MENTAL HEALTH MATTERS
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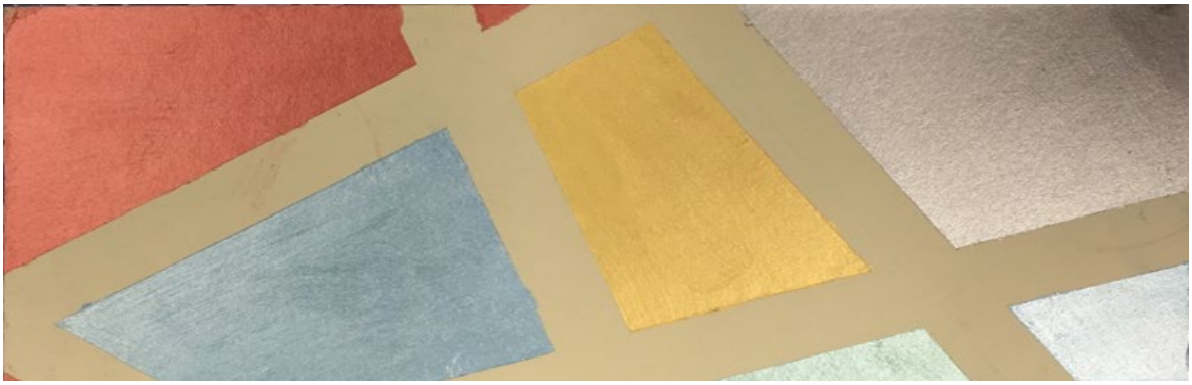

Welcome to the February 2026 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: two tributes following recent deaths of MCA champions, and best interests in the balance;

(2) In the Property and Affairs Report: *ACC* guidance from the OPG and guidance for regulated business on capacity issues;

(3) In the Practice and Procedure Report: personal welfare deputies revisited and facilitating access to pro bono representation;

(4) In the Mental Health Matters Report: the Mental Health Act 2025 and the Supreme Court considers illegality and insanity;

(5) In the Children's Capacity Report: looked after children and serious medical treatment and a consent confusion around DNACPR;

(6) The Wider Context: cannabis, criminality and capacity – a Jersey perspective.

(7) In the Scotland Report: a guest post from the Minister responsible for AWI reform and the Scottish perspective on treatment refusal by children.

We have also updated our unofficial update to the MCA / DoLS Codes of Practice, available here.

Chambers have launched a new and zippy version of our website. But don't worry, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via here. We know (flatteringly) that many of our materials are embedded on websites; the old links should automatically redirect to the new page, but do please let us know if you encounter difficulties. This is also perhaps a useful opportunity to flag that it is always best to link to the webpage which houses a guidance note, rather than a PDF of the guidance note, as we update them regularly, and linking to the PDF may inadvertently trap you in a time warp.

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 Act 2025

The Mental Health Act 2025 received Royal Assent on 18 December 2025. The Act can be found here, and the Explanatory Notes here. The Act is very difficult to read in isolation, as it is an Act amending the Mental Health Act 1983. During the passage of the Bill through Parliament, DHSC produced a version of the Act as it would look as if amended by the Bill as it stood after Report stage in the House of Lords. However, unfortunately, this was not updated to reflect further amendments made later in the Parliamentary process. Alex has therefore produced an entirely unofficial update to that document to show how the MHA 1983 will look in due course. He has also done a walkthrough of the MHA 1983 as amended by the MHA 2025.

Neil has also launched an app (currently for iOS devices, with Android coming soon), explaining the changes.

Sections 30(2), 32, 35, 36(1) and (3)(b), 38 and 39 of the MHA 2025 come into force on 18 February 2026, implementing changes to ss. 42, 48, 71, 73, and 75 MHA 1983 (concerning removal to hospital of a wider range of those under detention, and the provision for deprivation of liberty in the community presence of risk of serious harm to others for those conditionally discharged from hospital). We eagerly anticipate guidance from the Ministry of Justice as to how it anticipates that these provisions should be deployed in practice.

We do not yet have a time-frame for the commencement of other changes.

Alex has a page of resources on the Bill (now Act), available here.

Welsh emergency legislation

A rather faster-tracked mental health reform has come into effect in Wales. The Welsh Government introduced emergency legislation to resolve a technical issue that had sharply reduced the number of available medical members of the Mental Health Review Tribunal for Wales. Under the Mental Health Act 1983, tribunal medical members were understood to require both GMC registration and a licence to

practise, leading the Tribunal President to exclude unlicensed—often retired—doctors and leaving only 19 medical members, with serious risks to statutory hearing timescales.

The Emergency Bill removed the requirement for a licence to practise, making GMC registration alone sufficient and retrospectively validating earlier appointments. It was introduced on 13 January 2026, fast-tracked through the Senedd, received Royal Assent on 21 January 2026 as the Mental Health Review Tribunal for Wales (Membership) Act 2026, and came into force on 22 January 2026, immediately restoring tribunal capacity.

Illegality and insanity

Lewis-Ranwell v G4S [2026] UKSC 2 (Supreme Court (Reed, Hodge, Loyd-Jones, Rose and Simler SCJJ))

Mental Health Act 1983

Summary[1]

Mr Lewis-Ranwell, diagnosed with paranoid schizophrenia, was arrested twice on 8–10 February 2019 and displayed clear signs of acute psychosis while in police custody. Despite involvement by G4S, the NHS Trust (L&D service) and Devon CC (AMHP service), no Mental Health Act 1983 assessment or admission was arranged and he was released on bail. On 10 February 2019, during a psychotic episode, he killed three men and later assaulted two others.

At trial, the jury found him not guilty of murder by reason of insanity under the *M'Naghten* rules, and a mandatory s.37/41 MHA 1983 hospital order was imposed. He brought civil proceedings alleging negligence and HRA breaches, claiming losses including detention, loss of liberty, loss of earnings, reputational damage, and an indemnity against victims' claims. In essence he argued that but for the alleged negligence, he would have been admitted to hospital and would not have killed the three men. The issue was whether the illegality defence applied so as to bar the individual's claim against the negligent party in tort.

The Supreme Court unanimously allowed the appeal and held that the claimant was barred by the doctrine of illegality from bringing civil proceedings in negligence. The illegality defence was engaged despite the insanity verdict, because the claimant committed the actus reus of murder with mens rea, albeit without criminal responsibility. Applying *Patel v Mirza* [2016] UKSC 42, the claims for losses flowing directly from the killings and the resulting criminal disposal were barred by illegality as inconsistent with the criminal law and the integrity of the legal system.

Comment

The decision confirmed, for the first time, that the threshold for the doctrine of illegality does not require criminal liability. The availability of the illegality defence in civil law should not be governed by the criminal law's distinctions between the defences of diminished responsibility and insanity. The court said this was because the insanity defence is criticised as being out of date (paragraph 123, in circumstances where the Law Commission is considering insanity as part of its 14th programme of law reform), the criminal law necessarily sets out clear dividing lines between conduct which results in criminal responsibility and conduct which does not, but it is not

[1] Alex having been involved in the case, he has not contributed to this note.

appropriate for the civil law to rely on the same distinctions (paragraph 124-125). And the difference between those who are criminally responsible for their acts, despite diminished responsibility, and those who are not because they do not know that what they are doing is wrong (as per *M'Naghten*), is a difference between positions on a spectrum of mental illness (paragraphs 126-127).

It is worth noting at paragraph 158 of the judgment that the Chief Constable did not seek a strike out and that the other public bodies may still face a human rights claim under Articles 3 and 8 owing to the decision in *Al Hassan-Daniel v Revenue and Customs Comrs* [2010] EWCA Civ 1443.

Benefits and hospital orders

The Government has announced its intention to extend the ban on prisoners claiming state benefits to those who are detained under the MHA 1983 under one of the forensic sections of Part 3 on the basis that "*their bed, board and treatment costs are covered*." This proposal has met with considerable concern on the part of mental health charities, Mind, for instance, noting that: "[r]*emoving access to benefits for those who are most unwell undermines court decisions and penalises people for their illness. People need support to recover, understand the harm they've caused, and reintegrate into their communities*."

Short note – recall, conditional discharge and Tribunal jurisdiction

In *Cameron v Secretary of State for Justice & Anor* [2025] EWCA Civ 1574, the Court of Appeal considered whether "*a conditional discharge is extinguished by the recall to hospital of that patient by the Secretary of State for Justice*" (paragraph 1). The patient had pleaded guilty to attempted murder in 2016, and been placed on a ss.37/41 MHA 1983 order. He was conditionally discharged in October 2021, and sent to live in a care home. He applied for an absolute discharge in October 2023, but by March 2024, concerns had been raised about the patient's presentation and he was recalled to hospital by the Secretary of State. His application for absolute discharge had not yet been heard, and was later struck out "*on the basis that the FTT no longer had jurisdiction to consider it in the light of the* [patient's] *recall to hospital.*" However, the FTT did hear the automatic reference which was made upon the patient's being recalled, and did not order his discharge. The FTT considered that the automatic reference "*gave the judicial oversight over the Appellant's detention which the law required*" (paragraph 16). The Upper Tribunal affirmed this decision, finding that "*taking account of the patient's Article 5(4) protection and judicial review, the legislative provisions governing the recall of a conditionally discharged patient provided effective judicial oversight*" in the form of the reference (paragraph 18). The Upper Tribunal's decision was appealed to the Court of Appeal.

The appeal was dismissed, with a unanimous finding that the FTT and UT decisions had been correct. The Appellant argued that there was a 'lacuna' in judicial oversight in the event that a patient who has been recalled to hospital is again conditionally discharged by the Secretary of State before the reference is made, which would bar the patient from being able to apply to the Tribunal for a further 12 months. The Secretary of State argued that the statutory language of the MHA supported the FTT's conclusion, and that "[n]*o problematic lack of access to the Tribunal arises from this interpretation either in the Appellant's case or generally*," and no issues arose under the ECHR (paragraph 25). It was argued that the point raised was academic where the FTT had gone on to consider the reference, an argument accepted by the Court of Appeal. However, the Court of Appeal continued

to consider the question to give guidance for future cases. It concluded that the SSJ had a mandatory and unqualified obligation to make a reference on recall, and noted that on the basis of case law, this obligation was likely to require a reference to be made within a few days (it was 4 days in the present case). In these circumstances, "*any outstanding application by the patient under s 75 (2) is subsumed in the recall hearing. It is difficult to see what practical advantage there would have been for Mr Cameron or there would be for any other patient in the same position if it were otherwise*" (paragraph 33). For a patient who was quickly conditionally discharged, "*even in the case of a patient whose status changes repeatedly, the legislative provisions governing the recall of a conditionally discharged patient, as interpreted in Rayner, provide effective judicial oversight*."

Short note: leave and the role of the Tribunal

In *WM v Bradford District Care NHS Foundation Trust* [2025] UKUT 396 (AAC), the Upper Tribunal confirmed that the First-tier Tribunal can make a statutory recommendation that a patient be granted leave of absence with a view to facilitating discharge under s.72(3) MHA 1983 even if the responsible clinician has already granted leave under s.17. [2] Even if on the face of it, such recommendations might seem pointless, Upper Tribunal Judge Johnston noted that:

> *the discretion given to the tribunal to make a recommendation is designed to identify the best way forward for the patient. If a patient has one form of leave, for example escorted leave, the tribunal when looking at the best way forward must be able to recommend that he is granted unescorted leave. Successful unescorted leave will facilitate discharge on a future date as the patient may show his treating team he is able to manage this successfully without restrictions. That leave is quite different from escorted leave.*

Short note: Schrodinger's cat and mental disorder

The (distinctly complicated) decision of Upper Tribunal Jacobs in *AN v St Andrew's Healthcare and SSJ* [2026] UKUT 32 (AAC) concerned the situation where a First Tier Tribunal was considering a deferred conditional discharge. It had made a provisional determination that patient did not have a mental disorder, but that it was appropriate for him to be liable to recall, subject to specified conditions. Matters then stalled. The assertion was made that the patient was being unlawfully detained thereafter, but Upper Tribunal Jacobs ultimately rejected that conclusion, and also that the Tribunal was entitled to revisit its conclusion in relation to the existence (or otherwise) of mental disorder before making a final decision. As UTJ Jacobs noted, "[]*f the issue arises whether a tribunal should make a different finding at a reconvened hearing, fairness requires that the patient be given notice that the issue arises*" (but, on the facts of the case, that AN had had such notice).

CQC Monitoring the Mental Health Act in 2024-2025

The CQC has published its annual report on its activities monitoring the Mental Health Act 1983 in England. Its themes of overstretch, poor quality environments, and unlawful practices (especially around unlawful deprivation of liberty) are familiar, but no less depressing, In

[2] Note, Arianna having been involved in the case, she has not contributed to this note.

respect of unlawful deprivation of liberty, this passage in particular stood out:

> *De facto detention*
>
> *Our MHA reviewers expressed their concerns that too many people, especially those on wards for older people, were deprived of their liberty without clear legal authorisation. They explained that this can happen when a person is kept in hospital while not being formally detained under the Mental Health Act or having a Deprivation of Liberty Safeguards authorisation in place to provide an alternative authority to keep them detained. As discussed in our State of Care report, applications to authorise the deprivation of a person's liberty have increased significantly over the last decade, often resulting in lengthy delays. MHA reviewers said that this practice has become so common it is "almost normalised". Where patients are deprived of their liberty without a legal authorisation in place, they have no legal framework to use to appeal the deprivation of their liberty or de-facto detention. They also have no right to support from an Independent Mental Health Advocate to help them understand their rights, or to support them in raising concerns about their situation.*

Learning disability and discharge from mental health hospitals – progress in Wales

The Welsh Government has published an update on its progress securing better support for those with learning disabilities, alongside a report from the Learning Disability Ministerial Advisory Group's Stolen Lives Task and Finish Group. The report makes very powerful reading – and sounds the alarm both in relation to the extent to which discharge from hospital into 'social care detention' can replicate precisely the same problems as experienced in hospital, and also in relation to the direction of travel in terms of the Mental Health Act 2025. As the report notes:

> *The Mental Health Act (1983) (MHA) is the primary law governing the assessment and treatment of people with mental health conditions in the UK, especially when they are detained in hospital. The term 'mental disorder' in the MHA (1983) is currently defined to include learning disability and autism, even though they are not mental health conditions. This means people can be detained under the MHA (1983) when they do not have a mental health condition, which is a significant point of discrimination. Mental health reform aims to change this by linking Community Section 3 to 'psychiatric disorders' only. However, without investment in community housing and support many people could remain in hospital under the Deprivation of Liberty Safeguards (DoLS) system, with no right to s117 aftercare. This is a system already under pressure. There might also be an increase in forensic detentions with individuals held under criminal law for behaviours that could be better addressed in a community-based setting. It is important that Welsh Government plans for mental health reform and any unintended consequences of the proposed Mental Health Bill.*

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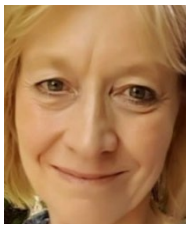

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex is speaking at a conference organised by St Christopher's Hospice on Mental Capacity in Palliative Care on 9 March. The conference is in person (in London) and online; for details and to book, see here.

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 March. 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.

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