



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

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on *Cheshire West 2*, non-withdrawal of treatment in two very different contexts and SCIE sounds the alarm;

(2) In the Property and Affairs Report: the OPG annual report and increases to LPA fees;

(3) In the Practice and Procedure Report: the Court of Protection (Amendment) Rules 2025, a route map for anorexia cases relating to detained patients, and taking evidence from abroad;

(4) In the Mental Health Matters Report: the police, Article 2 and suicide risk, and an evaluation of the HOPE(S) programme;

(5) In the Children's Capacity Report: *Gillick* does not provide a universal test, and jurisdictional issues in the making of deprivation of liberty and wardship orders;

(6) In the Wider Context Report: anonymity, vulnerability and the open justice principle, and learning disability and social murder;

(7) In the Scotland Report: an apparently open and shut guardianship case and an update on Adults with Incapacity Act reform.

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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The OPG annual report

The OPG has published its annual report and accounts for 2024-2025. It has cleared its backlog for registering LPA applications but, as the report acknowledges at the outset:

*We do, however, face significant challenges in investigations. The number of cases continues to grow, and this year we were unable to meet the 70 working days target for completing investigations. While this is not a position we want to be in, the team have worked hard to ensure we are still meeting our targets on safeguarding – consistently responding to 99% of calls within the 3-minute window and triaging 98% of acute cases within two days to protect those who need it most. To work to reduce the backlog in investigations the team have implemented several creative solutions to intercept cases earlier and pre-empt investigations. This is an organisation wide priority for 2025 to 2026 as we remain committed to taking consistent and timely action to ensure we enact our responsibility to intervene when our clients’ best interests are not being upheld.*

In more detail (at page 17):

*The continued growth in LPA demand has been the primary contributing factor to the proportional increase in the*

*number of investigations. This year, concerns raised with OPG increased to 11,266 from 10,577 last year, representing a 6.5% increase. This increase corresponds with the increase in the number of LPAs registered, which has risen by 1,301,364. In response to the increasing number of investigations and to support our long-term approach to managing investigations we are proactively exploring the main causes, identifying process improvements, and using data to predict future trends.*

[...]

*Of the 11,266 concerns raised, 3,823 were accepted as investigations (34%) with 7,443 (66%) being signposted appropriately.<sup>1</sup> Each investigation leads to a report that summarises the investigation and provides any recommended actions. The reports are agreed and approved by the Public Guardian, or by those within OPG who have the responsibility to sign on the Public Guardian’s behalf. OPG’s target for finalising and achieving either Public Guardian approval for investigation reports or a legal case review is within 70 working days of the concern being raised.*

[...]

*During 2024 to 2025, in 73% of investigations undertaken, no further*

<sup>1</sup> It would be interesting to have more detail about this, as 34% does appear to be quite low as a proportion.

action was required, compared to 77% last year. Additionally, 24% of investigations resulted in Court of Protection action, compared to 15% last year. For 3% of investigations, we used alternative methods to making applications to court. These included asking attorneys to provide a revised account in a few months to demonstrate how they are adhering to the code of practice.

### LPA fee increase

The MoJ has announced an intention to increase the LPA application fee from £82 per LPA application to £92. The new fee will be payable for LPA applications received by the Office of the Public Guardian (OPG) from 17 November 2025.

### P&A Court User Group Minutes

The Minutes of the July meeting have now been published. Amongst the issues of wider relevance include the following exchanges relating to capacity assessments.

*The issue we are having is that COP3 assessments are being rejected on the basis that no formal diagnosis of an impairment of the mind or brain is given. In each instance we have sent a COP9 referring to observations of MacDonald J and the information from the COP3 form, that a formal diagnosis is not required. Each time the new order requiring a new capability assessment "by a suitably qualified medical practitioner" has been set aside. Please can there be clarification on this.*

*HHJH referred the group to **paragraphs 44, 47 & 48 of MacDonald J's judgment in North Bristol NHS Trust v. R [2023] EWCOP 5***  
*<https://www.bailii.org/ew/cases/EWCO P/2023/5.html>*

*HHJH explained that internally she has regular 'supervision' meetings with the Authorised Court Officers (ACO's), and this judgment has been discussed so she is confident that there is full and proper awareness of it. The issue is whether the COP3 submitted satisfies the decision-maker that there is a causative link between functional incapacity and mental impairment/disturbance. Without commenting on any individual case, there are circumstances where evidence submitted makes it entirely appropriate for a decision maker to query this. HHJH noted that BS is clearly aware of the correct procedural route to raise any concern about an order made on the papers (COP9 application for reconsideration), so the system seems to be working.*

*HHJH advised of an additional question raised directly to an ACO outside the meeting : 'we understand that virtual capacity assessments were acceptable during covid, is this still ok now, as we are finding that more GP's, social workers and psychiatrists are refusing to carry these out?'*

*HHJH responded that accommodations for this were made during the pandemic and although these are still possible where circumstances require it, remote assessment is not the optimal way for P to be seen. If a virtual assessment is undertaken, an explanation must be provided as to why and as to what support measures were provided to P. An explanation based simply on 'stretched resources' is unlikely to be persuasive.*

Senior Judge Hilder also gave some useful clarifications around tenancies:

*HHJH highlighted the difference in tenancies in respect of where P's lives and tenancies as investment property.*

*The templates for appointment of a professional/solicitor deputy do not standardly include express provision in respect of tenancies that P live in; templates for LA deputies do. This is because of the different types of estates commonly handled by the different types of deputies. In respect of powers of management and investment, see Re ACC para 53.3. It is common practice for professional deputies to be given explicit authority to let or manage investment properties. Evidence in support of an application for such authorities should be filed on form COP24. If the issue relates to P's home, evidence of where P will live if a tenancy is terminated, and any deprivation of liberty authorisation should be provided.*

***Sheree Green (SG) Greenchurch Legal Services Ltd via the chat** often for panel appointments, we have folk in supported living with a tenancy. Is it possible to extend the clause included in the local authority deputyship orders to panel orders?*

***HHJH** confirmed that yes that is possible. The request should be made clear in the application.*

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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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## 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.

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Our next edition will be out in October. 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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