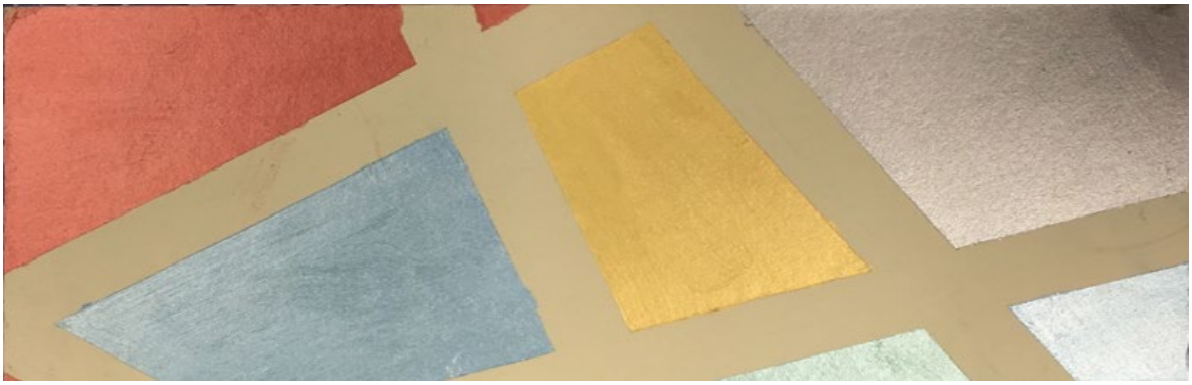


Welcome to the November 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: *Cheshire West 2*, the return of LPS and where the buck stops with termination;

(2) In the Property and Affairs Report: accessing Child Trust Funds and LPA fee increase;

(3) In the Practice and Procedure Report: where (not if) brain stem death testing should take place;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the duties owed by AMHPs;

(5) In the Children's Capacity Report: resources for children transitioning to adult in the palliative context.

(6) The Wider Context: the Terminally Ill Adults (End of Life) Bill before the House of Lords, and CQC despairs at the state of care.

(7) In the Scotland Report: an update on AWI reform.

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: still rolling, but so slowly!

In the October Report, we narrated the progress at that point of what we called "the massive and carefully constructed way in which a programme of improvement and reform is now being rolled forward". We narrated the establishment of a Ministerial-led Oversight Group ("MOG"), which had held the first of its planned quarterly meetings in September: and of the Expert Working Group ("EWG"), which had its first monthly meeting also in September, and has now met again in October. We confirmed that we intended to report more fully on the remits of the EWG, and of the twelve planned workstreams, in this Report.

In the October Report, I referred to the clearly committed personal engagement in the reform process of Tom Arthur MSP, Minister for Social Care and Mental Welbeing and Sport, that at his invitation I had met him in-person and one-to-one, and that I hoped to be able to share the outcome in the November Report, subject to necessary clearance. I am delighted now to report a change of plan in that the Minister has accepted an invitation to contribute personally, probably to the February Report.

The purpose of the EWG is described in its remit as follows:

> *"This group has been convened to advise and collaborate on the changes required to modernise the Adults with Incapacity system in Scotland, including the future amendment of the Adults with Incapacity (Scotland) Act 2000, with a specific focus on enhancing the rights and protections of people affected by incapacity law."*

I record an interest as a member of the EWG. This article contains my own independent views and comments. Nothing in it is on behalf of the EWG, nor does it purport to represent the views of any other member of the EWG.

Within Scottish Government, the process is led by Amy Stuart, Head of the Mental Health and Incapacity Law Unit, with three teams reporting to her, namely the Adults with Incapacity Improvement Team, led by Gill Scott; the Adults with Incapacity Transformation Team, led by Peter Quigley; and the Mental Health Law Team, led by Aime Jaffeno.

Amy is Chair of the EWG. Her deputies are Gill and Peter. The "substantive members" of the group are:

Jo Savege: Social Work Officer, Mental Welfare Commission

Jennifer Paton: Secretary, Law Society of Scotland Mental Health and Disability Sub-Committee

Professor Colin McKay: Emeritus Professor of Mental Health and Capacity Law, Edinburgh Napier University

Fiona Brown: Public Guardian, Office of the Public Guardian (Scotland)

Ian Waitt: Mental Health Officer, Subgroup Deputy Chair, Social Work Scotland

Adrian Ward: Subject Matter Expert

The Secretary to EWG is Joseph O'Neill. Official support is provided by Sarah Saddiq and Nicola Duncan. Al three are Senior Policy Managers, Mental Health and Incapacity Law Unit, Scottish Government. EWG is an advisory group, with no decision-making powers. Its function is to "make recommendations to be escalated to" the MOG.

The Terms of Reference of the EWG extend in all to nine pages. The first item in its role and remit is to advise and collaborate with Scottish Government on delivery of the twelve AWI workstreams. With my numbering, the titles and desired outcomes of each of those workstreams are as follows:

1: General Principles: To ensure that the general principles of the Act remain in line with developing thinking and international standards on human rights.

2: Deprivation of Liberty: Develop a Deprivation of Liberty approval system for Scotland, ensuring compliance with ECHR, for adults who lack capacity.

3: Definition of an Adult: Ensure that the Act and any proposed amendments remain compatible with the United Nations Convention on the Rights of the Child.

4: Forced Detention and Covert Medication: To develop any additional safeguards required where force or covert medication may be permitted under Part 5 of the AWI Act.

5: Supported Decision Making: To embed supported decision making as the default approach for adults who lack capacity and to ensure there is effective recognition of the adults will and preferences, in line with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

6: Data Collection: To collate and consider any improvements required to the data collected centrally in relation to AWI.

7: Powers of Attorney: Review and improve Power of Attorney process and practice (legislative and non-legislative) and ensuring that the adults will and preferences are recognised in accordance with UNCRPD.

8: Access to Funds: Review Access to Funds process and practice, identifying opportunities for improvement (legislative and non-legislative) and ensuring that the adults will and preferences are recognised in accordance with UNCRPD.

9: Managing Residents' Finances: Review Managing Residents' Finances process and practice, identifying opportunities for improvement (legislative and non-legislative) and ensuring that the adults will and preferences are recognised in accordance with UNCRPD.

10: Guardianships and Intervention Orders: Review guardianship and intervention order process and practice, identifying opportunities for improvement (legislative and non-legislative) and ensuring that the adult's will and preferences are recognised in accordance with UNCRPD.

11: Medical Treatment: To develop provisions to address a number of discrete issues in relation to medical treatment, examples being; conveying an incapable adult to hospital for non-urgent medical treatment and requiring an incapable adult to remain in hospital for medical treatment; that have been identified in previous consultations on the AWI Act as well as the Scottish Mental Health Law Review.

12: Research: Review and improve the processes for participation in health research and the ethical review of research proposals

involving adults with incapacity in Scotland; whilst ensuring the rights, safety, dignity and wellbeing of research participants are prioritised throughout.

The following are my abbreviated preliminary comments, by reference to the above numbering, on the workstreams that are directly relevant to AWI practice. Many of them are achievable by good practice now, but require to be mandatory and explicit in reformed legislation.

1: General Principles:

For much of what is required here, see the Three Jurisdictions Report (Essex Autonomy Project, 6th June 2016). Assistance with communication requires to be widened to cover support for the exercise of legal capacity. The passive language of section 1 needs to be reframed as attributable duties, with remedies for not performing those duties. There should perhaps be an explicit presumption of capacity, and words to exclude any implied presumptions of incapacity when existing orders are renewed. Worldwide, concepts of "incapacity" are being challenged, with emphasis transferring to issues of "vulnerability" and "fragility". The realities of variations and degrees of capacity, and fluctuations over time, need to be better incorporated.

2: Deprivation of Liberty:

A clear and workable deprivation of liberty scheme is essential. It is welcome that this is now being addressed, rather than previous indications of possible partial arrangements to attempt to circumvent the fundamental issues. The other UK jurisdictions have significant problems about resource implications. Scotland almost certainly needs to shift to availability in suitable cases of non-court procedures: but these would still require professional input, particularly that currently provided by MHOs.

One has to hope for a quicker than usual publication of a decision by the UK Supreme Court upon the current reference by the Attorney General for Northern Ireland "of a devolution issue under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998", framed as follows:

> *"Does the Minister of Health for Northern Ireland have the power to revise the Deprivation of Liberty Safeguards Code of Practice ("the Code") so that persons aged 16 and over who lack capacity to make decisions about their care and treatment can give valid consent to their confinement through the expression of their wishes and feelings?"*

The hearing took place on 20th – 22nd October 2025. Scotland's Lord Advocate participated in the public interest. Waiting in the wings, or rather hovering hierarchically above that case, is the Strasbourg case of *TF and MD v France* (Case 15290/23), in which interveners suggest – in effect – that the *Cheshire West* case went too far, and "invite the court to clarify the meaning of 'valid consent' for purposes of identifying whether a person is subjectively deprived of their liberty".

If decisions in either or both of the UK Supreme Court case and the Strasbourg case become available before a Bill is presented to the Scottish Parliament, they may or may not have significant influence on the content of the Bill. One suspects, on the basis of past patterns, that our reformed legislation could well be in force before the Strasbourg Court issues its decision, though it would still be reasonable to take account of the submission of the interveners in that case.

As a matter of editorial policy across the various components of the Mental Capacity Report, we are likely to avoid the hazards of commenting speculatively on the UK Supreme Court case until a decision has been issued. Readers may

however anticipate that they may see comment "from the Scottish angle" (from me) in Scots Law Times before Christmas.

3: Definition of an Adult:

This ought not be a particular problem. We already have the position that under the Hague Conventions our 16 and 17 year-olds are children. It is a matter of practice that proceedings in relation to them must now be conducted so as to respect their CYC rights, as well as complying with the section 1 principles.

5: Supported Decision Making:

The UN Disability Convention quite deliberately does not mention supported decision-making. What it requires is support for the exercise of legal capacity, broadly equating to our "acting and deciding". The narrowing to decision-making is appropriate – if appropriate at all – for the narrower approach of common law systems, exemplified by the differences between Scotland's 2000 Act and the Mental Capacity Act 2005, but extending more broadly as described in the 2023-2024 volume of the Yearbook of Private International Law ("From past to future – the emergence and development of advance choices", Adrian D Ward, page 23). Beyond that, the comments at 1 above are particularly relevant to this item.

7: Powers of Attorney:

The requirements here are largely as listed in responses by the Law Society of Scotland to the 2016 and 2018 Scottish Government consultations, with the addition of the need for clarity as to whether powers of attorney can be integrated into a deprivation of liberty regime; and clear provision to accommodate support arrangements and co-decision-making.

8: Access to Funds ("ATF"):

There have been suggestions that this and the next item could be subsumed into a new guardianship regime. That would increase the load on the courts, when the opposite is needed. The ATF system could be improved, and there needs to be better flexibility both ways between guardianship and ATF, with better guidance emphasising that under the general principles, and also section 58 of the 2000 Act, a guardianship order must not be granted if ATF would suffice. The great majority of deputyship applications in England & Wales relate to financial matters only, because a major proportion of situations which are dealt with by guardianship orders in Scotland can in England & Wales be covered by deprivation of liberty procedures, leaving no need for any welfare powers in addition. One suspects that many of the resulting "financial only" guardianships could be dealt with here by ATF.

9: Managing Residents' Finances:

It would be relevant to have data – if it can be assembled – on the extent to which arrangements under this scheme have "gone wrong", whether from inadequately managed conflicts of interest or otherwise; as well as assessment of whether registration and supervision should remain as at present (for which there must surely be practical advantages).

10: Guardianships and Intervention Orders:

As with powers of attorney, the long-standing lists of needed amendments should at last be implemented. The distinct nature of intervention orders should be emphasised, and there are probably some actions which ought only be available by a section 53(5)(a) order – that is where the court itself acts, rather than authorising an appointee to act. There should be better provision for combinations of intervention orders and guardianships (already used in

practice in appropriate situations, but probably benefiting from clear statutory frameworks). A particular topic for both of the above points in combination would be any case where a court authorises a deprivation of liberty, so that the deprivation of liberty can remain potentially "live" before the same sheriff without the cumbersome mechanism of requiring renewal of the whole guardianship order at frequent intervals. Another possible topic for a section 53(5)(a) order might be making or amending a Will (for which England & Wales has had a procedure since section 96 of the Mental Health Act 1983 came into force).

General on AWI reform process

A matter for disappointment is that it is now understood that the work of the twelve workstreams will not proceed in parallel under the oversight of the EWG, and with participation of members of the EWG as appropriate; but rather that the workstreams will be addressed in sequence, primarily by the EWG, with other participants who are able to make particular contributions joining members of the EWG in dealing with particular workstreams. Coherence is likely to be better, but duration to be extended against a background of unconscionable past delays and resulting urgency, during which fundamental rights of vulnerable people are likely to continue to be violated to their serious disadvantage. One might reasonably estimate that this sequential methodology will add some twelve months to the total duration until reformed legislation is in place, during which additional delay the deficiencies in current practice must continue to be eliminated.

Adrian D Ward

Mental Welfare Commission for Scotland Report on the joint unannounced visit/safe delivery of care inspection: Royal Hospital for Children and Young People, Melville Inpatient Unit

This report was published on 23rd October 2025 following its joint unannounced visit/inspection with Healthcare Improvement Scotland of the Melville Inpatient Unit within the Royal Hospital for Children and Young People in Edinburgh. The unit is a purpose-built Child and Adolescent Mental Health Services unit which twelve beds.

Background

Serious concerns were raised by the BBC Disclosure February 2025 documentary *Kids on the Psychiatric Ward* about the treatment of young people at the Skye House Unit in Glasgow. This was discussed, alongside the relevant rights that were engaged, in the March 2025 issue of the Mental Capacity Report.

As a result of this, the Minister for Social Care, Mental Wellbeing and Sport made a commitment to address these concerns commissioning the Mental Welfare Commission for Scotland and Healthcare Improvement Scotland to conduct visits/inspections across all three young people units in Scotland and the separate children's in-patient psychiatric unit in Glasgow. The unannounced visit/inspection of the NHS Lothian Melville Unit was the first undertaken in this programme of visits/inspections and took place between 12th to 16th May 2025.

Findings

A full reading of this clearly written report is strongly recommended for all the detail. It details both areas of good practice and those where improvement is required. For example:

Areas of good practice included:

1. Positive staff-young people interactions with young people feeling they were listened to.
2. The commitment of staff to working with young people and supporting recovery, and staff feeling they were supported.
3. A positive view of psychology input.
4. Evidence of initiatives seeking to reduce the use of restraint in connection with administering nutrition by artificial means, weekly community meetings for young people and staff and online resources for young people and their families.
5. Daily structured multidisciplinary brief meetings to focus on patient safety issues, and to identify and anticipate risks (safety huddles).
6. Better assessment and consideration of nursing staffing levels.
7. Relatives and carers being grateful for the care provided and that some staff were approachable but feeling that more dietitian and psychology support was required.

Areas for improvement (requiring enquiry and improvement), and of significant concern, included:

1. The use of restraint, in terms of proportionate use as a last resort and recording of incidents of restraint.
2. Nasogastric tube feeding under restraint.
3. The requirement for adherence to treatment in accordance with the Mental Health (Care and Treatment) (Scotland) Act 2003 and managerial oversight of this.
4. The need to address long-standing issues concerning multidisciplinary team dynamics.
5. The actual availability of activities for the young people, particularly in the evenings and at weekends.
6. The quality of care planning, associated documentation and inclusion of parents and relatives.
7. Communication with young people and their families.
8. The maintenance of the unit to ensure staff and patient safety.

The areas of good practice must be acknowledged. However, importantly, there are areas of significant concern which need addressing, some of which the Commission notes it had previously raised (e.g. adherence to the Mental Health (Care and Treatment) (Scotland) Act 2003, addressing multidisciplinary team dynamics, the qualityof care planning, associated documentation and inclusion of parents and relatives). These are important ethical and human rights issues and must be acted on. The Scottish Mental Health Law Review made it clear that there are many areas of implementation of the Mental Health (Care and Treatment) (Scotland) Act 2003 that can be improved (not least adherence to its human rights-based principles) in advance of any new legislation which incorporates the review's recommendations. Moreover, the incorporation of UNCRC rights into the Scottish legal framework, along with the already incorporated ECHR and influence of the CRPD, add impetus to this and the need for sector wide guidelines on, in particular, the use of restraint for children and young people in psychiatric settings.

Jill Stavert

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.

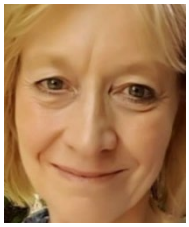
Katie Scott: katie.scott@39essex.com
Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular 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.

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 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.

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