



Welcome to the May 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Fact-finding in relation to coercive and controlling behaviour; habitual residence; and how recent should evidence be for the deprivation of liberty of a child?

(2) In the Property and Affairs Report: The Governments to the 'Modernising Lasting Powers of Attorney' consultation

(3) In the Practice and Procedure Report: Balancing privacy and open justice; costs of proceedings; and compliance with practice directions.

(4) In the Wider Context Report: Mental Health Act reform; COVID-19 in care homes; and MARSIPAN is replaced.

(5) In the Scotland Report: The World Congress; the Scott Review; and more on the PKM Litigation and Guardians' remuneration.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also find updated versions of both our capacity and best interests guides.

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The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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Modernising Lasting Powers of Attorney – Government Response to the Consultation

The Ministry of Justice has published the [Government's Response](#) to the consultation on Modernising Lasting Powers of Attorney. While some proposals for reform have been supported, the response set out that a number of proposals will remain under consideration and be subject to further study, and finalised plans for reform are awaited. In summary:

1. Role of the Witness:

- *The government will continue to investigate the possibility of using technology to replace the witness with a similar (digital) function within the digital channel.*
- *The government will investigate how to combine the role of the certificate provider and the witness in relation to execution of the LPA by the donor.*
- *Review the requirements for witnessing the donor's execution and attorneys' execution, accepting these may be different in a future service.*
- *The government will consider whether retaining a mechanism to evidence the attorney's execution of the document provides a safeguard to an LPA.*
- *The government will provide greater clarity around the role of the certificate provider in assessing the donor's understanding of the LPA and protecting against fraud, abuse and undue pressure. It intends to do this by giving additional guidance and support*

to those carrying out this role and providing a way to raise concerns directly with OPG.

- *The government will not introduce a requirement that the certificate provider be a professional.*
- *The government will ensure that the LPA continues to be, or be treated as, a deed even if changes are made to the requirements for witnessing an LPA.*

2. Role of the Application:

- *The government will continue to investigate the feasibility of two potential approaches to registration, namely sending an LPA for registration as soon as it is executed, and allowing for delayed registration of an LPA to continue, as is currently the case.*

3. OPG Remit:

- *The government will consider whether checks on the attorney are necessary and appropriate when considered alongside other safeguarding mechanisms that exist across the LPA process, including when an LPA is used.*
- *The government will seek to verify the identity of the donor and certificate provider in the modernised service.*
- *The government will consider including a range of identification options to ensure access for everyone.*

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- *The government will proceed with developing a system of conditional checks...and not discretionary checks.*
 - *The government will not be introducing additional suitability checks on attorneys (such as criminal background checks).*
4. How to object:
- *The government will pursue [an approach in which the] OPG receives all objections [rather than the current regime, in which the OPG may only consider objections from donors, attorneys and others named in the LPA].*
 - *The government will amend legislation to permit objections to the registration of an LPA from anyone.*
 - *The government will amend legislation so that OPG will have the power to refer cases directly to the Court of Protection where necessary.*
5. When to object:
- *The government will investigate a method for people to raise objections during the creation of an LPA.*
 - *The government will consider introducing a system that permits objections to be registered by a third party before the LPA process is started. Government will test the feasibility of such a system and will consider which third parties should be permitted to object.*
 - *The government will commit to keeping a statutory waiting period as part of the objections process for registering an LPA.*
- *The government will continue to investigate what the appropriate length of the statutory waiting period should be in a future service, accounting for other changes to the objections process across both digital and paper channels.*
 - *The government will not reintroduce a requirement to provide people to notify on an LPA.*
6. Speed of service:
- *The government will not be proceeding with an urgent service.*
7. Solicitors' access to the service:
- *The government will proceed with working to integrate a digital LPA channel with document and case management systems.*
 - *[The government] will ensure sufficient powers within the legislation for us to mandate regulated legal professionals to use the digital service in the future should it be required.*
8. Other responses and recommendations:
- *OPG will continue to work towards COVID-19 recovery and return to normal service.*
 - *The government is committed to ensuring that a paper channel remains available for those who need it.*
 - *OPG will continue to develop and roll out its Use an LPA service.*
 - *Amendable LPAs will remain out of scope for modernising lasting powers of attorney.*
 - *At the appropriate point in development [the government] will work with stakeholders and the public to develop the guidance and information they need to use and understand the modernised LPA registration service.*

- *While the government will not merge the different types of LPA, [the government] will consider how [it] can remove the duplication of data entry where information is repeated across both types.*
- *[The government] will not introduce a requirement to use a solicitor. However, [the government] will continue to look at the most appropriate opportunities to provide information on seeking legal advice in the LPA process as development continues.*
- *OPG will provide more information for donors on the option of security bonds and the protection they can provide for donors as part of a modernised process.*

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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. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).

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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. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. 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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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, CCGs 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 2019). To view full CV click [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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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. 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 and Seminars

Physical restraint and PBS plans in the Court of Protection, 26 May 2022, 5:00-7:00PM

Victoria Butler-Cole QC and Dr Theresa Joyce will be holding a seminar (chaired by Senior Judge Hilder) on their [recent paper](#) to assist legal professionals and judges in understanding and responding to PBS plans that include the use of physical restraint against people with learning disabilities. There will be an opportunity for questions and discussion. Questions can be sent in advance to marketing@39essex.com or during the seminar using Zoom’s Q&A function. People can attend either remotely or in person, and can find full details (including how to register) [here](#).

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

17 June 2022	DoLS refresher for mental health assessors (half-day)
14 July 2022	BIA/DoLS legal update (full-day)
15 July 2022	Necessity and Proportionality Training (9:30-12:30)
15 July 2022	Necessity and Proportionality Training (13:30-16:30)
16 September 2022	BIA/DoLS legal update (full-day)

To book for an organisation or individual, further details are available [here](#) or you can email [Neil](#).

7th World Congress on Adult Capacity, Edinburgh International Conference Centre [EICC], 7-9 June 2022 The world is coming to Edinburgh – for this live, in-person, event. A must for everyone throughout the British Isles with an interest in mental capacity/incapacity and related topics, from a wide range of angles; with live contributions from leading experts from 29 countries across five continents, including many UK leaders in the field. For details as they develop, go to www.wcac2022.org. Of particular interest is likely to be the section on “Programme”: including scrolling down from “Programme” to click on “Plenary Sessions” to see all of those who so far have committed to speak at those sessions. To avoid disappointment, register now at “Registration”. An early bird price is available until 11th April 2022.

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.

Conferences (continued)

The Judging Values and Participation in Mental Capacity Law Conference

The *Judging Values in Participation and Mental Capacity Law* Project conference will be held at the [British Academy](#) (10-11 Carlton House Terrace, London SW1Y 5AH), on **Monday 20th June 2022 between 9.00am-5.30pm**. It will feature panel speakers including Former President of the Supreme Court Baroness Brenda Hale of Richmond, Former High Court Judge Sir Mark Hedley, Former Senior Judge of the Court of Protection Denzil Lush, Former District Judge of the Court of Protection Margaret Glentworth, Victoria Butler-Cole QC (39 Essex Chambers), and Alex Ruck Keene (39 Essex Chambers, King's College London). The conference fee is £25 (including lunch and a reception). If you would like to attend please register on our events page [here](#) by 1 June 2022. If you have any queries please contact the Project Lead, [Dr Camillia Kong](#).

Essex Autonomy Project Summer School 2022

Early Registration for the 2022 Autonomy Summer School (*Social Care and Human Rights*), to be held between 27 and 29 July 2022, closes on 20 April. To register, visit the [Summer School page](#) on the Autonomy Project website and follow the registration link.

Programme Update:

The programme for the Summer School is now beginning to come together. As well as three distinguished keynote speakers (Michael BACH, Peter BERESFORD and Victoria JOFFE), Wayne Martin and his team will be joined by a number of friends of the Autonomy Project who are directly involved in developing and delivering policy to advance human rights in care settings. These include (affiliations for identification purposes only):

- > Arun CHOPRA, Medical Director, Mental Welfare Commission for Scotland
- > Karen CHUMBLEY, Clinical Lead for End-of-Life Care, Suffolk and North-East Essex NHS Integrated Care System

- > Caoimhe GLEESON, Programme Manager, National Office for Human Rights and Equality Policy, Health Service Executive, Republic of Ireland

- > Patricia RICKARD-CLARKE, Chair of Safeguarding Ireland, Deputy Chair of Sage Advocacy

Planned Summer School Sessions Include:

- > Speech and Language Therapy as a Human Rights Mechanism
- > Complex Communication: Barriers, Facilitators and Ethical Considerations in Autism, Stroke and TBI
- > Respect for Human Rights in End-of-Life Care Planning
- > Enabling the Dignity of Risk in Everyday Practice
- > Care, Consent and the Limits of Co-Production in Involuntary Settings

The 2022 Summer School will be held once again in person only, on the grounds of the Wivenhoe House Hotel and Conference Centre. The programme is designed to allow ample time for discussion and debate, and for the kind of interdisciplinary collaboration that has been the hallmark of past Autonomy Summer Schools. Questions should be addressed to: autonomy@essex.ac.uk.

Our next edition will be out in June. 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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