



Welcome to the May 2026 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: *Townsend* updated, sex before the Court of Protection again, and a profoundly disturbing report on dementia in acute hospitals;
- (2) In the Property and Affairs Report: new OPG investigation requirements and the consequences thereof;
- (3) In the Practice and Procedure Report: importance guidance on instructing experts, when habitual residence can be revisited, and a very useful new book on coercive control;
- (4) In the Mental Health Matters Report: the legal gaps for those in mental health crisis in ED and misunderstandings of the MCA in the mental health context;
- (5) In the Children's Capacity Report: deprivation of liberty of children in statute and in unregulated placements and what procedural fairness (does) not require in assessment;
- (6) In the Wider Context Report: the MCA and suicide, and new guidance on consenting to clinical trials.
- (7) In the Scotland Report: an update on the new AWI accreditation programme being run by the Law Society of Scotland.

We offer our hearty congratulations to Sir Stephen Cobb on his appointment as President of the Family Division and of the Court of Protection. For anyone who wants reassurance that the new President truly 'gets' the Mental Capacity Act, we suggest reading his judgment in the case of '[Stitch](#),' his last decision as a Tier 3 judge of the Court of Protection.

A reminder that that whilst Chambers have launched a new and zippy version of our [website](#) which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via [here](#).

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

Short Note: the inherent jurisdiction takes another blow, but staggers on..... 2

Children’s Wellbeing and Schools Act 2026..... 2

Depriving children of their liberty in unregulated placements 3

Short Note: what procedural fairness does (and does not) require in assessing children 3

Transition guidance..... 4

Supporting parents with a learning disability..... 5

Short Note: the inherent jurisdiction takes another blow, but staggers on

The Supreme Court in *X and Y (Children: Adoption Order: Setting Aside)* [2026] UKSC 13 held that, whatever the substantive merits of doing so might be on the facts of any given case, it was simply not possible to use the inherent jurisdiction of the High Court to set aside a validly made adoption order. In so doing, however, it did not take up the baton laid down by Professor Rob George KC (and Lady Hale), who have both challenged the very existence of the inherent jurisdiction as a mechanism by which the High Court can grant substantive relief in respect of children. Insofar as the High Court also continues to make decisions in relation to ‘vulnerable adults,’ the judgment therefore suggests that the question is less as to whether the jurisdiction exists, and more as to whether and how it is being operated in a manner that does justice to all the interests involved.

Children’s Wellbeing and Schools Act 2026

The Children’s Wellbeing and Schools Act 2026 received Royal Assent on 29 April 2026. Amongst a very varied range of matters it covers, it introduces a new framework which should narrow, but not eliminate, the need for the use of the inherent jurisdiction to deprive children of

their liberty through the amendments made by s.15 of the 2026 Act to s.25 Children Act 1989. Significant questions remain in relation to this reform, including

1. Whether it covers all those children who are currently the subject of proceedings under the inherent jurisdiction, our suggested answer being ‘no’;
2. Whether it is capable of being operated compatibly with Article 5 ECHR, our answer being, in principle yes, although it is concerning that it does not spell out on the face of the primary legislation whether the basis upon which deprivation of liberty is justified is said to be Article 5(1)(d) (educational supervision) or Article 5(1)(e) (mental disorder). This does matter, as McKendrick J has recently reminded us;
3. Whether it will make any difference at all to the current situation where judges in the national DoL list are confronted with situations which are profoundly unsatisfactory, but where there is said to be no other option on the table for the child. If steps are not taken to prevent these situations arising, all the changes in the 2026 Act will do will provide another route to confront the judiciary with nigh-on

impossible dilemmas, and will do nothing to serve the interests of the children whose circumstances are before those judges.

Depriving children of their liberty in unregulated placements

On 20 February 2026, Henke J sent a letter to family judges who sit at the RCJ and on the South Eastern Circuit hearing applications relating to deprivation of liberty for children, setting out the procedure for considering deprivations of liberty in unregulated placements. The letter has been approved for wider release and circulated by the COP Bar Association) and we reproduce its contents here so that applicants and other parties will understand what is expected when such an application is made:

The purpose of this letter is to ask that when determining an application for a Deprivation of Liberty order in relation to an unregulated placement, you consider the following:

- *Evidence that planning permission has been obtained for the premise to operate as a children's home.*
- *Evidence of the placement provider actively progressing Ofsted registration.*
- *Requiring the Children's Guardian to visit the placement itself and thereafter considering the evidence of their observations upon it.*
- *Requiring the local authority to establish a regular scheme of visits to the placement, preferably weekly although individual circumstances may require a different regime of visiting.*
- *Requiring a senior member of the local authority leadership team to have regular oversight of the placement given its unregulated status.*

- *Requiring the local authority to commit to regular communication with the child or young person who is to be placed and to ensure that they visit that child or young person (in person or virtually) at least once a week and that the child or young person is seen during those visits and spoken to alone (in the absence of any member of staff).*

Short Note: what procedural fairness does (and does not) require in assessing children

In *ZHB v Cardiff City Council* [2026] EWHC 913 (Admin), Coppel J rejected the argument that a council assessing the age of an asylum-seeker must always appoint a guardian or legal representative: (1) to represent them; or (2) to ensure their informed participation in the assessment. Coppel J accepted that

35. [...] "informed participation in the age assessment procedure" should be regarded as a universal minimum standard, reflecting as it does an oft-stated requirement of Article 8 in the context of administrative and judicial procedures which affect private or family life ("the applicant must be involved in the decision-making process, seen as a whole, to a degree sufficient to provide him or her with the requisite protection of his interests": *Lazoriva v Ukraine* (appl. 6878/14, judgment of 17 April 2018, §63 and the authorities cited therein)).

He declined to go further, however:

But the proposition that a legal representative/guardian and access to a lawyer are essential pre-requisites of every age assessment procedure would be inconsistent with (a) the express reference to domestic and EU law in the relevant paragraphs of Darboe and Diakit , (b) the distinction drawn

in AC between age assessment of an asylum-seeker and age assessment for other purposes (the latter potentially requiring lesser safeguards), (c) the absence of any finding in AC that the failure to appoint a legal representative/guardian from the outset of the age assessment procedure gave rise to a breach of Article 8 and (d) with the margin of appreciation which is afforded to states when designing procedural safeguards for age assessment procedures. As to (d), given the diversity of law and practice amongst the Contracting States, and the recognised margin of appreciation, it would be surprising if the ECtHR had intended to lay down firm rules requiring a particular type, incidence and duration of representation and/or advice for persons undergoing age assessment.

*36. In my judgment, the correct analysis is that there is a minimum legal standard (reasonable steps/reasonable diligence in ensuring procedural safeguards) and a choice of means as to how states satisfy that standard in each case. That would be consistent with the approach generally adopted by the ECtHR of avoiding broad statements of principle as to when the domestic law of a Contracting State violates Article 8 or other Convention rights and focusing instead on the particular facts of individual cases (see, for example, *Zakharov v Russia* (2016) 63 EHRR 17, §164: "The Court has consistently held in its case-law that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention" [citations omitted]).*

That having been said, Coppel J accepted (at paragraph 39) that:

in my judgment, a state which does not appoint a representative or guardian for a presumed child undergoing age assessment or which fails to ensure access to legal advice could, on the facts of a particular case, be held not to have acted with reasonable diligence, contrary to Article 8, even where these are not already requirements of domestic law.

That had not happened on the facts of this particular case, Coppel J considered. He also held that (by operation of the statutory framework in play in Wales), the Council was not required to have regard to the provisions of the UN Convention on the Rights of the Child in assessing the age of the asylum-seeker in question (and that, even if it had been, it had discharged its duty).

Transition guidance

The Law Commission's Disabled Children's Social Care project was the latest in a long line of reports to identify that supporting young people to transition through to adult services is not working. Whilst we wait for the Government to respond to the Law Commission's recommendation that (in England) "[t]he assessment of whether a disabled child is likely to have needs for care and support after becoming 18 and, if so, what those needs are likely to be, should begin by the school year in which they turn 14," NHS England has provided guidance (dated 8 April 2026) to support health care services in England to provide developmentally appropriate care for 0 to 25-year-olds. As it states in the introduction

It sets out proposed actions for integrated care boards (ICBs), providers and clinical teams to enable safe and effective transition between services. If adopted by systems, this approach will improve continuity of care, health

outcomes and young people's experience.

The guidance contains much very sensible information, but the observations about the law need to be taken with a pinch of salt (it is not, for instance, possible for family members and carers to apply to the Court of Protection to become an attorney under a Lasting Power of Attorney).

Supporting parents with a learning disability

Parents with learning disabilities are disproportionately represented in the child protection system and more likely to have their children removed. A very helpful briefing has been published by Research in Practice (part of the National Children's Bureau) on [Supporting parents with a learning disability – the role of Adult Services](#). Its focus is to support leaders, commissioners and frontline practitioners across adult and children's services to understand how adult and children's services can work together to support parents with learning disabilities and their children.

This is also an opportunity to flag that:

- (1) 'capacity to parent' has nothing to do with capacity for purposes of the Mental Capacity Act 2005;
- (2) Professionals working with parents with learning disabilities should join the (free) [Working Together with Parents Network](#).

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 and European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Professor of Practice 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 a former 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. He trains health, social care and legal professionals through his training company, LPS Law Ltd. 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 the Court of Protection Practice (LexisNexis). To view 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, ICBs 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](#).

Annabel Lee: annabel.lee@39essex.com



Annabel has a well-established practice in the Court of Protection covering all areas of health and welfare, property and affairs and cross-border matters. She is ranked as a leading junior for Court of Protection work in the main legal directories, and was shortlisted for Court of Protection and Community Care Junior of the Year in 2023. She is a contributor to the leading practitioners' text, the Court of Protection Practice (LexisNexis). 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](#).



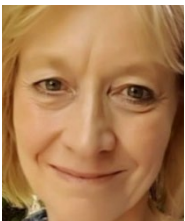
Nyasha Weinberg: Nyasha.Weinberg@39essex.com

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 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.

Sheraton Doyle
 Director of Clerking
sheraton.doyle@39essex.com

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

Peter Campbell
 Director of Clerking
peter.campbell@39essex.com

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](#)