



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

(1) In the Health, Welfare and Deprivation of Liberty Report: Senior Judge Hilder lays down her baton; attorneys and failures to consult, and a research corner on anorexia and last resort options;

(2) In the Property and Affairs Report: new OPG guidance, 'third sector' deputyship and a reverse indemnity tangle;

(3) In the Practice and Procedure Report: notes from a fireside chat with DDJ Flanagan, and litigation capacity in the absence of subject-matter capacity;

(4) In the Mental Health Matters Report: conditional discharge and deprivation of liberty – the new regime, and conditional discharge into hospital;

(5) In the Children's Capacity Report: parental responsibility and confinement – the need for an appellate judgment;

(6) The Wider Context: assisted dying / assisted suicide update, Strasbourg's latest word on withdrawing life-sustaining treatment and mental capacity reform in New Zealand.

Circumstances beyond our control mean that we do not have a Scottish report this time.

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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Senior Judge Hilder

We are sad to note that HHJ Hilder will be stepping down as Senior Judge of the Court of Protection. We await details of precisely when this will be, and we will at that point publish a full appreciation, but, amongst other things, we owe her a huge debt of thanks for the work that she did during the pandemic to keep the Court of Protection functioning.

The Court of Appeal, clinical judgment and best interests decisions

As we go to press, we understand that it is likely that the Court of Appeal will be handing down a significant judgment about this issue in the week of 2 March. We will update via the [usual channels](#) when the judgment is out.

Short note: attorneys, failures to consult and consequences

Cwm Taf Morgannwg University Health Board v RW & Anor [2026] EWCOP 10 (T3) provides a snapshot of the realities of navigating health and welfare decision-making of a kind that rarely

makes it to court.¹ In short compass, it concerns a failure by a hospital to consult with an attorney regarding decision-making about life-sustaining treatment. In the context of a considerable focus on understanding about the MCA in Parliament at the moment, it is important to emphasise that failures to apply the Act are not uncommon, including (here) failures to comply with a clear statutory duty to consult. What is uncommon is that, in this case, the attorney was a professional attorney – an extremely experienced solicitor – who sought to move heaven and earth to correct the situation. The full story is complicated, difficult, and is likely to be the subject of detailed examination in an inquest. For present purposes, what is of importance is both that the Health Board acknowledged its unlawful behaviour in failing to comply with the MCA 2005 by consulting with the attorney, and that it was penalised in costs for doing so on the basis that it was only the bringing of an application by the attorney which led to changes in the man’s care and treatment.

It is very much to be hoped that the results of this case will be that this Health Board hews very

¹ Arianna having been involved in the case, she has not contributed to this note.

much closer to the law (and, it appears, its own policy); is it too aspirational to hope that other health bodies will recognise the case as a 'near miss,' so as to carry out their own work in this regard?

Deprivation of liberty in acute hospitals

Drawing heavily, and with credit, on the Law Society's guidance on deprivation of liberty, West Midlands ADASS has published [guidance](#), written by Lorraine Currie, for hospitals and local authorities working together to process applications for deprivation of liberty in acute hospitals. This is an area that we are aware causes very considerable tensions, and the "myth-busting" at the end is very helpful indeed. We very strongly suggest that this is a document which can, and should, be read simultaneously by the relevant leads for local authorities and acute trusts so as to identify whether or not there is a shared understanding of both the substantive law relating to deprivation of liberty here, and of the consequential procedural obligations.

National Mental Capacity Forum Annual Report 2023-2025

Margaret Flynn, the Chair of the National Mental Capacity Forum, has published her [annual report](#) (in fact, a double issue) for 2023-2025, drawing on both her own tireless work and that of members of the Forum. Amongst other highlights, contains observations about deprivation of liberty, case studies illuminating both good and bad practice under the MCA 2005, a year in cases (by Alex), work around a consensus statement on DNACPR, reflections on partnerships and networks, and 'back to basics' around DoLS.

Artificial intelligence and assessments

The Ada Lovelace Institute has published a

detailed and disturbing report entitled "[Scribe and prejudice? Exploring the use of AI transcription tools in social care.](#)" Whilst much of its focus is on children's social care, it also addresses adult social care. Of particular concern should be Insight 4:

Social workers assume full responsibility for AI transcription tools, but perceptions of the tool's reliability, accuracy and 'human in the loop' vary significantly. The use of AI transcription tools to generate documents creates new mechanisms for people's experiences to be misrepresented in official records. Some social workers observed instances where AI-generated misrepresentations could directly lead to harm. Other social workers were less aware of possible AI risks. This creates inconsistencies in the oversight and evaluation of AI-generated documents.

An example of a hallucination was given in the report:

For example, one social worker recounted an instance where, when using an AI transcription tool to create a summary, the tool had incorrectly 'indicated that there was suicidal ideation', but 'at no point did the client actually, you know, talk about suicidal ideation or planning, or anything'.

Our clear view is that:

- (1) Any reliance upon AI which goes beyond transcription of interviews into the completion of assessments of capacity or best interests (even with 'humans in the loop') are profoundly problematic.
- (2) Until and unless the courts have pronounced upon the acceptability of the use of AI in relation to materials put before them (in particular the COP3 form), any reliance upon such AI assistance – especially without

making it clear that it has been used – brings with it significant legal risks.

Research corner: Last resort as a justification for compulsory nasogastric tube feeding of adults with anorexia nervosa

In the context of ongoing debates about both 'under' and 'over' treatment in relation to anorexia, we draw attention to [this article](#) by Rachel Jenkins and Emma Cave. As the abstract makes clear:

Nasogastric tube feeding may be imposed on adults with anorexia nervosa without their consent. Although it can preserve life, it can also cause significant and lasting distress, and it is widely accepted that the intervention should be employed only as a last resort. However, the concept of last resort remains insufficiently defined. Clinical guidance and case law in England and Wales use the term to guide decision-making, but the thresholds by which a particular action can be considered a last resort are varied and ambiguous. Informed by human rights principles, this article articulates the relevant thresholds for last resort decisions relevant to detention, restraint, and high-risk or speculative treatments, clarifying operative meanings by way of a typology.

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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](#).



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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](#).



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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.



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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 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 April. 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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