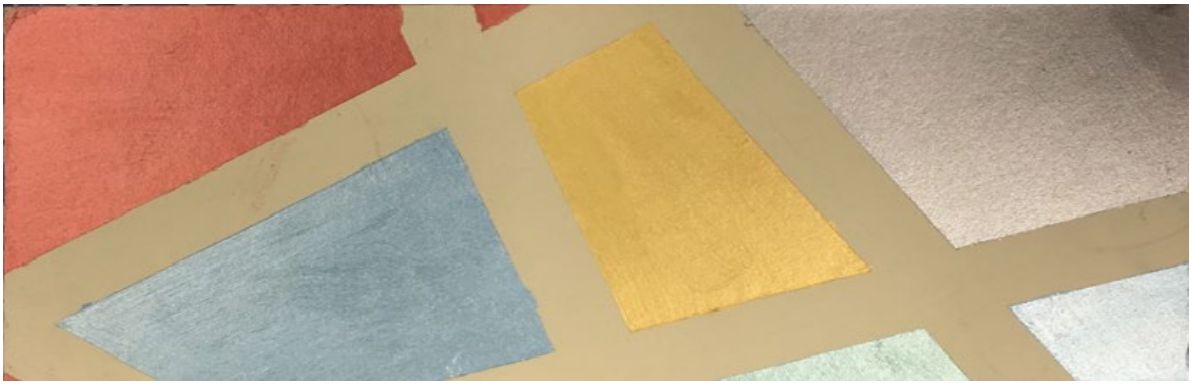

Welcome to the March 2026 Mental Capacity Report. Highlights this month include:

(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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Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
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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.

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Assisted dying / assisted suicide

Jersey passed the Assisted Dying (Jersey) Law on 26 February 2026. Reflecting the constitutional complexities involved, whether it will be implemented will depend, in the first instance, on whether it receives Royal Assent from the King in the United Kingdom. The equivalent legislation in the Isle of Man is still waiting for such Royal Assent nearly a year on, in the face of concerns raised by the (Westminster) Ministry of Justice about its compliance with the UK's obligations under the ECHR.

In light of the fact that it appears increasingly likely that the Terminally Ill Adults (End of Life) Bill will not clear Parliament before the end of the current session, it is perhaps worth making the observation that it would not be easily possible for the Jersey legislation to be replicated in a Bill before the Commons in Westminster. Such a course might hold attractions for many, given the fact that it has been developed as a Governmental initiative, with detailed external oversight, and input throughout from the bodies required to implement it. However, it is fundamentally different to the Terminally Ill Adults (End of Life) Bill in a number of ways, including for the administration of the relevant substance by the medical professional, and for so-called 'waiver of final consent,' to cater for the situation where the person loses the relevant capacity before the point of assistance. The Parliament Act procedure could only be used (as some have suggested it could / should be used) to require the House of Lords to accept legislation coming from the House of Commons if the legislation has been passed twice in the same form.

A recording of and the slides from the webinar on the Westminster Bill put on by the National Mental Capacity Forum on 25 February 2026 can be found here.

Further developments on the Westminster Bill can be followed on Alex's website here.

Withdrawing clinically inappropriate life-sustaining treatment – the latest Strasbourg word

In light of the cases that are coming before the Court of Protection about the dividing line between treatments which are clinically inappropriate (and hence are not on the table), and treatments which are not in the person's best interests (and hence are in principle on the table), *Medmoune v France* [2026] ECHR 27, is of no little importance as the latest Strasbourg

word on the position. The judgment is in French (the translations below are informal ones via Google Translate), but concerned a patient who had sought to make an advance directive seeking (in effect) to be kept alive at all costs; in this he was supported by his family. After he had lost capacity following a serious road traffic accident, the medical professionals considered (in effect) that life sustaining treatment was no longer clinically appropriate, and sought to withdraw it in line with the relevant French law.

The ECtHR noted in its judgment that:

> *48. Furthermore, the Court points out that, in the case of the cessation of treatment which artificially sustains life, reference must be made, in the context of the examination of a possible violation of Article 2, to Article 8 of the Convention (see Lambert and Others, cited above, § 142). However, it has held that, while Article 8 guarantees the right to personal autonomy as an element of the right to respect for private life, it does not oblige the Member States to confer binding legal effect on advance directives (see Lindholm and the Estate after Leif Lindholm v. Denmark[, no]. 25636/22, § 86, 5 November 2024), this question falls within their discretion (Pindo Mulla v. Spain[GC][, no]. 15541/20, § 153, 17 September 2024). Furthermore, the Council of Europe's guide "on the decision-making process relating to medical treatment in end-of-life situations", which should be taken into account (see Lambert and Others, cited above, § 143), states that "autonomy does not imply a right for the patient to receive any treatment that he/she may request, in particular when the treatment concerned is considered inappropriate[, since] the decision in the field of health care is the result of the meeting of the patient's will and the assessment of the situation by a professional subject to his professional obligations and, in particular, those arising from the principles of beneficence and non-maleficence, as well as justice".*

The ECtHR found the relevant French law to comply, in the abstract, with the requirements of Article 2 ECHR. As regards the specific circumstances of the case, the ECtHR was satisfied that the patient's wishes had been at the centre of the decision-making process, and the views of the family had been appropriately taken into account (see paragraphs 53 and 54), such that "*the medical team took into account the family's opposition to the cessation of care, but considered that, while it could understand it on a human level, it could not endorse it from a medical point of view.*" The court was also satisfied that there had been appropriate mechanisms by which the family could seek to challenge the decision (nb, in England & Wales, and for the reasons set out here, that route is not the Court of Protection if the decision is that treatment is not clinically appropriate). The court appeared to be satisfied that this was a route which was to be used by a person challenging the medical decision – in other words, it did not make any observations about disputes needing to be placed before the domestic courts by the treating body; rather, it was the existence of a potential route of challenge which was important. It was also satisfied that, in the instant case, that route of challenge, once invoked by the family, had been operated appropriately. It therefore found that the patient's rights under Article 2 ECHR had not been violated.

Proxy access to digital health services

The updated NHS England Identity Verification and Authentication Standard for Health and Care Digital, Data, Analytics and Technology Use published in December 2025 contains useful guidance on so-called proxy access to digital services and, in particular, in table 4.2, a clearly defined set of bases of proxy access, covering

the relevant variables (i.e. person with capacity, person lacking capacity but with power of attorney or deputy, and person lacking capacity with neither).

Short note: when does vulnerable not mean vulnerable?

In *Khan v Secretary of State for the Home Department* [2026] EWCA Civ 148, the Court of Appeal made clear that the "Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance" in the First-tier Tribunal did not give rise to free-standing obligations upon the Tribunal, but rather guidance to ensure that parties are able effectively to participate in proceedings and to ensure that their evidence is properly and fairly considered. The Court of Appeal also made clear that it was insufficient simply to assert a vulnerability, as opposed to identifying how that vulnerability on the part of the appellant will affect their ability to give evidence.

Research corner: translating insight – in conversation with Professor Tony David

Some may find of interest Alex's 'in conversation with,' Professor Tony David about his new paper, Insight, the law and psychiatry: Going round in circles or playing nice?. They talk about what 'insight' means clinically, and how law and medicine can have a more productive discussion about applying the concept in a way which better secures the interests of those whose capacity to make relevant decisions may be under examination.

Ending Wardship in Ireland

The National Disability Authority in Ireland has published its new study entitled 'The journey from wardship to supported decision-making: An examination of the process and the experiences of people leaving wardship.' The report, including an Easy to Read version, are available on the NDA website.

Mental capacity law reform in New Zealand

The New Zealand Law Commission has published its final report following its review of adult decision-making capacity law. Alex read the report with particular interest, having had the opportunity to stick his oar in a various stages. Many of the recommendations may have a ring of familiarity for those involved in thinking about mental capacity reform on this side of the world, but two features perhaps stick out:

1. The interaction between 'western' conceptions of mental capacity and Māori conceptions of decision-making, which provide fruitful grounds for considering equivalent interactions in relation to other communities;

2. The clear view of the Law Commission that compliance with the UN CRPD does not mandate abolition of a concept of mental capacity or a framework which recognises and responds to a situation where a person lacks capacity (even with all appropriate support) to make a relevant decision.

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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 a former Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click here.

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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, ICBs 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.

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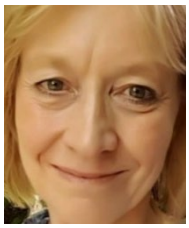
Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership 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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