

The Participation of P in Welfare Cases in the Court of Protection

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¹ www.nuffieldfoundation.org

OUTLINE

This report considers the participation of P – an individual who is alleged to lack mental capacity – in proceedings concerning his health, welfare or deprivation of liberty in the Court of Protection (CoP) under the Mental Capacity Act 2005 (MCA). We argue that the CoP was established on a model of ‘low participation’ that is no longer compatible with developments in international human rights law under the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities. The European Court of Human Rights has developed a threefold ‘right to participate’ in proceedings concerning deprivation of liberty and deprivation of legal capacity, emphasising individual dignity, and adversarial and evidential principles. Support for, and participation in, decision making are also central elements of the MCA.

We consider different elements of participation in the CoP in turn, and highlight particular concerns in relation to:

- difficulties experienced by P in accessing the CoP to challenge a decision made under the MCA or to review a deprivation of liberty;
- resource constraints on making P a party to the proceedings;
- the serious detriment to the fairness of proceedings done by a decision not to notify P about the case;
- uncertainty about whether and how judges should take evidence from P and form their own view as to P’s mental capacity;
- the limited resources available for representation of P within the proceedings – either via a legal representative or, in some cases, even a lay representative;
- difficulties reconciling the ‘best interests’ model of representation currently adopted by litigation friends with recent human rights authorities on deprivation of legal capacity and deprivation of liberty proceedings;
- a lack of recognition of the centrality of P’s ‘personal presence’ in proceedings in the CoP’s rules and guidance;
- a lack of provision for special measures and reasonable adjustments in the CoP’s rules, as well as no specific allocation of resources for this purpose;
- inadequate training of legal representatives and judges on disability and access to justice matters;
- a lack of accessible information about the CoP for those who are subject to its jurisdiction.

We contrast the CoP with the Mental Health Tribunals, which in many respects outperform the court in relation to these matters of participation. We conclude that there is an urgent need to address the model of participation of P in the CoP. This will require revisions to the rules and practice directions, through increased resources for various elements of participation, and by addressing the question of when and how cases should come to the CoP. We make 20 specific recommendations for the CoP, the court service and the government to enhance the participation of P.

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ABBREVIATIONS

ALRs	Accredited Legal Representatives (under Rule 3A)
CoP	Court of Protection
COPR	Court of Protection Rules 2007
CRPD	United Nations Convention on the Rights of Persons with Disabilities
DoLS	Mental Capacity Act 2005 Deprivation of liberty safeguards
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
MCA	Mental Capacity Act 2005
MHA	Mental Health Act 1983
MHTs	Mental Health Tribunals (including both the Mental Health Review Tribunals in Wales and the First Tier Tribunal (Mental Health) in England)
P	A person who lacks, or is alleged to lack, mental capacity in relation to a particular matter and who is the subject of CoP proceedings (defined in Rule 6 of the COPR)
Rule 3A	The newly introduced Rule 3A, inserted into the COPR in amendments in 2015. This requires the CoP to consider how P should participate in the proceedings from a menu of options.

SUMMARY

The Court of Protection (CoP) was established to make decisions under the Mental Capacity Act 2005 (MCA) including determining whether a person has the mental capacity to make a decision for themselves, and, if not, determining what course of action is in their best interests. The CoP can also authorize detention and hear appeals against detention under the MCA deprivation of liberty safeguards (DoLS). Support for, and participation in, decision making are central elements of the MCA. This report considers how effectively the person who is alleged to lack mental capacity – known as ‘P’ – can participate in court proceedings which are about their health, welfare or deprivation of liberty. We base our analysis on European and domestic case law, court rules, practice directions and practice guidance, academic commentaries, and key issues identified at a roundtable discussion of experts on the CoP held at the Nuffield Foundation in 2015.

This report is part of a wider project on accessibility, efficiency and transparency in welfare cases in the CoP, funded by the Nuffield Foundation. You can read our other reports on our project website: <http://sites.cardiff.ac.uk/wccop/>

The CoP was created in 2007 and based on the practices of the ‘old’ CoP which dealt with people’s property and affairs, and the practices of the Family Division of the High Court, which had already started to address questions about health and welfare before the MCA was created. The Court of Protection Rules (COPR) are highly flexible, and proceedings can be ‘formal’ or ‘informal’ depending on the kind of case. When the court was set up, the participation of P received very little attention; the assumption appeared to be that where P participated it would only be indirectly through a representative of some kind. This was similar in many ways to practices relating to children in the family courts at that time. Recent amendments to the COPR have introduced new rules to promote P’s participation, including a new Rule 3A which requires the CoP to consider and select from a menu of options for P’s participation and representation in the proceedings.

The CoP’s jurisdiction includes cases concerning property and affairs, and cases concerning health, welfare and deprivation of liberty. The CoP’s jurisdiction over health, welfare and deprivation of liberty is the focus of this report. Cases can be contentious or non-contentious. We describe the CoP as comprising several ‘courts within a court’, each of which is subject to different processes and case management approaches.

One important focus for this report is the availability of resources to facilitate the participation of P in proceedings concerning his or her legal capacity or liberty. Enhancing P’s direct participation in the proceedings will often require special measures or reasonable adjustments, such as funding for intermediaries to assist with putting questions to P during a hearing. Many kinds of case require some form of legal or lay representation for P, which again will often require resources in the form of legal aid or provision of some form of independent advocacy. This report describes several situations where a shortfall of resources means that P cannot participate fully in the proceedings, or where it is unclear how the additional costs incurred by P’s representation or participation should be met. We recognise that in the current climate additional resources for representation or other measures to support participation are unlikely to be easily found. However, we conclude that such resources are essential to achieve compliance with international human rights and common law obligations. .

The question of resources for participation has become especially acute in the wake of the Supreme Court’s ruling in *P v Cheshire West and Chester Council and another; P and Q v Surrey*

*County Council*², which defined deprivation of liberty in such a way that hundreds of thousands of people with mental disabilities are eligible for safeguards under Article 5 of the European Convention on Human Rights (ECHR). In particular, this means that many more people in care homes and also quasi-domestic settings such as supported living will now be considered to be deprived of their liberty and require safeguards to protect their Article 5 rights. Outside of care homes and hospitals the DoLS procedures are unavailable and the only way to comply with Article 5 ECHR is for the CoP to directly authorise the detention. The majority of these cases are non-contentious, that is, neither P nor P's family object to the arrangements. In a sequence of litigation beginning with *X & Ors (Deprivation of Liberty)*³ the CoP (and the Court of Appeal) have grappled with the question of how to balance P's rights to participate in proceedings concerning his liberty, with the reality that very limited resources are available to facilitate this. Following a critical report by the House of Lords Committee on the MCA, and the Supreme Court's ruling in *Cheshire West*, the Law Commission has undertaken a review of the DoLS and is developing a replacement framework. They have proposed that for matters relating to deprivation of liberty, a tribunal may be a more appropriate destination for appeals than the CoP.

THE RIGHT TO PARTICIPATE AND THE 'RULE OF PERSONAL PRESENCE'

After the CoP was established, the European Court of Human Rights (ECtHR) heard in increasing number of cases about proceedings concerning the legal capacity and deprivation of liberty of people with mental disabilities. Its case law was influenced by the recently adopted United Nations Convention on the Rights of Persons with Disabilities (CRPD) and by *Recommendation No. R(99)4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults*.⁴ Recommendation 99(4) emphasises procedural fairness and a right to be heard in person in any proceedings which could affect a person's legal capacity. This report particularly focuses on the requirements of the ECHR, as this is directly incorporated into UK law⁵, but we also highlight the significance of the CRPD's provisions in relation to legal capacity, access to justice and accessibility.

Starting with the case of *Shtukaturov v Russia*⁶ in 2008, the ECtHR began to build on older case law concerning Article 5 ECHR, and drawing on the principles in Recommendation R 99(4), developed a right to participate in proceedings and what came to be known as the 'rule of personal presence' for proceedings concerning legal capacity and deprivation of liberty. The right to participate and the rule of personal presence contain three key elements:

1. **The 'dignity principle'**: the idea that the person has a fundamental right to participate in proceedings that will have serious consequences for their lives, including meeting the judge in person;
2. **The 'evidential principle'**: the idea that the person themselves is an importance source of evidence about their capacity and the proportionality of any measures proposed in relation to them. Judges must form their own opinions, and not simply rely on expert opinion;

² [2014] UKSC 19

³ [2014] EWCOP 25

⁴ Council of Europe Committee of Ministers, 'Recommendation No. R(99)4 on principles concerning the legal protection of incapable adults' (Adopted on 23 February 1999).

⁵ Human Rights Act 1998

⁶ (App no 44009/05) [2008] ECHR 223

3. **The ‘adversarial principle’:** the person is the subject of the proceedings and their participation may be necessary to help them present his case, refute evidence and counter arguments recommending any measures that the person opposes.

In our report we assess different elements of participation in the CoP against these principles, based on our analysis of case law, rules, guidance and the academic literature. Our conclusion is that despite the best efforts of the judges and lawyers working in the CoP, the CoP system was not set up with these principles in mind and cannot satisfy the requirements of the ECHR for the large volume of cases that it increasingly hears. For this reason, and because of the Law Commission’s proposals, we also consider the approach taken by the Mental Health Tribunals, which built in direct participation of patients from the outset, and discuss whether this model better satisfies the requirements of rights to participate and the ‘rule of personal presence’.

The ‘right to participate’ in legal capacity and deprivation of liberty proceedings spans a range of specific issues, such as how a case gets to court, and what rights a person has to be told about the case or to put their views to the court, which we address in turn.

Access to a court

The ECtHR has established that people deprived of legal capacity have a fundamental and unqualified right of access to a court to challenge a deprivation of liberty, loss of their legal capacity or to adjudicate serious disputes between them and their guardian. This right must not depend on the views of the parties as to their prospects of success. Although the CoP establishes no formal barriers to P if s/he wishes to challenge a deprivation of liberty under the DoLS or best interests decision under the MCA, in practice P faces a number of obstacles in applying to the CoP.

Foremost among these obstacles to accessing the CoP is P’s awareness of the right to challenge, and securing assistance in making the application. The forms for personal welfare applications are highly complex and not designed for challenging findings of incapacity; the forms relating to deprivation of liberty are more concise and better adapted to be used by P to challenge.⁷ If the person is deprived of their liberty by court order, outside of the DoLS, P is unlikely to be able to secure funding for legal representation, which is a major barrier to challenging deprivation of liberty or best interests decisions. The non-availability of litigation friends also poses a barrier to some seeking to access the CoP, although this situation may improve when an Accredited Legal Representative scheme comes into force which permits accredited legal representatives to represent P in certain types of case without taking instruction from a litigation friend.

Because of the obstacles that P and P’s family face in bringing a dispute to the attention of the courts, the ECtHR and the CoP have increasingly required public authorities themselves to make an application. These developments have occurred through case law, and there is still considerable uncertainty about whether certain issues – such as restrictions on contact or forced treatment – require judicial sanction. We believe that because of the fundamental human rights questions, and potential for public controversy raised by the possibility of restrictions on contact with loved ones and forcible treatment without judicial sanction, that these matters should be settled by way of a policy consultation rather than piecemeal through case law. Revised guidance or regulations on

⁷ HM Courts & Tribunals Service, ‘Court and tribunal form finder’, <<http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do>> accessed 14 February 2017.

this matter would also offer professionals greater clarity regarding the limits of their powers under the general defence of s 5 and s 6 MCA.

Where P is subject to a DoLS authorisation a number of ‘special procedural safeguards’ – including the appointment of the relevant person’s representative (RPR) and Independent Mental Capacity Advocates (IMCAs) – operate in theory to assist P in accessing the CoP to challenge detention. Public funding is available for this purpose. In practice these safeguards are not operating as anticipated, but recent guidance for RPRs and IMCAs may improve this situation.

Where P is *de facto* detained without the protection of the DoLS or a court order, the protection of his Article 5 rights is seriously deficient. We express particular concern about situations where P or those close to them object to the detention, as the costs of such a challenge could significantly deplete their personal financial resources. In situations where no application has been made to the CoP, no ‘special procedural safeguards’ apply and there is a clear violation of their Article 5 rights. Until the Law Commission’s replacement to the DoLS is enacted, this situation applies to tens of thousands of individuals.

Our recommendations on access to the CoP are as follows:

Recommendation 1: In situations where P objects to a best interests decision that constitutes a serious interference with his or her human rights, s/he should be informed of her/his right to challenge best interests decisions in the CoP and assisted to access legal advice if they wish to do so. This would operate in a similar way to requirements that already operate under Article 5(2) for deprivation of liberty to notify a person of their right of appeal against detention.

Recommendation 2: The duty upon advocates to assist P in challenging a best interests decision to which P objects should be clarified.

Recommendation 3: There should be a review of the CoP’s application forms and guidance to facilitate ease of completion by a person wishing to challenge any deprivation of legal capacity.

Recommendation 4: The availability of public funding for legal representation in CoP proceedings, and for litigation friends where appropriate, should be reviewed in the light of the requirements of the ECHR for access to a court to challenge loss of legal capacity and deprivation of liberty (including outside of the DoLS).

Recommendation 5: When the government considers the final proposals of the Law Commission regarding amendments to the MCA DoLS it should also undertake a policy review of which matters under the MCA require an application to the CoP, or whether alternative procedural safeguards might suffice.

Party status

Ordinarily in civil litigation those whose rights and interests will be primarily affected are given ‘party status’. This enables them to submit evidence and arguments to the court and to respond to the evidence and arguments put forward by the other parties. Party status has symbolic importance as it recognises the significance of the proceedings for the rights and interests of P, and may also be essential under the adversarial principle to safeguard P’s rights in certain cases.

Under the CoP rules, P is not joined as a party to CoP proceedings unless the court directs otherwise. Established practice and guidance in this area mean that P will generally be joined as a party in health and welfare cases, and cases under the DoLS. In property and affairs and deprivation of liberty cases that are not part of the DoLS scheme, P will generally be joined as a party only if the matters are contentious.

Party status will generally mean that P needs some form of representation; in general this means legal representation with a litigation friend. Whilst party status has been viewed as an important protection for P's rights, in reality the absence of resources for representation means that the CoP has had to balance competing considerations of resources and procedural protections for P. This has been especially acute for those who are deprived of their liberty but not subject to the DoLS. In circumstances where party status is not realistically possible because of the lack of funds for legal representation, the CoP has made creative use of new forms of representation under Rule 3A to try to offer similar protections for P's rights. In some cases the practical inability to join P as a party means that the adversarial principle under the ECHR is violated. Our recommendations in relation to party status are thus linked to our recommendations regarding public funding and representation.

Notification

Notifying a person of CoP proceedings concerning them is an important element of respect for their dignity. Notification also engages the adversarial and evidential principles of participation. If a person is not informed of the existence of the proceedings it becomes impossible for them to meet with their lawyer, to meet with the judge directly, to know the case against them, to advance their case, to rebut evidence and arguments, or even to engage independent experts to furnish the court with reports. Without notification, none of these rights to participate can be exercised. Non-notification is thus 'at the outer reaches' of what is compatible with the ECHR and common law rules of natural justice.⁸ In some cases CoP judgments do not appear to recognise or address the significant human rights concerns raised by a decision not to notify P of the proceedings⁹, but more recent authorities increasingly address this question¹⁰. Proper consideration of these matters will require applications to be brought well ahead of the proposed interventions.

The manner of notification can also be a matter of concern in some cases. In some cases it would be appropriate to seek further guidance on the best way to notify P. Insofar as the purpose of notification is – in accordance with the adversarial principle – to advise P that he can seek advice and assistance in relation to the proceedings, the COPR should be revised to require that those effecting notification must also themselves assist P in securing advice and assistance if they wish to do so.

In relation to notification, our recommendations are:

Recommendation 6: The COPR should be amended to require explicit recorded consideration by the CoP of the reasons for non-notification of P of any matter regarding

⁸ *Ridge v Baldwin* [1964] AC 40

⁹ *Re AA* [2012] EWHC 4378 (COP)

¹⁰ *NHS Trust & Ors v FG (Rev 1)* [2014] EWCOP 30

the proceedings, and in particular consideration of whether non-notification is necessary and proportionate in pursuit of a legitimate aim, and supported by objective evidence.

Recommendation 7: The COPR should be updated to place those notifying P of P's right to advice and assistance in relation to the proceedings under a duty to help P secure this advice if that is P's wish.

Evidence and information before the court

In most civil or criminal court proceedings, those giving witness evidence to the court must swear an oath or 'affirm' to the court that they will tell the truth. A person must be 'competent' to make this oath. In many cases P would not be regarded as 'competent' to give evidence under oath before a court. This means that anything they say before the CoP counts as 'hearsay'. Under the amended rules, P can now provide 'information' to the CoP other than on oath. Uncertainty remains, however, as to how they should do this and the significance of this source of evidence for determining different kinds of issues.

The ECtHR authorities are unequivocal that judges should meet directly with P as an 'object' of the proceedings and an important source of evidence in their own right, and form their own view as to his capacity and the proportionality of any proposed measures. This is viewed by the ECtHR as a vital safeguard against arbitrariness and over-reliance on expert evidence. Although there are a growing number of examples of CoP judges doing just this, there is concern about the idea of judges assessing mental capacity, in or out of the courtroom, especially if this is not in the presence of the other parties.

We argue that whilst judges may use an encounter with P to rebut expert evidence of mental incapacity, they cannot make a finding of mental incapacity without supporting expert evidence in this regard. We also maintain, *contra* recent authorities, that the CoP must come to its own view as to whether P should supply information or evidence to the court rather than delegating this decision to litigation friends. This is because the new Rule 3A, which was introduced to promote P's participation in CoP proceedings, requires the CoP to come to its own view on what directions it should give about P's participation.

In relation to evidence, our recommendations are:

Recommendation 8: A working group should be established to consider: those cases in which the evidential principle requires that the judge meet P to form their own view as to their capacity and the proportionality of any proposed measure; the best way to facilitate P giving evidence to the CoP for different kinds of matters; and how to address questions of fairness to P and the other parties in providing evidence or information directly to the judge. The recommendations of this group should be given force of law in the COPR, rather than non-binding guidance, to clarify P's rights in this regard.

Recommendation 9: The working group should include, in addition to legal and other experts, members of organisations representing disabled people to comply with the CRPD principle that those developing policies and legislation affecting disabled people should consult with them through their representative organisations.

Representation in proceeding

Legal representation is important to ensure ‘effective access to a court’ for P, and several ECtHR authorities regard it as essential in deprivation of legal capacity proceedings.¹¹ The ECtHR has emphasised the importance of legal representatives meeting with the person and actively pursuing their claims.

Under the COPR there are several possibilities for P’s representation:

- P may not be represented at all, especially if they are not joined as a party;
- they may be represented by lawyers taking instruction from a litigation friend;
- they may now be represented by an Accredited Legal Representative who is not required to take instructions from a litigation friend;
- they may have ‘lay’ representation by a litigation friend who does not act through a lawyer; or
- they may have a lay Rule 3A representative.

The availability of funding for legal representation and the availability of individuals who are willing and appropriate to act as litigation friends or Rule 3A representatives are critical determinants of how P will be represented in practice. In some circumstances because of resource limitations there may be nobody available to represent P; in such circumstances the risk of violations of the ECHR are high, especially where P is deprived of their liberty.

Litigation friends, and increasingly Rule 3A representatives, are viewed as representing P’s best interests to the court. This means they can decline to pursue the outcome that P wants or even advance arguments in support of outcomes that P objects to. We argue, on the basis of the Strasbourg authorities reviewed in this report, that this ‘best interests’ approach to representation violates the adversarial principle of participation in legal capacity and deprivation of liberty proceedings: P’s representatives should advance the evidence and arguments that support the outcome that P would be most likely to choose. We also argue that it is important for those representing P to ensure that he is supported and enabled to take decisions for himself about his participation and representation in the proceedings wherever possible

We recommend:

Recommendation 10: Funding for legal representation and Rule 3A representatives for capacity and deprivation of liberty cases must be reviewed by the government as a matter of urgency.

Recommendation 11: The CoP should reconsider the approach to representation taken by litigation friends and Rule 3A representatives to take into account the ‘active representation’ approach based on the person’s wishes and feelings increasingly advocated under human rights law, and requirements under the MCA to support P in making decisions about participation and representation for himself wherever possible.

Attending court and personal contact with judges

Several ECtHR and common law authorities support the view that P has a right to a direct meeting with a judge as a matter of principle, in order to respect his dignity within the proceedings, and to

¹¹ *Ivinović v Croatia (App no 13006/13)* [2014] ECHR 964; *MS v Croatia (No 2)* [2015] ECHR 196

attend court. This right is especially important where P is able to express a view and wishes to meet the judge, or where P objects to the proposed measures.

This presents a problem for the CoP, where the vast majority of cases are decided ‘on the papers’ without a hearing. Although there is some evidence of past judicial reluctance to meet with P, there are encouraging developments in this area with a growing number of cases where judges enthusiastically embrace opportunities to meet P and encourage others to do so. Nevertheless, judges face considerable systemic practical challenges in meeting P or if P attends court, as the CoP system was simply not set up to facilitate this on a regular basis, unlike the Mental Health Tribunals. The recent case of *A County Council v AB & Ors (Participation of P in Proceedings)*¹² highlights the challenges in this regard.

Our recommendations in connection to P meeting judges or attending court are:

Recommendation 12: Consideration should be given to whether the CoP can facilitate a process where the court ‘goes to the person’, like the tribunals, where P wishes to participate in a hearing.

Recommendation 13: Practice directions on Rule 3A on the participation of P should emphasise the requirements of the ECHR’s rule of personal presence and the limited circumstances in which judges may depart from this rule.

Special measures and reasonable adjustments

Under the ECHR, the CRPD and domestic equalities laws – as well as common law doctrines of fairness – courts are required to take into account the specific needs for support and modification of processes and procedures to facilitate the participation of disabled people in court proceedings. In the criminal courts, and potentially in the family courts, there are systems in place to provide ‘special measures’ to assist the participation of people with disabilities and other vulnerable parties or witnesses. For example, special measures might enable people to give evidence or ‘attend’ a hearing via a video link, or to respond to questions from the parties through an intermediary who can help them to break the question down in a more understandable way.

Surprisingly given it is a jurisdiction wholly devoted to matters concerning people with mental disabilities, the CoP has until recently given no systematic consideration to the special measures and reasonable adjustments that would be needed to facilitate the participation of P. Recent (non-binding) guidance encourages judges and parties to consider these matters, but there is no provision in the COPR or practice directions in relation to this matter, and questions remain as to how such measures would be funded.

Our recommendations in relation to special measures and reasonable adjustments are:

Recommendation 14: The COPR and practice directions should be amended to include specific recognition of the need for the court to consider special measures and reasonable accommodations to facilitate P’s participation.

Recommendation 15: The government should provide additional funding for special measures – either through the court service, or by means of legal aid - to ensure compliance with human

¹² [2016] EWCOP 41

rights and common law obligations to ensure effective participation in CoP proceedings for disabled people.

Training of judges and legal representatives

Article 13 of the CRPD on access to justice calls for training on disability issues to be provided to all of those working within the justice system. The domestic courts have also highlighted inadequacies of training where courts have failed to identify that special measures and reasonable adjustments should have been adopted but were not.

Disability training is critical for judges in the CoP and legal practitioners and barristers working in the CoP. We found no evidence of systematic provision of training on these matters by the Judicial College for the general judiciary, or for those taking qualifying legal practice courses or as part of their continuing professional development.

Our recommendations on training are as follows:

Recommendation 16: The Judicial College should introduce training on disability as it concerns access to justice.

Recommendation 17: The CoP should review whether there is a need to introduce special training for its nominated judges on facilitating the participation of P, with particular regard to the growing human rights jurisprudence and the practical considerations this may entail.

Recommendation 18: The Bar Standards Board and the Solicitors Regulatory Authority should introduce requirements for qualifying training courses and continuing professional development for practising solicitors and barristers on their specific obligations in respect of disabled clients.

Accessibility measures in the Court of Protection system

Under the CRPD and domestic law, the court service has obligations to anticipate the general needs of disabled people in relation to accessing information, buildings, services and public functions. We draw particular attention to the unavailability of any information or guidance published by the CoP for people who may have communication impairments or print disabilities, informing them about the court, their rights and specific matters such as attending hearings or the role of different kinds of representatives. We contrast this with the guidance available for those using the Mental Health Tribunals.

Our recommendations in relation to accessibility are as follows:

Recommendation 19: The central London and regional courts housing the CoP should consider their accessibility obligations to disabled litigants seeking to attend court, with a particular focus on the kinds of support needs that Ps may have.

Recommendation 20: The courts service as a whole should consider the introduction of an 'accessible information standard' comparable to that recently adopted within the NHS and the CoP should produce accessible guidance and information for those involved in CoP proceedings.

CONCLUSIONS

We conclude that the human rights approach to participation, which developed after the CoP was established, poses a fundamental challenge to the CoP system. Many conceptual matters need to be addressed, such as what is happening in evidential and adversarial terms when P meets a judge, and the most appropriate model of representing P. Perhaps even more challenging are the practical questions that ensue from increasing rights to participation: how is P's representation to be funded? how can P's specific needs be addressed in giving evidence, meeting the judge or attending hearings? How are these special measures to be funded? We observe that many – but not all – of these practical issues could be resolved by a court or tribunal that 'went to the person', although this would raise further practical questions about accommodating the hearing if a person was not resident in a hospital setting. This is being achieved in the Mental Health Tribunal and the Mental Health Review Tribunal in Wales, which increasingly are holding hearings in community settings convenient to the patient, for patients seeking review of their community treatment order. Resources remain a major limitation on P's rights to participation. The government must urgently address the funding of legal representation and special measures to ensure compliance with international human rights law.

Our overarching conclusion is that the Law Commission's review of the DoLS presents an opportunity to introduce a new approach to jurisdiction over people alleged to lack decision-making capacity based on a human rights approach to participation. We outline the key elements in a human rights approach, and set out several important respects in which the CoP's processes require reconsideration, both in the context of detention but also wider issues of health and welfare. We have also highlighted the important steps that need to be taken by government to ensure the entire system operates in a way that respects, protects and upholds the rights of those subject to substitute decision making under the MCA. Our report is intended to contribute to the policy debate about the appropriate forum for disputes about deprivation of liberty, and we hope that it may inspire policy makers and those responsible for review of the CoP's processes for health and welfare, to consider a new approach.

KEY RECOMMENDATIONS

ON ACCESS TO A COURT

Recommendation 1: In situations where P objects to a best interests decision that constitutes a serious interference with his or her human rights, s/he should be informed of her/his right to challenge best interests decisions in the CoP and assisted to access legal advice if they wish to do so. This would operate in a similar way to requirements that already operate under Article 5(2) for deprivation of liberty to notify a person of their right of appeal against detention.

Recommendation 2: The duty upon advocates to assist P in challenging a best interests decision to which P objects should be clarified.

Recommendation 3: There should be a review of the CoP's application forms and guidance to facilitate ease of completion by a person wishing to challenge any deprivation of legal capacity.

Recommendation 4: The availability of public funding for legal representation in CoP proceedings, and for litigation friends where appropriate, should be reviewed in the light of the requirements of the ECHR for access to a court to challenge loss of legal capacity and deprivation of liberty (including outside of the DoLS).

Recommendation 5: When the government considers the final proposals of the Law Commission regarding amendments to the MCA DoLS it should also undertake a policy review of which matters under the MCA require an application to the CoP, or whether alternative procedural safeguards might suffice.

ON NOTIFICATION

Recommendation 6: The COPR should be amended to require explicit recorded consideration by the CoP of the reasons for non-notification of P of any matter regarding the proceedings, and in particular consideration of whether non-notification is necessary and proportionate in pursuit of a legitimate aim, and supported by objective evidence.

Recommendation 7: The COPR should be updated to place those notifying P of P's right to advice and assistance in relation to the proceedings under a duty to help P secure this advice if that is P's wish.

ON EVIDENCE

Recommendation 8: A working group should be established to consider: those cases in which the evidential principle requires that the judge meet P to form their own view as to their capacity and the proportionality of any proposed measure; the best way to facilitate P giving evidence to the CoP for different kinds of matters; and how to address questions of fairness to P and the other parties in providing evidence or information directly to the judge. The recommendations of this group should be given force of law in the COPR, rather than non-binding guidance, to clarify P's rights in this regard.

Recommendation 9: The working group should include, in addition to legal and other experts, members of organisations representing disabled people to comply with the CRPD principle that

those developing policies and legislation affecting disabled people should consult with them through their representative organisations.

ON REPRESENTATION

Recommendation 10: Funding for legal representation and Rule 3A representatives for capacity and deprivation of liberty cases must be reviewed by the government as a matter of urgency.

Recommendation 11: The CoP should reconsider the approach to representation taken by litigation friends and Rule 3A representatives to take into account the ‘active representation’ approach based on the person’s wishes and feelings increasingly advocated under human rights law, and requirements under the MCA to support P in making decisions about participation and representation for himself wherever possible.

ON MEETING JUDGES AND ATTENDING COURT

Recommendation 12: Consideration should be given to whether the CoP can facilitate a process where the court ‘goes to the person’, like the tribunals, where P wishes to participate in a hearing.

Recommendation 13: Practice directions on Rule 3A on the participation of P should emphasise the requirements of the ECHR’s rule of personal presence and the limited circumstances in which judges may depart from this rule.

ON SPECIAL MEASURES AND REASONABLE ADJUSTMENTS

Recommendation 14: The COPR and practice directions should be amended to include specific recognition of the need for the court to consider special measures and reasonable adjustments to facilitate P’s participation.

Recommendation 15: The government should provide additional funding for special measures – either through the court service, or by means of legal aid - to ensure compliance with human rights and common law obligations to ensure effective participation in CoP proceedings for disabled people.

ON TRAINING

Recommendation 16: The Judicial College should introduce training on disability as it concerns access to justice.

Recommendation 17: The CoP should review whether there is a need to introduce special training for its nominated judges on facilitating the participation of P, with particular regard to the growing human rights jurisprudence and the practical considerations this may entail.

Recommendation 18: The Bar Standards Board and the Solicitors Regulatory Authority should introduce requirements for qualifying training courses and continuing professional development for practising solicitors and barristers on their specific obligations in respect of disabled clients.

ON ACCESSIBILITY

Recommendation 19: The central London and regional courts housing the CoP should consider their accessibility obligations to disabled litigants seeking to attend court, with a particular focus on the kinds of support needs that P may have.

Recommendation 20: The courts service as a whole should consider the introduction of an 'accessible information standard' comparable to that recently adopted within the NHS, and the CoP should produce accessible guidance and information for those involved in CoP proceedings.

ABOUT THIS REPORT

This report is part of a research project on welfare cases in the Court of Protection (CoP)¹³ which is funded by the Nuffield Foundation. The aim of the project is to gather high quality information to contribute to policy discussions about transparency, efficiency and accessibility in the Court of Protection's welfare jurisdiction. The study comprises several strands of research, including a systematic quantitative analysis of court files, and gathering qualitative data from a range of stakeholders using focus groups, surveys and interviews.

The Court of Protection was established under the Mental Capacity Act 2005 (MCA) to adjudicate on matters relating to an individual's mental capacity and best interests. It also plays an important role in relation to deprivation of liberty under the MCA. This report considers how effectively those who are the subject of welfare proceedings in the CoP can participate in them. This individual is referred to as 'P' in this report.¹⁴

The participation of P in Court of Protection welfare proceedings is an increasingly important issue due to recent developments in international human rights law, domestic changes relating to deprivation of liberty under the MCA and recent changes to the CoP Rules. In this report 'welfare proceedings' refers both to cases concerning the individual's health and welfare, as well as matters relating to deprivation of liberty. It excludes cases concerning the individual's property and affairs.

STRUCTURE OF THE REPORT

This report is designed so that it can either be read in full, by those with a keen interest in questions of participation, or so that readers can dip into individual sections about either the history of the court, the development of human rights relating to participation in general, specific elements of participation, or the approach taken by the tribunal.

Part 1 of this report describes the background that has prompted the recent focus on participation in the CoP. It describes how the CoP's current framework for participation evolved out of the 'old' CoP and was heavily influenced by the procedures of the Family Division of the High Court. It considers how recent changes relating to deprivation of liberty under the MCA, and in particular the Supreme Court's decision in *Cheshire West*, have prompted renewed reflection on matters of participation.

Part 2 of the report discusses the international human rights framework for participation under the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the European Convention on Human Rights (ECHR). It describes how case law that developed after the CoP was already established has placed a much greater emphasis on participation in legal capacity and deprivation of liberty proceedings. We extract three key principles for compliance with international human rights norms on matters of participation: the dignity principle; the evidential principle, and the adversarial principle.

Part 3 of this report reviews key elements of participation in CoP welfare proceedings against the international human rights standards described in Part 2. These are:

- Access to a court

¹³ More information is available on the project website: <http://sites.cardiff.ac.uk/wccop>

¹⁴ As defined in r 6 Court of Protection Rules 2007 and Schedule A1 Mental Capacity Act 2005

- Party status
- Notification of P
- Giving evidence, or being a source of information
- Representation in proceedings
- Special measures and reasonable adjustments
- Training of judges and representatives
- Accessibility measures in the Court of Protection

Part 4 of the report considers an alternative model of participation offered by the Mental Health Tribunals in England and Wales. The tribunal model is considered in detail here because in many ways it has developed a more satisfactory approach to satisfying international human rights norms relating to participation for people with mental disabilities than the model that developed for CoP welfare proceedings. A tribunal has consistently been mooted as an alternative adjudication mechanism under the MCA, including – most recently – as a possible venue for appeals under the DoLS. The tribunal approach is considered for each of the elements of participation discussed in Part 3.

Part 5 of the report discusses the key findings of the research and makes recommendations.

ROUNDTABLE ON PARTICIPATION

This report is primarily based on doctrinal and policy research. However, to support this research the researchers also held a policy roundtable¹⁵, bringing together key experts on the CoP and participation in proceedings to discuss these key issues. The report also draws from discussions at the roundtable event.

The roundtable was held at the Nuffield Foundation’s Headquarters on 20 March 2015. It was attended by 21 participants with experience of CoP welfare proceedings from a range of backgrounds, including the judiciary, solicitors and barristers, litigation friends, expert witnesses, local authority social care practitioners, advocates, disability rights experts, academics and civil servants. It was structured so that participants heard short presentations by experts on a range of topics, followed by chaired discussions. Presentation topics included the international human rights framework for participation in court proceedings concerning legal capacity and deprivation of liberty, practice and procedure in the CoP, the experiences of P of CoP litigation, and consideration of participation issues in other courts – including the Family Court, the Mental Health Tribunals (MHTs), and the criminal courts.

Attendance at the roundtable and the discussions were held under the Chatham House Rule¹⁶, a system named after the headquarters of the Royal Institute of International Affairs, which is designed to facilitate full and frank discussion whilst protecting anonymity.¹⁷ Roundtables held under the Chatham House Rule have been very effective in promoting discussion of key policy

¹⁵ The researchers have used roundtables to explore specific policy issues with experts, such as transparency in the CoP: Lucy Series, Phil Fennell, Julie Doughty and Luke Clements, ‘Transparency in the Court of Protection: Report on a Roundtable’ (Cardiff University School of Law and Politics 2015). <<http://sites.cardiff.ac.uk/wccop/transparency-in-the-court-of-protection-report-on-a-roundtable/>> accessed 14 February 2017.

¹⁶ See: <http://www.chathamhouse.org/about/chatham-house-rule>

¹⁷ Under the rules, participants are free to use the information from the roundtable and any points made, but are asked not to identify other participants or their affiliations when discussing any comments they have made.

issues relating to the MCA.¹⁸ The comments and questions raised by the participants were immensely useful in preparing this report. However the opinions expressed here – and responsibility for any errors – remain the authors' alone.

¹⁸ The Essex Autonomy Project at the University of Essex has made particularly strong use of this method, for examples see: Anselm Szerletics and Tom O'Shea, 'Deprivation of Liberty and DoLS: An AHRC Public Policy Roundtable' (Essex Autonomy Project, Ministry of Justice, Arts and Humanities Research Council 2012); Wayne Martin, 'Mental Capacity Law Discussion Paper: Consensus Emerges in Consultation Roundtables: The MCA is Not Compliant with the CRPD' (39 *Essex St Mental Capacity Law Newsletter*, Issue 49, August 2014). These reports are available on the project website: <http://autonomy.essex.ac.uk/>

1. BACKGROUND

The Mental Capacity Act 2005 (MCA) established a legal framework for making decisions in the best interests of people who lack mental capacity. It is estimated to affect around two million people in England and Wales with conditions such as dementia, learning disabilities, brain injuries and mental health problems¹⁹, which we refer to collectively as ‘mental disabilities’ in this report.

The Court of Protection (CoP) was created by the MCA²⁰ to adjudicate on a range of matters relating to mental capacity and best interests. The MCA was amended in 2009 to include a framework for detention in care homes and hospitals known as the deprivation of liberty safeguards (DoLS).²¹ The CoP also exercises jurisdiction over deprivation of liberty under the MCA.

Support for, and participation in, decision making are central elements of the MCA. Under the MCA a person is not to be regarded as unable to make a decision for themselves ‘unless all practicable steps to help him to do so have been taken without success’²², and ‘A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).’²³ If it is concluded that the person lacks the mental capacity to make a decision for themselves, those taking decisions in P’s best interests must ‘so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.’²⁴ These provisions apply not only to those providing care and treatment for P, but also to the CoP²⁵ and any persons under a duty to act in P’s best interests in relation to the proceedings.

The CoP has powers under s15 MCA to make declarations regarding P’s mental capacity and the lawfulness of acts done (or yet to be done) to the person.²⁶ Section 16 MCA created powers to make orders relating to P’s welfare or property and affairs, and to appoint deputies to make decisions on P’s behalf.²⁷ The CoP can also rule on issues arising from legal instruments created

¹⁹ Ministry of Justice, *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Mental Capacity Act 2005* (Cm 7955, 2010).

²⁰ MCA 2005, Part 2.

²¹ See Schedules A1 and 1A of the MCA and Ministry of Justice, *Mental Capacity Act 2005: Deprivation of Liberty Safeguards Code of Practice* (Department for Constitutional Affairs 2007).

²² MCA 2005, s1(3)

²³ MCA 2005, s3(2)

²⁴ MCA 2005, s4(4)

²⁵ MCA 2005, s16(3)

²⁶ MCA 2005, s 15

²⁷ MCA 2005, s 16

under the MCA, such as advance decisions refusing treatment²⁸ and lasting powers of attorney²⁹ (LPAs). It can rule on the lawfulness of detention authorised by supervisory bodies under s 21A of the MCA 2005, and as well as authorising detention in its own right.

The vast majority of applications to the CoP concern property and affairs, but a growing number relate to health and welfare matters.³⁰ The CoP's welfare jurisdiction has attracted considerable interest from the media and academics, as it encompasses a range of socially and politically sensitive issues. These include serious medical treatment decisions such as the withdrawal or withholding of life sustaining treatment, forced medical treatment and non-therapeutic sterilisation. The CoP also considers wider welfare questions such as where a person should live, and matters connected with relationships such as limiting contact with third parties, and whether or not someone has the mental capacity to consent to sexual relations or marriage. Section 1.2 below describes how the CoP came to assume its current structure and rules of procedure. It discusses some recent changes to the court's practices and procedures which have attempted to enhance the participation of P.

When the CoP was established, less attention was paid to questions of participation, which are increasingly important today, such as when P should be supported to attend court or meet the judge in person. This means that the CoP's original practices and procedures were not built upon the presumption that P would routinely participate directly in cases that are about them. In recent years, questions of participation have come increasingly to the fore as a result of the disability rights movement and their success in developing an international human rights instrument – the UN Convention on the Rights of Persons with Disabilities (CRPD)³¹ – that harnesses the spirit of the disability rights motto 'Nothing about us without us'. This spirit has increasingly influenced the case law of the European Court of Human Rights (ECtHR) on the European Convention on Human Rights³² (ECHR) on participation in deprivation of liberty hearings and what in international parlance would be referred to as adult guardianship or legal capacity proceedings. These developments are discussed in Section 2 below.

Issues of participation have an additional urgency as a result of debates about the role of the CoP in reviewing detention under the MCA. Section 1.4 below will outline how the CoP came to assume its current role in reviewing and authorising deprivation of liberty under the MCA. It will describe how the landmark ruling of the Supreme Court in *P v Cheshire West and Chester Council and P and Q v*

²⁸ These are legal instruments which allow a person who has mental capacity to specify circumstances in which they would like to refuse specific treatments, in the event that they did not have the mental capacity to refuse that treatment at the requisite time. See MCA 2005, ss 24-26.

²⁹ Lasting Powers of Attorney (LPA) allow a person who has mental capacity to specify named individuals who they would like to make decisions on their behalf about either property and affairs, or health and welfare matters in the event that they lose mental capacity (or immediately, in the case of property and affairs LPAs) MCA 2005, s 9.

³⁰ Ministry of Justice, *Court Statistics Quarterly* October to December 2015, (Ministry of Justice Statistics Bulletin, 31 March 2016) <<https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2015>> accessed 14 February 2017).

³¹ United Nations Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD)

³² Council of Europe (1950) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (ECHR)

*Surrey County Council*³³, which expanded the meaning of ‘deprivation of liberty’ to include hundreds of thousands of disabled people in health and social care settings, has led to a crisis in the legitimacy of the DoLS themselves and the court’s jurisdiction over deprivation of liberty. This section will describe the litigation that has ensued as the court has attempted to grapple with a potentially huge influx of applications to authorise deprivation of liberty, and the current review by the Law Commission to replace the DoLS framework, including potentially replacing the court’s deprivation of liberty jurisdiction with a tribunal system.

1.2 THE ORIGINS AND STRUCTURE OF THE COURT OF PROTECTION

The provisions of the MCA establishing the CoP³⁴ came into force in 2007. The new court was based on two separate antecedent jurisdictions: the ‘old’ CoP, which was an office of the Supreme Court³⁵ that had jurisdiction over property and affairs, and the ‘declaratory’ jurisdiction of the Family Division of the High Court, which had developed rapidly after the House of Lords decision in *Re F*³⁶ and was concerned with health and welfare matters.³⁷

These two jurisdictions had distinct practices and cultures. The general conduct of property and affairs cases in the old CoP has been described as ‘relatively informal’, ‘inquisitorial’ and ‘non-adversarial’.³⁸ Typically, the patient³⁹ was not made a party to the case and neither they nor their relatives would attend court because applications were generally uncontested. Where the patient or their family did attend court, they often did not instruct solicitors, except in contentious or complex cases, and hearings tended to be informal. By contrast, the procedure to seek a declaration in the High Court for a health or welfare matter was more formal. P would always be made a party to the case. If the person was considered to lack litigation capacity – as most, but not all⁴⁰, were – they would normally be represented by a lawyer who would be instructed by a litigation friend on their behalf, acting in their best interests.

³³ [2014] UKSC 19.

³⁴ MCA Part 2

³⁵ This was a different body to the current Supreme Court of the United Kingdom. The Constitutional Reform Act 2005 established new appellate court of last resort, the Supreme Court, to replace the judicial functions of the House of Lords. Confusingly, prior to the Constitutional Reform Act 2005 another body was also known as the Supreme Court of England and Wales (and was known before that as the Supreme Court of Judicature). This was renamed by the Constitutional Reform Act as the “Senior Courts of England and Wales”, and it comprises the Court of Appeal, the High Court and the Crown Court.

³⁶ *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1; [1991] UKHL 1

³⁷ For a review of developments under the declaratory jurisdiction, see: Phil Fennell, ‘Chapter 4: Mental Capacity’ in L. O. Gostin, P. Fennell, J. McHale, D. McKay and P. Bartlett, (eds) *Principles of Mental Health Law* (Oxford University Press 2010); Peter Bartlett, *Blackstone’s Guide to The Mental Capacity Act 2005* (Second ed., OUP 2008).

³⁸ Department for Constitutional Affairs, *Draft Court Rules: Mental Capacity Act 2005 Court of Protection Rules*, (CP 10/06, 2006). p. 19

³⁹ The person who was the subject of proceedings in the ‘old’ CoP was known as the ‘patient’.

⁴⁰ It seems that in the cases of *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290 and *Ms B v An NHS Hospital Trust* [2002] EWHC 429 (Fam) the individuals whom the cases concerned were treated as having the capacity to litigate as there is no indication they were represented by a litigation friend.

These distinct origins can still be discerned today in what Rees and Ruck Keene describe as ‘a fundamental difference in cultures’ between the lawyers who deal with property and affairs, and health and welfare cases.⁴¹ They identify cost as a key issue:

Underlying the thinking of property and affairs lawyers will always be the question of who is paying the costs of the proceedings. Clients funding the litigation from their own pocket do not want to spend two days in court arguing about legal issues if matters can be short-circuited. This issue is particularly acute in Court of Protection cases where P may be footing the entire bill.⁴²

Increasing P’s participation often increases the costs and duration of the litigation because of the additional efforts that must be made by lawyers and experts to consider and facilitate their participation, so the property and affairs cases that make up the majority of the CoP’s work are based on a low participation model. Conversely, many lawyers in welfare cases come from a public or family law background, where litigation is often publicly funded. Such lawyers have a greater desire, Rees and Ruck-Keene argue, ‘to explore issues of principle’ and ‘engage with human rights jurisprudence’.⁴³ Participation raises many human rights issues and matters of principle, and these are increasingly being argued by lawyers working in the CoP’s welfare jurisdiction.⁴⁴

The CoP as established by the MCA has several tiers of judges.⁴⁵ The majority of cases are heard by District Judges, but more controversial or serious cases – such as serious medical treatment cases – must be heard by High Court judges (although some have been heard by Circuit Court judges). Many nominated High Court judges who sit in the CoP also sit in the Family Court.

The President of the CoP is Sir James Munby. He is also the President of the Family Division. The Vice President of the CoP is Mr Justice Charles. He has also sat in the Family Division and is the President of the Administrative Appeals Chamber of the Upper Tribunal. Until his retirement in July 2016, the CoP also had a Senior Judge – Denzil Lush – who was formerly the Master of the ‘old’ CoP. A new Senior Judge has yet to be announced.

The CoP is legally and structurally distinct from the Family Division of the High Court, but many of its senior judges and practising lawyers work in both courts. Hence practice and procedure in the family courts have a significant influence on some of the CoP’s practices. As HH Mark Rogers recently put it, ‘just as the role of the child in Family proceedings is under constant re-evaluation, so is P’s role and his ability to participate in CoP proceedings likewise.’⁴⁶

During 2013-14 the House of Lords Select Committee on the MCA heard evidence from a wide range of sources on the performance of the CoP. Its report praised the CoP for its expertise, but it

⁴¹ David Rees and Alex Ruck Keene, ‘Property and Affairs Lawyers are from Mars, Health and Welfare Lawyers from Venus’ (2014) 4(3) *Elder Law Journal* 285, p286.

⁴² *Ibid.*, p287

⁴³ *Ibid.*

⁴⁴ Although, this is not to suggest that property and affairs lawyers are not exercised about matters of participation, see: Sarah Green, ‘Sarah’s story: being ‘P’ – the importance of rule 3A’, (2016) 6(2) *Elder Law Journal*

⁴⁵ MCA 2005, s 46(2).

⁴⁶ *A County Council v AB & Ors (Participation of P in Proceedings)* [2016] EWCOP 41, Para 6.

raised concerns about its accessibility, costs and delays.⁴⁷ Members of the judiciary have also raised concerns about the cost and duration of CoP proceedings⁴⁸, and we have reported on their cost, duration and accessibility elsewhere.⁴⁹

The Court of Protection Rules 2007 and the 2015 amendments

The CoP has its own rules of procedure: the Court of Protection Rules 2007 (COPR).⁵⁰ The COPR were designed to be sufficiently flexible to combine the informal approach of the 'old' CoP, and the more formal approach of the declaratory jurisdiction of the High Court, which was regarded as offering a higher level of protection for P and their interests.⁵¹ Thus different models of participation are possible within the court's practices, and vary according to the type of case.

The consultation on the Draft Court Rules in 2006 considered some aspects of the participation of P.⁵² The approach taken towards children in family proceedings was seen to be a helpful model, as it provided for 'a range of different ways in which children can become involved in cases such as care proceedings'.⁵³ However, this range was not further explored as a basis for future arrangements. No reference was made at the time to developments in the criminal courts facilitating vulnerable witnesses in giving evidence, which might have addressed specific issues around the accessibility of proceedings for disabled adults.⁵⁴ Nor was any reference made to the need to provide reasonable adjustments for disabled litigants, or the government's obligations under the recently ratified UN CRPD. Consequently, the initial COPR consultation did not discuss a number of matters that would be considered important today, especially in light of the important developments in international human rights law discussed below in Section 2.

For example, the COPR consultation did not discuss whether judges should have some direct contact with P, whether P should be supported to attend hearings, and whether they could give evidence other than on oath. Nor was there any discussion of *how* litigation friends should represent the person. Because there was no attention to these matters, there was little discussion of the practical arrangements that might be required to facilitate P's participation – for example where the court should sit, whether judges and lawyers might require specialist training to work

⁴⁷ House of Lords Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post-legislative scrutiny* (HL Paper 139, 2014). Chapter 6.

⁴⁸ *A Local Authority v ED & Ors* [2013] EWHC 3069 (CoP) and *A & B (Court of Protection: Delay and Costs)* [2014] EWCOP 48; *N (Deprivation of Liberty Challenge)* [2016] EWCOP 47

⁴⁹ Lucy Series, Adam Mercer, Abigail Walbridge, Katie Mobbs, Phil Fennell, Julie Doughty and Luke Clements, *Use of the Court of Protection's welfare jurisdiction by supervisory bodies in England and Wales* (Cardiff University School of Law and Politics 2015).

⁵⁰ Court of Protection Rules SI 2007 No 1744.

⁵¹ Department for Constitutional Affairs, *Consultation Paper: Draft Court Rules: Mental Capacity Act 2005 Court of Protection Rules*, (CP 10/06, 2006). p 20.

⁵² *Consultation Paper: Draft Court Rules: Mental Capacity Act 2005 Court of Protection Rules*, n 52; Department for Constitutional Affairs, *Draft Court Rules: Mental Capacity Act 2005. Court of Protection Rules: Response to a Consultation Carried out by the Department for Constitutional Affairs*. (CP 10/06, 2007).

⁵³ *Ibid*

⁵⁴ Specifically, to the kinds of special measures permitted by the Youth Justice and Criminal Evidence Act 1999, which are discussed in more detail below.

more effectively with disabled litigants, and whether any special measures might be required to facilitate P's participation. These issues are increasingly coming under the spotlight today.

Although there is not a standing rules committee in the CoP, over the period since the COPR were originally drafted in 2007 they have been reviewed by ad hoc committees⁵⁵ and amended.⁵⁶ In response to concerns raised by the House of Lords Select Committee on the MCA, and to accommodate changes to the procedure for handling deprivation of liberty applications and the challenge of responding to the *Cheshire West* decision (discussed in Section 1.4, below), a new ad hoc committee was convened to consider reforms to rules.⁵⁷ The committee's first tranche of proposed amendments came into force in April and July 2015.⁵⁸ The 2015 amendments introduced new provisions for P's participation in CoP proceedings, and were accompanied by new practice directions.

Most notably for this report, the new Rule 3A on *Participation of P* requires the CoP to consider, in each case, what directions it should make in relation to the participation of P (reproduced for reference in Appendix A). This was introduced in response to recent Strasbourg case law that required a much greater judicial focus on how P is to participate in the proceedings.⁵⁹ In the words of one roundtable participant, Rule 3A was very deliberately 'put up front' in recognition of the importance of this. Indeed new forms of representation created by Rule 3A have assumed a central role in the CoP's efforts to secure compliance with the requirements of Article 5 ECHR and the common law in deprivation of liberty cases. This is discussed in more detail in Sections 1.4 and 3.5 below.

Rule 3A was accompanied by *Practice Direction 2A on the Participation of P*.⁶⁰ This states that ECtHR and domestic case law has highlighted the importance of ensuring that P 'takes an appropriate part in the proceedings and the court is properly informed about P'. However, it also acknowledges the difficulties of ensuring that this occurs in a way that is proportionate to the nature of the issues, whilst avoiding excessive cost and delay.⁶¹ It distinguishes between non-contentious property and affairs cases which 'experience has shown' can be dealt with on the papers without making P a party to proceedings or appointing anyone to represent them⁶² and other cases that 'may call for a

⁵⁵ Court of Protection Rules Committee, 'Report of the ad hoc Court of Protection Rules Committee' (Judiciary of England and Wales 2010).

⁵⁶ The Court of Protection (Amendment) Rules 2009 SI 2009/582 (amendments to provide supporting rules for the new deprivation of liberty jurisdiction); The Court of Protection (Amendment) Rules 2011 SI No. 2753 (L.19) (amendments to enable authorised court officers to exercise the court's jurisdiction in relation to certain property and affairs cases, to alleviate the burden of work on District Judges).

⁵⁷ Alex Ruck Keene, 'The next stage of the journey: The Court of Protection (Amendment) Rules 2015' (2015) 5(2) *Elder Law Journal*, p150.

⁵⁸ The Court of Protection (Amendment) Rules 2015 SI 2015 No 549 (L6)

⁵⁹ Alex Ruck Keene, 'The next stage of the journey: The Court of Protection (Amendment) Rules 2015', n 57.

⁶⁰ Court of Protection, *Practice Direction 2A - Participation of P* (2015). P is defined in the Court of Protection Rules SI 2007 No 1744 r 6. 'P' is the term used to denote the person who is alleged to lack mental capacity and is the subject of CoP proceedings).

⁶¹ *Practice Direction 2A*, para 1

⁶² *Ibid*, para 3

higher level of participation'.⁶³ The Practice Direction goes on to outline the provisions of Rule 3A, and the different mechanisms whereby P's participation may be supported. These are discussed in more detail below.

The 2015 amendments to the rules also made provision for pilot schemes to assess the use of new practices and procedures.⁶⁴ To date, this has been used to establish pilot schemes increasing transparency in the CoP⁶⁵, testing out new case management procedures⁶⁶ and procedures for expert reports by the NHS and local authorities.⁶⁷ These pilot schemes have some limited direct or indirect impact upon questions of participation, as discussed in Section 3 below.

In November 2016 Mr Justice Charles, the Vice President of the CoP, introduced practice guidance on 'Facilitating the participation of P and vulnerable persons in CoP proceedings'.⁶⁸ This guidance referenced a recent practice note for solicitors issued by the Law Society on meeting the needs of vulnerable clients⁶⁹ and resources from the Advocate's Gateway.⁷⁰ These sources of guidance are also discussed in more detail in Section 3 below.

1.3 COURTS WITHIN A COURT?

The CoP has many different functions, each with different practices and procedures. One participant at the roundtable described it as comprising several different courts. The concept of 'courts within a court' may be useful for analyzing their distinct participatory practices, cultures, and human rights obligations. Any guidance or reforms on participation must take account of the diverse and distinct functions of the CoP and the fact that it exercises jurisdiction over property and affairs, health and personal welfare decisions, and deprivation of liberty. The case management pilot referred to above recognizes the different demands made in each of the different areas of jurisdiction by allocating different types of case to one of three case management pathways: the personal welfare pathway; the property and affairs pathway; and the mixed welfare and property pathway.

A property and affairs court

The property and affairs court, the successor to the 'old' CoP, processes applications relating to a person's property and affairs, resolves issues concerning deputyships and LPAs for property and affairs, and performs functions like the making of statutory wills. More than 20,000 applications

⁶³ Ibid, para. 4

⁶⁴ COPR Rule 9A, as amended

⁶⁵ 'Transparency Pilot: Court of Protection' (Judiciary of England and Wales, 2015), <<https://www.judiciary.gov.uk/publications/transparency-pilot-court-of-protection/>> accessed 9 November 2016.

⁶⁶ Court of Protection, *Practice Direction - Case Management Pilot* (2016)

⁶⁷ Court of Protection, *Practice Direction – Section 49 Reports Pilot* (2016)

⁶⁸ Mr Justice Charles, 'Facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings' (2016) <http://www.familylaw.co.uk/system/froala_assets/documents/1245/Practice_Guidance_Vulnerable_Persons.pdf> accessed 16 November 2016.

⁶⁹ Law Society, 'Meeting the needs of vulnerable clients' (2016). <<http://www.lawsociety.org.uk/support-services/advice/practice-notes/meeting-the-needs-of-vulnerable-clients-july-2015/>> accessed 16 November 2016.

⁷⁰ Advocate's Gateway, <http://www.theadvocatesgateway.org/>

during 2015 fell into this category.⁷¹ These cases are largely uncontested, and are dealt with ‘on the papers’ without any oral hearing by District Judges or – increasingly – by authorised court officers.⁷² Property and affairs cases typically use a model of very low participation by P – they are generally not made a party to the proceedings. In terms of costs they are distinct from welfare cases - the general rule is that P pays the costs of all the parties,⁷³ and there is virtually no legal aid available.⁷⁴ One corollary of this is that increasing P’s level of participation, for example through joining them as a party and ensuring they have independent legal representation, may significantly inflate the costs they will incur.

Personal welfare court

The second ‘court within the CoP’ is the successor to the declaratory jurisdiction of the High Court, which was used prior to the MCA to make declarations as to the lawfulness of serious medical treatments and a small number of other personal welfare matters relating to persons considered to lack the mental capacity to consent to them.⁷⁵ Since the passage of the MCA, the CoP has heard a number of serious medical treatment applications, but there has also been a large growth in the number of personal welfare applications from local authorities.⁷⁶ Many of these are ‘adult safeguarding’ matters comparable in some respects to public law family proceedings; one roundtable participant referred to this function as an ‘adult protection court’. In a small number of cases the CoP can also appoint welfare deputies, although this power is comparatively rarely used.⁷⁷ Some applications to the CoP may also invoke the inherent jurisdiction of the High Court as an alternative remedy where a person might be deemed to have capacity yet remain vulnerable because of their wider circumstances.⁷⁸

⁷¹ Ministry of Justice, *Court Statistics Quarterly*, n 30.

⁷² The Court of Protection (Amendment) Rules 2011 SI No. 2753 (L.19) amended the Court of Protection Rules 2007 to permit the Senior Judge or the President of the CoP to nominate a court officer to exercise the jurisdiction of the CoP in accordance with *Practice Direction 3A: Authorised Court Officers* (2011).

⁷³ Court of Protection Rules 2007, SI 2007 No 1744, r 156. NB: the court is preparing a public consultation on costs which may provide judges with greater discretion to award costs to parties other than P.

⁷⁴ Legal aid in proceedings in the CoP is only available to the extent that they concern a person’s right to life, their right to liberty or physical safety, their medical treatment, their capacity to marry, enter into a civil partnership or enter into sexual relations, or their right to family life. See Legal Aid, Sentencing, and Punishment of Offenders Act 2012, Schedule 1 Part 3.

⁷⁵ For a description of the history of this jurisdiction, and key cases, see: Peter Bartlett, *Blackstone’s Guide to The Mental Capacity Act 2005* and Phil Fennell, ‘Chapter 4: Mental Capacity’, both n 37.

⁷⁶ Lucy Series et al, *Use of the Court of Protection’s welfare jurisdiction by supervisory bodies in England and Wales*, n 49.

⁷⁷ In 2015 446 applications were made for welfare deputyships, and 621 applications for ‘hybrid’ property and affairs and welfare deputyships. Ministry of Justice, *Court Statistics Quarterly*, n 30, Table 17.

⁷⁸ The Family Division has developed the inherent jurisdiction to provide remedies for the protection of vulnerable but not legally incapable adults developed by Singer J in *Re SK* [2004] EWHC 3202 (Fam), where he said this: I believe that the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values. As Peter Jackson J put it in *Spencer v Anderson* [2016] EWHC 851 (Fam) para 56, ‘That manifestation of the jurisdiction was cemented by Munby J in *Re SA* [2005] EWHC 2942 (Fam) and the Court of Appeal has confirmed that it has survived the enactment of the Mental Capacity Act 2005: see *DL v A Local Authority* [2012] EWCA Civ 253.’

The CoP's health and welfare jurisdiction uses a very formal model of proceedings and the person is more likely to participate in them than in property cases. Nevertheless, even where an individual is fully represented, welfare cases can involve relatively low levels of *direct* participation by P. An extreme example of this was the case of Alessandra Pacchieri, who, despite the fact that she was independently represented in proceedings brought by an NHS Trust for a declaration that it would be lawful to deliver her child by caesarean without her consent, she herself was not notified of the proceedings until afterwards.⁷⁹ Section 3 of this report will describe more fully key elements of the CoP's model of participation in welfare cases.

As to the all-important issue of costs, for health and welfare cases the general rule is that the parties pay their own costs.⁸⁰ This means that P may have to pay his or her own costs, even if s/he did not bring the proceedings. An important exception to this rule is serious medical treatment cases, where by convention the public body making the application will pay half of the Official Solicitor's costs. In some, but not all, welfare cases, P's legal costs may be met by legal aid, subject to a stringent means test.

Jurisdiction over Deprivation of Liberty

The CoP has two roles in relation to deprivation of liberty. The first is to review the lawfulness of deprivations of liberty carried out in hospitals and care homes under the deprivation of liberty procedures in Schedules A1 and 1A to the Mental Capacity Act (known as the 'deprivation of liberty safeguards', or DoLS). The court's powers in this regard are set out in s21A MCA. The second role is where the CoP actually authorizes and provides for the continuing review of deprivations of liberty by making a welfare order.⁸¹ This function is primarily used in settings other than residential care homes or hospitals where there is as yet no administrative framework for detention. However, the CoP may also authorise detention in hospitals or care homes by making a welfare order in exceptional circumstances when the powers contained within Schedules A1 and 1A are insufficient or inappropriate.⁸² The CoP's jurisdiction over deprivation of liberty is explained and discussed in more detail in Section 1.4 below. Although CoP deprivation of liberty functions are intimately involved in welfare matters, they use different participatory models to other kinds of welfare case and as they involve Article 5 ECHR and have distinct human rights implications.

1.4 THE COURT OF PROTECTION AND THE MENTAL CAPACITY ACT 2005 DEPRIVATION OF LIBERTY SAFEGUARDS

This section gives an overview of the CoP's jurisdiction over Article 5 ECHR matters connected with the MCA. It describes the insertion of the DoLS into the Act, through Schedules A1 and 1A. The CoP's jurisdiction over deprivation of liberty derives both from the requirement under Article 5(1) ECHR for a procedure prescribed by law to authorise deprivation of liberty, and the requirement under Article 5(4) ECHR for a competent court or tribunal to review the lawfulness of detention. The evolution of these ECHR rights in relation to persons with mental disabilities, and their relevance to matters of participation, are described more fully in Section 2 below.

⁷⁹ *Re AA* [2012] EWHC 4378 (COP); the decision not to notify Ms Pachierri until after the operation is detailed in the transcript of the hearing and the order itself.

⁸⁰ Court of Protection Rules 2007, SI 2007 No 1744, r 157

⁸¹ MCA 2005, s 4A(3) and s 16(2)(a).

⁸² *A NHS Trust v Dr. A* [2013] EWHC 2442 (COP)

This section explains how the Supreme Court's decision in *Cheshire West* and the report of the House of Lords Select Committee on the MCA have led to a crisis in the CoP over its management of deprivation of liberty cases, and the possibility that these functions might be revoked or reduced and transferred to a tribunal. It explores how questions as to whether and how P participates in CoP proceedings concerning Article 5 ECHR have been at the heart of these dilemmas. A more detailed account of the history and development of the MCA DoLS can be found elsewhere.⁸³

Overview of the MCA deprivation of liberty safeguards

The Deprivation of Liberty Safeguards (DoLS) constitute an administrative framework for authorizing detention in care homes and hospitals. The DoLS were inserted into the MCA by amendment under the Mental Health Act 2007 in response to the ruling of the ECtHR in *HL v United Kingdom*.⁸⁴ HL, a man with autism, had been informally admitted under the common law doctrine of necessity to Bournemouth Hospital in his 'best interests'. He was found by the Strasbourg Court to have been unlawfully deprived of his liberty because a procedure prescribed by law had not been followed as required by Article 5(1). The failure to apply procedural safeguards and to provide access to a court to review detention breached Articles 5(1) and 5(4) ECHR.

Under the DoLS, if the managers of a care home or hospital consider that they are depriving a person of his or her liberty, they must seek authorisation from a supervisory body⁸⁵. The supervisory body directs assessments to be carried out of whether the person is over 18, of the person's mental health, of their capacity to decide where to live, whether care in circumstances amounting to a deprivation of liberty is in the person's best interests, whether the person is eligible for deprivation of liberty under the MCA⁸⁶, and whether there are any objections from a person who has the power to decide where the person is to live under a Lasting Power of Attorney, a welfare deputyship granted by the CoP or any advance refusal of treatment pertinent to the detention.

If detention is authorised, the supervisory body must appoint a 'Relevant Person's Representative' (RPR) to assist the person in understanding and exercising their rights. The detained person and the RPR may also be supported by an Independent Mental Capacity Advocate (IMCA). P or their RPR may at any time ask the supervisory body to review whether the criteria for a deprivation of liberty continue to be met.⁸⁷ P or their RPR may also 'appeal' against the detention by making an application for review to the CoP under s21A MCA. Non-means tested legal aid is available for this purpose.⁸⁸

⁸³ Paul Bowen, *Blackstone's Guide to The Mental Health Act 2007*, (OUP 2007); Peter Bartlett, *Blackstone's Guide to The Mental Capacity Act 2005*, n 37.

⁸⁴ (App no 45508/990) [2004] 40 EHRR 761

⁸⁵ In England, local authorities are the supervisory body for the DoLS, in Wales, local authorities perform this function in respect of care homes and Local Health Boards in respect of hospitals.

⁸⁶ 'Eligibility' is determined by reference to Schedule 1A MCA and is a fiendishly complicated and rapidly evolving area of law, that will not be addressed here. It relates to the interface between the MCA and the MHA, and the choice of which framework should be used to authorise detention or whether both regimes might coexist in some circumstances.

⁸⁷ MCA 2005, Schedule A1, Part 8, para 95.

⁸⁸ The Civil Legal Aid (Financial Resources and Payment for Services) Regulations SI 2013 No. 480

These provisions are intended to give effect to P's right under Article 5(4) of the ECHR 'to take proceedings by which the lawfulness of ... detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. In Section 3.1 we discuss issues surrounding access to the CoP for the purpose of exercising Article 5(4) rights; Section 4.4 discusses a contrasting procedure for the satisfaction of these rights that is adopted by the Mental Health Tribunals.

The DoLS procedure is only available for deprivations of liberty in hospitals or care homes. Where people are deprived of their liberty in settings other than in care homes or hospitals, however, the DoLS do not apply and detention must be authorised by a welfare order granted by the CoP. Legal aid for this authorisation process or any challenge to such a deprivation of liberty is subject to a stringent means test. This was subject to criticism by the House of Lords Select Committee,⁸⁹ but the government has rejected proposals for reform in this area.⁹⁰

The House of Lords report and the Law Commission review

The DoLS have been widely criticised as being too complex and bureaucratic, whilst offering insufficient protection for human rights.⁹¹ In 2014, the House of Lords Select Committee on the MCA conducted detailed and wide-ranging post-legislative scrutiny of the MCA. In its final report, it recommended that the government undertake a fundamental review of the safeguards with a view to their replacement.⁹² The government has instructed the Law Commission to undertake this review; a final report with proposals for a replacement statutory framework is currently scheduled for March 2017.⁹³ The Law Commission's proposed replacement framework would cover a wider range of settings than the DoLS, including supported living and possibly domestic settings. The Commission has also proposed that a tribunal system might be preferable to a court for reviewing the lawfulness of detention under Article 5(4), partly because tribunals are regarded as more accessible and better placed to facilitate participation than courts.⁹⁴

The Supreme Court Ruling in *P v Cheshire West*

Ever since the DoLS came into force, doubt and uncertainty prevailed as to the meaning of 'deprivation of liberty'. One week after the House of Lords Select Committee published its report on the MCA, the Supreme Court handed down its landmark ruling in *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council*⁹⁵ ('*Cheshire West*'). This decision, drawing on

⁸⁹ House of Lords Select Committee on the Mental Capacity Act 2005, n 21. Recommendation 71.

⁹⁰ HM Government, *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act. The Government's response to the House of Lords Select Committee Report on the Mental Capacity Act 2005*, (Cm 8884, 2014). Paragraphs 9.12 – 9.15.

⁹¹ Richard Jones, *Mental Capacity Act Manual* (4th ed., Sweet and Maxwell 2010); Paul Bowen, *Blackstone's Guide to The Mental Health Act 2007*, (OUP 2007); Mental Health Alliance, 'The Mental Health Act 2007: A review of its implementation' (2010).

⁹² House of Lords Select Committee on the Mental Capacity Act 2005, n 47. Participation is dealt with somewhat cursorily at paras 11.19 ad 11.20.

⁹³ Law Commission, *Mental Capacity and Detention*, <<http://lawcommission.justice.gov.uk/areas/capacity-and-detention.htm>> accessed February 2017.

⁹⁴ Law Commission, *Mental Capacity and Deprivation of Liberty: a Consultation Paper* (Law Com No 222, 2015), Chapter 11.

⁹⁵ [2014] UKSC 19

the Strasbourg Court's judgment in *HL v United Kingdom*⁹⁶ and the guardianship cases discussed in Section 2 below, laid down the 'acid test' for deprivation of liberty: a person is deprived of liberty if he or she is subject to continuous or constant supervision and control and is not free to leave. The result of the ruling was that many more people than before had to be treated as deprived of their liberty and in need of detention safeguards. Following the ruling there was a tenfold increase in the number of applications for authorisation received by supervisory bodies, which are currently struggling with significant backlogs.⁹⁷

The *Cheshire West* decision also had significant consequences for settings, such as supported living, which, not being hospitals or care homes, fall outside the scope of the DoLS. Deprivation of liberty can only be authorised in accordance with Article 5(1) ECHR by a welfare order of the CoP⁹⁸ or the High Court⁹⁹ because the DoLS procedures in Schedule A1 do not apply. Welfare orders authorizing deprivation of liberty must be reviewed at least annually.¹⁰⁰ Following the ruling in *Cheshire West* it was estimated that as many as 31,000 such cases might require court authorisation.¹⁰¹ If costs remain at present levels, each such application may cost public authority applicants around £11,000¹⁰². The projected number of applications would more than double the overall number of applications received by the CoP in 2013, and would increase the reported number of applications relating to deprivation of liberty by a factor of more than 200.¹⁰³ New judges were recruited from the social entitlement chamber of the First Tier Tribunal to receive these applications. Yet multiple sources confirm that the anticipated flood of applications has not materialised.¹⁰⁴

⁹⁶ (App no 45508/990) [2004] 40 EHRR 761. The court said at para 91 that 'HL's concrete situation was that he was under continuous supervision and control and was not free to leave' and expressed its agreement with Lord Steyn's observation in the House of Lords that the suggestion that HL was not detained stretched 'credulity to breaking point' and was a 'fairy tale'.

⁹⁷ Health and Social Care information Centre, *Mental Capacity Act 2005, Deprivation of Liberty Safeguards (England) Annual Report, 2014-15*, (2015); NHS Digital, 'Mental Capacity Act 2005, Deprivation of Liberty Safeguards (England), Annual Report 2015-16' (2015) <<http://content.digital.nhs.uk/catalogue/PUB21814>> 14 February 2017.

⁹⁸ *Salford City Council v BJ* [2009] EWHC 3310 (Fam).

⁹⁹ The inherent jurisdiction of the High Court may also be the only available route to authorise a deprivation of liberty that falls into the new 'Bournewood gap' of circumstances where a proposed treatment under the MCA would involve a deprivation of liberty but it cannot be authorised by the CoP making a welfare order because the person is already detained under the MHA 1983. This is because a person who is currently detained under the MHA is 'ineligible' to be detained under the DoLS (See Schedule 1A of the MCA), and s16A MCA specifies that 'If a person is ineligible to be deprived of liberty by this Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty'. See *A NHS Trust v Dr. A* [2013] EWHC 2442 (COP).

¹⁰⁰ *Salford City Council v BJ* [2009] EWHC 3310 (Fam).

¹⁰¹ Association of Directors of Adult Social Services and Local Government Association, *LGA and ADASS warn changes to safeguarding rules could take £88 million from care budgets*, (2014) <<https://www.adass.org.uk/number-of-dols-referrals-rise-tenfold-since-supreme-court-ruling-jun-14>> accessed 14 February 2017.

¹⁰² Based on estimates provided to us under the Freedom of Information Act 2000 by local authorities for 2013-14. See Lucy Series and colleagues, n 49.

¹⁰³ Statistics published by the Ministry of Justice report that the CoP received, in total, 24923 applications in 2013, of which 109 related to deprivation of liberty and 166 related to a 'one off' welfare order. In our research, local authorities reported 109 cases where the person was deprived of their liberty but was not subject to the DoLS; presumably these were cases where the authorisation to detain was issued by the CoP. Ministry of Justice, *Court Statistics Quarterly*, n 30.

¹⁰⁴ *Re MOD (Deprivation of Liberty)* [2015] EWCOP 47, para 17; *Re the Mental Capacity Act 2005 JM and others* [2016] EWCOP 15; Ministry of Justice, *Court Statistics Quarterly* n 30; Andy McNicoll, 'Councils' failure to make court

The *Re X* 'streamlined' procedure

This anticipated flood of applications presented a difficulty for the CoP: there simply weren't the resources available to hear the expected volume of applications using the existing formal processes reserved for deprivation of liberty welfare order applications. The Law Commission estimated that if the anticipated flood of applications *had* materialised, and full procedural rights were afforded to all parties, it would cost in excess of one billion pounds.¹⁰⁵ Pending the introduction of a replacement framework for DoLS, the court looked to modify its formal procedures for applications for welfare orders to authorize deprivation of liberty. Tensions arose between responding to such a high volume of applications and guaranteeing procedural protections and participatory rights in accordance with the ECHR and the common law without the system collapsing under its own weight.

In the immediate aftermath of the *Cheshire West* judgment, the President of the CoP, Sir James Munby, handed down two judgments establishing a 'streamlined' procedure for hearing applications for the authorisation of a deprivation of liberty: *Re X & Ors (Deprivation of Liberty)*¹⁰⁶ and *Re X and others (Deprivation of Liberty) (Number 2)*¹⁰⁷. Under the 'streamlined' procedure, a person could be deprived of their liberty by order of the CoP without being made a party to the case. If certain 'triggers' were identified – such as a person objecting to the detention – there would be an oral hearing, but otherwise the authorisation could be 'dealt with on the papers'.

Following the *Re X* decisions, Practice Direction 10AA¹⁰⁸ was updated to provide further guidance on this streamlined procedure, and new forms were issued¹⁰⁹. Practice Direction 10AA required the applicant, before submitting the application, to arrange for P to be informed of the following matters: the nature of the application, that they are entitled to participate in the proceedings – including through being joined as a party – and that the person undertaking the consultation can help them to obtain advice and assistance if they do not agree to the proposed arrangements.¹¹⁰ Form COP DOL 10, on which applications to authorize deprivation of liberty under the streamlined procedure are to be made stated that:

The person this application is about must be consulted about the application and the person undertaking this consultation must take all reasonable steps to assist the

applications leaving 'widespread unlawful deprivations of liberty' a year after Cheshire West ruling' (*Community Care*, 17 June 2015) <<http://www.communitycare.co.uk/2015/06/17/councils-failure-make-court-applications-leaving-widespread-unlawful-deprivations-liberty-year-cheshire-west-ruling/>> accessed 14 February 2017.

¹⁰⁵ Law Commission, *Impact Assessment: Mental Capacity and Detention*, (LAWCOM0044 2015).

¹⁰⁶ [2014] EWCOP 25

¹⁰⁷ [2014] EWCOP 37

¹⁰⁸ Court of Protection (2014) *Practice Direction 10AA: Deprivation of Liberty Applications*, London. <<https://www.judiciary.gov.uk/wp-content/uploads/2014/05/PRACTICE-DIRECTION-10AA-consolidated-FINAL.pdf>> accessed 14 February 2017.

¹⁰⁹ Court of Protection, 'Form COP DOL10: Application to authorise a deprivation of liberty (section 4A(3) and 16(2)(a) of the Mental Capacity Act 2005). A streamlined procedure pursuant to *Re X and Ors (Deprivation of Liberty)* [2014] EWCOP 25 and *Re X and Ors (Deprivation of Liberty) (Number 2)* *Re* [2014] EWCOP 37', (2015).

¹¹⁰ Court of Protection, *Practice Direction 10AA: Deprivation of Liberty Applications*, (2014). <<https://www.judiciary.gov.uk/wp-content/uploads/2014/05/PRACTICE-DIRECTION-10AA-consolidated-FINAL.pdf>> accessed 14 February 2017, para 35.

person to make a decision. If the person the application is about does not have capacity to consent to being deprived of their liberty, they must be given the opportunity to be involved in the proceedings, and to express their wishes and views, to help the court reach a decision about whether the proposed deprivation of liberty would be in their best interests.

The person carrying out this consultation 'should be someone who knows the person the application is about, and who is best placed to express their wishes and views', such as a relative or close friend, or someone the person has previously chosen to act on their behalf such as an attorney under an LPA. If no suitable person is available, then an IMCA or another similar independent advocate should be appointed to perform the role. That person must then complete Annex C to the application form, which also asked whether the person has expressed 'any views, wishes or feelings in relation to the application and the proposed/actual deprivation of liberty', and whether they wish to take part in the proceedings.

The streamlined procedure proposed in the *Re X* judgments raised a number of questions about how people could participate and be represented in judicial decisions concerning deprivation of liberty. A central question was whether P should be made a party.

The judgments in *Re X Nos 1 and 2* were appealed by the two detained parties to the proceedings and by the Law Society.¹¹¹ In the Court of Appeal, Black, Moore-Bick, and Gloucester LJ were sympathetic to the President's purpose in providing a 'streamlined' procedure for hearing these applications, but held that 'the particular course he adopted was not one that was open to him' and that the procedure should have been established by a practice direction, not via judgments.¹¹² The Court of Appeal ruled that, because the *Re X* judgments dealt with 'generic academic issues' rather than determining particular disputes arising in the cases before him, the President had no jurisdiction to rule as he had and that, consequently, the Court of Appeal had no jurisdiction to hear the appeal.¹¹³ Nevertheless, Black LJ went on to set out what she would have decided if the Court of Appeal had jurisdiction to hear the appeal, remarking that the procedures set out in the first instance judgments did not satisfy the requirements of Article 5 ECHR.¹¹⁴ The Court of Appeal's *obiter* remarks suggested that under the present system party status was essential to satisfying the requirements of Article 5; this issue is explored at greater length in Section 3.2 below.

In July 2015, in *MOD and Others (Deprivation of Liberty)*¹¹⁵ District Judge Marin considered nine applications using the *Re X* procedure in relation to adults ranging in age from 19 to 87, living in different placements. In none of the nine cases was there a challenge to the appropriateness of the placement or the restrictions on P's liberty. Bearing in mind the words of Black LJ in *Re X*, DJ Marin

¹¹¹ *Re X (Court of Protection Practice)* [2015] EWCA Civ 599

¹¹² *Ibid*, para. 58

¹¹³ *Ibid*, para.127

¹¹⁴ These remarks are *obiter dicta*, therefore not essential to the decision and not binding precedent on other courts, but are likely to have persuasive authority. However, see now the judgment of Charles J in *In the Matter of the Mental Capacity Act 2005 Re: NRA, HR, ML, MJW, VS, EJM, MT, DPW, NR, and LM* [2015] EWCOP 59, where the judge took the view that Family members, in particular family members that have been devoted to caring for P for years, are generally to be trusted by the Court as capable of advocating for P's best interests; His Lordship considered that In the majority of cases in which there is every reason to trust the judgment of family members, P need not therefore be joined as a party to proceedings. This would add no protection and would potentially cause detriment

¹¹⁵ [2015] EWCOP 47.

joined all nine as parties and then in the case of eight of them, invited the Official Solicitor to act as litigation friend. The Official Solicitor wrote to the judge declining to act, stating:

I am not currently in a position to accept the invitations to act as litigation friend in the referrals in these cases; and, I am most unlikely, on my current understanding of my budgetary position, to be able, even when I have established a light touch process, which is nevertheless consistent with my duties as litigation friend, and the external outsourcing to which have I referred above, to be able to accept invitations to act in more than a relatively small proportion of the total expected numbers of these former streamlined procedure cases.¹¹⁶

Since in all but one of these nine cases there was no one to act as litigation friend to P, this brought matters to a standstill. DJ Marin transferred the proceedings to Charles J, the Vice-President of the CoP, where they were heard under the name *In the Matter of the Mental Capacity Act 2005 Re: NRA, HR, ML, MJW, VS, EJG, MT, DPW, NR, and LM*¹¹⁷ (hereafter *Re NRA and others*).

Charles J considered the ‘Procedural Balance’ to be struck between satisfying the procedural and substantive requirements of Article 5 and the common law, without a procedure so costly it diverted resources away from care provision, caused unnecessary intrusions into private lives, and without incurring such delays that it did not provide an effective procedural safeguard. Charles J considered whether P must be made a party in cases involving a deprivation of liberty, what role could be played by Rule 3A representatives, whether family could act as litigation friends, and what should happen when no suitable litigation friend was available and the Official Solicitor could not perform this function.

Charles J’s decision revived and adapted the streamlined procedure proposed by Munby P in *Re X*. It afforded family and friends a central function in safeguarding P’s rights, acting in the role of litigation friend or Rule 3A representative. This role, and Charles J’s ruling on party status and litigation friends, are considered in more detail in Section 3.2 (on party status) and Section 3.5 (on representation in proceedings) below.

In *Re NRA and Others*, family or friends were available to act as Rule 3A representatives for all the parties. In *obiter* remarks Charles J considered that should a case arise where P had no family or friends available to perform this function, one way for the CoP to obtain further information and secure P’s participation was to exercise its investigatory jurisdiction by requiring reports from health or social care bodies under s49 MCA¹¹⁸, although he felt that a ‘much better solution’ would be the appointment of a Rule 3A representative.¹¹⁹ Within 3 months a test case addressing this situation was heard by Charles J: *In the Matter of the Mental Capacity Act 2005: Re JM, AMY, JG, MM and VE*¹²⁰ (hereafter *Re JM and Others*).

¹¹⁶ *Ibid*, para 23.

¹¹⁷ *In the Matter of the Mental Capacity Act 2005 Re: NRA, HR, ML, MJW, VS, EJG, MT, DPW, NR, and LM* [2015] EWCOP 59

¹¹⁸ Provided the report’s authors were ‘not involved professionally or for remuneration in the provision or commissioning of the care package’, see *Re NRA & Ors* [2015] EWCOP 59 para 260.

¹¹⁹ *Re NRA & Ors* [2015] EWCOP 59, para 244. See also paragraphs 263 – 267.

¹²⁰ [2016] EWCOP 15

The five cases in *Re JM and Others* were chosen because they fell within ‘the class where the applicant (usually a public authority) is of the view that the application is not controversial and there is no family member or friend who the COP can appoint as a Rule 3A(2)(c) representative.’¹²¹ Again Charles J applied the logic behind his decision in the *NRA* case. Although the *Re X* streamlined procedure does not meet the minimum procedural requirements of Article 5, a procedure in which P was not joined as a party and there was no hearing would do so if a Rule 3A representative is appointed for P.¹²² The lack of capacity and vulnerability of the person deprived of his liberty pointed towards him having someone ‘in his corner’ to carry out an independent review of whether the application for a deprivation of liberty is justified and represents the least restrictive available option. Charles J said this:

Without some assistance from someone on the ground who considers the care package through P's eyes and so provides the independent evidence to the COP that a family member or friend can provide, the procedure will not provide an independent check that meets the minimum procedural safeguards required by Article 5 and the common law.¹²³

In one of the five test cases there was someone who could be appointed under Rule 3A. In the other four cases where there was no appropriate family member or friend who could be appointed as a Rule 3A representative. Charles J made an order joining both the Ministry of Justice and the Department of Health as parties and inviting the parties to take steps to either ‘identify a suitable person who is ready, willing and able to accept immediate appointment as P’s Rule 3A representative, or identify an alternative procedure that is actually available to the COP to take to meet the minimum procedural requirements in the case.’ In the meantime the applications would be stayed ‘pending the identification of a practically available procedure that enables the COP to adopt a procedure that meets the minimum procedural requirements in that case.’¹²⁴ Although the judgment in *Re JM* was handed down in March 2016, at the time of writing this report, the cases still appear to be stayed.

¹²¹ Ibid, para 3.

¹²² Ibid, para 23.

¹²³ Ibid, para 140.

¹²⁴ Ibid, para 25.

2. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK FOR PARTICIPATION IN LEGAL CAPACITY AND DEPRIVATION OF LIBERTY PROCEEDINGS

Since the CoP was established there have been very important developments in the human rights framework relating to the participation of disabled people in decisions on their legal capacity and deprivation of liberty. An overview is given here, with further detailed discussion for each of the key participation issues in Section 3 below.¹²⁵

2.1 EARLY RULINGS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON PARTICIPATION UNDER ARTICLE 5 ECHR

Article 5 formed the basis of much of the court's early jurisprudence concerning legal capacity, mental disability and participation in proceedings. There is an important connection between the participatory guarantees of the ECHR for deprivation of liberty and legal capacity proceedings. In its recent decision in *AN v Lithuania*¹²⁶, the ECtHR stated that the guarantees of Article 5 ECHR are broadly similar to Article 6, and in its decisions concerning legal capacity and guardianship it will have regard to its case law under Article 5.¹²⁷

The first case to consider legal capacity, deprivation of liberty and rights of access to a court for a person with mental disabilities was *Winterwerp v the Netherlands*¹²⁸ in 1979. In *Winterwerp* the Court held that detention must be reviewed at

Article 5 ECHR: Liberty and Security of the Person

- 1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants [...]
- 2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

[...]
- 4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- 5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

¹²⁵ See also: Lucy Series, *The participation of the relevant person in proceedings in the Court of Protection: A briefing paper on international human rights requirements*, (Version 1.3, School of Law and Politics, Cardiff University 2015); Lucy Series, 'Legal capacity and participation in litigation: Recent developments in the European Court of Human Rights' in Gerard Quinn, Lisa Waddington and Eilionoir Flynn, (eds) *European Yearbook of Disability Law*, (Martinus Nijhoff 2015)

¹²⁶ (App No. 17280/08) [2016] ECHR 462 (31 May 2016)

¹²⁷ *Ibid*, para 88

¹²⁸ (App no 6301/73) [1979] 2 EHRR 387

regular intervals¹²⁹ and found a breach of Article 5(4) in that Mr Winterwerp had not been given the right to be heard by the court renewing his detention. The Court said this:

The judicial proceedings referred to in Article 5(4) need not, it is true, always be attended by the same guarantees as those required under Article 6(1) para. 1 for civil or criminal litigation... Nonetheless, **it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation**, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty". Mental illness may entail restricting or modifying the manner of exercise of such a right but it cannot justify impairing the very essence of the right. Indeed, **special procedural safeguards may prove called for** in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.¹³⁰

The Court found that Mr Winterwerp was 'never associated, either personally or through a representative, in the proceedings leading to the various detention orders made against him: he was never notified of the proceedings or of their outcome; neither was he heard by the courts or given the opportunity to argue his case.'¹³¹

The case also considered legal capacity matters independently of Article 5. Mr Winterwerp had been automatically deprived of the right to administer his property and affairs by virtue of his detention. The Court held that this breached Article 6(1) affirming that 'Whatever the justification for depriving a person of unsound mind of the capacity to administer his property, the guarantees laid down in Article 6(1) must nevertheless be respected'.¹³²

The next significant case to develop the participation rights of disabled people was *X v United Kingdom*¹³³ (1981), a test case brought by Larry Gostin at MIND¹³⁴ on the right to seek review of the lawfulness of psychiatric detention. It produced far reaching effects in the campaign to reform the Mental Health Review Tribunal and increase patients' rights to participate effectively in reviews of the lawfulness of their detention. Mr X had been recalled to Broadmoor High Security Hospital without being promptly informed of the reasons for his recall in breach of Article 5(2). *X v United Kingdom* also established the important principle in relation to review of detention pursuant to Article 5(4) that the detained person must be entitled to call in question the lawfulness of detention before a court or tribunal, which must have the power to order discharge. The case brought about an increase in patients' rights to apply for a tribunal hearing as well as rights to be informed of the fact of detention and rights of challenge under the Mental Health Act 1983.

*Van der Leer v the Netherlands*¹³⁵ (1990) was a key Article 5 case in relation to participation, rights to challenge detention, and the right to be heard in court where the initial detention is authorised

¹²⁹ Ibid, para 39. See also *X v UK* (1981) 4 EHRR 188, and *Van der Leer v the Netherlands* (1990) 12 E.H.R.R. 567.

¹³⁰ *Winterwerp v the Netherlands*, [1979] 2 EHRR 387 para 60.

¹³¹ Ibid, para 61

¹³² Ibid, para 75.

¹³³ (1981) 4 EHRR 188

¹³⁴ At that time known as The National Association for Mental Health.

¹³⁵ Judgment of 22 January 1990 (1990) 12 EHRR 567

by a court. Mrs Van der Leer had been detained by court order on 18 November 1983 and only found out that she was a detained rather than a voluntary patient, when she was placed in isolation on 28 November.¹³⁶ Mrs Van der Leer had not been heard by the court ordering her detention, even though Dutch law required that she be given the opportunity to be heard. Article 5(1)(e) had been breached because the procedure prescribed by domestic law had not been followed. Nor was she informed promptly of the fact that a court had ordered her detention, which amounted to a breach of Article 5(2), the right to be given reasons for arrest and information about the right to challenge under Article 5(4). Arrest was held to include detention on grounds of unsound mind and detained patients were to be told that they were detained, the reasons for their detention and their rights to challenge. The Court furthermore held that there had been a breach of the right to speedy review of the lawfulness of detention under Article 5(4), partly occasioned by the fact that Ms Van der Leer had not even been informed of the fact that she was detained, let alone of her right to challenge. *Van der Leer* is one of the key ECtHR precedents on the right to be notified.

In *Hutchison Reid v United Kingdom*¹³⁷ the ECtHR again elaborated on the features of a competent court for the purposes of reviewing the lawfulness of detention under Article 5(4), holding that it need not necessarily be a court of law of the ‘classic kind’, but it should provide guarantees ‘appropriate to the kind of deprivation of liberty in question’ and ‘of a judicial procedure’, with the competence to decide the ‘lawfulness’ of the detention and to order release if not lawful.¹³⁸ The Court also held that the burden of proof for making the case for detention rested with the detaining authorities and not the patient,¹³⁹ as was the case at that time under the MHA 1983 – which was subsequently amended.¹⁴⁰ This case reiterates the importance of access to a court rather than a non-judicial form of review of detention for compliance with Article 5(4). This is significant as it confirms that procedures for the review of detention by a supervisory body under the DoLS¹⁴¹ do not provide an alternative means of satisfying the requirements of the ECHR because they are not a ‘judicial procedure’.

The role of the ECtHR’s ruling in *HL v United Kingdom*¹⁴² in prompting the government to amend the MCA and insert the DoLS was discussed above in Section 1.4. Its significance for matters of participation lay in requiring the guarantees of Article 5 – including rights of appeal – for

¹³⁶ Ibid, para 9.

¹³⁷ Judgment of 20 February 2003 (2003) 37 EHRR 9.

¹³⁸ Ibid, para 64.

¹³⁹ Ibid, para. 70

¹⁴⁰ By the time the Strasbourg Court ruled in *Hutchison Reid v United Kingdom*, the English Court of Appeal had already issued a declaration of incompatibility in relation to the burden of proof in *R (H) v Mental Health Review Tribunal North and East London Region and Secretary of State for Health* [2001] 3 WLR 512 where Lord Phillips MR held it ‘contrary to the Convention compulsorily to detain a patient unless it can be shown that the patient *is* suffering from a mental disorder that warrants detention.’ The burden of proof in the Mental Health Review Tribunal was subsequently changed by Mental Health Act 1983 (Remedial) Order 2001 S.I. 2001 No 3712, and the tribunal is now required to discharge a patient if not satisfied that the patient is then suffering from detainable mental disorder of the requisite nature or degree. Meanwhile, in *Lyons v. the Scottish Ministers* 17 January 2002, (First Division of the Court of Session) Scottish Ministers accepted that the Convention required them to bear the burden of proof and argued that section 64 of the Scottish legislation should be read to give this effect.

¹⁴¹ MCA 2005 Schedule A1, Part VIII (the ‘Part 8 review procedure’)

¹⁴² (App no 45508/990) [2004] 40 EHRR 761

incapacitated adults *who may not be objecting to their detention*. In England and Wales, since the Mental Health Act 1959, compliant incapacitated patients could be admitted to hospital informally without any formal detention procedure. Compulsory powers of detention were used if the patient objected to admission or, if they were already an inpatient, made ‘persistent and purposeful attempts to leave hospital’.¹⁴³ Detained patients who objected to admission had the right to seek review of their detention before the tribunal. Patients who lacked capacity and were not actively resisting admission were often prevented from leaving hospital, or care homes even though they were not formally detained. These patients were sometimes referred to as ‘de facto detained’: detained in fact, but with no mechanism to seek review of that detention even if they were objecting.¹⁴⁴

Following *HL v UK*, the difficult aspect in relation to participation was how might a person who lacks capacity to decide where to live and who is not necessarily resisting being in the hospital or care home be enabled to participate in a decision reviewing the lawfulness of that placement carried out to satisfy the requirements of Article 5(4). The Strasbourg Court suggested a vital role for patient representatives, akin to the role of the nearest relative under mental health legislation:

The appointment of a representative of a patient who could make certain objections and applications on his or her behalf is a procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for patients who are legally incapacitated and have, as in the present case, extremely limited communication abilities.¹⁴⁵

The role of representatives in deprivation of liberty cases where P is not objecting is pivotal to the *Re X* ‘streamlined’ procedure for authorising a deprivation of liberty, and will be considered under Section 3.5 below.

In 2005 the Court’s ruling in *Storck v Germany*¹⁴⁶ effectively extended the reach of Article 5 even into private care arrangements. Ms Storck was a patient who had been detained and treated without consent in a private hospital. The ECtHR declared that Article 5 places states under a positive duty to exercise effective supervision and review of decisions by private parties to deprive people of their liberty and to treat them against their will. The positive duty under *Storck* applies not only to decisions to detain, but also to decisions to interfere with people’s rights of self-determination under Article 8 by treating them without their consent.¹⁴⁷ Citing this ruling, Charles J recently held that local authorities and the CoP had obligations to ensure that even a deprivation of liberty arranged by a person’s deputy, using their personal financial resources, required safeguards in accordance with Article 5 ECHR – in that case by way of a welfare order authorising the detention.¹⁴⁸ This decision was appealed by the Secretary of State for Justice on the grounds that

¹⁴³ Department of Health and Welsh Office, *Mental Health Act Code of Practice* (London 1999). Para 19.27.

¹⁴⁴ Mental Health Act Commission, *First Biennial Report of the Mental Health Act Commission* (1985), para 8.10.

¹⁴⁵ *Ibid*, para 120.

¹⁴⁶ (2005) 41 EHRR 96

¹⁴⁷ *Ibid*, para 150.

¹⁴⁸ *Staffordshire County Council v SRK & Ors* [2016] EWCOP 27

such 'private' detentions were not 'imputable to the state'; the Court of Appeal rejected the appeal and upheld Charles J's decision.¹⁴⁹

Hence, by 2005 there was a comprehensive system of enforcement of Article 5 rights via positive and negative obligations on states to protect against arbitrary detention on grounds of unsoundness of mind. States had a 'negative' obligation not to detain without due process as set out in *Winterwerp*. Moreover, they had a positive obligation to ensure that there was effective supervision and review of decisions to detain in private and public institutions and even quasi-domestic settings, and to ensure that those who lack capacity to decide where to live have access to effective supervision and review of decisions to detain them, even though they may be compliant.

2.2 UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The adoption by the United Nations of the Convention on the Rights of Persons with Disabilities (CRPD) has brought an even greater focus on participation in proceedings by people alleged to lack decision-making capacity, which has infused the later rulings of the ECtHR on legal capacity proceedings, a topic we return to below. Although the main focus of this report is on compliance of the CoP with the human rights paradigm of the ECHR, rather than the 'new paradigm' of the CRPD,¹⁵⁰ we highlight the significance of the CRPD for its approach to participation and accessibility, and its influence on Strasbourg case law.

The CRPD was adopted by the UN in 2006 and ratified by the UK in 2009. It has been described as a 'paradigm shift' in approach to disability, from welfare policies and charity to an approach based on human rights and equality.¹⁵¹ It is based on a social model of disability, which emphasises that disability arises from the interaction between a person's impairment and the barriers they encounter in their environment and society.¹⁵² This approach shifts the emphasis from diagnosis and cure towards addressing social and environmental barriers to full inclusion and participation in society.¹⁵³ Thus, the CRPD shifts models of participation away from disability justifying exclusion from participating in court proceedings, towards ensuring that court and tribunal proceedings are suitably adapted to facilitate inclusion on an equal basis with others.

The CRPD has not been directly incorporated into UK law, and thus cannot be enforced within the domestic courts. However signatory states are obliged to ensure and promote the full realization of all rights contained within the CRPD for disabled people, to refrain from engaging in acts or practices that are inconsistent with it, and modify legislation, customs and practices that constitute discrimination (Article 4). States' implementation of the CRPD is subject to a monitoring framework¹⁵⁴ and the UK is a signatory to an Optional Protocol that permits individuals to complain

¹⁴⁹ Secretary of State for Justice v (Staffordshire County Council & Anor [2016] EWCA Civ 1317

¹⁵⁰ Series, L. (2014) 'Comparing old and new paradigms of legal capacity', *Elder Law Journal*, 4(1), 62.

¹⁵¹ Hammarberg, T. (2011) 'Disability rights: from charity to equality', *European Human Rights Law Review*, (6), 638-641.

¹⁵² Article 1 CRPD. For further reading on social models of disability and the CRPD see Rannveig Traustadóttir, 'Disability Studies, the Social Model and Legal Developments' in O. M. I. Arnardóttir and G. Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities. European and Scandinavian Perspectives* (Martinus Nijhoff Publishers 2009).

¹⁵³ Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?' (2006-7) 34 *Syracuse Journal of International Law and Commerce*, 563, 563.

¹⁵⁴ Article 33 CRPD

to the UN Committee on the Rights of Persons with Disabilities if their rights under the CRPD have been violated.¹⁵⁵ Although the CRPD is not directly binding upon the courts, it is a source of persuasive authority¹⁵⁶ and has influenced to varying degrees many domestic rulings and judgments of the ECtHR, particularly those concerning independent living, deprivation of capacity and deprivation of liberty.¹⁵⁷

Articles 5, 12, 13 and 14 CRPD have had an especially important influence on subsequent ECtHR authorities relating to the rights of disabled people who are challenging their detention in court or who are subject to legal capacity proceedings. Thus although not directly enforceable by individuals in the UK, the CRPD is an important source of law, which cannot be disregarded.

Because this report makes several policy recommendations for changes to the MCA, COPR or guidance, which will have an impact on disabled users of the court, we also draw attention to Article 4(3) of the CRPD:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

Article 5 CRPD: Equality and non-discrimination

Article 5 CRPD prohibits all forms of discrimination on the basis of disability and requires states to take all appropriate steps to ensure that reasonable accommodations are provided. Reasonable accommodations¹⁵⁸ are defined in Article 2 CRPD as:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Domestically the Equality Act 2010 also makes provision for a right to reasonable adjustments for disabled people.¹⁵⁹ This right applies not only to the provision, criteria and practices of HM Courts and Tribunals Service but also to any legal services disabled people may use in accessing justice. It is unclear, however, whether the Equality Act 2010 applies to the conduct of a case within the courts, since judicial functions¹⁶⁰ are exempt from the s29 Equality Act 2010 duty prohibiting

¹⁵⁵ United Nations (2006) Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (OPCRPD)

¹⁵⁶ *Burnip v Birmingham City Council & Anor (Rev 1)* [2012] EWCA Civ 62; *P v Cheshire West and Chester Council and another*; *P and Q v Surrey County Council* [2014] UKSC 19

¹⁵⁷ Anna Lawson and Lucy Series, 'United Kingdom' in Anna Lawson and Lisa Waddington (eds) *Domestic Interpretation of the UN Convention on the Rights of Persons with Disabilities: A Comparative Analysis*, (Oxford University Press, forthcoming in 2017).

¹⁵⁸ We have used the terminology of 'reasonable adjustments' throughout this report instead of 'reasonable accommodations', as this is the terminology adopted under UK equalities legislation.

¹⁵⁹ Equality Act 2010, s 20.

¹⁶⁰ Equality Act 2010, Schedule 3, s3

discrimination.¹⁶¹ Nevertheless, in *J W Rackham v NHS Professionals Ltd*¹⁶² the Employment Appeal Tribunal accepted that it could not ‘sensibly be disputed that a Tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments to accommodate the disabilities of Claimants’.¹⁶³ The ‘particular route by which the obligation rests upon the Tribunal is unimportant’, but might be through the operation of the UN CRPD or common law fairness.¹⁶⁴ The case law of the ECtHR has also found some limited rights to reasonable adjustment by the courts within Articles 6 and 8 ECHR, and a more expansive approach to reasonable adjustments within these ECHR rights has been taken in domestic jurisprudence.¹⁶⁵

Article 9 CRPD: Accessibility

Article 9 CRPD requires states to ensure that public facilities and services are made accessible to disabled people, including providing ‘training for stakeholders on accessibility issues’ and ensuring that ‘forms of live assistance and intermediaries’ are available for facilities open to the public. A General Comment by the UN Committee on the Rights of Persons with Disabilities on accessibility states that:

There can be no effective access to justice if the buildings in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities.¹⁶⁶

Accessibility duties are anticipatory and apply to groups, whereas rights to reasonable accommodation apply to individuals. The accessibility of services should be considered *prior* to any individual requesting reasonable accommodation.¹⁶⁷ Domestically, the Equality Act 2010 contains several provisions, framed as anticipatory reasonable adjustment duties, which are relevant to the accessibility of court and tribunal services.¹⁶⁸ Accessibility issues for the CoP are considered in more detail in Section 3.9, below.

Article 12 CRPD: Equal recognition before the law

Article 12 CRPD confers the right to equal recognition before the law. This article has provoked considerable discussion and controversy, as it is increasingly widely regarded as prohibiting ‘substitute decisions’ imposed on a person in their ‘best interests’, calling into question the

¹⁶¹ With thanks to Professor Anna Lawson for that clarification.

¹⁶² [2015] UKEAT 0110_15_1612

¹⁶³ *Ibid*, para. 32

¹⁶⁴ *Ibid*

¹⁶⁵ For discussion see: Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*, (Hart Publishing, 2008). Chapter 2.

¹⁶⁶ Committee on the Rights of Persons with Disabilities, *General comment No 2 (2014) Article 9: Accessibility*, (Adopted at the Eleventh session of the Committee, 31 March –11 April 2014, CRPD/C/GC/2) Geneva.

¹⁶⁷ *Ibid*, paragraph 25.

¹⁶⁸ Anna Lawson and Sarah Woodin, ‘Task 4 - National Accessibility Report: UK’ (Academic Network of Experts on Disability, European Union 2012).

compatibility of legislation like the MCA with the CRPD.¹⁶⁹ The recent General Comment on Article 12 adopted by the UN Committee on the Rights of Persons with Disabilities adopts this analysis.¹⁷⁰

This report does not consider the compatibility of the MCA with Article 12 CRPD. Because the CoP adjudicates on the MCA, which permits substituted decision making, we have primarily assessed the compliance of the CoP with 'old paradigm' approaches to human rights under the ECHR. However, whatever interpretation of Article 12 CRPD is accepted, it is clear that it places a much stronger emphasis on ensuring equal rights in exercising legal capacity for disabled people (Article 12(2) CRPD), putting in place any supports that are required to enable people to exercise legal capacity (Article 12(3) CRPD) and ensuring that such measures respect the person's 'rights, will and preferences' (Article 12(4) CRPD). We consider this issue throughout the report in relation to contrasting models of participation based on the 'best interests' or the 'will and preferences' of the person.

Echoing this provision, Article 14 CRPD states that if disabled people are deprived of their liberty, they must be 'entitled to guarantees in accordance with international human rights law' on an equal basis with others. Several other rights contained within the CRPD closely connected to Articles 12 and 14 sit in tension with the MCA and its provision for detention and treatment without consent; however as these are not directly related to matters of participation in court proceedings themselves they are not discussed here.¹⁷¹

Article 13 CRPD: Access to justice

Article 13 CRPD requires states to:

ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

This article has been heavily relied upon in the recent ECtHR authorities emphasising participation in proceedings, discussed in Section 2.4 below. Article 13 CRPD also requires States to 'promote

¹⁶⁹ For further discussion, see: Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law', (2012) 75(5) *Modern Law Review*, 752-778; Genevra Richardson, 'Mental capacity in the shadow of suicide: What can the law do?', (2013) 9(01) *International Journal of Law in Context*, 87-105; Denzil Lush, 'The 2nd World Congress on Adult Guardianship', (2013) 3(1) *Elder Law Journal*; Lucy Series, 'Comparing old and new paradigms of legal capacity', (2014) 4(1) *Elder Law Journal* 62; Wayne Martin, 'Mental Capacity Law Discussion Paper: Consensus Emerges in Consultation Roundtables: The MCA is Not Compliant with the CRPD' (39 *Essex St Mental Capacity Law Newsletter*, Issue 49, August 2014); Phil Fennell and Urfan Khaliq, 'Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English Law' [2011] *European Human Rights Law Review* 662-674.

¹⁷⁰ *General comment No 1*, n 166.

¹⁷¹ For discussion see: Tina Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from non-consensual psychiatric interventions', (2006-7) 34 *Syracuse Journal of International Law and Commerce*, 405; Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law', n 169; Genevra Richardson, 'Mental capacity in the shadow of suicide: What can the law do?', n 169; Arlene Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2015).

appropriate training for those working in the field of administration of justice' in order to help ensure effective access to justice. Training is discussed in Section 3.8, below.

There is a growing literature exploring the diverse 'access to justice' measures that may be required by the CRPD.¹⁷² In her comprehensive analysis of access to justice and disability rights, Flynn argues that Article 13 encompasses wide ranging aspects of the justice system, including access to information and advice, representation in proceedings, the accessibility of court buildings and information, and the kinds of special measures and reasonable adjustments discussed in this report.¹⁷³

2.3 THE FLOURISHING OF LEGAL CAPACITY JURISPRUDENCE IN THE EUROPEAN COURT OF HUMAN RIGHTS

The former President of the ECtHR, Sir Nicholas Bratza, has written that the jurisprudence of the ECtHR in the two decades following *Winterwerp* was 'notable for the almost complete dearth of judicial decisions in this vitally important area.'¹⁷⁴ As noted above, several cases did expand the ECtHR's jurisprudence on Article 5 ECHR, but few addressed the restrictions on participation in court proceedings faced by individuals who are deprived of legal capacity. Yet starting with the case of *Shtukaturov v Russia*¹⁷⁵ in 2008, the ECtHR has rapidly developed its jurisprudence on mental disability in general, and on participation in legal capacity and deprivation of liberty proceedings in particular. In many of these cases the ECtHR has cited the CRPD.

Many of these cases originated in Central and Eastern Europe, often brought with the assistance of strategic litigation organizations such as the Mental Disability Advocacy Centre¹⁷⁶. In these countries there has been a widespread practice of using adult guardianship laws to deprive people of liberty, to make decisions about their treatment, and indeed to restrict all aspects of their rights as citizens. Under these traditional guardianship regimes a person is formally declared legally 'incapable' by a court and typically stripped of all rights to make legally recognized decisions ('plenary guardianship'), although in some cases courts may have powers to only deprive a person of limited decision making rights ('partial guardianship'). The courts then appoint a guardian, often a relative or a social welfare officer, who can make a wide range of decisions on their behalf, including deciding to admit them to a psychiatric hospital or social care home without their agreement, or to consent to treatment on their behalf. Critically, under many of these regimes a person has no right to bring legal proceedings of any kind without the consent of their guardian – including proceedings to restore their legal capacity, to challenge the appointment or decisions, of their guardian, or appeal against detention. This effectively deprived people of all their Convention

¹⁷² Eilionoir Flynn and Anna Lawson, 'Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities', in Lisa Waddington, Gerard Quinn and Eilionoir Flynn (Eds) *European Yearbook of Disability Law* (Volume 4, Martinus Nijhoff 2013) p7-42; Arlene Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2015); Eilionoir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities*, (Ashgate 2015).

¹⁷³ Eilionoir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities*, (Ashgate 2015).

¹⁷⁴ Peter Bartlett, Oliver Lewis, and Oliver Thorold, *Mental disability and the European Convention on Human Rights* (Martinus Nijhoff Publishers 2007). See foreword by Sir Nicholas Bratza.

¹⁷⁵ (App no 44009/05) [2008] ECHR 223

¹⁷⁶ www.mdac.org

rights to challenge loss of legal capacity, deprivation of liberty, or treatment without consent, since the guardian could consent to detention and treatment and in many cases only the guardian could challenge these interventions.

Shtukaturov is a typical example. Mr Shtukaturov had been placed in hospital by his mother, who was his guardian, despite his objections, and without the use of any formal detention safeguards. He did not take part in the court proceedings to appoint his mother as guardian, as he was not made aware that they were taking place. He was not examined by the judge in person, and was unable to challenge the judgment, since the City Court refused to examine his appeal. The ECtHR compared the significance of deprivation of legal capacity proceedings to deprivation of liberty, as 'personal autonomy in almost all areas of life' is at issue, including rights to liberty.¹⁷⁷ Four years later, in *Stanev v Bulgaria*¹⁷⁸ the Strasbourg Court went on to hold that:

The right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned, since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty.¹⁷⁹

The string of guardianship cases following *Shtukaturov* also included the first examples of the ECtHR recognizing that individuals with mental disabilities could be deprived of their liberty in social care homes, as well as psychiatric hospitals;¹⁸⁰ jurisprudence that ultimately inspired the 'acid test' of deprivation of liberty identified by the UK Supreme Court in *Cheshire West*.

It is important to note that these formal guardianship regimes differ in important respects from the legal capacity regime of the MCA, which is unusually 'informal' in international terms. The MCA is not a plenary guardianship regime, but considers an individual's ability to make specific decisions at a specific point in time.¹⁸¹ Although 'deputies' may be appointed by a court to manage a person's properties and affairs, formal declarations of incapacity and the appointment of a deputy to make health and welfare decisions such as admission to a hospital or care home, or consenting to medical treatments, are extremely rare.¹⁸² Even when a deputy is appointed, there is no formal bar to a person bringing proceedings in the CoP to challenge their appointment or any decision they have

¹⁷⁷ *Shtukaturov v Russia* (App no 44009/05) [2008] ECHR 223, para 71.

¹⁷⁸ (App no 36760/06) [2012] ECHR 46

¹⁷⁹ *Ibid*, para 89.

¹⁸⁰ *Stanev v Bulgaria* (App no 36760/06) [2012] ECHR 46; *DDv Lithuania* (App no 13469/06) [2012] ECHR 254; *Kędzior v Poland* (App no 45026/07) [2012] ECHR 1809; *Mihailovs v Latvia* (App no 35939/10) [2013] ECHR 65

¹⁸¹ MCA 2005, s 2(1)

¹⁸² In 2015, for example, the CoP appointed 29,083 property and affairs deputies, but only 276 personal welfare deputies and only 49 deputies with authority over both property and affairs and personal welfare. As of 2016 changes to the CoP forms, separate applications must be made for property and affairs and personal welfare deputies, and 'hybrid' deputies with authority over both areas are almost never made. Ministry of Justice, *Family Court Statistics Quarterly, England and Wales, April to June 2016* (2016). < <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2016> > accessed 15 February 2017. Supplementary tables excel spreadsheet, table 18. There is a statutory presumption against the appointment of a deputy under s16(4) MCA, whereby a decision of the CoP on the matter in question is to be preferred to the appointment of a deputy and the powers of deputies must be as limited in scope as possible.

made. There may, however, be significant practical barriers to access to justice of a nature discussed in Section 3.1 and Section 3.5 below.

Whereas the formal guardianship regimes considered by the ECtHR appoint a single decision maker to make most, or all, decisions concerning a person's health and welfare, the MCA takes a more 'informal' approach to health and welfare matters. In most cases health and welfare decisions are made on behalf of adults deemed 'incapable' informally, where carers and health and social care professionals rely upon a general defence against liability for acts of care and treatment in the best interests of adults whom they reasonably believe lack the mental capacity to decide for themselves.¹⁸³ In theory this permits far more flexible, proportionate and tailored loss or 'denial' of legal capacity without the cost, bureaucracy and possible stigma of a formal declaration of incapacity by a court or tribunal.¹⁸⁴

The limits of this informal procedure are unclear, and some suggest that in practice it operates as a *de facto* power for health and social care professionals making major life changing decisions.¹⁸⁵ We return to this point in Section 3.1 and Section 5 below.

The informal nature of the MCA's main provisions for health and welfare are significant to matters of participation, because they prompt the question of whether, when and how an individual might be able to access court proceedings to contest decisions that may have significant consequences for their legal capacity and human rights, considered in Section 3.1. Thus, although it might be argued that ECtHR cases concerning Central and Eastern European plenary guardianship regimes have little bearing on matters of access to a court and participation under the MCA 2005, we suggest that insofar as decisions made under the MCA touch upon a person's capacity to exercise fundamental rights and challenge decisions concerning liberty, privacy, home, family life, and bodily integrity, they will engage the same issues as these authorities.¹⁸⁶

2.4 THE RIGHT TO PARTICIPATE AND THE 'RULE OF PERSONAL PRESENCE'

Within this recent tranche of authorities concerning legal capacity and deprivation of liberty, the ECtHR has developed and refined its jurisprudence on the right to participate in legal capacity and deprivation of liberty proceedings and established the 'rule of personal presence'. The rule of personal presence reflects Principle 13 of *Recommendation (99) 4 on principles concerning the legal protection of incapable adults* from the Council of Europe's Committee of Ministers: 'The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.'¹⁸⁷ Although *Recommendation 99* is non-binding, it is frequently cited by the

¹⁸³ MCA 2005, ss.5-6..

¹⁸⁴ These are the reasons given by the Law Commission when proposing what they termed the 'general authority', which became the 'general defence' of sections 5 and 6 MCA. Law Commission, *Mentally Incapacitated Adults and Decision-Making: An Overview* (Law Com No 119, 1991); Law Commission, *Mentally Incapacitated Adults* (Law Com No. 231, 1995)

¹⁸⁵ Alex Ruck Keene, 'Powers, defences and the 'need' for judicial sanction' [2016] *Elder Law Journal* 244.

¹⁸⁶ A similar conclusion was drawn by Alex Ruck Keene and others, who comment that 'However, too much can be made of the difference between 'status' based systems and that enshrined in the MCA 2005.' Alex Ruck-Keene, Kate Edwards, Anselm Eldergill and Sophy Miles, *Court of Protection Handbook: a user's guide* (First Edition, Legal Action Group, 2014) Para 13.60.

¹⁸⁷ 'Recommendation (99)4 of the Council of Europe Committee of Ministers on principles concerning the legal protection of incapable adults' (23 February 1999).

ECtHR as of great persuasive force in relation to the Court's interpretation of Articles 3, 5, 6 and 8 ECHR. This rule of personal presence echoes the longstanding common law rules of natural justice, most notably the principle of *audi alteram partem*, that the person should be able to be heard and to challenge the case against him.¹⁸⁸

The ECtHR's right to participate and the rule of personal presence has a threefold rationale:

1. The dignity principle: the fundamental right to meet judges taking decisions with serious consequences for a person's life.
2. The evidential principle: a person is an important source of evidence before the court for legal capacity, guardianship and deprivation of liberty proceedings.
3. The adversarial principle: Participation may be necessary to help a person to present his case and to refute expert evidence or arguments recommending measures that a person opposes.

These principles for participation in proceedings have chiefly been read into Articles 6 and 8 ECHR. In *Matter v Slovakia* (1999) the ECtHR held that proceedings depriving a person of legal capacity or restoring it were directly decisive for the determination of the applicant's civil rights and obligations and therefore engaged Article 6.¹⁸⁹ In *Shtukaturv* the ECtHR found a violation of Article 6 ECHR because Mr Shtukaturv was unable to participate and present his own case, in violation of the 'adversarial principle'. In *Shtukaturv* the ECtHR also went on to find a violation of Article 8 ECHR on procedural grounds. Holding that 'A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life'¹⁹⁰, the ECtHR found that whilst Article 8 of the Convention contains no explicit procedural requirements, 'the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8.'¹⁹¹ In Mr Shtukaturv's case, the decisions had very serious consequences for his private life – rendering him dependent upon his guardian in almost all areas of his life - and 'his participation in the decision-making process was reduced to zero.'¹⁹²

As will be considered in more detail in Section 3, Article 5 also contains procedural obligations connected with participation that have become especially salient in light of the *Cheshire West* and *Re X* decisions. Here, we rehearse the rationale of the principles underpinning participation in both legal capacity and deprivation of liberty proceedings. In Section 3, we consider in more detail how these might be interpreted in light of specific aspects of participation.

The dignity principle

This first principle suggests that even if the evidence and arguments for intervention without consent are sufficiently robust, there may still be grounds for ensuring the person has an opportunity to participate in the case and have direct contact with the judge simply by virtue of the

¹⁸⁸ *Ridge v Baldwin* [1964] AC 40.

¹⁸⁹ *Matter v Slovakia* (App no 31534/96) [1999] ECHR 38, para 51.

¹⁹⁰ *Shtukaturv v Russia* (App no 44009/05) [2008] ECHR 223, para 20

¹⁹¹ *Ibid*, para 21.

¹⁹² *Ibid*, para. 91.

consequences of the decision for that person. The right to meet the judge deciding one's case was succinctly expressed by the Court in *X and Y v Croatia*¹⁹³:

judges adopting decisions with serious consequences for a person's private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons.¹⁹⁴

It is important, however, to distinguish between the ECtHR jurisprudence that a person has a fundamental right to *meet the judge* and the right to be present throughout some or all of a hearing. This important distinction is considered under Section 3.6 below. Developments in the CoP in this regard have taken place in parallel to the development of policies for young people who wish to meet the judge in family proceedings.¹⁹⁵

A similar principle can also be found under the common law. In *Osborn v The Parole Board*¹⁹⁶ the Supreme Court held that the common law affords a prisoner the right to an oral hearing, deriving this from his 'legitimate interest in being able to participate in a decision with important implications for him'¹⁹⁷ and respecting his dignity.¹⁹⁸ The Supreme Court cited the 18th century authority, *Dr Bentley's case*, which draws on the biblical account of the judgement of God on Adam and Eve¹⁹⁹: 'Adam was allowed a hearing notwithstanding that God, being omniscient, did not require to hear him in order to improve the quality of His decision-making'.²⁰⁰ The principled basis of the rule of natural justice conferring the right to be heard is the dignity of the individual and the potential impact of the decision on individual rights, not the improvement of the quality of the decision. The court cited in support of its approach Jeremy Waldron's thesis that dignity entails 'paying attention to a point of view and respecting the personality of the entity one is dealing with'.²⁰¹

The evidential principle

The second principle is connected with improving the quality of the evidence available to the judge, and with the idea of the person as the object of the proceedings. The evidential principle recognizes that a person is an important source of evidence before the court for legal capacity, guardianship and deprivation of liberty proceedings. As the Court put it in *Shtukaturov*, they are the 'object of

¹⁹³ (App no 5193/09) [2011] ECHR 1835

¹⁹⁴ *Ibid*, para 84

¹⁹⁵ Children and Vulnerable Witnesses Working Group, *Report of the Vulnerable Witnesses & Children Working Group* (Judiciary of England and Wales, 2015).

¹⁹⁶ [2013] UKSC 61

¹⁹⁷ *Ibid*, para.82

¹⁹⁸ *Ibid*, para. 68, citing arguments made by Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 *The Cambridge Law Journal* 200-222.

¹⁹⁹ *Dr Bentley's Case (R v Chancellor of Cambridge, Ex p Bentley (1748) 2 Ld Raym 1334*

²⁰⁰ Para 69, citing *Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180*, 195 of a dictum of Fortescue J in *Dr Bentley's Case (R v Chancellor of Cambridge, Ex p Bentley (1748) 2 Ld Raym 1334*).

²⁰¹ Jeremy Waldron (2012), n 198

the proceedings' and their participation is therefore necessary 'to allow the judge to form his personal opinion about the applicant's mental capacity'.²⁰²

In *X and Y v Croatia*²⁰³, the ECtHR reiterated that although decisions regarding legal capacity should be based on medical evidence, 'at the end of the day, it is the judge and not a physician, albeit a psychiatrist, who is to assess all relevant facts concerning the person in question and his or her personal circumstances'.²⁰⁴ Hearing from other witnesses, including the person themselves, is thus an important procedural safeguard against any arbitrariness that could result from over-reliance on expert evidence, and to consider the proportionality of any measures imposed.²⁰⁵ This principle was reiterated in *Ivinović v Croatia*²⁰⁶, where the European Court was critical of the 'decisive' reliance of domestic courts on medical evidence in deprivation of legal capacity proceedings.²⁰⁷ This criticism of reliance on medical evidence, and the expectation that judges will come to an independent view on legal capacity, raises fundamental questions about the CoP's approach to evidence and participation, discussed in Section 3.4 below.

This approach builds upon earlier ECtHR jurisprudence that guarantees a right for a litigant to be physically present in court proceedings in cases involving the assessment of a person's state of health and character, or of 'emotional suffering'²⁰⁸, or where the subject of proceedings is themselves a source of factual evidence²⁰⁹.

The adversarial principle

The third rationale is connected with the principle of fairness and the common law rules of natural justice, most notably the principle of *audi alteram partem*, that the person should be able to be heard and to challenge the case against him. It echoes Lon Fuller's contention that 'the essence of the rule of law lies in the fact that men affected by the decisions which emerge from social processes should have some formally guaranteed opportunity to affect those decisions'.²¹⁰

The adversarial principle is relevant not only to whether a person attends court or meets the judge, but also to the conduct of the proceedings by any representative. This is an especially important principle when considering the role of litigation friends, accredited legal representatives or Rule 3A representatives (Section 3.5, below).

²⁰² *Shtukaturv v Russia* (App no 44009/05) [2008] ECHR 223, para. 72

²⁰³ (App no 5193/09) [2011] ECHR 1835

²⁰⁴ *X and Y v Croatia* (App no 5193/09) [2011] ECHR 1835, para 82. A similar point has been made by Charles J in *A Local Authority v K & Ors* [2005] EWHC 144 (Fam) paras 39, 44 and Baker J in *CC v KK and STCC* [2012] EWHC 2136 (COP), para 24, *A Local Authority v TZ (No. 2)* [2014] EWCOP 973, para 27 and *GW v A Local Authority & Anor* [2014] EWCOP 20 para. 17

²⁰⁵ *X and Y v Croatia*, n 204, para. 85

²⁰⁶ (App no 13006/13) [2014] ECHR 964

²⁰⁷ *Ibid*, para 40

²⁰⁸ *Göç v Turkey* (App no 36590/97) [2002] ECHR 589

²⁰⁹ *Salomonsson v Sweden* (App no 38978/97) [2002] ECHR 736; *García Hernández v. Spain* (App no 15256/07) [2010] ECHR, unreported, judgment delivered on 16 November 2010.

²¹⁰ Lon Fuller, 'Collective bargaining and the arbitrator', [1963] *Wisconsin Law Review* 3

In *Shtukaturv* the Court found that in proceedings to deprive someone of legal capacity they play a 'double role': they are the 'object of proceedings', as considered under the evidential principle, but they are also 'the subject' of proceedings and therefore an interested party. Their participation may therefore be necessary to help a person to present his case²¹¹, or to refute expert evidence or arguments recommending measures that a person opposes.²¹²

In *Shtukaturv* the Court held that the 'decision to decide the case on the basis of documentary evidence, without seeing or hearing the applicant, was unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6.'²¹³ The presence of a representative of the hospital and a public prosecutor was not sufficient to satisfy Article 6.²¹⁴ In the later case of *Salontaji-Drobnjak v Serbia*²¹⁵, neither was the appointment of a temporary guardian to represent the applicant's interests where that guardian did not oppose the measure in question – deprivation of legal capacity.²¹⁶

In *Ivinović v Croatia*²¹⁷ the applicant had been partially deprived of her legal capacity in proceedings where she had been represented by a 'legal guardian' who had worked for the same Social Welfare Centre that had instituted the guardianship proceedings. The ECtHR found that this process had violated her Article 8 rights, noting 'that national law does not provide for obligatory representation of the person concerned by an independent lawyer, despite the very serious nature of the issues concerned and the possible consequences of such proceedings'.²¹⁸ The ECtHR went on to say that 'in cases of mentally disabled persons the States have an obligation to ensure that they are afforded independent representation, enabling them to have their Convention complaints examined before a court or other independent body'.²¹⁹

In *MS v Croatia (No 2)*²²⁰, MS had been deprived of her liberty in hospital by a judicial order. The judge had visited MS in person, and a legal representative had been appointed for her, funded by legal aid. Nevertheless, the ECtHR found that these measures did not offer sufficient procedural guarantees under the adversarial principle. Although MS had a legal representative, that representative had never met with her and so 'did not have the benefit of hearing her arguments concerning the involuntary internment in order to understand and effectively represent her position.' Moreover, he had not advised her of the legal procedure and the most appropriate course of action. This was held to be particularly significant given her opposition to her detention and complaints about her care.²²¹ Contact between legal representative and the person was held to

²¹¹ As in *Shtukaturv v Russia* (App no 44009/05) [2008] ECHR 223, paras 72-3

²¹² *Salontaji-Drobnjak v Serbia* (App no 36500/05) [2009] ECHR 1526, para 127

²¹³ *Ibid*, para 73.

²¹⁴ *Ibid*, para 74. See also *AN v Lithuania* (App No. 17280/08) [2016] ECHR 462

²¹⁵ *Salontaji-Drobnjak v Serbia*, n 212

²¹⁶ *Ibid*, para 122

²¹⁷ *Ivinović v Croatia* (App no 13006/13) [2014] ECHR 964

²¹⁸ *Ibid*, para 45

²¹⁹ *Ibid*

²²⁰ [2015] ECHR 196

²²¹ *Ibid*, para. 151

be 'necessary or even crucial in order to ensure that the proceedings would be really adversarial and the applicant's legitimate interests protected'.²²²

Moreover, although the judge had met with MS in person in hospital, the meeting had only lasted for five minutes and the judge made no 'appropriate accommodations to secure her effective access to justice': he did not inform MS of her rights or give 'any consideration to the possibility for her to participate in the hearing'.²²³ MS did not attend the hearing and was given no opportunity to comment on the expert reports that the court relied upon; given her objections, the ECtHR held that her 'right to be heard was ever more pressing'.²²⁴ MS's lawyer did attend the hearing, but he acted as 'a passive observer' and made no submissions on MS's behalf. The ECtHR held that the court itself should have reacted to this and secured for MS 'effective legal representation'.²²⁵

In *AN v Lithuania*²²⁶ the ECtHR once again highlighted the importance of independent representation of the individual, of their having contact with their legal representative and the importance of participation in the proceedings in order to 'present his own case'.²²⁷

In Section 3.5 and in the discussion of this report we consider whether the adversarial principle being developed by the ECtHR increasingly requires a model of representation based on the 'will and preferences' of the person (in the parlance of Article 12 CRPD) rather than their 'best interests'.

²²² Ibid, para 155. See also *AN v Lithuania* (App No. 17280/08) [2016] ECHR 462, para 103

²²³ *MS v Croatia* (No 2) [2015] ECHR 196, para 157

²²⁴ Ibid, para. 158

²²⁵ Ibid, para 156

²²⁶ (App No. 17280/08) [2016] ECHR 462

²²⁷ Ibid, para 96

3. KEY ISSUES FOR PARTICIPATION IN THE COURT OF PROTECTION

Section 3 of this report considers different strands of participation in the CoP in light of the foregoing discussion of the Court's history, the growing pressures it faces and the rapidly evolving human rights standards for personal participation in legal capacity and deprivation of liberty proceedings. The following key issues are considered individually under the following headings:

- 3.1 Access to a court;
- 3.2 Party status;
- 3.3 Notification;
- 3.4 Evidence and information before the Court;
- 3.5 Representation in proceedings;
- 3.6 Attending court and personal contact with judges;
- 3.7 Special measures and reasonable adjustments;
- 3.8 Training of judges and representatives;
- 3.9 Accessibility measures in the wider Court of Protection system.

Under each heading we first describe the international and domestic legal framework, and then consider how these relate to the CoP's current practice and procedure. For purposes of comparison, a similar exercise is repeated in Section 4 on the Mental Health Tribunals, to illustrate a very different model of participation which is of increasing interest given the Law Commission's proposals for a tribunal to replace the CoP as the destination for 'appeals' against detention under the MCA.

3.1 ACCESS TO A COURT

Direct rights of access to a court under the European Convention on Human Rights

Access to a court is a defining feature of the ideal of the rule of law that underpins the ECHR.²²⁸ Yet in many countries, people who are deprived of their legal capacity on disability related grounds are not permitted to initiate legal proceedings except through their guardian.²²⁹ The ECtHR has held since *Winterwerp* that whilst mental disabilities can render legitimate limitations on rights of access to a court, 'it cannot warrant the total absence of that right'.²³⁰ In its more recent case law, the ECtHR has held that people with mental disabilities, including those with limited legal capacity,

²²⁸ *Golder v United Kingdom* (App no 4451/70) [1975] ECHR 1; 1 EHRR 524 §34

²²⁹ Mental Disability Advocacy Centre, *Guardianship and Human Rights in Serbia: Analysis of Guardianship Law and Policy* (Budapest 2006); Mental Disability Advocacy Centre, *Guardianship and Human Rights in Bulgaria: Analysis of Law, Policy and Practice* (Budapest 2007); Mental Disability Advocacy Centre, *Guardianship and Human Rights in Russia: Analysis of Law, Policy and Practice* (Budapest 2007); Mental Disability Advocacy Centre, *Guardianship and Human Rights in Hungary: Analysis of Law, Policy and Practice* (Budapest 2007); Mental Disability Advocacy Centre, *Guardianship and Human Rights in the Czech Republic: Analysis of Law, Policy and Practice*, (Budapest 2007); Mental Disability Advocacy Centre, *Guardianship and Human Rights in Kyrgyzstan: Analysis of Law, Policy and Practice* (Budapest 2007).

²³⁰ *Winterwerp v the Netherlands* (App no 6301/73) [1979] 2 EHRR 387, paras. 74-75; see also *Ashingdane v United Kingdom* (App no 8225/78) (1985) 7 EHRR 528, para 56.

must enjoy certain direct rights of access to a court that are not conditional upon securing the consent of a guardian, or upon the discretion or goodwill of other third parties:

1. **A person must have standing to seek a court review of any deprivation of liberty** in accordance with Article 5(4) ECHR, regardless of whether their guardian consents to such action.²³¹ Special procedural safeguards must be available to assist a person in bringing an appeal under Article 5(4).²³² This right of access to a court must not be dependent upon the exercise of discretion or goodwill by a third party²³³ - even if their decisions are justified by the person's prospects of success.²³⁴ A person's right of appeal against detention does not depend upon them demonstrating any particular prospect of success.²³⁵
2. In *Stanev v Bulgaria*, the ECtHR affirmed that **a person who seeks restoration of their legal capacity must have direct access to a court**.²³⁶ As discussed in Section 2.3 above, because the MCA does not, for the most part, operate like a formal guardianship system - especially for health and welfare decisions - this principle is difficult to translate to the domestic context.²³⁷ However, it is notable that many of these ECtHR cases were about placement in a social care facility or hospital by a person's guardian against their will. Arguably, similar direct rights of access to a court will apply to challenge 'informal' decisions under the MCA that engage fundamental ECHR rights such as respect for family, home and private life under Article 8.
3. In *DD v Lithuania*, the ECtHR held that **where a person is in conflict with their guardian, and 'the conflict potential has a major impact on the person's legal situation' it is essential that the person concerned must have access to the court**.²³⁸ Again, it is difficult to translate this into the informal framework for health and welfare decision-making under the MCA where formal guardians (deputies) are rarely appointed. It suggests that where a person is in conflict with those making best interests decisions having a major impact upon their ECHR rights, that they should have direct access to a court. In other words, there should be a right to challenge best interests decisions engaging fundamental rights, even if a person does not seek to assert their 'capacity' to make the decision themselves.
4. Outside the context of guardianship and legal capacity cases, the ECtHR has also emphasised the importance of a person having the possibility of **challenging decisions**

²³¹ *Shtukaturov v Russia* (App no 44009/05) [2008] ECHR 223; *Sýkora v The Czech Republic* (App no 23419/07) [2012] ECHR 1960; *Stanev v Bulgaria* (App no 36760/06) [2012] ECHR 46; *Kędzior v Poland* (App no 45026/07) [2012] ECHR 1809; *Mihailovs v Latvia* (App no 35939/10) [2013] ECHR 65.

²³² *Winterwerp v the Netherlands* (App no 6301/73) [1979] 2 EHRR 387, para 60

²³³ *Stanev v Bulgaria* (App no 36760/06) [2012] ECHR 46 para 174; *DDv Lithuania* (App no 13469/06) [2012] ECHR 254 para 166; *Lashin v Russia* (Application no. 33117/02) [2012] ECHR 63 para 121; *Shtukaturov v Russia* (App no 44009/05) [2008] ECHR 223 para 124; *Sýkora v The Czech Republic* (App no 23419/07) [2012] ECHR 1960 para 79; *MH v UK* (App no 11577/06) [2013] ECHR paras 92 and 94.

²³⁴ *Winterwerp v the Netherlands* (App no 6301/73) [1979] 2 EHRR 387 para. 64

²³⁵ *Waite v The United Kingdom* (App no 53236/99) (2003) 36 EHRR 54, [2002] ECHR 804 paras 58, 59

²³⁶ See also *Kędzior v Poland* n 231; *Mikhaylenko v Ukraine* (App no 49069/11) [2013] ECHR 484.

²³⁷ *Court of Protection Handbook: A User's Guide*, n 186.

²³⁸ *DD v Lithuania* (App no 13469/06) [2012] ECHR 254, para118. See also *MS v Croatia* (App no 36337/10) [2013] ECHR 378, paras 80 and 107.

about medical treatments to which they object.²³⁹ This supports our analysis that these fundamental rights of access to a court are likely to apply to challenge individual decisions engaging fundamental human rights, even where a person has not formally been deprived of their legal capacity by a court.

Special procedural safeguards to support the exercise of rights of access to a court

Many people with mental disabilities may experience difficulties initiating litigation without assistance. In its case law on Article 5(4), the ECtHR has emphasized that rights of access to a court must be practical and effective²⁴⁰ and accessible to the person.²⁴¹ Part of the function of Article 5(2) is to ensure that a person is aware of their right of appeal, in order that they can exercise it.²⁴² A person is not excluded from this protection because of any mental disability, although if they are incapable of receiving the information it may need to be communicated to a person who represents his interests.²⁴³ In *ZH v Hungary*²⁴⁴ the ECtHR applied the concept of reasonable adjustment (which they termed ‘reasonable steps’) to the communication of information under Article 5(2) to individuals with communication impairments.

‘Special procedural safeguards’ may be needed to protect the interests of those unable to act for themselves under Article 5(4).²⁴⁵ In *MH v UK* the ECtHR was reluctant to dictate what special procedural safeguards might be required, but went on to say that this goes beyond the requirement to remove legal and practical obstacles in exercising appeal rights and may involve ‘empowering or even requiring some other person or authority to act on the patient’s behalf in that regard’.²⁴⁶ There may be a violation of Article 5(4) if a person is unable to secure outside help to assist them in bringing an appeal.²⁴⁷ The ECtHR case law has not yet determined the circumstances in which a person empowered to act to assist a person in bringing an appeal is required by Article 5(4) to do so. However, the CoP has been developing its own principles in this regard, which are discussed below.

The ECtHR has not yet elaborated such strong positive obligations to assist a person in accessing a court to challenge a deprivation of legal capacity or the decision of a guardian as it has for deprivation of liberty. The fact remains however, that the ECtHR has developed similar substantive

²³⁹ *X v Finland* (App no 34806/04) [2012] ECHR 1371; *LM v Slovenia* (App no 32863/05) Chamber Judgment [2014] ECHR 608

²⁴⁰ *Nataliya Mikhaylenko v Ukraine* (App no 49069/11) Chamber Judgment [2013] ECHR 484 (30 May 2013) para. 32; *RP v UK* (App no 38245/08) [2012] ECHR 1796 para. 61; *MH v UK* (App no 11577/06) [2013] ECHR para 82

²⁴¹ *MH v UK* (App no 11577/06) [2013] ECHR para 76

²⁴² *Van Der Leer v The Netherlands* (App no 11509/85) (1990) 12 EHRR 567

²⁴³ *X v UK* (App no 6998/75) [1980] ECHR Report of the Commission (Adopted on 16 July 1980)

²⁴⁴ (App no 28973/11) [2012] ECHR 1891

²⁴⁵ *DD v Lithuania* (App no 13469/06) [2012] ECHR 254 para. 163; *Magalhaes Pereira v Portugal* (App no 44872/98) [2002] ECHR 161 para. 56; *Megyeri v Germany* (App no 13770/88) [1992] ECHR 49; (1993) 15 EHRR 584 para. 22; *Stanev v Bulgaria* (App no 36760/06) [2012] ECHR 46 para. 170; *Winterwerp v the Netherlands* (App no 6301/73) [1979] 2 EHRR 387 para. 39; *MH v UK* (App no 11577/06) [2013] ECHR paras. 77, 19, 80, 93; *Storck v Germany* (App no 61603/00) (2005) 43 EHRR 96 para 117.

²⁴⁶ *MH v UK*, n 245, para 93

²⁴⁷ *Storck v Germany*, n 245, para 118; *MH v UK*, n 245, para 94

criteria and procedural safeguards under Article 5 in relation to deprivation of liberty in the line of cases following *Winterwerp* and under Articles 6 and 8 in relation to deprivation of capacity in the line of cases post *Shtukaturov*. Consequently there is a strong argument that similar obligations should apply where loss of legal capacity entails serious interferences with fundamental human rights.

Access to the Court of Protection

There are no formal legal barriers to accessing the CoP under the MCA and the COPR. P is not required to seek permission from the court or any other person before commencing proceedings.²⁴⁸ Yet, in practice, applications to the CoP are only very rarely made by P – the vast majority are made by public authorities, with a smaller number being made by P’s family or friends.²⁴⁹ This is likely to be the result of the practical barriers that P may face in making an application, in combination with positive obligations on public authorities to refer disputes to court by making the application themselves. These are discussed below.

Practical and procedural barriers to accessing the Court of Protection

People who lack, or are alleged to lack, mental capacity may face a number of practical or procedural barriers which make it difficult to access a court in the event of any dispute about their capacity or best interests. One major barrier may be lack of awareness of the MCA and the role of the CoP. The House of Lords Committee on the MCA found that a lack of awareness of the MCA ‘allowed prevailing professional practices to continue unchallenged, and allowed decision-making to be dominated by professionals’.²⁵⁰ It is likely that those subject to the MCA 2005, and their supporters, may not know of the CoP and its potential role in challenging decisions.

In Sections 2.1 and 2.3 above we discussed how the ECtHR has often drawn an analogy between deprivation of legal capacity and deprivation of liberty proceedings because they can have similar significance for a person’s autonomy. It has imported many principles of Article 5 into its case law on Article 6 and 8 rights in deprivation of legal capacity proceedings. Here, we make the argument that the principle under Article 5(2) that people should be informed of their right to appeal against detention should be transposed to other areas of the MCA where the person objects to a proposed decision or action in their best interests, to remedy this lack of understanding about rights to challenge decisions made under the MCA.

Under the Mental Health Act 1983 there has been a duty since 1983 to inform patients of their legal rights to challenge detention before a tribunal and treatment without consent. The Mental Health Act 2007 introduced new ss 130A-L into the 1983 Act requiring local authorities to make available Independent Mental Health Advocates (IMHAs). The help which IMHAs must provide includes helping patients to exercise their rights which can include representing them and speaking on their behalf. Although there is a duty to inform those detained under the DoLS of their rights of appeal, there is no similar statutory duty to tell a person of their right to challenge a decision made under ss 5 and 6 of the MCA 2005 that they lack capacity and that an action affecting their rights will be carried out as it has been determined to be in their best interests. In an appropriate case the

²⁴⁸ The MCA 2005, s 50(1)(a) provides that ‘No permission is required for an application to the court for the exercise of any of its powers under this Act... by a person who lacks, or is alleged to lack, capacity.’

²⁴⁹ Lucy Series and others, n 49.

²⁵⁰ *Mental Capacity Act 2005: post-legislative scrutiny* (n 47) para 107.

CoP might develop a principle of the right to be informed of the means by which a person can challenge a best interests decision affecting an important area of their life. Such a requirement could also be inserted into the MCA Code of Practice or it may be felt appropriate for legislation. There is no logical reason why serious invasions of physical or psychological integrity or deprivation of liberty should carry less effective obligations to provide rights to information and support if carried out under the MCA 2005 rather than the MHA 1983.

People who are alleged to lack mental capacity are likely to require support to challenge decisions made under the MCA 2005. Securing this assistance may be especially difficult if they are in conflict with those they ordinarily rely upon for support, especially if family and friends are in agreement with professionals over the proposed course of action.²⁵¹ Referrals to Independent Mental Capacity Advocates (IMCAs) must be made where best interests decisions regarding serious medical treatment, longer term admissions to residential care or hospital, or safeguarding matters are made under the MCA for individuals who have no friends or family who are appropriate to consult, or for those who are deprived of their liberty under the DoLS.²⁵²

IMCAs may support a person to challenge decisions in the CoP.²⁵³ Unlike advocates under the Care Act, however, IMCAs are under no explicit duty to make a formal challenge where the person wishes them to do so (except under the DoLS, discussed below) or where they have concerns about the decisions being made.²⁵⁴ Most people for whom decisions are made under the Act will not have an IMCA referral; those with friends or family to consult are generally ineligible and there are concerns about regional disparities in IMCA referral rates.²⁵⁵ Even where IMCA referrals are made, official data suggests that IMCAs only very rarely take steps that may result in an application to the CoP.²⁵⁶ This suggests that a safeguard that was initially introduced to address access to justice concerns is not functioning as it should.

Identifying a solicitor who specialises in CoP welfare work²⁵⁷ and securing funding for the litigation may also be major barriers to making an application. Welfare litigation in the CoP can be very

²⁵¹ This concern was expressed by Phil Fennell and Lucy Series to the House of Lords Committee on the MCA, who shared this concern: *Mental Capacity Act 2005: post-legislative scrutiny* (n 47) paras 67 and 236.

²⁵² See MCA s35-41 and The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006 SI 2006/1832; The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Role) Regulations 2006 SI 2006/2883

²⁵³ Section 7(2) of The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006 SI 2006/1832 states that 'The IMCA has the same rights to challenge the decision as he would have if he were a person (other than an IMCA) engaged in caring for P or interested in his welfare.'

²⁵⁴ The Care and Support (Independent Advocacy Support) Regulations 2014 SI 2014/2924, s5(5)

²⁵⁵ Department of Health, *The Sixth Year of the Independent Mental Capacity Advocacy (IMCA) Service: 2012/2013* (2014)

²⁵⁶ In 2011 – the last year where data on court applications involving IMCAs was reported – the Department of Health recorded only '4 cases where the action of IMCAs led to applications to the Court of Protection', out of a total of 10,680 IMCA instructions (<0.04%). Department of Health, *The Fourth Year of the Independent Mental Capacity Advocacy (IMCA) Service: 2010/2011* (2011).

²⁵⁷ The Law Society has a 'find a solicitor' webpage, but this does not list solicitors with CoP specialisms, only those with 'mental health' specialisms, which may not include the Court of Protection: <http://solicitors.lawsociety.org.uk/>. Once its accreditation scheme is up and running, however, it may develop a public facing directory of accredited legal specialists in CoP work. The Mental Health Lawyers Association does have a listing for CoP solicitors, but it is not comprehensive: <http://www.mhla.co.uk/find-a-lawyer/court-of-protection-lawyers/>.

costly. Some, but not all, areas of health and welfare litigation are eligible for public funding, but are still subject to a stringent means test, meaning that many will not qualify.²⁵⁸ Only those subject to a DoLS authorisation and their RPRs are entitled to non-means tested legal aid, to seek a determination in relation to the authorisation itself. Those who are deprived of their liberty but are not subject to a DoLS authorisation, for example people who are deprived of their liberty in settings such as supported living, are not eligible for non-means tested legal aid.

The House of Lords Committee on the MCA expressed concern about 'inconsistent provision of non-means tested legal aid for cases concerning a deprivation of liberty'.²⁵⁹ The government has indicated that it will not provide non-means tested legal aid for those who are deprived of their liberty but not subject to a DoLS authorisation.²⁶⁰ Limitations on legal aid for addressing wider welfare issues than deprivation of liberty have led representatives and the CoP itself to make creative use of the legal aid that is available for challenging deprivation of liberty under s21A MCA. For example, in *Briggs v Briggs*²⁶¹, a determination regarding a deprivation of liberty authorisation under s21A was said to encompass the substantive dispute about treatment (the withdrawal of artificial nutrition and hydration from a person in a minimally conscious state²⁶²), rather than a strict reading of rights to liberty themselves. Other recent cases concerning end of life decisions have also relied upon accessing funding through s21A.²⁶³ Perhaps unsurprisingly, the Secretary of State for Justice is currently seeking permission to appeal against the decision in *Briggs*.

Creative use of the s21A appeal to enable legally aided challenges of medical treatment decisions may also be significantly limited following the Court of Appeal's recent decision in *R (Ferreira) v HM Senior Coroner for Inner South London*.²⁶⁴ In *Ferreira* Arden LJ, delivering the judgment of the Court held that 'Any deprivation of liberty resulting from the administration of life-saving treatment to a person falls outside Article 5(1) (as it was said in *Austin*²⁶⁵) "so long as [it is] rendered unavoidable as a result of circumstances beyond the control of the authorities and is necessary to avert a real risk of serious injury or damage, and [is] kept to the minimum required for that purpose.'²⁶⁶ Arden LJ was careful to point out that this ruling does not apply to cases such as the administration of obstetric care by force, such as *NHS Trust I v G*²⁶⁷, where a hospital considered that it might have to give obstetric care to a pregnant woman of unsound mind who objected to such treatment. In such

²⁵⁸ Jessica Connelly, 'Transforming legal aid: restricting access to justice in the Court of Protection?' (2013) 3(3) *Elder Law Journal* 293

²⁵⁹ *Mental Capacity Act 2005: post-legislative scrutiny* (n 47) para 70

²⁶⁰ *Valuing every voice, respecting every right*, n 90. paras 9.12 – 9.15.

²⁶¹ [2016] EWCOP 48

²⁶² For the substantive decision see: *Briggs v Briggs (No 2)* [2016] EWCOP 53

²⁶³ Jakki Cowley, 'How the DoLS can give voice to people with minimal consciousness' (*Community Care* 27 January 2017) <<http://www.communitycare.co.uk/2017/01/27/dols-can-give-voice-people-minimal-consciousness/>> accessed 15 February 2017.

²⁶⁴ [2015] EWHC 2990 (Admin) (High Court reference); [2017] EWCA Civ 31 (Court of Appeal).

²⁶⁵ *Austin v United Kingdom v UK* (2012) 55 EHRR 359.

²⁶⁶ *Ibid*, para 89.

²⁶⁷ [2015] 1 WLR 1984.

a case authorisation for a deprivation of liberty will be necessary.²⁶⁸ The Court of Appeal decision in *Ferreira* is likely to lead to considerable uncertainty in situations where treatments for physical disorders are administered against the wishes of the person or those close to them. The knock on effect will be that fewer P's and families will be able to afford to challenge medical treatment given against their wishes, since without a DOLS authorisation to challenge under s 21A, legal aid funding will in many cases not be available.

Where people are regarded as lacking litigation capacity, they will usually require a litigation friend to instruct any legal representatives on their behalf (discussed in more detail in Section 3.5, below). Requirements to secure a litigation friend for P may present a practical barrier to initiating litigation. Whereas typically in civil litigation a friend or relative might act as litigation friend, the view was initially taken that they were unsuitable to do so in the CoP, as they might lack the requisite objectivity and independence of the matter in dispute.²⁶⁹ Although this stance was abandoned by Charles J in *Re: NRA and others*²⁷⁰ for non-contentious *Re X* type cases, which we return to in Section 3.5 below, in many cases family or friends will still be considered unsuitable if they are involved in a dispute as to P's capacity or best interests. In such cases, the Official Solicitor may act as litigation friend as last resort.

Some respondents to the House of Lords Committee on the MCA raised concerns about the capacity of the Official Solicitor to take on this work.²⁷¹ These concerns were realized in the cases of *MOD and others* and *NRA*, where the Official Solicitor wrote to the Court stating that he did not have the resources to act as a litigation friend in cases involving authorization of deprivation of liberty. The House of Lords Select Committee on the MCA recommended that the government should review the resources made available to the Official Solicitor.²⁷²

IMCAs may also act as litigation friends, and guidance has been produced to assist them in doing so.²⁷³ However, IMCAs are not contractually obliged to act as litigation friends, they may not be trained or insured to act in this capacity, and they would need to secure additional resources from their commissioning bodies to fund this service – who are likely to be the other parties to the dispute. Additionally, whereas the Official Solicitor acts in name as litigation friend, in practice this function is fulfilled by experienced case workers under his supervision. Where an IMCA or RPR fulfills the role of litigation friend, it is unclear whether it is a 'corporate appointment' – which can be fulfilled by colleagues in the event of their unavailability – or whether only they as an individual can fulfill this role.

Rule 3A now makes provision for Accredited Legal Representatives (ALRs), 'a legal representative authorised pursuant to a scheme of accreditation approved by the President to represent persons meeting the definition of "P" in this rule in proceedings before the court', who may represent P without taking instruction from a litigation friend. The Law Society has been developing a scheme

²⁶⁸ [2017] EWCA (Civ) 31, at para 90.

²⁶⁹ *G v E* [2010] EWHC 2512 (COP) para 75

²⁷⁰ [2015] EWCOP 59

²⁷¹ *Mental Capacity Act 2005: post-legislative scrutiny*, n 47, para 203

²⁷² *Ibid*, Recommendation 33

²⁷³ Alex Ruck Keene, 'Guidance Note: Acting as a litigation friend in the Court of Protection' (39 Essex St Chambers and University of Manchester 2014). < <http://www.law.manchester.ac.uk/medialibrary/Main%20site/LAC/Acting-as-a-Litigation-Friend-in-the-Court-of-Protection-October-2014.pdf> > accessed 15 February 2017.

to support practitioners in this special area of practice and intends to have this up and running in this first half of 2017. This follows the recent endorsement of the scheme provided by the President of the CoP, Sir James Munby, in January 17.

Under the streamlined procedure for uncontested deprivation of liberty applications, the trend following *NRA and others* and *Re JM* is to rely instead on lay Rule 3A Representatives where a person has no legal aid to instruct a lawyer. However, as the CoP heard in *Re JM & Ors*, even the availability of lay Rule 3A Representatives may be in question in some cases. We return to the question of representation under Section 3.5 below, but here note that the inability to fund litigation may result in a person being unable to secure the representation of a lawyer, a litigation friend or another kind of representative. In circumstances where there is no candidate available and willing to act as a litigation friend or Rule 3A representative, even where a person may bring an application it is likely to be stayed until a resolution to this impasse is found.

Forms and guidance

A further difficulty in accessing the CoP may arise from the design of the CoP forms themselves.²⁷⁴ The CoP serves the important function of providing a mechanism whereby a person who is deprived of legal capacity (formally or informally) or deprived of their liberty may ask a judge to review this status, or challenge best interests decisions where the person is in conflict with decision makers. As noted in Section 2.3 above, this is an essential function of the CoP under the ECHR. Yet the forms and guidance available to applicants do not reflect this purpose; they appear to be oriented towards third parties – families or professionals - seeking declarations of incapacity and orders in relation to P. For example:

- Form COP1B is required to start personal welfare proceedings in the CoP (other than s21A appeals under the DoLS, or uncontested deprivation of liberty authorisations using the *Re X* 'streamlined' procedure outlined in Section 1.4 above). Although the parallel COP1 form contains the option for the person (P) to make the application (section 2.2), the COP1B form is phrased throughout as if the applicant is a person other than P. For example, asking 'Do you personally visit the person to whom the application relates' (2.7).
- The guidance notes for all applications (appended to the COP1 form) state that a COP3 *Assessment of capacity* form must be completed. There is no guidance suggesting that an application may be made without a COP3 form in the event that a declaration that P *has* capacity is sought. Although at law there is a presumption of mental capacity on the part of P,²⁷⁵ and therefore it falls to those asserting incapacity to submit evidence to the CoP, if P (or a third party on his behalf) *did* wish to assert and submit evidence that he had mental capacity this form would be inappropriate. There is no guidance on the COP1, COP1B or COP3 form as to how an application asserting that P has mental capacity should be made. It may be obvious to those familiar with the CoP's workings that a witness statement detailing evidence of P's mental capacity may be appended to this effect, but it cannot be presumed that all applications will be made with the assistance of experienced legal practitioners.
- Turning to the COP3 form itself, it is structured on the assumption that those completing it will find that P lacks mental capacity, rather than asking an open question regarding P's mental capacity as a letter of instruction to an expert witness might. Part 7.1 presumes that

²⁷⁴ See HMCTS form finder, n 7.

²⁷⁵ MCA 2005 s1(2)

P will have an impairment of or disturbance in the functioning of the mind or the brain²⁷⁶, and that 'As a result, the person is unable to make a decision for themselves in relation to the following matter(s) in question'. Part 7.2 elaborates why P is *unable* to make the relevant decision, and Part 7.3 seeks clarification of what evidence of *incapacity* this is based on. Additionally, the more 'empowering' features of the MCA 2005 are not reflected in this form. There is, for example, no requirement to describe what support has been provided to assist with decision making²⁷⁷, or to indicate what support might assist P in making the decision in the future.

The COP application forms are thus inappropriate for seeking a declaration that P has capacity, they are structured in a way that could be regarded as leading to a foregone outcome for those providing evidence on capacity, and contain few of the provisions of the MCA 2005 that relate to supporting capacity.

The CoP's application processes are also complex and difficult to negotiate for those without the relevant experience. The forms for a typical personal welfare application²⁷⁸ number at least 24 pages in length²⁷⁹. If permission to proceed with an application is granted or not required, the applicant would also need to share copies of these forms with any respondents or persons whom the CoP directs must be notified. This is an onerous bureaucratic undertaking, especially for those making an application in person without legal or administrative assistance. Given the difficulties securing legal advice and representation discussed above, there may be circumstances in which P needs to make the application, perhaps on their own or without specialist assistance. In these circumstances, navigating the forms and guidance would pose a significant barrier to accessing the CoP.

It may appear surprising to those familiar with the CoP's processes to suggest that P might make the application without the advice and assistance of a lawyer, yet we note that this is the working assumption in the case of the Mental Health Tribunals discussed in Section 4 of this report. By way of contrast, the Tribunal forms are simple, short (3 pages), and designed to be completed by patients themselves with minimal assistance. The bureaucratic work of notifying the other parties and seeking reports is performed by the Tribunal and detaining authorities and not the patient.²⁸⁰ We have appended a copy of the Tribunal forms for comparison with the CoP forms in Appendix B. We return to consider the accessibility of the CoP's forms and guidance for disabled litigants in Section 3.9 below.

Positive obligations to refer health and welfare disputes to the CoP

Where disputes arise in relation to health and welfare matters there are many reasons – including those rehearsed above - why P or P's family may be ill-placed to make an application to the CoP.

²⁷⁶ As per the requirements of s 2(1) of the MCA 2005

²⁷⁷ As per the requirements of ss 1(3) and 3(2) of the MCA 2005

²⁷⁸ COP1 – Application form; COP1B – Supporting information for personal welfare application; COP3 – Assessment of capacity.

²⁷⁹ Excluding guidance appended to the forms, and additional forms for those who must seek permission before bringing proceedings.

²⁸⁰ Although the patient is permitted to seek independent expert reports in addition to standard reports required by the Tribunal.

This section considers when public authorities must themselves take the initiative and seek judicial sanction for an intervention under the MCA or refer a dispute about capacity or best interests to the CoP. The following section then considers similar duties arising in connection with supporting individuals to exercise rights of appeal under the MCA DoLS.

Under the MCA 2005 there is, as Ruck Keene points out, 'no obvious requirement of law (whether by way of a directly imposed duty or sanction for a failure) to seek judicial sanction in respect of any act of care or treatment'.²⁸¹ This is a legacy of the approach adopted by the House of Lords in *Re F (Adult Mental patient sterilisation)*²⁸², the case that established the doctrine of medical necessity, subsequently placed in statutory form by s5 of the MCA 2005.²⁸³ *Re F* also established that the High Court could grant a declaration that a treatment is lawful, notwithstanding that P lacks capacity to consent to it (analogous to a CoP declaration under s15 of the MCA 2005). Yet such a declaration did not 'make lawful that which would otherwise be unlawful'²⁸⁴. The lawfulness of the proposed intervention turned on necessity – whether the actions were in the best interests of a person who lacked the capacity to consent to them - and not the 'approval or sanction of a court'²⁸⁵. The role of the court was to offer a 'third opinion'²⁸⁶ on questions of capacity and best interests, clarifying for concerned practitioners whether the requirements of the doctrine of necessity were satisfied.

Yet *Re F* was a controversial case, involving the non-consensual contraceptive sterilisation of a woman with a learning disability. Although the involvement of the court was 'not strictly necessary as a matter of law' Lord Brandon felt that 'it is nevertheless highly desirable as a matter of good practice', considering that the risks of wrongly deciding best interests, or of improper reasons or motives, might be greater without the involvement of a court. A court decision 'should serve to protect the doctor or doctors who perform the operation, and any others who may be concerned in it, from subsequent adverse criticisms or claims.'²⁸⁷ Whilst the majority took the view that although there was no strict legal obligation to come to court it would be good practice to do so, Lord Griffith strongly urged the development of a common law rule requiring a declaration from the court in such cases as this:

I cannot agree that it is satisfactory to leave this grave decision with all its social implications in the hands of those having the care of the patient with only the expectation that they will have the wisdom to obtain a declaration of lawfulness before the operation is performed. In my view the law ought to be that they must obtain the approval of the court before they sterilise a woman incapable of giving consent and that it is unlawful to sterilise without that consent. I believe that it is open to your Lordships to develop a common law rule to this effect. ²⁸⁸

²⁸¹ Alex Ruck Keene, 'Powers, defences and the 'need' for judicial sanction', n 185, p248.

²⁸² [1990] 2 AC 1.

²⁸³ *R (Sessay) v South London & Maudsley NHS Foundation Trust & Anor* [2011] EWHC 2617 (QB); *The Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69

²⁸⁴ *Ibid*, p 13

²⁸⁵ *Ibid*, p 5.

²⁸⁶ *Ibid*, p 13

²⁸⁷ *Ibid*

²⁸⁸ *Ibid*, p 19

Lord Goff particularly emphasised the importance of independent representation of the person, so that they could participate in the process of decision making, and their point of view could be put forward.

Under the new jurisdiction established in *Re F* the approach adopted was for a combination of case law, practice notes and Practice Directions²⁸⁹ setting out which cases should come to court. Yet the courts continued to refer to the duty to apply to court as 'matter of practice'²⁹⁰, or as being 'in the public interest' or that of their patient²⁹¹, rather than being strictly necessary as a matter of law. The incentive to involve the court was not that failure to apply to court was itself clearly unlawful, rather it was an impulse to clothe potentially controversial non-consensual acts or omissions with legal authority, offering protection against possible claims or criticisms.

The Law Commission sought to rationalise the position in relation to medical treatment in its Report *Mental Incapacity* (1995)²⁹², which a decade later would form the basis of the MCA 2005. The Commission recommended codifying the defence of necessity, which it termed the 'general authority' to care for a person who lacked capacity. But it also stipulated that for certain serious medical interventions there should always be an independent check on whether the procedure would be in the best interests of the person concerned.²⁹³ Certain procedures listed in their proposed statute, such as sterilization, would require authorisation by the court or the consent of an attorney or court appointed deputy.²⁹⁴ A second group of treatments, which could be specified by ministerial order, would require a second medical opinion, reflecting the approach taken to treatment without consent under the Mental Health Act 1983, discussed in Section 4. The Law Commission also proposed a set of powers to address what would now be called 'safeguarding' matters, such as powers to decide where a person should live and restrictions on contact with their parties.²⁹⁵ However, this approach was not adopted by the government.²⁹⁶

Under the MCA the general authority, now rebadged the 'general defence' and found in ss5 and 6 MCA, was not subject to any statutory restriction except in relation to deprivation of liberty.²⁹⁷ Instead the Government took the view that the courts should take the lead in deciding which cases should come to court.

²⁸⁹ Practice Note (Official Solicitor: Sterilisation [1996] 2 FLR 111); Practice Note (Official Solicitor: Vegetative state [1996] 2 FLR 375); Practice Direction (Declaratory Proceedings: Incapacitated Adults) [2002] 1. All ER 794.

²⁹⁰ *Airedale Hospital Trustees v Bland* [1992] UKHL 5, opinion of Lord Goff;

²⁹¹ *Re T (adult: refusal of medical treatment)* [1992] EWCA Civ 18; 4 All ER 649. Judgment of Lord Donaldson MR.

²⁹² Law Com No 231, n 184.

²⁹³ *Ibid*, para 6.1.

²⁹⁴ *Ibid*, para. 6.3.

²⁹⁵ Law Commission, *Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection*, (Law Com No 130, 1993).

²⁹⁶ Lord Chancellor's Office, *Who decides? Making decisions on behalf of mentally incapacitated adults.*, (Cm 2803, 1997); Lord Chancellor's Office, *"Making Decisions" The Government's proposals for making decisions on behalf of mentally incapacitated adults. A Report issued in the light of responses to the consultation paper Who Decides?*, (Cm 4465, 1999).

²⁹⁷ s6(5) MCA as enacted, now repealed. See s4A MCA.

Case law has set out ... categories of case that should have prior sanction of the court... the Government intends the situation to continue under the Bill. The current law has developed by guidance in case law responding to difficult cases. We want the courts to continue to decide which cases should have their prior sanction... for that reason we consider it would be most effective to use the Codes of Practice to specify the situations where decisions should be taken only by a court.²⁹⁸

The MCA Code of Practice listed the cases that the Practice Directions had stated should always come to court.²⁹⁹ This meant that there was a wide discretionary *de facto* power in the form of the general defence, then there were the cases which the Practice Directions and the Code of Practice (but not the appellate courts) said required the intervention of CoP, but in between, aside from IMCAs there was to be no intermediate set of safeguards. The second opinion proposal of the Law Commission was never implemented.

The Law Commission also appeared to envisage that judicial sanction would be required for major treatment or serious welfare decisions that the person objected to, outside of an emergency.³⁰⁰ This approach is not reflected in the MCA; there is no statutory provision that P's objection to an intervention which was being imposed would trigger a requirement of court authorisation. The Law Commission had entitled their statutory limitation on the general authority 'no powers of coercion', which emphasised that, outside of an emergency, force or the threat of force could not be used 'to enforce the doing of anything to which the person concerned objected'.³⁰¹ Yet the equivalent provision in s6 MCA is simply entitled 'Section 5 acts: limitations' and in its presentation starts from the presumption that force *can* be used, subject to certain restrictions.

Meanwhile the MCA Code flatly contradicts the Law Commission's comments on coercion. It advises that 'cases where there is a dispute about whether a particular treatment will be in a person's best interests', including 'cases where there is conflict between professionals or between professionals and family members which cannot be resolved in any other way', should be brought to court.³⁰² But the Code did not state that where P objected to a medical treatment the case should be brought to court. The Code also states that the general defence in s5 MCA may offer protection against liability for acts that the person themselves objects to, including a move out of their home; implying that court authorisation would not be necessary for such steps to be taken, even if the use of force were required to transport the person (provided the s6 MCA provisions were followed).³⁰³ The Code states that an application 'can' be made to the CoP in cases of 'serious disagreement', for example 'if members of a family disagree over what is best for a relative who lacks capacity to give or deny permission for a move.'³⁰⁴

²⁹⁸ Baroness Ashton, Under Secretary at the Department for Constitutional Affairs, *Hansard* HL Deb 25 January 2005 col 1246

²⁹⁹ *Mental Capacity Act Code of Practice*, n 21, paras 6.18, 8.18 - 8.24.

³⁰⁰ Law Commission, *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (Law Com No 128, 1993) para 2.18; Law Commission, *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research*, (Law Com no 129, 1993), para 3.45; Law Com No 231, n 184, para 4.30.

³⁰¹ Law Commission No. 231, n 184, p224, clause 5 of their draft Mental Incapacity Bill.

³⁰² *Ibid*, paras 6.18 – 6.19; see also para 8.23.

³⁰³ *Ibid*, paras 6.10 – 6.11.

³⁰⁴ *Ibid*, para 6.12

Thus outside of situations of deprivation of liberty, the MCA Code appears to envisage only very limited use of the CoP to address disputes about capacity and best interests, with the emphasis being on disputes among professionals and relatives rather than objections by the person themselves. The Code does emphasise, however, that for medical treatment cases applications should be made by the organisation responsible for P's healthcare, and local authorities should make the application where 'social care staff are concerned about a decision that affects the welfare of a person who lacks capacity'³⁰⁵, rather than P or families being the applicant.

The idea that the MCA could not be used to impose serious non-emergency decisions on a person without court authority was not taken up by the Government in the Mental Capacity Bill. This approach of leaving it to the judges to decide has enabled the courts steadily to reassert such an approach through its case law, with a strong reliance on Article 8 ECHR. In doing so, they have been assisted by the passage of the Human Rights Act 1998.

In *D v an NHS Trust (Medical Treatment: Consent: Termination)*³⁰⁶, a case concerning the lawfulness of terminating the pregnancy of a woman without her capable consent, Coleridge J was asked to consider whether it was necessary as a matter of law to apply to court for a declaration in such circumstances, given the advent of the Human Rights Act 1998. Coleridge J considered the case of *Glass v UK*.³⁰⁷ *Glass* concerned the administration of medical treatment to a child without the consent of the child or the mother, in circumstances that were not an emergency, and where the hospital had not sought a court order consenting to the treatment on the child's behalf. The ECtHR held that the decision to override the mother's objections to treatment of her son in the absence of court authorisation was a violation of Article 8 ECHR.³⁰⁸ Applying this reasoning to adults, Coleridge J held that Article 8 ECHR 'has enhanced the responsibility of the court to protect positively the welfare of these patients',³⁰⁹ and that where issues of capacity and best interests are 'clear and beyond doubt', an application to the court was not necessary.³¹⁰ However, in other circumstances authority from the court would be required 'to avoid any doubt as to the legitimacy of the Article 8 interference'.³¹¹ In cases of termination of a pregnancy, this included, *inter alia*, cases where there was doubt or dispute as to capacity or best interests among professionals, the woman's family or the woman herself.³¹² Coleridge J's guidance was endorsed by the President of the Family Division at that time.³¹³

D v an NHS Trust was a pre-MCA decision of the High Court. Coleridge J's reasoning that Article 8 had converted what was merely 'good practice' into a legal duty in certain circumstances to seek

³⁰⁵ *Mental Capacity Act Code of Practice*, n 21, para 8.8

³⁰⁶ [2004] 1 FLR 1110; [2003] EWHC 2793

³⁰⁷ *Glass v UK* (App No 61827/00) [2004] ECHR 103; (2004) 39 EHRR 15

³⁰⁸ *Ibid*, para 83

³⁰⁹ *Ibid*, para 31

³¹⁰ *Ibid*, para 32

³¹¹ *Ibid*, para 33

³¹² *Ibid*. para 34

³¹³ *Ibid*, para 37; see also *Re V (Care Proceedings: Human Rights Claims)* [2004] EWCA Civ 54, [2004] 1 FLR 944, at paras [6], [98].

court authority for treatment in the best interests of a person who lacked capacity was considered by the Court of Appeal in *R (Burke) v General Medical Council & Ors*.³¹⁴ Mr Burke had sought judicial review of guidance by the General Medical Council concerning when artificial nutrition and hydration treatment could lawfully be withdrawn from an incompetent patient. At first instance, Munby J (as he then was) had relied upon Coleridge J's judgment in *D v An NHS Trust* to conclude that court authorization was required for treatment decisions where there was doubt or dispute about the person's mental capacity or best interests.³¹⁵ However, the Court of Appeal in *Burke* rejected Coleridge J and Munby J's interpretation of the requirements of Article 8. Lord Philips distinguished *Glass* on the basis that in the case of a child, outside of an emergency, consent to treatment can only be given by the child (if he or she is competent), the parent or the court. In *Glass* the situation was not an emergency and the medical professionals had not obtained consent from any of those three sources. Thus, under domestic law the treatment was unlawful and it was because it was *unlawful* that it was not 'in accordance with the law', not because of the failure to refer a dispute to court, that an Article 8 violation was found.³¹⁶ The situation for adults who lacked capacity was different, according to the Court of Appeal, because the purpose of a court declaration was not to 'authorise' the treatment, but simply to 'declare' whether the treatment was lawful or not.³¹⁷ Lord Philips thus reverted to the earlier position adopted by the House of Lords in *Re F* and *Bland*: 'Good practice may require medical practitioners to seek such a declaration where the legality of proposed treatment is in doubt. This is not, however, something that they are required to do as a matter of law.'³¹⁸

Although this question has not been revisited by either the Court of Appeal or the Supreme Court, it appears that the approach adopted by Coleridge J and Munby P has been followed in the CoP. The current *Practice Direction 9E on Serious Medical Treatment* of the CoP states that serious medical treatments such as non-therapeutic sterilization and the withdrawal of artificial nutrition and hydration from a person in a permanent vegetative state 'should' be brought to court, rather than describing this as mere 'good practice'.³¹⁹ The Practice Direction has led the CoP to declare, of sterilization, that 'Such a treatment decision is so serious that the Court has to make it'.³²⁰ Yet Ruck Keene writes that it plainly is not a duty as a matter of law, and hopes that the practice direction will be revised to make this clear.³²¹ However, in relation to *welfare* interventions, as opposed to medical treatments, the 'duty' to apply to court under Article 8 has been strongly affirmed in the CoP in numerous cases. The principle was first stated in *obiter* remarks by Munby P himself in *A Local Authority v A (A Child) & Anor*³²², commenting that 'if a local authority seeks to control an incapacitated or vulnerable adult it must enlist the assistance of either the Court of Protection or

³¹⁴ [2005] EWCA Civ 1003; [2006] QB 273

³¹⁵ *R (Burke) v The General Medical Council Rev 1* [2004] EWHC 1879 (Admin), paras 200 and 202

³¹⁶ *R (Burke) v The General Medical Council* [2005] EWCA Civ 1003, paras 75 – 80.

³¹⁷ *Ibid*, para 80

³¹⁸ *Ibid*, para 80

³¹⁹ Court of Protection, *Practice Direction 9E - Applications relating to serious medical treatment* (Judiciary of England and Wales 2015). Para 5.

³²⁰ *A Local Authority v K* [2013] EWHC 242 (COP), para 36

³²¹ Alex Ruck Keene, 'Powers, defences and the 'need' for judicial sanction', n 185, p249

³²² [2010] EWHC 978 (Fam)

the High Court... Otherwise it may find itself being sued in tort'.³²³ Oddly, he did not discuss why professionals could not rely upon s5 and s6 MCA and the Codes of Practice in these circumstances.

The landmark case of *London Borough of Hillingdon v Neary & Anor*³²⁴ offered an opportunity to review this principle in a welfare case. A local authority had unlawfully detained a man with autism in a care home and refused to let him return home to his father, despite Steven Neary (the detained person) and his father showing clear opposition to this detention. The case had received considerable publicity from the perspective of a father battling with the local authority for almost a year to get his son home. The judgment highlighted numerous difficulties Steven Neary's father had encountered in challenging the local authority and like *HL v UK*, it was a compelling example of the potential for abuse of the 'powers' conferred by the MCA. Citing Munby J's *obiter* remarks in *A Local Authority v A (A Child) & Anor*, Mr Justice Peter Jackson held that even where local authorities had authorised detention under the DoLS, public authorities had a wider duty under Article 8 ECHR to place disputes about serious welfare issues that cannot be resolved by discussion before the CoP.³²⁵ This duty has been reiterated in a number of subsequent cases, where the CoP found violations of both Articles 8 and 5 ECHR where councils failed to ensure that disputes about residence and contact were placed before the CoP.³²⁶ These cases do not cite any particular Strasbourg authorities for this principle; they appear to enshrine in law a new duty which was not recognised under the declaratory jurisdiction or by those drafting the MCA or the Code of Practice.

Despite the lack of promising domestic precedents from the appellate courts, the CoP has also been developing a body of case law expounding (or clarifying) duties to seek prior authorisation from the CoP for medical treatments that are the subject of a dispute, and particularly in cases where P objects to the treatment. These cases have mainly concerned procedures relating to pregnancy and childbirth. In *NHS Trust & Ors v FG (Rev 1)*³²⁷ Keehan J described four categories of case where a healthcare provider should make an application to the CoP regarding obstetric care:

1. cases where the proposed intervention amounts to serious medical treatment as defined in *Practice Direction 9E*;
2. cases where there is a real risk that P will be subject to more than transient forcible restraint;
3. cases where there is a dispute between professionals, or with P or others concerned with their welfare, as to what obstetric care is in P's best interests; and
4. cases where there is a real risk that P will be deprived of their liberty and this cannot be authorised under the DoLS³²⁸.

³²³ *Ibid*, para 68

³²⁴ [2011] EWHC 1377 (COP), para. 33.

³²⁵ *Ibid*

³²⁶ *The Local Authority v Mrs D & Anor* [2013] EWHC B34 (CoP); *Essex County Council v RF & Ors (Deprivation of Liberty and damage)* [2015] EWCOP 1; *Milton Keynes Council v RR & Ors* [2014] EWCOP B19 and *RR (Costs Judgement)* [2014] EWCOP 34; *Somerset v MK (Deprivation of Liberty: Best Interests Decisions: Conduct of a Local Authority)* [2014] EWCOP B25

³²⁷ [2014] EWCOP 30

³²⁸ This latter situation may arise where the person is detained under the Mental Health Act 1983, due to the (most likely inadvertent) interaction between eligibility provisions of Schedule 1A of the MCA and s16A.

He emphasised the importance of bringing the application in good time to enable P's participation to be fully enabled. This was recently reiterated by Baker J in *Re CA (Natural Delivery or Caesarean Section)*.³²⁹

There is also a growing trend for medical practitioners to seek court authority in cases where they consider it unethical to give treatment which might lawfully be given to a detained patient without consent under s 63 of the Mental Health Act 1983³³⁰, to seek a declaration from the CoP that it is lawful to *withhold* life sustaining treatment from patients who are refusing that treatment.³³¹ In this latter category the CoP has advised that it may be prudent to seek CoP authorisation, but again the legal basis for this is unclear. The general defence in ss 5 and 6 the MCA 2005 is a defence for acts and not omissions, but a declaration of the CoP also encompasses omissions to act.³³² This may be important for practitioners where such omissions engage common law duties and the positive obligation to preserve life under Article 2 ECHR.³³³ Ethical concerns, or the desire to seek legal protection lest the patient should die from an omission to treat or bring an action in battery for forced treatment, may be prompting such applications.

These CoP authorities do not distinguish their approach from the House of Lords and the Court of Appeal in *Re F, Bland* and *Burke*. Although the Court of Appeal's reading of *Glass* in *Burke* suggests that Article 8 may not require court authorisation for treatments to which an adult or their family objects, there are other Strasbourg authorities on Article 8 that offer support to the CoP's approach. A growing body of ECtHR case law has found that in certain circumstances Article 8 requires procedural safeguards to ensure that interferences with rights to home, family and private life are 'fair and such as to afford due respect to the interests safeguarded to the individual by Article 8'.³³⁴ In *Funke v France*³³⁵ the ECtHR has held that even if interferences with Article 8 rights are in pursuit of a legitimate aim, and despite the margin of appreciation afforded to states, the 'the relevant legislation and practice must afford adequate and effective safeguards against abuse'.³³⁶ In that case, which concerned the use of search warrants without judicial authorisation, the Strasbourg court held that 'in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law... appear too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued.'³³⁷

³²⁹ [2016] EWCOP 51

³³⁰ *Re E (Medical treatment: Anorexia) (Rev 1)* [2012] EWHC 1639 (COP); *A NHS Trust v Dr. A* [2013] EWHC 2442 (COP).

³³¹ *Nottinghamshire Healthcare NHS Trust v. RC* [2014] EWCOP 1317; *Cheshire & Wirral Partnership NHS Foundation Trust v Z* [2016] EWCOP 50

³³² MCA s15 (2)

³³³ Discussed by Alex Ruck Keene, 'Powers, defences and the 'need' for judicial sanction', n 185.

³³⁴ *Buckley v The United Kingdom* (App no 20348/92) [1996] ECHR 39, para 78; citing *McMichael v The United Kingdom* (App no 16424/90) [1995] ECHR 8, para 87.

³³⁵ (App no 10828/84) [1993] ECHR 7

³³⁶ *Ibid*, para 56

³³⁷ *Ibid*, para 57

In *X v Finland*³³⁸ the ECtHR held that ‘forced administration of medication represents a serious interference with a person’s physical integrity and must accordingly be based on a “law” that guarantees proper safeguards against arbitrariness’.³³⁹ Noting that ‘The decision-making was solely in the hands of the treating doctors who could take even quite radical measures regardless of the applicant’s will’ and the applicant ‘did not have any remedy available whereby she could require a court to rule on the lawfulness, including proportionality, of the forced administration of medication and to have it discontinued’³⁴⁰, it found a violation of the Article 8(2) requirement that interferences are in accordance with the law. It is important to be clear that *X v Finland* concerned ‘access’ to a remedy, rather than a requirement for judicial sanction to be sought by professionals prior to administering involuntary treatment. Technically of course such a remedy exists under the MCA in the form of the CoP. In practice, however, it is questionable whether this remedy is realistically available to P in most circumstances. Domestically, in the context of immigration appeals, the Court of Appeal has held that Article 8 requires that ‘procedures for asserting or defending rights must be effectively accessible’.³⁴¹

It is relevant to the principles established in *Funke v France* that the ‘powers’ contained in s5 and s6 MCA are very broad; deliberately so for they were crafted to be used for a very wide range of situations appertaining to the care and treatment of adults with mental disabilities. Some interventions under the MCA – such as serious medical treatment against a person’s will or significant restrictions on contact with a loved one – are just as serious an interference with Article 8 rights as a search of one’s property. The question arises, therefore, whether the general defence of s5 and 6 MCA – including its requirements to consult with P and those close to P regarding their best interests³⁴² – offers a ‘fair’ decision making process to safeguard Article 8 rights, and sufficient guarantees against arbitrariness to protect against abuse. Would the use of the DoLS or an IMCA offer more satisfactory protection of Article 8 rights?

The answer to the question is likely to be highly specific to the nature of the interference and the situation of the person. However, in *J Council v GU & Ors (Rev 1)*³⁴³ Mostyn J indicated that certainly some kinds of restrictions – including strip searches and monitoring of correspondence – were so invasive that even the safeguards of the DoLS and CoP authorisation were not sufficient to satisfy the requirement of Article 8 that such interferences are ‘in accordance with the law’. Mostyn J drew attention to the absence of ‘equivalent detailed procedures and safeguards’ under the MCA as compared with the MHA 1983.³⁴⁴ In its consultation on a replacement framework for the DoLS, the Law Commission also drew attention to the absence of ‘specific procedures or safeguards governing the provision of care or treatment which might interfere with article 8 rights’ such as restrictions on contact with family and friends and removal from a person’s home.³⁴⁵ They proposed a network of procedural safeguards to offer some protection of these Article 8 rights,

³³⁸ (App no 34806/04) [2012] ECHR 1371

³³⁹ *Ibid*, para 220

³⁴⁰ *Ibid*

³⁴¹ *R (Gudanaviciene & Ors) v The Director of Legal Aid Casework & Or* [2014] EWCA Civ 1622, para 71

³⁴² MCA s4

³⁴³ [2012] EWHC 3531 (COP)

³⁴⁴ *Ibid*, para 14

³⁴⁵ Law Commission No 222 (2015), n 94, para 2.16

which received strong support at consultation³⁴⁶, but this was not a requirement for court authorisation.

At present, the received wisdom from the CoP is that serious conflicts concerning welfare matters must be placed before the CoP. It is unclear whether this simply involves disputes about where a person lives or also extends to restrictions on contact with loved ones or other possible 'welfare' interventions. It would certainly be an oddity if contact could be restricted by those relying upon the general defence, when the statute prohibits such steps being taken by a court appointed deputy.³⁴⁷ There is a clear statement from the CoP that certain obstetric interventions must seek prior judicial authorisation, but the position on other treatments is less clear.

Nevertheless, health and social care practitioners taking decisions under the MCA hear a consistent refrain from the court and its practitioners that if they undertake serious interferences with rights to home, family and private life against the objections of P or P's family without court authorisation, they are on thin ice. Prompting health and social care professionals to bring a greater number of disputes to court may ensure better protection of P's Article 8 rights, in part because under the MCA there are few alternative means of ensuring a fair decision making process and offering guarantees against arbitrariness.

By placing the onus on professionals to bring an application, instead of relying on the theoretical availability of the CoP as a remedy for P, some of the difficulties accessing a court experienced by P may be overcome. However, this approach also expands the range of situations where P's personal affairs are subject not only to the scrutiny of the CoP, but also to the public at large, as a greater number of court hearings are publicly reported (albeit usually anonymously). It increases the importance of questions about how P may participate in proceedings. As more and more cases come to the attention of the CoP, finding Charles J's elusive 'Procedural Balance' between participation and dealing with large numbers of cases expeditiously and fairly becomes ever more challenging.

The limits of clinical authority under the general defence and requirements to seek judicial authorisation from the CoP are thus unclear and contested. The law in this respect is hardly, as the ECHR requires, 'formulated with sufficient precision to enable the citizen to regulate his conduct' in accordance with the rule of law.³⁴⁸ In 2014 the House of Lords Committee on the MCA 2005 raised concerns that 'the responsibility of public authorities to initiate proceedings in cases of dispute is not widely known or adhered to', and recommended that the government provide clearer guidance for public authorities 'regarding which disputes under the Act must be proactively referred to the Court'.³⁴⁹ Following this recommendation, the government made a commitment to provide guidance to public authorities on when disputes should be referred to the CoP as part of the second tranche of reviews of the COPR and practice directions.³⁵⁰ However, to date no such comprehensive guidance has been published by a government body or the CoP.

³⁴⁶ Law Commission, 'Mental Capacity and Deprivation of Liberty: Interim Statement' (2016), para 1.24

³⁴⁷ MCA s20(2)(a)

³⁴⁸ *The Sunday Times v United Kingdom* (App No 6538/74) [1979] ECHR 1, para 49.

³⁴⁹ *Mental Capacity Act 2005: post-legislative scrutiny*, n 47, paragraphs 236-7

³⁵⁰ Department of Health and Ministry of Justice, *Update for the House of Lords Committee on the Mental Capacity Act* (2015).

Although it is not obvious how the approach of the High Court in cases such as *Neary* sits alongside the approach taken by the Court of Appeal and House of Lords in *Re F, Bland* and *Burke*, it is understandable why the High Court and the CoP have imposed sanctions on public authorities who have failed to bring disputes under the MCA to the CoP.³⁵¹ These decisions are occurring against a backdrop of rising public concern about the power exercised by health and social care professionals in relation to disabled people and their families. Interventions under the MCA by healthcare providers and local authorities in dispute with families of older and disabled people regularly feature in the news. Meanwhile some families of adults with learning disabilities and autism, including the family of Steven Neary, have campaigned for legislation requiring CoP oversight of *all* residential placement decisions under the MCA.³⁵²

To health and social care practitioners and to people subject to decisions made under the MCA there is no clear systematic guidance as to where someone aggrieved by the imposition of an intervention on P without consent has a legitimate expectation that the court will need to 'authorise' the intervention. Many of these cases are controversial, involving interventions such as such as restrictions on contact with loved ones or forced treatment, and raise significant human rights issues. The system at present means that cases come to court largely where the authorities or the professionals feel the need to seek reassurance that what they are proposing is lawful. From the point of P's rights, this lack of clarity as to when the court will be involved is a barrier to access to justice.

Whilst technical legal arguments may continue to rage about whether the court is required to authorise treatment or declaring it to be lawful, the reality is that it is only called upon to do so in certain cases. The policy route which has been chosen to govern access to court was to allow guidance to develop through the common law, Practice Directions and the MCA Code of Practice, resulting in a lack of clarity. Clearly there is a fear that the imposition of a duty to refer would risk generating a case load that the court could not possibly manage. In *Burke* the Court of Appeal was anxious to avoid overburdening practitioners and overwhelming the court. The Court was deeply impressed by the estimate put forward in evidence by the Intensive Care Society that there would be 10 cases a day coming to court if Munby J's guidance at first instance on reference to court was to be followed.³⁵³

We agree with the House of Lords Committee on the MCA that clear and systematic guidance on the circumstances where a court application is necessary must be provided. We believe that this should be done following a policy consultation that ensures a transparent consideration of these issues, giving disabled people and their families the opportunity to contribute their views. Such a consultation would offer an opportunity to explore the potential volume of litigation should a more restricted approach to the general defence be taken. A consultation could also consider whether the CoP is the most appropriate procedural safeguard in these cases or whether other alternatives might be developed. Restrictions on the general defence, the development of a second opinion system, or other alternative procedural safeguards would require amendment to the MCA. In the

³⁵¹ For cases, see n 326.

³⁵² They have produced the draft Disabled People (Community Inclusion) Bill 2015, known as the 'LB Bill'. The draft bill is linked to a campaign for justice following the death of Connor Sparrowhawk, a young man with autism who drowned whilst *de facto* detained in an assessment and treatment unit. See proposed section 5(2)(c) of the draft Bill. <<https://lbbill.wordpress.com/draft-lb-bill-v-2/>> accessed 26 January 2017.

³⁵³ *R(Burke) v General Medical Council* [2005] EWCA (Civ) 1003, paras 69-70.

interests of achieving clarity for professionals and service users alike, the consultation could form the basis for updated guidance in the MCA Code of Practice, which is more likely to reach front line professionals, carers, and service users.

Access to the Court of Protection under the deprivation of liberty safeguards

As outlined in Sections 2 and 3.1 above, Article 5(4) guarantees to everyone who is detained a right to bring proceedings before a court to determine the lawfulness of one's detention. A body of case law developed by the ECtHR has stated that 'special procedural safeguards' may be necessary to assist with the exercise of this right. The DoLS provide a complex system of safeguards that are intended to ensure that even those who are incapable of exercising their Article 5(4) rights independently are able to enjoy access to this fundamental safeguard against arbitrary detention. In practice, however, there are signs that this system does not function as it should, and many – if not most – of those who are detained under the DoLS are unable to protect their interests under this right.

When a person is subject to an authorisation issued under the DoLS in Schedule A1 and wishes to challenge this in the CoP, a number of safeguards may, at least in theory, overcome some of the practical difficulties outlined above in making an application to the CoP. The DoLS require P to be provided with information about their right to challenge the authorisation in the CoP, in line with Article 5(2) ECHR.³⁵⁴ The supervisory body must appoint a relevant person's representative (RPR) to support and represent P in matters connected with the DoLS.³⁵⁵ If the RPR is unpaid (typically a family member or a friend) and they or P request it, or if it appears to the supervisory body that the RPR and relevant person would have difficulty exercising rights to seek a court review without assistance, the supervisory body must also make a referral to an IMCA, known as a s 39D IMCA, to assist them.³⁵⁶ The s39D IMCA must assist the RPR or P to exercise the right to apply to court, if it appears to the advocate that either of them wishes to do so.³⁵⁷ P and the RPR are entitled to non-means tested legal aid to seek a court review of the lawfulness of their detention.³⁵⁸ The safeguards of RPR and s39D IMCA are designed to satisfy the ECHR requirement for special procedural safeguards to support a person in exercising their Article 5(4) rights of court review, whilst the legal aid provisions help to overcome some of the funding difficulties that can affect other kinds of CoP litigation.

In our research, we found that the overall number of DoLS cases in the CoP appears to be very low, with marked regional disparities, suggesting that many people are not able to exercise rights of appeal.³⁵⁹ One reason may be that those charged with supporting the person (the RPR, the IMCA, and the supervisory body) may be confused as to where ultimate responsibility lies for assisting P to exercise rights of appeal. It may also be the case that RPRs, advocates and supervisory bodies believe that the person should only be supported in exercising rights of appeal if it is in the person's

³⁵⁴ MCA 2005 Schedule A1, para 59

³⁵⁵ MCA 2005, Schedule A1, para 139

³⁵⁶ MCA 2005, s39D(2)-(5).

³⁵⁷ MCA 2005, s39D(8)

³⁵⁸ The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 SI 480, s5(g)

³⁵⁹ Lucy Series and others, n 49.

best interests to do so. The recent cases of *AJ v A Local Authority*³⁶⁰ and *RD and Others*³⁶¹ have clarified their respective duties to assist P in exercising their Article 5(4) rights of access to a court.

In *AJ v A Local Authority*³⁶², Baker J clarified where responsibility lay in appropriate cases for ensuring that appeals against authorisations granted under the DoLS are heard by the CoP. Citing the Strasbourg case law outlined above, Baker J confirmed that: 'There is no place in Article 5(4) for a best interests decision about the exercise of that right since that would potentially prevent the involvement of the court.'³⁶³ In other words the person responsible for launching an appeal against detention on P's behalf must not decline to bring a case because they do not consider it to be in the person's best interests to challenge the detention.

Baker J held that a key function of the RPR is to challenge any authorisation under the DoLS,³⁶⁴ and that supervisory bodies should not appoint an individual as RPR if it appeared to them that they would not comply with this obligation because, for example, they supported continuing detention³⁶⁵. The judge went on to say that IMCAs appointed to support the RPR and P under the DoLS should 'act with diligence and urgency to ensure that any challenge to an authorisation under Schedule A1 is brought before the court expeditiously'.³⁶⁶

On Baker J's analysis, the supervisory body should bring the matter before the court itself only as a last resort, where the RPR and IMCA have failed to take steps to challenge the authorisation. Thus in the context of the DoLS, the ruling in *AJ* appears to shift the onus away from the public authority having direct responsibility for referring disputes to the CoP – in contrast to what appeared to be the *ratio* in *Neary*. Instead, *AJ* clarified that supervisory bodies' primary responsibilities under Article 5(4) lay in ensuring that the relevant safeguards are in place to enable others – the RPR and the IMCA - to support P in challenging a DoLS authorisation. The *ratio* in *Neary* that public authorities should make the application to court in cases of dispute remains intact in Article 8 matters outside of the DoLS, however.

It was clear that AJ strongly and consistently objected to her detention in the care home. However, for many people who are deprived of their liberty under the DoLS their wishes and feelings regarding the detention and challenging it in court may be unclear or may fluctuate. In such circumstances, there was a lack of clarity among professionals as to what counts as an objection sufficient to trigger the duties outlined in *AJ*.

In *RD and Others* five test cases were identified to clarify this duty. Each case involved an individual whose behavior– in the past or present – could be interpreted as an objection to their care arrangements, but where it was unclear whether or not they wished to challenge their detention in court. Each applicant was an older person with dementia. In some of the test cases the individual's expressed wishes about the care arrangements fluctuated or were unclear; in some the individuals

³⁶⁰ [2015] EWCOP 5

³⁶¹ [2016] EWCOP 49

³⁶² [2015] EWCOP 5

³⁶³ *Ibid*, para. 77

³⁶⁴ *Ibid*, para. 81-2

³⁶⁵ *Ibid*, paras. 86, and 135-7

³⁶⁶ *Ibid*, para. 138

expressed a desire not to go to court or a refusal to submit to the court's 'governance' despite an expressed objection to their detention.

Applications were made to the COP and Baker J was asked to determine whether the s.21A applications had been properly brought and, in doing so, to set out some guidance to RPRs and IMCAs to apply in the future.

Before Baker J the parties advanced three different constructions of 'objections' sufficient to trigger the duty upon RPRs and IMCAs to assist P with an application to the CoP. The public authorities, stressing the significant cost of s21A proceedings³⁶⁷, advanced a minimal construction of objections based on the 'informed wish' of P to bring an appeal. They argued that the s39D duty upon IMCAs to assist P in bringing an appeal implied that P understood the matters referred to in s39D(7) MCA: the effects, purpose, duration and conditions of the DoLS authorisation, why assessors felt they met the qualifying requirements, and their appeal rights. This would set a high bar for understanding a complex set of safeguards, which is unlikely to be achieved by many of those subject to the DoLS. In tension with this position, the public authorities also agreed that there might be 'indirect evidence' of this wish through P's behaviour, but cautioned that this must not merely be behaviour indicative of an objection to the care (which, they argued, could be attributed to P's mental disabilities) but should appear to a 'trained representative' such as an IMCA to be an expression of *a wish to go to court*. They argued that 'The appearance of an equivocal or ambivalent expression would not meet the threshold for the wish.'³⁶⁸

The OS initially argued that if there was any direct or indirect evidence of a wish by P to leave the care home, and it is not possible for the RPR or IMCA to be satisfied that P *does not* wish to go to court, then there was a duty to apply to court. In a later submission the OS distinguished the roles of IMCA and RPR, arguing that the duty of the RPR was wider than that of an IMCA and the decision of whether or not to apply to court on P's behalf should be based on his best interests.

Counsel for four of the claimants, for whom RPRs and IMCAs acted as litigation friends, rejected the public authorities' position as too narrow, arguing that IMCAs and RPRs should consider not only whether P was expressing a wish to go to court, but also whether P *would wish* to do so if he had capacity. They also argued that drawing a distinction between behaviour caused by dementia and behaviour which indicates a wish or preference on the individual's part is often neither possible nor appropriate.³⁶⁹ They rejected the 'best interests' approach advanced by the OS on the basis this could result in situations where RPRs decided not to assist P in exercising his Article 5(4) rights when he wished to do so, in contradiction of the position adopted in *AJ* and ECtHR case law. Meanwhile the public authorities rejected the OS's initial submissions that absent the RPR or IMCA being satisfied that P *does not* wish to go to court, any direct or indirect evidence of a wish by P that they wish to leave their place of residence should prompt an application. They argued that this was tantamount to an automatic judicial review under the DoLS, which the system could not sustain.

Baker J adopted a hybrid of these approaches. He first distinguished between the role of the s39D IMCA and RPRs. Both IMCAs and RPRs are under a duty to assist P with an application under s21A

³⁶⁷ We found that the typical cost to a public authority of ongoing s21A proceedings in 2013-14 was £11,317. *Lucy Series and others*, n 49, p23.

³⁶⁸ *RD and Others* [2016] EWCOP 49, para 62.

³⁶⁹ *Ibid*, para 97.

MCA where P wishes, or 'P would wish to make the application in circumstances where he or she is unable to communicate that wish', because the right of appeal is available to all detained under DoLS 'irrespective of whether or not they can communicate their wishes'.³⁷⁰ However, RPRs have an additional duty to assess for themselves the matters contained within s21A MCA³⁷¹, and if they conclude that the relevant requirements are not met then 'the RPR has a right to apply to the court'. Baker J concluded that the decision as to whether or not to exercise that right should be based on the best interests principle - best interests is, therefore, integral to the decision by the RPR whether or not to apply to the court himself under s.21A..³⁷² This did not contradict the position in *AJ*, because 'the best interests principle does not apply where the RPR is facilitating P's wish to apply to the court, but it does apply when the RPR himself is deciding whether or not to apply.'³⁷³

The approach to RPRs taken by Baker J is comparable to the approach required of advocates under the Care Act 2014, who have a duty to assist a person with any complaint or challenge to a decision made under the Act if they wish to do so, but an additional duty to challenge a decision if the person is unable to communicate a wish and the advocate believes a decision will be detrimental to the individual's wellbeing.³⁷⁴

Baker J adopted as guidance eight paragraphs based on proposals by Victoria Butler-Cole, Counsel for the four applicants represented by IMCAs and RPRs, and Claire Leonard, who appeared for Bristol Clinical Commissioning Group:

1. The RPR must consider whether P wishes, or would wish, to apply to the Court of Protection. This involves the following steps:
 - (a) Consider whether P has capacity to ask to issue proceedings. This simply requires P to understand that the court has the power to decide that he/she should not be subject to his/her current care arrangements. It is a lower threshold than the capacity to conduct proceedings.
 - (b) If P does not have such capacity, consider whether P is objecting to the arrangements for his/her care, either verbally or by behaviour, or both, in a way that indicates that he would wish to apply to the Court of Protection if he had the capacity to ask.
2. In considering P's stated preferences, regard should be had to:
 - (a) any statements made by P about his/her wishes and feelings in relation to issuing proceedings,
 - (b) any statements made by P about his/her residence in care,
 - (c) P's expressions of his/her emotional state,
 - (d) the frequency with which he/she objects to the placement or asks to leave,
 - (e) the consistency of his/her express wishes or emotional state; and
 - (f) the potential alternative reasons for his/her express wishes for emotional state.

³⁷⁰ Ibid, para 77

³⁷¹ These are the purpose, duration, conditions and effect of any authorisation, and whether the qualifying requirements of the DoLS are met.

³⁷² n 368, para 80

³⁷³ n 368, para 81

³⁷⁴ The Care and Support (Independent Advocacy Support) Regulations 2014 SI 2014/2924, s5(5)

3. In considering whether P's behaviour constitutes an objection, regard should be had to:
 - (a) the possible reasons for P's behaviour,
 - (b) whether P is being medicated for depression or being sedated,
 - (c) whether P actively tries to leave the care home,
 - (d) whether P takes preparatory steps to leave, e.g. packing bags,
 - (e) P's demeanour and relationship with staff,
 - (f) any records of challenging behaviour and the triggers for such behaviour.
 - (g) whether P's behaviour is a response to particular aspects of the care arrangements or to the entirety of those arrangements.
4. In carrying out this assessment, it should be recognised that there could be reason to think that P would wish to make an application even if P says that he/she does not wish to do so or, conversely, reason to think that P would not wish to make an application even though he/she says that she does wish to, since his/her understanding of the purpose of an application may be very poor.
5. When P does not express a wish to start proceedings, the RPR, in carrying out his duty to represent and support P in matters relating to or connected with the Schedule, may apply to the Court of Protection to determine any of the four questions identified in s.21A(2) i.e. on the grounds that P does not meet one or more of the qualifying requirements for an authorisation under Schedule A1; or that the period of the standard authorisation or the conditions subject to which the standard authorisation is given are contrary to P's best interests; or that the purpose of the standard authorisation could be as effectively achieved in a way that is less restrictive of P's rights and freedom of action.
6. Consideration of P's circumstances must be holistic and usually based on more than one meeting with P, together with discussions with care staff familiar with P and his/her family and friends. It is likely to be appropriate to visit P on more than one occasion in order to form a view about whether proceedings should be started.
7. By way of an alternative to proceedings, it may be appropriate to instigate a Part 8 review, or to seek to work collaboratively with the family and the commissioning authority to see whether alternate arrangements can be put in place. Such measures should not, however, prevent an application to the court being made where it appears that P would wish to exercise a right of appeal.
8. The role of the IMCA appointed under s.39D is to take such steps as are practicable to help P and the RPR understand matters relating to the authorisation set out in s.39D(7)(a) to (e), and the rights to apply to the Court of Protection and for a Part 8 review, and how to exercise those rights. Where it appears to the IMCA that P or the RPR wishes to exercise the right, the IMCA must take all practical steps to assist them to do so. In considering P's apparent wishes, the IMCA should follow the guidance set out above so far as relevant.³⁷⁵

Paragraph 7 – that as an alternative to proceedings the RPR should consider exercising the power to seek a Part 8 review by the supervisory body³⁷⁶ or working collaboratively with the family - is likely to be widely taken up. In this case there are clear analogies with the Mental Health Act 1983 where a patient can apply to the hospital managers to review the continued need for detention and this is a right that exists alongside the right to apply for discharge by a Mental Health Tribunal; a

³⁷⁵ n 368, para 86.

³⁷⁶ As provided for by Part 8 of Schedule A1 to the Mental Capacity Act 2005.

parallel right, but not an alternative. The right of access to the court is protected by Article 5(4) and must not be delayed or denied.

As to the outcome of these cases, in two of them the local authority had conceded that the application was rightly brought and the cases had been remitted to the local court for consideration. In the other three the RPRs were invited to reconsider the cases in the light of the above guidance, and report back to a reconvened hearing which would be held 'in a few weeks.'³⁷⁷ In RD's case, she now appeared settled and on occasion was now expressing fear that she might have to leave the home. When she had been asking to leave she was asking to go to the home where she had lived with her parents many years previously, and, which was no longer available. Baker J said that 'I have not found clear evidence that RD ever wished to appeal to the court against the standard authorisation. Her presentation has followed the familiar pattern in which she appeared very unsettled at times in the early stages of her stay at B House, but has now, to a certain extent, settled down subsequently.'³⁷⁸ It is noteworthy in this context to observe that AJ, who was said to be a clear cut case of objections meriting an application under Article 5(4), herself did not wish to go to court.³⁷⁹ Baker J asked RD's RPR to apply the guidance and come back to court with an assessment as to whether it was appropriate to apply on her behalf. Similarly with JB, who expressed her desire to leave mainly in the afternoons when she felt she should be picking up her children from school. The local authority argued that this was the result of her illness rather than indicative of a true wish to leave. Again Baker J said this was a matter for the RPR/IMCA and asked them to apply the guidance and return with a view as to whether an application was appropriate.

One key point arising from *RD and Others* is that the decision whether P would wish if s/he had capacity to apply to the court is a matter for the clinical judgment of the RPR or the IMCA, acting in accordance with the guidance.³⁸⁰ Although Baker J's guidance was designed to ensure that those responsible for assisting P in exercising Article 5(4) rights cannot refuse to do so on the discretionary basis that it is not in P's best interests, in accordance with the Strasbourg authorities outlined above and in Section 2.3, it does suggest that such decisions may often be finely balanced questions of judgment and there may well be disagreements as to whether or not P's behavior does amount to an 'objection' for this purpose. The Official Solicitor's initial submission that an application should be made wherever there was any behavior which *could* be construed as an objection, unless there was clear evidence they did not wish to go to court, was presumably designed to restrict the scope for judgments of this nature to constrain the exercise of Article 5(4) rights. However this approach was not adopted by Baker J.

To assist RPRs and IMCAs in applying this guidance to make decisions about applications under s21A MCA.³⁸¹ Victoria Butler Cole, who appeared in both *AJ* and *RD*, has produced a flowchart, which we reproduce with thanks in [Figure 1](#), below.

In its decision in *RD and Others*, as in *Cheshire West*, the CoP has gone further in developing and clarifying the Article 5 ECHR rights of adults considered to lack capacity than the Strasbourg authorities to date. *RD and others* both affirms the universal right to be supported in exercising a

³⁷⁷ *RD and Others* [2016] EWCOP 49, para 107

³⁷⁸ *Ibid*, para 91.

³⁷⁹ *AJ v A Local Authority* [2015] EWCOP 5, para 65

³⁸⁰ *Ibid*, para 94.

³⁸¹ We are grateful to Victoria Butler-Cole for giving us permission to reproduce this flowchart.

right of appeal if they wish, or would likely wish, to do so, and imposes a duty upon RPRs and IMCAs to safeguard the individual's best interests in respect of the detention. It remains to be seen whether the principles put forward in the guidance have sufficient clarity to be readily applicable.

It is also important in passing to note the *obiter* comments of Charles J in *Re NRA and others* regarding the duties of RPRs, as on first reading these appear to be at odds with the approach adopted by Baker J in *RD*. Charles J outlined the role of the RPR when considering the safeguards that should be made available to those deprived of their liberty by the Court, outside the framework of the DOLS, and therefore without its safeguards such as the RPR. Charles J construed the role of the RPR as being to advance P's *best interests*, and the best interests test had to be applied to the conduct of any challenge brought to the CoP.³⁸² These remarks were *obiter*, and hence Baker J's view of the role of RPRs as outlined in *AJ* and *RD* is the correct approach to take when considering whether to make a s21A application on behalf of P. Additionally, it is clear from Baker J's judgment in *RD* that this 'best interests' approach cannot be applied to impede the important function of seeking access to the CoP on the basis of P's wishes and feelings. This tension between advancing P's best interests, or advancing the outcomes preferred by P, has continued to haunt CoP (and Tribunal) case law regarding different forms of representation for P, and will be returned to in Section 3.5 and Part 4 of the report, below.

³⁸² *Re NRA & Ors* [2015] EWCOP 59, para 170

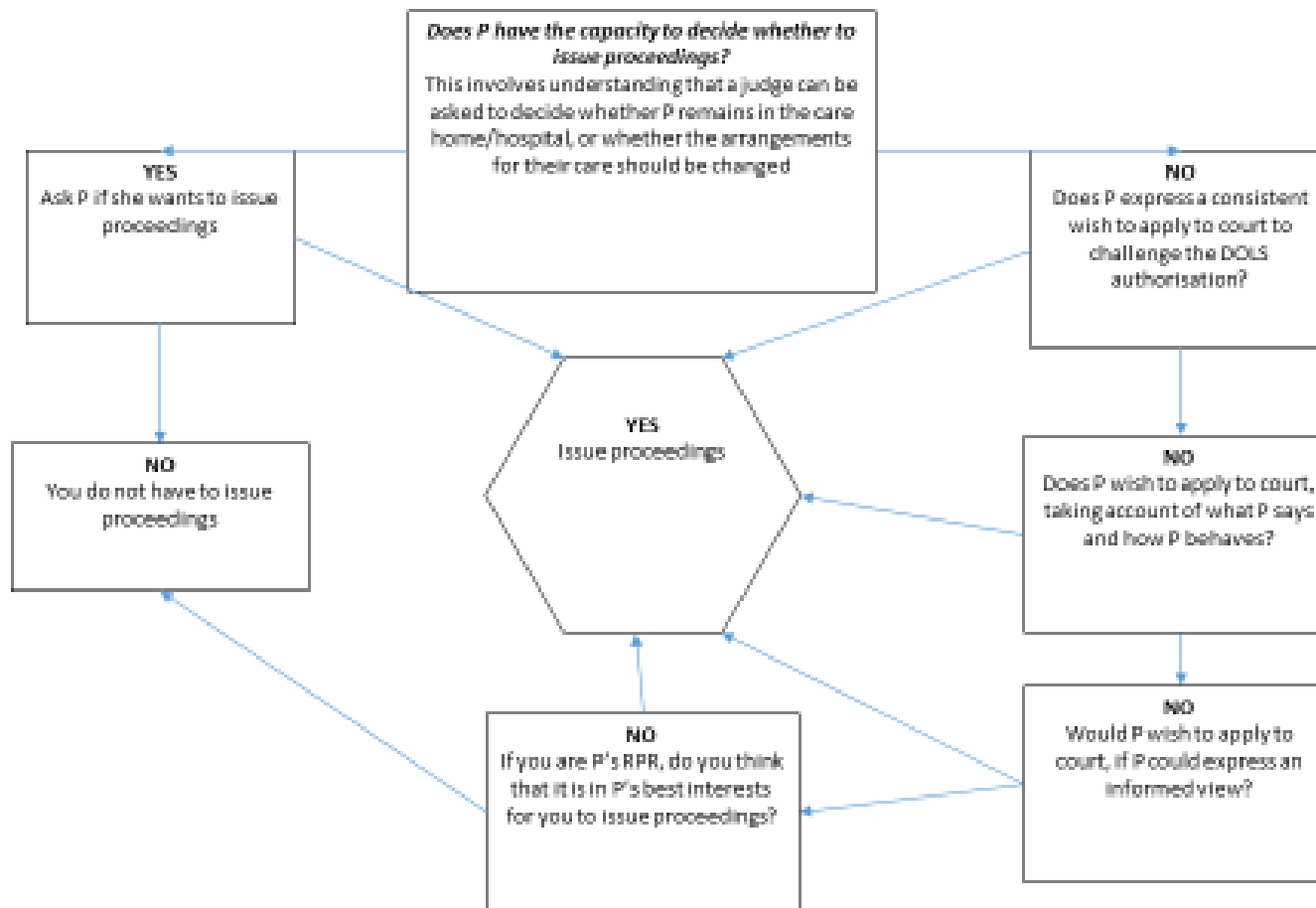


Figure 1 Section 21A MCA decision making flowchart, by Victoria Butler-Cole

Access to a court for those detained outside the scope of the DoLS

As noted above, following *Cheshire West* many people who live in domestic or quasi-domestic settings such as supported living would be considered deprived of their liberty but are not eligible for the DoLS, as Schedules A1 and 1A only apply to care homes and hospitals. These individuals do not have access to ‘special procedural safeguards’ such as RPRs and IMCAs. In theory, in order to comply with the requirements of Article 5 ECHR, those responsible for the detention should apply to the CoP to authorize the detention using a welfare order. Where there is no objection to the detention by P or others close to P, they may use the ‘streamlined’ procedure outlined in Section 1.4 above. Where either P or others close to P object, however, more formal proceedings will be required and P is likely to be joined as a party.

Problems arise in protecting the Article 5 rights of this population on two fronts. In the first place, as noted above, there is no non-means tested legal aid for this group. Where the detention is non-contentious the streamlined procedure may suffice, except in situations such as those which occurred in *Re JM*³⁸³ where there is nobody available to act in the capacity of litigation friend or Rule 3A representative. In such cases, the individuals’ Article 5 rights will not be protected. Where the detention is contentious, matters are even worse. For contentious cases, P should be joined as a party and be independently represented, but the unavailability of public funding for such litigation means P may incur significant costs in opposing or challenging any authorisation. The CoP and representatives are thus left with the uneasy decision of whether to protect P’s personal resources (which may be necessary to fund an alternative to the placement they object to) or to fund the legal procedures required to protect their Article 5 rights.

For the vast majority of people falling into this category, however, it seems that no application to the CoP has been made to authorise their detention in accordance with Article 5. For these individuals, their *de facto* detention is a clear violation of Article 5(1). In the event that these individuals, or those close to them, object to the detention, they would encounter the same problems in exercising rights to challenge the detention under Article 5(4) as those who wish to challenge best interests decisions outside of the DoLS: a lack of awareness of their rights (violations of Article 5(2)), lack of ‘special procedural safeguards’ such as RPRs or IMCAs to assist them in understanding and exercising these rights, difficulties securing legal representation due to the absence of public funding in this area. We are unable to give an indication of how many of the (likely) tens of thousands of persons who are *de facto* detained in these circumstances would wish to challenge their detention, but we regard this as a matter of the utmost concern in human rights terms. The Law Commission’s proposals, when enacted in law, should better protect the Article 5 rights of this population, but until that point their rights remain in limbo.

Recommendations on access to a court

Recommendation 1: In situations where P objects to a best interests decision that constitutes a serious interference with his or her human rights, s/he should be informed of her/his right to challenge best interests decisions in the CoP and assisted to access legal advice if they wish to do so. This would operate in a similar way to requirements that already operate under Article 5(2) for deprivation of liberty to notify a person of their right of appeal against detention.

³⁸³ *In the Matter of the Mental Capacity Act 2005 Re JM, AMY, JG, MM and VE* [2016] EWCOP 15

Recommendation 2: The duty upon advocates to assist P in challenging a best interests decision to which P objects should be clarified.

Recommendation 3: There should be a review of the CoP's application forms and guidance to facilitate ease of completion by a person wishing to challenge any deprivation of legal capacity.

Recommendation 4: The availability of public funding for legal representation in CoP proceedings, and for litigation friends where appropriate, should be reviewed in the light of the requirements of the ECHR for access to a court to challenge loss of legal capacity and deprivation of liberty (including outside of the DoLS).

Recommendation 5: When the government considers the final proposals of the Law Commission regarding amendments to the MCA DoLS it should also undertake a policy review of which matters under the MCA require an application to the CoP, or whether alternative procedural safeguards might suffice.

3.2 PARTY STATUS

When a person is made a party to proceedings, her or his level of participation changes in important ways. Under the Court of Protection Rules (COPR) as drafted in 2007, the default position is that P is *not* made a party to the case unless the CoP directs otherwise.³⁸⁴ Even if P is not made a party to the proceedings, P is still bound by any orders made by the CoP in the case.³⁸⁵ This approach was strongly contested during the consultation over the COPR in 2007, with one respondent affirming that it was 'vital that the individual concerned is at the heart of the case and we do not see how this can happen if the individual themselves is not considered to be a party to the case. They are after all the primary party and the reason why the case is being heard.'³⁸⁶ Others argued that the default position should be that P is joined as a party except in non-contentious property and affairs cases. However, the Government clearly rejected this position with the adoption of the COPR 2007.

The question of party status remains controversial today. At the roundtable, one participant echoed this argument, saying that the question 'shouldn't be "when should a person be a party to the case?" Instead it should be "when *shouldn't* they be" '; this participant commented that even if 95% of cases ended up with the person not joined as a party, there should be a rebuttable presumption that they are. In *Re NRA*, Charles J freely acknowledged:

the instinctive reaction of most English and Welsh lawyers would be that P must be a party to all proceedings in the Court of Protection because necessarily the orders directly affect his or her welfare or property and affairs and so he or she needs to be bound by them and have a say in what they should contain. Indeed, this was my starting point when the COP Rules were originally drafted.³⁸⁷

Yet, however desirable in principle it is that P has party status, this is subject to a number of practical constraints. Hence the pattern of recent litigation and revisions to the COPR has been to

³⁸⁴ Court of Protection Rules 2007, SI 2007 No 1744. r 73(4), prior to 2015 amendments.

³⁸⁵ *Ibid*, r 74, prior to the 2015 amendments.

³⁸⁶ *Draft court rules: Mental Capacity Act 2005. Court of Protection Rules: Response to a consultation carried out by the Department for Constitutional Affairs.*, n 52, p17

³⁸⁷ *Re NRA & Ors* [2015] EWCOP 59, para 34

devise alternative ways to ensure that P can participate and ‘have a say’ in CoP proceedings without being given party status.

The financial cost of party status

One of the major barriers to P being joined as a party is that, once so joined, they will require independent legal representation in order to exercise the rights and discharge the obligations attached to party status. In the vast majority of CoP cases,³⁸⁸ P would be regarded as lacking litigation capacity, in which case they may only be joined as a party if a litigation friend or Accredited Legal Representative (see Section 3.5 below) can be appointed.³⁸⁹ Although in theory P may act as a litigant in person³⁹⁰, in reality most of those subject to the CoP’s jurisdiction will require funded representation of some form. Yet, as discussed earlier, there is no public funding for CoP property and affairs cases, and public funding for welfare cases outside the DoLS is subject to a stringent means test. In a recent CoP case concerning deprivation of liberty, Mostyn J withdrew P as a party, because otherwise it was foreseeable that ‘his savings would soon be consumed in legal costs’.³⁹¹

At the roundtable, one participant who represented litigants in the CoP questioned whether it was right that P should be joined in non-contested cases, and ‘pay for the privilege when there is actually no dispute’. Another lawyer commented that even in cases where the evidence was overwhelming but a ‘difficult relative’ refused to accept the outcome, it was not straightforward to persuade the court to remove the person as a party. This meant that the person might have to pay many thousands of pounds out of their life savings to be represented. Legal representatives of clients in the CoP spoke of cases where welfare litigation had cost their clients tens of thousands of pounds, describing themselves as between ‘a rock and a hard place’ in protecting their clients’ interests.

Party status under the amended Court of Protection Rules

Following the 2015 amendments to the Rules, the general rule that P is not to be made a party remains in force. However, the new Rule 3A on the ‘Participation of P’ requires the court to consider in each case whether the person should be made a party, having regard to:

- a) the nature and extent of the information before the court;
- b) the issues raised in the case;
- c) whether a matter is contentious; and
- d) whether P has been notified in accordance with the provisions of Part 7 and what, if anything, P has said or done in response to such notification.³⁹²

³⁸⁸ Rare exceptions to this include *Re P (capacity to tith inheritance)* [2014] EWHC B14 (COP) and *L v NG* [2015] EWCOP 34, where the relevant person was found to have litigation capacity and represented themselves as a litigant in person before the CoP.

³⁸⁹ Court of Protection Rules 2007, SI 2007 No 1744, r 3A(4) as amended by The Court of Protection (Amendment) Rules 2015 SI 2015 No 548, r 5.

³⁹⁰ This has occurred in some very rare instances before the CoP: *L v NG* [2015] EWCOP 34

³⁹¹ *Bournemouth Borough Council v BS* [2015] EWCOP 39, para 5

³⁹² Court of Protection Rules 2007, SI 2007 No 1744, r 3A(1), as amended by r 5 of The Court of Protection (Amendment) Rules 2015

Where P is *not* joined as a party (unless the CoP directs otherwise) they must still be notified about the proceedings and key decisions, in a language which she or he understands.³⁹³ The CoP may also still hear the person on the question of whether or not a particular order should be made.³⁹⁴ They may also have a ‘representative’ under Rule 3A, whose function is to provide the CoP with information on:

‘the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)... the beliefs and values that would be likely to influence his decision if he had capacity, and... the other factors that he would be likely to consider if he were able to do so.’³⁹⁵

The role of Rule 3A representatives is discussed further in Section 3.5 below.

Ruck Keene et al, writing before Rule 3A was adopted, stated that at that time ‘the working presumption has developed that P will be joined in all serious medical treatment cases and in healthcare and welfare cases other than those concerning a very limited single decision to be taken on P’s behalf’.³⁹⁶ Practice Direction 2A on the ‘Participation of P’ confirms the established practice in the CoP, whereby non-contentious property and affairs cases (which form the vast majority of the CoP’s work) are dealt with without joining P as a party or any representative.³⁹⁷ However, other cases may ‘call for a higher level of participation’.³⁹⁸ The guidance is not more specific than this, however, on whether P should be joined as a party.

Although in this report we focus on welfare cases, we recognize that not joining P as a party may also raise serious concerns in some property and affairs cases. Sheree Green, solicitor and Chair of the Law Society’s Mental Health and Disability Committee, reports on a case of a client of hers, ‘Sarah’, who objected to an application by the local authority to act as her deputy for property and affairs. Despite her objections, which were known to the court, she was not joined as a party to the case. A special visitor visited Sarah without prior notice, and so she had nobody with her to assist with the meeting or access to her hearing aids or the information she would need to discuss her finances. The visitor concluded that she lacked financial capacity and the local authority was appointed as deputy. Her advocate alerted her solicitor, who helped her to apply to successfully discharge the deputyship. The case signifies the potential importance of party status to ensure adequate representation of P in challenging the evidence of an applicant or court appointed expert, in accordance with the adversarial principle of Strasbourg jurisprudence.

³⁹³ Court of Protection Rules 2007, SI 2007 No 1744, Part 7 as amended by The Court of Protection (Amendment) Rules 2015 SI 2015 No 548

³⁹⁴ Court of Protection Rules 2007, SI 2007 No 1744, r 88

³⁹⁵ Court of Protection Rules, 3A(2)(c), requiring representatives to provide the CoP with the information required by MCA 2005, s 4(4).

³⁹⁶ *Court of Protection Handbook: A User's Guide*, First edition, n 186, Paragraph 12.5

³⁹⁷ Practice Direction 2A, paragraph 3

³⁹⁸ Practice Direction 2A, paragraph 4

Party status and detention

The question of party status for P in non-contentious applications to the CoP for authorisation of a deprivation of liberty under the streamlined procedure was controversial in the *Re X* litigation³⁹⁹ discussed in Section 1.4 above. To recap, under the streamlined procedure as originally formulated by Munby P,⁴⁰⁰ the CoP could authorize the deprivation of liberty of P in proceedings to which they were not a party, subject to certain 'triggers' to identify situations such as disagreement between P and others, where greater participation was required. In the Court of Appeal,⁴⁰¹ Black, Moore-Bick, and Gloucester LJ cast doubt on the compatibility of such a process with the requirements of Article 5 ECHR in *obiter* remarks. To understand the significance of party status, it is worth reviewing their arguments in closer detail.

In *Re X (No 1)* the President held that Article 5 ECHR did not require P to be joined as a party, as long as they were able to 'take proceedings' in accordance with Article 5(4);⁴⁰² to participate in such a way as to 'present their case "properly and satisfactorily";⁴⁰³ and have 'access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation'.⁴⁰⁴ The President went on to say that P should always be given the opportunity to become a party if they wish, and 'whether joined as a party or not must be given the support necessary to express views about the application and to participate in the proceedings to the extent that they wish'.⁴⁰⁵ The President's reasoning that P need not be made a party to the proceedings was explained in *Re X (No 2)*, where he relied upon an analogy with wardship of children, who are not always made a party.⁴⁰⁶ In wardship proceedings, this is because:

There is no "lis" between the parties. The plaintiffs are not asserting any rights; they are committing their child to the protection of the court and asking the court to make such order as it thinks is for her benefit."⁴⁰⁷

In other words, where proceedings are *inquisitorial* rather than adversarial – as they are often said to be in the CoP⁴⁰⁸ – it will not be necessary for P to become a party.

In their *obiter* remarks, Black LJ and Gloucester LJ⁴⁰⁹ disagreed with Sir James Munby P's analogy between incapacitated adults and children, with Black LJ holding that the correct comparator for an

³⁹⁹ *Re X and others* [2014] EWCOP 25; *Re X and others (Deprivation of Liberty) (Number 2)* [2014] EWCOP 37; *Re X (No 2)* [2015] EWCA Civ 599 *In the Matter of the Mental Capacity Act 2005 Re: NRA, HR, ML, MJW, VS, EJG, MT, DPW, NR, and LM* [2015] EWCOP 59; *In the Matter of the Mental Capacity Act 2005 Re JM, AMY, JG, MM and VE* [2016] EWCOP 15

⁴⁰⁰ In *Re X & Ors (Deprivation of Liberty)* and *Re X and others (Deprivation of Liberty) (Number 2)*

⁴⁰¹ *Re X (Court of Protection Practice)*

⁴⁰² [2014] EWCOP 25, para. 18

⁴⁰³ *Re X (No 1)* at para. 19, citing *Airey v. Ireland* (App no 6289/73) [1979] ECHR 3; (1980) 2 EHRR 305, §24

⁴⁰⁴ *Re X (No 1)* at para.19, citing *Winterwerp v the Netherlands* (App no 6301/73) [1979] 2 EHRR 387, para. 60

⁴⁰⁵ *Ibid*, para. 19

⁴⁰⁶ *Ibid*, paras. 4-10

⁴⁰⁷ *In re B (JA) (An Infant)* [1965] Ch 1112, 1117

⁴⁰⁸ *Re X (No 2)* [2015] EWCA Civ 599 at para. 10, citing *Cheshire West and Chester Council v P and M* [2011] EWHC 1330 (COP), para. 51 and *Re G (Adult)* [2014] EWCOP 1361, para. 26

⁴⁰⁹ *Re X (No 2)* para. 169.

adult without capacity is not a child but an adult with capacity, citing *Cheshire West*.⁴¹⁰ She also rejected the analogy with wardship and private law proceedings, stating that the closest parallel was with secure accommodation proceedings (where the child is a party).⁴¹¹ Tellingly, Black LJ stated ‘no other example could be found of an adult whose liberty was in question in proceedings before a court or tribunal not being automatically a party to those proceedings’.⁴¹²

The Court of Appeal did not hold that Article 5 ECHR *in essence* always required P to be made a party if ‘his participation in them can reliably be secured by other means’.⁴¹³ Black LJ contrasted the network of safeguards available under the DoLS scheme and the streamlined procedure. A person detained under the DoLS would have an RPR and also possibly a s39D IMCA to assist them in understanding and exercising their rights; a person detained under the streamlined procedure had no equivalent independent assistance in understanding and exercising their rights, and thus its safeguards lacked the requisite degree of independence from the detaining authorities.

In the streamlined procedure the court bases its decision upon information from the (would be) detaining authorities.⁴¹⁴ Black LJ observed that it is only in relation to the consultation with P by a close friend, relative or advocate⁴¹⁵ ‘that any significant degree of detachment is introduced’.⁴¹⁶ However, Black LJ felt that this consultation process was only a limited safeguard: there was no equivalent to an RPR, whose role involves challenging any proposed deprivation of liberty (see Section 3.1 above), and it may be that those consulted support the arrangements or are unaware of alternatives. In contrast, a relevant person joined as a party would have a litigation friend who would be required to look after their interests and who would have access to all the documentation and reports, and be able to challenge the case presented to the court⁴¹⁷, providing analogous safeguards to an RPR.

The streamlined procedure rested on the presumption that it was sufficient for P to be given an *opportunity* to be joined as a party if they expressed a desire to do so. Black LJ considered that P ‘is not likely to be in a position to make an *informed* decision himself about his participation in the proceedings or indeed about his living circumstances’⁴¹⁸ and consequently there was ‘too significant a risk that cases would slip through the net, going unrecognised by the applicant and by the court despite the best efforts of all involved’.⁴¹⁹

Although Black LJ’s remarks about the requirements of Article 5 are *obiter dicta*, and not strictly binding precedent her statement of the position regarding Article 5 compliance carried significant

⁴¹⁰ Ibid, para. 84

⁴¹¹ Ibid, para. 86

⁴¹² Ibid, para 106

⁴¹³ Ibid, para 96

⁴¹⁴ Ibid, para. 102

⁴¹⁵ Required in the COP DOL 10 forms that are used for the streamlined procedure, described at Section 1.4 above.

⁴¹⁶ Ibid, para. 103

⁴¹⁷ Ibid, para. 105

⁴¹⁸ Ibid, para.103

⁴¹⁹ Ibid, para. 106

weight. In *HSE Ireland v PD*⁴²⁰, decided shortly after the Court of Appeal's ruling, Baker J considered the Court of Appeal judges' 'clear statements of principle' to 'serve as a strong reminder of the importance to be attached to ensuring that P's voice is heard on any application where deprivation of liberty is in issue.'⁴²¹ Baker J emphasised Black LJ's observation that 'it is generally considered indispensable in this country for the person's whose liberty is at stake automatically to be a party to the proceedings in which the issue is to be decided'.⁴²²

Nevertheless, for the reasons outlined above, the requirement that P be joined as a party for all applications for authorisation of a non-contested deprivation of liberty was deeply problematic given the insufficiency of funding to secure representation, and the shortage of litigation friends to instruct representatives on behalf of P. Thus, the decisions of Charles J in *In Re NRA and others* and in *Re JM and others* have reasserted an amended streamline procedure where P is not made a party but where the Rule 3A Representative plays a central role.⁴²³ Rule 3A representatives in these cases are intended to offer similar guarantees of independence of process and support for P as an RPR under the DoLS, but without requiring that P is made a party to the proceedings. Their role is considered further in Section 3.5 below.

Party status and the right to participate

The Court of Appeal's remarks in *Re X* cast doubt on whether it could be lawful for P to be deprived of their liberty by proceedings to which they are not a party without additional steps being taken to secure independence of process, and support and representation for P. However, it is not clear whether similar reasoning might also apply in circumstances where Article 5 ECHR is not engaged. The *obiter dicta* of Moore Bick LJ could, as Charles J observed in *Re NRA*⁴²⁴ be interpreted as applying to *all* cases before the CoP, not merely those concerning deprivation of liberty:

These are essentially practical considerations, but they invite consideration of what is actually meant by being a party to proceedings. In my view a party can best be described for these purposes as a natural or juridical person who has come before the court in order to obtain vindication of his rights and relief of some kind (usually described in the proceedings as a claimant) or who has been brought before the court by another under compulsion in order that the court's powers may be invoked against him (usually described as a defendant). Such persons are directly affected by the court's decision and are therefore entitled to play a full part in the proceedings in accordance with the rules of procedure.⁴²⁵

As noted in Section 2.4 above, the ECtHR has developed a threefold rationale for the importance of personal participation in court proceedings concerning legal capacity and deprivation of liberty:

⁴²⁰[2015]EWCOP 48.

⁴²¹ *Ibid*, para 31.

⁴²² *Ibid*.

⁴²³ *In the Matter of the Mental Capacity Act 2005 Re: NRA, HR, ML, MJW, VS, EJG, MT, DPW, NR, and LM* [2015] EWCOP 59; *In the Matter of the Mental Capacity Act 2005 Re JM, AMY, JG, MM and VE* [2016] EWCOP 15

⁴²⁴ [2015] EWCOP 59, para 32

⁴²⁵ *Re X (Court of Protection Practice)* [2015] EWCA Civ 599, para 170

1. The dignity principle: the fundamental right to participate, including meeting judges taking decisions with serious consequences for a person's life.
2. The evidential principle: a person is an important source of evidence before the court for legal capacity, guardianship and deprivation of liberty proceedings.
3. The adversarial principle: Participation may be necessary to help a person to present his case and to refute expert evidence or arguments recommending measures that a person opposes.

The evidential principle does not necessarily entail that a person should be made a party, and there is nothing *in theory* to prevent P attending court in person.⁴²⁶

However, party status may be regarded as important to reflect the impact of the decision on the person's human rights and the need to uphold their individual dignity. A lack of party status was perceived by some participants at the roundtable as problematic as a matter of principle – even when decoupled from wider participatory and evidential questions. One participant felt that 'presentationally, it seems odd that P should not be a party. It objectifies and depersonalises them', as if the proceedings were about a 'thing that happened to be a human being'. Another participant with a background in human rights litigation, felt that it was 'obvious' that P should be a party. In response to concerns about difficulties of funding legal representatives that arose where a person as joined as a party, they countered: 'Of course they should have representation, it just shouldn't bankrupt them'. Party status thus foregrounds a difficult tension between the funding of legal representation and protection of fundamental human rights.

It is arguable that it is necessary to join P as a party as the 'subject' of the proceedings in accordance with the adversarial principle, to guarantee equality of arms in representation. Where a person is not a party to the proceedings, their ability to shape the course of proceedings through presenting evidence and arguments to the court, and contesting the evidence and arguments of the other parties is limited, as Sarah's case shows. For example, party status has been (unsuccessfully) sought by media organisations, who wanted to be able to help shape instructions to expert witnesses and examine expert witness evidence regarding the mental capacity of P to speak to the media about her case.⁴²⁷

The approach of the Court in Practice Direction 2A, and also in the *Re X* streamlined procedure, has been to distinguish between contested and non-contested cases. On this approach, arguably the adversarial principle is only engaged where P or others object to the proposed measures before the CoP. In *Re X*, Black LJ highlighted the potential danger of relying upon P to express an objection or a desire to be joined as a party in order to trigger additional protection of his or her interests, given that they are unlikely to be in a position to make an informed decision.⁴²⁸ This reasoning echoes the ECtHR's approach in *HL v UK*, that where a person is 'legally incapable of consenting to, or disagreeing with, the proposed action' their compliance is not to be treated as if it were consent.⁴²⁹ Although these remarks were made in a different context, they do highlight the potential danger of

⁴²⁶ The Court of Protection Rules 2007 SI 2007 No 1744, r 88(1)

⁴²⁷ *G v London Borough of Redbridge, Associated Newspapers Limited and Others* [2014] EWHC 1361

⁴²⁸ *Re X (No 2)* [2015] EWCA Civ 599, para. 103

⁴²⁹ *HL v United Kingdom* [2004] 40 EHRR 761, para. 90

making the degree of scrutiny to which the court subjects an application dependent on the extent to which P is perceived, or recorded, as objecting.

This may have implications for situations where other fundamental rights than Article 5 are engaged, for example rights to respect for home, family life, privacy or bodily integrity under Article 8 ECHR. For the most part, this concern is theoretical in relation to health and welfare applications: Practice Direction 2A and anecdotal reports suggest that it is very rare for the person not to be joined as a party in health and welfare cases outside of non-contested deprivation of liberty applications.

Whilst we recognize the symbolically charged importance of party status, we do not make any specific recommendations in this report. Instead, we regard this as coupled to wider recommendations regarding the adequacy of P's representation in proceedings, and particularly funding for representation, and the extent to which P is placed at the centre of the proceedings.

3.3 NOTIFICATION

Notification of proceedings in the CoP is an essential precursor to direct participation. Notification is particularly important to give P the opportunity to voice any objection to the proposed measures. In several cases, the ECtHR has found that failure to notify individuals of proceedings connected with their legal capacity violated fair trial guarantees, in part because it denies a person the opportunity to use any remedies against the proposals.⁴³⁰ The right to be notified is thus closely linked to the 'adversarial principle' under the ECHR and under the common law.⁴³¹ Being notified of proceedings which concern the person and may have significant consequences for their lives is also a matter of dignity.

Notification under the Court of Protection Rules

The notification of P is governed by Part 7 of the COPR, which has recently been amended.⁴³² Whether or not they are a party, P must generally be notified of the following matters relating to an application:

1. That an application has been issued by the CoP, or withdrawn, and the date and location of any hearing;⁴³³
2. The identity of the applicant, 'that the application raises the question of whether P lacks capacity in relation to a matter or matters, and what that means', 'what will happen if the court makes the order or direction that has been applied for' and whether it contains any proposal for the appointment of a deputy to make decisions on the person's behalf;⁴³⁴

⁴³⁰ *Shtukaturv v Russia* (App no 44009/05) [2008] ECHR 223, paras 10, 16 and 69; *MS v Croatia* (App no 36337/10) [2013] ECHR 378, para. 105; *X and Y v Croatia* (App no 5193/09) [2011] ECHR 1835; para. 94; *Sýkora v The Czech Republic* (App no 23419/07) [2012] ECHR 1960, paras. 107-109

⁴³¹ See *Ridge v Baldwin* [1964] AC 40.

⁴³² The Court of Protection Rules 2007 SI 2007 No 1744, as amended by the Court of Protection (Amendment) Rules 2015 SI 2015 No 548.

⁴³³ *Ibid*, r 42(1)

⁴³⁴ *Ibid*, r 42(2)

3. Where the CoP has given directions under Rule 3A that a litigation friend, accredited legal representative or 'Rule 3A representative' should be appointed;⁴³⁵
4. If the application is withdrawn, then the consequences of the withdrawal should be explained to the person;⁴³⁶
5. That P 'may seek advice and assistance in relation to any matter of which he is notified';⁴³⁷
6. If the court makes any decision relating to P, other than case management decisions;⁴³⁸
7. Any other matters which the court directs.⁴³⁹

P must also be notified of similar matters in relation to any appeal.⁴⁴⁰

Notification must be effected by the applicant (or appellant) or an agent appointed by them, or by 'such other person as the court may direct'.⁴⁴¹ The person notifying P of the relevant matter must 'provide P, or arrange for P to be provided with, with the information specified... in a way that is appropriate to P's circumstances (for example, using simple language, visual aids or any other appropriate means)'.⁴⁴² This must be provided to P 'personally', as soon as practicable and within 14 days of the relevant matter.⁴⁴³ The person effecting notification must file a certificate of notification with the court. Following the 2015 amendments, this certificate must state when the person was notified and 'the steps taken to enable P to understand, and the extent to which P appears to have understood, the information'.⁴⁴⁴

Cases where P is not notified

Although the presumption is that P will be notified of the matters listed above, the court may direct that P must *not* be notified of some or any matters, or provided with any document.⁴⁴⁵ The court has used this power on a number of reported occasions. For example, in *P v Independent Print Ltd. & Ors*⁴⁴⁶ the court had authorised the media to report elements of the case, but had made an order prohibiting anyone from bringing to P's attention 'the fact of or the content of any such media reports'.⁴⁴⁷ This decision was based on expert evidence that if he 'believes that information about him is being shared with the media it will contribute to a sense of distrust. This will seriously

⁴³⁵ Ibid, r 41A, as inserted by the Court of Protection (Amendment) Rules 2015 SI 2015 No 548, r 18.

⁴³⁶ Ibid, r 42(3)

⁴³⁷ Ibid, r 42(4)

⁴³⁸ Ibid, r 44, as amended by the Court of Protection (Amendment) Rules 2015 SI 2015 No 548, r 19. The previous version referred only to 'orders', but this was amended in 2015 to refer to 'decisions' on the basis that not all court decisions that may have a material effect on the person are contained in orders (e.g. a declaration regarding the relevant person's mental capacity or best interests).

⁴³⁹ Ibid, r 45.

⁴⁴⁰ Ibid, r 43.

⁴⁴¹ Ibid, r 41

⁴⁴² Ibid, r 46

⁴⁴³ Ibid, r 46, as amended by the Court of Protection (Amendment) Rules 2015 SI 2015 No 548 r 20

⁴⁴⁴ Ibid, r 48, as substituted by the Court of Protection (Amendment) Rules 2015 SI 2015 No 548 r 21

⁴⁴⁵ Ibid, r 40.

⁴⁴⁶ [2011] EWCA Civ 756

⁴⁴⁷ Ibid, para. 18

undermine his care plan and developing therapeutic relationships.⁴⁴⁸ Some may find it unsettling to think that the readers of the judgment have knowledge of these orders when P does not.

In some cases, P has not been notified of an application for serious medical interventions that the person opposes. In *Re AA*⁴⁴⁹ a hospital trust applied for an order authorising them to deliver by caesarean the child of a woman who was detained under the MHA 1983 using force if necessary, as it was believed to be in her best interests. The woman, Alessandra Pacchieri, later told media organisations that the first time she was made aware of the application and order was the morning of the operation.⁴⁵⁰ This seems plausible, since order stated that 'The terms of this order shall not be disclosed to the Respondent until after the medical procedure described below has been completed.'⁴⁵¹ The published judgment and transcript do not discuss the reasoning behind the decision not to notify Pacchieri of the application or the court's decision.⁴⁵² Ms Pacchieri was made a party to the proceedings, and was represented by the Official Solicitor, yet it is unclear whether she herself had any contact at all with those representing her (a matter which is discussed further below).

Notification engages the dignity principle, the evidential principle and the adversarial principle of the right to participate. The decision not to notify a person until after the substance of the decision has been implemented not only affects their ability to directly put their objections to the court, but may also have a wider impact on the quality of the evidence available to the court. Clearly, if the person is not to learn of the court proceedings, they cannot have any direct contact with the judge; thus the 'principled' approach of the individual meeting the judge cannot be fulfilled, nor can the judge come to an independent view of their capacity or the proportionality of the proposed measure. A prohibition on notification also presents serious difficulties for obtaining independent expert evidence, as contact with a court appointed expert for the purposes of an assessment for the court may involve revealing to the person the existence of the proceedings. In *Re AA*, the court appears to have based its decision entirely upon evidence provided by the applicant NHS trust. This raises the same concerns about the potential conflict of interest when a court must base its decision solely on evidence supplied by the applicant as those discussed by the Court of Appeal in *Re X*⁴⁵³, although in this case the proceedings clearly were contentious.

The dangers of over-reliance on the evidence of the applicant public authority were illustrated in the pre-MCA case of *St George's Healthcare NHS Trust v S*⁴⁵⁴, where a trust applied *ex parte* to the court for declarations permitting a caesarean section on a woman who wanted a natural birth and who was detained under the MHA. The court made the declarations after having been provided

⁴⁴⁸ Ibid, para. 29

⁴⁴⁹ [2012] EWHC 4378 (COP)

⁴⁵⁰ Sue Reid, 'I could feel my baby kicking inside me. I was crying as I begged them not to cut me open: Mother whose baby was snatched from her womb by the State talks to the Mail' (*Daily Mail*, 4 December 2013) <<http://www.dailymail.co.uk/news/article-2518417/Alessandra-Pacchieri--I-feel-baby-kicking-inside-I-crying-I-begged-cut-open.html>> accessed 11 March 2015.

⁴⁵¹ Unusually, the order itself is provided at the end of the judgment on BAILII

⁴⁵² The matter of notification is not discussed in the judgment itself, and the transcript records only that Mostyn J and counsel for the Trust and the OS agreed that AA should not be notified until after the operation.

⁴⁵³ *Re X (Court of Protection Practice)* [2015] EWCA Civ 599, §100

⁴⁵⁴ [1999] Fam. 26

with information by the applicant trust that was untrue, including that the woman had been in labour for 24 hours, when in fact she was not in labour at the time. The woman in question sought judicial review of the decision after the caesarean had been carried out, and the Court of Appeal held that the caesarean constituted trespass. The Court of Appeal in the *St George's* case laid down guidelines for similar applications, including that the hearing should be *inter partes* (with notice to all parties) as an order made in the woman's absence would not be binding unless she was represented by a litigation friend, or by counsel or a solicitor.

Where a person must not learn of the proceedings, it is difficult to see how they could meet or engage with their legal representatives (if they are a party to the case and they are represented), because in doing so they would need to learn about the existence of the proceedings. It will be almost impossible for them to present their views and arguments, or to rebut the arguments or evidence of other parties. In *Re AA*, Ms Pacchieri was represented by expert counsel, but it is difficult to see how they could do anything other than ensure the court's processes 'ticked all the boxes'⁴⁵⁵ rather than provide an effective safeguard against any potential arbitrariness in the evidence submitted by the applicant, unless they had direct contact with the person or were able to instruct experts to do so on their behalf. Non-notification thus raises significant problems for the ECtHR 'adversarial principle' and the common law rules of natural justice, even if P is joined as a party and is represented.

In subsequent published judgments concerning planned (or possible) interventions relating to childbirth, the question of notification was given more explicit consideration than had taken place in *Re AA*. In *The Mental Health Trust & Anor v DD & Anor*⁴⁵⁶ DD was pregnant and there was medical evidence that pregnancy and childbirth presented serious risks to her and her child, yet she would not engage with professionals. The trust obtained orders authorising a range of interventions including a scan to assess her health and that of the child, a planned caesarean to deliver the child safely, forcible entry to her home for the purpose of assessing her mental capacity to give or refuse consent to contraception and – in a later hearing⁴⁵⁷ – forcible entry to her home for the purpose of removing her to hospital to be sterilised. It was considered too risky to notify DD of these plans, in case she disappeared prior to these steps being taken. Even partial information was regarded as problematic in case it elevated her anxiety. Mr Justice Cobb felt that it was a justified interference with DD's Article 8 rights to be only given partial information about the plans, and that her Article 6 rights were protected by her full and effective representation (through the Official Solicitor) at the hearing, and her having been given opportunities (which she did not take up) to participate in the proceedings.⁴⁵⁸

In *NHS Trust & Ors v FG (Rev 1)*⁴⁵⁹ Mr Justice Keehan stated that orders permitting applicants not to notify P were 'extremely unusual' and 'at the extremity of what is permissible under the European Convention'; he stated that it would only be justified 'if the interests of the patient and/or the child

⁴⁵⁵ A phrase, tellingly, used by Ms Pacchieri's own counsel. In the published transcript in *Re AA* counsel for AA, Mr Lock, takes Mostyn J through the requirements of the MCA, at one point commenting 'So, my Lord, for capacity there is a tick in the box.'

⁴⁵⁶ [2014] EWCOP 11

⁴⁵⁷ *The Mental Health Trust & Ors v DD & Anor* [2015] EWCOP 4

⁴⁵⁸ [2014] EWCOP 11, paras 143-4

⁴⁵⁹ [2014] EWCOP 30

demand the same'.⁴⁶⁰ In relation to care proceedings, the threshold for not notifying a mother of a plan to remove her child at birth is extremely high.⁴⁶¹ It was put to Mr Justice Hayden in *Re DM*⁴⁶² that CoP cases such as *FG* had appeared to lower the bar for such radical interventions,⁴⁶³ but this suggestion was rejected.⁴⁶⁴

In *An NHS Trust v The Patient*,⁴⁶⁵ Mr Justice Holman made orders authorising surgery to remove a tumour from a man who refused surgery on the basis that he wished 'keep the tumour with him for life'⁴⁶⁶ and did not believe it posed any threat. His sister felt that he was terrified of the surgery, because of his past experiences of psychiatric hospitals.⁴⁶⁷ The court authorised covert sedation to minimise his distress before going to hospital. However, Holman J added a rider to the order that 'The patient must be told in clear but sensitive terms before he is anaesthetised that he is going to be anaesthetised and that the operation is going to be performed', stating 'it remains extremely important in any civilised society that they are not subjected to anaesthesia or invasive surgery without, as a minimum, being informed in sensitive and appropriate language as to what is about to be done to them before it is done'.⁴⁶⁸ Clearly, the purpose of this 'notification' of what was to occur was not to present an opportunity to use a legal remedy against it, but an attempt to reconcile the exigencies of the case with the spirit of the 'dignity principle' discussed in Section 2.4 above.⁴⁶⁹

Decisions not to notify P may also raise wider questions of 'transparency'. In *FG* and *An NHS Trust v The Patient*, the court sat in public⁴⁷⁰ but issued reporting restrictions so that P did not learn about the court's decision (of which they had not (yet) been notified) through reports of the proceedings in the media.

Complex considerations regarding notification

The foregoing cases highlight a range of complex considerations about notifying P of applications and decisions in the CoP concerning them. On the one hand, failure to notify P of the application and decisions is problematic from the perspective of all three of the ECtHR's rationales for promoting the participation of P in the proceedings. It presents problems for obtaining

⁴⁶⁰ *Ibid*, para. 55. NB: the rights of the unborn child are not relevant to applications under the MCA 2005 as an unborn foetus has no legal personality to which rights may attach (*Re MB (Medical Treatment)* [1997] 2 FLR 426, CA). Nevertheless the Court is likely to take the view that it is not in the best interests of a mother who has carried a child almost to term that her child should be still born or should suffer damage whilst in the womb.

⁴⁶¹ *Re D (Unborn Baby)* [2009] 2 FLR 313

⁴⁶² [2014] EWHC 3119 (Fam)

⁴⁶³ *Ibid*, para 27

⁴⁶⁴ *Ibid*, para 28

⁴⁶⁵ [2014] EWCOP 54

⁴⁶⁶ *Ibid*, para 7

⁴⁶⁷ *Ibid*, paras. 5-6

⁴⁶⁸ *Ibid*, para. 22

⁴⁶⁹ This principle is expressed in the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment CPT Standards <http://www.cpt.coe.int/en/docsstandards.htm> p 53, para 41 'Patients should, as a matter of principle, be placed in a position to give their free and informed consent to treatment.'

⁴⁷⁰ In general, the CoP sits in public for hearings concerning serious medical treatment, see: Court of Protection, *Practice Direction 9E - Applications relating to serious medical treatment* (Judiciary of England and Wales 2007).

independent evidence, it makes it difficult for P to put their case to the court directly or through their legal representative, and it may be offensive as a matter of principle not to notify a person of proceedings with such momentous consequences for their lives. Some earlier reported CoP cases make non-notification orders with little recognition that they lie at the outer extremity of what is permissible under the ECHR, and consequently no explicit consideration of whether they are necessary and proportionate. However, more recent cases increasingly recognise that non-notification raises profound human rights questions and do state the justification more explicitly.

Whilst recognising strong arguments in favour of notification of the relevant individual, participants at the roundtable (especially those involved in representing P) discussed some of the moral difficulties that could be raised by a decision to notify the person. In particular, notifying P of an application or decision can cause the person significant distress or anxiety. One lawyer, who had experience of cases where the court's final decision had caused the person immense distress, argued that there was sometimes a need for expert evidence on how (if at all) notification should be effected. This argument may have some support in ECHR jurisprudence. In the only case where the ECtHR has held that it was lawful not to notify P of legal capacity proceedings concerning them, *Berková v Slovakia*⁴⁷¹, the court's decision was based on expert recommendations.⁴⁷² In future reforms of the COPR, it might be appropriate to consider an explicit requirement that any court orders that P should not be notified of the application or any material decisions concerning the proceedings should only be made if necessary, proportionate and based on appropriate evidence.

It is difficult to balance the competing legal and moral imperatives to ensure that the best possible evidence and arguments are gathered and tested for the court's decision, and the dignity principle is respected, with the possibility that the act of notification itself may cause significant distress to the person. Because notification raises such profound questions, it is important that it is considered carefully on a case by case basis. This will require ensuring that applications are brought well in advance of the anticipated requirement of an order wherever possible, to ensure the court is given adequate time to ensure questions of participation are considered appropriately. Moreover, in cases where P is not a party to the proceedings, if the purpose of notification is to provide P with the opportunity to oppose the application, it is questionable whether the existing COPR requirement that those effecting notification must tell P that they 'may seek advice and assistance' are sufficient if the person is incapable of independently accessing that assistance.

The COPR, as presently drafted, do not place those notifying P under any duty to provide active assistance in seeking advice and assistance or otherwise informing the court of their objections. Paradoxically, these provisions appear to be based on the assumption that a person alleged to lack mental capacity in relation to the matter in question would have the independent capability to contest that assertion in court. In contrast, the guidance under the *Re X* streamlined procedure places those consulting P and notifying them of the application under an implicit duty to help the person to secure such assistance.⁴⁷³ If the notification process is to provide an effective safeguard

⁴⁷¹ (App no 67149/01) [2009] ECHR 514

⁴⁷² *Ibid*, para 144

⁴⁷³ The duty is implicit because it is not explicitly stated in the COPR as amended or in Practice Direction 10AA. Instead the practice direction states that the applicant must arrange for the relevant person to be informed 'that the person is entitled to seek to take part in the proceedings by being joined as a party or otherwise, what that means, and that the person undertaking the consultation will ensure that any such request is communicated to the court;' and 'that the person undertaking the consultation can help him or her to obtain advice and assistance if he or she does not agree

for P to enable them to convey any objections to the court, or to seek assistance in order to use remedies against the application, it is suggested that the COPR and relevant practice directions should be amended to place those effecting notification under an explicit duty to convey P's views to the court and to assist them in seeking legal advice and representation if they desire it.

Recommendations on notification

Recommendation 6: The COPR should be amended to require explicit consideration by the CoP of the reasons for non-notification of P of any matter regarding the proceedings, and in particular consideration of whether non-notification is necessary and proportionate in pursuit of a legitimate aim, and supported by objective evidence.

Recommendation 7: The COPR should be updated to place those notifying P of P's right to advice and assistance in relation to the proceedings under a duty to help P secure this advice if that is P's wish.

3.4 EVIDENCE AND INFORMATION BEFORE THE COURT

The person as a source of evidence under the European Convention on Human Rights

One of the principles established by the ECtHR for the participation of P, is that the person themselves is an important source of evidence on which the court must base its decision. This evidential principle has been adopted by the ECtHR more widely than in legal capacity and deprivation of liberty cases. In cases where the courts are dealing with questions of fact, as well as law, the ECtHR has held that personal presence is generally required,⁴⁷⁴ unless there are no issues with the credibility of witnesses, the facts are not contested and the parties are given adequate opportunities to put forward their cases in writing and challenge the evidence against them.⁴⁷⁵ Personal presence has also been held to be important in cases involving the assessment of 'emotional suffering', where the applicant should have the opportunity to explain orally any 'moral damage' and 'distress and anxiety' which particular acts entailed for him; this has been held to outweigh considerations of speed and efficiency.⁴⁷⁶ Personal presence has been considered important if the case involves an assessment of a person's state of health or character,⁴⁷⁷ or where they are an important source of the factual evidence.⁴⁷⁸ Many of these considerations are likely to be relevant in CoP proceedings, where the court is often required to assess the individual's health, character or emotional state and the potential impact of an order upon a person.

The ECtHR has adopted a similar approach in its case law on legal capacity and deprivation of liberty. In *Shtukaturov*, it held that the applicant's presence was necessary in legal capacity

with the proposed arrangements in the application.' Court of Protection, *Practice Direction 10AA: Deprivation of Liberty Applications*, (2014). Para 35.

⁴⁷⁴ *Ekbatani v Sweden* (App no 10563/83) [1988] ECHR 6 (26 May 1988); *Koottummel v Austria* (App no 49616/06) [2009] ECHR 2033 (10 December 2009)

⁴⁷⁵ *Schlumpf v Switzerland* (App no 29002/06) [2009] ECHR 36, paras. 66-70; *Igual Coll v Spain* (App no 37496/04) ECHR (10 March 2009), paras. 28-38

⁴⁷⁶ *Göç v Turkey* (App no 36590/97) [2002] ECHR 589, para. 51; see also *Kovalev v Russia* (App no 78145/01) [2007] ECHR 380, paras 35-37

⁴⁷⁷ *Salomonsson v Sweden* (App no 38978/97) [2002] ECHR 736

⁴⁷⁸ *García Hernández v. Spain* (App no 15256/07) [2010] ECHR, unreported, judgment delivered on 16 November 2010

proceedings ‘to allow the judge to form his personal opinion about the applicant’s mental capacity’.⁴⁷⁹ In *X and Y v Croatia*, the ECtHR elaborated on its reasoning, stating that whilst medical reports concerning a person’s mental capacity are relevant and important, ‘at the end of the day, it is the judge and not a physician, albeit a psychiatrist, who is to assess all relevant facts concerning the person in question and his or her personal circumstances.’ This, the court held, was a necessary procedural safeguard to minimise the risk of any arbitrariness.⁴⁸⁰ In *Shtukurov* the ECtHR had emphasised that this was to enable the judge to form their own view of the person’s mental capacity – a question of fact – whereas in *X and Y v Croatia* the court emphasised the importance of judicial contact with the person ‘to assess the proportionality of the measure to be taken’,⁴⁸¹ which is a question of judgement as well as fact.

The person as a source of evidence or information in the Court of Protection

The emphasis placed by the Strasbourg Court on personal participation as an important source of evidence in judgments concerning legal capacity and deprivation of liberty is difficult to reconcile with current practice and procedure in the CoP. No official statistics are available on how frequently the judge has some direct contact with P, but in evidence to the House of Lords Committee on the MCA 2005, Senior Judge Lush estimated that P was present in 5-10% of hearings.⁴⁸² However, most cases in the CoP do not have an oral hearing,⁴⁸³ and so overall the number of cases where the judge has direct contact with the person would be comparatively few. Therefore, in the majority of cases, judges of the CoP are basing their decisions regarding mental capacity and the proportionality of any proposed measures on expert evidence and the evidence of the parties, and not any direct contact with the person affected. A group of barristers and solicitors working in the CoP submitted evidence to the House of Lords Committee on the MCA 2005 expressing concern that ‘Often, declarations about P’s lack of capacity are granted without the evidence being tested orally, and without hearing from P directly or even considering whether P should be heard’.⁴⁸⁴ At face value, this appears to run contrary to the rulings of the ECtHR discussed above, and will be discussed further below when considering P’s attendance in court and personal contact with judges.

Nevertheless, despite this trend, in some high profile cases, judges have relied heavily upon an encounter with P as a source of evidence when making determinations as to their mental capacity. In *CC v KK and STCC*⁴⁸⁵ Baker J found that Mrs KK had the mental capacity to make decisions about

⁴⁷⁹ Ibid, para. 72

⁴⁸⁰ Ibid, para. 85

⁴⁸¹ Ibid

⁴⁸² The House of Lords Select Committee on the Mental Capacity Act 2005, *Evidence Session No. 14. Tuesday 26 November 2013. Witnesses: Mr Justice Charles, Senior Judge Denzil Lush, District Judge Margaret Glentworth and District Judge Elizabeth Batten* House of Lords (2013) Question 306.

⁴⁸³ Recent data on hearings are unavailable. However, a report on the CoP published in 2010 reported around 1229 hearings in 2010, for a total of 19,528 applications. Judiciary of England and Wales, ‘Court of Protection Report 2010’ (2011). Data taken from pages 24 (applications) and 26 (hearings).

⁴⁸⁴ Written evidence of Victoria Butler-Cole, Neil Allen, Andrew Bowmer, Julie Cornes, Charlotte Haworth Hird, Laura Hobe-Hamsher, Laura Jolley, John McKendrick, Alex Ruck Keene, Polly Sweeney, Rachel Turner and Paula Scully. House of Lords Select Committee on the Mental Capacity Act 2005, ‘Oral and written evidence – Volume 1 (A – K)’ (2013) paragraph 15, pp 353-4.

⁴⁸⁵ [2012] EWHC 2136 (COP)

where she should live, following a conversation with her in court. He arrived at this conclusion despite unanimous expert evidence holding that Mrs KK lacked mental capacity in this respect. His comments echoed those of the ECtHR in *X and Y v Croatia*, that whilst expert evidence was ‘of very considerable importance’, ultimately it was up to the judge – not the expert – to make the final decision regarding P’s mental capacity.⁴⁸⁶ In *Re SB (A Patient; Capacity To Consent To Termination)*⁴⁸⁷, Holman J rejected the evidence of SB’s treating psychiatrist and an independent expert that she lacked the mental capacity to consent to the termination of a pregnancy after hearing evidence directly from SB herself. Holman J observed that:

In most cases that come before the Court of Protection, at any rate in my experience, the assessment of capacity by one or more psychiatrists is regarded as determinative. But those are generally cases in which the patient himself or herself is not positively and strongly asserting, and actually giving evidence, that he or she has the required capacity.⁴⁸⁸

Like Baker J, Holman J asserted that the question of capacity was ‘for the judgment of the court’.⁴⁸⁹ More recently in *WBC v Z & Ors*⁴⁹⁰ Mr Justice Cobb found that an applicant local authority had not rebutted the presumption of capacity where it relied upon a year old psychiatric report to argue that Z lacked the mental capacity to decide her place of residence. Z gave ‘unsworn evidence’⁴⁹¹ in court, where the judge recorded her conduct was ‘was entirely appropriate’, she ‘concentrated well for the duration of her evidence, was courteous to counsel and to me’⁴⁹² and she showed ‘insight’ into relevant matters.⁴⁹³ These cases are very unusual instances of the court rejecting unanimous expert evidence that a person lacks mental capacity, and are important examples of the court relying upon the evidence of direct personal contact between P and the judge.

Direct contact between the judge and P may also have a bearing on best interests decisions. In *Re M (Best Interests: Deprivation of Liberty) (Rev 1)*⁴⁹⁴ Jackson J met M, a 67 year old lady who wished to return to live in her own home from residential care, but this was opposed on the basis that she might not be able to manage her diabetes effectively when at home. M was visited by a district judge during the course of the proceedings, and Peter Jackson J recorded one purpose of the visit as informing the court of M’s views.⁴⁹⁵ M told the district judge ‘I want to be out of here quick or be dead.’ Peter Jackson J concluded that it was in M’s best interests to go home, notwithstanding the risks, given the strength of her feelings. Some participants at the roundtable felt that the evidence that M had given to the district judge about the strength of her feelings had an important impact

⁴⁸⁶ Ibid, para. 24, citing Charles J in *A County Council v KD and L*[2005] EWHC 144 (Fam) , para 44.

⁴⁸⁷ [2013] EWHC 1417 (COP)

⁴⁸⁸ Ibid, para. 36

⁴⁸⁹ Ibid, para. 38

⁴⁹⁰ [2016] EWCOP 4

⁴⁹¹ Ibid, para 53

⁴⁹² Ibid

⁴⁹³ [2016] EWCOP 4, para 54

⁴⁹⁴ [2013] EWHC 3456 (COP)

⁴⁹⁵ Ibid, para. 41

on the outcome of the case. Likewise in *Wye Valley NHS Trust v Mr B*⁴⁹⁶ Jackson J's meeting with Mr B to discuss his views regarding the proposed amputation of his leg led him to the view that it was not in his best interests for the surgery to go ahead unless he agreed to it. Further examples of CoP judges meeting with P are detailed by Butler-Cole and Hobey-Hamsher in their 2016 article on assessment of capacity by judges in the CoP.⁴⁹⁷

Whilst the published cases attest to the powerful impact of P attending court or meeting the judge in asserting that they *have* mental capacity or informing the court of their wishes and feelings for the purpose of best interests decisions, these cases also point towards the potential that such evidence could be relied upon for a finding of *incapacity* or that a best interests decision should run counter to what the person wants. There is a theoretical possibility that a party who wishes to rebut unanimous expert evidence that P has mental capacity could request the opportunity to cross-examine the person in court in order to demonstrate that they lack mental capacity. Alternatively a judge might reject unanimous expert evidence that P has mental capacity following a direct meeting with the person. Some participants at the roundtable suggested that they might not invite the judge to meet P where they had reports indicating the person to have mental capacity, because of the risk that the judge might conclude that the person lacked mental capacity. To date, no such cases have been reported.

Whilst the Strasbourg authorities clearly show that a judge may arrive at the conclusion that P has capacity, contrary to the expert evidence, we argue that it would be impermissible under the MCA 2005 and under the ECHR for the contrary to occur – for a judge to conclude that P lacked mental capacity, despite unanimous expert evidence to the contrary, and to impose a measure on this basis. Taking the MCA 2005 point first, the second principle in s 1 of the MCA 2005 is that a person is not to be treated as unable to make a decision unless all practicable steps have been taken to enable him to do so without success. An assessment of capacity in the context of a meeting with a judge or an adversarial cross-examination is likely to place P under significant stress and therefore to run counter to this 'support principle'.⁴⁹⁸

Meanwhile there are also strong human rights arguments against such an approach by either a judge or a party. We suggest that the Strasbourg jurisprudence might lean towards an asymmetric approach to this matter. Where the outcome of the decision is that a person's rights are to be restricted – through a declaration of incapacity or the authorisation of a deprivation of liberty – it may not be compatible with the Convention for a judge to come to this view without the support of any expert evidence. By way of comparison we observe that a court could not authorise a deprivation of liberty on grounds of 'unsoundness of mind' that had no support from 'objective medical expertise' under Article 5.⁴⁹⁹ Meanwhile, since the judge is recognized by Strasbourg as an important safeguard against arbitrary restrictions on legal capacity and liberty based on excessive deference to expert opinion, it is permissible for a judge to come to a *less restrictive* view than that adopted by the experts before the court, based on his impression of a person.

⁴⁹⁶ [2015] EWHC 60 (COP)

⁴⁹⁷ Victoria Butler-Cole and Laura Hobey-Hamsher, 'The assessment of capacity by judges in the Court of Protection', (2016) 6(2) *Elder Law Journal*.

⁴⁹⁸ A point also made by Butler-Cole and Hobey-Hamsher, *Ibid*.

⁴⁹⁹ *Winterwerp v the Netherlands* (App no 6301/73) [1979] 2 EHRR 387, para 39

Giving evidence, or being a source of information?

In the CoP, it is clear that some judges have effectively gathered evidence regarding the person's mental capacity and wishes and feelings both in the courtroom, in cases such as *CC v KK* and *Re SB*, and through judicial meetings with the person, which appeared not to be in the presence of the other parties. This approach would appear to be endorsed by the ECtHR authorities, which positively embrace judges having direct contact with the person in order to form their own view as to the person's mental capacity, and learn more about their wishes and feelings. However, this approach may not sit comfortably for those with a background in family proceedings who transpose the logic of judicial meetings with children onto the CoP's practices and procedures for meeting P.

There is some evidence of cultural resistance among some CoP nominated judges regarding the evidential status of any information supplied directly to the court or the judge by P. In *YLA v PM & Anor*⁵⁰⁰ Parker J declined to meet P to ascertain her wishes and feelings, and expressed concern at counsel's suggestion that the judge should 'form my own assessment of the strength of her wishes and feelings; and indeed capacity'. Parker J applied reasoning from cases concerning children, where although the court may see the child to allow them to express their wishes and feelings and 'to feel part of the proceedings', the meeting is 'not to be used for gathering evidence'. In particular, Parker J was concerned that hearing from P in private would not permit the other parties to be part of the process of evidence gathering.⁵⁰¹ In a subsequent case, Parker J agreed to meet P, but again stressed that 'if the meeting takes place only in the presence of the judge, with no opportunity to test the evidence, then in my view no factual conclusions save those which relate to the meeting itself should be drawn, in particular with regard to capacity'.⁵⁰²

Parker J's resistance to meeting P or treating this as evidence were based on her experience as a Family Court judge. It is important to remember that many of the High Court judges hearing CoP DoLS and welfare cases will also be Family Court judges, who may be influenced by the approach taken within the Family Court towards children. In family proceedings, there are guidelines for judges on meeting with children.⁵⁰³ The guidelines for family proceedings state that 'It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence'.⁵⁰⁴ In the recent report of the Vulnerable Witnesses and Children Working Group, it was acknowledged that this was a 'difficult concept' for a young person to grasp, as 'it amounts to saying the judge is here to listen to you but cannot take any notice of what you say'.⁵⁰⁵ The current guidelines are based on *Re W (Children) (Rev 2)*⁵⁰⁶, which held that when courts considered whether or not a child should be called as a witness, they should weigh up 'the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child'.⁵⁰⁷ The President of the Family Court and the CoP, Sir James Munby, has called for a

⁵⁰⁰ [2013] EWCOP 4020

⁵⁰¹ *Ibid*, para 34

⁵⁰² *Ibid*, para 42

⁵⁰³ Family Justice Council, 'Guidelines for Judges Meeting Children who are subject to Family Proceedings' (2010).

⁵⁰⁴ *Ibid*, para. 5

⁵⁰⁵ *Ibid*, para. 24

⁵⁰⁶ [2010] UKSC 12

⁵⁰⁷ *Ibid*, para. 24.

review of the current guidelines⁵⁰⁸ in light of a recent Supreme Court judgment in *In the matter of LC (Children)*⁵⁰⁹, which considered when it would be appropriate for a child to give evidence as to her state of mind.

In many – albeit not all – CoP proceedings, P may not be considered as competent to give evidence. The test of witness competence is distinct from tests of litigation capacity or capacity in relation to the decisions under consideration by the CoP.⁵¹⁰ It requires the witness to understand the solemnity of the occasion and the responsibility to tell the truth, in order for them to be sworn to give evidence.⁵¹¹ Where P is not competent to give evidence formally to the court, any information they provide to the court will technically stand as hearsay evidence.⁵¹²

The COPR as originally drafted made no provision for the admission of hearsay evidence. This contrasted with the evidence of children in family proceedings, where s 96 of the Children Act 1989 makes provision for a child to give evidence to the court even if they do not understand the nature of the oath, provided they understand ‘that it is his duty to speak the truth’ and they have ‘sufficient understanding to justify his evidence being heard’. However in *LB Enfield v SA*⁵¹³ Macfarlane J interpreted the CoP’s power to ‘admit such evidence, whether written or oral, as it thinks fit’⁵¹⁴ as permitting the court to admit hearsay evidence from a person who was regarded as an incompetent witness. Macfarlane J went on to hold that ‘the weight to be attached to any particular piece of hearsay evidence will be a matter for specific evaluation in each individual case’.⁵¹⁵ A distinction may need to be drawn between P giving evidence which has a bearing on questions of fact beyond their own mental state – for example, regarding allegations about an individual or past events where their recollection may be poor – and the evidence they provide for the court concerning their mental capacity and their own wishes, feelings, values and beliefs. In the latter case, it is difficult to see how a person’s ‘incompetence’ as a witness could decrease the weight that should be attached to their evidence, since the matter to be determined is their own understanding and subjective experience.

The 2015 amendments to the COPR clarified the CoP’s powers in this respect, with a new power to ‘admit, accept and act upon such information, whether oral or written, from P, any protected party or any person who lacks competence to give evidence, as the court considers sufficient, although not given on oath and whether or not it would be admissible in a court of law apart from this rule.’⁵¹⁶ Thus the question of whether or not P is competent to give evidence is sidestepped as the

⁵⁰⁸ Sir James Munby P, ‘12th View from the President’s Chamber: The process of reform: next steps’, (*Family Law* 2014) http://www.familylaw.co.uk/news_and_comment/12th-view-from-the-president-s-chamber-the-process-of-reform-next-steps? accessed 11 March 2015.

⁵⁰⁹ [2014] UKSC 1

⁵¹⁰ The test of witness competence was set out in *R v Hayes* [1977] 2 All ER 288 as the ability to understand the responsibility to tell the truth when giving evidence in court, and the ability to give rational testimony. See also *Milroy v BT* [2015] EWHC 532.

⁵¹¹ *R v Hayes* [1977] 1 WLR 238

⁵¹² *Court of Protection Handbook: A User’s Guide*, n 186, para 16.32.

⁵¹³ [2010] EWHC 196 (Admin)

⁵¹⁴ The Court of protection Rules 2007 SI 2007 No 1744, r 95(d).

⁵¹⁵ [2010] EWHC 196 (Admin), §36

⁵¹⁶ *Ibid*, r 95(e) as amended by the Court of Protection (Amendment Rules 2015 SI 2015 No 54, r 47(b)

CoP has the power to base its decisions on ‘information’ from P, without P giving evidence as a sworn witness. This flexible provision was considered by HH Mark Rogers J in the recent case of *A County Council v AB & Ors (Participation of P in Proceedings)*⁵¹⁷ regarding whether the court could elicit ‘information’ from P, notwithstanding that P was not competent to give evidence:

It may well be that the net result will quickly be apparent that his information is too unclear or lacks probative value and so the exercise can gently be curtailed. In other words, using Rule 95(e) the Court may admit the information but there is no guarantee that it would accept or act upon it... Of course even if this exercise proves fruitless the position may be different at the best interests stage because it is certainly clear that AB has communicated his views as to the future.⁵¹⁸

In this statement HH Mark Rogers J highlighted the multiple purposes which this information may serve: it may (or may not) have a bearing on questions of fact regarding past events, it may form the basis of an assessment of mental capacity by a judge, or even if it does not serve either of those evidential purposes, it helps to satisfy the requirement under s 4(4) of the MCA 2005 that P is supported and enabled to participate in best interests decisions concerning him. The judge held that it was for the litigation friend, and not the CoP, to decide whether or not P should give evidence or information to the court in this way.⁵¹⁹ We suggest that this interpretation is incorrect; it is clear from Rule 3A (see Appendix A) that it is for the *court* – not the litigation friend – to consider ‘on its own initiative or on the application of any person’ whether or not P should have the opportunity to address (directly or indirectly) the judge.⁵²⁰

Practical steps for P giving evidence or information to the COP

Until recently there was no CoP guidance available for judges on meeting P and P giving information to the court. However, in November 2016 Mr Justice Charles, Vice President of the CoP, issued (non binding) practice guidance on *Facilitating participation of ‘P’ and vulnerable persons in Court of Protection proceedings*.⁵²¹ The provisions related to judges meeting P will be considered in Section 3.6 below. In this guidance Charles J set out some considerations regarding whether or how P should give information to the CoP, indicating that the CoP is beginning to grapple with the practical issues that will arise as P participates more directly in proceedings:

6. Consideration should be given in advance to the following:
 - (a) Does P wish to attend the court and give the information in person?
 - (b) Alternatively, or additionally might P wish to be video or audio recorded (this could be on a mobile phone in some cases, as long as a copy is available for the Judge and the parties, and appropriate security and confidentiality assured)? Where might such a recording take place (in Court, outside Court or at P’s home or day centre, for example)?

⁵¹⁷ [2016] EWCOP 41

⁵¹⁸ Ibid, para 45

⁵¹⁹ Ibid, para 46

⁵²⁰ COPR Rule 3A(1) and Rule 3A(2)(d)

⁵²¹ Mr Justice Charles, ‘Facilitating participation of ‘P’ and vulnerable persons in Court of Protection proceedings’ (2016).

- (c) The impact of the hearing being in public on the choices made;
- (d) How should questions be drafted and posed to P to elicit P's views, minimising leading questions? Who might be best placed to ask P questions to elicit P's views – P's representative or another professional? Will it be necessary to seek advice, for example from an intermediary who has assessed P's communication needs and abilities, to facilitate communication with P?
- (e) In cases where P's communication is such that it is necessary to ask closed or leading questions, can these be broken down and drafted in such a way as to minimise (not avoid altogether) the extent that they lead P? Such work would need to be done in advance.
- (f) What other advance work might need to be undertaken with P by, for example explaining the issues before the Court to P (see above) and ensuring that P knows what they are to be asked about either in person at a hearing or via a recording.

As to P giving sworn witness evidence, the guidance issued by Charles J appears to foresee that this will only be necessary in fact finding hearings, acknowledging also that the occasions where P will be competent to give sworn evidence will be rare.⁵²² Regarding such rare occasions, however, the guidance advises that the following needs to be considered:

- (a) A Ground Rules Hearing to discuss and determine the precise arrangements for P giving evidence;
- (b) P's need for an intermediary should be determined and how this might be funded;
- (c) Careful advance preparation and if possible agreement of questions to be posed to P by the Court and the parties is likely to be required in advance of the Ground Rules Hearing.⁵²³

These matters relating to attending court, and any special measures or reasonable adjustments that may be required, will be considered in Sections 3.6 and 3.7 below.

Should judges base decisions upon evidence or information provided directly by P?

At the roundtable, participants expressed mixed views and experiences concerning judges relying upon encounters with P as a source of evidence or information. One lawyer had experience of judges who would comment that 'if it wasn't for the expert report, I'd be confident that P had capacity' on the basis of their meeting with the person. Another felt that judges might be less inclined to make a decision that conflicted with what the person wanted, if they had met the person and seen for themselves the strength of their wishes and feelings. However, a judge who attended the roundtable stated that they felt that meeting P never had much evidential impact upon the case; a position that sits in tension with the evidential principle. One participant expressed concern that it should be the function of the parties, not the judge, to 'pull in evidence'. Another suggested that in cases such as *Re SB*, judges were 'in reality, conducting a capacity assessment with no training', and questioned whether it was right that judges were 'unleashed'

⁵²² Ibid, para 17

⁵²³ Ibid, para 18

upon P. They drew attention to the fact that in Mental Health Tribunals, there was a medical member who at least had medical expertise.⁵²⁴

The question of whether, and if so when, it is appropriate for judges to form their own view – which may depart from expert evidence – as to P’s mental capacity and best interests is likely to be contentious for those working within the system, regardless of the position under the ECHR. For example, Butler-Cole and Hobey-Hamsher question whether a courtroom is an appropriate setting for the assessment of capacity, given guidance in the MCA Code of Practice that assessors should look to settings that are likely to make the person feel comfortable. They go on to argue that where capacity is assessed in the courtroom ‘there is not only a real risk that the person will not receive the appropriate support and assistance to make a decision’; an approach that potentially runs counter to the requirements of s1(3) MCA and Article 12(3) CRPD. They also express concern that a person may appear ‘capacitous’ in a courtroom but this does not translate into everyday life.⁵²⁵

Further consideration needs to be given to how evidence or information should be taken by judges if they meet P, especially if this occurs outside the presence of their legal representatives or the other parties. Consideration should also be given to the question of whether P could ever be compelled to give evidence or information, for example if one of the parties sought to rely upon this to demonstrate that they lack mental capacity. For the reasons outlined above, we suggest that a finding of incapacity cannot be arrived at by a judge without any supporting expert evidence. Practical questions of how the person should be supported to give evidence or information must also be addressed, and are discussed in Sections 3.6 and 3.7 below. Because of the complexity of these questions, it is appropriate that they should be considered in more detail by a competent body, comparable to the Children and Vulnerable Witnesses Working Group in the family court, with input from disability organisations with expertise in the area of access to justice.

Recommendations on P as a source of evidence or information before the court

Recommendation 8: A working group should be established to consider: those cases in which the evidential principle requires that the judge meet P to form their own view as to their capacity and the proportionality of any proposed measure; the best way to facilitate P giving evidence to the CoP for different kinds of matters; and how to address questions of fairness to P and the other parties in providing evidence or information directly to the judge. The recommendations of this group should be given force of law in the COPR, rather than non-binding guidance, to clarify P’s rights in this regard.

Recommendation 9: The working group should include, in addition to legal and other experts, members of organisations representing disabled people to comply with the CRPD principle that those developing policies and legislation affecting disabled people should consult with them through their representative organisations.

⁵²⁴ The future status of the medical member of Mental Health Tribunals, in England at least, may be in doubt: Ministry of Justice, *Transforming our justice system: summary of reforms and consultation*, (Cm 9321, 2016); Ministry of Justice, *Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals. Government response*, (Cm 9391, 2017).

⁵²⁵ Victoria Butler-Cole and Laura Hobey-Hamsher, n 497

3.5 REPRESENTATION IN PROCEEDINGS

Article 6 ECHR rights to a fair trial guarantee *effective* access to a court. In *Airey v Ireland*⁵²⁶ it was recognised that this might require legal representation if the subject matter of the case involved complicated points of law, expert evidence, the examination of witnesses and an ‘emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court’.⁵²⁷ These are likely to be factors in many CoP cases concerning health and welfare. Cases concerning deprivation of liberty under the MCA are widely acknowledged as engaging highly complex and technical areas of law.⁵²⁸ Effective representation is important for *any* litigant in the CoP, but it is especially important for P whose core rights are at stake, and who is likely to have disabilities that would make it especially difficult or even impossible to understand and participate in the proceedings without assistance.

Effective legal representation under the ECHR

The additional difficulty that people with mental disabilities may have participating in proceedings has been recognised by the ECtHR in a number of cases where it has found that legal representation was indispensable for effective access to a court in cases concerning legal capacity⁵²⁹ and divestment of parental rights of people with intellectual disabilities.⁵³⁰

In cases concerning both Article 5(1)⁵³¹ (judicial authorisations of deprivation of liberty) and Article 5(4)⁵³² (rights to seek a review of the lawfulness of detention), the ECtHR has found violations of the right to liberty where detained people were not provided with *effective* legal representation. Article 5(4) does not require people with mental disabilities to take the initiative in obtaining legal representation before having recourse to a court.⁵³³

Effective legal representation extends beyond the mere appointment of a representative. Representatives should be independent of any guardians⁵³⁴ or public bodies⁵³⁵ with whom P is in dispute. The ECtHR has stated that representatives must not be passive. In cases concerning deprivation of legal capacity and deprivation of liberty, the presence of a public prosecutor⁵³⁶, a

⁵²⁶ (App no 6289/73) [1979] ECHR 3; (1980) 2 EHRR 305

⁵²⁷ *Ibid*, para. 24

⁵²⁸ The Vice President of the Court of Protection, Mr Justice Charles, described trying to understand the DoLS as akin to going through a ‘a washing machine and spin dryer’. *Mental Capacity Act 2005: post-legislative scrutiny* paragraph, n 47, para 271. See also the comments of Jackson J in *C v Blackburn and Darwen Borough Council* [2011] EWHC 3321 (COP)

⁵²⁹ *MS v Croatia* (App no 36337/10) [2013] ECHR 378

⁵³⁰ *AK and L v Croatia* (App no 37956/11) [2013] ECHR 8

⁵³¹ *MS v Croatia (No 2)* [2015] ECHR 196

⁵³² *Megyeri v Germany* (App no 13770/88) [1992] ECHR 49; *Pereira v Portugal* (App no 44872/98) [2002] ECHR 161

⁵³³ *Megyeri v Germany* (App no 13770/88) [1992] ECHR 49, para 22

⁵³⁴ *DDv Lithuania* (App no 13469/06) [2012] ECHR 254

⁵³⁵ *Ivinović v Croatia* (App no 13006/13) [2014] ECHR 964

⁵³⁶ *Shtukaturov v Russia* (App no 44009/05) [2008] ECHR 223, para 74

temporary litigation guardian⁵³⁷ and even an independent legal aid lawyer⁵³⁸ to represent the person, were not sufficient to comply with Article 6 ECHR where they were passive and did not make submissions on the person's behalf or oppose the measure in question.

In the recent case of *AN v Lithuania*⁵³⁹ the ECtHR has given the strongest indication yet that it regards the role of a person's representative in court as being to advance arguments in support of the person's own view of his situation, rather than an 'objective' assessment of their best interests. The case concerned the deprivation of legal capacity of AN and the appointment of his mother as his guardian. The court emphasised that being subject to guardianship 'does not mean that he is incapable of expressing a view on his situation' and it is essential that he has access to a court 'and the opportunity to be heard either in person or, where necessary, through some form of representation'⁵⁴⁰. The court went on to say:

The Court also reiterates that there is the importance of ensuring the appearance of the fair administration of justice and **a party to civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims.**⁵⁴¹

This construction of effective participation as being able to 'put forward matters in support of his or her claims' gives a strong indication that the role of representatives in securing participation is to advocate for what P wants, rather than his or her 'best interests'.

The ECtHR has also held that it is important for a person's legal representative to meet with the person they are representing in order to hear their arguments and 'to understand and effectively represent [their] position'.⁵⁴² Contact between the person and their representative was held to be 'necessary or even crucial in order to ensure that the proceedings would be really adversarial and the applicant's legitimate interests protected'.⁵⁴³

These cases suggest that the ECtHR takes the view that even where a person is deprived of legal capacity, the role of their legal representative is to actively pursue arguments on their behalf that reflect the person's own position. This contrasts with an approach to representation based on advancing a case putting forward the representative's own view of the person's 'best interests', which may not reflect the person's own position regarding the measures in question. However, the waters are muddied on the ECtHR position on 'best interests' representation, versus representing P's wishes and feelings, by the case of *RP v UK*⁵⁴⁴. This case concerned how litigation friends should act when representing a parent in care proceedings. The ECtHR held that acting in a person's best interests did not require the OS (as litigation friend) 'to advance any argument R.P. wished'

⁵³⁷ *Salontaji-Drobnjak v Serbia* (App no 36500/05) [2009] ECHR 1526

⁵³⁸ *MS v Croatia (No 2)* [2015] ECHR 196

⁵³⁹ (App No. 17280/08) [2016] ECHR 462 (31 May 2016)

⁵⁴⁰ *Ibid*, para. 90

⁵⁴¹ *Ibid*, para. 91

⁵⁴² *MS v Croatia (No 2)*, para 151

⁵⁴³ *MS v Croatia (No 2)*, para 155; See also *AN v Lithuania* (App No. 17280/08) [2016] ECHR 462 (31 May 2016), para 106

⁵⁴⁴ (App no 38245/08) [2012] ECHR 1796

although it was imperative that her views ‘be made known to the domestic court’.⁵⁴⁵ The Strasbourg court also held that litigation friends were an appropriate accommodation to facilitate disabled people’s effective role in proceedings, and that – interpreting Article 6 ECHR in light of Article 13 CRPD – ‘it was not only appropriate but also necessary for the United Kingdom to take measures to ensure that R.P.’s best interests were represented’.⁵⁴⁶ The Court gave no further elaboration as to the meaning of ‘best interests’. Ruck Keene, Bartlett and Allen⁵⁴⁷ observe that the ECtHR’s decision in *RP v UK* is ‘entirely inconsistent’ with its position on the importance of active representation of those subject to legal capacity or deprivation of liberty proceedings, outlined above. It is important to recognize that the position of the ECtHR in these guardianship cases is far closer to the situation of those subject to proceedings in the CoP than the facts in *RP v UK*.

Representation under the amended Court of Protection Rules

The amended COPR provide for a variety of different forms of representation for P in CoP proceedings:

1. If P *has* litigation capacity they may be joined as a party and may either instruct legal representatives on their own behalf, or may even act as a litigant in person in the proceedings – perhaps with some form of lay support.
2. If P lacks litigation capacity they may *only* be joined a party to the proceedings if a litigation friend or an ‘accredited legal representative’ is appointed to represent them.⁵⁴⁸ (The amended COPR are silent, however, as to whether a P who lacks litigation capacity may be the *applicant* in a case, as in such circumstances they will not need to be joined as a party).
3. If P is not joined as a party to the proceedings, a ‘Rule 3A representative’ may be appointed whose function is ‘to provide the court with information as to the matters set out in section 4(6) of the [MCA] and to discharge such other functions as the court may direct’.⁵⁴⁹

It is very rare for P to be considered to have litigation capacity in CoP cases⁵⁵⁰, and rarer still for P to act as a litigant in person in the proceedings – although this situation has occurred in at least one reported property and affairs case.⁵⁵¹ In health and welfare and deprivation of liberty cases outside the *Re X* streamlined procedure, it is most common for P to be represented by a litigation friend who instructs their legal representative on their behalf. Typically, the litigation friend has been the

⁵⁴⁵ Ibid, para 76.

⁵⁴⁶ Ibid, para. 67

⁵⁴⁷ Alex Ruck Keene, Peter Bartlett. and Neil Allen, 'Litigation friends or foes?: representation of 'P' before the Court of Protection' (2016) 24(3) *Medical Law Review* 333–359

⁵⁴⁸ Court of Protection Rules 2007 SI 2007 No 1744, r 3A(4) as inserted by Court of Protection (Amendment) Rules 2015, SI 2015 No 548, r 5.

⁵⁴⁹ Ibid, r 3A(2)(c).

⁵⁵⁰ There are very few published judgments of the CoP where the relevant person was regarded as having the capacity to litigate. *Re SB (A Patient; Capacity To Consent To Termination)* [2013] EWHC 1417 (COP), *CC v KK and STCC* [2012] EWHC 2136 (COP) and *GW v A Local Authority & Anor* [2014] EWCOP 20 are rare examples of this occurring.

⁵⁵¹ In both *L v NG* [2015] EWCOP 34 and *Re P (capacity to tith inheritance)* [2014] EWHC B14 (COP) the relevant person was said to have litigation capacity and appeared to be joined as a party and participate in the proceedings as a litigant in person.

Official Solicitor, but they might also be the RPR or an IMCA,⁵⁵² and since *In Re NRA and others* the litigation friend is likely to be a friend or family member in non-contentious cases.

Prior to the 2015 amendments, the COPR were drafted in such a way as to appear to presume that P would always lack litigation capacity at the outset of the proceedings.⁵⁵³ Provisions for terminating the appointment of a litigation friend referred to P 'ceasing' to lack the capacity to litigate⁵⁵⁴ and if P sought to terminate the appointment of their litigation friend on this basis, they were required to supply evidence.⁵⁵⁵ In effect, therefore, the COPR as drafted in 2007 presumed that P would lack the capacity to litigate and placed the burden of proof upon those asserting that he had litigation capacity, contrary to the presumption of mental capacity under the MCA.⁵⁵⁶ Recommendations to reconsider this rule were not taken up in 2010⁵⁵⁷, but the 2015 amendments have replaced these provisions. There is now no presumption in the Rules that P will lack litigation capacity and be required to supply evidence in order to seek the termination of the appointment of a litigation friend.

'Best interests' representation in the Court of Protection

People who have litigation capacity can instruct their solicitor to conduct the case according to their wishes and preferences, so long as their instructions are 'properly arguable'.⁵⁵⁸ Thus, they can use CoP proceedings to contest any measure proposed in their best interests by arguing either that they have the mental capacity to make the relevant decision, or that it is not in their best interests, or that it would be unlawful for other reasons. In contrast, when a person is considered to lack litigation capacity, the pre-MCA case of *Re E (Mental Health Patient)*⁵⁵⁹ defines the role of litigation friends as being to 'carry on the litigation on behalf of the plaintiff and in his best interests', and they are 'responsible to the court for the propriety and the progress of the proceedings. It has been assumed that this approach should be adopted in the CoP, and in consequence litigation friends may take the view that it is not in P's best interests to oppose the measure on his behalf; they may even argue for it.

Established practice in the CoP, recently confirmed by Charles J in *Re NRA*, required litigation friends to form a view as to what is in P's best interests and advance it, 'although it may not accord with what P is asserting'.⁵⁶⁰ This means that litigation friends may be required to advance arguments that are at odds with the outcome the person themselves wants. For example, in *Re E*

⁵⁵² *AB v LCC (A Local Authority)* [2011] EWHC 3151 (COP)

⁵⁵³ Rule 141(1) stated that 'Subject to rule 147, P (if a party to proceedings) must have a litigation friend.'

⁵⁵⁴ Rule 147(1) stated 'This rule applies where P ceases to be a person who lacks capacity to conduct the proceedings himself but continues to lack capacity in relation to the matter or matters to which the application relates'.

⁵⁵⁵ Rule 144(2) (unamended). Court of Protection (2007) *Practice Direction 17A - Litigation Friend*, (Judiciary of England and Wales, London).

⁵⁵⁶ MCA 2005, s 1(2).

⁵⁵⁷ Court of Protection Rules Committee (2010) *Report of the ad hoc Court of Protection Rules Committee* London: Judiciary of England and Wales.

⁵⁵⁸ *Buxton v Mills-Owens* [2010] EWCA Civ 122

⁵⁵⁹ [1985] 1 WLR 245

⁵⁶⁰ *Re NRA & Ors* [2015] EWCOP 59, para 170.

*(Medical treatment: Anorexia) (Rev 1)*⁵⁶¹, E's litigation friend argued that it was in her best interests to be forcibly fed, although E herself opposed that measure. It was left to E's parents, who were unrepresented, to support the case against intervention which she would have advanced.

A litigation friend may also seek to withdraw proceedings before the court has determined the substantive issues, including withdrawing proceedings to seek a court review of a deprivation of liberty which the detained person objects to. In *TA v AA*⁵⁶² the Court of Appeal was asked to consider whether it was lawful for a litigation friend to withdraw an appeal against a standard authorisation issued under the DoLS on the basis that:

- i. that there had been no material change since the last application was determined [seven months earlier] and that the Appellant was running the 'same argument' as before;
- ii. an application under section 21A was not an appropriate means of challenging care arrangements, at least not without a review [by the supervisory body who granted the authorisation]⁵⁶³;
- iii. section 21A proceedings [to appeal against a DoLS authorisation] represented a 'significant burden on both the [Legal Services Commission] and the court service and should only be brought if there is merit in so doing and it is proportionate', which was not the case in relation to the Appellant's application⁵⁶⁴

It was argued by the appellant, who was P's father and RPR, that to permit the appeal against detention to be withdrawn before it had been determined by the CoP violated the detained person's Article 5(4) rights to seek a court review of the lawfulness of their detention. Regrettably the Court of Appeal was unable to dispose of the appeal due to jurisdictional issues. Hence it is unclear whether and when appeals against detention can be withdrawn by litigation friends on the basis that there was no material change, there were alternative means to challenge care arrangements (albeit not Article 5 compliant⁵⁶⁵) and that appeals under the DoLS were a 'significant burden' to the court system and should only be brought 'if there is merit in doing so and it is proportionate'. It is suggested that this last ground for withdrawing an appeal is dubious and likely to be discriminatory, since a person with litigation capacity cannot have their Article 5(4) right of appeal disposed of in this way and on these grounds. We suggest that the appropriate mechanism for managing the limited resources of the CoP is the permission seeking process – which was deliberately omitted by Parliament for the purpose of DoLS appeals⁵⁶⁶ – and the ordinary case management powers of the *court*, rather than by those representing P.

⁵⁶¹ [2012] EWHC 1639 (COP)

⁵⁶² [2013] EWCA Civ 1661

⁵⁶³ These are known as 'Part 8 Reviews', as they are provided for in Part 8 of Schedule A1 to the MCA which contains the DoLS.

⁵⁶⁴ [2013] EWCA Civ 1661 para. 22

⁵⁶⁵ For a review of the lawfulness of detention to be compliant with Article 5(4) it must be a review by a court or tribunal, which must be independent of the detaining authorities (*Weeks v UK* (Application no. 9787/82) [1987] ECHR (2 March 1987); *Hutchison Reid v UK* (App no 50272/99) [2003] ECHR 9). It has been recognised by the government that reviews by the supervisory body would not satisfy the requirements of Article 5(4): Department of Health, 'Protecting the Vulnerable: the "Bournemouth" Consultation: Summary of Responses' (2006) para 38.

⁵⁶⁶ s50(1A) MCA, as amended by the MHA 2007

In *obiter* remarks in *Re NRA and Others*, Charles J also expressed support for the view that whilst an RPR should decide whether or not to issue a challenge on the basis of P's objections, as per the guidance in *AJ* (discussed in Section 3.1 above), but the challenge itself should proceed on the basis of the RPR's assessment of P's best interests.⁵⁶⁷ Charles J held that litigation friends 'may well have to advance argument that does not accord with P's expressed wishes. Indeed, this is not uncommon', and both litigation friends and Rule 3A representatives 'may well have to advance a solution that does not accord with objections being expressed by P'.⁵⁶⁸ In some cases this will lead to the somewhat bizarre outcome that an RPR – acting on the guidance in *AJ* and *RD and Others* may be required to assist P in making an application to the CoP on the basis that they wish to challenge the deprivation of liberty in accordance with Article 5(4), yet if they then assume the role of litigation friend they must – acting in P's best interests' – either withdraw the application or support or consent to the very measure that they were supposed to help P to oppose. This scenario highlights the consequences that ensue when 'best interests' and 'wishes and feelings' models of representation collide.

Arguments against representing a person's 'best welfare interests' in the CoP

We have suggested above that this model of best interests representation sits in tension with the 'active representation' model of ECtHR jurisprudence on participation in legal capacity and deprivation of liberty proceedings. It potentially undermines both the dignity principle, that the person's own voice (not that of their representative) should be at the centre of the proceedings, and the adversarial principle that the person who is the subject of proceedings should be able to advance and rebut evidence and arguments in support of their position. It raises questions about the value of the right guaranteed by Article 6 of 'direct access to a court to seek restoration of his or her legal capacity'⁵⁶⁹ or the Article 5(4) right 'to take proceedings by which the lawfulness of his detention shall be decided speedily by a court' if once a person gets to court their legal representative may *not* seek the restoration of their capacity or a court review of the lawfulness of their detention. This model of 'best interests' representation also runs counter to the increasing emphasis on respect for the 'will and preferences' of P under Article 12(4) of the CRPD.⁵⁷⁰

An alternative analysis of the requirements of the common law for litigation friends has been proposed by Ruck Keene, Bartlett and Allen, who maintain – citing *Osborn v the Parole Board* – that the common law emphasises 'the importance of respect for the individual to be affected by the decision-making process' and argue that 'procedural fairness dictates that the litigation friend be (and be seen by P to be) representing P, rather than discharging any other functions'.⁵⁷¹ They argue that models of representation of those without litigation capacity in ordinary civil proceedings and the representation of children's interests in family proceedings by a guardian are not an appropriate model for the representation of P in the CoP. They argue that *if* the litigation friend is bound to act in P's best interests under s1(5) MCA, then:

⁵⁶⁷ *Re NRA & Ors* [2015] EWCOP 59, para 171

⁵⁶⁸ *Ibid*

⁵⁶⁹ *Stanev v Bulgaria (App no 36760/06)* [2012] ECHR 46, para. 245

⁵⁷⁰ Alex Ruck Keene, Peter Bartlett and Neil Allen, n 547

⁵⁷¹ *Ibid*

there is a strongly arguable case that they would owe a duty to P (not to the court) to select the option that P would have chosen if such an option is available. Until and unless prevented by the deployment of appropriate case management tools by the court, a litigant with capacity can advance a hopeless case even if this would be most unwise. If it is right that a decision maker must at least in some circumstances follow the wishes and feelings of P if it is practical to do so, a litigation friend acting on behalf of a person without capacity must advance such a hopeless case if that clearly reflects P's wishes.⁵⁷²

In other words, in the context of CoP litigation, P's best interests for representation are advanced not by arguing for his representative's assessment of his best *welfare* interests but by actively pursuing the best possible case for what P wants, even if that means advancing a hopeless case. They argue for an amendment to the COPR to 'Make clear that the primary duty of a litigation friend acting on behalf of P should—where P's wishes and feelings can reliably be identified—be to proceed on the basis that the case that they put to the court is derived from those wishes and feelings'.⁵⁷³

The traditional 'best interests' approach to representing P in the CoP also conflicts with the duties upon IMCAs and RPRs to assist P in exercising his or her Article 5(4) rights, as outlined by Baker J in the *AJ* and *RD* cases described in Section 3.1 above. In these cases Baker J has held that 'best interests' cannot be used as a reason to restrict the exercise of Article 5(4) rights. It would be odd if this simply applied to the *access to a court* element of Article 5(4), but did not actually result in a person having an Article 5(4) compliant hearing before a court that was empowered to fully consider the person's rights and order the person's discharge. It remains to be seen whether another test case will be brought that could require the CoP to clarify the approach that should be taken by a litigation friend.

A different model of representation is adopted before Mental Health Tribunals and the Mental Health Review Tribunal in Wales. Solicitors may represent clients without taking instructions from a litigation friend. Traditionally this model of representation has been closer to the 'active representation' model supported by the ECtHR jurisprudence on deprivation of liberty and deprivation of capacity, where solicitors advance a case based on the outcome that P wants, even if there is little likelihood that their arguments will be successful. However, the 'best interests' approach taken by litigation friends has begun to have an influence on practice in the Mental Health Tribunals through recent litigation. Since the Law Commission is considering the relative merits of a CoP based system as against a system based on review by the Mental Health Tribunal, it is important to understand the key features of the tribunal system and the model of participation which is employed there. This will be discussed in more detail the Section 4.8 of this report, where we consider the approach of the Tribunal in closer detail.

In some cases in the CoP it may be unclear precisely how P wishes, or would wish, his or her representatives to proceed. For example, in cases where P is unconscious or has profound communication impairments, it may be unclear what P's overall wishes, feelings, values and beliefs would be in relation to the decision the CoP has been asked to make. In circumstances where a person's 'will and preferences' are unclear, the approach recommended by the United Nations

⁵⁷² Ibid, p350 - 351

⁵⁷³ Ibid, p358

Committee on the Rights of Persons with Disabilities is to proceed on the basis of the ‘best interpretation of will and preferences’.⁵⁷⁴ Representatives may approach this task in accordance with MCA s 4(6) – consulting with those caring for and close to the person about their wishes, feelings, values and beliefs. However, insofar as they have based this case on an *interpretation* of what P would likely want, it is important that they are transparent with the CoP and the other parties about how they have arrived at this reasoning. The critical point is that the case is based on a ‘substituted judgment’ of what P would want, not ‘objective’ factors such as health, or extended lifespan (unless it can be shown that it is likely that P would desire this). To paraphrase Lady Hale’s remarks in *Aintree University Hospitals NHS Foundation Trust v James*⁵⁷⁵, the purpose of P’s representative is to represent the person’s own ‘point of view’.⁵⁷⁶

It is also important to note that under the MCA a person is not to be regarded as unable to make a decision for himself ‘unless all practicable steps to help him to do so have been taken without success.’⁵⁷⁷ In addition, Article 12(3) CRPD requires that States Parties to the Convention ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.’ These provisions mean that prior to the question of representing P in his or her best interests, there is a requirement to support P to make decisions regarding her or his participation in the proceedings, including the conduct of his representation. As yet, this element of the MCA has not received as much attention in relation to the practices of litigation friends and other representatives as the question of what P’s ‘best interests’ are in relation to litigation. Yet supporting P’s legal capacity is fundamental to a human rights approach to representation. There are examples of systems of support to enable people to instruct representatives and participate in litigation that do not involve representatives or others taking substituted decisions on a person’s behalf.⁵⁷⁸

It might also be possible for P to take *some* decisions about his participation and representation, even if overall it is considered that he lacks the capacity to instruct his representatives in the fine grained detail of the conduct of his case. At present litigation capacity has been constructed as an all or nothing affair because of its ongoing nature⁵⁷⁹, but this does not sit comfortably with the general principle that mental capacity is ‘decision specific’⁵⁸⁰ and the requirement to consider less restrictive courses of action.⁵⁸¹ Of course, if representatives acted on the basis of P’s wishes and feelings, rather than P’s best interests, concerns about ‘denials’ of litigation capacity would weigh less heavily.

⁵⁷⁴ United Nations Committee on the Rights of Persons with Disabilities, *General comment No 1 (2014) Article 12: Equal recognition before the law*, (19 May 2014) UN Doc CRPD/C/GC/1) para 21.

⁵⁷⁵ [2013] UKSC 67

⁵⁷⁶ *Ibid*, para 45

⁵⁷⁷ MCA 2005 s 1(3)

⁵⁷⁸ Lucy Series, n 125

⁵⁷⁹ *A, B and C v X, Y and Z* [2012] EWHC 2400 (COP)

⁵⁸⁰ Section 2(1) MCA emphasises that mental incapacity is to be assessed ‘at the material time’, and s3(3) MCA states that ‘The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.’

⁵⁸¹ MCA s1(6)

Further attention needs to be given to how P can best be supported and enabled to make decisions for himself about his or her participation and representation in CoP proceedings. This will require litigation friends and other representatives to take a new approach. The COPR should be amended so that P's representatives base their case, as far as possible within their other professional obligations, on the outcome that P themselves wants.

Rule 3A representatives and Accredited Legal Representatives

The CoP system has had to grapple with a growing number of situations where a person is unable to secure the services of either a legal representative, a litigation friend, or both; this has been highlighted in the recent *Re X* sequence of litigation. This may be because public funding is not available for the litigation in question and it is not possible, or is undesirable, to use P's personal financial resources to pay for legal representation. Or it may be, as in *Re MOD*, that there is no suitable person to act as P's litigation friend and the Official Solicitor is unable to act in this capacity. This means that in some cases a person cannot be joined as a party to the proceedings, or a person who is not a party is not afforded any independent representation or assistance in CoP proceedings, where it would be desirable for them to be. The 2015 amendments created the roles of 'Rule 3A representative'⁵⁸² ('representatives') and 'Accredited Legal Representatives' (ALRs) to address these situations.⁵⁸³

Rule 3A representatives can represent the person where they are not joined as a party. Unlike ALRs they need not be legal practitioners – the role might be fulfilled, for example, by an advocate or a family member. Rule 3A representatives were introduced following growing awareness of the Strasbourg case law on participation outlined above. They were also referenced in comments by the President in *Re X No 2* that in deprivation of liberty cases, 'P will also need some form of representation, professional though not necessarily always legal'⁵⁸⁴, and that they could be represented in the proceedings without being made a party.⁵⁸⁵ Their role is defined by Rule 3A(2)(c) as follows:

P's participation should be secured by the appointment of a representative whose function shall be to provide the court with information as to the matters set out in section 4(6) of the Act and to discharge such other functions as the court may direct;

Rule 3A representatives must, therefore, provide the court with information on 'the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)', 'the beliefs and values that would be likely to influence his decision if he had capacity' and 'the other factors that he would be likely to consider if he were able to do so'. Hence it is important to emphasise that the Rules construct the Rule 3A representative's role on the 'wishes, feelings, values and beliefs' model of representation, rather than the representative's own views of P's best interests. However, the role is not limited to providing the CoP with information;

⁵⁸² Rule 3A(2)(c) and s4(6) MCA

⁵⁸³ NB: In Part 17 Section 2, Rule 3A representatives (lay representatives) and Accredited Legal Representatives are both referred to as 'Rule 3A representatives' (see rule 146A, as amended). For the avoidance of confusion, we will refer to lay representatives appointed under Rule 3A as 'Rule 3A representatives', whilst 'Accredited Legal Representatives' will be referred to as such.

⁵⁸⁴ (2014) EWCOP 37, para. 14

⁵⁸⁵ *Ibid*, para 19.

the power for the court to impose other functions makes the role very flexible and therefore makes it possible to fulfil a variety of functions in support of participation.

ALRs are legal representatives 'authorised pursuant to a scheme of accreditation approved by the President to represent persons meeting the definition of "P" in this rule in proceedings before the court'.⁵⁸⁶ The Law Society has developed such a scheme, which is likely to begin operation in 2017. The role of ALRs is defined by Rule 3A(2)(b) as 'to represent P in the proceedings and to discharge such other functions as the court may direct'. Like lawyers acting for clients before the Mental Health Tribunals, ALRs will be able to represent P without taking instructions from a litigation friend, and thus may be able to address situations like those in *MOD* where there is no available litigation friend who can act for P but it is desirable that P is joined as a party to the proceedings. As the scheme is not yet in operation, and there is no available guidance further specifying how ALRs must discharge their functions. It remains to be seen what model of representation ALRs adopt, whether one based on the 'best interests' approach of litigation friends in the CoP or one closer to the approach taken by solicitors representing clients before the Tribunal.

Like litigation friends, both representatives and ALRs must be able to discharge their functions 'competently and fairly'.⁵⁸⁷ Unlike litigation friends, there is no requirement for a representative or an ALR to have 'no interests adverse to those of that person'.⁵⁸⁸ The court may appoint a representative or ALR on its own initiative or upon receipt of an application, but only with the consent of the person who will act as representative or ALR.⁵⁸⁹ The court can also direct that a person may not act as representative or ALR, or terminate their appointment, on its own initiative or on the application of any person.⁵⁹⁰

The rule permitting the appointment of Rule 3A representatives came into force in April 2015, and at the time of writing there have been four reported cases concerning the (possible) appointment of Rule 3A representatives: *Re NRA*, *Re JM* (both discussed in Sections 1.4, 3.1 and 3.2 above), *HSE Ireland v PD*⁵⁹¹ and *Re VE*⁵⁹².

In *HSE Ireland v PD* Baker J noted that the Rule 3A requirement to consider whether it was appropriate to appoint a representative applied as much to cross-border cases where the CoP was asked to consider for recognition a foreign order authorising a deprivation of liberty, as for domestic cases.

In *Re VE* Mr Justice Charles responded to a need to provide further guidance for friends or family acting in the role of a representative under Rule 3A, whom local authorities described as often confused about their role. He issued an Explanatory Note for representatives, which we have included in Appendix C. Tellingly, this note emphasised the role of Rule 3A representatives in scrutinising P's care and support from the perspective of their *best interests*:

⁵⁸⁶ Rule 6, COPR as amended.

⁵⁸⁷ Rule 146A COPR, as amended.

⁵⁸⁸ Contrast with Rule 140(1)(b) for litigation friends.

⁵⁸⁹ Rule 148A COPR, as amended.

⁵⁹⁰ Rule 148B COPR, as amended.

⁵⁹¹ [2015] EWCOP 48

⁵⁹² [2016] EWCOP 16

What you need to do is to consider and decide from that perspective whether P's package of care and support is the least restrictive available option that best promotes P's best interests and then inform the Court what you have decided and what P's wishes and feelings about the package of care and support are

In short, the Court is asking you, as someone who knows the position on the ground, to consider whether from the perspective of P's best interests you agree or do not agree that the Court should authorise P's package of care and support.⁵⁹³

Although in the COPR the primary role of Rule 3A representative is to convey to the CoP information about P's wishes, feelings, values and beliefs – the subject matter of s4(6) MCA – these subjective matters take a back seat in Charles J's guidance, which reflects a best interests model of representation.

Re NRA and *Re JM* formed part of the *Re X* sequence of litigation outlined in Section 1.4 above. These concerned how the CoP should facilitate P's participation in a *non-contentious* application for authorisation of a deprivation of liberty that fell outside the scope of the DoLS, and so could only be authorised directly by the CoP in accordance with the requirement of Article 5(1) ECHR. In *Re NRA*, Charles J departed from the Court of Appeal's assessment in *Re X (Court of Protection Practice)*⁵⁹⁴ that it was likely that P would need to be joined as a party to protect his Article 5 and common law rights. His judgment considered the 'Procedural Balance' to be struck between the competing interests of securing to P his rights under Article 5 ECHR and the common law, and 'avoiding disproportionately intrusive, delayed and/or expensive intervention in the lives of P and his or her family and carers.'⁵⁹⁵ Like Sir James Munby P when he had first established the 'streamlined' procedure, Charles J emphasised that much of the CoP's jurisdiction is investigative and non-adversarial.⁵⁹⁶ *Re NRA* was concerned with applications that – at least on the face of the evidence submitted to the CoP by the detaining authorities – were non-controversial; neither P nor anybody else objected to the detention. He acknowledged, however, the risks that 'an application that is presented as non-contentious and in P's best interests may be neither' and the potential advantage of an independent check, but these were competing factors in the Procedural Balance to be struck.⁵⁹⁷

Several possible routes to representing P in the proceedings were considered by Charles J in *Re NRA*, including: joining P as a party (a route favoured by the Law Society and the Official Solicitor) and his representation either through a litigation friend instructing legal representatives or even a litigation friend addressing the court directly (the ALR scheme not being operational at the time of the hearing), or his not being joined as a party and being represented through a lay Rule 3A representative, who could be an independent person such as an IMCA (a route advanced by the Secretary of State for Justice) or a family member. The pressing reality that undermined arguments for P to be joined as a party and given legal representation was the unavailability of legal aid for these cases; likewise the solution of appointing an *independent* Rule 3A representative (such as an IMCA) was undermined by their being no professional advocates or representatives funded or

⁵⁹³ Ibid, Explanatory Note appended to judgment. Emphasis in original.

⁵⁹⁴ [2015] EWCA Civ 599

⁵⁹⁵ *Re NRA & Ors* [2015] EWCOP 59, para 33.

⁵⁹⁶ Ibid, paras 35-39.

⁵⁹⁷ Ibid, para 44

contracted to undertake such work. Charles J did, however, conclude that a lay person could act as a litigation friend without acting through a legal representative, offering an alternative to a Rule 3A representative where no funding was available to instruct a solicitor.

Charles J concluded that any representative on behalf of P needed to fulfil three main functions:

- i. eliciting P's wishes and feelings and making them and the matters mentioned in s. 4(6) of the MCA known to the Court without causing P any or any⁵⁹⁸ unnecessary distress,
- ii. critically examining from the perspective of P's best interests, and with a detailed knowledge of P, the pros and cons of a care package, and whether it is the least restrictive available option, and
- iii. keeping the implementation of the care package under review and raising points relating to it and changes in P's behaviour or health.⁵⁹⁹

Drawing on his experience in the CoP and Family Court, he concluded that it would be P's family who would be best placed to fulfil these tasks. Yet the precise role they occupied in the litigation – as a person in their own right, as a litigation friend or as a Rule 3A representative – was less relevant.⁶⁰⁰ One advantage of appointing a family member as a Rule 3A representative was the power of the CoP to direct that they undertake specific functions, such as monitoring a care package and keeping the authorisation under review, analogous to the role of the RPR.⁶⁰¹ Thus this would be the most appropriate course of action in most cases.⁶⁰² The COPDOL 10 form to be used by public authorities applying for authorisation of a deprivation of liberty under the streamlined procedure has been amended to include a list of persons who are willing to act as a litigation friend or Rule 3A representative.⁶⁰³

As regards the need for an *independent* check, referenced by the Court of Appeal in *Re X* and Lady Hale in *Cheshire West*, Charles J saw no reason why family members could not ordinarily satisfy this requirement. Although in *Re UF*⁶⁰⁴ Charles J had concluded that a relative could not be appointed as P's litigation friend, this was because they were 'clearly wedded to a particular answer' and lacked the requisite balanced approach.⁶⁰⁵ The question of whether a family member or friend can act as a litigation friend is case sensitive and turns on whether they can 'a balanced way consider and properly promote P's best interests'.⁶⁰⁶ Charles J felt that in most cases they could.

Charles J's view of the role of a Rule 3A representative is, then, closely connected to a 'best interests' model of representation – which he also emphasises in relation to RPRs under the DoLS. This sits in tension with the role of Rule 3A representatives as outlined in the COPR, which is primarily connected to conveying information regarding P's *wishes and feelings*, rather than his

⁵⁹⁸ Sic (typo in the copy of the judgment on BAILII at the time of writing)

⁵⁹⁹ Ibid, para 164

⁶⁰⁰ Ibid, para 231

⁶⁰¹ Ibid, para 233

⁶⁰² Ibid, para 239

⁶⁰³ Form COPDOL 10, as amended September 2016.

⁶⁰⁴ [2013] EWCOP 4289

⁶⁰⁵ Ibid, para 23

⁶⁰⁶ *Re NRA & Ors* [2015] EWCOP 59, para 173

best interests. It also contrasts with the view advanced by Ruck Keene and colleagues in connection with litigation friends, that a person's best *legal* interests are better served by representing what the person wants, rather than the representative's assessment of their best *welfare* interests. This distinction may be less critical in streamlined procedure cases where the matters are non-contentious; in other words, P is not objecting and neither are P's family. But it could be problematic under a human rights model of representation if P's views about his or her care were different from those of the representative.

It remains to be seen how this Rule 3A representative role will develop. The model of representation to be adopted by both lay representatives under Rule 3A and ALRs are caught in the cross winds of wider conflicting forces. Those who favour a best interests model of representation, based on the traditional understanding of the role of the litigation friend, or those who prefer a more 'active' approach to representing the *wishes and feelings* of P – however hopeless that may seem. The latter approach may well be the preferred by the ECtHR and the common law, and is almost certainly the model favoured under the CRPD.

Recommendations on representation of P

Recommendation 10: Funding for legal representation and Rule 3A representatives for capacity and deprivation of liberty cases must be reviewed by the government as a matter of urgency.

Recommendation 11: The CoP should reconsider the approach to representation taken by litigation friends and Rule 3A representatives to take into account the 'active representation' approach based on the person's wishes and feelings increasingly advocated under human rights law, and requirements under the MCA to support P in making decisions about participation and representation for himself wherever possible.

3.6 ATTENDING COURT AND PERSONAL CONTACT WITH JUDGES

The ECtHR increasingly emphasises personal contact between P and the judge for three reasons:

1. As a matter of principle, where judges are making important decisions about a person's life (the 'dignity principle');
2. For evidential reasons, so that the judge may form her or his own view as to the person's mental capacity and the proportionality of any measures they may impose, as a safeguard against over-reliance on expert evidence (the 'evidential principle');
3. To increase equality of arms, so that the person may put their case to the judge (the 'adversarial principle').

The evidential principle has already been discussed in Section 3.4 in connection with giving evidence or information in court. Potentially, the adversarial principle could be satisfied by effective representation in court, subject to the debates concerning the appropriate mode of representation outlined in Section 3.5. This section will review the case law on when judges in the CoP should meet P as a matter of principle, regardless of whether it will enhance the quality of their decision making.

The rule of personal presence under the ECtHR

The ECtHR first set out what it later came to call the 'rule of personal presence'⁶⁰⁷ in deprivation of capacity proceedings in *X and Y v Croatia*:

⁶⁰⁷ *Lashin v Russia* (Application no. 33117/02) [2012] ECHR 63, para 82.

judges adopting decisions with serious consequences for a person's private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons.⁶⁰⁸

Echoing this stance, the UKSC has also held that under the common law the requirements of justice and respect for dignity call for 'a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions'.⁶⁰⁹ It may be necessary to hear directly from the person concerned, not merely because it may enhance the procedural fairness and quality of decision making, but also to avoid 'the sense of injustice which the person who is the subject of the decision will otherwise feel'.⁶¹⁰

At face value, this may be a very problematic approach for the CoP, since almost any decision made by a judge within this jurisdiction will have 'serious consequences for a person's private life'. Yet the vast majority of cases before the CoP are typically dealt with 'on the papers' without a hearing, such as non-contentious property and affairs or *Re X* non-contentious deprivation of liberty applications.

The ECtHR has offered a little further refinement of this principle in subsequent cases. In *Zagidulina v Russia*⁶¹¹ the court indicated that the stronger a person's views about the outcome of a decision, the stronger this right of personal presence, stating that a person's 'right to be heard' was 'ever more pressing' given their 'clear and undisputed refusal to undergo any treatment'.⁶¹² This suggests that one key criterion for implementing the rule of personal presence in the CoP may be whether or not the proceedings are contentious, particularly in terms of P's potential objections.

In *Shtukurov* the court coupled its statement that the judge should have had some 'brief visual contact' with Mr Shtukurov to an observation that he was 'a relatively autonomous person'.⁶¹³ Likewise in *AN v Lithuania*⁶¹⁴ the court observed that Mr AN was 'a relatively independent person', before concluding that the judge should have 'brief visual contact' with him. The court observed that just because a person is subject to guardianship 'does not mean that he is incapable of expressing a view on his situation'.⁶¹⁵ Where a judge does not have 'direct contact with the person concerned', the court commented, this would usually call for 'judicial restraint on the part of the Court'.⁶¹⁶ This suggests that the rule of personal presence may also be related to whether or not P can express a view – regardless of his capacity.

⁶⁰⁸ Ibid, para 84

⁶⁰⁹ *Osborn v The Parole Board* [2013] UKSC 61, para. 68

⁶¹⁰ Ibid, para. 68

⁶¹¹ (App no 11737/06) Chamber Judgment [2013] ECHR 398

⁶¹² §62, echoing the 'right to be heard' in the assessment of emotional suffering established in *Göç v Turkey* (App no 36590/97) [2002] ECHR 589, para 51. See also *MS v Croatia (No 2)* [2015] ECHR 196, para 158

⁶¹³ *Shtukurov v Russia* (App no 44009/05) [2008] ECHR 223, para. 73

⁶¹⁴ (App No. 17280/08) [2016] ECHR 462

⁶¹⁵ Ibid, para 90.

⁶¹⁶ Ibid, para 120.

In *Lashin v Russia*⁶¹⁷ the court held that there are possible exceptions from the ‘rule of personal presence’, but commented that ‘departure from this rule is possible only where the domestic court carefully examined this issue.’⁶¹⁸ In *Berková v. Slovakia*⁶¹⁹ it found that the decision of the domestic courts to exclude Ms Berková, a woman diagnosed with ‘a querulous type of paranoia’, from deprivation of capacity proceedings to be compatible with her rights. However, this was based upon a specific recommendation by medical experts. In contrast, in *Lashin v Russia*, ‘the District Court merely stated that the applicant’s personal presence would be “prejudicial to his health”, and there is no evidence that the court ever sought a doctor’s opinion on that particular question, namely what effect appearing in court might have had on the applicant.’⁶²⁰ It seems that in situations where the rule of personal presence would generally be engaged, the court may only dispense with this requirement where it has specifically considered the question of P’s participation and based its decision on actual evidence (rather than judicial conjecture) about the impact of participating directly in the proceedings upon the person.

The ECtHR has also held that the right to personal presence may be dispensed with in exceptional circumstances, such as minor misdemeanor offences.⁶²¹ It is unlikely that any matter before the CoP would be sufficiently trivial to engage this provision. A person can also waive their right to be present, but this waiver must be unequivocal and attended by minimum procedural safeguards commensurate to its importance.⁶²²

Court of Protection rules and procedure for personal contact with judges and attending court

Rule 88 of the COPR grants the court the power to hear from P on whether or not an order should be made, even if he is not a party to the proceedings. However, the court may proceed in P’s absence if the judge ‘considers that it would be appropriate to do so.’ Under the COPR prior to the 2015 amendments, the rules were silent regarding whether judges could meet with P outside of a hearing and the presence of the other parties. Under the new Rule 3A imposes a duty on the court to consider the question of participation directions. The court must consider, in each case, whether P ‘should have the opportunity to address (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur’. The accompanying Practice Direction 2A does not, however, give any guidance on when it would – or would not - be appropriate for the judge to be addressed directly or indirectly by P, nor the circumstances in which this should occur. Further detail is, however, provided by Charles J’s (non-binding) recent guidance on facilitating the participation of P in the CoP, which is discussed in more detail below. Nevertheless, neither of these sources of guidance reflect the strength of this principle in ECtHR case law, nor the limited circumstances in which it has held that a judge may *not* meet with the person concerned.

⁶¹⁷ (Application no. 33117/02) [2012] ECHR 63

⁶¹⁸ Para 82

⁶¹⁹ (App no 67149/01) [2009] ECHR 514

⁶²⁰ *Lashin v Russia* (Application no. 33117/02) [2012] ECHR 63, para 82.

⁶²¹ *Allan Jacobsson v Sweden (No. 2)* (App no 16970/90) [1998] ECHR 2 (19 February 1998); *Uros Suhadolc v Slovenia* (App no 57655/08) [2011] ECHR 836

⁶²² *Poitrimol v France* (App no 14032/88) [1993] ECHR 54 (23 November 1993)

Judge Rogers in *A County Council v AB & Ors (Participation of P in Proceedings)*⁶²³ considered that Rule 90 of the CoP rules, which provides that ‘A private hearing is a hearing which only the following persons are entitled to attend; (a) the parties; (b) P and others’ creates a right for P to attend a hearing. The judge said this: ‘In my judgment Rule 90 provides or establishes the entitlement of P to attend proceedings. The word ‘entitlement’ or ‘entitled’ is clear.’⁶²⁴ This is an important statement of the right of P to attend court, though in what capacity remained an issue in the case.

Historical, cultural and practical considerations

Unlike Mental Health Tribunals, the CoP was not established on the assumption that all cases would be determined by an oral hearing which the person would attend. Historically, the working presumption seems to have been that P – like children in the Family Court – would participate directly only very rarely. In fact, the direct participation of P in the proceedings, and the question of P meeting with judges outside of the courtroom, is not discussed in the COPR consultations that took place when the new CoP was established. In common with its predecessor court, the majority of non-contentious property and affairs cases are decided ‘on the papers’ without an oral hearing at all. Indeed, to require direct judicial contact with P in all cases concerning legal capacity or deprivation of liberty would represent a potentially insurmountable practical challenge for the CoP under its current arrangements. This background has led to a number of barriers to P’s direct participation in the proceedings.

As we have outlined above in Section 3.4 (Evidence and information before the court) sometimes the barriers to P’s direct participation may be cultural. A group of barristers and solicitors who regularly represent clients in the CoP observed to the House of Lords Committee on the MCA that:

There is marked variation in the willingness of judges to meet P and allow P to give evidence, or put across his/her views in whatever way is suitable... We have considerable doubts that the current system which does not presume that judges should have ‘personal contact’ before making decisions about their capacity or best interests is compatible with the ECHR⁶²⁵

They recommended that further guidance should be provided for the courts on hearing from P. At the roundtable, participants spoke of variations in judicial willingness to meet with P, but several commented that the practice of the CoP was increasingly moving towards P being given opportunities to attend court or meet with the judge in person. One judge who attended commented that if they knew that P wished to meet them, they felt it was a matter of ‘courtesy’ to do so, echoing that suggestion by the ECtHR and the Supreme Court in *Osborn* that direct contact between the judge and the person was a matter of principle. Cultural barriers to participation are not restricted to the judiciary, of course. It will also be important that lawyers and others working in the justice system – such as court staff, and litigation friends, support P’s direct participation and work collaboratively to overcome the barriers that may be faced.

Part of the problem may be a lack of understanding of the purpose of direct contact between P and the judge. We have noted in Section 3.4 above, that the approach to taking information and

⁶²³ [2016] EWCOP 41

⁶²⁴ Ibid, para 36

⁶²⁵ n 484, paragraph 28, p 357

evidence gathering from children in the Family Court, which many High Court judges may have transposed onto P when sitting in the CoP, sits in tension with the approach required of judges under the ECtHR in relation to deprivation of capacity proceedings. This requires judges to use such encounters to form an independent view of P's capacity and the proportionality of any measures proposed in relation to him. Furthermore because there is no established system in place in the CoP for facilitating the special measures and reasonable adjustments that may be required to assist P in attending court or meeting the judge in person, judges may be cautious of proceeding without adequate support, guidance and resources to ensure that P's participation needs are met. This issue is returned to in Section 3.7 below.

Despite these difficulties, reported cases indicate that some judges regularly seek out meetings with P, and growing numbers are adopting this practice.⁶²⁶ In *Wye Valley Trust v B*, a case involving the decision as to whether it was in Mr B's best interests to amputate his leg, Peter Jackson J commented that 'given the momentous consequences of the decision either way, I did not feel able to reach a conclusion without meeting Mr B myself.'⁶²⁷ In *Re CD*⁶²⁸, Mostyn J referred to Peter Jackson J's judgment in the *Wye Valley* Case and said this about how invaluable he found the experience of meeting P:

I took the view that it would be right if I were to meet CD face to face and I did so at the mental hospital on the first day of the hearing. It was an enlightening experience and one which I would recommend to any judge hearing a similar case. Mr Justice Jackson met Mr B and it is obvious from his judgment that the encounter was critically valuable. The reason it was enlightening for me was that the person I met was different in many respects to the person described in the papers. CD was engaging and polite. She was articulate. She was amusing. She listened carefully to questions and answered them equally carefully. True, there were comments that suggested powerful delusional forces; and Dr FH explained that she was heavily medicated. But even so, the person I met was a world away from the violent sociopath described in the papers.⁶²⁹

Another striking example of the 'dignity' principle in action is the decision of Mr Justice Baker in *W v M*⁶³⁰ to visit M – a woman in a minimally conscious state, whose family applied for an order authorising the withdrawal of artificial nutrition and hydration. If there has been historical reluctance among some CoP judges to meet with P or for P to attend court, the tide seems to be turning. Nevertheless, the challenges they face are considerable. The entire CoP system – from the court service itself, the very architecture of the court buildings and courtrooms, through to legal aid provisions, systems of representation via litigation friend, and systems for ensuring that P's needs are supported and accommodated - is simply not set up or resourced for P to attend hearings or meet the judge in large numbers of cases.

The court is attempting to grapple with the practical implications of the rule of personal presence without the supporting infrastructure of comparable courts, such as the Mental Health Tribunals,

⁶²⁶ Victoria Butler-Cole and Laura Hobey-Hamsher, n 497.

⁶²⁷ *Wye Valley NHS Trust v Mr B* [2015] EWHC 60 (COP), para 18

⁶²⁸ [2015] EWCOP 74.

⁶²⁹ *Ibid*, para 31.

⁶³⁰ [2011] EWHC 2443 (Fam)

which were designed to facilitate participation by disabled people from their very outset. Even the criminal courts, by comparison, have done substantial work to facilitate the participation of disabled and vulnerable witnesses. We return to this theme in Section 3.7, below.

Attending court hearings

In several reported CoP cases the judgment records that P has attended court for some, or all, of a hearing about their case.⁶³¹ However, attending a court hearing in person can bring with it practical difficulties.

Whereas the Mental Health Tribunals sit in the hospital where the person is detained or being treated, or in local community settings if the patient is subject to a Community Treatment Order, the CoP usually sits in its central London registry or a regional court. The CoP is taking steps towards increasing regionalization⁶³², meaning that hearings may be held nearer to where the person lives. However, for some people even the distance to their regional court may be problematic, especially for those living in rural and remote areas. For people with very limited mobility, regionalization is still a far cry from holding a hearing in the place where they are receiving care or treatment. Several participants at the roundtable made frequent reference to the importance of the tribunal 'going to the person', in contrast with the person being required to travel to the hearing. There is one example, from before the passage of the MCA 2005, of a court 'going to the person'. According to a BBC documentary about the case of *Re C (Adult: Refusal of Medical Treatment)*⁶³³ the High Court hearing was actually held in the hospital where Mr C was detained.⁶³⁴ There are no reported examples of the CoP adopting this practice, but there appears to be no reason in principle why it could not do so.

Some patients may find attending a hearing tiring or physically uncomfortable. For example, in *London Borough of Redbridge v G & Ors*⁶³⁵ the judgment records that 'It was apparent that she was uncomfortable, if not actually distressed' and so G was taken home by a carer.⁶³⁶ If P nevertheless wished to attend as much of it as possible, they might benefit from the hearing being held in their immediate vicinity to allow them to take breaks and rest more easily.

At the roundtable, some participants spoke of experiences of high-risk patients where court attendance posed a potentially serious risk to themselves and others. They commented that because the tribunal hearing was held in the hospital, those risks could be managed much more effectively than they could in a courtroom setting.

There may be emotional elements of attending court hearings that would be problematic for the individual's wellbeing. It is in the nature of a court hearing, whose very purpose is to determine

⁶³¹ *Re MP, LBH v GP* [2009] EWHC (Fam) (Case no FD08P01058, unreported, 8 April 2009), para. 4; *London Borough of Redbridge v G & Ors* [2014] EWHC 17 (COP), paras. 18-19

⁶³² For further information about the regionalisation of the CoP, please see the October and November 2015 editions of the *Mental Capacity Newsletter* published by 39 Essex St, an important source of news and information for all who work in the CoP's jurisdiction. These are available online from here: <http://www.39essex.com/tag/mental-capacity-newsletter/>

⁶³³ [1994] 1 W.L.R. 290

⁶³⁴ J Panting and D Bowman, 'Test Case: Mr C' (BBC Radio 4, 4 February 2014)

⁶³⁵ [2014] EWHC 17 (COP)

⁶³⁶ *Ibid*, para 19

whether or not P's wishes should prevail, that they may hear evidence or arguments that they find distressing. For example, in the case of *EM v SC*⁶³⁷ EM applied to the CoP to discharge a standard authorisation for his detention in a care home. EM attended court and directly addressed the judge, Eleanor King J, to inform her of his views. He told the court that he was 'fed up' and that he wished to 'go home', where he believed that his son MM would assist him.⁶³⁸ MM did not attend the hearing but had written a letter for the court. At the hearing, the letter was read out to EM. In the letter MM stated that he does not visit his father and did not wish to do so, and that if he returned home he would not offer him any support.⁶³⁹ EM did not believe that the letter was written by MM, and dismissed its contents. EM's case serves as an illustration of the potential that the court hearing process itself could potentially be distressing for the individual, regardless of the outcome of the case. It highlights that there may be a difficult balance to strike between ensuring a person has an opportunity to respond to the evidence and arguments, and minimising any harm that might ensue from the hearing process itself.

Case study on participation in court hearings: A County Council v AB & Ors (Participation of P in Proceedings)

The recent case of *A County Council v AB & Ors (Participation of P in Proceedings)*⁶⁴⁰ provides a noteworthy example of some of the practical issues that can arise for participation in court hearings, and how the CoP and practitioners have attempted to overcome these in the face of systemic challenges. The court was asked to determine whether AB could attend court and give evidence for a fact-finding hearing regarding allegations of abuse by his parents. The court's conclusions regarding witness competence and giving 'information' or evidence to the court were described in Section 3.4, above. Critically, Judge Mark Rogers afforded to P's litigation friend the pivotal role in deciding whether P should attend court or otherwise participate in the proceedings. Counsel for the Official Solicitor, AB's litigation friend, had argued that the key decision-maker in respect of P's active participation in the case is the litigation friend, with the Court having no or only a residual duty to overrule.⁶⁴¹ The key questions were whether the decisions as to whether P should attend Court and should give evidence are decisions for the Litigation Friend as part of the conduct of proceedings or a best interest determination for the Court. Judge Rogers held that the CoP has no general case management powers to exclude P, or 'micro-manage' the litigation friend, but has the ultimate power to dismiss the litigation friend. The judge concluded that because the CoP's powers to micro-manage the decisions of the litigation friend were limited, there was no 'best interests' decision for the CoP to make regarding P's participation.

Such a sweeping delegation of broad authority to the litigation friend with review available only in extreme cases would appear to be at odds with the Court's duty under Rule 3A to consider 'on its own initiative or on the application of any person' whether it should make directions regarding P's participation, including addressing the judge. We do, however, agree that the decision as to whether or not P should address the judge, directly or indirectly, may not be a 'best interests' decision under the MCA. As we have seen in other areas relating to participation, such as whether

⁶³⁷ [2012] EWHC 1518 (COP); [2012] All ER (D) 42

⁶³⁸ Ibid, paras 16-18.

⁶³⁹ Ibid, para 20.

⁶⁴⁰ [2016] EWCOP 41

⁶⁴¹ Ibid, para 8.

or not an application is made for a review of detention under Article 5(4) or how P should be represented by his lawyers, best interests is not the most appropriate yardstick to apply, since it undercuts the rule of personal presence. We suggest that a more appropriate framework is one which addresses the threefold evidential, adversarial and dignity principles for the rule of personal presence. We suggest that the court should consider questions of participation in the context of its own overriding objectives and the requirements of the ECHR. Whilst we understand that the CoP may seek to avoid satellite litigation on P's participation, we suggest that it cannot delegate its own obligations under Rule 3A of the COPR, the overriding objective and the ECHR to the litigation friend in this way. One way to limit satellite litigation on P's participation would be for the COPR and Practice Directions to emphasise the strength of P's right to participate directly in the proceedings, subject only to very limited exceptions under the ECHR.

AB's own main interest was 'to express his views as to the future not the past, and to provide his expressed wishes as to his own circumstances rather than to give an account of past events'. The judge commented that 'Simply to regard AB's contribution as forensically worthless without even hearing him is not something I can contemplate.'⁶⁴² A case note by AB's solicitors⁶⁴³, Nicola Mackintosh QC, describes the considerable steps taken to prepare AB and to secure his participation. This is described here in some detail as it highlights the wide ranging practical challenges that may be faced by the CoP system if increasing numbers of P's attend court hearings.

AB had expressed a wish to attend court in order to 'tell his story'. In order to support this, his lawyers met with a speech and language therapist (SALT) to prepare him for the hearing, to explain to him concepts like what a judge is, what the judge is deciding, and how he could tell his story. The court's video facilities did not allow AB to view the proceedings from an adjacent room to minimize any distress, so facilities were found locally that could provide a video link to the court. This required special arrangements to be made with the court's IT specialists and the facility to ensure the footage was secure. The court gave its consent for photos to be taken⁶⁴⁴ to explain the layout of the courtroom to AB and the identities of those involved. AB was taken to visit the court when it was not sitting, and to meet the clerk. Arrangements were made for his personal care needs to be met at the court, including the provision of mobile hoists. AB was provided with a separate room next to the court, with a fan because he had reduced control of his temperature.

On the first day of the hearing there was a Ground Rules Hearing (these are discussed in Section 3.7 below). The judge met with AB in a side room with his solicitor and his SALT. His SALT explained to the judge how he communicated using Makaton signs. Although the fact finding hearing was listed for 9 days, an agreement was reached early on between the parties, and AB was present throughout all of the discussions between lawyers and the court, having communicated his wish to be involved and listen to the proceedings. To reduce the need for transfers in and out of the courtroom, and because the room set aside for his use was uncomfortable, the judge permitted him to watch a DVD with his support workers between updates to the court. After the parties had reached agreement as to the core issues in the case – and so in effect the matters before the CoP

⁶⁴² Ibid, para. 50

⁶⁴³ 'Guest Post: Facilitating participation of 'P' in Court of Protection proceedings', (*Court of Protection Handbook*, 30 September 2016) <<https://courtofprotectionhandbook.com/2016/09/30/guest-post-facilitating-participation-of-p-in-court-of-protection-proceedings/>> accessed 14 December 2016.

⁶⁴⁴ It is ordinarily an offence to take a photograph of a courtroom, so judicial permission is required for this. Criminal Justice Act 1925, s41

had been decided – it was seen as vital that AB could tell his story. This is an example of the ‘dignity’ principle in action, since it could no longer have any bearing on the outcome of AB’s case.

AB’s solicitor explains what happened as follows:

Questions of P were drafted by P’s legal representatives with the assistance of P’s SALT and intermediary. As P’s communication was limited to responses such as ‘yes, no’ etc, it was necessary for leading questions to be posed however these were broken down into questions so that the leading element was minimised. Examples of questions included ‘Do you want to talk about when you were living at home?’, ‘How did you feel when you were living at home?’, ‘When you were living at home did anyone do X to you?’, and if the answer was affirmative, ‘How did it make you feel?’ These questions were devised to ensure that P’s broad wishes were communicated to the court notwithstanding the agreement between the parties, so that P felt that he had been listened to by the parties and the judge, but avoiding detailed questioning on the fact finding schedule which eventually proved to be unnecessary.

Opportunities were provided for AB to rest in between the question and answer sessions. Footage of these sessions was recorded on a mobile phone and played to the judge in his chambers, and to the other parties, avoiding the difficulties presented by the court video facilities. At the end of the proceedings, the judge held a further short hearing to explain to AB the outcome of his decision. AB positioned his wheelchair to be solely in line of sight of the judge and not the other parties.

The case note is revealing for the sheer breadth of issues that need to be navigated – from the technical limitations of court video links, to accessibility and reasonable adjustments in the court buildings and in communication, to taking into account the emotional needs of AB, telling his story in front of those alleged to have abused him. Yet if the case note serves as a warning of the inadequacies of the CoP system itself in terms of facilitating participation, it is highly encouraging in terms of the willingness of the judiciary, court staff, P’s own lawyers and support staff to overcome the not inconsiderable hurdles facing his participation. It is reassuring to see his desire to tell his story taken so seriously. It raises important questions about the systemic availability of accessibility, special measures and reasonable adjustments, which we consider in Sections 3.7 and 3.8 below.

Shortly after the case of AB, Charles J issued non-binding practical guidance on facilitating the participation of P.⁶⁴⁵ It provides a lengthy list of considerations for those representing P and for the judge in relation to court hearings. There are 12 matters to consider, one of which is necessary practical arrangements, which itself has 9 subheadings:

12. P’s views should be sought at an early stage as to whether they wish to attend one or more of the court hearings, including meeting with the Judge. Suitable explanations will need to be given to P as to what this may mean, what may happen and what support might be available. Different considerations may apply to P’s attendance at an interim directions hearing as opposed to a final hearing or a hearing where P might be giving evidence, or where P might wish simply to listen to the evidence of others.

13. If P wishes to attend a hearing, consideration should be given to the following:

(a) The impact on P of the hearing being in public and what directions about this should be sought;

⁶⁴⁵ Mr Justice Charles, *Facilitating participation of ‘P’ and vulnerable persons in Court of Protection proceedings*, (2016).

- (b) Liaising with the Court staff as soon as possible in advance to advise them of P's wish to attend, so that they and the Judge are made aware in advance;
- (c) Seeking Court staff views as to how practical arrangements can be made which are proportionate given the demands on Court facilities and other users of the Court;
- (d) Is the Court able to accommodate P's visit? If not, is there another Court able to accommodate P and can this be arranged without disproportionate additional work and resources?
- (e) Whether use of video link would be an alternative option to an attendance by P? Are facilities available and do they actually work? There may be a need to test them in advance;
- (f) What is P's understanding of a Courtroom, a hearing, the issues in the proceedings, what decisions are to be made and when? How can this be enhanced in the time available?
- (g) What assistance can be provided to P to understand what is to be decided at the hearing, who is who, the layout of a Courtroom and who sits where (including P themselves)?
- (h) Would it be helpful for P to be assisted to visit the courtroom before the hearing? Can this be arranged with the Court in practice? Who will accompany P? Is a visit feasible?
- (i) Might P be provided with pictures of the courtroom (for which special permission will be required) (or a courtroom, there are plenty of pictures available on line)? Pictures of the parties and their representatives?
- (j) What practical arrangements might need to be made? For example:
 - (i) Who will accompany P to the hearing and support them throughout, if needed?
 - (ii) What time will P need to arrive and how does this fit with P's routine (such as the taking of medication) and any support required?
 - (iii) How will P physically access the Courtroom?
 - (iv) What arrangements will be made for P's personal care if required?
 - (v) Are there accessible toilet facilities if needed?
 - (vi) Will P need a side room near the Courtroom for a break and are there facilities for this?
 - (vii) Does P have any particular needs which should be considered in advance?
 - (viii) Where will P sit in the hearing, and does this need to be discussed and agreed with court staff in advance of the hearing? For example in some cases P might need to be positioned in the hearing so as not to be within eyesight of another party or parties.
 - (ix) Are there any safety/ security concerns – either relating to P's potential conduct or the conduct of any other person in the courtroom?
- (k) Will P need breaks in the proceedings or if P's input on all issues is not required, should the proceedings continue if P wishes to take a break or leave the hearing altogether?
- (l) Where and how will the Court's decision be communicated to P? By the judge in the courtroom or in any side room? In the presence of the parties or in private? Is it

possible in appropriate cases to give a summary of the decision to P so as to allow P to leave before the full judgment is given if P wishes?⁶⁴⁶

The guidance reflects a growing awareness by senior judiciary of the CoP of the practical implications of implementing Rule 3A, and enthusiasm to encourage participation by P. It stresses the importance of advance planning to facilitate P's participation. The list of matters that might be problematic in making practical arrangements also suggests that much adaptation will be needed to ensure that the court is ready to receive P. One important question left unanswered by the guidance, however, is how the costs of increasing participation are to be met. We return to this question below.

3.7 SPECIAL MEASURES AND REASONABLE ADJUSTMENTS

The forgoing discussion in Sections 3.4 (giving information and evidence to the court) and 3.7 (attending court and personal contact with judges) highlights some of the practical difficulties that P's may experience in attending court hearings. This raises the question of what special measures and reasonable adjustments the CoP may need to adopt to facilitate the participation of P – or indeed any other parties who may experience barriers to participation.

Obligations to make remove and overcome barriers to participation in proceedings

The CoP is under a number of intersecting legal obligations to ensure barriers to participation are removed or overcome. Under international law, Article 13 of the UN CRPD requires states to provide 'procedural and age-appropriate accommodations, in order to facilitate [the] effective role as direct and indirect participant' of disabled people in legal proceedings. The MCA 2005 itself requires the provision of assistance to support the person to make decisions for themselves,⁶⁴⁷ or to enable them to participate in the making of decisions that concern them,⁶⁴⁸ and this must logically include decisions in the context of the CoP.

Courts are also under specific duties to make reasonable adjustments to facilitate participation for disabled litigants. In *J W Rackham v NHS Professionals Ltd*⁶⁴⁹ the court found a number of intersecting duties to make reasonable adjustments to ensure access to and participation in hearings. In the recent case of *Galo v Bombardier Aerospace UK*⁶⁵⁰ the Court of Appeal in Northern Ireland held that 'It is a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing' and that therefore 'Courts needs to focus on the impact of a mental health disability in the conduct of litigation.'⁶⁵¹ The Court of Appeal was highly critical of the Industrial Tribunal for failing to take steps to consider what reasonable adjustments Mr Gallo, who the Tribunal was aware had Asperger's Syndrome, might require to facilitate his participation in the proceedings. The Court of Appeal stated that as soon as the Tribunal was aware that the litigant had a disability 'enquiries should have been made as to

⁶⁴⁶ Ibid

⁶⁴⁷ MCA 2005, s 1(3).

⁶⁴⁸ MCA 2005, s 4(4).

⁶⁴⁹ [2015] UKEAT 0110_15_1612

⁶⁵⁰ [2016] NICA 25

⁶⁵¹ Ibid, para 53

whether reasonable adjustments to the process were necessary'.⁶⁵² Importantly, the Court of Appeal rejected the argument that the applicant had not requested any reasonable adjustments, stating 'The duty is cast on the Tribunal to make its own decision in these matters.'⁶⁵³ Although this decision was taken by the Court of Appeal in Northern Ireland and thus has persuasive authority and is not binding precedent, if a similar approach were taken in England and Wales it would put the duty squarely upon the CoP itself to pro-actively investigate what special measures and reasonable adjustments are required to facilitate P's participation.

Special measures and reasonable adjustments in the CoP

Perhaps surprisingly, given that almost the entire workload of the CoP concerns people who would experience barriers to participating directly in court proceedings, there was little discussion when the Court was established and the COPR drafted of what adjustments or accessibility measures might be required to enable P to participate in the proceedings directly. This may be because the model of participation which the court was based assumed either that the person would not be a party to the proceedings, or that they would only participate *indirectly* through their litigation friend. Only recently, with the advent of Rule 3A and Charles J's non-binding guidance has the CoP itself turned to consider these issues.

This contrasts starkly with other jurisdictions who have for some time considered how best to facilitate the participation of disabled people in proceedings. The most obvious comparator court is the Mental Health Tribunal, which we consider separately in Section 4 of this report. However, even ordinary courts have taken steps to introduce 'special measures' to make certain processes relating to proceedings more accessible. In particular, the criminal courts have grappled for several years with the question of how best to promote the ability of 'vulnerable witnesses' to give evidence. Vulnerable witnesses are defined by the Youth Justice and Criminal Evidence Act 1999 (YJCEA) as including people with a 'mental disorder' in the meaning of the MHA, or otherwise with a 'significant impairment of intelligence and social functioning' or a person with a physical disability or physical disorder.⁶⁵⁴ One roundtable participant proposed an alternative definition of vulnerability for the purpose of procedural fairness as 'those who are at risk of unfairness if adjustments are not made'. It was suggested that legal professionals may not always be skilled at identifying 'vulnerability' in this sense, and it may be something that health and social care professionals should be flagging up to the court. A practice note issued by the Law Society advises solicitors on how to identify vulnerable clients who may need further steps to be taken to accommodate their needs and facilitate participation in proceedings.⁶⁵⁵ We return to questions of training in Section 3.9 below.

The YJCEA 1999 and associated practice directions⁶⁵⁶ and general guidance⁶⁵⁷ outline certain 'special measures' that may be put in place to enable vulnerable witnesses to give evidence in the

⁶⁵² Ibid, para 56

⁶⁵³ Ibid, para 59

⁶⁵⁴ Youth Justice and Criminal Evidence Act 1999, s 16.

⁶⁵⁵ Law Society, *Practice Note: Meeting the needs of vulnerable clients*, (2016).

⁶⁵⁶ Criminal Practice Directions [2013] EWCA Crim 1631; *Criminal Practice Directions Amendment No. 2* [2014] EWCA Crim 1569

⁶⁵⁷ www.theadvocatesgateway.org

criminal courts. Special measures encompass a range of adjustments that might be made to the court's practices and procedures to accommodate the needs of witnesses in a particular case. For example, a witness who is vulnerable because they are scared to be seen by the defendant, might give evidence behind a screen. A witness with a disability which makes it difficult for them to understand questions under cross-examination might use an intermediary with specialist communication skills. A 'ground rules' hearing might be used to establish how questions might be put to the person to ensure the avoidance of any unnecessary distress and to facilitate their understanding and communication. A person who was uncomfortable attending court in person might give video evidence, or might have a familiarisation visit to the court before the hearing. At the roundtable, participants with expertise in special measures spoke of the creative measures adopted by the criminal courts to facilitate the needs of witnesses with autism or learning disabilities, for example allowing them to give evidence whilst wearing an unusual outfit or with their back turned. A fuller description of the framework for special measures in the criminal courts, alongside toolkits for advocates working in these courts, can be found on the website the *Advocate's Gateway*.⁶⁵⁸ There are examples of the Family Court using, for example, certain special measures such as intermediaries to good effect.⁶⁵⁹

In contrast to the well-established frameworks in the criminal courts and Mental Health Tribunals, there are no specific provisions under the MCA, in the COPR or in practice directions for special measures in CoP proceedings, even though the main focus of the jurisdiction is the affairs of people who would fall within the definition of 'vulnerable witnesses' under the YJCEA. Steps were being taken to address this in the CoP's sister court, the Family Court, but they appear to have stalled. The President of the Family Court and the CoP – Sir James Munby – acknowledged in 2014 that 'there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system'.⁶⁶⁰ The Children and Vulnerable Witnesses Working Group was established to review the procedures in the family justice system for children meeting judges and giving evidence, and wider issues of other vulnerable witnesses giving evidence.⁶⁶¹ The Working Group concluded that it was 'unarguable' that the approach taken in the criminal courts for vulnerable and intimidated witnesses should be modified and adopted in the family courts, although its recommendations have not yet been implemented.⁶⁶² The Ministry of Justice opened a consultation into draft amendments to the Family Procedure Rules, which included specific provisions on the measures that might be taken to assist with participation.⁶⁶³ Although the consultation closed in September 2015, there are no indications on the consultation website as to the response to the consultation or

⁶⁵⁸ www.theadvocatesgateway.org

⁶⁵⁹ *Newcastle City Council v WM and Others* [2015] EWFC 42 and *Re D (A Child) (No 3)* [2016] EWFC 1

⁶⁶⁰ Sir James Munby (2014) '12th View from the President's Chamber: The process of reform: next steps', *Family Law*, available: http://www.familylaw.co.uk/news_and_comment/12th-view-from-the-president-s-chamber-the-process-of-reform-next-steps?

⁶⁶¹ *Ibid*

⁶⁶² Children and Vulnerable Witnesses Working Group, 'Report of the Vulnerable Witnesses & Children Working Group February 2015' (2015)

⁶⁶³ See draft Rule 3A.7, Ministry of Justice, *Amendments to Family Procedure Rules – Vulnerable Witnesses and Children* (2015) <<https://consult.justice.gov.uk/digital-communications/draft-amendments-to-family-procedure-rules/>> accessed 22 December 2016

what further steps may be taken. Recently *The Guardian* newspaper has reported on the situation of women in the Family Court who have been cross-examined by abusive partners; a situation that would not be permitted in the criminal courts and where special measures would be used.⁶⁶⁴ In response to these reports the Justice Secretary, Liz Truss, has committed to a review of a possible ban on cross-examination by abusive partners.⁶⁶⁵ It is unclear whether this review will also consider the introduction of a comprehensive system of special measures in the Family Court, but if these are introduced the likelihood that the CoP will follow its sister court down this path is increased. It will certainly increase the awareness of the High Court judges working across both jurisdictions of the necessity for, and availability of, special measures that might enhance P's participation.

We have already referred to the guidance recently issued by Charles J on *Facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings*. This guidance is clearly informed by the work of other courts on special measures, for example suggesting holding a Ground Rules Meeting, and considering whether a number of specific special measures might be of use – such as involving an intermediary to help put questions to P in evidence gathering, or the use of a video link. The guidance refers to the well respected *Advocate's Gateway*⁶⁶⁶, and the Law Society's Practice Note on Vulnerable Clients⁶⁶⁷ for further information for and guidance.

The guidance is wide ranging and whilst clearly welcome, its legal status is uncertain. The fact it is issued as 'practical guidance' rather than a practice direction, or even amendments to the COPR, suggests its status for judges and lawyers may be less than clear. For those seeking advice on how to facilitate participation it may prove very useful as a starting point, but it does not go as far as inscribing into the COPR and associated practice directions the positive duty upon the CoP to consider what reasonable adjustments and special measures may be appropriate to facilitate P's participation. Neither does the guidance resolve the pressing question of how special measures and reasonable adjustments are to be funded. In the Family Court, where special measures are starting to be used, there are no fixed arrangements for funding special measures. They might be partially funded by the parties, including through legal aid, or the court may bear some of the costs. The provision of a statutory right to funded special measures to facilitate participation is likely to require steps to be taken by Parliament, and not lie within the gift of the CoP. Nevertheless, it may be a pivotal issue if the rule of personal presence is to be taken seriously.

Recommendations on special measures and reasonable adjustments

Recommendation 14: The COPR and practice directions should be amended to include specific recognition of the need for the court to consider special measures and reasonable accommodations to facilitate P's participation.

Recommendation 15: The government should provide additional funding for special measures – either through the court service, or by means of legal aid - to ensure compliance with human

⁶⁶⁴ S Laille, 'Family courts chief backs end to abusers cross-examining their victims', (*The Guardian*, 30 December 2016) S Laille, 'Revealed: how family courts allow abusers to torment their victims' (*The Guardian*, 22 December 2016).

⁶⁶⁵ S Laille and O Bowcott, 'Truss orders review to ban abusers tormenting victims in family courts', (*The Guardian*, 4 January 2017),

⁶⁶⁶ <http://www.theadvocatesgateway.org/>

⁶⁶⁷ Law Society, 'Practice Note: Meeting the needs of vulnerable clients' (2016).

rights and common law obligations to ensure effective participation in CoP proceedings for disabled people.

3.8 TRAINING OF JUDGES AND REPRESENTATIVES

Article 13 of the CRPD emphasises the importance of training for those working in the justice system to promote effective access to justice. This will include the judiciary of the CoP, but is also likely to extend to solicitors and counsel representing disabled clients and even those working within the administration of the court. One of the issues highlighted by the Court of Appeal in *Galo v Bombardier Aerospace Ltd* was 'the need for there to be better training of both judiciary and the legal profession in the needs of the disabled.'⁶⁶⁸

It is our understanding that there is training on disability related issues for judges of the CoP, although we were not able to identify its content in time for publication of this report. In order to ensure that training secures effective access to justice for P, we believe it needs to consider, at a minimum:

1. The core rights to participate, including rights of access to a court and the rule of personal presence, contained within the ECHR, as well as broader duties to make reasonable adjustments;
2. The practical matters that will need to be considered to ensure effective access to justice and the tools available to judges and representatives to achieve this;
3. An overview of the nature of how different kinds of disability can impact on P's and their ability to participate in proceedings, and guidance on where judges and representatives can find further guidance and information on these areas should the need arise.

Ideally such training would be available to all judges, as it is not only CoP nominated judges who hear cases involving disabled litigants. At present, the Judicial College prospectus⁶⁶⁹ lists the training provided for the judiciary by the Judicial College. The one module in the prospectus that makes reference to disability issues is a generic module on the Equality Act 2010, which appears to relate to disability related claims rather than the adjustments that the courts themselves might need to make to facilitate the participation of disabled people in litigation. The module does not appear to be mandatory.

The Judicial College also published the Equal Treatment Benchbook⁶⁷⁰, which provides detailed guidance on the implications of the Equality Act 2010 for the courts. This includes separate chapters on physical disability, mental disability and mental illness, age and 'vulnerable adults'. The Benchbook does discuss how special measures, intermediaries and reasonable adjustments may be required to promote participation in the court's processes. This might form a useful basis for future training.

A number of resources are available for solicitors and barristers working with disabled clients. In particular, the *Advocates Gateway* and the Law Society's own practice note on *Meeting the needs*

⁶⁶⁸ *Galo v Bombardier Aerospace UK* [2016] NICA 25. See also P Cooper & C Allely (forthcoming 2017) 'You can't judge a book by its cover: Evolving professional responsibilities, liabilities and 'judgecraft' when a party has Asperger's Syndrome' (NILQ).

⁶⁶⁹ Judicial College, 'Prospectus: April 2014 - March 2015. Courts Judiciary' (2015)

⁶⁷⁰ Judicial College, 'Equal Treatment Benchbook' (2013, with 2015 amendments)

of vulnerable clients provide a useful basis for any future training for counsel or solicitors. However, the provision of guidance will only make a difference where judges, solicitors, and barristers proactively seek out the resources that will assist disabled litigants; it will not help alert them to the need to do so.

Professional training requirements for solicitors and barristers are determined by the Solicitors Regulation Authority and Bar Standards Board respectively. There do not appear to be any training requirements on disability-related issues at either the academic stage,⁶⁷¹ qualifying stage, nor as a mandatory part of any Continuing Professional Development (CPD) requirements.⁶⁷²

The present requirements for training judges and legal professionals are significantly out of step with the requirements of Article 13 CRPD. We recommend that in the first instance the CoP itself undertake a review of what training requirements its own judiciary may need in relation to disability, reasonable adjustments and special measures – perhaps as part of a wider review of reforms in this area. Professional bodies should reflect on how they can ensure that professional training equips solicitors and barristers to act for disabled clients. Ideally generic training on disability issues should be mandatory, with specialist training available for particular issues that arise for specific client groups or in particular kinds of litigation. One potential driver for promoting disability training for practitioners was suggested at the roundtable: to make public funding certificates contingent upon solicitors having undergone appropriate training to represent clients with disabilities. Similar measures have been successfully adopted requiring barristers working on criminal cases to have undergone training on vulnerable witnesses.

The content of training for legal professionals will also need careful consideration. The particular training needs of different professionals will depend on their role – and generic training is likely to be inadequate. Professional bodies should liaise with experts in disability, access to justice, accessibility and reasonable adjustments to ensure that training fulfils the purpose of promoting effective access to justice for disabled people.

Recommendations on training

Recommendation 16: The Judicial College should introduce training on disability as it concerns access to justice.

Recommendation 17: The CoP should review whether there is a need to introduce special training for its nominated judges on facilitating the participation of P, with particular regard to the growing human rights jurisprudence and the practical considerations this may entail.

Recommendation 18: The Bar Standards Board and the Solicitors Regulatory Authority should introduce requirements for qualifying training courses and continuing professional development for practising solicitors and barristers on their specific obligations in respect of disabled clients.

⁶⁷¹ Bar Standards Board and Solicitors Regulation Authority, *Academic Stage Handbook, version 1.4*, (2014).

⁶⁷² Introduction to the Training Regulations 2014 - Qualification and Provider Regulations, <http://www.sra.org.uk/solicitors/handbook/trainingregs2014/part1/resources.page> [accessed on 13 May 2016]; Bar Standards Board (2015) *Bar Professional Training Course: Course specification requirements and guidance*, BPTC Handbook 2015/2016.

3.9 ACCESSIBILITY MEASURES IN THE COURT OF PROTECTION SYSTEM

Whereas reasonable adjustments and special measures respond to the specific needs of individuals in particular circumstances, Article 9 CRPD also requires states to take steps to ensure the general accessibility of the physical environment, information and communications, and services and facilities. Domestically, the Equality Act 2010 contains an anticipatory reasonable adjustment duty.⁶⁷³ This requires services and bodies performing public functions to anticipate the ways in which disabled people might be placed at a substantial disadvantage in accessing services or public functions and take reasonable steps to ensure this does not happen by altering provisions, criteria and practices, altering or removing physical features and providing auxiliary aids or services.

The accessibility duty is highly relevant to the way the CoP system as a whole functions, rather than the actions of individual judges and those representing P. It has a bearing on all the points at which a disabled people – in this case P – might interact with the CoP system. For example, it raises the question of how accessible the CoP's application processes is – from the government's CoP website, the CoP forms and guidance, to those staffing telephone and desk communication points, and the general accessibility of the court's buildings themselves for those with physical or sensory impairments. As the CoP is increasingly regionalised away from its central registry in London, this will be a matter for each court to address individually.

Here, we draw particular attention to a striking lack of accessible information about the CoP and its processes for people with sensory disabilities or intellectual or cognitive impairments. There is, for example, no easy to read guidance on the CoP published by the court service. We find this deeply disappointing since it would surely be beneficial not only for P, but for those representing or notifying P in the proceedings, to have some well prepared accessible materials to help explain the role of the court, the nature of their rights, and specific matters such as what happens in a hearing.

In contrast, for those detained under the MHA 1983 there is an array of easy to read sources of guidance, including easy to read information for those detained in hospital covering a broad range of rights including those governing information, the role of the nearest relative, visitors, leaving the hospital ward,⁶⁷⁴ and the role of tribunals.⁶⁷⁵ There is even an easy to read version of the MHA Code of Practice.⁶⁷⁶ The better provision of accessible information for those detained under the MHA 1983 may be because the MHA largely operates within the NHS, which has, since 2016, operated an Accessible Information Standard. The standard is set by NHS England and establishes a detailed specification which all NHS providers licensed by NHS England must adhere to. The aim of the standard is 'to make sure that people who have a disability, impairment or sensory loss are provided with information that they can easily read or understand with support so they can communicate effectively with health and social care services.'⁶⁷⁷ Ideally a similar accessible information standard would operate throughout all public services, including the justice system.

⁶⁷³ Equality Act 2010, s 20(3), (4) and (5) in combination (for services and public functions) with schedule 2.

⁶⁷⁴ <<http://www.nhs.uk/NHSEngland/AboutNHSservices/mental-health-services-explained/Pages/easy-read-mental-health-act.aspx>> accessed 22 December 2016

⁶⁷⁵ <<https://www.england.nhs.uk/learningdisabilities/wp-content/uploads/sites/34/2016/04/tribunal-factsheet.pdf>> accessed 25 January 2017

⁶⁷⁶ Department of Health, *Code of Practice: Mental Health Act 1983 (Easy Read version)* (2015)

⁶⁷⁷ NHS England (2016) *Accessible Information Standard: Making health and social care information accessible*, URL: <<https://www.england.nhs.uk/ourwork/accessibleinfo/>> accessed 22 December 2016

Recommendations on accessibility

Recommendation 19: The central London and regional courts housing the CoP should consider their accessibility obligations to disabled litigants seeking to attend court, with a particular focus on the kinds of support needs that P may have.

Recommendation 20: The courts service as a whole should consider the introduction of an 'accessible information standard' comparable to that recently adopted within the NHS and the CoP should produce accessible guidance and information for those involved in CoP proceedings.

4. PARTICIPATION AND MENTAL HEALTH (REVIEW) TRIBUNALS

As noted above, the Law Commission's recent review of Deprivation of Liberty proposed that a tribunal system would be preferable to a court for reviewing the lawfulness of deprivations of liberty, partly because tribunals are regarded as more accessible and better placed to facilitate participation than courts.⁶⁷⁸ We therefore now consider the development of the model of patient participation which applies in the Mental Health Tribunal (in Wales the Mental Health Review Tribunal).

Mental Health Review Tribunals were established under the Mental Health Act 1959 following the recommendations of the Royal Commission on the Law relating to Mental illness and Mental Deficiency (the Percy Commission).⁶⁷⁹ Their role was to provide a mechanism to review the continued need for a patient's detention. It is instructive to consider in outline how the model of participation before the tribunals differs from that in the CoP. It has evolved following pressure from service user support groups like MIND (the National Association for Mental Health) and the NCCL (National Council for Civil Liberties) and the test cases brought by Larry Gostin, the Legal Officer of MIND, such as *X v United Kingdom*⁶⁸⁰ in 1981. It is important to consider how that model of participation has evolved in the period since 1959.

4.1 DEVELOPMENT OF THE MENTAL HEALTH TRIBUNALS IN ENGLAND AND WALES

There have been three key stages in the development of the current system of Mental Health Tribunals. The first was the period from the establishment of the MHRT by the Mental Health Act 1959 until the Mental Health Act 1983, and the development of the first set of tribunal rules.⁶⁸¹ The second stage in the evolution of the tribunals began with the reform of the MHRT's powers by the Mental Health Act 1983, and the introduction of the MHRT Rules 1983⁶⁸², which advanced a more due process model of decision-making whereby some of the more egregious limitations of the rights of patients to participate in hearings were removed, most notably the right of access to information in reports. The 1983 Act was accompanied by the introduction of non means-tested legal aid to cover tribunal representation.

Representation was crucial to participation since the representative would have access to information which had been withheld from the patient. Only with representation could such information be effectively tested before the tribunal. The 1983 Rules required tribunals to provide reasons for their decisions. Two of the earliest cases required tribunals to give reasons for their decisions which had to be more than mere rehearsals of the statutory language. It had been common for tribunals to state they were not satisfied that the patient was not suffering from mental disorder etc. without saying why they had reached their decision.

⁶⁷⁸ Law Commission No 222, n 94, Chapter 11.

⁶⁷⁹ Lord Percy, *Report of the Royal Commission on the law relating to mental illness and mental deficiency 1954–1957* (Cmnd 169, 1957) (The 'Percy Report')

⁶⁸⁰ [1981] 4 EHRR 188.

⁶⁸¹ Mental Health Review Tribunal Rules 1960 SI 1960 No 1139

⁶⁸² Mental Health Review Tribunal Rules 1983 SI 1983 No 942.

These changes, coupled with the advent of legal aid for tribunals, radically changed the tribunal from a primarily inquisitorial model to one based to the adversarial idea of a *lis inter partes*, and brought greater emphasis on the due process safeguards accompanying an adversarial process. The volume of case law on the Mental Health Act post 1983 increased dramatically. There had only been two cases between 1959 and 1983.⁶⁸³ In the period between 1983 and the Mental Health Act 2007 there were over 100 judicial reviews of tribunal decisions.

The third key stage in the tribunal's development began when the MHRT was radically restructured in 2007, one of the key features being a divergence in the arrangements between England and Wales. The Tribunals Courts and Enforcement Act (TCEA) 2007 created two new tribunals: the First Tier Tribunal and the Upper Tribunal. The TCEA provides for the establishment of Chambers within the First Tier tribunal and the jurisdiction of the MHRT in England was transferred by the Transfer of Tribunal Functions Order 2008 to the Health, Education and Social Care Chamber of the tribunal governed by the First-tier Tribunal (Health Education and Social Care Chamber) Rules 2008.⁶⁸⁴ The tribunal is now known in England as the Mental Health Tribunal. Wales retained a separate Mental Health Review Tribunal, subject to the Mental Health Review Tribunal for Wales Rules 2008.⁶⁸⁵ The Upper Tribunal hears appeals from the First tier Tribunal and the MHRT Wales.⁶⁸⁶

In our discussion of participation in the CoP we identified a number of aspects of participation. These are equally relevant here.

1. Information about rights. In the original system established under the 1959 Act, activated by applications from patients or their nearest relatives, the first key prerequisite of participation is information about rights, a *sine qua non*.
2. The process of application should be accessible.
3. Representation and support should be available for patients to enable them to participate fully as parties in the process.
4. 'Equality of arms' in that patients should be entitled to know the case being made for their continued detention, so as to be able to put counter arguments, and should have the right to be heard.
5. The right to receive a reasoned decision, so that the person has the relevant material on which to base an appeal if the tribunal has misdirected itself in law, has taken into account an irrelevant fact or failed to take account of relevant facts.
6. Decision-makers who have been trained to facilitate effective participation.

We shall consider the Mental Health Tribunals in relation to the same issues as have been raised regarding the CoP:

- notification;
- access to a court;
- party status;
- giving evidence;

⁶⁸³ *Re VE (Mental health Patient)* (1972) 3 All ER 373, *R v Bracknell Justices ex parte Griffiths* [1976] AC 314..

⁶⁸⁴ SI 2008 No 2699.

⁶⁸⁵ SI 2008 No 2705.

⁶⁸⁶ Section 32 of the TCEA 2007 allows the Lord Chancellor by order to provide for an appeal against a decision of a scheduled tribunal to be made to the Upper Tribunal, instead of to the court to which an appeal would otherwise fall to be made, where the decision is made by the tribunal in exercising a function in relation to Wales.

- representation in proceedings;
- attending court;
- personal contact with judges;
- broader issues of accessibility and training.

Before we do so, it is important to recognize that when it was set up in 1959, the MHRT was a new court with a limited jurisdiction by comparison with the extensive jurisdiction conferred on the CoP by the MCA 2005. Its role was to consider the patient's suitability for discharge from detention or guardianship under the Mental Health Act (MHA). Entitlement to apply arose once in the initial period of detention and subsequently once in each period for which the detention or guardianship was renewed. As one roundtable participant with extensive experience in the tribunal put it, 'The Tribunal is periodic – there is always a next time. For some patients who have been detained a long time, each application forms a step in the process, for example from High Secure Hospitals, to medium secure settings and so on.'

It must also be remembered that the MHRT membership was specifically recruited for the purpose, and could be trained from scratch, whilst the CoP's jurisdiction over health and personal welfare decisions would be exercised by Family judges already experienced in the processes of the Family Court, including those relating to child protection.

The establishment of the MHRT under the Mental Health Act 1959

The Percy Commission, whose recommendations formed the basis of the Mental Health Act 1959, had recommended a body whose role would be:

To consider the patient's mental condition at the time when it considers his application, and to decide whether the type of care which has been provided by the use of compulsory powers is the most appropriate to his present needs or whether any alternative form of care might be more appropriate, or whether he could be discharged from care altogether.

This more best interests based role of considering whether the type of care being provided was most appropriate to his present needs was dropped in favour of confining the decision to considering whether or not patients should be discharged, based on their condition at the time of the hearing. The tribunal eventually created had no jurisdiction to examine the type of care the patient was receiving, or to determine upon its suitability, except in the broad sense that it could decide whether or not the patient still needed to be detained in hospital.

Introducing the second reading of the Mental Health Bill in the Commons, Derek Walker Smith, the Minister of Health stated that the tribunal was designed to fulfill two functions. It was to provide a major safeguard against improper admission under the compulsory powers, and it was to provide the major safeguard against unduly prolonged detention.⁶⁸⁷ The other major safeguards against improper admission were the professional expertise of doctors and social workers in the admission process, and the fact that the hospital managers would have to scrutinise the admission documents to ensure that they were sufficient to justify detention.

It was no part of the MHRT's function to consider the lawfulness of the original decision to detain a patient or to renew detention. The High Court retained jurisdiction over the lawfulness these decision by way of habeas corpus and judicial review. The role of the MHRT was confined to

⁶⁸⁷ 598 *Hansard* HC Debs Ser 5 Col 783, 26 January 1959.

deciding whether at the time of the hearing the criteria for detention are met. The new tribunal offered a judicial process for review, and it was to be based on interviews with the patient, his relatives, the Responsible Medical Officer (the consultant psychiatrist in charge of the patient's case), and with others responsible for his care.

Section 123 of the 1959 Act gave the tribunal a general discretion to discharge a patient, and put a duty on it to discharge if satisfied either that (a) the patient was not then suffering from mental illness, psychopathic disorder, subnormality or severe subnormality or (b) it was not necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should continue to be liable to be detained.⁶⁸⁸

From the outset the burden of proof was on the patient to satisfy the tribunal that the criteria for detention were not met, and this would not alter until the Human Rights Act 1998 came into force and the case of *R (H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)*⁶⁸⁹ where the Court of Appeal held that the positioning of the burden of proof under MHA 1983 ss 72 and 73 on the applicant to satisfy the tribunal of the absence of detainable mental disorder was incompatible with Art 5 of the ECHR .

The Mental Health Act 1959 introduced the concept of the 'informal patient', a category which included voluntary patients who had consented to admission but also what used to be called 'non-volitional' patients, those who were not capable of consenting to admission but were not resisting being in hospital. Non-volitional patients had previously been subject to an admission procedure under s 5 of the Mental Treatment Act 1930 which resembles the current procedure for compulsory admission under s 3 of the Mental Health Act 1983. Under the 1930 Act, if they did not recover their volition sufficient to consent to their placement after six months, they would then have to be judicially certified or else released.

The Mental Health Act 1959 abolished the judicial admission procedures of certification, and formal detention was now for those who resisted or objected to admission. They would be detained by a non-judicial procedure involving an application to the managers of the detaining hospital made by a social worker and supported by two medical recommendations.⁶⁹⁰ A patient detained for treatment would then be entitled to apply to the MHRT for discharge, and could make a fresh application during each period for which the detention was renewed.

The introduction of informal status took the vast majority of patients out of the regulatory system, where they would remain until the European Court ruling in *HL v United Kingdom*⁶⁹¹ required the Government to (re)introduce procedural safeguards for patients who lack capacity to consent to placement in an institution but are not resisting, and who are cared for in circumstances amounting to a deprivation of liberty.

Since eligibility depended on the patient being detained, and only 20 per cent of patients were likely to be detained, the Government officials gauging the resources required for the new tribunal were confident that the new tribunal could be adequately resourced. There was a strong sense that

⁶⁸⁸ Mental Health Act 1959, s 123.

⁶⁸⁹ [2001] 3 WLR 512

⁶⁹⁰ Mental Health Act 1959, s 26

⁶⁹¹ [2004] 40 EHRR 761

this system could work effectively because 80 per cent of patients were excluded from its scope. If the procedures were applied to all patients the system would not have been workable.

The officials estimated that by mid 1960 about 80 percent of patients formerly certified under the old procedures would have become informal, and the number of detained patients would be about 20,000.⁶⁹² They then estimated the likely percentage of these who would be likely to apply. They considered that all the 750 offender patients with restrictions on discharge would apply, but after that they expected a comparatively low uptake of rights. Using the new statutory categories of mental disorder they came up with the following guesstimates: mentally ill after admission 500 (10%); mentally ill applying on renewal 3,000 (20-25%); subnormal, severely subnormal or psychopathic disorder after admission 250 (one sixth) and on renewal 2,750 (one sixth). This gave a total of 7,250, plus an expected additional 1,000 applications by relatives.

In fact in the first thirteen months of the tribunal's existence it heard only 850 cases,⁶⁹³ and the low take up rate of the new right to a tribunal was a major issue from the outset until the debates leading to the Mental Health Act 1983. It is important to note at the outset that, in terms of workload, the Tribunal in 1960 was a very different institution to its present day counterpart. The annual number of hearings in 2015-2016 was 22,000 when Community Treatment Order cases and reviews of detention are combined. Cyril Greenland, who carried out the first research on the tribunal in the 1960s, wrote in 1970 that there were wide variations in hospitals in the use of tribunals, and pinpointed the important role of giving patients information about their rights in increasing the rates of use.⁶⁹⁴

Considerable debate about the form of the new tribunal took place between the Government and the recently formed Council on Tribunals, whose interventions were to have a powerful impact in shaping the new tribunal's procedures, set out in the Mental Health Review Tribunal Rules 1960. In October 1960 the Home Office, the Department of Health and the Lord Chancellor's Department convened a meeting of the newly appointed Regional MHRT Chairmen. Its purpose, as described in the official minute, was 'to enable chairmen of all 15 tribunals to meet each other' but also to enable departments to 'put a number of points to the chairmen.' These were set out in a document distributed at the meeting, which began by expressing the collective departmental view that the tribunal should avoid an adversarial atmosphere. The Government view was that the initial ethos of the jurisdiction was to be parental rather than adversarial - based on ideas of best interests. "It is hoped", the document began,

[T]hat neither the Tribunal nor the responsible authority will regard the responsible authority as presenting a case 'against' the patient. The aim of all concerned is to decide what is in the patient's own best interests, and the tribunal's function is to decide between differing views of where the patient's own best interests lie, within the terms of their powers and duties under s 123 of the Act.⁶⁹⁵ The function of the tribunal under s 123 of the 1959 Act was to determine whether the criteria for detention were met at the time of the hearing.

⁶⁹² The Mental Health Review Tribunal Rules 1960 SI 1960 No 1139. National Archive, Kew, File MH140/13 Mental Health Act 1959 Pts 1 and 9 Mental Health Review Tribunals Policy Questions.

⁶⁹³ Annual Report of the Council on Tribunals for 1961, Appendix B.

⁶⁹⁴ Greenland, Cyril, *Mental Health and Civil Liberties* (1970), p 46.

⁶⁹⁵ National Archive, Kew File MH140/23 Minutes of Meeting of Regional Chairmen of MHRTs held 18 October 1960.

Several tribunal chairmen expressed doubt at the induction meeting as to whether the tribunal was authorized to deal with a case where the patient raised the legality of the original order of detention as a preliminary issue. It was suggested that if the tribunal proceeded to hear the application this might prejudice the patient if at a later stage he took proceedings to question the legality of his detention. The officials answered this by pointing out that, as s 123 of the MHA 1959 indicated, the tribunal was concerned only with the state of the patient's health and the desirability of his detention at the time of the application and the legality of his original detention was not a matter for the tribunal. The tribunal's decision to hear the application could not prejudice the patient's right to question the legality of the original detention in the courts.⁶⁹⁶

This limitation on the role of the tribunal has not changed, although there has recently been some debate about whether the tribunal or some similar body should have the power to review the merits of decisions to detain.⁶⁹⁷

Establishing the process of the hearing

At their initial meeting, the Chairmen were presented with a document indicating how the departmental officials envisaged tribunal hearings would proceed, indicating that when 'the members of the tribunal have assembled they will probably wish to have a short talk among themselves on any points arising from the papers which they have received. Also they might wish to consider at this stage 'whether any material from the responsible authority's report which has been withheld under rule 6 should be disclosed to the patient or whether a formal hearing should be allowed if the patient has requested one.' This initial meeting would also enable the tribunal 'to decide how best to handle the patient as they will know whether he is inclined to be garrulous, resentful or withdrawn.'⁶⁹⁸ Gathering the new members together as 'raw recruits' enabled the departmental officials to shape the modus operandi of the new tribunal. This contrasts with the introduction of the CoP, which was staffed by experienced Family Court judges who were already accustomed to exercising a 'parental' jurisdiction over children, making decisions for them in their best interests. There were obvious parallels with the new MCA jurisdiction to determine the capacity of adults to make specific decisions, and, if they lacked capacity, to make whatever order was in their best interests.

To the present day the tribunal hearings are held in the hospitals where patients are detained, quite often in hospital boardrooms. Since the advent of Community Treatment Orders, tribunals are now being held also in community settings. As is discussed further below, the process has evolved over the years. Hearings usually begin with the medical member of the tribunal reporting to the tribunal on her or his meeting with the patient prior to the hearing. Today, hearings tend to

⁶⁹⁶ Ibid, para 20.

⁶⁹⁷ Department of Health, *No Voice Unheard, No Right Ignored - A consultation for people with Learning Disabilities, Autism, and Mental Health Conditions* (Cm 9007 2015); Department of Health, *Government Response to No Voice Unheard, No Right Ignored - A consultation for people with Learning Disabilities, Autism, and Mental Health Conditions* (Cm 9142 2015), para 99 where the Government indicates its intention to amend the MHA 1983 to enable patients and families to challenge whether their wishes and feelings were appropriately considered when making applications for detention.

⁶⁹⁸ National Archive, Kew File MH140/23 Minutes of Meeting of Regional Chairmen of MHRTs held 18 October 1960 Explanatory Memorandum on the MHRT Rules, paras 28-48.

follow a basic framework described by one roundtable participant with long experience in tribunal work as follows:

The judge normally introduces the panel, reminds the parties of the independence of the panel, and suggests an order for the evidence. This will usually be: the responsible clinician (RC) first, then whoever is presenting nursing evidence, then the social circumstances evidence. The patient will typically give her or his evidence last, but is usually offered a choice. The patient is sometimes encouraged to go first, especially if either the panel or the patient's representative considers that there is a risk the patient might find the hearing distressing. Patients are reminded that they can take a break at any time and that they can address the tribunal alone if they wish.

The panel takes evidence from the professional witnesses who are then cross examined by or on behalf of the patient. No evidence is sworn or on affirmation. The patient may or may not wish to say anything but if he or she does then typically this will be in the form of a dialogue with the representative, followed by questions from the panel. This is followed by submissions and then the parties leave while the tribunal deliberates. In most cases the patient will return to hear the decision.

The Tribunal may give its decision orally at the hearing or it may reserve its decision. The rules outline the requirement to give written notice of their decision and their reasons to each party in any case where the Tribunal has made a 'decision which finally disposes of all issues' (England) or in Wales has made a 'final determination'. 'Decision which disposes of all the issues' and 'final determination' each include decisions with recommendations and deferred directions for conditional discharge, but do not include decisions about permission to appeal.

Subject to the rules on withholding information likely to cause serious harm, the Tribunal must, as soon as reasonably practicable (and in any event within three *working* days after the hearing in s 2 cases, and in all other cases within seven days) provide a decision notice stating the tribunal's decision, and stating written reasons for the decision. In England the decision notice must also contain notification of any right of appeal against the decision the manner of exercise of the appeal right, and the time limits within which an appeal may be lodged. The MHRT Wales Rules 2008 do not contain this last requirement to notify about rights of appeal, but the overriding objective would appear to require it.⁶⁹⁹

These processes by which the tribunal operates today have their origins in the reforms in the tribunals' powers and procedures introduced with the Mental Health Act 1983. These had a dramatic effect on the functioning and the case load of the tribunal.

The reforms to the Tribunal accompanying the Mental Health Act 1983

There were two parallel processes of reform in the late 1970s. The first involved reform of primary mental health legislation. An Inter-Departmental Committee consisting of representatives of the DHSS (Department of Health and Social Security), the Home Office, the Lord Chancellor's Department and the Welsh Office, produced a discussion document in 1976, *A Review of the*

⁶⁹⁹ Mental Health Review Tribunal Rules 1983, SI 1983/942, r 23(3) ((First Tier Tribunal HESC Rules 2008, r 41(2); MHRT Wales Rules 2008 r 28(2). First Tier Tribunal HESC Rules 2008, r 41(2)(c).

Mental Health Act 1959.⁷⁰⁰ This was followed by a White Paper in 1978.⁷⁰¹ The Government already had the benefit of the extensive recommendations on mentally disordered offenders of the Butler Committee which had reported in 1975, and had referred to the need to strengthen the rights and safeguard the liberties of mentally disordered people whilst retaining a proper regard for the rights of the general public and staff.⁷⁰²

The Inter-Departmental Committee considered proposals for reform of the tribunal. Foremost among these was MIND's proposal that automatic periodic reviews should be undertaken in cases where patients had not applied to the tribunal within specified periods. The Committee accepted this proposal, as long as the period between hearings was sufficiently long. The White Paper later proposed automatic reviews once after the first six months and thereafter once in every three years. Despite concerns from the Royal College of Psychiatrists at the resource implications⁷⁰³, provision for automatic reviews on this basis was introduced in the Mental Health Act 1983.⁷⁰⁴ MIND also proposed that the frequency of entitlement to a tribunal should effectively be doubled, with patients entitled to apply once within the first six months and once within every subsequent twelve month period. This too was eventually implemented in s 66 of the MHA 1983.

Changes to the Tribunal's Powers

The scope of the tribunal's powers was also a major issue of debate, and many saw the 'all or nothing' options available to the tribunal, discharge or not discharge, as one of the major problems. The Royal College of Psychiatrists and the British Association of Social Workers commented on the tribunal's powers. The Review Document states that 'Some' (without specifying who) 'had suggested that tribunals should not have the power of discharge against the RMO's advice.' This was apparently in the light of cases where discharged patients had committed serious criminal offences. The Committee rejected this proposal on the grounds that the numbers involved were small, and that to remove the power of discharge would deny the 'prime function of the tribunal' namely to provide an independent assessment of the patient's liability to detention.⁷⁰⁵ Having scotched the idea that the tribunal's power of discharge should be removed, which would have breached Article 5(4) of the European Convention on Human Rights, the Committee went on to consider what changes might be made to the tribunal's existing powers.

The 1983 Act transformed the Mental Health Review Tribunals' powers by introducing more possibilities to ensure that discharge was planned with proper after-care support, whilst ensuring that the tribunal complied with the requirements of Article 5(4) as set out in *X v United Kingdom*⁷⁰⁶ in that it would have the power to direct discharge of all detained patients except for those transferred from prison and still subject to sentence. In addition the Act provided increased access to tribunals for patients detained under the 28 day assessment power (again necessary to comply

⁷⁰⁰ DHSS, *A Review of the Mental Health Act 1959* HMSO 1976.

⁷⁰¹ *A Review of the Mental Health Act 1959* HMSO Cmnd 7320 1978.

⁷⁰² *Report of the Committee on Mentally Abnormal Offenders*. 1975 Cmnd 6244 HMSO 1975 (The Butler Committee Report).

⁷⁰³ E Moonman, 963 HC Debs Ser. 5 col 679.

⁷⁰⁴ Mental Health Act 1983, s 68.

⁷⁰⁵ DHSS, *A Review of the Mental Health Act 1959* HMSO 1976, para 8.12.

⁷⁰⁶ [1981] 4 ECHR 184

with the ruling in *X v United Kingdom*), and automatic references for those who had not themselves applied within specified periods, as would be required over 20 years later by the Strasbourg Court in *HL v United Kingdom*⁷⁰⁷.

Changing the Tribunal Rules

The second strand of the reform process of the late 1970s took place in another Inter-Departmental Committee specifically set up to look at the tribunal and possible changes to the Tribunal Rules. This Committee was chaired by a Principal Secretary at the Lord Chancellor's Department, and comprising officials from the Home Office and the Department of Health and Social Security, two tribunal chairmen, Professor Sir John Wood from the Yorkshire Region and Mr James Cooke, a solicitor chair, with strong interest in reforming the tribunal, and Mr Locke, a tribunal clerk. The Council on Tribunals was also represented. This Committee issued a discussion document in 1978. This Committee's recommendations would play a crucial role in creating a framework whereby patients acquired more due process rights, and hence a greater opportunity to participate more effectively in the hearing.

The Committee proceeded on the basis that some degree of uniformity of procedure was necessary in order to counter the tendency, which had developed over the previous 18 years for tribunals to develop largely in isolation, 'adopting different procedures within the framework provided by the rules.'⁷⁰⁸ MIND argued that 'Uniformity of procedure is essential in preparing a case. The parties must be able to predict the pattern that the hearing will follow so that evidence can be presented in a coherent and orderly fashion.'⁷⁰⁹ MIND supported the drive for conformity of procedures across the tribunal regions primarily because it facilitated the task of the representative, and enhanced the ability of the patient to play a more effective part in the proceedings.

In order to achieve uniformity, the Committee recommended abolishing the distinction between formal and informal hearings on the grounds that it was not clear to the tribunal how these hearings should differ in practice and that 'Tribunals have tended to disregard the distinction and to adopt the pattern of hearing which seems to them to best meet the need.'⁷¹⁰ However they remained undecided about what should be put in its place.

The Committee canvassed two options. The first they called the 'Review Body Approach', based on the conception of the tribunal's role as scrutineer of the justification for detention and examiner of the 'opinions and actions of a wide range of persons'⁷¹¹ If this role were to be accepted the Committee envisaged the tribunal discharging its function with 'a wide and unfettered discretion' and it would have overall responsibility for ensuring that it has all the evidence necessary, 'and flexibility in arranging its procedure which should be provided only in skeleton form in the rules.'⁷¹² The proponents of this 'less structured' approach saw no need for many changes to be made to the rules provided that 'Within the broad framework it provides, tribunals are given the flexibility which

⁷⁰⁷ [2004] 40 EHRR

⁷⁰⁸ Report of the Inter-Departmental Committee on Mental Health Review Tribunal Procedures DHSS 1978 para 1.2.

⁷⁰⁹ Gostin L O and Rassaby E *Mental Health Review Tribunal Procedures* (1978) MIND, 18.

⁷¹⁰ Report of the Inter-Departmental Committee on Mental Health Review Tribunal Procedures DHSS 1978 para 1.3.

⁷¹¹ *Ibid*, para 1.4.

⁷¹² *Ibid*, para 1.5.

they require whilst ensuring that all present are given adequate opportunity to give evidence and question that of others.⁷¹³

The second option was based on the idea of the tribunal as an 'independent body carrying out a thorough inquiry' which would provide opportunities for the patient to challenge witnesses and be governed by a 'structured system of procedure prescribed by rules.'⁷¹⁴ However, the tribunal would retain discretion to modify the procedure in the light of the patient's state of mental health or for other good reasons.⁷¹⁵ This approach accords more closely with the case law of the European Court of Human Rights on reviewing the lawfulness of detention (discussed at pp above).

In order to maintain the independent body model, again the existing framework could be maintained, but it would be 'strengthened and elaborated' in order to spell out the ability of the parties to adduce their own evidence and challenge that of others.

The discussion document indicated that the following would be provided for specifically. First, the Tribunal president would have to explain the procedure to be followed to all parties. Second, the applicant, the RMO and the responsible authority would be entitled to call witnesses and give evidence, and all witnesses would be available for questioning by or on behalf of interested parties, with the applicant having the final right of reply. Third, unless the tribunal exercised its power to exclude the applicant or decided to conduct a private interview, both the patient and the RMO should normally be expected to be present throughout the hearing. Fourth, where there was any material challenge to a social circumstances report, the social worker would be examined by the tribunal.⁷¹⁶ MIND emphasized that 'definitive procedures' were required if any substantial change was to occur. They felt that it should be regarded as the norm that the patient, the RMO and the all the witnesses should be present throughout, and that this should only be departed from in clearly specified circumstances, and that the reasons for excluding the patient would be disclosed to the representative.⁷¹⁷ These recommendations were reflected in the Mental Health Review Tribunal Rules 1983

The Committee proposed five key principles in steering the tribunal towards 'the independent body carrying out a thorough inquiry' model of decision-making. Each of these has a bearing on participation.

1. All cases should be subject to the same procedure
2. Patients should not have to complete a complicated form to apply to the tribunal. The discussion paper proposed that an application should be accepted if made in writing by the applicant or on his behalf though there would be a simplified form not laid down in rules, the use of which would be optional. The minute taker noted in capitals that there had been 'AGREEMENT THAT IT SHOULD NOT BE OBLIGATORY FOR PATIENTS TO USE THE STANDARD FORM'.
3. Patients' representatives, where legally qualified or approved by the tribunal should have the right to see and hear all evidence put to the tribunal

⁷¹³ Ibid, para 2.68.

⁷¹⁴ Ibid, para 1.10.

⁷¹⁵ Ibid

⁷¹⁶ Ibid, para 2.70.

⁷¹⁷ Gostin L O and Rassaby E Mental Health Review Tribunal Procedures (1978) MIND, 18.

4. Hearings should continue to be normally held in private but tribunals should give reasons to refuse requests for a public hearing
5. Tribunals should continue to be able to exclude anyone (except the representative) from the hearing but should do so exceptionally and only for good reason.

The 1983 Act and the reforms accompanying it which extended non-means-tested legal aid to representation of patients before the tribunal set the pattern by which the tribunal continues to operate today – a pattern that the Interdepartmental Committee would have recognised as the ‘independent body conducting a thorough review approach.’

Non-judicial treatment safeguards under the Mental Health Act 1983

The 1983 Act also introduced important reforms on consent to treatment. We consider these briefly in this section as they represent an important example of a non-judicial procedural safeguard that might potentially comply with Article 8 ECHR in some circumstances and could help offer an intermediate safeguard under the MCA between the informality of the general defence and a requirement for judicial sanction by the CoP. As we discussed earlier in Section 3.1, a second opinion system was suggested by the Law Commission in 1995 as providing an independent check where the person could be seen and interviewed by a second opinion doctor, but a court hearing would not be necessary.

Even though patients detained under the MHA 1983 only become eligible for a second opinion for psychotropic medicine after three months⁷¹⁸, nevertheless they have an entitlement to a second opinion for medicine or ECT given without consent. Statistics on the operation of second opinions for medicine and ECT are set out in Appendix D. No equivalent system of safeguards exists for people who are deprived of their liberty under the Mental Capacity Act 2005. This is a discrimination in that each is detained, each is having the same treatment, given without consent, yet one has the opportunity of an independent second opinion to verify that the treatment is appropriate, the other does not. One has the sort of independent safeguard which might satisfy the requirements of article 8 in relation to physical and psychological integrity where a treatment is given against a person’s will, as set out in *X v Finland*.⁷¹⁹ *The other does not.*

The reforms accompanying the Mental Health Act 2007

The Mental Health Act 2007 amended the Mental Health Act 1983. At the same time the MHRT was radically restructured in 2007, one of the key features being a divergence in the arrangements between England and Wales. The Tribunals Courts and Enforcement Act (TCEA) 2007 created two new tribunals in England: the First Tier Tribunal and the Upper Tribunal. The TCEA provides for the establishment of Chambers within the First Tier tribunal and the jurisdiction of the MHRT in England was transferred by the Transfer of Tribunal Functions Order 2008 to the Health, Education and Social Care Chamber of the tribunal governed by the First-tier Tribunal (Health Education and Social Care Chamber) Rules 2008.⁷²⁰ The tribunal is now known in England as the Mental Health Tribunal. Wales retained a separate Mental Health Review Tribunal, subject to the Mental Health

⁷¹⁸ MHA 1983, s 58.

⁷¹⁹ [2012] ECHR 1371, paras 220-221.

⁷²⁰ SI 2008 No 2699.

Review Tribunal for Wales Rules 2008.⁷²¹ The Upper Tribunal hears appeals from the First tier Tribunal and the MHRT Wales.⁷²² The Mental Health Tribunal and the MHRT are each subject to an overriding objective. Each now has extensive powers of case management in the form of wide powers to issue directions.

The caseload has increased dramatically as a result of the various reforms outlined above. In the period immediately prior to the 1983 Act very little had changed since 1959 in terms of caseload. The Council on Tribunals Annual Reports show that tribunals disposed of 709 cases in 1980, 708 in 1981 and 858 in 1982.

With the advent under the 1983 Act of entitlement to MHRT hearings for patients admitted for 28 days for assessment, the introduction of a power to direct discharge of restricted patients, and the halving of the duration of periods of detention of patients admitted for treatment or under hospital orders, there was a dramatic increase in tribunal case load. The increase was further fuelled by provision for the automatic referral of the cases of patients who have not made an application within the first six months of detention, and also of patients whose detention is renewed and whose cases have not been considered by a MHRT within the last three years. In the five years following the 1983 Act the caseload of the tribunal increased steadily, as Table 1 shows.

Table 1 Applications received by the Tribunal and cases decided, 1983 - 1988 (Source: Annual Reports of the Council on Tribunals, HMSO)

Year	1983	1984	1985	1986	1987	1988
Applications received	3,868	3,554	4,305	5,046	5,287	5,834
Cases decided	2,009	2,117	2,516	2,920	3,101	3,327

The first Annual Report of the Council on Tribunals following the coming into force of the 1983 Act noted the substantial additional workload created for MHRT's, and that one result was that patients had to wait longer for a hearing. In particular the Council noted that there had been considerable delays with the handling of the cases of patients subject to restrictions. The causes of these delays were attributed in part to difficulties in securing the services of judges with Crown Court experience to preside over MHRT's convened to hear these cases, in part to delays by advocates in the preparation of the patient's case, and in part to failure by doctors in special hospitals to observe the three week time limit for providing medical reports for the MHRT.

Delays between application and hearing were a regular feature of the Council's Reports. In 1986 the Council reported a case of delay referred to them by the Mental Health Act Commission where, due to difficulties in securing the services of a judge president, a MHRT hearing originally listed for November 1985 did not take place until May 1986 over a year after the patient's original

⁷²¹ SI 2008 No 2705.

⁷²² Section 32 of the TCEA 2007 allows the Lord Chancellor by order to provide for an appeal against a decision of a scheduled tribunal to be made to the Upper Tribunal, instead of to the court to which an appeal would otherwise fall to be made, where the decision is made by the tribunal in exercising a function in relation to Wales.

application. In 1988, the Council Annual Report contains a trenchant reference to the problem and expresses its firm opinion that this was largely due to understaffing in the MHRT offices. The Council on Tribunals was abolished and replaced by the Administrative Justice and Tribunals Council, which has itself since been abolished.

Statistics on the caseload of the Mental Health Tribunals are now found in the Reports of the Care Quality Commission and Health inspectorate Wales. The CQC figures for detained patients since 2000 are set out in Table 2 on the next page. Figures are also given for Community Treatment Order cases in England (Table 3).

There are several striking features of the figures in Tables 1 - 3. The discharge rate for detained patients remains as it has done throughout the period since 1959 at around 10 -12%. The discharge rate for Community Treatment Order patients is even lower, at around 4-5%. In a very high number of detained patient cases – not far off one third - the person is discharged by their responsible clinician prior to the tribunal hearing. High numbers of cases are withdrawn by the patient, so that only about 60% of cases actually go to a hearing. Even so, given this very high level of caseload, the tribunal struggles to meet requirements for speedy review. One of the strategies being suggested to address this is the removal of the medical and lay members from the three person tribunal panel and transferring the jurisdiction to a single judge, with the power to bring in medical expertise if necessary and appropriate.

Table 2 Applications, hearings and discharges before Mental Health tribunals (Source: CQC)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2013-2014	2014-2015	2015
Total Applications						16,155	15,367	17,648	15,605	23,959	23,533	25,074	29,605	30,320	27,380	28,892	28,892
Total hearings												16,048	19,320	17,130	18,751	17,635	17,635
Total Discharge	1,336	1,351	1,362	1,897	1,351	1,587	1,361	1,402	967	1,458	1,374	1,590		1,457	1,676	1,773	1,773
No Discharge	10,199	10,229	8,637	9,906	10,546	7,935	7,417	7,158	6,328	10,664	9,982	10,498		10,991	12,383	12,422	12,422
%age discharge to hearings	12%	12%	14%	16%	11%	17%	16%	16%	13%	12%	12%	10%		8.5%	9%	10%	10%
Withdrawn applications						1,843	1,960	2,744	3,799	3,779		4,431		4,392	4,971	5,560	5,560
Discharged by clinician prior to hearing						4,790	4,629	6,344	5,862	8,056	7,631	7,559		5188	7,990	7,862	7,862

Table 3 Appeals to MHT England against Community Treatment Orders (Source: CQC)

Year	2010-2011	2011-2012	2012-2013	2014-2015	2015-2016
Applications	3,284	4,317	4,211	4,349	4,317
Withdrawn Applications	0	713	814	834	873
Full hearings with patient present	2,457	3,272	2,801	3,629	3,942
Paper hearings without patient present	0	0	368	486	521
Discharges by Tribunal	112	161	132	165	132
No discharge	2,048	3,196	3,040	3,238	3,196

The *Transforming our Justice System* proposals

The 2016 Ministry of Justice Consultation Document *Transforming our justice System: Summary of Reforms and Consultation*⁷²³ on 'simplifying panel composition' had the potential to affect the Mental Health Tribunal in England and the Mental Health Review Tribunal in Wales. The document advocated a 'balanced, tailored approach ... making sure the panels that make decisions in tribunals are designed to best suit the circumstances of the case. Most tribunals currently reflect historic arrangements that may be out of date and do not tailor the expertise of the panel according to the case.'⁷²⁴

The initial consultation proposed that a single judge would exercise the tribunal's jurisdiction instead of the current three person panel including a judge, a psychiatrist and a lay member. The composition of the original Mental Health Review Tribunal was intended to reflect the philosophy of the Mental Health Act 1959 that the issue of detention on grounds of mental disorder was not simply a legal issue or a medical issue but also a social issue. A balance of all perspectives was to be achieved. Detention was on application to the managers of the detaining hospital by a social worker supported by medical recommendations. The tribunal would have on its panel a medical member to form an opinion on the state of mind of the detained person and to report her or his view to the tribunal. The lay members (or specialist category member as some preferred to be called), were initially drawn from those with experience of health and social services for mental disorder. In recent years the importance of recognizing the vital contribution to decision-making of those who are 'experts by experience', has come to the fore, with the appointment of people with experience of receiving psychiatric services being appointed as lay members.

The belief at the time was that the three person panel was not only there to provide expertise, but to ensure that each of these perspectives on mental disorder the medical, the social and the legal, were adequately reflected. Given that the decision to discharge a patient detained under the Mental Health Act involves a risk that a patient may self harm or harm others, the fact that the decision is taken by a three person panel provides a greater security for those making the decision than if the decision fell on one person's shoulders. That security comes from having ensured that all the issues are fully deliberated and relevant perspectives are brought to bear. By placing the onus of responsibility on one person, an incentive may be created to err on the side of caution and decide not to discharge. As we have seen, the discharge rate by the tribunal never exceeds 12% of cases which go to a hearing.

Mental Health Tribunals perform a key role in determining the need for continued detention, and whether there is objective medical evidence of a true mental disorder of a kind or degree warranting confinement, as required by Article 5 ECHR. A tribunal without a medical member also risked breaching the requirements for psychiatric opinion independent of the detaining hospital⁷²⁵ as the only medical expertise available to the tribunal is likely to be contained in the responsible clinician's report. It is rare these days for a patient to be able to get legal aid for an independent psychiatrist's report, so the medical member's input is likely to be essential in providing a psychiatric opinion independent of the hospital. A single judge may not have the confidence of professional expertise to offer a contrary opinion to that of the detaining psychiatrist. There is a

⁷²³ *Transforming our justice system*, consultation, n 524, paras 5.1 and para 7.3

⁷²⁴ *Ibid*, at paras 5.1 and para 7.3

⁷²⁵ *X v Finland* (App no 34806/04) [2012] ECHR 1371

need at the bare minimum to provide medical expertise independent of the hospital in connection with tribunal proceedings. The detained patient will be unlikely to obtain legal funding to commission a psychiatric report.

The proposed change, which would have completely altered the basis of the tribunal system established by the Franks Committee in 1957, caused considerable alarm among consultation respondents and the government appears to have backed down.⁷²⁶ Whilst denying that the proposals 'would result in decisions being made without the appropriate expertise being drawn on where required, or users being left without the support that they need', they concluded 'We therefore do not intend to proceed with the proposal to introduce a single member panel as the default position in the unified tribunals'.⁷²⁷ There will, however, be the potential for the Tribunal chair to decide that the presence of expert members is not required. The presence of the medical and lay members on the tribunal panel appears to have been protected; for now at least.

⁷²⁶ *Transforming our justice system*, government's consultation response, n 524,

⁷²⁷ *Ibid*, para 78

4.2 PARTICIPATION IN MENTAL HEALTH TRIBUNALS

Having outlined the background to the tribunals' current powers and procedures in England and Wales, the changes in the workload of the tribunal, and some of the proposals to address these, we now turn to the issue of participation in relation to the same subject areas listed above in relation to the CoP, and in the light of the European Court of Human Rights threefold rationale of the right to participate and the rule of personal presence. The first element is the overarching dignity principle that as the subject of proceedings the person should be entitled to be present when matters affecting their fundamental rights are being decided. The second rationale is that as the 'object of the proceedings' their participation is necessary 'to allow the judge to form his personal opinion about the applicant's mental capacity'⁷²⁸ Finally participation is necessary to enable a person to present her or his case⁷²⁹ and to refute expert evidence or arguments recommending measures s/he opposes.⁷³⁰

4.3 NOTIFICATION AND INFORMATION

Information about the right to apply was a *sine qua non* of participation in proceedings which could only be begun by application from the patient or the nearest relative.⁷³¹ Effective processes for automatic referrals to the tribunal were not introduced until 1983. The whole question of how patients were to be given information about their right to apply to the tribunal was fraught with controversy from the very beginnings of the tribunal in 1960. Throughout the period 1959-1983 the application rate was comparatively low - between 10 and 15 per cent of the eligible population of detained patients actually applied to the tribunal. A significant cause of the very low uptake of rights was undoubtedly that there was no statutory duty to give patients information about their right to apply to the tribunal.⁷³²

The MHA 1959 gave the Secretary of State for Health the power to make regulations requiring hospital managers to provide patients and relatives with statements of their rights and powers under the Act.⁷³³ However, knowing the issue to be controversial, the Secretary of State took the

⁷²⁸ *Shtukurov v Russia* (App no 44009/05) [2008] ECHR 223, para 72

⁷²⁹ *Ibid*, para. 72-3

⁷³⁰ *Salontaji-Drobnjak v Serbia* (App no 36500/05) [2009] ECHR 1526, para.127

⁷³¹ Offenders subject to Home Office restrictions (under ss 60 and 65 of the MHA 1959) did not have a right to apply but had the right to request that their case be referred to the tribunal by the Home Secretary. The Home Secretary always complied with requests.

⁷³² There were other reasons for the low uptake. Larry Gostin noted in *A Human Condition Volume 1 The Mental Health Act from 1959-1975 Observations, Analysis and Proposals for Reform: A MIND Special Report 1975*, 71 'It has been alleged that some RMOs (Responsible Medical Officer The psychiatrist in charge of treatment of a detained patient) object to a MHRT on the ground that it presents a challenge to their clinical judgment. Some RMOs will discharge a patient rather than defend their clinical judgment before an appeals bpd; others will promise the patient imminent release if he does not make an application or withdraws an exiting one. If the patient is not discharged, he will have lost his right to appeal to the tribunal until his order is renewed. The patient may not be aware of this consequence. Finally there are RMOs who directly discourage the application by means of the express or implied threat of punitive action, such as a longer hospital stay, if the patient continues with the application. These doctors may rationalize the decision by saying that the patient, if he applies to the tribunal, has not accepted his treatment programme and, therefore, must remain in hospital longer for the treatment to be effective.' These allegations were based on complaints received by MIND from patients in Special Hospitals.

⁷³³ Mental Health Act 1959, s 56(2)(c)

decision early on not to use this power as he considered it appropriate to rely on administrative arrangements for this purpose and not to make regulations unless experience showed them to be necessary.⁷³⁴

Leaflets explaining rights were prepared by the Department of Health and distributed to hospitals, and the Minister's view that he wished hospitals and mental nursing homes to distribute these to patients and their relatives was communicated by Ministerial Circular in 1960.⁷³⁵ It soon became apparent that this system was unreliable and the Department of Health suggested that hospitals should post notices on wards informing patients of their rights. This met with considerable opposition, a typical response being that of Newcastle Regional Health Board, whose group clerks considered

any possible benefit which might be derived from displaying of a notice for the relatively few patients who are compulsorily detained would not offset the considerable disadvantages of constantly reminding the far greater number of voluntary or informal patients of the custodial aspect of the hospital. The general feeling appears to be that the displaying of such a notice would be a retrograde step reminiscent of the old 'lunatic asylum' days when it was the custom to display a variety of notices relating to the rights of patients in writing to the Board of Control.⁷³⁶

In the light of this general reluctance to inform patients of their rights, in case it would upset their fellow patients who were informal and undermine the ethos of the new legislation, it is scarcely surprising that the uptake of tribunal rights was around 12 per cent.

Cyril Greenland conducted a study in 1967-68 of four London Tribunal Regions showing that just over 10 per cent of patients who were eligible to apply actually did so.⁷³⁷ Larry Gostin and MIND replicated the survey in the mid 1970s for the whole of England and found that 12 per cent of those eligible to apply actually did so.⁷³⁸ This was considerably less than the Government estimates when resourcing the tribunal where they thought that over one third of detained patients would apply – 7,500 out of a projected 20,000. Greenland found that from the available data there were:

wide variations in hospitals in the use of tribunals. This was particularly to be observed in the subnormality⁷³⁹ hospitals ... This is not to say that the mentally handicapped do not wish to exercise their rights. When informed of their rights and encouraged to apply for tribunals 10% of the detained patients in one subnormality hospital, including severely subnormal persons, made applications.⁷⁴⁰

⁷³⁴ Gostin, n 717, p 70.

⁷³⁵ HM(60)69

⁷³⁶ National Archive, Kew, File MH140/13 Mental Health Act 1959 Pts 1 and 9 Mental Health Review Tribunals Policy Questions.

⁷³⁷ Greenland, Cyril, *Mental Health and Civil Liberties* (1970), p 34.

⁷³⁸ Gostin, L. O., *A Human Condition Part One* (1975) MIND London

⁷³⁹ 'Subnormality' and 'Severe subnormality' were the terms used by the MHA 1959.

⁷⁴⁰ Greenland, Cyril, *Mental Health and Civil Liberties* (1970), p 46.

Greenland's research highlighted the need for effective support to enable people to exercise their rights to challenge detention.

Lobbying by MIND and the NCCL, and the increasing awareness of the Government of the need to comply with the rulings of the European Court of Human Rights in *Winterwerp v the Netherlands*⁷⁴¹ and *X v United Kingdom*⁷⁴² led to the introduction under the MHA 1983 of statutory duties on hospital managers not only to give patients information about their rights (and take all practicable steps to ensure that they understood that information), but also to refer cases to the tribunal of patients who had not themselves made an application within the first six months of detention or in any subsequent three year period.⁷⁴³ These provisions recognized that patients whose detention might not be warranted were not applying for discharge, possibly because they did not know they had the right to do so, and possibly because of the effects of their illness or their medication, or perhaps because they lacked mental capacity to make an application.

Participation is now a strong principle in mental health legislation. Sections 130A-L of the MHA 1983, introduced by the Mental Health Act 2007, confer duties on local authorities to provide Independent Mental Health Advocates (IMHAs) for patients subject to detention or community compulsion. The help to be given by IMHAs is to include (a) help in obtaining information about and understanding any rights which may be exercised under this Act by or in relation to him; and (b) help (by way of representation or otherwise) in exercising those rights.

The Care Quality Commission has the task, formerly discharged by the Mental Health Act Commission of monitoring the MHA 1983. The monitoring process entails ensuring that the principles in the Mental Health Act Code of Practice are adhered to. In their 2011/2012 report the CQC included a chapter headed Participation and Respect, where it commented that Government mental health strategy enshrines the principle of 'no decision about me without me' and promotes patient involvement at an individual and collective level.⁷⁴⁴

The 2012/2013 Report emphasised that detaining authorities should ensure that patients who may have difficulty in exercising their legal right to appeal are supported to do so and have timely access to Independent Mental Health Advocacy services. Consideration may also be given to requesting the Secretary of State to exercise their referral powers for any patient who lacks capacity to initiate their legal appeal.⁷⁴⁵

The CQC devotes considerable energy to ensuring that patients have access to IMHAs. No equivalent monitoring exists in relation to advocacy provision under the MCA 2005.

⁷⁴¹ [1979] 2 EHRR 387.

⁷⁴² [2001] 4 EHRR 144.

⁷⁴³ Section 68 of the Mental Health Act 1983 introduced a duty on the hospital managers to refer the case to a tribunal of a patient who had not appealed within specified periods. The Secretary of State was given a power and a more limited duty to refer under s 67. Section 132 imposes a duty on the hospital managers to take such steps as are practicable to ensure that the patient understands – (a) under what provisions of the act he is for the time being detained, and the effect of that provision; and (b) what rights of applying to a tribunal are available to him in respect of his detention under that provision.

⁷⁴⁴ Care Quality Commission, Monitoring the Mental Health Act 1983 2011/2012, p 19.

⁷⁴⁵ Ibid, p 25

4.4 ACCESS

Given that applicants were persons believed to be suffering from mental disorder, there were initially considerable formalities surrounding the process of application under the 1959 Act. Application to the tribunal had to be on a form set out in the First Schedule to the Tribunal Rules. Rule 3 put a duty on the responsible authority and the tribunal to supply the appropriate form of application to an applicant on request. If a patient wrote direct to the tribunal, purportedly applying without using the statutory form, rather than supply them with an application form. Regional Chairmen were given the following standard form letter to use in their reply to the patient:

Dear Sir,

Thank you for your letter in which you ask whether you can apply to the Mental Health Review Tribunal.

It is not clear from the information in your letter whether you have rights to apply or not. If you have rights to apply, you should have received from the hospital a leaflet explaining what your rights are. If you have not received a leaflet, it may mean that at present at least you are not entitled to apply to the tribunal. If you are in any doubt about the position you are advised to consult the staff of the hospital.

The hospital are in the best position to advise you because they will have particulars of the authority for your detention. But if you care to supply fuller particulars, the Tribunal staff will give you any help they can, or if you wish you can fill in the enclosed form and the tribunal will then consider formally your right to make an application.⁷⁴⁶

It is not difficult to imagine the spirit-dampening effect of such a letter on the addressee. The delays occasioned by this approach would nowadays be viewed as inimical to the right under Article 5(4) of the ECHR to speedy review of the lawfulness of detention.

The application form was set out in the first schedule to the Rules. It required the patient to give name and address and name and address of the detaining hospital. The applicant could give reasons for the application, but was not required to do so. There were two types of hearing, formal and informal, and if the patient wanted a formal hearing this had to be stated on the form.

There is no longer a statutory form, but both the English and Welsh tribunals provide forms, available on line, whose use is encouraged as they help to ensure that the necessary information is provided.⁷⁴⁷ The simplification of the application process was a key achievement of the 1983 Reforms. We have already discussed at the complexities of the forms used to initiate proceedings in the CoP, and how these represent a significant barrier to participation.

Tribunals usually take place in hospitals, either the hospital where the patient is detained, or the responsible hospital where the patient is subject to a Community Treatment Order.

⁷⁴⁶ National Archive, Kew File MH140/23 Meeting of Regional Chairmen of MHRTs held 18 October 1960.

⁷⁴⁷ For a full discussion of the current application process, see Fennell, P., Letts, P. and Wilson, J. *Mental Health Tribunals, Law, Policy, and Practice* The Law Society London 2014, 169-170.

4.5 PARTY STATUS

The MHRT Rules 1960 did not mention parties, but gave rights to the applicant, the responsible authority, and any person to whom notice of the application had been given, to be represented by any person authorized in that behalf as long as the representative was not liable to be detained or subject to guardianship under the Act or a patient in the same hospital.⁷⁴⁸ The MHRT Rules 1983 introduced a definition of party to mean ‘the applicant, the patient, the responsible authority, any other person to whom a notice of the proceedings is sent (as an interested party) or who is added as a party by direction of the tribunal.’⁷⁴⁹ Parties were entitled to representation under r 10 of the 1983 Rules. Parties had a right to receive the decision and written reasons within seven days of the decision.⁷⁵⁰

Parties are defined under the current 2008 Rules for England and for Wales as meaning the patient, the Secretary of State, the responsible authority, and any other person who makes an application.⁷⁵¹ The respective Rules each set out an overriding objective for their respective tribunals. They must deal with cases fairly, justly, efficiently and expeditiously.⁷⁵² The tribunals must seek to give effect to the overriding objective when they:

- a) exercise any power under the Rules; or
- b) interpret any rule.⁷⁵³

In England the rules then specify that dealing with a case in accordance with the overriding objective includes

- a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties
- b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- d) using any special expertise of the Tribunal effectively; and
- e) avoiding delay, so far as compatible with proper consideration of the issues.⁷⁵⁴

In Wales, para (a) above is omitted. In England, parties are under an obligation to (a) help the tribunal to further the overriding objective; and (b) co-operate with the tribunal generally.⁷⁵⁵ This obligation does not appear in the Welsh Rules as it was felt that placing such an obligation on a detained patient to co-operate

⁷⁴⁸ Mental Health Review Tribunal Rules 1960 SI 1960 No 1139, r 10(1).

⁷⁴⁹ Mental Health Review Tribunal Rules 1983, SI 1983 No 944, r 2.

⁷⁵⁰ *Ibid*, r 24.

⁷⁵¹ Tribunal Procedure (First-tier Tribunal) Health Education and Social Care Chamber Rules 2008 SI 2008 No 2699, r 1 (The HESC Rules), Mental Health Review Tribunal for Wales Rules SI 2008 No 2705, r 2 (The MHRT Wales Rules).

⁷⁵² HESC Rules, r 2(1), MHRT Wales Rules, r 3(1)

⁷⁵³ HESC Rules, r 2(2) MHRT Wales rules, r 3(2).

⁷⁵⁴ HESC Rules, r 2(1), MHRT Wales Rules, r 3(1)

⁷⁵⁵ HESC Rules, r 2(4),

with the tribunal was undesirable.⁷⁵⁶ Parties have various rights to notice of the proceedings, to appoint a representative, to apply for directions and witness summonses, and to attend the hearing.⁷⁵⁷

4.6 ATTENDING THE TRIBUNAL AND PERSONAL CONTACT WITH JUDGES

From the beginning, the 1960 Tribunal Rules provided a right to for the patient to be interviewed, to be given an opportunity to state his views, and to draw the attention of the tribunal to any evidence or information relevant to the application. Rule 12 of the 1960 Rules conferred a discretion on the Tribunal 'at any time before making its determination' to interview the patient, and a duty to do so if the patient requested it. In addition, the tribunal could authorize any one or more of its members to visit and interview the patient in private.

The Rules also required the tribunal to give to the applicant, the responsible authority and any other person to whom notice has been given of the hearing the opportunity of an interview with the Tribunal at a time and a place of at which at least seven days notice has been given. This right to be interviewed would later be reaffirmed as being of key importance by the Interdepartmental Committee, which reviewed MHRT procedures in 1978. That Committee was unanimous that the rules should continue to provide without doubt that the patient should have the right to be interviewed by the Tribunal.⁷⁵⁸ Hence, the rule of personal presence in these Article 5(4) reviews has been respected from the outset.

From 1960 until 2014 the Tribunal rules required that, where practicable, prior to the hearing, the patient be interviewed by the medical member of the Tribunal panel in order to form an opinion of his mental condition. The new rules have made the pre-hearing examination voluntary, unless the patient is detained under section 2 for assessment.

The prehearing examination is by 'an appropriate member of the Tribunal' and is still for the purpose of forming an opinion of the patient's mental condition. If the patient is detained for assessment under s 2, the patient must be examined prior to the hearing, unless the Tribunal is satisfied that the patient does not want such an examination. If the patient is detained under any other provision there is a duty to carry out a pre-hearing examination if the patient or the patient's representative has informed the Tribunal in writing, not less than 14 days before the hearing, that the patient; or if the patient lacks the capacity to make such a decision, the patient's representative, wishes there to be such an examination, The Tribunal may direct in any case that there be such an examination.⁷⁵⁹

Subject to one exception, the tribunal must hold a hearing before making a decision that disposes of proceedings. The exception is where a patient subject to a community treatment order has had her or his case referred to the tribunal, and either the patient has stated in writing that s/he does not wish to attend or be represented at a hearing of the reference and the Tribunal is satisfied that the patient has the capacity to decide whether or not to make that decision. Alternatively the

⁷⁵⁶ Fennell, P, Letts, P. and Wilson J., *Mental Health Tribunals: Law, Policy and Practice* (2013) London, The Law Society, 166.

⁷⁵⁷ HESC Rules, rr 37, 11, 6,16, and 36 respectively..

⁷⁵⁸ Report of the Inter-Departmental Committee on Mental Health Review Tribunal Procedures DHSS 1978

⁷⁵⁹ Tribunal Procedure (First-tier Tribunal) Health Education and Social Care Chamber Rules 2008 SI 2008 No 2699, r 34 as substituted by SI 2014 No 514

patient's representative may state in writing that the patient does not wish to attend or be represented at the hearing of the reference.⁷⁶⁰

Rule 39 of the HESC Rules sets out the very limited circumstances where the tribunal may proceed with a hearing in the patient's absence. If the patient fails to attend, the tribunal may proceed in her or his absence if satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and the tribunal considers that it is in the interests of justice to proceed with the hearing. The Tribunal may not proceed with a hearing that the patient has failed to attend unless the Tribunal is satisfied that—

- a) the patient—
 - (i) has decided not to attend the hearing; or
 - (ii) is unable to attend the hearing for reasons of ill health; and
- b) an examination under rule 34 (medical examination of the patient)— (i) has been carried out; or
- (ii) is impractical or unnecessary.

A participant in the round table with great experience of tribunals said that 'the presence of the patient is the norm, whether or not the patient is represented. In cases where there is an oral hearing and the patient is unlikely to attend, the usual course of events is that the Tribunal's medical member will interview the patient before the hearing.'

The pre-hearing examination can be seen as a reflection of the rationale that the patient is the object of the proceedings in terms of the *Shtukaturov* principles. We now turn to address more directly the principle that the patient is the subject of the proceedings and should have the right to present his case and contest the proposed restrictions on her or his liberty. The two key issues here are the ability to know and challenge effectively the case being made in favour of detention or compulsion, and the availability of representation.

4.7 THE RIGHT OF THE PATIENT TO HAVE ACCESS TO THE RESPONSIBLE AUTHORITY'S REPORT

Respect for the rules of natural justice, particularly the *audi alteram partem* principle, is a key component of participation in the sense of ability to defend one's rights. Both sides should have the right to be heard and this applies also to the right of each person know the case being made out against them. The tribunal under the 1959 Act was based on a norm of non-disclosure to the patient of the report supporting detention. The rules on non-disclosure have undergone significant amendment in 1983 and again in 2008 so that the circumstances in which information may be withheld from the patient are now much more circumscribed. The key source of written information about the patient is the Responsible Authority's Statement, which includes a statement of the authority's reasons why the patient should not be discharged, a report on the patient's mental condition and the facilities available if s/he were to be discharged. Before the tribunal panel sees the patient the members will have had the responsible authority's report, and possibly a report from their own medical member.

Gostin and Rassaby, in their guide to tribunal representation written in 1980, describe the pivotal role of the RMO in the process, and how reports on after care arrangements were prepared by 'hospital social workers' an indication of the tendency at the time for the entire system of

⁷⁶⁰ Ibid, r 35.

psychiatric care to be hospital based, in the sense that psychiatric hospitals often served as the base for community care professionals.⁷⁶¹ The authors warned that 'These reports must be examined very carefully because of considerable variation in their quality. The representative should bring to the attention of the tribunal any failure to provide clear and accurate information in the form required.'

A major problem for those detained under the 1959 Act was that they were unlikely to have access to these reports, a serious obstacle to participation in the sense of being able to challenge the accuracy and veracity of the case being made for their detention. Under the rules, the responsible authority, in effect the RMO, could in preparing the statement, set aside certain information to be withheld from the applicant on the grounds that its disclosure would be undesirable in the interests of the patient or for other special reason. The rules required the RMO to specify the reasons for non-disclosure.

Although the rules provided for the tribunal to examine the sufficiency of the authority's reasons, Gostin and Rassaby noted that RMOs and the MHRT 'seldom' complied with the rules in that RMOs did not identify specific material which would be harmful but there was a widespread practice of designating the whole report to be withheld, and although the rules appeared to envisage each case being considered on its merits, for a standard generalized ground to be typed on top of each report that 'disclosure would damage the doctor-patient relationship.'⁷⁶² Clearly participation in the sense of the right to know and test the evidential basis of the case for continued detention was severely constrained by this medically paternalist interpretation and practice.

This practice also made representation even more important, since the representative was entitled to all the information made available to the applicant, and the tribunal was empowered to provide the withheld information to the representative provided that s/he did not disclose it to the patient.⁷⁶³ Hence representatives could, if they trod carefully, obliquely obtain information from the patient as to the accuracy of the report and hence provide a sort of participation by proxy that, although imperfect, would be far superior to the position of unrepresented patients.

The 1983 Rules continued to allow the responsible authority to set aside parts of its statement which it considered should not be disclosed, but placed a presumption in favour of disclosure to the patient by giving the final decision to the tribunal, and by providing that information could only be withheld if its disclosure would adversely affect the health or welfare of the patient or others. Case-specific reasons for seeking non-disclosure had to be given by the responsible authority. The MHRT then had to consider if disclosure would have adverse effect claimed and, if satisfied that it would, record in writing its decision not to disclose, giving reasons.

When new tribunal rules were introduced in 2008, the presumption was still in favour of disclosure unless the Tribunal was satisfied (a) that such disclosure would be likely to cause that person or some other person serious harm; and (b) having regard to the interests of justice, that it is

⁷⁶¹ Gostin and Rassaby, *E Representing the Mentally Ill and Handicapped*, p 68.

⁷⁶² *Ibid*, p 69. See also Fennell, P 'The Mental Health Review Tribunal: A question of Imbalance' (1977) 2 *British Journal of Law and Society* 186-219.

⁷⁶³ Mental Health Review Tribunal Rules 1960, SI 1960 No 1139.

proportionate to give such a direction. In England the Tribunal has a discretion to order non-disclosure if the tests are met. In Wales it has a duty not to disclose in such cases.⁷⁶⁴

In both jurisdictions the current rules require the responsible authority to send a statement containing specified information and specified reports to the Tribunal as soon as practicable and in any event within 3 weeks after the responsible authority received a copy of the application or request from the Tribunal for a statement. In England the required reports are specified in a Practice Direction issued in 2013⁷⁶⁵, and include biographical information, an up to date medical report, an up to date Social Circumstances Report (SCR) and a nursing report. In Wales, the same information is required, but there is no express duty to provide a nursing report and the duty to provide a SCR is not absolute, but the information provided for the tribunal must, 'where reasonably practicable', include a SCR.⁷⁶⁶

Since a SCR will provide crucial information about the support which would be available for the patient, if discharged, and the tribunal is more likely to discharge if adequate support is available, these reports can play a crucial role in the proceedings. The SCR should provide evidence of planned aftercare, in line with the guidance in the MHA Codes of Practice for England and Wales on the duty to provide aftercare under s 117 of the MHA 1983 and the English and Welsh policy guidance on the Care Programme Approach (CPA).

The overriding objective includes ensuring so far as practicable that the parties are able to participate in the proceedings, which of course entails the patient having access to the evidence on which the case for detention is based. Under the 2008 Rules, as under the 1983 Rules, the presumption is in favour of disclosure of the responsible authority's report. The test to be applied in deciding whether any of the report should be withheld has been strengthened so that the tribunal must be satisfied that disclosure would be likely to cause that person or some other person serious harm; and (b) having regard to the interests of justice, that it is proportionate to give such a direction. In England the Tribunal has a discretion to order non-disclosure if the tests are met. In Wales it has a duty.⁷⁶⁷ In *Dorset Healthcare NHS Foundation Trust v MH* the Upper Tribunal held the starting point to be that 'full disclosure of all relevant material should generally be given.'⁷⁶⁸ In *RM v St Andrews Healthcare*⁷⁶⁹ Judge Jacobs held that the tribunal judge had been wrong to order non-disclosure of the fact that the applicant had been covertly medicated and laid great emphasis on full participation:

The overriding objective in rule 2 requires that the rules of procedure be applied so that cases are dealt with fairly and justly. This includes ensuring full participation, so far as practicable. Rule 14(2) requires the tribunal to have regard to the interests of justice. Justice and fairness generally require openness. Sometimes, they are not

⁷⁶⁴ First Tier Tribunal HESC Rules 2008 r 14, MHRT Wales Rules 2008, r 17..

⁷⁶⁵ 2013 Practice Direction First-tier Tribunal Health, Education and Social Care Chamber. Mental Health Cases, available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Practice%20Directions/Tribunals/statements-in-mental-health-cases-hesc-28102013.pdf>

⁷⁶⁶ Mental Health Review Tribunal for Wales Rules SI 2008 No 2705, r 15(5)(c) and Para 2 of Part B of the Schedule to the Rules

⁷⁶⁷ First Tier Tribunal (HESC) Rules 2008 r 14, MHRT Wales Rules 2008, r 17.

⁷⁶⁸ [2009] UKUT 4 (AAC), para 20.

⁷⁶⁹ 2010 UKUT 119 (AAC)

compatible and a compromise is possible. It may, for example, be possible and necessary to conduct proceedings while concealing that the true prognosis is worse than the patient realises. In this case, I have set out the full implications of the tribunal's order. They involve more than a compromise between justice and openness. They involve the sacrifice of the patient's right to challenge his detention effectively.⁷⁷⁰

In the *St Andrews* case Judge Jacobs recommended a form of words for non disclosure directions and stressed that the paragraph dealing with the key issue of the information that must not be disclosed. It needs to be precise, clear and exhaustive. Knowledge of the case against one and the opportunity to challenge it, as reflected in the common law *audi alteram partem* rule are prerequisites of full participation in legal proceedings affecting individual rights⁷⁷¹, all the more so when liberty is at stake. The new tribunal rules have resulted in a tightening of the criteria for non-disclosure, and this has been accompanied by a more robust attitude to scrutiny of reasons by the Upper Tribunal.

Since the patients' representative can have access to any material withheld from the applicant, representation assumes a central position in securing the right of the patient to participate as a subject of the proceedings.

4.8 REPRESENTATION

At the initial meeting of tribunal Chairmen in 1960 the main concern appears to have been whether the responsible authority would need legal representation. Chairmen were told that the Minister had suggested 'to responsible authorities that they might usually be represented by the RMO, and that legal representation is not likely to be necessary, except perhaps if it is known that there is to be a formal hearing and that the patient is likely to be legally represented.'⁷⁷²

The applicant was entitled to be represented by a person of her or his choosing, provided that person was not a detained patient or subject to guardianship, or receiving treatment for mental disorder as an informal patient in the hospital. Unless the tribunal otherwise directed, the patient or any other person appearing before the tribunal could also be accompanied by a person of their choosing. Hence the initial tribunal rules provided for participation and support for a patient challenging detention. Whether such support was available was left to others.

Representation of patients was an issue from the very beginning. Martin Ennals of the National Council for Civil Liberties (NCCL) wrote to Enoch Powell, then Minister of Health, stating that the NCCL was establishing a panel of people willing to help patients and their relatives in conducting appeals before MHRTs, and asking the ministry 'to take steps in the direction of encouraging suitable people who might be willing to act as patients' friends and that patients should be so advised when they discuss the possibility of an appeal with the hospital authorities. The Minister replied that 'it would not be appropriate for him to establish a panel of the kind suggested, though the method of working of tribunals will be kept under review in the light of experience.'

The concerns of the officials in 1960 betrayed a certain stereotyping: that patients might well blame a nominated representative if the decision were adverse; and there was also a perceived

⁷⁷⁰ *RM v St Andrews Healthcare*, 2010 UKUT 119 (AAC) Para 31.

⁷⁷¹ *Ridge v Baldwin* [1964] AC 40.

⁷⁷² National Archive, Kew File MH140/23 Meeting of Regional Chairmen of MHRTs held 18 October 1960.

'risk that any volunteer panel would include a number of unbalanced people who might well be of no help either to the tribunal or the patient.'⁷⁷³

The NCCL persisted with its inquiries, and wrote on 4 July 1961 asking the Ministry about the number of appeals allowed or rejected, and in how many was the person represented, and in how many were patients' friends present. After initially stalling, the Ministry provided the answers sought, in fact admitting that 'As it happens, the figures do show a significantly greater success rate for represented compared with the unrepresented patient - 12 per cent as opposed to 10 per cent.' The discharge rate of patients by Tribunals today remains at around 10%.

The source of their data was the principal regional officers (PROs) who claimed to have additional evidence that patients who were represented were much more likely to succeed than those who were not. Officials asked PROs if they would in their records distinguish patients who were represented, 'so that later we could see what proportion had been successful and compare it with the success of unrepresented patients.' The Principal Secretary at the Ministry of Health revealed in a memo what he intended to do with the information requested suggesting that 'We could then show the figures to the Lord Chancellor's Department, who could if necessary point out to Chairmen that Tribunals should be careful not to be over-impressed by solicitors etc. representing patients.'⁷⁷⁴

The NCCL continued to run a volunteer representation scheme, from 1959 until the MHA 1983. Some solicitors' firms had also developed a specialism in tribunal work, usually because they were based in towns adjacent to the 'Special Hospitals' – the High Security Hospitals (Broadmoor, Rampton, and Moss Side (now Ashworth) where every in-patient was detained. When the legal aid 'green form scheme' was introduced to allow a solicitor to give advice and assistance worth up to £25, this was used to provide assistance to patients, but it could not cover the solicitors' costs of attending the hearing.

The need for representation of patients was a key feature of MIND's campaign for reform of the tribunal in the 1970s and 1980s. MIND's new director, Tony Smythe, had come from the directorship of the NCCL in 1974, and brought in a young civil liberties lawyer from the US, Larry Gostin as legal director, and under their leadership MIND not only provided information and training on patients' rights and advocacy before tribunals, but also brought test cases, and spearheaded the reform campaign which led to the introduction of the Mental Health Act 1983 and the Mental Health Review Tribunal Rules 1983.

In October 1979 MIND's Legal Director, Larry Gostin, submitted MIND's evidence to the Interdepartmental Committee on MHRT Procedures advocating full legal aid for representation before MHRTs to overcome the funding limitations of the Green Form Scheme. The Committee accepted the view that skilled representatives should be available for those who needed them, pointing to the increase in recent years of the proportion of patients represented. The Committee noted that most of the solicitors who carried out this work were using the legal aid 'green form' scheme, which allowed advice and assistance to be reimbursed, but not court or tribunal appearances. Solicitors would obtain a £25 extension and use any residue left over to reimburse their costs of attending the hearing. This was not a satisfactory system, and the Committee

⁷⁷³ National Archive, Kew File MH140 'Mental Health Act 1959 Mental Health Review Tribunals Representation of Patients'.

⁷⁷⁴ Ibid

proposed a mental health duty solicitor scheme, and had already secured agreement in principle from the Law Society that they would provide exemption for participating solicitors from the practising rules which prohibit advertising. This idea would later be partially implemented with the Law Society Panel List of accredited Mental Health Tribunal advocates.

The Committee was concerned about accountability of representatives, because the representative would be in a position to see and hear all the evidence put before the tribunal, and felt that some controls on the flow of information were necessary in order to ensure the security of confidential information. They accepted that members of the legal profession were bound by professional codes. Although the Committee felt that people outside the profession should be given the possibility of acting as representatives, they felt that such people should be subject to strict control. The Departmental officials were well aware that everyone is bound by s 12 of the Administration of Justice Act 1960 not to disclose any information about proceedings held in private.

The Committee suggested that solicitor and barrister representatives should be automatically accorded rights to be present throughout and to see all the evidence, whereas others would be granted audience at the discretion of the tribunal. The sort of criteria which the tribunal was expected to use in granting such rights were relevant professional background, experience of tribunal work, attendance at a training course. Other persons' lacking relevant professional status 'unknown to the tribunal' or personally involved in the case should in the committee's view be known as friends, not representatives, and the tribunal would retain the discretion to exclude a friend from any part of the hearing.

Following the decision in *X v United Kingdom* in 1981 there was significant concern in the Department of Health and Social Security that the reference in the judgment to the necessity for 'sufficient procedural safeguards appropriate to the category of deprivation of liberty dealt with'⁷⁷⁵ could be taken to include legal representation in such cases but the hope was expressed that they 'do not necessarily imply a system of state funded legal aid'. The concern was that *X v United Kingdom*, read in conjunction with the ruling in *Airey v Ireland* might imply a need for state funded legal aid.⁷⁷⁶ There was support for legal aid among some Ministers in the newly elected Conservative Government of Margaret Thatcher. Norman Fowler wrote to Lord Hailsham the Lord Chancellor on April 7 1982 as follows

I completely share your view that MHRTs are unique among tribunals in that they are concerned with individual liberty. It is very difficult for the mentally disordered to make their case, especially without sight of medical reports. As you say, we have been pressed very strongly on legal aid during the Lords stages of the Mental Health (Amendment) Bill and it was a theme in the second reading debate in the Commons. The subject will certainly come up again in the special Standing Committee which the Government decided will apply to the Bill. I believe we shall be given a great deal of credit if we are able to agree to this extension of legal aid while the Bill is being discussed in the Commons.⁷⁷⁷

⁷⁷⁵ [1981] 4 EHRR 188 para 61

⁷⁷⁶ Judgment of 9 October 1979.

⁷⁷⁷ National Archive, Kew File HO 343/102 MHRTs MIND MHRT Representation Scheme For the Lords debates see Hansard HL Debs 25 January 1982 cols 785-796 and 23 February 1982 Cols 890-896

Leon Brittan, then Chief Secretary to the Treasury, was in no doubt that ‘we would, if anything, be under very strong pressure indeed in the Commons stages if we were unable to make any move in this area.’

Non-means tested legal aid was extended to MHRT representation to coincide with the coming into force of the Mental Health Act 1983. The Law Society maintains a panel of solicitors who are accredited to carry out this work. It is now a requirement of contracts with the Legal Services Agency that solicitors are members of the Law Society’s Mental Health Tribunal Panel. There have been strong signs for several years now that legal aid cutbacks and reductions in the rate of remuneration are leading to a retreat from this work on the part of legal aid solicitors.

The current rules provide that a party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings, not being a person liable to be detained or subject to guardianship or a community patient under the Act or a person receiving treatment for mental disorder at the same hospital or registered establishment as the patient.⁷⁷⁸

The representative or party must notify tribunal in writing of the representative’s name and address. The representative may do anything required in relation to the hearing on behalf of the party other than sign a witness statement. If there is a representative, the tribunal must provide to the representative any document which is required to be sent to the represented party, and need not provide that document to the represented party.

The Tribunal may appoint a legal representative for the patient if the patient has not appointed a representative; and either (i) the patient has stated that they do not wish to conduct their own case but have indicated that they wish to be represented; or (ii) the patient lacks the capacity to appoint a representative but the Tribunal believes that it is in the patient’s best interests for the patient to be represented. The rules also provide that a party may be accompanied in the hearing by another person, who may assist in presenting the party’s case.

The 1983 Rules had simply allowed the tribunal to appoint an authorised person to act as a representative, and made no mention of capacity, and the ethical guidance from the Law Society was to the effect that representatives should follow their client’s instructions and argue for discharge when this was what the client wanted.⁷⁷⁹ The advent of the concept of capacity into the tribunal rules raised the prospect that a patient might lack capacity to give instructions, and that the advocate’s duty would be to act in their best interests, rather than necessarily advancing the case for discharge. In *MH (by her litigation friend the Official Solicitor) v Secretary of State for Health* Baroness Hale made reference to the low level of capacity required to make an application to the tribunal when she said:

Most of the patients who are admitted under the formal procedures in the Mental Health Act 1983 do have the very limited capacity required to make an application to a mental health review tribunal or have someone else who can help them to make it.⁷⁸⁰

⁷⁷⁸ HESC Rule 11, MHRT Wales Rule 13

⁷⁷⁹ Mental Health Review Tribunal Rules 1983 SI 1983 No 944.

⁷⁸⁰ [2005] UKHL 60, para 4.

In *AA v Cheshire and Wirral Partnership NHS Foundation Trust*⁷⁸¹ Judge Rowlands likened the role of the representative in a case where the client lacks capacity to give valid instructions to that of a litigation friend when he said

The rule must also anticipate that the solicitor will exercise her or his judgment and advance any argument s/he considers to be in the patient's 'best interests' which will ... not necessarily involve arguing for the patient's discharge. In those circumstances it seems to me that the solicitor has the same freedom of action as a litigation friend.

As a roundtable participant put it, 'The current Practice Note issued by the Law Society draws an important distinction between a litigation friend and a representative.' It says this:

An appointment by the tribunal does not mean that you are also appointed to act as the patient's litigation friend. You should not assume that guidance prepared for a litigation friend in other court proceedings applies to you as a representative.'⁷⁸²

The Practice Note acknowledges the heightened duty of a tribunal appointed advocate to identify and act in the best interests of the client, but then says that

In our view the client's interest in a fair hearing to determine the lawfulness of their detention is paramount. There are likely to be few cases where a client who is able to express their wish to be discharged by a tribunal will be assessed as lacking capacity to instruct you. Similarly, where a client without litigation capacity tells you they wish to be discharged from hospital, there will be few cases where it will not be appropriate to argue for their discharge.⁷⁸³

This is because of the overriding importance of the client's right under Article 5(4) to challenge the lawfulness of their detention.' This right exists without the detained patient needing to show that they have any particular chance of success in obtaining their release.⁷⁸⁴ The Practice Note concludes on this point by saying that where the client lacks the ability to express their wishes the solicitor should

- Ensure that the tribunal receives all relevant material so that it can determine whether the criteria for continued detention are met
- Test the criteria for continued detention
- Remember the clients right to treatment in the least restrictive setting

In addition to his role as Vice-President of the CoP, Charles J is the President of the Administrative Appeals Chamber of the Upper Tribunal. In the latter capacity, in *YA v Central and NW London NHS Trust and Others*⁷⁸⁵ he held that 'To have capacity to appoint a representative a patient has to have

⁷⁸¹ [2009] UKUT 195 AAC

⁷⁸² Law Society (2015) *Representation before mental health tribunals*, (Law Society Practice Note) London. <http://www.lawsociety.org.uk/support-services/advice/practice-notes/representation-before-mental-health-tribunals/#mht42> para 4.2.

⁷⁸³ ⁷⁸³ <http://www.lawsociety.org.uk/support-services/advice/practice-notes/representation-before-mental-health-tribunals/#mht42> para 4.2.

⁷⁸⁴ *Waite v United Kingdom* [2003] 36 EHRR 54.

⁷⁸⁵ [2015] UKUT 0037 (AAC)

more than simply an understanding that they can make an application to a mental health review tribunal or have someone else make it for them and thus the limited capacity referred to [by Lady Hale in *MH*].⁷⁸⁶ Charles J considered the central goal of the process was that the grounds for the detention and its continuation should be tested and reviewed as effectively as is practicable. In many cases he considered this could be done effectively by reference to the relevant statutory provisions and existing reports (and evidence from their authors and others).

Charles J offered this guidance where a solicitor is appointed for a client who lacks capacity to appoint. First, the representative should not concede points if the client lacks capacity to consent to a concession, but should tell the tribunal s/he is only advancing arguable points. Solicitors have a general duty to advance only arguable points on behalf of capable patients as set out in the Court of Appeal ruling in *Buxton v Mills Owen*⁷⁸⁷

The representative should then inform the patient and the tribunal that he intends to act as the patient's appointed representative in the following way:

- a) He will provide the tribunal with an account of the patient's views, wishes, feelings, beliefs and values (including any wish that the representative should act in a different way to the course proposed by the representative).
- b) He will invite the tribunal to hear evidence from the patient and allow the patient to address the tribunal
- c) He will draw the tribunal's attention to such matters and advance such arguments as he properly can in support of the patient's expressed views, wishes, feelings, beliefs and values; and
- d) He will not advance any other arguments.⁷⁸⁸

The YA ruling applies to the appointment of representatives where the patient has not already appointed one and lacks capacity to give instructions.

Charles J's guidance from YA is reproduced in the Law Society's revised Practice Note on representation before Mental Health Tribunals.⁷⁸⁹ The Practice Note also deals with the solicitor's duty in representing a client who has capacity to give instructions. Solicitors are to assume that the client 'has capacity unless the contrary is established. The note informs advocates of the test of litigation capacity from *Masterman-Lister v. Brutton & Co*⁷⁹⁰, namely 'whether the party to legal proceedings is capable of understanding, with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings'. The Note goes on to say that the information which a patient needs to understand to instruct a solicitor regarding Mental Health Tribunal proceedings is not complex. The Law Society Practice Note states 'that people severely affected by a mental disorder may still be able to provide instructions if you explain matters simply and clearly.'

⁷⁸⁶ Ibid, para 57

⁷⁸⁷ [2010] EWCA Civ 122.

⁷⁸⁸ Ibid, para 101.

⁷⁸⁹ Law Society's Practice Note on Representation before Mental Health Tribunals (2016)
<http://www.lawsociety.org.uk/Support-services/Advice/Practice-notes/representation-before-mental-health-tribunals/>

⁷⁹⁰ [2003] 1 WLR 1511

As to the question of whether the person is able to provide instructions, this, says the Practice Note, 'is a judgment that in many cases an experienced mental health advocate will be able to make themselves.' The Note anticipates that it will only be in 'rare cases' that the advocate will be 'unable to form an opinion' about capacity to instruct and that in such cases the advocate should 'obtain the opinion of the responsible clinician (RC) - either directly or via the mental health act administrator - as to the client's litigation capacity. You should also ask the RC for his or her opinion of the client's capacity to appoint you'.⁷⁹¹ The fact that this will arise in 'rare cases' should not deflect attention from the fact that the advocate is being advised to ask for an opinion on his clients capacity from the very person who is on the other side of the dispute about the client's detention.

If the client has capacity to give instructions, the Note goes on to outline the solicitor's duty, which is to 'act in accordance with those instructions, even where they are inconsistent, unhelpful to the case or vary during the preparation of the case, or during the hearing itself.'⁷⁹² However, the Note then cautions that 'the fact that the client's instructions are contrary to their best interests may be evidence that they lack capacity.'⁷⁹³ This seems a dangerously wide statement. What if the advocate thinks that it is not in the patient's best interests to be discharged? This should surely not be a ground to conclude that the patient lacks capacity to instruct, and the passages, which follow in the Practice Note suggest that it would only be in very rare circumstances that such a conclusion would be reached.

In accordance with the ruling in *Buxton v Mills-Owen* advocates are told that they must 'refuse to advance an argument which is not 'properly arguable', despite instructions to do so.'⁷⁹⁴ However, the note goes on to say that a submission may be 'properly arguable' even if it has few, if any, prospects of success.⁷⁹⁵ It will depend upon the context and your judgment. The Note concludes on this point by saying that 'It is highly unlikely that to seek a client's discharge in accordance with his or her express wishes would not be 'properly arguable', even if it is unlikely to succeed.'

Where the argument that the client instructs the advocate to advance is properly arguable, it must be advanced 'without reservation.' Advocates are told not 'to advance a submission at the same time as signalling to the judge that they may think it is weak or hopeless, for example by using coded language such as 'I am instructed that'. Such coded language is well understood as conveying that the advocate expects it to be rejected.'⁷⁹⁶

Where advocates believe that the client's instructions are unrealistic or contrary to their interests they should 'discuss with the client an alternative and more realistic line of challenge', which may be pursued 'only if the client agrees.' Your duty to act in accordance with the client's instructions takes precedence over your duty to act in what you perceive to be their best clinical interests.

⁷⁹¹ Law Society's Practice Note on Representation before Mental Health Tribunals (2016) <http://www.lawsociety.org.uk/Support-services/Advice/Practice-notes/representation-before-mental-health-tribunals/>, para 4.1.

⁷⁹² Ibid.

⁷⁹³ Ibid

⁷⁹⁴ *Buxton v Mills-Owen* [2010] EWCA Civ 122, para 45.

⁷⁹⁵ Ibid, para 43.

⁷⁹⁶ Elisabeth Perkins in her 2003 study quotes from a tribunal Chairman who said 'The give away is when they say my instructions are blah blah – then you know it's cobblers' Perkins, E. *Decision-Making in Mental Health Review Tribunals* Policy Studies institute (2003), 71..

Therefore if your client wishes you to argue for their discharge you should do this, even if in your view your client needs hospital treatment.'

The YA ruling and the Law Society's Practice Notes issued in the wake of the ruling show a strong emphasis on the patient's capacity to instruct a solicitor. The Note emphasises that it is unethical for a solicitor to take instructions from a client who lacks capacity, that the test of capacity to bring a case is not difficult to satisfy, and that it can be applied by an experienced mental health tribunal advocate. The notion that the solicitor in a case of doubt should seek the opinion of the representative of the detaining authority as to his client's capacity to challenge detention is difficult to square with the human rights due process model of how Article 5(4) should work.

It is vitally important to acknowledge the overriding purpose of the tribunal process, as set out in Charles J's judgment in YA and in the Law Society's Practice Note, which is to test the criteria for detention and to enable the views and arguments expressed by the patient to be heard. This was the choice made by the Interdepartmental Committee in 1979 when they rejected an unstructured, review body approach in favour of the model of the tribunal as an 'independent body carrying out a thorough inquiry' which would provide opportunities for the patient to challenge witnesses and be governed by a 'structured system of procedure prescribed by rules.'⁷⁹⁷

The threefold rationale of the principle of personal presence is reflected in the model of participation evolved over time by the Mental Health Tribunals. The dignity principle has always been there, although not articulated as such in the early years, that the person should be seen in person, rather than through the lens of written reports. The notion that the patient should be seen to assess her or his condition, has also been there throughout. The real struggles have come about in recognising the patient as a 'subject', as an active participant who should be placed in a position to refute the case made against him and who should enjoy equality of arms with the authorities who are seeking to justify detention. It is not too much of a generalization to say that the client group eligible for Mental Health Tribunals is generally able to articulate opposition to mental health detention and be clear that they wish to challenge. The proportion of this population who are unable to express a clear opposition to their placement is probably low by comparison with those lacking capacity to decide where to live and deprived of their liberty under the DOLS. The availability of automatic reviews to a certain degree obviates the need for the level of guidance set out in *Re RD and Others*⁷⁹⁸ in relation to the CoP as to when there is a duty to bring a challenge before the Tribunal on a patient's behalf.

4.9 BROADER ISSUES OF ACCESSIBILITY AND TRAINING

In 2001 the Care Quality Commission and the Administrative Justice and Tribunals Council published a joint report *Patients' Experiences in the First-Tier Tribunal* which reported on a survey of service users who had experience of tribunal hearings. One participant pointed to the annual training course for tribunal members organised by the Judicial College entitled 'The Patient's Perspective: Taking Forward the AJTC Report.' The course contains a panel of service users, 'experts by experience', who all have experience of tribunals. As the roundtable participant put it, 'Most of the course consists of guided discussions with them as they describe their experiences of pre-hearing examinations, the hearing itself and getting the decision.' This is an important development

⁷⁹⁷ Report of the Inter-Departmental Committee on Mental Health Review Tribunal Procedures DHSS 1978, para 1.100

⁷⁹⁸ *Re RD and Others* (Duties and Powers of Relevant Persons Representatives and Independent Mental Capacity Advocates) [2016] EWCOP 49.

in the training of tribunal members, and in our opinion is an initiative which should be included in training for judges in the CoP.

5. DISCUSSION AND RECOMMENDATIONS

This concluding section summarizes the key themes arising from this report and sets out the essential elements of a human rights-based model of participation. We have argued that participation is itself a human right. It permeates Articles 5, 6 and 8 of the ECHR, and Council of Europe Recommendation 99(4) on Mental Incapacity. It is the driving concept of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD). Support for, and participation in, decision making are also central principles of the MCA, which bind the CoP and those representing or supporting P in the litigation.

We have put forward what we see as the three essential principles of a human rights-based approach to participation, modeled primarily around the case law of the European Court of Human Rights, but also drawing on the UNCRPD. They are:

1. **The overarching dignity principle:** a person should be entitled to be present when decisions are taken which impose serious restrictions on her or his rights and freedoms. This was fundamental to the decision in *Shtukurov* and is also evident in *X and Y v Croatia*,⁷⁹⁹ another case concerning deprivation of legal capacity, where the ECtHR held that ‘judges adopting decisions with serious consequences for a person’s private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons.’⁸⁰⁰ This principle has been reiterated in subsequent cases, with a particular emphasis on cases where the person opposed the measure in question.⁸⁰¹ A similar approach can be found under the common law in the case of *Osborn v The Parole Board*⁸⁰².
2. **The evidential principle:** the relevant person her or himself is an important source of evidence for judicial decisions about their legal capacity and liberty. As the Court put it in *Shtukurov*, they are the ‘object of the proceedings’ and their participation is therefore necessary ‘to allow the judge to form his personal opinion about the applicant’s mental capacity’.⁸⁰³ It is also necessary for the judge to consider the proportionality of the measure in question.
3. **The adversarial principle:** Participation – including directly and through effective representation - may be necessary to help a person to present his case⁸⁰⁴ and to refute expert evidence or arguments recommending measures that a person opposes.⁸⁰⁵

This threefold right to participate and the ‘rule of personal presence’ have profound and far-reaching implications. It is based on the fundamental ideals of the rule of law; the idea of procedural fairness in dealing with the rights of those deemed incapable of managing their own affairs. It radically recasts the idea of how courts and tribunals that adjudicate on matters relating

⁷⁹⁹ (App no 5193/09) [2011] ECHR 1835

⁸⁰⁰ *Ibid*, para.84

⁸⁰¹ *Zagidulina v Russia* (App no 11737/06) Chamber Judgment [2013] ECHR 398.

⁸⁰² [2013] UKSC 61

⁸⁰³ *Shtukurov v Russia* (App no 44009/05) [2008] ECHR 223, para. 72

⁸⁰⁴ *Ibid*, para. 72-3

⁸⁰⁵ *Salontaji-Drobnjak v Serbia* (App no 36500/05) [2009] ECHR 1526, para 127

to legal capacity and liberty for disabled adults should function. It is not clear that the CoP system can survive this test. From basic questions of accessibility through to the unresolved question of what is actually happening, in legal terms, when a judge meets with P, it is clear that the CoP system was not set up with the participation of P at its heart, and rapid adaptations are having to be made. The model is more akin to the old system for the participation of children in the family courts.

5.1 WHAT FUNCTIONS DO WE WANT THE COP TO PERFORM?

At the outset, we need to ask what are the functions and purpose of the CoP, and in what type of decisions is P supposed to be participating? What is the purpose of a court hearing, and of P's participation?

Historically the court's role has been viewed as, as Lord Goff described it in *Re F*, to provide 'an independent, objective and authoritative view on the lawfulness of the procedure in the particular circumstances of the relevant case, after a hearing at which it can be ensured that there is independent representation on behalf of the person upon whom it is proposed to perform the operation.'⁸⁰⁶ Providing a view on the lawfulness of a procedure is not the same as conferring authority which the defence of necessity (now codified in the MCA) could not confer, but there is here the seed of recognition of the importance of P's participation in decisions with major consequences for a person's life.

The human rights view that we have outlined above differs from this approach. It suggests that the court is an essential guarantor of fairness in decisions that have serious implications for people's human rights. That means that some decisions cannot be made without first seeking the court's authority, particularly those that the person or their family objects to. The boundaries around this obligation are not, however, clear cut. Viewed through the lens of the ECHR, the CoP also offers an important review function for decisions that have a significant impact on an individual's legal capacity, or for deprivation of liberty. The ECtHR guarantees unqualified direct rights of access to a court for these functions.

The CoP's jurisdiction in relation to health and welfare only partially reflects these approaches. It is true that those providing care and treatment *may* seek the court's sanction for contested or potentially controversial acts, but the extent to which they are legally required to do so outside the context of detention is far from clear. Meanwhile as we have shown, the forms and procedures of the CoP are not set up to guarantee P with a realistic prospect of asserting his capacity or otherwise contesting best interests decisions with a serious impact on his human rights. This is reflected in the extremely low numbers of applications from P himself, asserting his capacity.

One of the central criticisms of guardianship systems, that has prompted the 'revolutionary new norms'⁸⁰⁷ of the CRPD, is that they do not comply with the basic requirements of the rule of law because they confer arbitrary power on substitute decision makers.⁸⁰⁸ The response of the 'new

⁸⁰⁶ [1990] 2 AC 1, at p 28

⁸⁰⁷ Tina Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from nonconsensual psychiatric interventions' (2006-7) 34 *Syracuse Journal of International Law and Commerce* 405.

⁸⁰⁸ Oliver Lewis, 'Guardianship litigation: resisting casual positivism', (2nd World Congress on Adult Guardianship, Melbourne, Australia, 15 October 2012.)

paradigm' under Article 12 CRPD is that therefore guardianship systems should be abolished.⁸⁰⁹ The response of the 'old paradigm', captured in instruments such as Recommendation 99 and the ECtHR case law described in this report, is to overlay guardianship laws with procedural safeguards, to ensure there are systems of checks and balances over the power exercised by guardians. The threefold adversarial, evidential and dignity principles of the ECtHR's right to participate and the rule of personal presence can be viewed as a legalistic exercise to shore up the overall legitimacy of systems of substituted decision making in light of a rising tide of concern and criticism at an international level.

As we have already outlined, the MCA does not adopt a formal substitute decision making model for health and welfare matters, comparable to the guardianship systems of Central and Eastern Europe that have shaped the development of the ECtHR right to participate. Instead it operates a highly informal system of substitute decision making and deprivation of legal capacity for health and welfare matters based around ss 5 and 6, which provide statutory defences in respect of acts of care, treatment and restraint, provided certain conditions are met. The CoP exercises ultimate jurisdiction over this system of clinical authority.

The CoP's model of participation is undergoing a quiet revolution; from a low participation model that one might express as being 'seen (by experts) but not heard (by the court)', to a model where judges and representatives are increasingly involving P directly in the proceedings. This high participation model however has run up against significant conceptual and practical challenges. It is very difficult to see how the ECtHR vision of participation – with judges routinely meeting with P, and P given full and active legal representation to advance his claims in all proceedings with significant implications for his legal capacity and his human rights – could be reconciled to the current CoP system. High participation is only possible within the current system if there is a low volume of litigation; yet the participatory vision of the ECtHR suggests that all those wishing to assert their capacity in matters with serious implications for their human rights should have access to a court. We can only guess at the scale of this, but we suggest that the problems this may cause for the CoP system may exceed the scale of the difficulties created for the CoP by *Cheshire West*.

This prompts the questions 'How do we select the kinds of cases that we want the CoP to adjudicate? and Can we specify those types of case in general rules? The answers to these questions are not clear cut. 'We are not sure.' Capacity questions tend to be raised where a person is in conflict with those providing care and treatment for them.⁸¹⁰ The ECtHR authorities, in particular *DD v Lithuania*, suggest access to a court is vital where a person is in conflict with those making decisions on their behalf where it will have serious consequences for their lives. Yet how far should this principle go? One answer is that adjudication by a court is required in *any* situations where a person objects to a best interests decision made about them that has serious consequences for their human rights. Examples would be decisions about where they live, or with whom they are permitted to have contact, or medical treatments that might be given without their consent. There are indications that this was the original intention of the Law Commission in their proposals that went on to form the basis of the MCA 2005, although as we argued in Section 3.1 of

⁸⁰⁹ *General comment No 1 (2014) Article 12: Equal recognition before the law*, n 166

⁸¹⁰ V Williams and others 'Making Best Interests Decisions: People and Processes' (Norah Fry Research Centre, University of Bradford Dementia Group and the Mental Health Foundation 2012); C Emmett and others, 'Homeward bound or bound for a home? Assessing the capacity of dementia patients to make decisions about hospital discharge: Comparing practice with legal standards' (2012) 26(1) *International Journal of Law and Psychiatry* 73-82.

this report, this approach seems to have been lost in translation. Yet considering the potential *scale* of litigation that might ensue from this position, it is difficult to see how the legal system – or indeed the health and social care system – could cope with the administrative weight of such an approach. As Lord Brandon put it in *Re F* ‘if every operation to be performed, or other treatment to be given, required the approval or sanction of the court, the whole process of medical care for such patients would grind to a halt.’⁸¹¹

If it is not to be the approach that any non-consensual health or social care intervention to which a person objects and which interferes with their rights should be brought to court, then where do we draw the line? Are we content to allow medical and social care professionals to decide, on an informal and often unscrutinised basis, about matters such as forced treatment or restrictions on contact with loved ones? Unsupervised powers of this nature would be regarded with great suspicion if exercised in relation to the general population, so why are they acceptable for disabled people? This also raises constitutional questions, since these ‘powers’ to interfere with fundamental human rights against a person’s will are in fact statutory defences and not, in a technical sense, even formal powers that were specifically considered, debated and granted by Parliament at all. For this reason we argued in Section 3.1 that there should be a public consultation on when decisions taken under the MCA need to go to court, rather than the piecemeal accrual of duties under the common law. Such a consultation could also consider whether non-judicial safeguards, such as an expansion of the role of advocates or second opinion schemes like that proposed by the Law Commission in 1995 and in use under the Mental Health Act 1983 (see Section 4 above) that might suffice in some circumstances.

The approach we have advocated, for considering how far the public is content for substituted decisions with significant consequences for disabled people and their families to operate without formal scrutiny by the court or another procedural safeguard, clearly lies within the ‘old paradigm’ tradition of overlaying guardianship with legalism to assuage our anxieties about the powers they exercise. Quinn, a strong advocate of the approach to legal capacity connected to the UN CRPD, argues that ‘When you burn away the legalese’ this approach simply ‘provides for an ever more perfect and safeguarded process of loss’ of legal capacity⁸¹²; it is an approach based on addressing our fears of abuse of power, not a positive vision of support and empowerment.

To the advocates of the new paradigm, the answer is to seek more radical constraints on the powers of substitute decision makers, and a greater emphasis on supports for the exercise of legal capacity in accordance with the person’s rights, will and preferences. Yet we believe that our proposals for enhancing the participation of P would still have a bearing on any judicial forum under a ‘new paradigm’ approach. Even under the ‘support paradigm’, there is still tremendous power vested in supporters and in those situations where a person’s will and preferences are unclear or contested, that will doubtless be justiciable. Questions will also arise as to the extent to which a person’s apparent decisions are subject to ‘undue influence’; a growing number of CoP

⁸¹¹ [1990] 2 AC 1, at p 5.

⁸¹² Gerard Quinn, ‘Liberation, Cloaking Devices and the Law: A Personal Reflection on the Law and Theology of Article 12 of the UN CRPD.’, (Rights & Enforcement – The Next Steps, BCNL Conference., Sofia, 16 October 2013)

cases address this issue already.⁸¹³ Many proponents of the support paradigm do envisage some limited powers of intervention, provided they do not discriminate against disabled people.⁸¹⁴

We cannot escape these questions of how much power we are content for those supporting, treating and caring for adults with mental disabilities to exercise without judicial oversight. This prompts us to consider what are the limits and limitations of judicial oversight of medical and social care decision-making, which has an impact on individual human rights? Once caseload exceeds a certain volume there will be a direct trade off in terms of a fall in the level of scrutiny. In an important sense, the right of access to a court, insofar as it may increase the volume of litigation, sits in tension with rights to participate in the proceedings. We need to look to other participatory models than the CoP for answers, such as the mental health tribunals.

5.2 MODELS OF REPRESENTING P

There is a tension between the ‘best interests’ model of representation that is dominant in the CoP and MCA system and the ‘active representation’ of P’s own wishes and feelings that is increasingly endorsed in international human rights law. This plays out in the confusing and sometimes contradictory guidance for the conduct of IMCAs, RPRs, litigation friends and Rule 3A representatives (and, doubtless, ALRs, when they commence practice).

The problem with ‘best interests’ representation is that it potentially neutralizes P’s ability to contest decisions purportedly taken in her or his own best interests. It also violates the ‘dignity principle’ since P may very well, with good reason, feel that the interests of justice have not been served, and P’s voice not heard. It is notable that RP, in the ECtHR case of *RP v UK* (discussed under Section 3.5, above) complained that she did not feel that her voice had been heard under a best interests model of representation.⁸¹⁵

A human rights focus concentrates on ideals of due process and natural justice, and the UN CRPD notion of decisions based on will and preference (the nearest MCA equivalent ‘being wishes and feelings, values and beliefs’). If representation is to mean anything it must entail putting Ps in the best possible position to advance their own views to the bodies making decisions about them. ‘Nothing about us without us’. It is the role of others to advance best interests arguments to the decision-making body.

Seen through a human rights lens the role of the CoP is to enable P to test the lawfulness of decisions that s/he lacks capacity, or should be deprived of liberty, or should suffer interference with physical and psychological integrity. A best interests approach to access allows P’s own representative to give away the right of access to a court because to exercise it would not be in P’s best interests. Access to a court simply becomes a theoretical right, if P’s own representative, or the person appointed to represent P can argue those very rights away.

⁸¹³ Lucy Series, 'Relationships, autonomy and legal capacity: Mental capacity and support paradigms', (2015) 40 *International Journal of Law and Psychiatry*, 80-91.

⁸¹⁴ Pier Gooding and Eilionoir Flynn, 'Querying the Call to Introduce Mental Capacity Testing to Mental Health Law: Does the Doctrine of Necessity Provide an Alternative?' (2015) 4(2) *Laws* 245-271; Eilionoir Flynn and Anna Arstein-Kerslake 'State Intervention in the Lives of People with Disabilities: The Case for a Disability Neutral Framework', (2017) *International Journal of Law in Context*, Forthcoming.

⁸¹⁵ *RP v Nottingham City Council & Anor* [2008] EWCA Civ 462, para 74

5.3 MEETING THE JUDGE: WHAT IS HAPPENING WHEN P MEETS A JUDGE?

The ECtHR's rule of personal presence requires that the judge meet the person, but what is happening when a meeting between a CoP judge and P takes place is a key issue, and one that remains unresolved. The approach of the Family Court to judges meeting children is that this is essentially tokenistic, based on courtesy, and cannot have an impact on the decision. In the Mental Health Tribunal the patient has the right to address the tribunal. That may serve the dignity principle that the person has the right to be seen by the body responsible for limiting their rights. Yet it can also serve an evidential purpose, in that the tribunal can assess the person's mental state. It may also serve an adversarial purpose in that the patient may seek to use the opportunity to put forward their case and seek to refute the case for detention. Whilst the practice of CoP judges meeting P is happening more frequently, it is not yet the norm. It remains to be seen where the Court will take the statement by Judge Rogers in *A County Council v AB & Ors (Participation of P in Proceedings)*⁸¹⁶ that Rule 90 of the CoP Rules 'provides or establishes the entitlement of P to attend proceedings'. The word 'entitlement' or 'entitled' is clear.⁸¹⁷

The danger is that this process may become patronizing to P in the CoP. The Report of the Children and Vulnerable Witnesses Working Group reflects the oddity in saying to the child you effectively can't listen to what they say.⁸¹⁸ The person is being invited to be present and possibly to put forward their view, but those views cannot form part of the basis of the decision. However, meeting the judge raises a number of questions if the meeting were to be used for evidence gathering purposes or adversarial purposes. Is the CoP judge expected to assess capacity in the course of meeting P? Issues of P's capacity are usually addressed by expert evidence and there is very often consensus between expert witnesses that P lacks capacity. A courtroom setting is clearly not optimal for assessing capacity. If judges meet P alone, they will be rightly wary of being accused of evidence gathering in the absence of the parties.

Because our report has focused on questions of participation and the rights of P – rather than questions of evidence and the rights of the other parties – we are not able to make recommendations resolving these questions. This is why we have recommended the establishment of a working group to consider how best to respond to the ECtHR's rule of personal presence (Recommendations 8 and 9). This working group should have involvement from legal experts, who can help resolve concerns about potentially taking evidence in the absence of other parties, or the thorny question of what elements of capacity assessment are properly for the court and what lies within the domain of expert evidence. Yet this working group should also reflect the same participatory spirit that animates the human rights approach advocated for in this report, and the CRPD's specific requirement that disabled people through their representative organisations are properly involved and consulted upon for policy decisions concerning them.⁸¹⁹ The working group's approach should also reflect the CoP's broader commitment to transparency of process.

⁸¹⁶ [2016] EWCOP 41

⁸¹⁷ Ibid, para 36

⁸¹⁸ Children and Vulnerable Witnesses Working Group, 'Report of the Vulnerable Witnesses & Children Working Group February 2015' (Judiciary of England and Wales, 2015).

⁸¹⁹ Article 4(3) CRPD, which specifies that 'In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with

5.4 SHORTAGE OF RESOURCES

Clearly facilitating effective participation by P in cases where P lacks capacity can be a resource intensive exercise, and shortage of resources is a recurring theme at all levels of participation. There is a shortage of resources for IMCAs to support P in putting forward wishes and feelings in the decision-making process. Similarly resources for paid RPRs are short, which could restrict their ability to support P in upholding Article 5 rights. Non-means tested legal aid is available only for deprivation of liberty cases, and people may find themselves using their own resources to defend their human rights against a health or social care organization. Again Rule 3A representatives may need to be paid for if they are not family members, and there is no obvious source of funding for this. Clearly, providing special measures of the kind required to enable AB to participate in *A County Council v AB & Ors (Participation of P in Proceedings)*⁸²⁰ can be a costly exercise. Shortage of resources throughout the MCA and CoP system thus presents a very real threat to access to justice and rights to participate in decisions with serious consequences for a person's rights.

Inaction over funding for *Re X* deprivation of liberty cases could constitute discrimination against people with mental disabilities, and there has been no access to justice for the cases stayed after *Re JM*. It is important that we recognise the tension between participation and funding. The simple solution would be for the government to fund the justice system so that the human rights goal of participation may be effectively realized. The other possibility is to look at less expensive ways of doing what the CoP does, such as using the tribunal model of decision-making.

5.5 THE COURT V TRIBUNAL ISSUE

The question of whether a tribunal instead of a court should deal with issues arising under the Mental Capacity Act has been an issue from the outset. The status of a court was preferred to a tribunal by the Law Commission.⁸²¹ Yet the question of whether a tribunal would be more appropriate has continued to be raised and the Law Commission is currently considering which forum is most appropriate for the review of deprivation of liberty. All the signs are that they will opt for the tribunal. We have explained the evolution of the tribunal model of participation since the inception of the tribunal in 1959.

There are signs of cross-fertilisation of ideas from the MCA 2005 into tribunal decision-making, and a growing convergence in the conceptual apparatus of the MCA and MHA regimes. We have discussed the emergence and growing relevance of issues of capacity to instruct a tribunal advocate, and the development of Practice Notes by the Law Society providing detailed guidance on this issue. Determinations of incapacity to instruct are a potential barrier to participation and the guidelines in such cases offer encouragement towards a best interests approach to advocacy.

The tribunal too is under pressure from an ever increasing caseload and there are proposals which are driven primarily by 'efficiency savings'. Yet in many ways the tribunal offers a model of participation that is better suited to fulfilling the requirements of human rights law in facilitating the participation of P in the three senses we have identified.

disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.'

⁸²⁰ [2016] EWCOP 41

⁸²¹ Law Commission No 231, n 184, para 10.8.

As far as participation is concerned, there are many aspects of the tribunal model which recommend it over that currently available in the CoP. There are better systems for accessing information about rights, easier formalities to apply for review, legal aid is available without means test, the cost are less for the parties, legal representatives (in the main) base their case on what the patient wants, not what the representative believes is in their best interests, the proceedings are generally shorter, and case management is less protracted. Just as medical and social services reports with standardized headings may be required by the mental health tribunals, so too could similar templates be devised for other issues such as treatment without consent, decisions about residence and other issues.⁸²² Last but not most certainly not least, the tribunal goes to the person which overcomes in one sweep many (albeit not all) of the numerous practical hurdles to participation faced by the CoP.

We make these points in favour of a tribunal model whilst at the same time paying full tribute to the strong commitment to justice for P of CoP judges and those working within the system, as well as to their immense expertise. One possible option would be to replace the CoP – or at least its welfare jurisdiction - with a tailor made tribunal, or by transferring jurisdiction to the existing mental health tribunals. Another option would be a radical revision of the CoP rules and practices to adopt many of the procedures of the tribunal model that enhance P’s ability to participate. One advantage of incorporating a tribunal model into the existing CoP, would be the retention of the expertise of the existing CoP judiciary.

As to the appropriate judicial forum for hearing Article 5 appeals, the subject of the Law Commission’s current consultation, a strong argument in favour of incorporating a tribunal-like model of participation within the existing CoP system is the sheer difficulty – if not impossibility – of distinguishing which matters under the MCA are ‘pure’ questions of detention, and when they stray into other areas that might be connected with detention but which are not appropriate for a tribunal to decide. For example, cases such as *Briggs* highlight that a person may be deprived of liberty in order to administer a particular medical treatment, and the treatment (not the detention *per se*) is the ‘true’ subject of the dispute. A tribunal empowered only to address questions of detention, but not of medical treatments, would experience considerable difficulty arriving at a decision if the purpose of the detention is the particular treatment. Similar issues may apply where a person is deprived of their liberty because it is considered that they lack the mental capacity to consent to sex, or because of concerns about neglect or abuse by third parties. These kinds of cases may require fact-finding hearings or independent expert evidence in areas not represented on the Tribunal panel to be obtained, or flexible hearing to explore the available options.

Many DoLS cases are not analogous to the cases that the Mental Health Tribunals hear. If a tribunal system for detention were to sit alongside the CoP, rather than within it, there is considerable potential for satellite litigation over which jurisdiction should hear an appeal; the thought of another set of ‘interface’ issues for the courts to decide is deeply unattractive. Adopting elements of the tribunal model of participation within the CoP system will bring the advantage that it can be adapted for use for cases about other matters than detention – including the kinds of health and welfare issues discussed above, or even some property and affairs cases.

We quickly acknowledge that we have not considered in detail here the kinds of cases that may not be suitable for the tribunal model of evidence gathering and legal argument, as our focus here has

⁸²² The CoP has taken some steps towards this approach with the case management pilot.

been on participation. What really matters is not the name of the adjudicative forum – court or tribunal – but the detail of the processes and practices that facilitate P’s participation and recognition of his status at the heart of the case. However it is achieved, we suggest that the tribunal offers a promising model to advance the participation of P in the three senses underlying the right to participate and the rule of personal presence.

Whatever jurisdiction is created or adapted following the Law Commission’s proposals on DoLS, considerable difficulties will remain in reconciling rights to participate with the growing volume of litigation on legal capacity and deprivation of liberty. In connection with detention, the Law Commission’s work will remove from the CoP the non-contentious deprivation of liberty authorisation cases that are currently dealt with under the ‘streamlined’ procedure. However, if the Commission’s proposals succeed in overcoming the numerous difficulties those detained under the MCA have in exercising Article 5(4) rights of appeal, discussed in Section 3.1, it seems likely that there will be a steep rise in the number of cases to be heard. If the Commission’s initial proposal of an automatic court review for those who have not exercised any right of appeal within a particular timeframe⁸²³ is taken forward, this could result in over one hundred thousand Article 5(4) appeals each year⁸²⁴, far exceeding even the number of Mental Health Tribunal hearings. It is difficult to see how meaningful participation would be possible on this scale.

In our view it would be preferable to restrict tribunal hearings to those situations where either P or those close to P object to their detention, or where professionals have concerns about the restrictions (for example, an advocate representing P). On the available evidence it is difficult to draw any conclusions about how widely such a jurisdiction would be used, but it seems likely to see far greater use than the CoP’s current jurisdiction over deprivation of liberty. Thus, the shadow looming over any future jurisdiction in this area is the difficult ‘Procedural Balance’ so aptly summed up by Charles J in *Re NRA and others*,⁸²⁵ between satisfying the procedural and substantive requirements of Article 5 and the common law, without a procedure so costly it diverts resources away from care provision, causes unnecessary intrusions into private lives, and incurs such delays that it does not provide an effective procedural safeguard. We have returned to the difficult procedural balance between volume and participation throughout this report. Its resolution will be critical to the success of any future court or tribunal jurisdiction for the MCA.

Our overarching conclusion is that the Law Commission’s review of the DoLS presents an opportunity to introduce a new approach to jurisdiction over people alleged to lack decision-making capacity based on a human rights approach to participation. We outline the key elements in a human rights approach, and set out several important respects in which the CoP’s processes require reconsideration, both in the context of detention but also wider issues of health and welfare. We have also highlighted the important steps that need to be taken by government to ensure the entire system operates in a way that respects, protects and upholds the rights of those subject to substitute decision making under the MCA. Our report is intended to contribute to the policy debate about the appropriate forum for disputes about deprivation of liberty, and we hope

⁸²³ Law Commission Number 222, n 94. Provisional proposal 11-4

⁸²⁴ The Law Commission estimate that 70% of the estimated 149,810 who would be subject to their restrictive care and treatment scheme would have a tribunal hearing on this scheme, totalling 104,867 hearings per year (if hearings are restricted to one per year). Law Commission, ‘Impact Assessment: Mental Capacity and Detention (LAWCOM0044 2015).

⁸²⁵ *Re: NRA and others* [2015] EWCOP 59

that it may inspire policy makers and those responsible for review of the CoP's processes for health and welfare, to consider a new approach.

APPENDIX A: RULE 3A OF THE COURT OF PROTECTION RULES 2007, AS AMENDED

- (1) The court shall in each case, on its own initiative or on the application of any person, consider whether it should make one or more of the directions in paragraph (2), having regard to –
 - (a) the nature and extent of the information before the court;
 - (b) the issues raised in the case;
 - (c) whether a matter is contentious; and
 - (d) whether P has been notified in accordance with the provisions of Part 7 and what, if anything, P has said or done in response to such notification.
- (2) The directions are that –
 - (a) P should be joined as a party;
 - (b) P's participation should be secured by the appointment of an accredited legal representative to represent P in the proceedings and to discharge such other functions as the court may direct;
 - (c) P's participation should be secured by the appointment of a representative whose function shall be to provide the court with information as to the matters set out in section 4(6) of the Act and to discharge such other functions as the court may direct;
 - (d) P should have the opportunity to address (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur;
 - (e) P's interests and position can properly be secured without any direction under subparagraphs (a) to (d) being made or by the making of an alternative direction meeting the overriding objective.
- (3) Any appointment or directions made pursuant to paragraph (2)(b) to (e) may be made for such period or periods as the court thinks fit.
- (4) Unless P has capacity to conduct the proceedings, an order joining P as a party shall only take effect –
 - (a) on the appointment of a litigation friend on P's behalf; or
 - (b) if the court so directs, on or after the appointment of an accredited legal representative.
- (5) If the court has directed that P should be joined as a party but such joinder does not occur because no litigation friend or accredited legal representative is appointed, the court shall record in a judgment or order –
 - (a) the fact that no such appointment was made; and
 - (b) the reasons given for that appointment not being made.
- (6) A practice direction may make additional or supplementary provision in respect of any of the matters set out in this rule.

APPENDIX B: MENTAL HEALTH TRIBUNAL FORMS

**First-tier Tribunal
Health, Education and Social Care Chamber
(Mental Health)**

Office stamp (date received)

**Application to First-tier Tribunal (Mental Health)
Mental Health Act 1983 (as amended)
The Tribunal Procedure (First-tier Tribunal) (HESC) Rules 2008**

Please tick the relevant application type			
(Please use special form for an application where the patient is subject to guardianship)			
Application by or on behalf of a patient detained for assessment (S.2)		Application by or on behalf of a patient subject to a CTO	
Application by or on behalf of a non-restricted patient detained for treatment		Application by or on behalf of a RESTRICTED patient	
Application by the patient's Nearest Relative (specify below *)		Other application by a non-restricted patient (specify below *)	
*		*	

<p>Please complete all information requested in this part of the application form.</p> <ul style="list-style-type: none"> An application must, if possible, contain all the information requested. If you cannot provide the information required below, please give reasons. The tribunal may return an incomplete application form. 	
Patients full name ⁸²⁶	
Date of Birth ¹	
Provision or Section under which the patient is detained, liable to be detained, or subject to an Order under the Act ¹	
Date(s) of relevant Section, Admission, and/or Order ¹	
Hospital (where patient is, or is liable to be, detained) ¹	
Responsible Authority ¹ (See Guidance)	

⁸²⁶ Parties must cooperate with the tribunal and this information is required to enable the tribunal to deal with the case effectively and to avoid delay. An incomplete application form may be returned.

For patients in the community please give 1) patient's address and 2) name and address of Community Supervisor or Care Coordinator¹	1) 2)
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Nearest Relative details if known (Non-restricted cases only)	
Name	
Address	
Relationship to patient	
Does the patient object to the Nearest Relative being informed about the case?	
Solicitor's details if known	
Name of solicitor	
Name & address of solicitor's firm	
Telephone number	
Secure email address	
Unrepresented: *Delete as appropriate	<ul style="list-style-type: none"> • I intend to appoint a solicitor myself* • I would like a solicitor to be appointed on my behalf* • I do not wish to appoint a solicitor as I intend to represent myself at the hearing*

--	--

Is an interpreter is required? If so, please enter the language and dialect required	
Please tell us of any other special requirements	

Declaration (*Delete as appropriate)

This application is submitted by the patient or nearest relative.

Or

This application is submitted on behalf of the patient or nearest relative, who has personally authorised me to submit this application on their behalf.

Signature		Date	
Print name			

Completed forms should be sent by secure email to: tsmapplications@hmcts.gsi.gov.uk

If you have a CJSM account, please send to tsmapplications@hmcts.gsi.gov.uk.cjism.net

Or send by DX to:

HM Courts & Tribunals Service,
First-tier Tribunal (Mental Health)
DX: 743090 Leicester 35

Or send by first class post to:

HM Courts & Tribunals Service,
First-tier Tribunal (Mental Health),
PO Box 8793,
5th Floor,
Leicester
LE1 8BN.

Please do **not** submit the form more than once.

APPENDIX C: EXPLANATORY NOTE FOR A FAMILY MEMBER OR FRIEND APPOINTED AS A RULE 3A REPRESENTATIVE

Issued by Mr Justice Charles in *Re VE* [2016] EWCOP 16 (10 March 2016)

General

The Supreme Court has decided that the package of care and support provided to P in this case means that P is being deprived of his liberty. If, as is asserted by the applicant authority, P does not have the capacity to give consent to that package of care and support, it needs to be authorised by the Court.

The Court will consider whether that package of care and support is the least restrictive available option to best promote the best interests of P and the application is made on the basis that the applicant authority is of the view that it is.

The Court has appointed you as a Rule 3A representative for P because of your relationship with and knowledge of P and because the Court is satisfied that without causing P any or any unnecessary distress you can assist the Court in reaching its decision by examining what is proposed and being done by the applicant authority from the perspective of P's best interests (rather than your own or those of others).

What you need to do is to consider and decide from that perspective whether P's package of care and support is the least restrictive available option that best promotes P's best interests and then inform the Court what you have decided and what P's wishes and feelings about the package of care and support are

In short, the Court is asking you, as someone who knows the position on the ground, to consider whether from the perspective of P's best interests you agree or do not agree that the Court should authorise P's package of care and support.

This will involve you weighing the pros and cons of that package of care and support, comparing it with other available options and (if appropriate) proposing changes to the applicant authority. For example, if you consider that some of the restrictions it puts in place are unnecessary or inappropriate and should be changed, you should raise this with the applicant authority and, if they do not agree with what you propose, the Court.

If you consider that P has capacity to consent to the package of care and support, or parts of it, you should raise this with the applicant authority and the Court.

In any event, you should inform the Court about what P has said about, and P's attitude towards, the package of care and support.

You should also check from time to time that the package of care and support is being properly implemented and whether it needs to be changed because P's condition has changed, or for any other reason. If you conclude that its implementation or terms should be changed you should raise this with the applicant authority and the Court if the changes are not made.

The Court Documentation

You will receive the application form (COPDOL10) with Annexes A, B and C. These include details of how the package of care and support is said to deprive P of his liberty and details of the consultations that have occurred with P and others about it.

You will also receive a formal assessment of P's mental capacity (COP3), a mental health assessment, a care plan, best interests assessment forms, risk assessments and a placement plan. These set out why the applicant authority has reached the view that the package of care and support is the least restrictive available option to best promote the best interests of P.

Steps you should take

These will include the following:

- examining the Court documentation to check that it is accurate and whether you agree with what it sets out
- discussing any points that you think need to be clarified or changed with the applicant authority
- discussing the package of care and support and the application to the Court with P in so far as P is able to understand them. In particular, if you do not know this already, and it will not cause unnecessary distress you should ask P what he thinks about the package of care and support
- considering whether you support the application and so think that the Court should make the order sought by the applicant authority
- if you support the application and so think that the Court should make the order sought by the applicant authority the Court could deal with the case without a hearing but you should discuss with P whether P wants to play a direct part in the proceedings (e.g. by attending a court hearing or by communicating directly with the judge) and if P wants to do this you should raise this with the applicant authority and include it in your statement to the Court.

Section 4(6) of the Mental Capacity Act

The order of the Court refers to this section. It provides that a person determining what is in a person's best interests must consider so far as is reasonably ascertainable:

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so

Your statement

This should be in form COP24 and it can be downloaded from the Courts website (<http://hmctsformfinder.justice.gov.uk/courtfinder/forms/cop024-eng.pdf>).

You should complete the details on page 1 as follows:

- Statement given by (name of witness) – **[your name]**
- Statement – **[tick 1st box]**
- Filed on behalf of (name of party) – **[your name (Rule 3A Representative)]**
- Date statement was made – **[date of completing your witness statement]**
- Case no. – **[Case number]**

- Full name of person to whom the application relates – **[P's full name]**

On page 2 you should include your name at (1), occupation at (2) and address at (3). You should not tick either of the boxes below (3).

Your statement begins at (4) and should be formatted in numbered paragraphs. It need not contain long explanations and if you agree with what others have set out in the court documentation you can simply say so.

Your statement should generally include the following:

- An explanation of who you are i.e. P's relation or friend
- So far as is possible the matters covered in section 4 (6), which is set out above
- If you do support the application your reasons for doing so
- Whether an oral hearing may be required because P wishes to see the judge or take a direct part in a hearing; setting out what P wants to happen
- Whether an oral hearing is required because matters are disputed because, for example, you do not support the arrangements proposed by the applicant authority or they are opposed by P or someone else (such as a friend or a family member); setting out the reasons for that lack of support or opposition
- Any comments you wish to make on P's capacity to make decisions about P's care arrangements
- Any other comments you wish to make and in particular any that are directed to assisting the Court to determine whether P's package of care and support is the least restrictive available option that best promote P's best interests

At the bottom of page four you should sign your statement to confirm that its contents are correct. You should also include your name and the date where indicated.

Legal advice

You may wish to seek independent advice from a solicitor who may be able to provide it to you free of charge under the legal aid regulations relating to "legal help".

The applicant authority may be able to provide you with a list of solicitors who do this work.

Queries

The applicant local authority may be able to answer any queries you have and will be able to give you details of how you can contact the Court, if you wish to do so.

APPENDIX D: SECOND OPINIONS UNDER THE MENTAL HEALTH ACT 1983

Table 4 Second opinions for Electro Convulsive Therapy (ECT) and medicines under the Mental Health Act 1983 from 1983-2015

Year (Biennial 1983 – 2009; annual 2009 – 2015)	ECT	Medicine	CTO (Introduced in 2009)
1983-1985	2,146	1,886	
1985-1987	2,483	2,363	
1987-1989	4,203	3,138	
1989-1991	3,978	3,023	
1991-1993	4,067	4,627	
1993-1995	4,456	6,195	
1995-1997	3,611	6,528	
1997-1999	4,426	10,848	
1999-2001	4,274	11,974	
2001-2003	4,280	14,112	
2003-2005	3,811	16,931	
2005-2007	3,773	18,831	
2007-2009	3,481	21,551	
Annual reports			
2009-2010	1,407	11,606	3406
2010-2011	1,217	11,709	3,667
2011-2012	1,215	11,944	3,721

2012-2013 ⁸²⁷	1,306	10,365	1,713
2013-2014	1,521	10,821	1,306
2014-2015	1,631	11,610	1,391

Sources: Mental Health Act Commission *Risk, Rights and Recovery: Twelfth Biennial Report, 2005-2007* TSO 2008 pp 195, 218; Mental Health Act Commission, *Coercion and Consent: Thirteenth Biennial Report 2007-2009* TSO 2009 p 139.

After 2009 the Mental Health Act Commission (MHAC) was subsumed into the Care Quality Commission (CQC), which assumed responsibility for running the second opinion service and monitoring the Mental Health Act 1983. Since 2009 the CQC publishes reports on an annual rather than a biennial basis. From 2009, following the introduction of community treatment orders (CTOs) the figures include the numbers of second opinions for CTO patients.

⁸²⁷ The sharp fall in numbers of CTO second opinions was due to s 299 of the Health and Social Care Act 2012 which provided that if the patients responsible clinician certified that the patient had capacity and consented to the treatment, no second opinion certificate was required.