



Welcome to the April 2026 Mental Capacity Report. It takes a different form to normal as our editors' commitments means that we cannot do more than provide an overview of some key matters, with more to follow (where necessary) in May. We do, however, have a bumper Scotland Report to make up for the lack of such a Report last time – and we would, commend the Scotland report to readers from other jurisdictions as it contains both comparative matters of interest, and research of wider reach than just Scotland.

A reminder that we have updated our unofficial update to the MCA / DoLS Codes of Practice, available [here](#), and that, whilst Chambers have launched a new and zippy version of our [website](#), all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via [here](#).

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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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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Sir Andrew McFarlane

Sir Andrew McFarlane has stood down as President of the Family Division and the Court of Protection, having served in both roles for 8 years. Whilst much of the attention is likely to be focused on Sir Andrew’s role as the President of the Family Division, we would like to say a ‘thank you’ on behalf of the Court of Protection as well for all the work that he has done in different ways (often behind the scenes) to support the Court. Alex, in particular, will never forget his first proper encounter with Sir Andrew by the bedside of (probably) the most complex ‘P’ either will ever

come across. His ability to remain entirely human in his interactions with those at the centre of proceedings, whilst never losing sight of his position and responsibilities as judge, was one that he demonstrated again and again in different contexts, to the benefit of us all.

Thank you very much, Sir Andrew.

Townsend

The ramifications of the *Townsend* decision continue to be felt across healthcare, and many are waiting with very considerable interest to see whether the matter goes further. In the meantime, readers may be interested to see this

[webinar](#) in which three members of Chambers consider the case.

Capacity as a social construct

The decision of HHJ Rogers in Nottinghamshire *County Council v JW & Anor* [2026] EWCOP 13 (T2) is both a very useful analysis of an expert report on capacity, and a – rare – case in which the judge examines in detail both the causative nexus and whether an impairment or disturbance (in JW's case, essentially low IQ) is sufficient to satisfy the test in the MCA 2005. For more, see [here](#).

Deprivation of liberty statistics

The DoLS statistics for [England](#) (now under the management of DHSC) and for [Wales](#) for 2024-2025 have now been published. They show, as ever, that those charged with discharging assessment functions are (to use a technical term) working their socks off, but the system is still entirely unable to cope. By way of example, the average length of time to complete the authorisation procedure in England was 126 days. Whilst that is undoubtedly an improvement on the previous figure of 144 days, it makes a mockery of the statutory timeframe of 21 days. All discussions of whether 'proportionate' assessments are appropriate (including, for instance, whether sight of the person is actually needed for all repeat authorisations) need to take place against a backdrop of the fact that it is distinctly unlikely that anyone who is not actively objecting to their deprivation of liberty will have their situation scrutinised.

Separately, the Court of Protection statistics for the most recent quarter have now been published. They show that for October – December 2025, 1,315 applications were made under the so-called *Re X* process for authorising deprivation of liberty for those who are too young

or in the wrong place for DoLS. Even taken together with the 276 applications for s.16 orders relating to deprivation of liberty, these figures undoubtedly pale into insignificance compared to the numbers who – according to *Cheshire West* – are deprived of their liberty.

PRACTICE AND PROCEDURE

Personal welfare deputies

There having been no substantive decisions about the personal welfare deputies for a while, three have now come along at once. We discussed the decision in *Parr* in the last Report; since then we have:

1. *Re XY* [2025] EWCOP 55 (T2), on the scope of the authority of personal welfare deputies;
2. *Re HDEB* [2026] EWCOP 12, taking a rather different approach to the appointment of personal welfare deputies than did *Parr*.

The second of these decisions is under appeal – we hope that it can be routed directly to the Court of Appeal, as otherwise we will have a further, potentially inconsistent, Tier 3 decision about appointment. For more on both of these, see [here](#).

CHILDREN'S CAPACITY

Deprivation of liberty and children

The Court of Appeal in *Re T (Inherent Jurisdiction: Deprivation of Liberty)* [2026] EWCA Civ 307 reviewed the (spiralling) number of cases coming to the so-called National DoL list, in a context where there is an acute shortage of secure accommodation. Baker LJ (giving the sole reasoned judgment of the court) identified that:

29. *Frequently in these cases [...] the court is faced with the problem that the placement is not capable of meeting all*

of the assessed welfare needs of the child but, by reason of a lack of appropriate resources, is the only placement available. In those circumstances:

"The child's welfare needs must be considered both holistically and realistically, which approach demands that the court consider the likely consequences of any order it does or does not make. Within that context, to leave out of the best interests equation the lack of availability of an alternative course of action with respect to L's welfare would be to artificially constrain the court from evaluating fully the extent to which it is in L's best interests for the court to authorise the current restrictions that constitute a deprivation of his liberty" (ibid, paragraph 74).¹

Further, in such circumstances, it was necessary to courts to "grapple with the actual consequences for [the child] if an order was not made authorising measures which would enable [them], in the short-term at least, to remain in [their] current placement," such that, on the facts of the case "[t]he 'imperative considerations of necessity' required the court to authorise the deprivation of T's liberty at L House notwithstanding that it is currently unregistered, provided there is compliance with the PFD's Guidance" (paragraph 46).

For a further example of the problems that are occurring at the moment, see the judgment of McKendrick J in *Re BA (A Child) (DOLS in Hospital) [2026] EWHC 653 (Fam)*, discussed further here, concerning a child who, since January 2026

has been deprived of her liberty in an accident and emergency ward of an

acute hospital in London. That is to say she has been detained in a windowless room in a busy hospital for nearly two and a half months. She is accommodated and cared for there, as there is nowhere else to do so.

For further discussion of the case, including the necessity clearly to identify the basis for Article 5 purposes of the deprivation of liberty, see [here](#).

Working Together and the myth of 'non-statutory' services

The Department for Education has published an updated version of Working Together to Safeguard Children ('Working Together'), the statutory guidance on multi-agency working to support and protect children in England. It is a very important, wide-ranging document; it does, however, perpetuate a problematic myth that services (including Family / Early Help) can be provided on a 'non-statutory' basis. For more as to why this is wrong, and the implications, see [here](#).

THE WIDER CONTEXT

The Frontal Lobe Paradox: Practical Guidance for Lawyers

Following on from a multi-disciplinary [webinar](#) put on by the Court of Protection Bar Association, a multi-disciplinary group of experts has produced The Frontal Lobe Paradox – a Practical Guide for Lawyers. Whilst the webinar materials are restricted to members (cue the thought that if you are a barrister, we strongly urge you to [join](#) the association), the Practical Guide is free to all

¹ A quotation from *Tameside Metropolitan Borough Council v C & Ors [2021] EWHC 1814 (Fam)*.

to use – and is hopefully useful for more than just lawyers.²

Mental capacity, homelessness and multiple disadvantage

As it enters its closing stages, the project leaders of at a KCL-led project looking at the use of the Mental Capacity Act 2005 with people experiencing multiple exclusion homelessness in England held a webinar on 25 March. The presentation can be found [here](#) to share emerging findings; further homelessness events in this series are listed [here](#).

Stronger visiting rights in England

The Government has announced plans to strengthen visiting rights in health and care settings following a review of the relatively recently introduced regulatory change which was supposed to have brought this about.

Resources that health and care settings will receive include:

- An explainer sheet or poster for people that details their visiting rights under Regulation 9A and routes to complain if they feel these are not being followed
- Draft advice for care homes, hospitals and hospice providers to use to explain any necessary restrictions to residents, patients and family members
- A public-facing decision-making process map which sets out important considerations for providers when making decisions about restrictions

² See also the "Frontal Lobe Paradox Field Guide" produced by Dr Ben Marram which has also, coincidentally, recently come out.

The announcement also states that

Ministers are exploring bringing forward proposals for legislating visiting rights as part of wider reform work. This would further strengthen the framework around visiting rights - embedding a culture of open visiting and reinforcing the right to be supported by loved ones in settings across health and social care.

Adult safeguarding, Dame Louise Casey and gaps in the law

Dame Louise Casey, leading an independent commission into adult social care, has recently (3 March) written to the Secretary of State for Health and Social Care, asking for immediate action on safeguarding, dementia and motor neurone disease. In relation to the former, she has asked that the DHSC:

Lead an urgent review of existing adult safeguarding statutory duties and powers, to test whether the current framework provides sufficient clarity and leverage in high-risk situations.

In the appendix to her letter, she identifies that this could include:

- *clarifying what triggers the Section 42 duty for local authorities to make inquiries if it is suspected an adult with care needs is experiencing, or is at risk of, abuse or neglect*
- *considering whether mechanisms such as powers of entry would strengthen safeguarding while remaining consistent with adults' rights;*

- *strengthening the links between safeguarding, inspection and regulation, potentially through clearer pathways for how SAR findings can inform regulatory action and the focus of inspections.*

Wes Streeting has written to confirm that this review will be carried out.

As is discussed here, it might be thought that the Law Commission would be very well placed to carry at least some of this work.

The COVID-19 inquiry

The most recent report published, addressing the impact on healthcare in the UK, contains two recommendations made by Baroness Hallett that resonate extremely strongly with our experiences at the time, the first relating to triage and the second to DNACPR recommendations. For more, see here.

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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 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 your event

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 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 England & Wales events. For Scottish events, we invite donations to [Alzheimer Scotland Action on Dementia](#).

Our next edition will be out in May. 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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