



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](#).

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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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### Capacity key elements videos

Alex has updated and added to his 'key elements' videos on his website on such matters as capacity and best interests: see [here](#).

### Terminally Ill Adults (End of Life) Bill

The increasingly complex progress of the Bill can be followed on Alex's website [here](#).

### The UK National Preventive Mechanism 2024-25 Annual Report

The UK National Preventive Mechanism is made up of 21 organisations, which independently monitor different settings of detention across the UK, and a central team, which supports and leads NPM bodies in delivering their responsibilities under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The NPM undertakes collective work to prevent ill treatment of detained people in the UK, promotes awareness and understanding of OPCAT principles, and works with international mechanisms and organisations with a mandate to prevent ill treatment of detained people.

The NPM published its [2024-25 Annual Report](#) on 11 December 2025, highlighting risks of inhuman and degrading treatment of people in

UK detention settings. This includes children and adults deprived of liberty under mental health and mental capacity laws, as well as individuals detained in immigration detention, prisons, and police and court custody.

The report warns that systemic failures continue to undermine efforts of many dedicated staff to uphold people's dignity, raising concerns about potential breaches of the UK's obligations under the Torture Convention.

The report identifies a wide range of issues, including:

#### ***Institutionalisation and closed cultures in care settings***

*People with a learning disability, and autistic people, continue to be detained in hospitals, even when their deprivation of liberty offers no therapeutic benefit. Long stays in institutional settings can erode connections with family and friends, and restrict basic freedoms to make everyday choices and decisions about treatment. Closed cultures (cultures where it is unlikely that many outsiders go in, [CQC 2022](#)) in health and social care risk normalising poor practice and perpetuating harm.*

## The Autism Act

No-one in our experience has heard of this 2009 Act. In this context, the House of Lords Autism Act 2009 published a report in November 2025 entitled Time to deliver: The Autism Act 2009 and the new autism strategy. The Government's response was published in January 2026. It is of some use as an overview of measures taken across Government in relation to addressing the needs of autistic people, although concrete additional commitments do not leap off the page. The response addresses the December 2025 launch of the independent review into mental health conditions, ADHD and autism, a review which is likely to have very significant weight in determining the scope of future commitments which cost money.

## LeDER revisited

Somewhat embarrassingly, the (very delayed) 2023 LeDER report had to be withdrawn very shortly after publication when it became clear that it contained a significant number of data errors – leading, inter alia, to an underestimation of the proportion of deaths classed as avoidable particularly in 2023 (40.2% vs 38.8%). However, as the Government made clear to the House of Commons when the report was republished on 27 January 2026

*The headline findings of the updated 2023 LeDeR report remain consistent with those previously published. The updated analysis reaffirms that people with a learning disability continue to experience significant health inequalities: on average, they die 19.5 years younger than the general population and are almost twice as likely to die from an avoidable cause of death. This remains unacceptable, and tackling these disparities continues to be a*

*priority for this Government.*

## Cannabis, criminality and capacity – a Jersey perspective

*Re E* [2026]JRC002 (Jersey Royal Court (A. R. Binnington, Esq., Commissioner, and Jurats Ronge and Berry))

*Deputies – property and affairs*

### Summary<sup>1</sup>

In the Capacity and Self-Determination Law 2016, Jersey has a framework which looks a great deal like the Mental Capacity Act 2005; the Jersey courts look to the caselaw in England & Wales to help them navigate some of the dilemmas that they are encountering in considering capacity and best interests. The decision in *Re E* [2026]JRC002 provides an example – we suggest – where the English courts might well wish to look south.

The case was brought by the Delegate (the equivalent of a Deputy) for a young man, E, seeking

*the Court's blessing of her decision to continue to pay pocket money to E should she deem it appropriate to do so. Described in that way the application would appear to be straightforward. However, the circumstances of the application are highly unusual, in that there is a distinct likelihood that E will use the pocket money given to him to purchase cannabis for his personal consumption, which is both illegal and adverse to E's health.*

As the Royal Court described it:

*14. The Delegate is, understandably, concerned that funds advanced to E*

<sup>1</sup> Tor having given advice cited in the judgment, she has not contributed to this note.

may be spent on cannabis, alcohol, or, potentially, other illegal drugs. The Delegate is similarly concerned that depriving E of funds could lead to a deterioration in his condition due to the loss of the small amount of independence it affords him and/or cause him to take detrimental steps, such as getting into debt, in order to procure cannabis and maintain his social life.

15. The issue was usefully summarised by Dr Stoffels in her report for the Court, dated 31 October 2025, in which she stated:

*"Professionals are therefore faced with a profound ethical dilemma. On one hand, continued access to substances directly contributes to physical and psychological harm, psychotic relapse, and financial exploitation. On the other hand, strict prohibition or withdrawal of all funds has historically precipitated aggression, non-engagement, escalation of risk-taking behaviours, and covert substance seeking through unsafe channels.*

*From a clinical and safeguarding standpoint, the MDT and financial deputy are therefore required to balance two competing imperatives:*

- i) Protection from harm - minimising the risks of intoxication, psychosis, and exploitation; and*
- ii) reduction of immediate crisis behaviours - preventing escalation, aggression, or absconding when access is restricted too abruptly.*

*The current approach, maintaining a limited weekly*

*allowance (£50) under close deputy and staff supervision, does not imply endorsement of substance use but is instead a harm-reduction measure. It allows a degree of autonomy while containing the scale of potential damage and preserving engagement with care. This is a pragmatic, ethically proportionate response in an individual who lacks capacity to make safe decisions about drug use and finances, yet whose behavioural volatility and disinhibition make absolute restriction unsafe in practice."*

In the absence of Jersey precedent, the Delegate obtained advice from English Leading Counsel, Gideon Cammerman KC and Victoria Butler-Cole KC on criminal law and the English Court of Protection approach respectively. Having considered both the arguments put forward by the delegate and the Attorney General acting (in rough English analogy) as Advocate to the Court, the Royal Court concluded as follows:

*70. As we have already noted, the Delegate was faced with having to make a difficult, and somewhat unusual, decision. She had to balance the risks of continuing to pay an, albeit modest, sum in pocket money in the knowledge that E might use it to purchase illicit cannabis, against the risk that stopping the pocket money would negatively impact his relationship with his carers and potentially lead to further acts of criminality by him.*

*71. We took into account, in particular, E's wishes to continue receiving pocket money and thus to have some degree of independence and the steps being taken by his carers to seek to reduce the likelihood of him purchasing cannabis.*

*72. In the circumstances, having*

*considered the evidence placed before us, we were satisfied that the decision taken by the Delegate was in E's best interests. Had we been applying the Re S test [a test under Jersey law which had been applied previously when determining whether to 'bless' the decision of a delegate] we would also have approved the decision.*

73. *For the avoidance of doubt, our decision is not to be regarded as the Court determining that it is in E's best interests to commit a criminal offence or declaring that illegal conduct is lawful.*

74. *We accordingly made the order requested, namely that:*

*"The Court approves the decision of the Delegate to advance funds to ("E") in the form of pocket money, currently £50 per week, in circumstances where, in the exercise of the Delegate's discretion, she considers it in E's best interests to do so notwithstanding the risk that E may spend the funds advanced on illegal cannabis (or other illegal substances) and/or alcohol. The discretion of the Delegate shall continue to be guided by the advice of the Multi-Disciplinary Team responsible for E's welfare, particularly Dr Martine Stoffels and Mrs Verity Boak (or such other professionals as may from time to time act in a similar capacity)."*

## Comment

As noted at the outset, this is a decision which we suspect – and hope – will be placed before the English courts in relatively short order, representing as it does a detailed analysis of a not uncommon dilemma, and an analysis which

was properly tested through the role of the Attorney General. It also relied heavily upon, and commented upon, English case-law. Of particular relevance, we would suggest, is approach taken to the decision in *EG & Anor v P* [2024] EWCOP 80 (T3), a case about which we have previously expressed some concerns as regards its approach to the Proceeds of Crime Act. In a passage which clearly satisfied the Royal Court, Gideon Kammerman KC identified that the approach taken in *EG* had been:

*simplicistic. The payer of the drugs debt in EG is unlikely to attract choate criminal liability under section 328 POCA. As set out above, the delegate's funds (or for that matter the funds of the payer in the case of EG) are not criminal property in their hands. Those funds may well become criminal property in the hands of the drugs dealer, and an agreement furnishing him with funds that are later rendered criminal by his possession of them would lead to an offence by him, and therefore potential inchoate liability by their donor. As with the payer of a ransom, English law has long recognised a distinction between (1) doing an act for good reason, knowing that the outcome may be the commission of an offence by another, and (2) attracting liability by either agreeing with that other person to commit an offence or doing something that perhaps you don't want to but is virtually certain to result in the commission of an offence.*



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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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## 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.

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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](mailto:marketing@39essex.com).

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