



Welcome to the May 2023 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: LPS on the shelf; fluctuating capacity and the interface under the judicial spotlight;
- (2) In the Property and Affairs Report: the new surety bonds structure and an update on the Powers of Attorney Bill;
- (3) In the Practice and Procedure Report: reporting restrictions and the Court of Appeal, and costs in serious medical treatment cases;
- (4) In the Wider Context Report: DNACPR notices and disability, litigation capacity, the new SCIE MCA database, and Ireland commences the 2015 Act;
- (5) In the Scotland Report: problems of powers of attorney in different settings and a very difficult Article 5 choice.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the Mental Capacity Report.

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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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Powers of Attorney Bill

Continuing its rapid progress through Parliament (see our [February](#) and [March](#) 2023 reports), Stephen Metcalfe's Bill had its third reading in the House of Commons on 17 March. No amendments were proposed. It has now left the House of Commons, has had its first reading in the House of Lords and is awaiting its first substantive consideration there at second reading stage. Fulfilling a commitment made at third reading in the House of Commons, Mike Freer MP (the Parliamentary Under-Secretary of State for Justice) has placed a letter in the House of Commons library explaining the position in relation to Scottish powers of attorney, thus:

I can confirm that there is already legislation in place which allows for the recognition of Scottish Powers of Attorney in England and Wales. Schedule 3, Paragraph 13 of the Mental Capacity Act provides that where an individual is habitually resident in another country to which England and Wales is a connected country (this would include Scotland) then, the law applicable to the power's existence is the law of the other country (in this case Scotland). This means that if the correct process has been followed for the Power of Attorney to be created in Scotland, it would be legally recognised in England and Wales without the need for further action from either the Court of Protection or Office of the Public Guardian (OPG) for England and Wales.

The letter goes on to note that "*despite this legislation being in place, the experience of those with Scottish Powers of Attorney continues to be that third parties, such as banks, often reject these powers.*" The Minister declined to move towards legislative amendment (although it remains possible that an amendment will be introduced by a Peer at the House of Lords stage), considering that "*this is a matter of education and awareness. We need to ensure that institutions and organisations are aware of the legal status of Scottish Powers of Attorney in England and Wales.*"

Separately, practitioners may wish to note the written exchange between Steve Reed MP and Mike Reed MP:

Steve Reed MP:

To ask the Secretary of State for Justice, what steps his Department is taking to ensure that a certificate provider for a Lasting Power of Attorney application is aware their role is to ensure the donor (a) understands the information relevant to the decision, (b) can retain that information and (c) can use or weigh up that information as part of the process of making the decision.

Mike Freer MP:

The certificate provider is a crucial safeguard during the creation of a lasting power of attorney (LPA). They sign to state that the person making the LPA understands it, is not being

pressured into making it and there is no evidence of fraud. A modernised LPA service must provide additional support to certificate providers, so they are confident and mindful of their role, including the part the functional test (understanding, retaining, weighing and communicating information relevant to the decisions made) plays in carrying out that role.

My department is therefore considering the best way to achieve this, including potential changes to the certificate that is signed, the forms more generally and supporting guidance. Testing and iterating any changes with stakeholders and users will be critical to ensure we achieve the core aim that the certificate provider understands what they need to do and has confidence taking on the role.

Although this exchange suggests that the Government will not amend the MCA itself in this regard, it is to be hoped that if the **certificate** is amended, it will make clear that the certificate provider is indeed (as the Minister appears to confirm the MoJ considers to be the case), considering the donor's capacity to grant the power. Strikingly, it might be thought, the certificate does not currently make that clear.

The new property and affairs deputyship process

A recording is now available of the webinar held on 28 February by HMCTS for legal professionals, to provide an overview on how to submit property and affairs deputyship applications using the Court of Protection online portal.

All change with security bonds!

[This is a guest post by Sheree Green of Greenchurch Legal Services Ltd]

At 2pm on Friday 31 March 2023 the Office of the Public Guardian contacted stakeholders to announce a change to the scheme for surety (security) bonds for Court of Protection deputies.

There was no fanfare, but also no forewarning, consultation or discussion, despite the OPG being fully aware that the existing contract, set up on 1 October 2016 with a single supplier – Howden UK Ltd, was always due to end in March 2023.

The OPG advise there has been a procurement exercise, which resulted in a move from the one preferred supplier to three suppliers:

- Marsh [www.arrangebonds.com]
- Howden [www.howdendeputybonds.co.uk]
- Insync Insurance Solutions Ltd [www.securitybonds.co.uk]

The Howden contract had been awarded competitively "to the provider who could provide the best value for money for clients". (It had always been possible to opt for a different bond supplier).

It is early days of course, but what are the immediate, felt consequences of the change?

Financial impact on "P"

Howden UK Limited have increased their premiums from 0.075% of the security required to 0.2%. So, a bond for £150k now costs £300 instead of £112.50, and a bond for £1.8m costs over £3k rather than around £1400. (We do not know of course whether this rise is a consequence of the change to the scheme, or a driver for the change. We might imagine that bulk purchases with a single provider could lead to reduced costs).

Marsh Ltd has its own pricing structure (which is not publicly available currently, but quotes are

available on request). Insync do not currently provide bonds for deputies but interestingly do offer bonds for appointees and for attorneys.

Impact on deputies

The court tells the new deputy that they may either set up a new bond with Howden or Marsh or through a company of their choice (provided the bond meets the requirements of the OPG). Leaflets are provided and links to the relevant websites. Lay deputies will now need to check with both providers as to terms, decide which option best serves the person's best interests and then proceed with the application. Prospective lay deputies prior to 1 April 2023 found the need for surety, the cost and the process bewildering, as their introduction to becoming a deputy. It is now more complex, and time consuming. For professional deputies, used to receiving notice of the bond having been issued, prior even to receiving the deputyship order itself, there is now a potential further few weeks' delay before we can begin work on behalf of our deputyship client.

The downsides to these changes appear to include further delay and increased costs.

And the upsides? We shall wait and see.

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Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. 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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Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a 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 2022). 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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Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, ICBs and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. 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

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Parishil Patel KC is speaking on Safeguarding Protected Parties from financial and relationship abuse at Irwin Mitchell's national Court of Protection conference on 29 June 2023 in Birmingham. For more details, and to book your free ticket, see [here](#).

Alex is also doing 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 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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