



Welcome to the July 2024 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: sexual capacity complexities, wishes and feelings in the balance, and finding the P in a PDOC case;
- (2) In the Property and Affairs Report: deputy bond provider problems and a job opportunity in the Official Solicitor's office;
- (3) In the Practice and Procedure Report: how far can the Court of Protection go to ensure its orders are complied with, and risk taking, best interests and health and welfare deputies;
- (4) In the Mental Health Matters Report: Tier 4 beds (again) and the Mental Health Tribunal and the Parole Board;
- (5) In the Wider Context Report: local authority consent to confinement, the Irish courts continue to grapple with the consequences of the framework, and Strasbourg pronounces on assisted dying;
- (6) In the Scotland Report: exasperation at the pace of the Scottish Government's Mental Health and Capacity Reform Programme.

There is one plug this month, for a [free digital trial](#) of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see [here](#).

Alex trusts that readers will not mind a slight blowing of the trumpet at his having been awarded Outstanding Legal Achievement at the [2024 Modern Law Private Client Awards](#) for his work sharing knowledge about the Mental Capacity Act 2005 (and hence, in significant part, thanks to his fellow editors on this Report), and being appointed Professor of Practice at King's College London from August 2024 (a position which reflects the opportunities given by Chambers to him to moonlight so often away from the day job – for which he is very grateful!).

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  
Simon Edwards (P&A)

### 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.

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### Mental Health Bill first reading

The Government introduced the [Mental Health Bill](#) into Parliament on 6 November. It draws on the work of the independent Review of the Mental Health Act 1983, chaired by Sir Simon Wessely, that reported in 2018 (to which Alex was the legal adviser).

The draft Mental Health Bill brought forward by the previous Government can be found [here](#). Alex’s unofficial annotated version of the current Mental Health Act 1983 if it were to be amended by that Bill can be found [here](#); he will update that as soon as possible.

The Parliamentary Office of Science and Technology has published two reports on mental health reform, one on [improving patient choice](#) and on [autistic people and people with learning disability](#). They have also published a wider report on [racial inequalities](#) in the mental health context. The House of Commons Library has published a wider research briefing [here](#).

A Joint Committee of both Houses of Parliament was convened to scrutinise the draft Bill published in 2022, and its report can be found [here](#) (together with Alex’s walkthrough of it). The previous Government responded to that report [here](#).

The Bill now introduced is very similar to the draft Bill. No doubt reflecting recent high-profile cases such as that of Valdo Calocane, the Bill also includes measures designed (in the words of the press release) to recognise that “safety is paramount” – including a requirement that the patient’s responsible clinician consults with

another person before discharging them; the press release also says that “[d]ischarge processes will be reviewed more broadly and will include a safety management plan for the patient, to keep themselves and others safe.”

Amongst the measures that the Bill includes are:

- An updating of the principles to be contained in the statutory Codes of Practice in both England & Wales.
- The removal of learning disability and autism from s.3 MHA 1983.
- Statutory care and treatment plans for all patients.
- Advance choice documents, including provision for NHS England and ICBs to make arrangements for making information about advance choice documents available to those for whom they are responsible, and “helping” such people as they consider appropriate to make advance choice documents.
- Replacing nearest relatives with nominated persons.
- For advocacy provision to be extended in England (as is already the case in Wales) to all informal patients, not just those detained under the MHA 1983.
- Greater access to Second Opinion Appointed Doctors.
- Shorter periods of detention under s.3 and greater access to the Tribunal.

- The power for Tribunals to recommend (but not direct) service provision in the community.
- Tightening the criteria for Community Treatment Orders.
- The prohibition on the use of police and prison cells for those experiencing mental health crisis.

What the Bill does not include are:

- Any provisions preventing the detention of autistic people or those with learning disability under the MCA 2005 (including in psychiatric hospitals) in the event that they are considered to lack capacity to consent to their admission and confinement.
- Statutory principles appearing on the face of the legislation, in the way that principles appear in s.1 MCA 2005.
- Any provision for addressing the legal powers to hold individuals in Accident and Emergency departments pending admission under the MHA.
- Any reference to the interface between the MHA and the MCA 2005.
- Any reference to advance consent to confinement in psychiatric settings, the DHSC having taken the position in response to the Independent Review's consideration of this issue that the law already provided that people could give such consent so as to avoid the need for formal detention when in crisis.
- Measures allowing patients to challenge their treatment before the Mental Health Tribunal, meaning that they will continue to have to rely upon judicial review to obtain a judicial determination of whether they can be compelled to receive a specific treatment.

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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](http://www.mentalcapacitylawandpolicy.org.uk). To view full CV click [here](#).

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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](#).

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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](http://www.lpslaw.co.uk). To view full CV click [here](#).

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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](#).

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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 5<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click [here](#).

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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](#).

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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](#)

**Simon Edwards: [simon.edwards@39essex.com](mailto:simon.edwards@39essex.com)**

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).

**Adrian Ward: [adrian@adward.co.uk](mailto: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.

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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 is also doing 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](#).

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. For more details and to book, see [here](#).

### **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 December. 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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