead of next year's election.
- A Bill lost altogether because of failure to complete its progress ahead of the election, including a Bill "timed out" because of multiple substantial amendments addressing perceived deficiencies in the Bill as introduced.

Assessment of the course which will be followed by the current government in accordance with the statement above has to be assessed by balancing the above dangers with the following:

- That all the deficiencies of current provision (and lack of it) will continue significantly longer.
- The present government cannot bind, nor directly influence, the relevant policies of the new government after the election, unless it forms a new government, or part of a reconstituted coalition committed to proceeding similarly, after the election.

The principles of the 2000 Act, though they need to be enhanced to make human rights compliance mandatory, have proved their value over the years. My opinion is that they should be applied to the present situation. For the last few years there has been massive consultation with all relevant "stakeholders". The statement confirms the shift, under Amy Stuart's leadership, from consultation to collaboration. That means collaboration in delivering a well-prepared Bill that meets all needs, and which can be presented to the Parliament. My personal view and decision, for what it is worth, is that the necessary collective benefit for adults with incapacities, as defined in the 2000 Act, those planning for the possibility of such incapacities, and all with an interest arising from professional and working responsibilities, and from family and voluntary obligations, will be to provide such collaboration. That benefit cannot be fully and adequately achieved without all necessary collaboration.

There remains the requirement to achieve the commitment for this course of all political parties who could possibly form part of government following the election. Remember that this potentially encompasses small parties, with a small number of seats which, in combination with a party holding many more seats, would achieve a working majority. Such consensus was achieved in relation to the 2000 Act in the run-up to the first-ever elections to the Scottish Parliament. It was easier to achieve then. No party had a record in government for it to defend and others to attack. Any campaigning now must attempt to tread the difficult path of raising the profile of the subject (and nothing works better for that than some controversy), but at the same time with a clear and explicit purpose of rebuilding the consensus of the late 1990s.

Still emphasising that these are matters of my own judgement from what is publicly available, I have the following two concluding points. Firstly, it will probably take some two to three years before we can expect to see amending legislation in force. Secondly, however it is done,

that is a reasonable estimate of the time that it will take, starting from "we are where we are now" to achieve that. The consequence of these is an absolute obligation upon all concerned to ensure that existing provisions are operated efficiently and well in the meantime. As we have reported last month and many times before that, that has not been happening, although the "Argyll & Bute case" reported last month, and the "Aberdeenshire case" before it, though not telling us anything new beyond the extremes to which malpractice can descend, seem already to have had a salutary effect in driving improvements.

Adrian D Ward

UK Protocol on Judicial Cooperation

On 7th May 2025 there was published a "New protocol on communications between Judges in Scotland, England & Wales, and Northern Ireland in cases involving adults who lack capacity", and accompanying handbook, available here. The new Protocol is to be welcomed as providing commendably straightforward and clearly expressed procedures for judicial cooperation in such cases, though unfortunately that welcome has to be subject to the apparent blemishes noted in this article, one of them significant and confusing.

Chapter V of Hague Convention 35 on the International Protection of Adults of 2000 contains important cooperation provisions, directed at cooperation among central authorities. The Hague Network of Judges takes that to the level of direct communication among judges. Scotland was the first jurisdiction in respect of which Hague 35 was ratified. It has still not yet been ratified in respect of England & Wales or Northern Ireland, even though – in the case of England & Wales – the text of the Convention, including Part 5 on cooperation, is substantially reproduced in Schedule 3 to the Mental Capacity Act 2005 and thus included within the legislative scheme of that Act. It is common experience that cross-border issues arise in relation to incapacity/capacity jurisdictions with increasing frequency. I would suggest that in all such cases the question should be not so much "Will such assistance assist?", as "Is such cooperation unlikely to assist?". Whichever question is favoured, one or other should always be asked in relation to such proceedings. To take some prominent recent examples, judicial cooperation before any final order was granted could well have avoided the now notorious outcomes in the *Aberdeenshire Council* and *Argyll & Bute Council* cases.

The procedure, in summary, is this. The requesting judge should prepare or approve an information-sharing request and a summary of information for the liaison judge in the requesting jurisdiction, for onward transmission to the receiving jurisdiction a standard request form is provided in Annex II to the Protocol. The liaison judge must provide, for relevant cases, clear lines of communication and form a free flow of relevant information, to facilitate effective case management of those cases. The liaison judge receives the request from the requesting judge, makes any modifications which the liaison judge considers necessary, to the liaison judge in the receiving jurisdiction. Responses from the receiving jurisdiction are returned to the requesting judge through the liaison judge. As noted, however, requests for information from the liaison judge in a receiving jurisdiction should be made through the offices mentioned above.

For provisions providing more detail on the operation of the scheme of the Protocol, see the Protocol itself.

The Protocol does however give rise to some concerns, one of them major, all of them addressed below.

The Protocol has been published along with "a handbook on adult capacity Law in Scotland, England & Wales, and in Northern Ireland". The handbook can be commended without reservation, including for its conciseness and

clarity. It does not seek to describe every possible provision that could arise in the context of cross-border cases. In the case of Scotland, it is limited to the provisions of Part 1 of the 2000 Act, entitled "General"; those in Part 2 on powers of attorney; and those in Part 6 on guardianship and intervention orders. The lead contributors were Alex Ruck Keene KC in respect of England & Wales, Sheriff Helen McGinty in respect of Scotland, and Master Hilary Wells in respect of Northern Ireland. Helen McGinty made her contribution while still a practising solicitor. We take this opportunity to welcome her appointment as a sheriff at Glasgow with effect from 16th June 2025, and to congratulate her.

Oddities in the Protocol, particularly when read in comparison with the handbook, include the possibly Anglo-centric statement that the handbook was "prepared by mental capacity law barristers and advocates". In accordance with the very different demarcation between the roles of the relevant parts of the profession, the great bulk of applications under the 2000 Act are conducted in Scotland by solicitors. Sheriff McGinty is a solicitor, not an advocate. Solicitor advocates are now represented in all tiers of the Scottish judiciary, including Lord Scott as a senator of the Scottish Supreme Courts, he – significantly – having led the work of the Scottish Mental Health Law Review ("the Scott Review") including publication of the massive, in both size and importance, Report of the Review.

Item (ii) ambiguously refers to "the local authority involved". That could be a local authority in the "receiving jurisdiction" where the adult retains ordinary residence and the authority is thus still responsible for cost of provision of services, notwithstanding that a court in the requesting jurisdiction may have jurisdiction, on grounds including that the adult has habitual residence there or is in fact present there (subject to the precise terms of the jurisdiction provisions of the Hague Convention); on which see *Milton Keynes Council v Scottish Ministers*, [2015] CSOH 156. One local authority, in one jurisdiction, may be "involved" with responsibility for providing local authority services to an adult, while another local authority in a different jurisdiction may be responsible for meeting the costs of such provision.

It seems odd that facilitation of direct judicial cooperation is through the Scottish International Family Justice Office in the case of Scotland, the similarly titled Office in respect of England & Wales, and the Lady Chief Justice's Office in the case of Northern Ireland. Family courts do not have jurisdiction in adult incapacity matters. I am not aware that any texts on Scots family law, or lists of family law statutes, include the 2000 Act. (The position is different in many European countries.) This may or may not be a factor.

Major puzzlement and widespread disagreement has been caused by Article 2.2 of the Protocol, specifying the persons to whom it relates. In full, it reads as follows:

> *2. In the Protocol,*
>
> *1. for proceedings raised in England and Wales, includes persons who are aged 16 or over (section 2(5) of the Mental Capacity Act 2005);*
>
> *2. for proceedings raised in Scotland, includes persons who are aged 18 or over (section 1(6) of the Adults with Incapacity (Scotland) Act 2000, as glossed by section 1(2), 24 and 29 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024); and*
>
> *3. for proceedings raised in Northern Ireland, includes persons who are aged 16 or over (section 1(1) of the Mental Capacity Act (Northern Ireland) 2016.*

The unusual wording appears to suggest that the definition of "adult" has effectively been amended from persons aged over 16 to persons aged over 18 by the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 ("the 2024 Act"), and in particular by the provisions quoted of the 2024 Act, and presumably for the purposes of all

related provisions including – to pick one example – section 79A which allows guardianship applications to be made three months before attainment of adulthood (whatever that now means!), but such orders only to come into force upon attainment of adulthood. What seriously exacerbates the confusion is that this contradicts the clear statement in paragraph 11 of the Scottish section of the handbook that: "An adult is, simply, a person who has attained the age of 16 years", and also appears to be contradicted in paragraph (v) in the section entitled "Operation of the principles" of the Protocol itself. It reverses those ages. It reads: "*Courts in Scotland may only request information from England, Wales and Northern Ireland for adults aged 18 or over while the courts in England, Wales and Northern Ireland may request information from Scotland for persons aged 16 and over*.

So, which version is correct? Despite obvious initial reluctance to disagree with a document signed by the heads of the judiciaries of the three United Kingdom jurisdictions, I have to say that upon consideration of the terms of significant relevant legislation, I for my part cannot avoid the conclusion that Helen McGinty (soon to be Sheriff McGinty) is clearly correct, as is the version in the "Operation" section where it appears to contradict Article 2.2. While it is perhaps strictly speaking irrelevant, one notes that prior to announcement of her appointment to the shrieval bench on 27th May 2025, Sheriff McGinty was an experienced and leading AWI practitioner and safeguarder in AWI cases, who reported no difficulties in bridging the requirements of the 2000 Act and the Convention in relation to "young persons" (Scottish 16 and 17 year-olds).

To start with an obvious point, the provisions of the Convention apply in respect of every human being below the age of 18 years "For the purposes of the present Convention" (Article 1), so compliance is required with all provisions of the Convention in respect of Scottish young persons. Is any provision of the 2000 Act incompatible with application of any provision of the Convention? No, although the only cause for doubt might be the requirement that "the best interests of the child [interpreted according to the Convention as including young persons] shall be a primary consideration". It is well known that a best interests test was rejected in favour of the section 1 principles for the purposes of drafting the 2000 Act, and decisions of the courts have rejected use of a best interests test in place of the section 1 principles. However, the 2000 Act does not exclude best interests: it does positively require compliance with the section 1 principles as applying both the provisions of the Convention and the section 1 principles in relation to Scottish young persons, does that give rise to difficulties? The answer from experienced safeguarders appears to be "no". Many of them are accustomed to being appointed curators ad litem, the test of such appointments being a best interests test, albeit in relation to matters in which that is not the test. In at least one sheriff court (Edinburgh), safeguarders are now appointed in all proceedings relating to young persons, and I am not aware that any have encountered difficulties in applying the provisions of the Convention in addition to, rather than in place of, those of the 2000 Act.

Further consideration does not appear to indicate anything to raise doubt as to whether the 2000 Act has been amended. Statutes normally expressly provide for any repeals or significant amendments to pre-existing legislation, with all minor and consequential amendments often to be found in a Schedule. Did the drafters of the 2024 Act omit to address the need to specify necessary consequential amendments of existing legislation? No, they did make provisions for consequential amendments, but only in relation to the Children and Young People (Scotland) Act 2014 (section 22). No such consequential amendments are noted in the "latest available" official versions of the 2000 Act, nor the Age of Legal Capacity (Scotland) Act 1991. As it stands, Scottish legislation contains the duality of "trigger dates" at the ages of both

16 and 18, and indeed 17 as well in relation to certain criminal offences. Such duality is "part of the scene".

Taking in turn the three provisions of the 2024 Act referred to in Article 2.2 of the Protocol, section 1(2) defines "the UNCRC requirements" as meaning the rights and obligations from the Convention, including the first and second optional Protocols. Section 24 deals with interpretation of legislation, not amendment or repeal. Section 24(1) addresses matters of interpretation ("The following must be read and given effect in a way which is compatible with the UNCRC requirements"), subject to the important qualification "So far as it is possible to do so", and section 24(2) clarifies that subsection (1) "does not affect – (a) the validity, continuing operation or enforcement of any incompatible Act of the Scottish Parliament". Accordingly, if I am wrong in asserting that the 2000 Act is not incompatible, it nevertheless remains in force unamended and section 24 requires "the UNCRC requirements" to be applied "so far as it is possible to do so", in other words in relation to the 2000 Act as unamended.

Section 24(1) refers to the words in an Act of the Scottish Parliament to which section 29 applies, but section 29 does not specify any primary legislation. It merely refers to words in an Act of the Scottish Parliament, and to the route by which those words have appeared in such an Act.

I shall be pleased to hear from anyone who disagrees with my interpretation.

Adrian D Ward

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

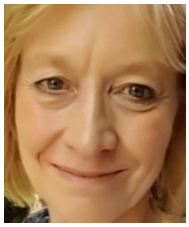
Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare 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.

Neil is running the following courses, with tickets available here:

- BIA/DoLS refresher training: 26 June 2025, 16 July 2025.
- DoLS Authoriser Training: 4 July 2025
- AMHP/MHA 1983 Legal Update: 10 July 2025

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 July. 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