

Welfare cases in the Court of Protection: A statistical overview

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September 2017

<http://sites.cardiff.ac.uk/wccop>
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KEY FINDINGS

The Court of Protection (CoP) was established in 2007 by the Mental Capacity Act 2005 (MCA) to adjudicate on questions relating to mental capacity and best interests. It has an important and growing jurisdiction over decisions concerning the health, welfare and liberty of people with mental disabilities such as dementia, learning disabilities, brain injuries and mental illness. The CoP can also authorise deprivation of liberty in a wide range of health and social care settings, and review the lawfulness of authorisations of detention issued by local authorities and health bodies under the deprivation of liberty safeguards (DoLS).

Two statistical studies on the Court of Protection's welfare jurisdiction

This report describes the findings of two statistical studies on the CoP's health, welfare and deprivation of liberty jurisdiction. One study was conducted on the CoP's own files. We examined 200 case files held in the CoP's main registry in London and 51 case files from CoP cases heard by High Court judges in the Royal Courts of Justice. The second study used the Freedom of Information Act 2000 (FOIA) to ask local authorities and NHS bodies in England and Wales about their involvement in CoP welfare litigation. Both studies relate to the year 2014-15.

We conducted this research as part of a wider project funded by the Nuffield Foundation on welfare cases in the CoP. In the ten years since the CoP was established, a number of concerns have been raised about the accessibility, efficiency and transparency of CoP proceedings. We have published detailed reports on the legal and policy issues surrounding transparency, efficiency and participation.¹ In the statistical studies reported here, we aim to provide hard data to inform discussion and analysis of these issues for policymakers and others with an interest in the work of the CoP.

Conducting this research raised significant legal and practical challenges. In particular, at the outset of the project in 2013 the legal framework made it almost impossible for research on CoP files to lawfully take place. Thanks to reforms to the Court of Protection Rules 2007 in 2015, and considerable assistance from the CoP's judiciary and staff, we were eventually able to undertake this research. Our report provides significant detail on practical issues regarding data collection from the court's files, to assist other researchers interested in undertaking empirical research on the CoP's jurisdiction.

The changing work of the Court of Protection's welfare jurisdiction

These statistical studies paint a picture of a jurisdiction that has changed beyond recognition from that envisaged by the Law Commission during the 1990s when it considered the need for a statutory mental capacity jurisdiction and court. The workload of the CoP is very different from its predecessor jurisdiction, the declaratory jurisdiction of the High Court, which heard a number of cases about mental capacity and best interests during the 1990s and early 2000s. Whereas these earlier cases mostly concerned serious medical treatment, the most common cases heard under the CoP's welfare jurisdiction today concern: where a person should live; how they should be cared for; and questions about relationships such as whether contact with particular individuals should be restricted, and whether a person has the mental capacity to consent to sex or marriage. Although

¹ These reports are available on our project website: <http://sites.cardiff.ac.uk/wccop>

serious medical treatment cases have a high profile in the media and academic literature, they make up a relatively small proportion of the CoP's current work.

This means that social care professionals and local authorities are now the main users of the CoP's jurisdiction, not medical professionals and healthcare bodies. This shift towards cases about residence and relationships also has important resource implications for the CoP and more widely: our studies indicate that these cases are more complex, involve more hearings and parties, take longer and cost more, than hearings about medical treatments.

Media concerns and transparency

The CoP has been the target of widespread campaigns for greater media freedom to attend and report on hearings. Our study, conducted before the current transparency pilot enhanced media access to the court, found little evidence of active media efforts to attend or report on hearings, and only a small number of examples of reporting restriction orders imposed on the media. Orders preventing the parties from communicating information about the proceedings were more common, however. We found few signs of key transparency markers such as holding hearings in public or the publication of judgments, although this may be because we only looked at a relatively small number of High Court case files.

Some media reports have raised concerns about the use of committal for contempt of court, and *ex parte* hearings where family are not notified – we found very little evidence for such practices in our sample.

Increasing volume of litigation

When the CoP was established, it was anticipated that it would hear only a couple of hundred health and welfare cases each year. Yet the number of cases heard under the CoP's health and welfare jurisdiction has increased dramatically since it was established. In 2008 the number of welfare related applications received by the CoP was fewer than 1000, in 2016 it is greater than 4000 and expected to continue to rise. This process was accelerated by the ruling of the Supreme Court in 2014 in *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council*.² *Cheshire West* adopted a more expansive interpretation of deprivation of liberty in care settings than earlier judgments, and meant that *in theory* local authorities should be applying to the Court of Protection for authorisation of deprivation of liberty in tens of thousands of cases. Our studies suggest that by and large local authorities are not complying with this requirement and the *Cheshire West* 'tsunami' has not materialised in the CoP. Nevertheless, *Cheshire West* has still led to noticeable increases in the number of *Re X* and other welfare cases brought by local authorities to the CoP.

The duration of proceedings

Concern about duration of CoP welfare proceedings has been frequently expressed by the judiciary and elsewhere. Our court files study found a median duration of four months for personal welfare proceedings, whereas the FOIA study of local authorities found a substantially longer median duration of 9 months. Similarly, our court files study found a median duration of five months for completion of s21A DoLS reviews, whereas our FOIA study of local authorities put the median duration at seven months. One reason for the longer median duration found in the FOIA study may

² [2014] UKSC 19

be that the kinds of proceedings that involve local authorities – cases about care, residence and relationships - take longer than cases about medical treatment. The court file study may also underestimate the median duration of cases, due to sampling issues.

Although the duration of proceedings seems to have improved slightly upon 2013-14, we express concern that this is still a very lengthy time for a review of detention. Article 5(4) of the European Convention on Human Rights requires a *speedy* review of detention for detained persons. The timescales for CoP detention reviews compare poorly with the timescales of Mental Health Tribunals, and we were saddened to find in our sample a significant proportion of people who died before their DoLS review could be resolved. Nevertheless, it should be noted that our research also confirmed that the substantive questions addressed by the CoP in the course of a s21A review are far wider ranging, and in many ways more complex, than those addressed by a Mental Health Tribunal.

The cost of proceedings

We asked local authorities and the Legal Aid Agency for information about the typical costs of CoP welfare cases. Using data on the median costs of in house legal staff, independent experts and counsel, we estimate that local authorities could expect a typical s21A DoLS review to cost them in the region of £10,000, and a personal welfare case in the region of £13,000. Our findings do, however, indicate that the cost of *Re X* streamlined procedure applications are substantially lower than other kinds of welfare case. This may be because of the streamlined procedure itself, but it could also be because such applications should be non-contentious.

The Ministry of Justice told us that the median cost of a legal aid certificate for a medical treatment case was £7,672, for a non-medical case was £20,874 and for a deprivation of liberty case was £7,288. For self-funding litigants, who would pay a higher rate for legal advice and representation, the costs of welfare litigation are likely to be substantially higher than this.

The high public and private cost of welfare litigation in the CoP is a major barrier to accessing justice and is likely to have a significant chilling effect on bringing disputes and serious issues before the CoP.

Access to justice

The CoP's jurisdiction can be viewed as both a means of conferring authority upon clinical and welfare professionals to carry out acts that are in Ps best interests, and as a means to challenge that authority for P or others acting on Ps behalf. The former function represents the bulk of the CoP's work. The latter judicial review function of enabling challenge to capacity assessments and best interests decisions is extremely important under the European Convention on Human Rights, which emphasises that a person who has been deprived of legal capacity must have direct access to a court to seek its restoration.³

In these studies, we examined two main routes into the CoP's welfare jurisdiction:

1. the personal welfare route, requesting a declaration or order under s15-17 MCA;

³ For further discussion of this see: L Series, P Fennell and J Doughty, 'The Participation of P in Welfare Cases in the Court of Protection' (Cardiff University 2017) < <http://sites.cardiff.ac.uk/wccop/new-research-report-the-participation-of-p-in-welfare-cases-in-the-court-of-protection/> > [accessed 22 September 2017].

2. the deprivation of liberty review route, requesting a determination from the CoP in respect of a DoLS authorisation issued by a public authority under s21A MCA.

Both our studies indicated that it was extremely rare for P to initiate a personal welfare application. Moreover, the court files study indicated that it was also rare for applicants to seek a declaration that P *had* mental capacity, or for the court to make a final order that P had mental capacity in personal welfare cases, under the personal welfare route. Thus the personal welfare application process does appear to be mainly a vehicle for public authorities to seek authority for, or overcome objections to, interventions which they feel are in Ps best interests. The application forms for the personal welfare route are not well-designed for challenging decisions that P lacks capacity.

The same cannot be said of the DoLS review process under s21A MCA, however. A large proportion of reviews of deprivation of liberty authorisations in the CoP were initiated by P, often with the support of an advocate. Many applications in our sample resulted in the termination of the authorisation on mental capacity or best interests grounds. These cases often addressed questions that were ancillary to the detention – such as medical treatment decisions, questions around where a person should live, whom they should have contact with, or whether P had the mental capacity to consent to sex. Our research suggests, therefore, that whereas the CoP’s main personal welfare application route does *not* appear to offer P a viable means to challenge a decision made under the MCA, the DoLS offer an enabling framework for P to be able to do so. This is likely to be because successfully framing the issue as a deprivation of liberty brings with it entitlement to notification of rights to challenge, specialist representation, advocacy, and legal aid.

Recent rulings by the Court of Appeal in *R (Ferreira) v HM Senior Coroner for Inner South London*⁴ and *Director of Legal Aid Casework & Ors v Briggs*⁵ mean that the s21A deprivation of liberty review procedure is no longer available as a route into the CoP’s welfare jurisdiction to challenge serious medical treatment decisions. Instead, P or those acting on P’s behalf will have to make applications under the main personal welfare route to challenge serious medical treatment decisions made under the MCA. We share the concerns recently expressed by Jackson J in *Re M*⁶ that although the s21A route to the CoP’s jurisdiction relied upon a ‘fiction’ and a distortion of the purpose of s21A MCA, those wishing to challenge best interests decisions about serious medical treatment will now face very real practical difficulties in doing so. Our research indicates that the accessibility of a personal welfare route for families and P to challenge best interests decisions under the MCA itself borders on the fictitious.

Furthermore, although the DoLS review procedure seems to offer a more accessible route into the CoP’s jurisdiction for P to contest a deprivation of legal capacity or deprivation of liberty, our FOIA study indicates that the overall number of court reviews under the DoLS is was very low in contrast with the number of detained persons. This suggests that despite although the DoLS offers an ‘enabling framework’ to access the CoP’s welfare jurisdiction in contrast with its main personal welfare route, most detainees under the DoLS are still not exercising rights of appeal in accordance with Article 5(4) ECHR. Our FOIA study suggests that this problem may be especially pronounced in Wales.

⁴ [2017] EWCA Civ 31

⁵ [2017] EWCA Civ 1169

⁶ [2017] EWCOP 19

The participation of P in welfare proceedings

The participation of P, the person whom the case is about, is increasingly important under domestic and international human rights law.⁷ In our study of the court files we found disappointingly few indications that judges were routinely meeting the person, or that their participation was being actively considered in other ways. However, it is important to emphasise that our study of the files took place in the summer of 2015, and the new rule 3A, designed to enhance the participation of P, only came into force in July 2015.

The outcome of cases

We found very few applications for declarations that P had mental capacity made using the personal welfare route, and very few final declarations that P had mental capacity made by the court in personal welfare cases. However, 40% of all s21A applications made by P sought a declaration that they had mental capacity in relation to the detention or ancillary matters. We found many examples of final orders in s21A review cases finding either that the mental capacity requirement under the DoLS was not met, or that P had mental capacity in relation to residence or another ancillary question that was the true substantive issue underlying the case. These findings seem to support our view that the personal welfare route has largely become a route to the Court's jurisdiction for confirming, rather than contesting, authority under the MCA, whereas DoLS reviews are a very important mechanism not only for challenging detention but also for seeking a restoration of legal capacity in relation to a wide range of health and welfare matters.

The extent to which 'best interests' decisions reflect the wishes and feelings of the person is an increasingly urgent question, owing to discussions prompted by Article 12 of the UN Convention on the Rights of Persons with Disabilities. Unfortunately, although we had hoped to be able to indicate in our research how often a CoP best interests decision results in the decision P wants or would have wanted, we are unable to do so. In part this was because in some cases what P wants is uncertain or contested, and so it would not be possible to categorise this in an objective fashion. However, in large part this was because it was often simply not possible to tell from the materials in the files what P's wishes and feelings actually were about the application or the orders made. We note that the standard application forms for personal welfare and DoLS reviews ask very few questions about P's wishes, and the elements of the capacity assessment forms inquiring about this were often incomplete. Meanwhile the declarations and orders themselves made little reference to P's wishes. We suggest that if we are serious about placing P's wishes and feelings at the heart of decisions made under the MCA, it would be a good start if they were prominent in the application forms and cited in orders making best interests decisions.

Future reforms

Following the Law Commission's recent proposals for reform of the MCA, and in particular the possibility that the CoP's jurisdiction over deprivation of liberty may undergo radical reforms, we hope that policymakers will keep in mind the serious problems reflected in this report regarding the cost and duration of CoP welfare proceedings, the difficulties that P and those acting on P's behalf may have in accessing justice, and in facilitating the full participation of P in proceedings in line with

⁷ For further information about the participation of P in the CoP, see our report: Lucy Series, Phil Fennell and Julie Doughty, 'The participation of P in welfare cases in the Court of Protection' (School of Law and Politics, Cardiff University, Report for the Nuffield Foundation 2017) <<http://sites.cardiff.ac.uk/wccop/new-research-report-the-participation-of-p-in-welfare-cases-in-the-court-of-protection/>>

their human rights. We also recommend that future consideration be given to redesigning the CoP application forms to facilitate any challenges that P or others may wish to bring to an assessment that they lack mental capacity, and to place P's wishes and feelings about any proposed orders at the heart of any application.

ACKNOWLEDGEMENTS

We would like to thank the Nuffield Foundation for funding this research. The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available on the Nuffield Foundation website.⁸

We would like to thank the Research Committee of the School of Law and Politics for providing some additional funding to employ a research assistant, Adam Mercer, to help with collecting data from local authorities.

We would like to thank the members of our advisory group for their ongoing support and advice during our study. Our advisory group members are: Alex Ruck Keene, Amanda Milmore, Anna Lawson, Denzil Lush, Jill Peay, Mat Kinton, Neil Allen, Peter Bartlett, Rachel Griffiths, Richard Jones, Tony Holland, Victoria Butler-Cole, Wayne M Martin, Liz Eaton and Joan Goulbourn. We would like to extend particular thanks to Imogen Parker from the Nuffield Foundation, Alex Ruck Keene, Neil Allen and Victoria Butler Cole for reading drafts of this report and offering helpful comments and suggestions. The views expressed in this report, and any mistakes, are the responsibility of the authors alone.

We would like to thank the judiciary and staff at the Court of Protection and the Ministry of Justice for their ongoing support in the empirical aspects of this study; we are very appreciative of the great efforts they have gone to facilitate access in order to enable this research. In particular we would like to thank the President of the Court of Protection, Sir James Munby, the Vice-President of the Court of Protection, Mr Justice Charles, Liz Eaton and Joan Goulbourn at the Ministry of Justice and the Court of Protection Ad Hoc Rules Committee for responding to our request for changes to the Court of Protection Rules to facilitate research. We would also like to thank James Batey, Lorna Green, Vanessa Howe, Carol Barber and Carolyn Bowstead for hosting Lucy Series at the Court of Protection to conduct the court files research and their assistance with locating the relevant files.

Thanks must also go to the staff at the local authorities and NHS organisations contacted for the second study reported here, for their time and care in responding to our requests for information under the Freedom of Information Act 2000. We hope that our use of this data helps to inform future policies that can have a positive impact on their organisations.



⁸ www.nuffieldfoundation.org