



Welcome to the September 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: capacity, silos and pigeon-holes, medical treatment dilemmas, and the limits of support;

(2) In the Property and Affairs Report: LPA modernisation and help with COP1 and COP1A forms;

(3) In the Practice and Procedure Report: the Court of Protection is, in fact, a court, costs updates, and insights in the future of remote hearings;

(4) In the Wider Context Report: a policy round-up, the inherent jurisdiction and children, advocacy in restricted settings, and the limits on the duty to secure life;

(5) In the Scotland Report: Mental Welfare Commission reports on the use of the Mental Health Act during COVID-19 and advance statements, and thoughts about SIDMA.

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. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, [here](#); Alex maintains a resources page for MCA and COVID-19 [here](#), and Neil a page [here](#). If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

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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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Lasting Powers of Attorney consultation

The Ministry of Justice has launched a consultation on modernising LPAs, closing on 13 October 2021, and to be found [here](#). The consultation proposals include amendments both to the MCA 2005 and secondary legislation centred around what the MoJ identify as seven proposals:

Proposal 1 considers the role and value of witnessing on LPAs and how to keep that value. We examine how we can achieve this using technology to support remote witnessing or to replace the witness. If there's no value, we consider removing the need for a witness. Our preferred option is to replace the witness with new safeguards that perform the same function.

Proposal 2 considers the role of applying to register an LPA and who can apply. We look at how to reduce the chance of an LPA being rejected by OPG and the benefits of reducing or keeping the delay between execution and registration. Our preferred option is that LPAs are digitally checked as they are being made, and are sent for registration as soon as they are executed.

Proposal 3 considers OPG's remit. We examine how to widen OPG's remit so it

can do things such as verify people's identity, and stop or delay an LPA's registration if it has concerns about it. Our preferred option is for OPG to be able to do this by expanding the types of checks it's allowed to carry out under the MCA and supporting regulations.

Proposal 4 considers how people can object to an LPA. We look at how to simplify the current process so people can more easily understand where to send objections and how to do so. Our preferred option is that anyone should be able to object to an LPA and that all objections are sent to OPG first.

Proposal 5 considers when people can object. We examine at what point and for how long objections can be made before an LPA is registered and if this remains a safeguard for the donor. Our preferred option is to allow people to object to an LPA from the time the donor starts creating it to the point it is registered. We would also like to shorten the time between an LPA being sent for registration and it being placed onto the register.

Proposal 6 considers the speed of the LPA service and whether a dedicated faster service should be introduced for people who need an LPA urgently. We look at whether an urgent service would

provide additional benefits over making the service faster for everyone. We also consider whether a dedicated service could be introduced without making the process more complex for users and OPG. Our preferred option is not to introduce a dedicated service, as we do not believe it's possible to create a faster service with a high enough level of safeguards that is not also overly complex.

Proposal 7 considers solicitors' access to the service. We look at whether this can be achieved through integrating our service with solicitor's case management systems or whether mandating part or all of the service would be necessary. Our preferred option is to provide solicitors with access to the service by integrating with their existing systems.

See also the OPG blog about the consultation [here](#), and video of the launch here: [Modernising LPA consultation launch with Minister Chalk and Public Guardian Nick Goodwin - YouTube](#).

In the meantime, the OPG has published a new blog with FAQs relating to the creation of

Sample COP1 and COP1 forms

Sample [COP1](#) and [COP1A](#) forms have been published for applications relating to monies held in Child Trust Funds (but equally relevant for other situations where a relatively small sum of money is in issue).

Short Note: the limits of the Golden Rule

Reinforcing the point that the so-called "Golden Rule" is not actually a legal rule, as opposed to a rule of practice designed to assist in the avoidance or minimisation of disputes, the

decision of in, *Hughes v Pritchard & Ors* [2021] EWHC 1580 (Ch), even compliance with it did not suffice to save a will from a challenge based upon lack of testamentary capacity. The GP who had been approached made clear in his oral evidence had he had been was unaware of significant facts and did not therefore ask questions which would have explored the full extent of the testator's cognitive impairments.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and the European Court of Human Rights. 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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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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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 are regularly presenting at webinars arranged both by Chambers and by others.

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 October. 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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