



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.

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

Property and Affairs webinars	2
ACC guidance from the Office of the Public Guardian.....	2
Supporting customers who may not be able to make their own decisions.....	4
Court of Protection Property and Affairs Users Group	4

Property and Affairs webinars

Members of the 39 Essex Chambers Court of Protection property and affairs team are doing a series of webinars on matters spanning the spectrum of issues that arise in this area. Previous and future webinars can be accessed via [here](#).

ACC guidance from the Office of the Public Guardian

On 9 January 2026, Office of the Public Guardian (OPG) published a [guidance note](#) to "set out the Public Guardian's position on the Re ACC judgment and the actions OPG expect deputies to take to ensure compliance." The guidance note caveats that it is not legal advice, and it is largely a summary of the ACC judgment.

It summarises the judgment on the general authority of deputies "encompassing the common or ordinary day to day tasks that are required to administer P's estate effectively. Deputies must consider when taking property and financial decisions on behalf of P whether the action in question falls within the scope of general authority or whether specific authorisation is required from the court. The deputy acts at their own personal risk if they act outside of their authority." The guidance note sets out the text of the standard property and affairs deputyship order, and states the position of the OPG that "the deputy has no authority to perform any of the

above activities on behalf of P unless the relevant clause is included in the order." The deputy "may undertake ordinary non-contentious legal tasks that are ancillary to the authority conferred by the order including obtaining legal advice," preparing a tax return, discharging P's responsibilities as a tenant, and applying P's funds to pay for care including employment contracts of directly employed carers.

However, "[s]pecific authority from the court is required to carry out litigation on behalf of P unless the proposed litigation is in the Court of Protection in respect of a property and affairs issue or to seek direction in respect of a personal welfare issue." The guidance note sets out the judgment's statement on what constitutes general authority and what requires specific authority. "Specific authority will also be required to use P's funds to reimburse a third party instructed to act on behalf of P. This includes costs incurred by a member of P's family."

Where a deputy wishes to instruct a member of their own firm for a work anticipated to cost more than £2,000 plus VAT, the deputy should obtain quotes from appropriate providers (including the deputy's firm) and use the provider whose services are in the best interests of P where reasonable and proportionate, or seek prior authorisation to use the deputy's own firm.

If P has capacity to give instructions around a piece of work and its costs, P may instruct the

deputy or deputy's firm without further authorisation.

The guidance note states the following on the OPG's position:

OPG expects any decisions made by deputies in relation to Re ACC to be outlined in the annual report.

1. Existing deputies

The judgment makes clear that there is a continuing expectation that deputies will consider, in detail, the limits of their own authority and address any potential conflicts of interest. Authorisation is required from the court for all on-going and future work which falls outside the authority of the deputyship.

Deputies should obtain three quotes if they wish to instruct a member of their own team to carry out work on behalf of P. They must apply to the court for authorisation in any case where projected costs exceed £2,000 plus VAT. The deputy should make a proportionate decision in instances where obtaining three quotations would cost more than the proposed work. In such cases the deputy must provide details of their decision in the annual report. There may be some instances where it is not possible to obtain three quotations. In these cases, OPG will take a proportionate approach and consider whether to refer the matter to the court. OPG does not envisage the need for deputies to make applications for retrospective authorisation in any cases completed prior to the release of the judgment, but this will be considered on a case per case basis to ensure P's best interests are being met.

OPG's position is that the positions set out in Re ACC and Others in relation to conflict of interest extend to any instance where a deputy is considering

the procurement of services for P which may include provision from the deputy's own firm and hence constitute a potential conflict of interest.

The judgment states that in personal welfare matters, other agencies, such as local authorities and the NHS, who do not need court authorisation to carry out urgent work outside the scope of the deputyship may be better placed to act. OPG expects deputies to consider whether they can ask someone else to handle the personal welfare issue and refer the issue in question to those agencies.

2. Prospective deputies

Prospective deputies should consider whether there is a potential need to instruct someone else to provide advice or carry out legal tasks on behalf of P at the time they apply to be appointed. If their own firm provides the service and they wish to instruct them they should include a request for specific authority to do so, subject to a specified costs limit, with their initial application. The court will decide whether this is in P's best interests, the period of the authorisation, and the level of expenditure.

Where a prospective deputy has been granted authority to instruct someone else, but not specific authority to instruct their own firm, the deputy must obtain three separate quotations from appropriate providers, one of which can be from their own firm. The deputy should then make a best interests decision as to which provider best meets the needs of P, and if they still wish to instruct their own firm, the deputy should make an application to the court for specific authority if anticipated costs are in excess of £2,000 plus VAT.

Supporting customers who may not be able to make their own decisions

This guidance has been published by the Office of the Public Guardian (OPG) and the UK Regulators' Network (UKRN).

Purpose and scope: The guide helps staff in regulated markets (especially in financial services and utilities) understand how to support customers who may lack capacity to make decisions themselves. It covers how to work with legal arrangements such as Lasting Powers of Attorney (LPAs), Enduring Powers of Attorney (EPAs), deputyship orders, and guardianship court orders, and explains their legal context under the Mental Capacity Act 2005.

The document offers helpful scenarios and links through to the MCA Code of Practice.

Key principles: Staff are not expected to assess a customer's capacity but should know how to recognise and process valid legal documents that authorise someone else (an attorney, deputy or guardian) to act on behalf of a customer. Organisations should update their records accordingly and treat attorneys or deputies as the customer's authorised representatives once documents are verified. Reports should be made to the OPG if there are concerns about the conduct of an attorney, deputy or guardian.

LPAs: The guide explains how to check whether an LPA is registered and valid, how to interpret its scope (e.g., property/financial or health/welfare decisions), and how attorneys should act within any instructions and conditions set by the donor.

EPAs: Although older than LPAs, EPAs still authorise decision-making for property/financial affairs; staff need to check registration and any restrictions.

Deputyship orders: Court orders appointing a deputy when someone has already lost capacity;

the guide explains how to verify validity and what deputies are authorised to do.

Guardianship orders: Newly included in this edition, these are explained similarly with instructions on checking authority and documentation.

How attorneys and deputies must act: Attorneys and deputies must support the person to make their own decisions where possible, act in the person's best interests, consider their wishes and feelings, and act only within the legal powers conferred by the document or court order. The guide explains how staff should interact with these representatives and how to clarify what decisions they are authorised to make.

Practical support: The guide includes FAQs, examples, checklists and procedural advice aimed at making customer interactions smoother and helping organisations build internal policies that reduce confusion and improve outcomes for vulnerable customers. Good examples include how to check if an LPA is registered or what to do in circumstances where a replacement attorney starts to act.

Court of Protection Property and Affairs Users Group

The minutes of the July 2025 P&A users group meeting are now [available](#).

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. 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, 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](#).

**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 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.

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](#)