



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: capacity, presumptions and the Care Act 2014; and the most comprehensive first instance 'run' at AGNI so far;
- (2) In the Property and Affairs Report: deputies and direct payments, and the Court of Protection and the validity of wills;
- (3) In the Practice and Procedure Report: the AGNI effect starts to show in the statistics;
- (4) In the Mental Health Matters Report: HSSIB's investigation into mental health care in the emergency department;
- (5) In the Children's Capacity Report: desperate deprivation of liberty and consenting to confinement;
- (6) In the Wider Context Report: Anglo-Welsh legal differences and asserting your own capacity;
- (7) In the Scotland Report: what listening to children tells us about listening to adults.

A reminder that that whilst Chambers have launched a new and zippy version of our [website](#) which may look unfamiliar, 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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Assisted dying

Lauren Edwards MP's attempt to bring back a materially identical Bill to that proposed by Kim Leadbeater MP was defeated in the House of Commons on 11 September at Second Reading.

Differences between English and Welsh law

The Law Society of England and Wales has produced an exceptionally helpful practice note on the (increasing) differences between the law in England and that in Wales across a whole range of matters. It is available [here](#).

Standard of proof for the short-form inquest conclusion of unlawful killing

The Ministry of Justice is consulting on whether it would be appropriate to consider changing the standard of proof for the short form inquest conclusion of unlawful killing from the civil to the criminal standard. This would reverse the effect of the Supreme Court decision in *R (Maughan) v Her Majesty's Senior Coroner for Oxfordshire* [2020] UKSC 46, although the MOJ emphasises that the consultation is not proposing to make any changes to the position in relation to suicide, the primary focus of case before the Supreme Court.

For more details and to respond (the deadline being 7 December 2026), see [here](#).

Short note: asserting your own capacity

KDS v EUI Ltd [2026] EWHC 2329 (KB) concerned a man, KDS, who suffered traumatic brain injuries in a road traffic accident in 2022; the claim related to a personal injury claim against the deceased defendant driver. KDS considered that he had capacity to conduct the proceedings and instruct his solicitors. When the claim was issue, a 'professional litigation friend' was acting on behalf of KDS, pursuant to a certificate of suitability and report of a neuropsychiatrist stating that KDS lack capacity; however, no court order was made appointing the litigation friend.

Shortly after proceedings were filed, the Claimant filed his own application for the determination of capacity as a preliminary issue, supported by a witness statement from the solicitor he wished to instruct. Updated medical evidence was obtained and a hearing was to be held in August 2026. KDS did not wish to attend a hearing or make direct representations at his own preference; his legal team filed written submissions and put written questions to the medical expert, and the matter was determined on the papers. KDS asserted that he had capacity; his litigation friend took a neutral position; the Defendant essentially put KDS to proof.

The court was without detailed witness evidence from the KDS's family, but did have significant medical evidence which had been filed (which

reached mixed conclusions as to whether KDS had or lacked litigation capacity, with evidence largely focusing on his ability to use and weigh information). The updating report prepared after the Claimant's application appeared to have been detailed and comprehensive, and informed by collateral information from records and KDS's family. Some of the key findings were summarised at paragraphs 30-31:

30 [...] ...Whilst recognising that the Claimant understands the roles of the various parties involved in the litigation and is capable of liaising with his solicitors, she concludes that his poor understanding of the nature and extent of his injuries, and of the way in which they affect his functioning, demonstrates a significant lack of insight. She accepts that the Claimant is capable of making straightforward day-to-day decisions. However, complex decisions arising within litigation of this nature, involving substantial documentation and nuanced considerations, would require significant support. Dr Obinwa concludes that, if information is presented in manageable segments and reasonable adjustments are made, including the provision of regular breaks, the Claimant may be able to understand that information at the time it is explained to him.

31. [...] the Claimant's emotional difficulties, for which the litigation itself acts as a trigger, create substantial barriers to his ability to retain and process the complex information required for effective participation in these proceedings. In her opinion, he "will struggle to hold the

information in mind, manipulate it in order to consider the pros and cons, and also to consider the consequences of his decision". She concludes that the Claimant is unable adequately to process, use and weigh the information relevant to the decisions that arise in the litigation so as to make informed choices. It is following that careful and balanced analysis that she concludes that the Claimant lacks capacity to litigate.

HHJ Howells reminded himself of the presumption of the capacity, but considered the significant expert evidence in the matter, particularly the updated report prepared after KDS's application. HHJ Howells was clear that this conclusion did not mean that KDS could not make decisions in his daily life, and that litigation was itself a significant stressor, and contributed to his lack of capacity in a complex and high value claim. The judgment¹ noted that his legal representatives should keep his capacity under review.

¹ Which makes an interesting contrast with the decision in *TLA v Chelsea and Westminster Hospital NHS Foundation Trust* [2026] EWHC 1751 (KB) covered in the September Report, the different outcomes turning in

large part upon the quality of the expert evidence before the court.

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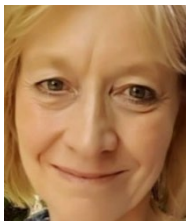
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Alex regularly appears in health and welfare and property and affairs cases in the Court of Protection. He has appeared in leading cases to do with deputyship and published a textbook about LPAs. His recent doctoral thesis explores the impact of changes to mental capacity law in England and Wales. To view a 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 November. 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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