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, it 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 Ps 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 Ps 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

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ABBREVIATIONS

ALR	Accredited Legal Representative. A legal representative who is appointed to represent P under Rule 3A of the COPR, without taking instructions from a litigation friend, who is accredited under a scheme endorsed by the President of the CoP.
CoP	Court of Protection
COP1	The COP1 application form (used to initiate personal welfare and property and affairs applications to the COP).
COP1B	The COP1B form must be submitted with the COP1 application form for a personal welfare application. It provides additional information regarding P in personal welfare cases.
COP9	A COP9 form may be used to make an application within the proceedings by any of the parties.
COPDLA	A COPDLA form is used to initiate a review of an authorisation for detention issued by a supervisory body under the deprivation of liberty safeguards.
COPDOL10	A COPDOL10 form is used to seek an authorisation of a deprivation of liberty by the CoP in non-contentious cases.
COPR	The Court of Protection Rules 2007
DAP	The Ministry of Justice Data Access Panel.
DoLS	The deprivation of liberty safeguards (Schedules A1 and 1A of the Mental Capacity Act 2005)
DPA	Data Protection Act 1998
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FOIA	Freedom of Information Act 2000
HRA	Human Rights Act 1998
IMCA	Independent Mental Capacity Advocate
LHB	Local Health Board (Wales)
LPS	Liberty Protection Safeguards (proposed by the Law Commission as a replacement framework for the DoLS)

MCA	Mental Capacity Act 2005
MCS	Minimally conscious state
MHA	Mental Health Act 1983
P	The person who is the subject of CoP proceedings and who lacks, or is alleged to lack, mental capacity in relation to the matter.
PAA	Privileged access agreement
PVS	Permanent vegetative state
RPR	Relevant person's representative
RROs	Reporting restrictions order
Rule 3A representatives	A person appointed to represent P under Rule 3 of the COPR. This term is typically used to refer to lay representatives, but the COPR also employ it to apply to ALRs.

1. THE COURT OF PROTECTION

The Mental Capacity Act 2005 (MCA) established a legal framework for making decisions in the best interests of people who lack the mental capacity to make decisions for themselves. In the context of health and welfare decisions, a best interests decision on behalf of an adult who lacks mental capacity, operates in lieu of their consent to the care or treatment in question. The MCA created the Court of Protection (CoP)[9] to adjudicate on issues relating to mental capacity, best interests, and legal powers and instruments created by the MCA such as advance decisions refusing treatment (ADRTs)[10] and Lasting Powers of Attorney (LPAs)[11].

A detailed description of the history and role of the CoP can be found in our recently published reports on *Transparency in the Court of Protection*[12], *Use of the Court of Protection's Welfare Jurisdiction by Supervisory Bodies in England and Wales*[13] and the *Participation of P in Welfare Cases in the Court of Protection*.[14] In this section of the report we summarise the key issues to assist the reader with terminological and procedural details of how the CoP operates, and the recent legal and policy changes to the CoP's welfare jurisdiction that shaped our research questions in these studies.

This report describes the findings of two statistical studies of welfare cases in the Court of Protection (CoP), which were carried out during 2015.[15] These studies aimed to provide information about the operation of the CoP during 2014-15, including the kinds of welfare cases it typically heard, how cases came to court, and what happened during the proceedings. This report was prepared by researchers at the School of Law and Politics at Cardiff University for a project funded by the Nuffield Foundation about welfare cases in the CoP.[16]

[9] Part II MCA

[10] 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 sections 24-26 MCA

[11] Lasting Powers of Attorney (LPA) allow a person who has mental capacity to specify named individuals who they would like to make decisions about either property and affairs, or health and welfare, matters in the event that they lost mental capacity (or immediately, in the case of property and affairs LPAs). See sections 9-14 MCA.

[12] 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/>

[13] 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). <http://sites.cardiff.ac.uk/wccop/local-authorities-in-the-court-of-protection-new-research/>

[14] 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 2017). <http://sites.cardiff.ac.uk/wccop/new-research-report-the-participation-of-p-in-welfare-cases-in-the-court-of-protection/>

[15] The delay between gathering the data and publishing this report has occurred because the researcher (L Series) took maternity leave during 2016.

[16] http://sites.cardiff.ac.uk/wccop

The court files study examined a sample of 251 files of CoP welfare cases and looked at a range of issues, including demographic data about the individuals involved in CoP welfare cases, the subject matter of the cases, and further procedural information about the litigation.

The second study used the Freedom of Information Act 2000 (FOIA) to request information from local authorities and NHS organisations in England and Wales about their use of the CoP's health and welfare jurisdiction during 2014-15. This study aimed to gather data that could not be obtained through an analysis of the CoP files, including data on regional variations in use of the CoP and the cost of the proceedings to public authorities. This study replicated an earlier study exploring similar issues between 2013 and 2014.[17]

1.1 The structure and powers of the Court of Protection

The person who lacks, or is alleged to lack, the mental capacity to make a particular decision and is the subject of the proceedings is known as 'P' in the CoP.[18] The CoP can make declarations about P's mental capacity and best interests[19], can make orders relating to P's welfare or property and affairs[20] and can appoint 'deputies' to make decisions on behalf of P.[21] In cases where the MCA cannot be used because either the person has mental capacity, or they have fluctuating capacity, or for technical reasons, the High Court has also been developing the use of its 'inherent jurisdiction' to make orders that grant relief for serious welfare matters that cannot be addressed in any other way. In our study of the CoP files, we looked for evidence of cases that involved use of the inherent jurisdiction of the High Court.

The court is led by the President of the CoP - Sir James Munby and the Vice President - Mr Justice Charles. The court also has a Senior Judge. At the time that the research reported here was undertaken the senior judge was Denzil Lush; he has since retired and Carolyn Hilder has been appointed as the new Senior Judge.

Three distinct 'tiers' of judiciary are nominated to sit as judges of the CoP: District Judges, Circuit Judges and puisne judges of the High Court.[22] The CoP's central registry is in London, but it has arrangements with courts across England and Wales to hear cases in regional courts. Following a recent move to 'regionalise' the CoP, more cases will now be heard in regional courts and administered by 'regional hubs'.[23]

The CoP can hear cases on a wide range of matters relating to a person's property and affairs, and health and welfare matters. The vast majority of CoP cases concern property and affairs, and comparatively few concern health and welfare matters. Official statistics report that in 2015 the

[17] Series, Mercer, Walbridge, Mobbs, Fennell, Doughty and Clements (2015) n 13.

[18] Rule 6 Court of Protection Rules 2007

[19] s15 MCA

[20] s16-18 MCA

[21] s16, s19-20 MCA

[22] s46 MCA

[23] 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 CoPs jurisdiction. These are available online from here: http://www.39essex.com/tag/mental-capacity-newsletter/

CoP received 26,722 applications overall, of which only 63 were for a 'one off' welfare order (compared to 3,217 applications for a 'one off' property and affairs welfare order), 446 were for a welfare deputy (compared to 14,967 applications for a property and affairs deputy), and 1,497 related to deprivation of liberty.[24] Despite having comparatively fewer cases, the CoP's jurisdiction in relation to health, welfare and deprivation of liberty has attracted significant attention in the media and from academic commentators.

The statistical studies reported here relate only to cases concerning health and welfare matters in the CoP, including cases concerning deprivation of liberty (see Section 1.2, below). These are collectively referred to in this research as 'welfare cases'.

The CoP has its own rules of procedure – the Court of Protection Rules 2007 (COPR)[25] and practice directions.[26] The rules govern matters such as the case management powers of the CoP, whether hearings should be in private or in public, and how P participates in a hearing. These rules were subject to wide ranging amendments in 2015[27], discussed further under Section 1.5, below.

1.2 Deprivation of liberty and the Court of Protection

In 2007 the MCA was amended to include a framework for detention in care homes and hospitals, known as the deprivation of liberty safeguards (DoLS).[28] The DoLS were inserted into the MCA following the ruling of the European Court of Human Rights (ECtHR) in *HL v UK*[29], that the 'informal' detention of adults who lacked mental capacity for the purposes of care and treatment did not provide adequate procedural safeguards to satisfy the requirements of Article 5 of the European Convention on Human Rights (ECHR) – the right to liberty and security of the person. The introduction of the DoLS has had a significant impact on the CoP.

The DoLS provide an administrative framework whereby supervisory bodies can authorise deprivation of liberty in care homes or hospitals when qualifying requirements are met. The qualifying requirements include that the person must lack the mental capacity to make decisions about where they should be accommodated for the purpose of care and treatment, and that the detention is in their best interests. In England, local authorities are the supervisory body for authorising detentions in both care homes and hospitals, and in Wales local authorities are the supervisory body for authorising detention in care homes and Local Health Boards (LHBs) are the supervisory body for hospitals.

When a supervisory body issues an authorisation under the DoLS, a relevant person's representative (RPR) is usually appointed to represent the person in matters connected with the detention. This will often be a family member, but where there is no available and appropriate family member at act as RPR a paid professional – often an advocate – may be appointed to fulfil

[24] Ministry of Justice, *Family Court Statistics Quarterly, England and Wales, July to September 2016* (2016) <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2016> accessed 2 March 2017. See supplementary tables 19 and 21.

[25] The Court of Protection Rules 2007 SI 1744/2007 (L. 12)

[26] These are available on the Judiciary website: https://www.judiciary.gov.uk/publications/court-of-protection-practice-directions/

[27] The Court of Protection (Amendment) Rules 2015 SI 2015/549 (L6)

[28] Mental Capacity Act 2005 Schedules A1 and 1A

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

this role. The detainee and unpaid RPRs are also entitled to assistance from an Independent Mental Capacity Advocate (IMCA) to help them understand and exercise their rights under the DoLS.

Under Article 5(4) ECHR, anyone who is deprived of their liberty is '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.' Under the DoLS, a detainee (or others acting on their behalf) may exercise this right of appeal by making an application to the CoP under s21A MCA to ask it to determine whether the qualifying requirements for detention under the DoLS are met. They may also ask the CoP to consider other matters in connection with a DoLS authorisation, such as its purpose, duration, or conditions placed on the care home or hospital. The CoP may to terminate the authorisation or direct that the supervisory body does so. Non-means tested legal aid is available for this purpose, whereas legal aid for wider welfare matters is means tested.

In February 2015, towards the very end of the period covered by the second study under the FOIA (April 1 2014 – March 31 2015), Mr Justice Baker handed down a ruling in *AJ v A Local Authority*[30] which clarified how P should be assisted in exercising these rights of appeal. In *AJ* Baker J held that in the first instance the RPR is responsible for helping P to exercise his right of appeal, with support from the IMCA if necessary. If these safeguards have failed and it appears to the supervisory body that P wishes to exercise his right of appeal, then the supervisory body must as a last resort apply to the CoP for a review of the detention. In *AJ* Baker J clarified 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.'[31] This was based on ECtHR case law described in more detail in our report on participation[32], which held that rights to challenge a deprivation of liberty cannot rest on the goodwill or discretion of third parties,[33] and should not depend upon them demonstrating any particular prospects of success are slim.[34] The effect of this ruling, in theory, should be that greater numbers of reviews under the DoLS may be brought to the CoP on P's behalf, yet such cases may have fewer prospects of success.

Prior to this ruling, the evidence suggests that P had great difficulty exercising his rights of appeal under the DoLS. Although official data on the number of DoLS cases in the CoP is not available[35], the data from the available research – including our study of 2013-14 - suggests that fewer than 2.5% of DoLS detainees exercised their rights of appeal to the CoP during 2012-14.[36] One motivation for repeating our survey of local authorities was to see whether more people were seeking reviews under s21A in 2014-15.

The CoP may only make a welfare order authorising detention where a person is 'eligible' for the DoLS.[37] The DoLS have a complex interface with the Mental Health Act 1983 (MHA). Schedule 1A of

[30] [2015] EWCOP 5

[31] Ibid, Para 77

[32] Series, Fennell and Doughty (2017) n 3

[33] *Stanev v Bulgaria* (App no 36760/06) [2012] ECHR 46 para 174

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

[35] It is not entirely clear whether 'deprivation of liberty' cases reported in the official Family Court Statistics published by the Ministry of Justice relate to the DoLS, or other kinds of deprivation of liberty case.

[36] Series, Mercer, Walbridge, Mobbs, Fennell, Doughty and Clements (2015) 13

[37] MCA s16A

the MCA defines when a person is 'eligible' for the DoLS, in relation to whether they are actually or potentially subject to a regime under the MHA. One important facet of eligibility relates to hospital settings. When a person is detained under the MHA for treatment in hospital for mental disorder, they are not 'eligible' for the DoLS.[38] Similarly, when a person is detained in hospital for treatment for mental disorder, they are not eligible for the DoLS if they are *objecting* to their treatment, and the MHA must be used instead in such cases.[39]

Importantly, in some cases, the CoP has been asked to authorise a deprivation of liberty for a person who is detained in hospital under the MHA for mental health treatment.[40] In such cases the only way to authorise their detention in accordance with the requirements of Article 5(1) ECHR is under the 'inherent jurisdiction' of the High Court. In circumstances where the CoP has been asked to authorise a detention in hospital for mental health treatment and the person is objecting, and therefore they are therefore ineligible for the DoLS, it has been held that, since the MHA is available in such circumstances, and offers more robust safeguards, it would be inappropriate to use the inherent jurisdiction to authorise this detention.[41]

1.3 THE *CHESHIRE WEST* CASE AND THE *RE X* STREAMLINED PROCEDURE

The DoLS administrative procedures are only available for those detained in care homes and hospitals. Yet large numbers of people are cared for in other kinds of settings, such as supported living settings (where many thousands of people with learning disabilities or mental health problems live), extra care housing (which is sometimes provided for older people), or other bespoke care arrangements in a person's own home. Where a person is deprived of their liberty in these settings, the DoLS cannot be used to authorise their detention. In these circumstances the only way to authorise the detention in accordance with the requirements of Article 5(1) ECHR is for an application to be made to the CoP seeking a personal welfare order authorising the detention. If the detention is ongoing, it will need to be reviewed by the CoP and the authorisation renewed at least annually.[42]

This state of affairs is far from satisfactory. In our study of local authorities' use of the CoP in 2013-14, local authorities estimated that such applications for authorisation of a deprivation of liberty cost them in excess of £11,000. As the courts have frequently acknowledged, this meant that if large numbers of applications for authorisation were required of public authorities, it would represent a very significant burden upon local authorities and the wider court system itself.[43] Since even before the DoLS came into force, there was frequent litigation about the definition of 'deprivation of liberty' to be applied for adults considered to lack the mental capacity to consent to their care arrangements. The broader the definition, the greater the resource implications for supervisory bodies charged with administering the DoLS and those responsible for seeking authorisation for detention directly from the CoP. This litigation came to a head when the Supreme

[38] This is 'Case A' under paragraph 2 of Schedule 1A of the MCA.

[39] This is 'Case E' under paragraph 2 of Schedule 1A of the MCA.

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

[41] *Northamptonshire Healthcare NHS Foundation Trust v ML (Rev 1)* [2014] EWCOP 2

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

[43] *Re RK; YB v BCC* [2010] EWHC 3355 (COP), para 6-13, see also 44-45; *P & Q v Surrey County Council* [2011] EWCA Civ 190, para 5; *P v Cheshire West and Chester Council* [2011] EWCA Civ 1333.

Court heard the case of *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council.*[44]

In March 2014 in *Cheshire West* the Supreme Court handed down an 'acid test' of whether or not a person who was unable to give a valid consent to their care arrangements was deprived of their liberty. It held that if a person was subject to 'continuous supervision and control' and 'not free to leave', then they are deprived of their liberty, regardless of whether they are objecting or not, whether the care is 'normal' for a person with a similar disability, and the good intentions of those restricting their liberty. This 'acid test' was much more expansive than the definitions of deprivation of liberty that the Supreme Court rejected. In the first year after the *Cheshire West* decision, 2014-15, the number of authorisations under the DoLS increased by a factor of ten.[45]

It was estimated that following *Cheshire West* as many as 31,000 people living in supported living and similar settings might be considered to be deprived of their liberty and require a court order authorising this.[46] If this 'tidal wave' of applications materialised, it would more than double the existing workload of the CoP and increase the number of welfare related cases it heard by a factor of more than sixty. Thus another motivation for repeating our FOIA study of local authorities in 2014-15 was to consider how *Cheshire West* has affected the number of applications they make to the CoP to authorise detentions that cannot be authorised under the DoLS.

In order to respond to an anticipated large volume of applications, Sir James Munby outlined a new 'streamlined' procedure in *Re X and others*[47] for non-contested applications to authorise a deprivation of liberty. This procedure was challenged in the Court of Appeal because it permitted the CoP to make an order authorising a person's detention without their being a party to the proceedings. In *Re X (Court of Protection Practice)*[48] the Court of Appeal did not have jurisdiction to hear an appeal against the *Re X* procedure because the way in which the procedure had been adopted was – for technical reasons – a nullity. However, in *obiter* remarks the Court of Appeal cast doubt on whether a procedure to authorise deprivation of liberty in which P himself was not a party could be lawful as it did not provide sufficient independent representation of P's interests. In *Re NRA & Ors*[49] Mr Justice Charles held that the *Re X* procedure could be adapted to comply with the requirements of Article 5 ECHR without making P a party to every case through new forms of lay representation, often by family members. We discuss the *Re X* streamlined procedure, and the questions it raises about P's rights to participate in proceedings concerning his liberty, in our report

[44] [2014] UKSC 19

[45] Health and Social Care Information Centre, 'Mental Capacity Act (2005) Deprivation of Liberty Safeguards (England) Annual Report, 2014-15'.

[46] 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). http://www.adass.org.uk/uploadedFiles/adass_content/press_releases/press_2014/EMBARGOED%20DoLS%20PR.pdf> [accessed 6 June 2017].

[47] *X & Ors (Deprivation of Liberty)* [2014] EWCOP 25; *Re X and others (Deprivation of Liberty) (Number 2)*[2014] EWCOP 37

[48] [2015] EWCA Civ 599

[49] [2015] EWCOP 59

on participation in the CoP.[50] In this report, we examined how frequently P is made a party in welfare proceedings more generally.

Despite the CoP taking precautions in anticipation of a large number of applications to authorise deprivation of liberty, the available evidence suggests that this 'flood' has not materialised. A study by *Community Care* found that councils were only making applications in 1.6% of cases where they had identified that they were required to do so by the *Cheshire West* ruling.[51] Our study of the CoP files did not include cases using the *Re X* streamlined procedure. However, our study of local authorities using the FOIA did ask for information about their use of the *Re X* procedure, and the associated costs and duration of such cases.

During 2013-14 the House of Lords Committee on the MCA heard evidence on the implementation of the Act. They concluded that the DoLS were 'not fit for purpose' and recommended that the government undertake a review with a view to their repeal and replacement.[52] The Law Commission has developed proposals for an alternative framework, the Liberty Protection Safeguards (LPS).[53] It considered whether the CoP or a tribunal would be a more appropriate destination for DoLS appeals, but left the question to the government to resolve. Their consultation found widespread support for a tribunal framework, although CoP stakeholders maintained that such cases are better dealt with within the CoP.[54] Robust evidence regarding the accessibility and efficiency (in terms of both speed and duration) of CoP proceedings will be important for making informed policy decisions about the future jurisdiction to resolve disputes under the proposed LPS.

1.4 THE VOLUME PROBLEM

When the CoP was created under the MCA, it was anticipated that it would only hear around 200 applications relating to health and welfare cases each year.[55] Since it began hearing cases in 2007, the number of applications relating to health and welfare matters rose year on year. In part this growth may have been prompted by growing awareness of the court and its role, and developing case law that emphasised the importance of referring disputes about serious welfare matters to the court.[56]

[50] *The Participation of P in Welfare Cases in the Court of Protection*, n 14.

[51] Andy McNicoll, 'Councils' failure to make court 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 27 November 2015]

[52] House of Lords Select Committee on the Mental Capacity Act 2005 (2014) *Mental Capacity Act 2005: post-legislative scrutiny*, (Report of Session 2013–14) TSO: London.

[53] Law Commission, *Mental Capacity and Deprivation of Liberty*, (Law Com No 372, 2017).

[54] Law Commission, *Mental Capacity and Deprivation of Liberty - Consultation Analysis* (2017).

[55] Department for Constitutional Affairs (2005) 'The Mental Capacity Bill: Full Regulatory Impact Assessment', London.

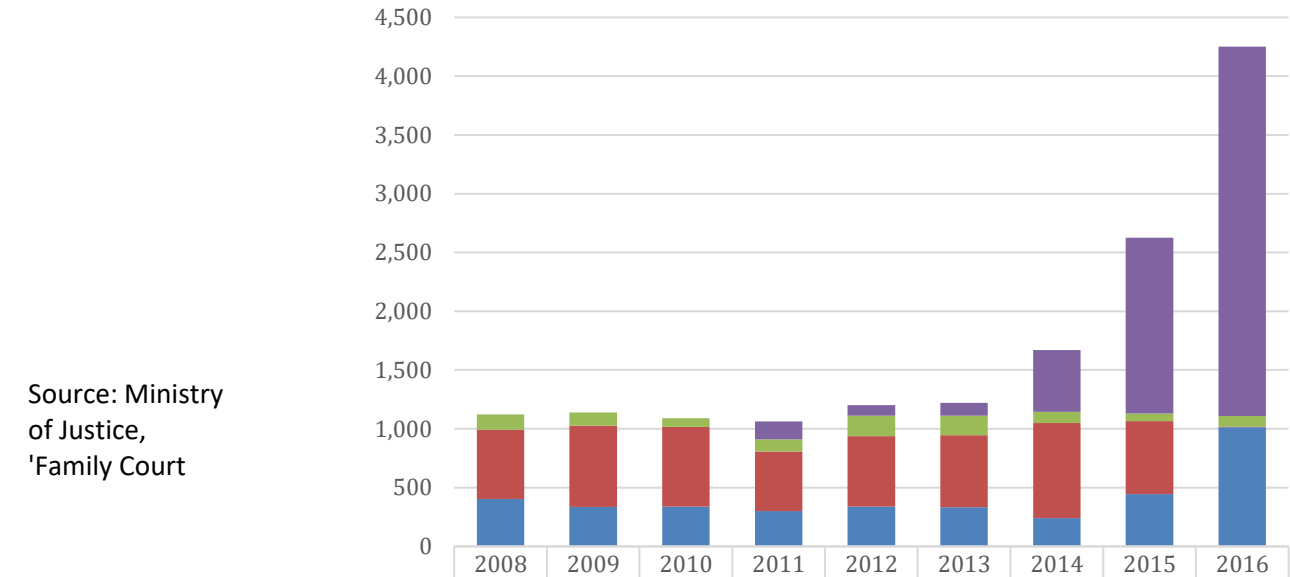
[56] We reviewed this case law in Section 2.1 of our recent report *The Participation of P in Welfare Cases in the Court of Protection*, n 14.

Data published by the Ministry of Justice shows that the CoP's welfare workload accelerated particularly rapidly after 2014 following the *Cheshire West* decision.[57] Figure 1 depicts the rising numbers of welfare related applications to the CoP between 2008-2016, and Figure 2 the number of welfare related orders in that period.[58] These data are useful for giving an overview of the CoP's growing welfare workload, and they do indicate that deprivation of liberty cases underwent a substantial increase from 2014 onwards. However, it is unclear what system is used to categorise these cases; 'deprivation of liberty' could include applications made under s21A seeking a review of a DoLS authorisation, or it might include applications for an order authorisation a deprivation of liberty, that would now be dealt with under the *Re X* streamlined procedure. In addition, many personal welfare cases that are not about deprivation of liberty *per se* may nevertheless involve a deprivation of liberty, yet will not necessarily be categorised as such (for example, applications for serious medical treatments commonly against a person's will involve a deprivation of liberty, but the motivation for applying to court is to authorise the treatment, not the deprivation of liberty). Thus care should be taken before drawing any conclusions about *what kinds* of deprivation of liberty cases this rapid growth reflects.

[57] Ministry of Justice, ''Family court statistics quarterly - January to March 2017'. <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2017> accessed 2 September 2017

[58] NB: these figures do not include all cases that may have welfare related elements, but are not listed as such in the statistics. Likewise, many welfare related applications and orders may have involved a deprivation of liberty, but not be recorded as a 'deprivation of liberty' case in the family statistics.

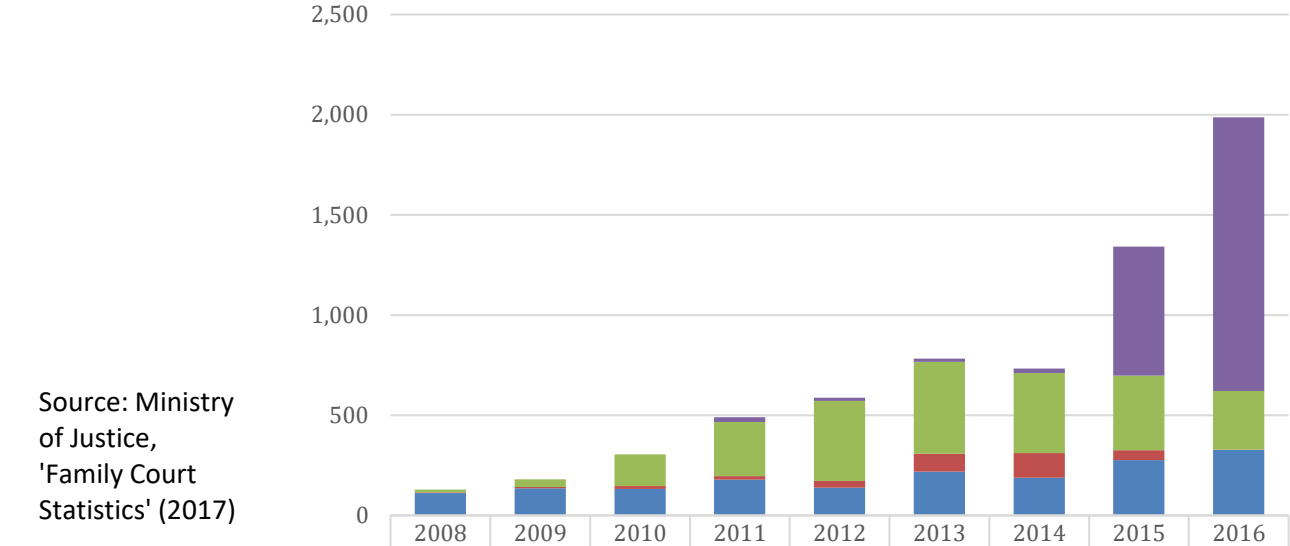
Figure 1 Welfare related applications to the Court of Protection, 2008-2016



Source: Ministry of Justice, 'Family Court

	2008	2009	2010	2011	2012	2013	2014	2015	2016
Deprivation of liberty application		0	0	152	88	109	525	1,497	3,143
Applications for a one-off welfare order	131	112	72	103	174	166	95	63	88
Application for a hybrid deputy	589	692	678	506	599	613	807	621	6
Applications for personal welfare deputy	404	336	339	302	340	333	242	446	1,014

Figure 2 Welfare related orders by the Court of Protection, 2008-2016



Source: Ministry of Justice, 'Family Court Statistics' (2017)

	2008	2009	2010	2011	2012	2013	2014	2015	2016
Deprivation of liberty order		0	0	24	15	17	22	644	1,366
One off' welfare order	14	38	159	270	399	458	400	373	292
Order apointing hybrid deputy	4	6	13	18	34	90	122	49	2
Order appointing personal welfare deputy	111	136	133	178	139	218	189	276	327

1.5 TRANSPARENCY, EFFICIENCY AND PARTICIPATION IN THE COURT OF PROTECTION

Our research on the CoP's welfare jurisdiction has focused on questions of transparency, efficiency and participation. These themes have dominated media and policy discussions about the CoP, yet they are areas where there is relatively little concrete evidence to support some of the claims made. The studies reported here were designed to facilitate a better understanding of matters relating to transparency, efficiency and participation in the court's welfare jurisdiction.

Under the COPR, the general rule is that hearings are in private.[59] The CoP has been subject to fierce media criticism because of this rule and related laws which mean that the publication of information about a private hearing, without the express permission of the CoP, may be a contempt of court.[60] In response to this criticism in January 2014, Sir James Munby introduced practice guidance on the publication of judgments in the CoP.[61] This guidance required judgments by High Court judges or the Senior Judge of the CoP on certain topics – including many related to health and welfare - to be anonymised and published on the British and Irish Legal Information Institute website (BAILIII). This guidance will have been in force for some, but not all, of the cases considered in the court files study reported here. Research on the application of analogous guidance in the Family Court found wide variations in interpretation and compliance between different regional courts and judges.[62]

In 2015, amendments to the COPR[63] created new powers to set up pilot schemes for assessing the use of new practices and procedures in connection with proceedings. The first such scheme announced was a 'transparency pilot' in 2016 (that has been extended into 2017).[64] The transparency pilot falls outside the period of the studies reported here, but represents an important change in the approach of the CoP to permit greater public and media access to observe and report upon welfare cases. Because of widespread media concerns about 'secrecy' in the CoP, particularly in cases concerning committal for contempt of court[65] and alleged *ex parte* hearings where the CoP determines cases without families being informed of a hearing[66], or without

[59] Rule 90 COPR

[60] We discuss the complex legal framework governing this in our report on *Transparency in the Court of Protection*, see n 12.

[61] *Practice Guidance (Transparency in the Court Of Protection)* [2014] EWCOP B2

[62] J Doughty, A Twaite and P Magrath, 'Transparency through publication of family court judgments: An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people' (Cardiff University 2017) < http://orca.cf.ac.uk/99141/> [accessed 21 September 2017].

[63] The Court of Protection (Amendment) Rules 2015 SI 2015/549 (L6)

[64] Judiciary of England and Wales, 'Transparency Pilot: Court of Protection' (28 January 2016) <https://www.judiciary.gov.uk/publications/transparency-pilot-court-of-protection/>

[65] S Doughty and A Dolan, 'Jailed in secret - for trying to rescue her father from care home where she believed he would die' (*Daily Mail,* 23 April 2013) <http://www.dailymail.co.uk/news/article-2313760/Wanda-Maddocks-Jailed-secret--trying-rescue-father-care-home-believed-die.html>

[66] John Hemming, a campaigner concerned about 'secrecy' in the CoP and the Family Court, has described the CoP system as 'an 'appalling' one in which 'the family are not told about it, but the judge is called to rubber-stamp a decision.' Francesca Infante, 'The secret justice that is delivered by phone: Judge gave decision on life-saving treatment over his mobile - while at the zoo' (*Daily Mail,* 24 June 2013) <http://www.dailymail.co.uk/news/article-2347109/The-secret-justice-delivered-phone-Judge-gave-decision-life-saving-treatment-mobile--zoo.html>

notification of P themselves,[67] we looked for evidence of such cases in the CoP files, and at how frequently hearings were in public, the media applied to attend a hearing, and judgments were published on BAILII.

The 2015 amendments to the COPR also introduced important changes for the participation of P in proceedings. This responded to wider changes in international human rights law regarding participation in proceedings concerning deprivation of liberty, deprivation of legal capacity and guardianship, which are outlined at greater length in our report on the participation of P in CoP welfare proceedings.[68] One important change was the introduction of a new Rule 3A on the participation of P. This required CoP judges to consider, in each case, what directions to give regarding the participation of P. It also created new roles for lay representatives (known as 'Rule 3A representatives') and 'accredited legal representatives' (ALRs) who could represent P in cases where P was not a party (using a Rule 3A lay representative) or where there were difficulties securing a litigation friend to give instructions to P's solicitor (using an ALR). Again, these changes came into force *after* the period covered in these studies, and so they are not explored here. However, our study of the CoP files does look at how P participated in cases that occurred before these changes, and will offer an important point of contrast against future research on the new framework for participation.

The CoP has also been criticized for the cost and duration of welfare proceedings by judges[69] and others.[70] In our 2013-14 study of local authorities' use of the CoP, we did find evidence that welfare cases could be very long in duration and could incur significant costs to the local authority (and, very likely, the other parties). We looked again at this issue when we repeated this study on 2014-15, to examine whether there had been any changes in the typical cost and duration of CoP welfare cases involving local authorities. The CoP has responded to these concerns about efficiency by developing a 'streamlined procedure' for *Re X* deprivation of liberty cases. It also introduced a case management pilot scheme,[71] which came into force in September 2016 – falling outside the period of our studies.

1.6 DATA GATHERED IN THE STUDIES

The statistical studies reported here were designed to provide further information relating to the key themes of this research: accessibility, efficiency and transparency in the CoP.

In our study of the court files, the data we sought can be broadly grouped into the following areas:

- The typical substantive issues that the cases were about (e.g. residence, care arrangements, contact, medical treatment, s21A reviews of DoLS authorisations etc).

[67] This occurred in the widely reported case of Alessandra Pacchieri, which we discuss in more detail in our report on the *Participation of P in Welfare cases in the Court of Protection,* n 14.

[68] *The Participation of P in Welfare Cases in the Court of Protection*, n 14.

[69] *A Local Authority v ED & Ors* [2013] EWHC 3069 (CoP) and *A & B (Court of Protection: Delay and Costs)* [2014] EWCOP 48

[70] See evidence to the House of Lords Committee on the MCA of Richard Jones: House of Lords Select Committee on the Mental Capacity Act 2005, *Oral and written evidence – Volume 2 (L – W)* (2014) p 925. <http://www.parliament.uk/business/committees/committees-a-z/lords-select/mental-capacity-act-2005/> [accessed 6 June 2017].

[71] Court of Protection, *Practice Direction - Case Management Pilot* (2016).

- Demographic data about P (e.g. P's age, disability, living arrangements etc)
- The identities of applicants in CoP welfare cases, and the number of parties in a case
- The duration of cases, and how they typically ended (e.g. by final order, by consent, by the death of P etc.)
- How P participated in the case (e.g. was P joined as a party to the case, did P attend any hearings, how was P represented in the case)
- How the case was managed within the court system (e.g. was it transferred to a regional court, how many judges heard a case, how many hearings were there, what 'tier' of judge heard the case, etc.)
- Whether any alternative dispute resolution procedures were used before, or during, the proceedings.
- The use of special procedures within the CoP to make human rights claims under the Human Rights Act 1998 (HRA), Schedule 3 of the MCA on the International Protection of Adults[72] or the inherent jurisdiction.
- What evidence was submitted with the application, what kinds of expertise the CoP bases its decisions on, including expert reports.
- Matters relating to 'transparency' – including privacy injunctions, reporting restriction orders, attendance at hearings by the media and the publication of judgments.
- Matters of particular concern in the media, including the use of committal for contempt of court and ex parte hearings without notification of P or P's family.

We also intended to gather data on how far CoP proceedings gave effect to P's wishes and feelings, and how far 'appeals against a deprivation of liberty' under the DoLS resulted in P being 'discharged from detention'. As we will discuss in more detail in the report, it was not possible to answer these questions because of the partial and complex nature of the information available in the files.

In our study using the Freedom of Information Act 2000 (FOIA) we sought information from local authorities in England and wales, and a sample of NHS bodies in England, on the following matters for the period 2014-15:

- How many CoP welfare cases they were involved in
- What kinds of CoP cases they were involved in
- The identity of the applicant in these cases
- The duration of these cases
- The estimated cost, to the local authority, of these cases
- How frequently did cases involve a claim (pursuant to rule 83 COPR) under the Human Rights Act 1998 (HRA)?

[72] This schedule gives effect in England and Wales to the Convention on the International Protection of Adults, signed at the Hague on 13th January 2000. http://www .hcch.net/e/con ventions/menu35e.html.

2. COURT FILES STUDY: RESEARCH METHOD

This section describes the methods used, and the challenges encountered, in gathering statistical data from files in the CoP. This study presented a number of complex and intersecting administrative, legal and practical challenges. We provide a fairly detailed description here for two main reasons:

1. To give readers a better understanding of the data presented in this report, the analyses conducted (and not conducted), and of the limitations to our study;
2. To assist other researchers with an interest in conducting research on the CoP files, by outlining the challenges faced, the way we overcame them, and potential difficulties for research of this nature on court files.

2.1 AN OVERVIEW OF THE COURT OF PROTECTION APPLICATION PROCESS

To understand the methodological challenges involved in research on CoP files as well as the research findings, it is important to understand the procedures involved in CoP proceedings. For further guidance on CoP practice and procedure, we highly recommend the *Court of Protection Handbook* and accompanying website[73] by Ruck Keene, Edwards, Eldergill and Miles, now in second edition.[74]

Court of Protection application forms for welfare cases

A case first reaches the CoP when an individual or organisation (the 'applicant') applies to the CoP to initiate the proceedings. An application is made by completing the appropriate application forms[75] for the kind of issues that require the court's involvement. We relied heavily on these application forms in our study to obtain much of the data reported here, particularly that which related to the identity of the applicant, demographic data about P, and the subject matter of the case (although this sometimes evolved during the proceedings, and was also taken from other material on the files).

Table 1 provides details on the most commonly used application forms for welfare cases.

Table 1 Court of Protection forms

COP1	**Court of Protection Application Form**	The COP1 form is used for almost all applications to the CoP to initiate personal welfare or property and affairs cases. It is not typically used for deprivation of liberty cases where a person is seeking a s21A review of a deprivation of liberty safeguards authorisation (see COPDLA) or the authorisation of deprivation of liberty in a non-contentious case (see COPDOL10).

[73] https://courtofprotectionhandbook.com/

[74] Alex Ruck Keene, Katie Edwards, Anselm Eldergill and Sophy Miles, *Court of Protection Handbook: A User's Guide* (Second Edition, Legal Action Group 2016)

[75] All CoP application forms are available on the HMCTS Form Finder website: http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court_forms_category=Court%20of%20Protection> [accessed 1 December 2015]

		The COP1 form requires the applicant to supply information identifying themselves, P, and others who may be notified about the application. On the COP1 form the applicant sets out what order they are asking the court to make – in other words, why they have applied to the CoP and what they would like the CoP to do. Requests for orders usually involve a request for a declaration that P has or lacks the mental capacity to make a specific decision, or class of decisions, and a request that a particular order be made in their best interests (if it is contended by the applicant that they lack mental capacity).
COP1B	**Annex B - Supporting information for personal welfare applications**	The COP1B form is used to provide supplemental information about P's situation in personal welfare applications (unless the applicant is completing a COPDLA or COPDOL10 for a deprivation of liberty related matter). Its counterpart, the COP1A, is used to provide additional information in property and affairs cases, but these are not included in this study. At the time of the study, the COP1B required information about, *inter alia*, P's living and care arrangements, their marital status, whether or not they had made any LPA or Enduring Power of Attorney (EPA), whether or not they were subject to guardianship under the Mental Health Act 1983. In July 2015 the COP1 was revised to include some of this information, and some of the information requested on the COP1B has been modified.
COP3	**Assessment of capacity**	The court's guidance on making a personal welfare application (COPGN4)[76] states that a COP3 form is required when making a personal welfare application using a COP1 form (the COP3 is not required for a COPDLA or COPDOL10 application). The COP3 form is for an assessment of P's capacity in relation to the declarations sought by the applicant. The applicant must complete the first part of the form, including re-stating what declarations and orders they are seeking from the CoP. The second part of the form contains the assessment of P's mental capacity, which must be completed by a practitioner. The form states that the practitioner must be a registered medical practitioner (for example, a GP), a psychiatrist, an approved mental health professional, a social worker, a psychologist, nurse or occupational therapist. This appears only to be guidance, however, as there is no statutory requirement, nor any requirement in the COPR or

[76] Available: http://hmctsformfinder.justice.gov.uk/courtfinder/forms/cop-gn004-eng.pdf [accessed 1 December 2015]

		the MCA Codes of Practice that court proceedings may only be initiated with evidence from a registered health or social care professional. In our report on the participation of P in CoP welfare proceedings,[77] we highlighted problems with the COP3 form: the guidance requiring its completion presumes that all applicants will be contending that P lacks, rather than has, mental capacity; the structure of the form is 'leading' in the sense that it does not ask open questions about P's mental capacity, and nothing on the form asks about more progressive elements of the mental capacity assessment such as what support has been, or could be, provided to assist P in making decisions.
COPDLA	**Deprivation of Liberty Application Form**	The COPDLA is used where P is subject to an urgent or standard authorisation under the DoLS, and a court review is sought under s21A MCA. Sometimes the applicant may not realise that the COPDLA is the appropriate form for seeking a court review of DoLS authorisation and they may use the personal welfare application forms (COP1 and COP1B). The revised COP1 and COP1B forms now direct applicants seeking a review of a DoLS authorisation to use the COPDLA form instead. The COPDLA form requests information about the applicant, P, the supervisory body that issued the authorisation, the managing authority (the care home or hospital where P is deprived of their liberty) and any RPR and IMCA involved in the case. The applicant must state what matters in relation to the DoLS authorisation they are asking the court to determine. Supporting documents – including the DoLS authorisation forms and assessments – may be filed with the COPDLA, or requested from the supervisory body or managing authority if they are not in the applicant's possession. No COP3 or COP1B is required to be submitted with the COPDLA form; much of the relevant information will be included in the DoLS forms. In these cases, we drew information about the assessment of mental capacity and P's situation largely from the DoLS forms, which are completed by the supervisory body.
COPDOL10	**Application to Authorise a**	The COPDOL10 form was introduced in the wake of the *Cheshire West* judgment as part of the *Re X* streamlined procedure for applications to authorise deprivation of liberty in settings other than care homes or hospitals, which were

[77] *The Participation of P in Welfare Cases in the Court of Protection*, n 14.

	Deprivation of Liberty	not covered by the DoLS. The COPDOL10 streamlined procedure is only to be used where the application to authorise the detention is non-contentious, i.e. neither P, nor P's friends or family or others involved in their care objects to the deprivation of liberty. Where there may be controversy over the authorisation, the COP1 personal welfare application procedure should be used. The COPDOL10 form is 'front loaded' and designed to provide the court with all the information it needs to be able to authorise the deprivation of liberty without requesting further reports or information. Evidence of incapacity may be supplied by attaching a COP3 form or other evidence of incapacity (for example, a report or in-house standardized capacity assessment). For reasons discussed below, the *Re X* streamlined procedure was excluded from our study. However in a handful of cases they were included because although an application was made using the COPDOL10 forms it transpired that the application was not non-contentious and so was transferred into the general personal welfare application process.
COP9	**Application notice**	The COP9 form is used in a variety of circumstances in the court's procedures. It might be completed by the applicant or another party if they wish to request further orders from the court, or to bring particular matters to the court's attention. It is typically used once the proceedings have already started. It requires information about those completing the COP9 application, the order they are asking the court to make, the grounds for that order and any persons with an interest and should be heard by the court in relation to the requested order.

Permission to bring proceedings

There are no restrictions on who can make an application to the CoP. However, most applicants will be required to seek the court's permission before the proceedings can be initiated.[78] At the outset of the study, separate forms were required for requesting permission to bring proceedings,[79] but in July 2015 the requirement to request permission was included as part of the COP1 form (section 6). A large proportion of personal welfare cases are not granted permission, but this is because many include requests for the appointment of a personal welfare deputy, which is rarely granted by the

[78] s50 MCA; Part 8 COPR

[79] The COP2 form.

court.[80] This study only included applications where permission to bring the proceedings was either not required or had been granted by the court.

Processing applications

When the CoP receives an application it is allocated to a specialist team at the court's general registry in London.[81] At the time of writing, the court had specialist teams who manage personal welfare applications and a separate specialist team for the *Re X* streamlined procedure applications. The case is then usually allocated to a district judge at the court's London registry, who will review the applications and issue a directions order. The directions order deals with matters such as who should be joined as a party to the case, whether and when a first hearing should be held, whether any further evidence should be gathered before this hearing, and who should be notified about the case. The directions order will also specify whether the case should be heard in a regional court so that hearings are closer to the parties, or whether it should be transferred to the High Court – for example, all serious medical treatment cases are transferred to the High Court.[82]

The application is then 'issued' by the CoP. This means that the directions order and notice of any hearing is sent back to the applicant. The directions order is likely to direct that the applicant serve notice of the proceedings to any parties joined by the court and others who the court direct should be notified about the case. It is then the responsibility of the applicant to ensure these persons are duly served and notified, and to file certificates[83] back to the court to confirm they have done this.

Interim orders

Further orders may be issued by the judge (or judges) overseeing the case, following a hearing, of their own initiative, or in response to COP9 applications or other correspondence with the parties. Orders may give directions about the gathering of further evidence – for example, a typical order in a welfare case would specify that a report on P's mental capacity or an element of their best interests is to be requested from a local authority or the NHS under s49 MCA (a 'section 49 report'), or from an independent expert. The order will typically nominate one of the parties – often the Official Solicitor, if he is representing P – to give instructions to the independent expert, which must be agreed by all the parties, and it will specify who is responsible for meeting the costs of any expert reports. Interim orders may also direct what should happen in relation to P whilst the matter is before the CoP.

Hearings

There may be any number of hearings during the course of the proceedings. The number of hearings is determined by a wide range of factors, including: whether further evidence is required by the court before making a final order, to give the parties an opportunity to comply with an

[80] Lucy Series, 'Applications for permission to the Court of Protection: a statistical analysis', (2012) 2(2) *Elder Law Journal* 175-184

[81] NB: regional registries will soon be established and may manage applications differently.

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

[83] The COP22 form must be completed by whoever is responsible for effecting service or notification; the COP20A is used for notification of P.

earlier order and give the changed circumstances a chance to bed in, etc. Hearings may also be vacated for a wide range of reasons: a temporary change in circumstances (e.g. a person might be temporarily admitted to hospital or become ill and the matters which the proceedings relate to are put on hold until they recover or are discharged; the inability of a judge or one of the parties to attend a hearing on a particular date; or the fact that a particular issue which a hearing was to address has been resolved or cannot be resolved by the planned time of the hearing).

Judicial continuity

The proceedings may be heard by one or more judges. Where a case is transferred to a regional court or the High Court it will almost always involve more than one judge – the district judge who issued the directions order and transferred the case, and the judge(s) who heard the proceedings from the point of transfer onwards. Different courts and different judges have different practices in relation to judicial continuity. Some judges try to ensure judicial continuity by making an order reserving a case to be heard by themselves in the future. We were told that in the High Court the judge hearing a case is usually determined by who is sitting as a CoP nominated judge on the day of the hearing, rather than cases being listed for a particular judge.

How cases end

CoP cases could end in a number of different ways. The court may issue a final order based on the evidence and issues before the court. In some cases, the parties to the case reach agreement as to the substantive issues and request that the court issues a final order with the consent of all the parties (a consent order). In some cases, the applicant may change their mind about the order sought, or the circumstances change such that the order initially sought is no longer appropriate, and they may apply to the court to withdraw the application. This must be approved by the court. In some cases the proceedings may be discharged because P dies or some other development means that they no longer have any purpose.

2.2 Ethics and access to the Court of Protection files

Research involving the CoP involves navigating complex administrative and access procedures. In this section we outline the challenges we faced in this respect, and how we overcame them.

We met with senior members of the judiciary and the court's management at the early planning stages of our study (before applying for funding), and throughout the preparation for, and undertaking of, our data collection. Without the invaluable support and advice of these individuals our study would have floundered entirely.

Navigating the court rules

The COPR and interconnected laws governing the sharing of information about CoP proceedings make it very difficult for researchers to access information about individual CoP cases. In our report on *Transparency in the Court of Protection*[84] we outlined the legal framework as it stood when we commenced our research. At that time, the legal picture was essentially this:

- Most CoP proceedings were heard in private, in accordance with Rule 90 COPR;
- Any disclosure or communication of information about CoP proceedings heard in private is potentially a contempt of court under s12 Administration of Justice Act 1960;

[84] Series, Fennell, Doughty and Clements (2015), n 13.

- Thus, even if we successfully navigated access to the files under the Data Protection Act 1998 (discussed below) anyone sharing these files with us, or any use of the information on these files, would potentially be a contempt of court.

At the outset of our study, the only provisions in the COPR for granting us permission to access the files and report on our findings were rule 17 (Supply of documents to a non-party from court records) and rule 91 (Court's general power to authorise publication of information about proceedings). There was no facility to make a 'bulk order' permitting access to a large number of case files; an order would be required for each and every file we accessed.

We discussed this problem with senior members of the judiciary of the CoP, who were very keen to assist us in our research. They suggested that a system be devised whereby when a personal welfare application was issued by the CoP the applicant be sent an information sheet about the study, and given directions to send copies of this to all persons notified about the case. Provided no person notified had objected to the inclusion of the case in our study within 21 days, an order would be made by a judge granting us access to the file. We met with manager at the court to put this system in place, and produced information sheets[85] and a set of brightly coloured stickers to identify the files that had been enlisted into the study by way of an order by the judge.

The following year (2014) we returned to the court to look at a sample of the files. Although very few people objected to inclusion in the study, it became apparent that this system for recruiting case files was unsuccessful: it placed an additional burden on the court's administrative staff as well as the applicant, who was required to notify others about the study, and there was no obvious 'trigger' for the judge to make the requisite order giving us permission to access the file after 21 days, so in many cases this was overlooked. The sample was likely to exclude emergency and out of hours applications, cases transferred to regional courts or the High Court, and contentious cases where the judge did not wish to add further disruption to the proceedings by making an order relating to our study.

We discussed our concerns with the district judges and managers at the court. We were aware that in the Family Court a rule change and practice direction had been introduced which lifted the restrictions of s12 Administration of Justice Act 1960 for the purpose of 'authorised' research projects, where the project was authorised by the President of the Family Division or the Lord Chancellor. We wrote a memo for the Ad Hoc Court of Protection Rules Committee, which was at that time drafting what became the 2015 amendments to the COPR discussed in Section 1 of this report. In our memo we set out the difficulties for researchers in the CoP and suggested that a rule change and practice direction be adopted modelled on the approach taken by the Family Court. We also met with officials at the Ministry of Justice to discuss these issues. Everyone we spoke to was receptive to our concerns, and in March 2015 amendments to the COPR which permitted the communication of information about CoP proceedings for the purpose of authorised research projects (and for other purposes) were laid before Parliament, and came into force in July 2015.[86]

The amended rule 91 now states that for the purposes of the law on the contempt of court, information about proceedings held in private may be communicated in accordance with Practice

[85] Available from: http://sites.cardiff.ac.uk/wccop/for-research-participants/information-for-participants-about-the-court-of-protection-files-study/

[86] The Court of Protection (Amendment) Rules 2015 SI 2015/549 (L6). See rule 91(4)(a) and Practice Direction 13A, as amended.

Direction 13A. Practice Direction 13A, in turn, provides a table setting out which persons may share what information, with whom, and for what purpose.[87] This provides that 'A party, any person lawfully in receipt of information or a court officer' may share information with 'A person or body conducting an approved research project' 'For the purpose of an approved research project'. An 'approved research project' is defined as a project of research which has been approved in writing either by the President of the CoP or the Secretary of State after consultation with the President of the CoP.[88] Thus, following these amendments researchers on the CoP may now gather information about proceedings held in private for the purpose of a research project that has written approval from the President of the CoP. Prior to this change, researchers using any kind of data gathering – including even speaking to litigants - were on thin legal ice.

Authorisation for the research was granted by the President after the rule change came into effect in July 2015. Lucy Series (LS) made arrangements with staff at the CoP to visit for 9 weeks during the summer vacation in 2015 (so as to minimize disruption during the busy Michaelmas term, which commenced at the beginning of October) and consult a sample of the CoP's files.

Ministry of Justice Data Access Panel

As our research involved accessing court files, we also had to seek approval from the Ministry of Justice Data Access Panel (DAP).[89] This procedure requires researchers to submit a detailed application to the DAP setting out what court data they wish to access, and what resources this will require from the Ministry of Justice and the court. Applicants are required to work with a business sponsor in the relevant department; ours was a manager at the CoP. This process required careful planning and detail about precisely what data we sought from the files, and how we planned to obtain it (in practical terms: where would the researcher sit to access the files, what resources would she need, etc). However, it was very useful for clarifying what data could and could not be obtained from the files and for making arrangements for the fieldwork. We received tremendous assistance and co-operation from the CoPs managers for this process.

The Ministry of Justice DAP considers applications both from the perspective of the resource demands placed on the court service by the research, and also for compliance with the Data Protection Act 1998 (DPA) and other relevant privacy and confidentiality laws. As our research was statistical in nature, it fell into a category that does not ordinarily require the consent of individual data subjects for the research under the DPA, provided the risk of harm to the data subject and risks of identification are non-negligible.[90] Researchers hoping to conduct qualitative research on court files would not be able to rely upon this provision of the DPA, and would thus need to find an alternative justification under the Schedules of the DPA for accessing sensitive personal data. This would make qualitative research on the CoP files very difficult to do. Those interested in conducting qualitative studies of CoP materials such as expert reports, might find it easier to access them via other means that would enable them to more easily seek the consent of the parties (for example,

[87] Court of Protection, 'Practice Direction 13A – Hearings (including reporting restrictions' (2015), para 35.

[88] Ibid, para 38.

[89] For further information about this process, see: 'Access to courts and tribunals for academic researchers', (*HM Courts and Tribunal Service*, 1 October 2014) <https://www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers> [accessed 1 December 2015]

[90] See s33 Data Protection Act 1998 and The Data Protection (Processing of Sensitive Personal Data) Order 2000 SI 2000/417

by recruiting participants through a CoP practitioner or expert witness), but would be likely to need to consider the implications of s30 – 34 MCA relating to P's mental capacity to consent to participate in research.

Before the Ministry of Justice DAP grants permission for researchers to access court files, researchers are required to sign a Privileged Access Agreement (PAA) which specifies the terms upon which they may access the data and restrictions on the publication or sharing of any information contained within the files. These terms included a prohibition on identifying any individuals within the court files, and a requirement that any publications or presentations from the court files research be sent to the Ministry of Justice DAP prior to publication.

We were granted a PAA in 2014, and this was extended to 2015 as we were unable to collect the data in the summer of 2014 for the reasons outlined above.

University Research Ethics Committee

As the research involved personal data from human subjects, we obtained authorisation for the research from the Research Ethics Committee at the School of Law and Politics at Cardiff University. When our method for enlisting participants to the study changed, as a result of the practical difficulties enlisting cases by way of an individual order described above, we sought a further review of our study from the Research Ethics Committee.

2.3 SAMPLING AND DATA QUALITY ISSUES

'Complete', 'dummy' and 'High Court' files

CoP files are stored in a number of different locations. Cases that were dealt with by district judges or the senior judge in the central London registry of the CoP were stored in an archive at the London Registry. We refer to these as 'complete' files in our study, as they contained the most information on the file. When cases are transferred to the regional courts or the High Court, most of the material is stored in those courts. However at the time of the study the CoP's central London registry maintained a 'dummy file', which contained some minimal detail about the case such as the COP1 application form, and any orders issued. When cases were transferred to the High Court a separate file was made up and stored on separate shelving in the offices for the Family Division of the High Court.

File storage and retrieval for the study

Initially the plan had been for LS to consult a larger sample of 'complete' files, held in archives by the CoP. These files were for cases where a final order had been made and the case was closed, or – in deprivation of liberty authorisation cases – simply required an annual review but there were no outstanding disputes or issues requiring resolution. LS was not able to access these files directly, for storage and security reasons. A member of the court's staff produced a list of the following kinds of welfare case, using codes that classify the cases in the court's digital database, CASREC: 'personal welfare' applications (i.e. those applications that are generally made using a COP1 and COP1B form), s21A DoLS applications and Serious Medical Treatment cases. Only cases that were 'active' (i.e. where an order was made during this period) during 2014-15 were included in the list. LS then selected a sample of 50 personal welfare and 50 s21A cases in alphabetical order, to pseudo-randomise the sample. The list was given to another member of the court's staff to retrieve the files from the archive, and bring them to the desk in the court where LS was based.

Unfortunately, a large proportion of these files were not available at the court's central registry, as they had been sent to regional courts and had not been returned, or were currently in use by court staff. There was no way of determining what proportion of files were at the regional courts or High Court, and which had been returned to the central London registry. This means that the 'complete' files may not be representative of the proportion of cases dealt with in London or by regional courts, as they simply represent those that happened to be in the London registry at the time of the study – and some regional courts may be more efficient at returning completed cases to London than others.

Obtaining the 'complete' files was time consuming and placed a significant burden on court staff. This was leading to delays in collecting an adequate sample, and LS was concerned about the resource impact of the study on the court staff's time in locating these files. A decision was taken between LS and court staff for LS to look at 'dummy files' which were located in an office in the court where active cases were being managed, and LS could access the files directly in the presence of other court staff.

The dummy files contained less information than the complete files. However the dummy files offered a useful insight into the overall work of the court, as they included those cases that were transferred to the regional courts and the High Court. Thus although they had a higher risk of 'incomplete data' than the complete files, they had a reduced risk of sampling bias.

A small proportion of CoP cases are heard by the High Court. Certain cases (e.g. serious medical treatment cases) are *always* heard by the High Court, others are referred to the High Court because they raise complex points of law, or are on especially complex or controversial matters. When a puisne judge of the High Court hears a CoP case, the listings are managed by the registry of the Family Court, and the papers are stored at the Royal Courts of Justice (in addition to the 'dummy' file at the central London registry of the CoP). It transpired during the course of the fieldwork that accessing these files required additional security clearance from the Ministry of Justice and the courts. This was secured thanks to the assistance of the High Court administrative staff.

To access the files, the researcher (LS) sat in a secure room at the Royal Courts of Justice and court staff brought files from the shelves to her. To minimize the burden on court staff's time, the files were simply taken from the shelves where they were stored in chronological order, and included files from 2014 and 2015. Unfortunately, due to the limited timescales of the study, only 51[91] High Court files could be consulted before the fieldwork ended. In a handful of cases the High Court files selected for the study overlapped with the same cases already included in the study from the dummy files; these cases were identified (using the CoP number) and removed from the study to avoid duplication. Like the 'dummy' files, High Court files contained only minimal paperwork.

Sampling and data quality considerations

The court files study presented methodological difficulties from a sampling and data quality perspective. Our findings should be considered with these in mind.

A general problem with the data quality across all the files is the possibility that they were incomplete. For example, data on the number of orders was obtained by counting the number of orders in the file. Data on the number of hearings, on evidence obtained as part of the CoP proceedings, on the number of judges involved in the case, and so on, was obtained by counting

[91] LS had intended only to complete data collection at 50 files, but an additional file was accidentally included.

information from the orders. If any orders were missing from the file, this means that the study would underestimate the number of orders, hearings and judges involved in a case, and potentially miss some information about the kinds of evidence relied upon by the court. These data quality problems have been reported by other researchers embarking upon court files research.[92]

The risks posed by incomplete files were greatest in the High Court files which tended only to contain minimal material about a case. The High Court files should, however, have contained any court orders, and they also contained 'attendance lists' for hearings, enabling us to answer questions such as whether or not P attended a hearing and how they were represented. The 'dummy' files – for cases transferred to the regional courts and the High Court – were also largely incomplete. However, they tended to contain – in addition to court orders – some application documents (usually a COP1, sometimes also COP1B and COP3; or a COPDLA, perhaps with some DoLS paperwork), and sometimes also reports or court correspondence with the parties regarding hearings. The 'complete' files, files that were in use by judges in the CoP's central London registry, contained the most information, including application forms, orders, correspondence with the parties from the CoP about hearings and orders, some expert reports and witness statements. However, they too might potentially be missing some information.

The use of a sample of convenience was the only practical way to gather data from the files in the time available and without posing an undue burden on court staff. However, it did create some unavoidable risks of selection bias in the sample. In particular, the 'complete' files would include only those cases that were dealt with in the London registry by the senior judge or district judges or which had been returned by the regional courts or the High Court. Court staff reported that some regional courts were more prompt than others in returning files. And so the sample of complete files is not representative of all cases that are heard in the regional courts or the High Court. The 'dummy' files have the least risk of sampling bias, as they include those sent out to regional courts and the High Court. Meanwhile, the High Court files only include those that were heard by High Court judges sitting in the Royal Courts of Justice in Lonndon.

Developments after completion of the study affecting future research

These methods of accessing the files placed a heavy burden on the court staff and raised data quality issues. However, researchers hoping to undertake a similar study might be heartened to hear that the court system as a whole, including the CoP, is gradually moving towards electronic rather than paper based files.[93] The Family Court now permits electronic applications. Some courts have introduced trials of the use of e-bundles. The CoP is starting to scan and electronically store documents. Should the CoP get to a point where all documentation relating to a case is stored electronically, future researchers could potentially find it easier to access a larger and more representative sample of files, all the material relating to a file, and it would be easier to locate files for research purposes. For the moment, however, researchers should be aware that there are practical difficulties locating materials on court files.

[92] J Masson, J Pearce, K Bader, O Joyner, J Marsden and D Westlake, 'Care profiling study', (Ministry of Justice Research Series 4/08, 2008).

[93] Ministry of Justice, *Transforming our justice system: summary of reforms and consultation* (Cm 9391 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 9321, 2017).

Final sample

Table 2, below, describes the breakdown of the types of file consulted and the type of application – whether a 'personal welfare' (COP1) or a DoLS (COPDLA) application. The 'complete' sample aimed to include 50 personal welfare and 50 DoLS applications; the breakdown by application form does not reflect this because three DoLS applications were made using the incorrect (COP1) form instead of the correct (COPDLA) forms, but the proceedings were transferred by the judge to s21A MCA proceedings.[94] This also happened in six 'Dummy' file cases and one High Court case file included in the study.

Table 2 Sample broken down by type of file and application form

		Application forms on file				
		COP1	COPDLA	COPDOL10	No application form on file	TOTAL
File type	Complete	53 (53%)	46 (46%)	0 (0%)	1 (1%)	**100**
	Dummy	65 (65%)	29 (29%)	3 (3%)	3 (3%)	**100**
	High Court	35 (69%)	6 (12%)	0 (0%)	10 (20%)	**51**
	All files	**153**	**81**	**3**	**14**	**251**

A note on sample sizes (N)

Depending on the question we were seeking information on, we used different samples. Sometimes it made the most sense to use all the cases in the sample; this was generally the case when seeking basic information that would be on all the files, such as P's gender, or the identity of the applicants and parties. In other cases it was important to restrict the sample to only include certain kinds of cases; for example, when looking at 'how cases end', we only looked at cases with a final order, or 'completed' cases. For this reason, the sample size (written as 'N' using standard statistical nomenclature) varies throughout this report.

[94] Presumably this was in part to ensure that P was eligible for non-means tested legal aid, which is available for applications under s21A but not for other kinds of application under the MCA.

3 Findings of the Court of Protection Files study

3.1 Typical substantive matters before the Court of Protection in welfare cases

Information about the substantive issues addressed in CoP welfare cases was generally taken from the COP1 and COPDLA forms. However, in the rare cases where those forms were not available (specifically High Court files), the substantive matters were inferred from the orders made. In some cases, new substantive matters for determination by the CoP emerged during the course of the case; this was typically apparent from either cross applications (COP9 forms), or from the orders themselves. Thus, not all the substantive matters addressed in a CoP case were raised by the applicant; some might be raised by the other parties or even by the CoP itself of its own motion[95]. Particularly where a new issue had been raised in a hearing, it was not always obvious who had sought what relief from the CoP.

Declarations of capacity sought by applicants using the personal welfare route

Out of all 153 personal welfare applications examined, we found only three examples of an application for a declaration that P had mental capacity. Each of these was dealt with in the High Court, and concerned treatment for physical disorders. Perhaps surprisingly, none of these applications were made by P: one was by an NHS Trust, another by a professional deputy, and the last by a relative of P.

Declarations and orders in best interests of P sought by applicants using the personal welfare route

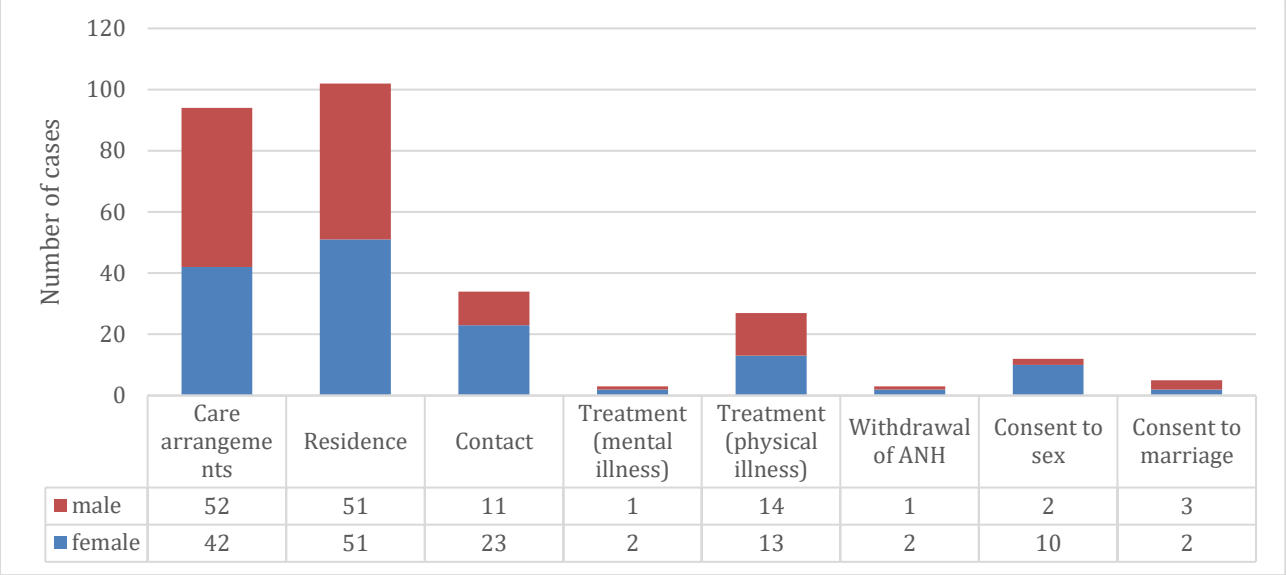
We examined 153 COP1 personal welfare applications for the most common kinds of declarations of incapacity sought by applicants. These figures include all case types, and as such will underestimate the overall number of applications sought as some files were missing the application forms. However, in some cases the declaration sought by the applicant was evident from the orders or other materials on the file.

Most applications sought declarations of incapacity on more than one topic. For example, applications for declarations of incapacity relating to residence also often sought declarations of incapacity concerning Ps' care arrangements. The number of applications for declarations of incapacity different kinds of decisions, shown in Figure 3, therefore should not be thought of as distinct cases – a single application may be represented across multiple categories.

These data indicated that by far the most common kind of personal welfare cases in the CoP relate to care arrangements and residence. However, cases concerning contact with a named person, or treatment for physical disorder, are also a fairly common feature of personal welfare cases. Perhaps unsurprisingly, since they would usually be regulated by the MHA, cases concerning treatments for mental disorder are relatively rare. In most areas there was little evidence of an effect of gender on the kinds of applications received by the CoP. There are not enough data to run a confirmatory statistical analysis, but it does look as if a higher proportion of cases concerning contact with a named person, or the capacity to consent to sex, involve women than men.

[95] Rule 27 of the COPR permit the court to exercise its powers on its own initiative. This power underpins the court's 'inquisitorial', as opposed to 'adversarial', role.

Figure 3 Applications for declarations of incapacity, by gender



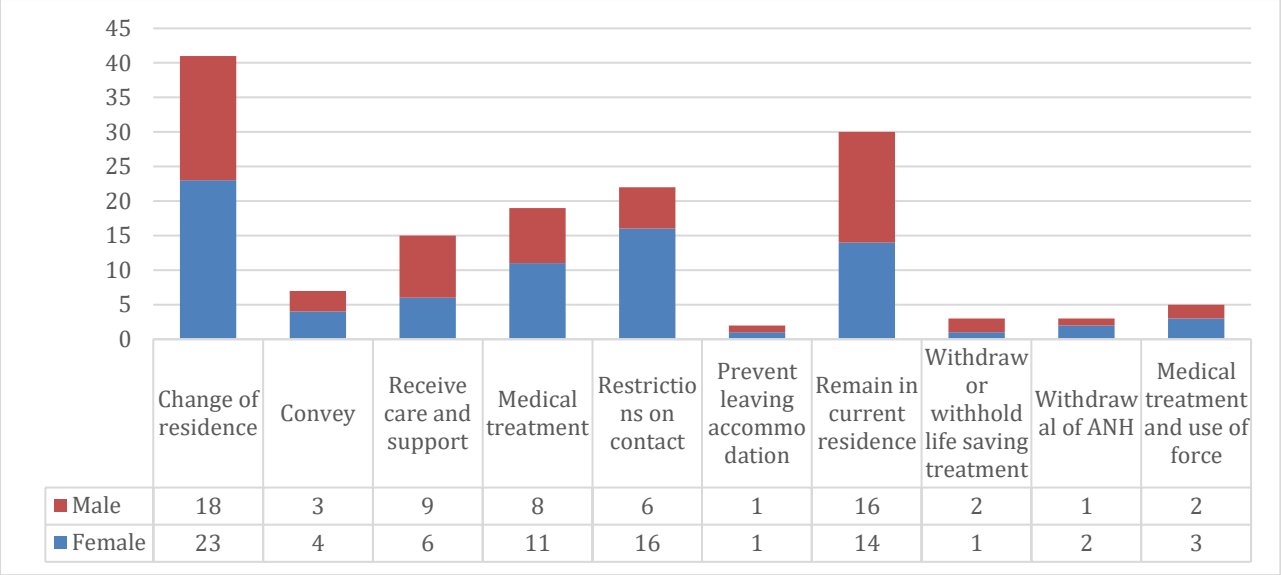
	Care arrangements	Residence	Contact	Treatment (mental illness)	Treatment (physical illness)	Withdrawal of ANH	Consent to sex	Consent to marriage
male	52	51	11	1	14	1	2	3
female	42	51	23	2	13	2	10	2

We repeated the above analysis for CoP personal welfare applications looking at the orders in the best interests of P sought by applicants. Once again, any single case might result in more than one order, and so might be represented across several categories in Figure 4, below.

It was evident that cases concerning residence were the most frequent in the CoP. There were 39 applications overall seeking a change in residence for P. Of the 25 cases where there was information on the file about where P lived at the time of the application, over half were living in their own home (16), 4 were in hospital, 3 were in a care home and 2 were in supported living.

There were 31 applications for a declaration that it was in P's best interests to remain in their current place of residence. Of the 26 where there was information on where P lived at the time of the application, there were only two cases where that was their own home; 12 were in care homes, 6 in supported living, 2 in hospitals and 3 in children's homes. Thus, the overall pattern in relation to personal welfare applications regarding residence appears to be that orders are generally sought either to move P away from accommodation in a private home, or to confirm that P should remain in more formal care settings than a private home.

Figure 4 Applications for declarations or orders relating to best interests, by gender



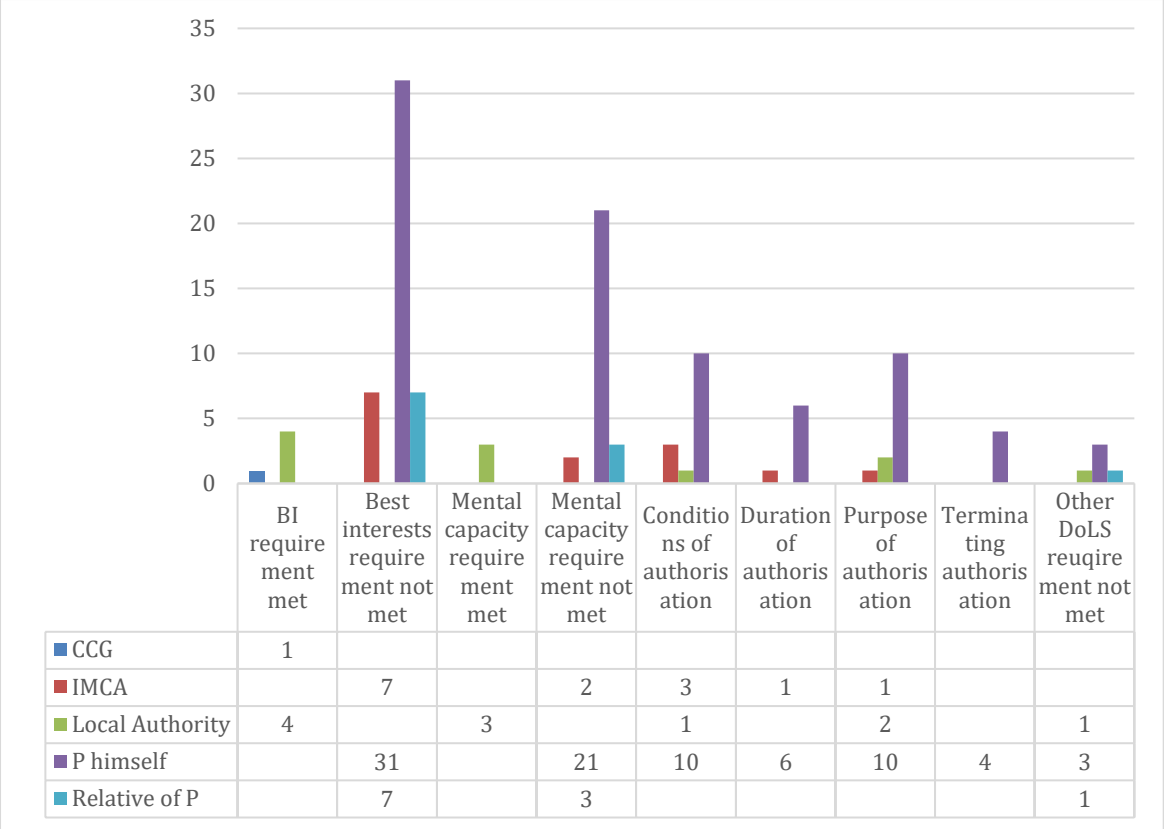
	Change of residence	Convey	Receive care and support	Medical treatment	Restrictions on contact	Prevent leaving accommodation	Remain in current residence	Withdraw or withhold life saving treatment	Withdrawal of ANH	Medical treatment and use of force
Male	18	3	9	8	6	1	16	2	1	2
Female	23	4	6	11	16	1	14	1	2	3

Applications for review of a deprivation of liberty safeguards authorisation under S21A MCA

Applications asking the CoP to review some aspect of an authorisation for detention made under the DoLS using s21A MCA are made using the COPDLA forms. Figure 5, below, plots the number of s21A applications for determinations of different kinds made by different applicants. Where an application as made by P, a relative of P or an IMCA, it most common sought a determination that the mental capacity or best interests requirements of the DoLS were not met. Conversely, where the application was made by a local authority (or in one case a CCG) they sought a determination that the mental capacity and best interests requirements *were* met.

Relatively few applications explicitly sought the termination of an authorisation, but this may be because termination would be implicitly required if the DoLS eligibility requirements were found not to be met.

Figure 5 Determinations under s21A MCA sought by applicants (N=60)



	BI requirement met	Best interests requirement not met	Mental capacity requirement met	Mental capacity requirement not met	Conditions of authorisation	Duration of authorisation	Purpose of authorisation	Terminating authorisation	Other DoLS reuqirement not met
CCG	1								
IMCA		7		2	3	1	1		
Local Authority	4		3		1		2		1
P himself		31		21	10	6	10	4	3
Relative of P		7		3					1

Advance planning instruments

Of all the files examined, we found only one case that involved (amongst other matters) P's mental capacity to make a Lasting Power of Attorney. We did not find any applications that made explicit reference to any written advance decision refusing treatment. However, such a case would be likely to be a medical treatment case dealt with in the High Court, and the files in the High Court contained the least information, so it is possible that this was simply not evident from what was on the file. Nevertheless, we saw no orders determining the validity, applicability or making of advance decisions refusing treatment. This suggests that cases involving these instruments are rare in the CoP.

Applications to authorise a deprivation of liberty

Out of 153 COP1 applications examined, 9 sought a declaration that P is deprived of his liberty, and 66 sought to authorise a deprivation of liberty.

Transfer from COP1 to s21A MCA cases

There were 9 examples of applications made using the COP1 forms, that were transferred by order of the CoP to s21A MCA proceedings; 5 of these were applications made by the local authority, 2 were from P himself and 2 were from relatives of P. By transferring these cases from the ordinary personal welfare procedure to the s21A procedure, P and any RPRs would be able to avail themselves of more generous public funding entitlements.[96]

[96] *Re UF* [2013] EWHC 4289 (COP)

3.2 CHARACTERISTICS OF P

This section describes the characteristics of P in the sample of files reviewed for the study. This information was mainly taken from the application forms where these were available. Where application forms were not available, data on P's characteristics were sometimes taken from other materials on the file, such as expert reports or care plans.

Gender, age and disability

There was a fairly even split between men and women across both personal welfare route and s21A review cases.

Table 3 Gender of P

	All	COP1	COPDLA
Male	118	75	40
Female	114	73	34

The mean age of P in the cases in this sample was 52, but there was a statistically significant[97] difference between the ages of P in personal welfare cases and DoLS cases. P was typically older in DoLS cases (M=65, sd=19) than in personal welfare cases (M=47, sd=23).

Table 4 presents summary statistics for the age of P for different kinds of substantive issues raised in the proceedings. Typically, Ps were younger for cases concerning consent to sex or marriage than other kinds of case.

Table 4 Summary statistics for Ps age for different kinds of CoP personal welfare case

Subject of application	Mean age	Standard Deviation for age	Maximum age in sample	Minimum age in sample	N
Care arrangements	45	23	91	16	89
Residence	47	24	96	16	96
Contact	41	22	87	16	34
Treatment for mental illness	62	6	69	57	3
Treatment for physical illness	47	19	88	17	23
Consent to sex	33	21	79	19	7
Consent to marriage	24	5	30	20	5

Ps disability

Under the MCA a person is only considered to lack mental capacity if it is 'because of an impairment of, or disturbance in, the functioning of the mind or brain'.[98] The CoP application forms, and in particular the COP3 assessment of capacity form and any DoLS authorisation forms, typically contained information on the disability that was the putative cause of any mental incapacity on the part of P. We looked at this data to get a sense of the demographics of Ps involved in CoP litigation.

[97] t (113)=-5.7, p<0.01

[98] MCA s2(1)

However, this is unlikely to include any disabilities that are not linked to mental incapacity that may be present among the CoP population.

Table 5 shows the number of individual cases where P had one of the listed categories of disability. As many Ps were said to have more than one disability, they might be counted across several different categories in this table; we have also created Table 6 to give an indication of how frequently particular conditions co-occurred in the population of Ps in this sample.

We developed these categories after consulting with our advisory group. One category we did not foresee, but which we would recommend including for any future research of this kind, was conditions related to alcohol abuse. It became apparent during the course of data collection that many Ps had conditions that arose from complications relating to alcohol abuse, or alcohol abuse in conjunction with a pre-existing condition. Unfortunately, we noticed this pattern too late to include this category retrospectively in the study.

Table 5 Table of diagnoses and disabilities of P recorded as a cause of incapacity (N=170)

Type of disability	**Sub-category**	**Ps with this disability**	**% of all Ps[99]**	Subtotals
Autistic Spectrum Disorders	Aspergers	1	1%	**24 (14%)**
	Autism with learning disability	23	14%	
Brain injury	Infection causing brain damage	2	1%	**26 (15%)**
	Traumatic brain injury	12	7%	
	Stroke	6	4%	
	Other acquired brain injury	6	4%	
Dementia	Alzheimer's dementia	12	7%	**47 (28%)**
	Vascular dementia	7	4%	
	Other dementia	28	16%	
Mental illness	Depression	7	4%	**37 (22%)**
	Schizophrenia	16	9%	
	Other mental illness	14	8%	
Learning disability		70	41%	**70 (41%)**
Chronic disorders of consciousness	PVS	5	3%	**8 (5%)**
	MCS	3	2%	

Table 6 Table of frequency of occurrence of more than one diagnosis for P

	ASD	**Brain injury**	**Dementia**	**LD**	**CDC**	**Mental illness**
ASD	1	1	0	21	0	6
Brain injury	1	17	1	1	2	3
Dementia	0	1	20	1	1	1

[99] NB: As most Ps had more than one diagnosis or disability, these percentages will not add up to 100%. They represent the overall share of the sample of Ps of any given disability or diagnosis.

LD	21	1	1	41	0	11
CDC	0	2	1	0	3	0
Mental illness	6	3	1	11	0	17

Ps living arrangements

Data on where P was living at the time of the application was often available from the COP1B form or the DoLS authorisation forms submitted with a COPDLA application. Each form had different ways of categorizing Ps' living arrangements, so we simplified these – for example collapsing together private and local authority residential care ('residential care'), and property that P lived in as an owner-occupier or tenant ('private home'). In some cases, P was described as living in both their own home and a hospital or residential care. This occurred where P was admitted on a temporary basis to a hospital or residential care, but it was recognised that this was not their permanent place of residence.

Table 7 Ps' living arrangements at the time of application (N = 167)

	Female	Male	Total	%
Children's home	0	3	3	2%
Own or rented property	22	18	40	24%
Hospital	14	13	27	16%
Residential care	32	37	69	41%
Supported housing	8	13	21	13%
Residential care and private home (e.g. respite care)	1	2	3	2%
Hospital and private home	4	0	4	2%

Subject matter of applications and Ps disability

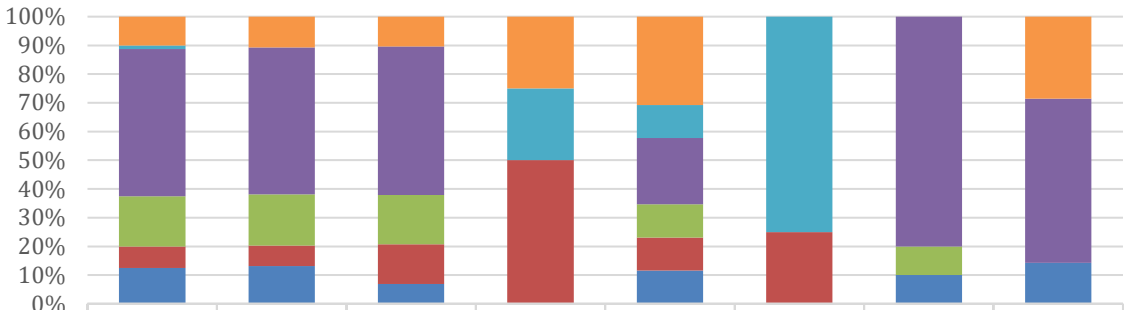
We were interested in whether different kinds of disabilities were represented in cases about different kinds of issues. Figure 6 and Figure 7 use 100% stacked columns to depict the percentage of different kinds of applications for declarations of incapacity or best interests orders relating to Ps with different kinds of disability. The tables contained within the figures give the raw data these are taken from.

These figures indicate that people with learning disabilities made up the largest proportion of applications relating to care arrangements, residence, contact, consent to sex and consent to marriage. Excepting the latter two categories, which tended to relate to younger Ps, these results were a surprise to us: we had expected the majority of cases to concern people with dementia, as earlier research indicated that people with dementia made up the majority of Ps in personal welfare applications.[100] The likeliest explanation for the different finding here is that this earlier study included applications for permission, the majority of which were not granted, whereas the study reported here only included cases where permission was not required or had been granted. The earlier study found that applications concerning Ps with dementia were less likely to be granted than those concerning Ps with learning disabilities. Most applications were rejected because they sought the appointment of a relative as a personal welfare deputy; as a general rule, deputies are

[100] Series, L. (2012) 'Applications for permission to the Court of Protection: a statistical analysis', *Elder Law Journal,* 2(2), 175-184.

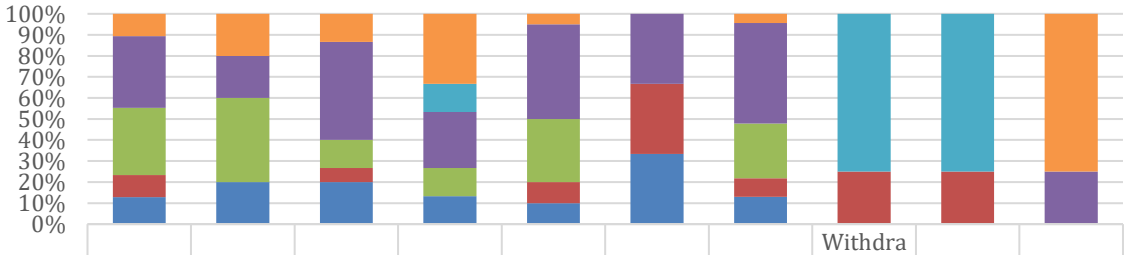
not appointed for welfare matters where informal procedures are available for making decisions about care and treatment.[101] Therefore although most applications to the CoP are about people with dementia, the majority of those personal welfare cases that are actually granted permission to proceed concern people with learning disabilities, and not dementia.

Figure 6 Applications for declarations of incapacity, by disability of P



	Incapacity							
	Care arrangements	Residence	Contact	Treatment (mental illness)	Treatment (physical illness)	Withdrawal of ANH	Consent to sex	Consent to marriage
Mental illness	8	9	3	1	8	0	0	2
CDC	1	0	0	1	3	3	0	0
LD	41	43	15	0	6	0	8	4
Dementia	14	15	5	0	3	0	1	0
Brain injury	6	6	4	2	3	1	0	0
ASD	10	11	2	0	3	0	1	1

Figure 7 Application for orders or declarations in P's best interests, by disability of P

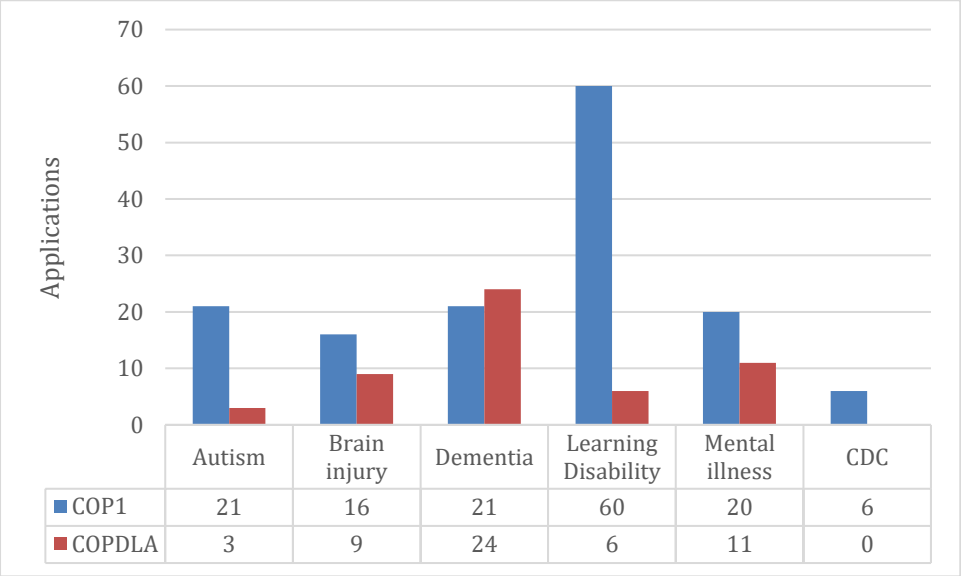


	Change of residence	Convey	Receive care and support	Medical treatment	Restrictions on contact	Prevent leaving accommodation	Remain in current residence	Withdraw or withhold life saving treatment	Withdrawal of ANH	Medical treatment and use of force
Mental illness	5	1	2	5	1	0	1	0	0	3
CDC	0	0	0	2	0	0	0	3	3	0
LD	16	1	7	4	9	1	11	0	0	1
Dementia	15	2	2	2	6	0	6	0	0	0
Brain injury	5	0	1	0	2	1	2	1	1	0
ASD	6	1	3	2	2	1	3	0	0	0

[101] See MCA s 16(4).

As Figure 8, below, indicates, Ps with learning disabilities make up a much smaller proportion of applications for review of DoLS authorisations under s21A; here the greater proportion of Ps have dementia.

Figure 8 Application form and Ps disability (N=153)



	Autism	Brain injury	Dementia	Learning Disability	Mental illness	CDC
COP1	21	16	21	60	20	6
COPDLA	3	9	24	6	11	0

3.3 THE PARTIES TO THE CASE

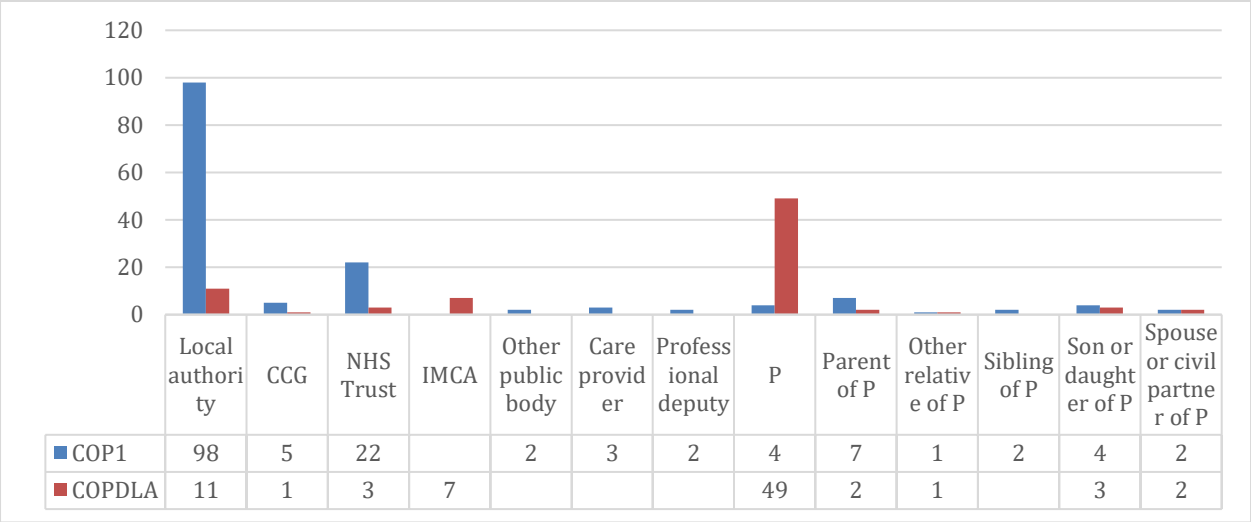
We were interested in who was making applications to the CoP, and whether this differed according to the kind of case. In the majority of files in our sample this data could be obtained from the CoP application forms. In the few files, mostly from the High Court, where there were no application forms on the file, we took this data from orders on the file.[102]

Applicants

Figure 9 presents our findings on the identity of applicants using different application procedures: the COP1 application procedure for personal welfare orders, or the COPDLA application procedure for reviews of DoLS authorisations under s21A MCA. We observed important differences in who was using each procedure. For the COP1 application process, the vast majority of applicants were local authorities, with a significant number of NHS Trusts. It was rare for P to use the COP1 application procedure in our sample of files, and we found no examples of IMCAs using this procedure. By contrast, P was the most frequent applicant using the COPDLA application procedure, and some IMCAs did use this procedure. There were some examples of local authorities using the COPDLA application procedure, although as we observed above in these cases they were seeking confirmation that the DoLS qualifying requirements were met.

Although we did find 3 examples of NHS Trusts using the COPDLA forms, these were used in error as they did not seek any determinations or orders under s21A MCA. Overall, applications from family members of P were relatively infrequent and roughly evenly divided between the two application procedures.

Figure 9 Applicants using the personal welfare (COP1, N=113)) and s21A (COPDLA, N=81) procedures



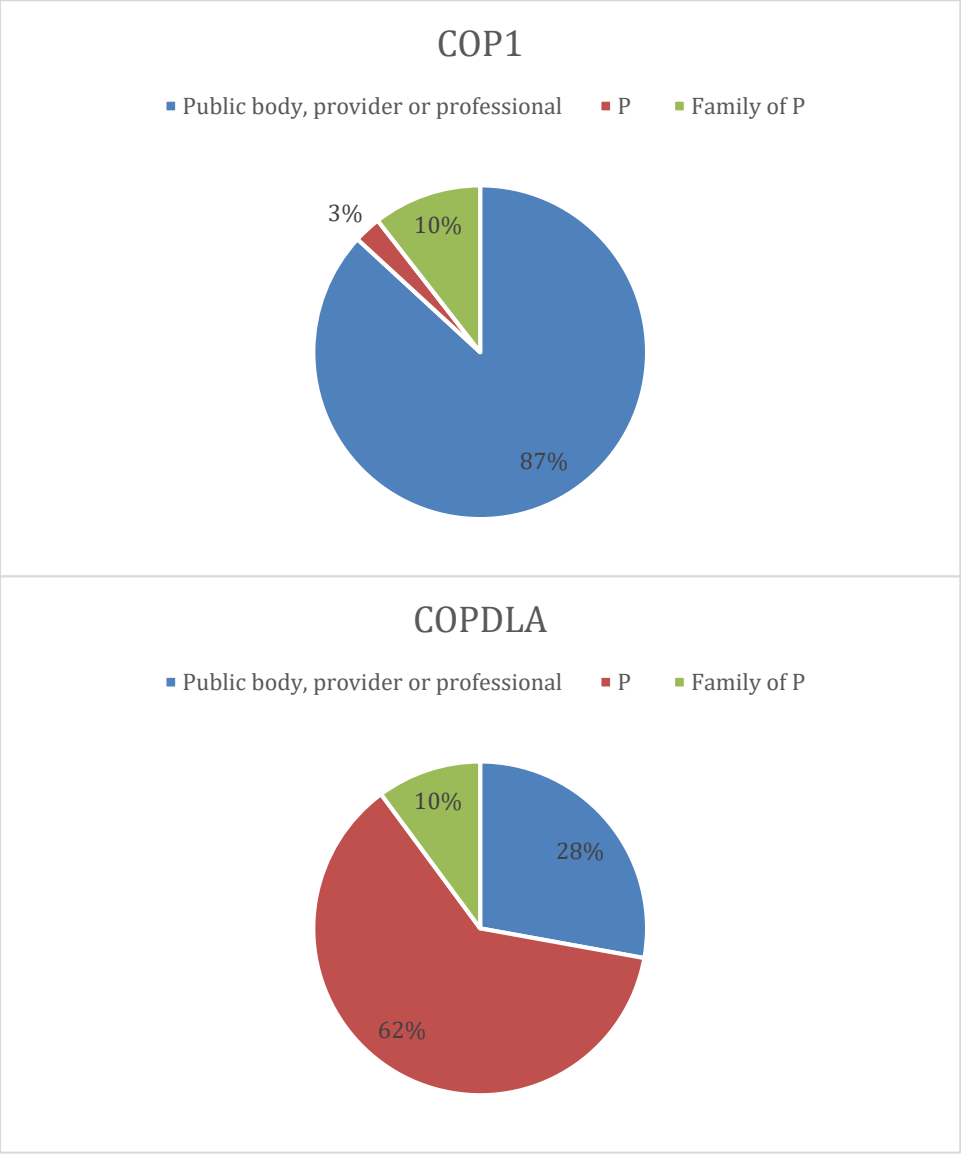
	Local authority	CCG	NHS Trust	IMCA	Other public body	Care provider	Professional deputy	P	Parent of P	Other relative of P	Sibling of P	Son or daughter of P	Spouse or civil partner of P
COP1	98	5	22		2	3	2	4	7	1	2	4	2
COPDLA	11	1	3	7				49	2	1		3	2

The pie charts in Figure 9 show the proportion of applications made by different kinds of applicants using each procedure. These show more clearly that the largest proportion of applications using the COP1 form are from public bodies, care providers or professionals (for example, professional

[102] There is a small chance in these cases that the applicant on the file is not the party who initiated the case, as it is possible the CoP substituted another party for the original applicant. This sometimes happens where an applicant is a litigant in person or a less experienced party, to enable a more experienced litigant such as a local authority or the Official Solicitor to undertake the responsibilities of the applicant. However, we felt this risk was negligible and overall it was better to include these cases in our dataset.

deputies), with a smaller proportion of applications from the family of P and very few applications by P. By contrast, the majority of applications using the COPDLA form were from P, a substantial minority were from public bodies, providers or professionals, and family made up the smallest proportion of applicants.

Figure 10 Percentage of applications using COP1 or COPDLA procedure from public bodies, P or family



IMCA assisted applications

We included in our database a field for cases where it was clear from the application form that an IMCA had assisted P in making the application (as opposed to those cases where the application was made by the IMCA themselves). We found one example of a COP1 application where the IMCA had assisted P to make the application (out of a total of only 4 applications by P themselves). Yet we found 22 examples of COPDLA applications by P where it was clear from the data on the file that the IMCA had assisted P in making the application; 45% of all COPDLA applications where P was the applicant.

It is clear from this data that IMCAs play an important role in enabling P to exercise their rights of review of a DoLS authorisation using the s21A review procedure. There is less evidence from the

data obtained in this sample of IMCAs providing similar assistance to challenge other kinds of decisions made under the MCA using the COP1 personal welfare route. One reason for this may be that fewer Ps are eligible for legal aid to challenge decisions made under the personal welfare route than are for s21A reviews of DoLS authorisations. Another reason may be that IMCAs appointed under s39D MCA to support and represent Ps who are subject to a DoLS authorisation are explicitly required to provide P wish support to understand and exercise this right of appeal,[103] whereas IMCAs appointed under other parts of the MCA are not required to support and enable P to challenge best interests decisions that they object to.

Respondents

We looked at the typical number of respondents for different kinds of cases. Table 9 provides summary statistics for the average number of respondents for cases putting different substantive issues before the CoP. Cases involving medical treatment appeared to involve fewer respondents than cases involving care and residence, or matters concerning relationships such as contact, sex and marriage.[104] This is likely to be because when proceedings concern personal relationships between P and a partner, friend or family member, they are likely to be listed as a respondent. This will always be the case in cases concerning sex, marriage and contact, and will often be the case in cases concerning residence or care arrangements where there is a dispute about whether P should live in a family home or not, however it is less likely to be the case where the contested question concerns medical treatment.

Table 8 Summary statistics for the number of respondents for different substantive issues before the CoP

	Number of respondents			
Declaration of incapacity	Mean	SD	Max	N
Care arrangements	2.1	1.3	5	101
Residence	2.1	1.2	5	109
Contact	2.5	1.3	5	40
Consent to treatment - MI	1.3	0.6	2	3
Consent to treatment - PI	1.7	1.1	4	28
Consent to sex	2.2	1.2	5	11
Consent to marriage	3.0	2.1	6	5

Cases where P was not joined as a party to the case

We came across only two cases within the entire sample of 251 cases that clearly recorded on the file that P was not a party. We are reasonably confident that it would be clear from the files where P was not joined as a party, because of the way the orders are drafted.

One case where P was clearly not joined as a party was a COP1 application by a family member for a property and affairs deputyship and declarations regarding medical treatment; the applicant was appointed as a welfare deputy 'until further notice' without P being joined. The second was a COP1 application by a local authority relating to care arrangements and residence. The application

[103] MCA s39D(8)

[104] We did not conduct a confirmatory statistical comparison of this, however, owing to the very uneven size of the samples for each kind of case, and the very small numbers of cases concerning medical treatments.

concerned a person with significant communication impairments. The records noted that P did not express a wish to be a party to the case, but did not otherwise specify Ps' views in relation to the orders sought by the applicant.

It is unclear precisely why P was not joined as a party in these cases, given it is generally expected that P would be so joined where welfare matters are before the CoP.[105] It may be out of a concern to preserve P's own financial resources if they were not eligible for legal aid for separate representation in the case, particularly if there was no evidence before the CoP that these matters were contentious. We discuss the tension between joining P as a party, and preserving P's financial resources, in our recent report on the *Participation of P in Welfare Cases before the Court of Protection.*[106] Reassuringly, these data suggest that a decision by the CoP not to join P as a party in a personal welfare case is a rare occurrence.

[105] Court of Protection (2015) *Practice Direction 2A - Participation of P*. Paragraph 4.

[106] Series, Fennell and Doughty (2017) n 14.

3.4 PROCEDURAL MATTERS

Alternative dispute resolution

We were interested to see whether there was any evidence for the use of alternative dispute resolution (ADR) procedures for CoP cases in the files. We looked for evidence of any of the parties using mediation, arbitration[107], a roundtable meeting, court directed best interests meeting or other form of ADR.

We found no examples of mediation or arbitration being used to resolve a CoP welfare dispute in any of the files. We did, however, find a number of cases where it was clear from the file that the parties had attempted to find common ground, narrow the issues before the CoP or even reach an agreement using roundtable meetings or best interests meetings directed by the CoP itself. These are reported in Table 9.

Table 9 Use of alternative dispute resolution in CoP welfare cases

	ADR procedure attempted			
Application type	**No record of ADR on file**	**Court directed best interests meeting**	**Roundtable meeting**	**Total**
COP1	136	6	11	153
COPDLA	77	1	3	81
Total	**213**	**7**	**14**	**234**[108]

We dug deeper into this data for evidence of whether these cases had, indeed, been resolved without the CoP imposing a final order on the parties. In 2 of the COPDLA cases where the parties had a roundtable meeting, the applicant withdrew the proceedings, and in 4 of the COP1 cases that had a roundtable meeting the case was settled by a consent order from the CoP. We found no evidence that where the CoP ordered the parties to have a best interests meeting this resulted in a consensual resolution to the cases, although it may have narrowed the issues between the parties.

Cases transferred to regional courts

We looked at how often cases were transferred to regional courts, and how many cases were addressed at the central London registry of the CoP in High Holborn or transferred to the High Court, at the Royal Courts of Justice on the Strand. Table 11 shows how many files for each kind of case involved a transfer to the regional court. However, this does not necessarily reflect the overall proportion of cases being transferred to a regional court; the 'complete' files reflect only those that have been returned to be archived by the regional courts or by the London CoP. Some courts are better than others at returning files promptly. The dummy files offer a better reflection of the proportion of cases being sent to a regional court, but again these files would be removed from the

[107] We suspect that arbitration is not in any case compatible with CoP litigation. This is because arbitration can only provide a binding resolution to a dispute with the consent of the parties. If P lacks the mental capacity to consent to the arbitration, P cannot be bound by its outcome. By contrast, orders of the CoP bind P, even if P is not a party to the case (COPR Rule 74). Moreover, it is likely that the reasoning applied by Mr Justice Baker in the Family Court also applies here, that its jurisdiction over the welfare of the child cannot be 'ousted by agreement. The parties cannot lawfully make an agreement either not to invoke the jurisdiction or to control the powers of the court where jurisdiction is invoked' *AI v MT* [2013] EWHC 100 (Fam), para 27.

[108] In a small number of cases there was no application form on the file and so it was unclear which route the application had taken into the CoP. These were excluded from this sample.

shelves and archived at different rates, depending on different regional courts' practices in returning the complete files for archiving. It is difficult, therefore, to estimate from our data the rate of transfer to the regional courts from the files stored by the CoP; only a system for recording this information for every application received by the CoP would be capable of accurately indicating the overall transfer rate.

Table 10 Cases transferred to regional courts

	Case remained in London CoP or High Court registries	Case transferred to regional court	Total
Complete	29	71	100
Dummy	21	79	100
High court	51	n/a	51
Total	**101**	**150**	**251**

Tier of judiciary making final orders (where case completed)

Cases can be transferred between different 'tiers' of the CoP system. We were interested to know which tier of the judiciary made the final orders in the different kinds of files we examined. All but one of the cases from our sample of files from the High Court were dealt with by a puisne judge of the High Court, the last being dealt with by a circuit judge. The 'complete' and 'dummy' files that contained final orders were most frequently dealt with by district judges, but a significant proportion were decided by circuit judges and a small proportion were transferred to the High Court for final orders.

Table 11 Tier of judiciary making final orders on file (N=110)

	Circuit Judge	District Judge	High Court judge
Complete	16	37	4
Dummy	6	17	4
High court	1		25
Grand Total	**23**	**54**	**33**

Judicial continuity

We were interested in the overall number of judges involved in a case. We kept track of the number of different judges making interim or final orders, or holding hearings, in each case. Typically, cases from the 'complete' and 'dummy' files involved two judges during the proceedings, although some had as many as 5 or 6. The number was somewhat higher in the High Court.

Table 12 Summary statistics for the number of judges involved in cases before the CoP

	Mean number of judges	Standard deviation	Highest number of judges in a single case	Lowest number of judges in a single case	N
Complete	1.98	0.64	5	1	83
Dummy	1.79	0.93	6	1	73
High Court	2.34	1.24	5	1	41
Total	**1.98**	**0.92**	**6**	**1**	**197**

One reason why cases may involve more than one judge, is that when the application reaches the central London registry, if it is transferred to a regional court or the High Court there would usually be a judge from the central London registry giving the initial directions order to transfer the case, and then at least one judge at its destination court. Table 14 shows the same summary statistics if those cases transferred to regional courts are removed (i.e. those cases dealt with at the CoP in London). This reduces the average number of judges involved in a case. The High Court judicial continuity figures remain higher because of the need for an initial directions order from a district judge, transferring the case to the High Court (except in those rare cases where the case arrived in the High Court directly for an urgent hearing).

Table 13 Summary statistics for the number of judges involved in cases before the CoP in central London

	Mean number of judges	Standard deviation	Highest number of judges in a single case	Lowest number of judges in a single case	N
Complete	1.58	0.61	3	1	19
Dummy	1.63	0.74	3	1	8
High Court	2.34	1.24	5	1	41
Total	**2.04**	**1.10**	**5**	**1**	**68**

One difficulty with these judicial continuity data is that many of the cases examined were ongoing; in other words, these data might well underestimate the overall number of judges who would be involved in deciding a case by its end. By examining only those cases with a final order on the file, we get a more accurate sense of how many judges are typically involved in each case before the CoP. These data do suggest that most cases involve only two judges, most likely an initial directions judge and a judge making substantive decisions in the case. The median number of judges for completed cases across all the files was 2. However, there were some outlier cases that had up to 5 individual judges making orders in a case. These tended to be cases that were transferred to the High Court.

Table 14 Summary statistics for the number of judges in cases with a final order on the file

	Mean number of Judges	Standard Deviation	Greatest number of judges	Lowest number of judges	N
Complete	1.99	0.65	5	1	80
Dummy	2.07	0.87	5	1	27
High Court	2.52	1.29	5	1	25
Total	**2.11**	**0.87**	**5**	**1**	**132**

Ex parte applications

Because of concerns expressed in the media about alleged *ex parte* hearings where the family, or P themselves, were not notified about an application or a hearing, we looked for evidence of *ex parte* hearings in the files we examined. We found evidence of only one application for an *ex parte* hearing, and this was not granted. The application came from a local authority, and it concerned care arrangements, residence and contact. Thus, despite concerns about families not being notified about hearings, we found no examples of this in our sample.

Committal proceedings

The CoP has powers to 'commit' an individual to prison or impose a fine for contempt of court.[109] In all the files examined we came across one instance of an application for committal during the proceedings. The case in question was brought by a relative and concerned multiple issues, including contact and residence. The application for committal was not granted.

Although we came across only one case where an application for committal was made, and none where it was granted, we did come across nine examples of cases with penal notices attached to orders, warning the parties of the potential consequences should they disobey court orders. These cases covered a wide range of matters, including care arrangements, residence, medical treatments and contact. There were no examples of the CoP actually ordering any penalties for contempt of court in the files examined.

Litigation capacity

We found four recorded cases where it was clear from the file that P had been found to have litigation capacity at some point during the proceedings. Two of these were COPDLA applications made by P; one application was withdrawn by P and in the other P was found to have mental capacity in relation to residence and care arrangements as well. The other two were COP1 applications made by the local authority. In each of these cases, P was found to lack mental capacity in relation to the substantive matters before the CoP.

Identity of litigation friends

We recorded the identity of P's litigation friend where it was evident from the file. Table 15 shows our findings. In the main, P's litigation friend was still the Official Solicitor for both COP1 and COPDLA cases. However, there were a number of examples of IMCAs, relatives and RPRs acting as a litigation friend for P in the files.

Table 15 Identity of P's litigation friend

	Deputy	IMCA	OS	Relative	RPR	N
COP1	2	8	88	8	1	**107**
COPDLA	1	7	34	1	5	**48**
Total	**3**	**15**	**122**	**9**	**6**	**155**

Hague Convention

We looked for examples of CoP welfare cases that also involved Schedule 3 of the MCA, which gives effect to the Hague Convention on the International Protection of Adults. We found only one example of this on the files.

Human Rights Act 1998

In nine cases, a party claimed that there had been a violation of P's human rights (using the Rule 83 procedure in relation to the Human Rights Act 1998 – see PD 11A). In three of these cases, P was the applicant, in two P's relatives were the applicant, and in four the local authority was the

[109] COPR Rules 185 - 194

applicant.[110] These cases concerned care arrangements and residence. We were unable to find any examples of court orders finding that a public authority had violated the human rights of P or another party, but observe that this is likely to be because the files themselves are partial or the cases are ongoing.

Inherent Jurisdiction

There were two examples of applicants seeking orders under the inherent jurisdiction of the High Court. Both of these were found within the High Court files.[111] One case was initiated by a local authority and concerned contact, amongst other matters. Very little information existed on the other file about the case.

Use of the Mental Health Act 1983

At the outset, we sought to collect data on the use of the MHA 1983 in parallel with the CoP's welfare jurisdiction. However, due to the partial and incomplete nature of the files, it was impossible to determine in many cases whether P was subject to a MHA regime or whether the CoP's jurisdiction had been considered as a possible alternative to the MHA. Accordingly, we do not report the data we did gather as it is too unreliable and partial.

We do note, however, that there were two cases where a NHS Trust had applied to the CoP for authorisation of a deprivation of liberty because they were unhappy about the waiting times for DoLS authorisations from their local authority supervisory body. In one of these cases, the application to the CoP appeared to prompt the local authority to conduct the relevant assessments and issue the authorisation, so the case was dismissed. In the other case, a High Court judge issued the authorisation. In the latter case, the file recorded that P was in hospital being treated for mental disorder, and was objecting to this treatment. We note that in circumstances where P is detained in hospital for the purpose of treatment for mental disorder and is objecting to that treatment, authorisation for deprivation of liberty should not be granted either by the supervisory body under the DoLS[112] or by the CoP because the individual is ineligible for detention under the DoLS.[113]

3.5 THE DURATION OF PROCEEDINGS

We were interested in the typical duration of CoP cases in the files. Of those cases with a final order on the file, we calculated the average and standard deviation for the duration of cases, in months, and looked at the longest and shortest cases (Table 16). These dates are calculated from the date the application was received by the CoP until the date of the final order on the file. The mean duration of a CoP personal welfare case was 7.3 months, but this is skewed by some very long lasting cases; the median duration of a personal welfare case is 4 months. The longest running

[110] NB: an application may be made by another party within the proceedings, and is not necessarily made by the applicant in the case

[111] Although only the High Court can make an order under the inherent jurisdiction, if such applications were more common we would have expected to find more instances of this in the 'dummy files' held by the CoP's London registry when the case is transferred to the High Court.

[112] See paragraph 5 of Schedule 1A MCA

[113] Under s16A MCA where a person is 'ineligible' to be deprived of their liberty under the DoLS, the Court of Protection may not authorise their detention by making a welfare order under s16 MCA.

personal welfare case in the files examined lasted for more than 3 years. Applications using the COPDLA route for a s21A review had a slightly shorter mean, at 5.6 months per case. However this is likely to be because the longest lasting cases were shorter under s21A review route than the personal welfare route. The median duration of a CoP DoLS review is actually longer than for personal welfare cases, at 5 months.

Table 16 The duration of completed CoP cases (months)

	Median duration	Mean duration	Standard deviation	Longest case	Shortest case on file	N
COP1	4	7.3	7.3	43.0	0.1	93.0
COPDLA	5	5.6	5.0	24.9	0.2	45.0
Total	**4**	**6.7**	**6.7**	**43**	**0.1**	**138.0**

We looked to see if there were differences in the overall duration of cases where different substantive matters were before the CoP. Table 18 displays our findings: the longest running cases seemed to be those concerning relationships: cases about consent to sex, or contact. The shortest cases concerned medical treatments, with cases concerning residence and care arrangements falling somewhere in between. In some ways these findings are unsurprising; medical treatment decisions tend to be one-off matters, whereas relationships and questions of where a person lives tend to be ongoing. We also saw that cases concerning relationships or residence tend to have a greater number of parties than medical treatment cases. Thus it seems that the CoPs social and relational jurisdiction is proving to be more complex, and potentially demanding of greater resources, than its jurisdiction over healthcare matters.

Table 17 Duration of CoP cases concerning different subject matter

Subject matter of case	Mean duration	Standard deviation	Longest case	Shortest case on file	N
Care arrangements	7.2	7.5	43.0	0.6	63.0
Residence	7.6	8.0	43.0	0.6	68.0
Contact	9.7	7.6	24.8	0.1	19.0
Medical treatment for mental illness	insufficient data				
Medical treatment for physical disorder	6.0	5.7	15.0	0.1	17.0
Withdrawal of ANH	insufficient data				
Capacity to consent to sex	18.6	10.7	25.5	2.8	4.0
Capacity to consent to marriage	insufficient data				

3.6 HEARINGS

The database included an index database that gathered data on each case as a whole; this included fields gathering data on the number of hearings and any adjourned hearings. We also created a connected database that gathered data on specific hearings, where this was available from the file. This looked at questions such as how P participated and was represented, and whether there was any evidence of media attendance.

Data for these fields was gathered differently depending on the type of files used. In the 'complete' files, it was relatively easy to gather data on the number of hearings actually held and those that were adjourned, as they contained correspondence about hearing dates and adjournments sent by the CoP to the parties, as well as orders and hearing attendance notes pertaining to individual hearings. From the dummy files, evidence of a hearing or an adjournment was inferred from the orders on the file. This is likely to underestimate the number of hearings (and adjournments) because hearings might be vacated or adjourned without a corresponding order necessarily being placed on the file. Information about the hearings themselves was scarce in the dummy files. Meanwhile in the High Court, there tended to be a hearing attendance note for any hearings before a High Court judge in the file, which recorded who was attending and who was representing them. This was a useful source of data for how P was represented but, as for the dummy files, it is possible that other hearings may have taken place (for example, with a district judge) that were not on the file. In summary, the data presented here will *under*-estimate the number of hearings and adjournments for the cases overall.

Number of hearings per case

In order to estimate the typical number of hearings per case, we only included those cases where a final order was found on the file. Table 18 presents summary statistics for the typical number of hearings for a case. It indicates that most cases were resolved with one or two hearings, however some outlier cases involved many more – we found an example in our sample of a case that had involved 9 hearings.

Table 18 Summary statistics on the number of hearings for individual cases

File type	Mean number of Hearings	Standard deviation	Most hearings	Fewest hearings	N
Complete	1.49	1.51	9	0	96
Dummy	1.17	1.14	5	0	48
High Court	**1.38**	**1.40**	**9**	**0**	**144**

Table 19, below, presents summary statistics for the number of hearings found in our sample for cases involving different subject matter. Our findings reiterate that cases about one might characterize as 'relational' matters such as contact or consent to sex are more involved and complex than other kinds of case in the CoP's welfare jurisdiction.

Table 19 Summary statistics for number of hearings, for different subjects of litigation

Subject matter	Mean number of Hearings	Standard deviation	Most hearings	Fewest hearings	N
Care arrangements	1.56	1.89	10	0	66
Residence	1.61	1.83	10	0	71
Contact	2.35	2.14	9	0	23
Treatment for mental illness	insufficient data				
Treatment for physical illness	1.60	1.35	5	0	20
Withdrawal ANH	insufficient data				
Consent to sex	2.29	1.70	5	0	7
Consent to marriage	insufficient data				

Table 21 breaks down these summary statistics on the number of hearings according to whether the case was managed using the personal welfare route (initiated by the COP1 form) or the s21A review of a DoLS authorisation route (initiated by the COPDLA form). This suggests that DoLS review cases tend to have slightly fewer hearings than the kinds of questions addressed by the personal welfare route.

Table 20 Summary statistics for the number of hearings in COP1 welfare applications and COPDLA 21A DoLS reviews

Case type	Mean number of Hearings	Standard deviation	Most hearings	Fewest hearings	N
Personal welfare applications (COP1)	1.49	1.51	9	0	96
S21A reviews (COPDLA)	1.17	1.14	5	0	48
Total	**1.38**	**1.40**	**9**	**0**	**144**

When we circulated a copy of our findings with some advisory group members with extensive experience of CoP welfare litigation they expressed surprise that the typical number of hearings was so low, indicating that in their experience the number of hearings tended to be higher. We reviewed our data but are unable to explain the discrepancy between their experiences and our findings here. One possible reason may be that because the files were 'incomplete' we are missing hearings that took place because the information was not found in the files. This explanation would be supported by the finding that evidence of more hearings was found on the 'complete' files than the dummy and High Court files.

Vacated hearings

We looked for evidence of any vacated hearings on the files. As noted above, it was harder to find evidence of this in the dummy or High Court files than the complete files. Nevertheless, as Table 21 shows, the number of vacated hearings found in the files was greater for High Court cases than for the other kinds of files, although the number of High Court files with a final order on them and therefor eligible for this analysis was only 5 so this finding should be treated with some caution.

Table 21 Summary statistics on the number of vacated hearings in a case

File type	**Mean number of Hearings**	**Standard deviation**	**Fewest vacated hearings**	**Most vacated hearings**	**N**

Complete	1.24	0.43	1	2	38
Dummy	1.27	0.59	1	3	15
HC	1.80	0.84	1	3	5
Total	**1.29**	**0.53**	**1**	**3**	**58**

Table 22 presents summary statistics for the number of vacated hearings in personal welfare (COP1) route cases or s21A reviews. This indicates that vacated hearings may be slightly more common in personal welfare than s21A review cases.

Table 22 Summary statistics for the number of vacated hearings for personal welfare casea and s21A reviews

Case type	Mean number of Hearings	Standard deviation	Fewest vacated hearings	Most vacated hearings	N
Personal welfare applications (COP1)	1.38	0.61	1	3	32
S21A reviews (COPDLA)	1.16	0.37	1	2	25
Total	**1.28**	**0.53**	**1**	**3**	**57**

Representation of P in hearings

The representation of P in hearings is an important matter for the rapidly developing jurisprudence and literature on rights to participate in legal capacity and deprivation of liberty proceedings.[114] Data on how P was represented in a hearing, where it could be located at all, was found on a 'representation' sheet for each hearing. Where it was recorded that P was represented by counsel, it can be inferred that a solicitor was also usually present. Whereas when it is recorded that P was represented by a solicitor, this indicates that a solicitor rather than counsel conducted any advocacy in the hearing. In a small number of cases, P was only represented by a litigation friend.

Table 23 provides frequency data on how many hearings[115] we came across with evidence on the file for different modes of representation of P. We came across three instances of cases where it was clearly recorded on the file that P attended the hearing in person but was otherwise unrepresented. Also potentially concerning was our finding of 35 instances of cases where it was recorded that P was not represented in any capacity. Very often these were early directions hearings, and the parties were still determining who could act as litigation friend for P. In the majority of cases P was represented by counsel. It was comparatively rare for P to be represented by a solicitor without counsel, especially in the High Court – this is in part because many solicitors do not have rights of audience before High Court judges. It may also be because CoP cases heard in the High Court tend to raise more complex legal questions and so solicitors are more likely to use counsel.

[114] Series, Fennell and Doughty (2017) n 15.

[115] NB: As this data is taken from the hearings database, and not the cases database, some of these datapoints relate to separate hearings within a single case.

Table 23 Mode of representation of P in Court of Protection hearings

Mode of representation for P	Tier of CoP judge hearing the case			
	Circuit judge	**District judge**	**High Court judge**	**Total**
Attended in person		1	2	3
Represented by counsel	27	83	65	175
Litigation friend	3	3	1	7
Other	1	1		2
Solicitor	7	28	1	36
Unrepresented	5	14	16	35
Total	**43**	**130**	**85**	**258**

Participation of P in hearings

We also looked at *how* P participated in the proceedings – whether by attending any hearings or through other means. Table 24 describes our findings.

Table 24 P's participation in the proceedings

Mode of participation for P	Tier of CoP judge hearing the case			
	Circuit judge	**District judge**	**High Court judge**	**Grand Total**
Attended a hearing in person	1	2	6	9
Attended a hearing in person and gave unsworn testimony in court	1	2		3
Met with the judge in private	1	1	2	4
None of the above	39	124	76	239
Total	**42**	**129**	**84**	**260**

We found only 12 examples of cases where it was recorded on the file that P had attended a hearing in person; within these there were three examples of cases where P had given unsworn testimony in court. We came across 4 instances of cases where it was recorded on the file that the judge met with P in private outside of a hearing. In the vast majority of the files, however, we found no evidence of any direct participation by P in the proceedings – either through attending court or meeting the judge.

Given the growing emphasis placed on P's direct participation in the proceedings and giving evidence in his case, discussed in our recent report on the *Participation of P in Welfare Cases in the Court of Protection*[116], this is a worrying finding. However, we reiterate that it is possible that in some hearings Ps attendance at, and direct participation in, a hearing was simply not recorded and so no evidence of this was found on the file. Following the introduction of Rule 3A, judges must in every case give directions as to how P should participate, meaning that all files should in future contain an order specifying whether and how P participated in the proceedings.

We did find on the files one heartening example of judicial engagement with P – a note from the (High Court) judge to P explaining, in simple language, the decision made and why they had made it.

[116] Series, Fennell and Doughty (2017) n 15.

3.7 Evidence before the Court of Protection

We were interested in the evidence before the CoP to make decisions regarding Ps' mental capacity and best interests. We looked at the evidence submitted by the applicant, using the COP3 form, that P lacked the mental capacity to make the decisions in question, and we also looked for evidence of expert reports where these were stored in the files.

Assessors completing COP3 forms

Of the 92 COP3 forms examined, roughly a third were completed by social workers and a third by psychiatrists (see Figure 11); the remainder were completed by other kinds of medical practitioner, psychologists, nurses, speech and language therapists and other kinds of professional. Table 25 gives a more detailed breakdown of the kind of professional completing the COP3 assessment form, against the kind of applicant in the case. Local authorities used social workers to complete COP3 applications in about half of all the cases where they were the applicant in this sample. Perhaps unsurprisingly, NHS Trusts and CCGs tended to rely upon doctors or psychologists. In the relatively small number of cases in this sample where P or a family member was the applicant, they tended to rely upon a COP3 assessment being completed by a doctor.

Figure 11 Professionals completing COP3 capacity assessment application forms

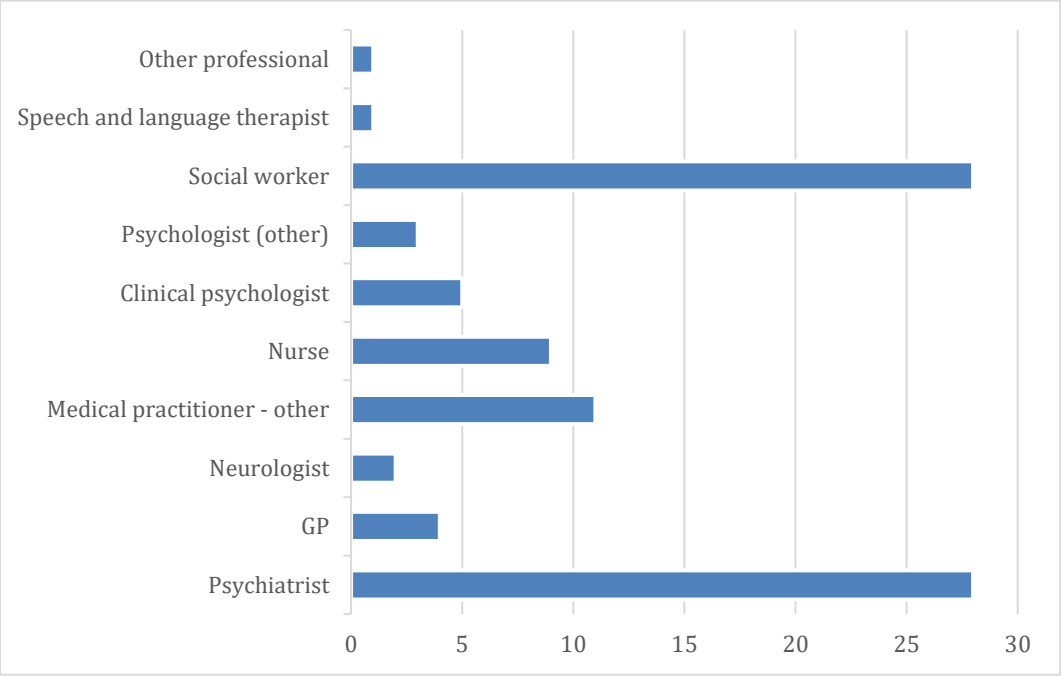


Table 25 Assessors completing COP3 assessment of capacity forms, by applicant

Applicant	Medical doctors				Psychologists		Other professionals				
	Psychiatrist	Neurologist	GP	Other	Clinical	Other	Nurse	Speech and Language Therapist	Social worker	Other professional	Total
Care provider	2										2
CCG	2						2				4
Local authority	14		2	4	2	2	6	1	28	1	60
NHS Trust	5	1		6	1	1					14
Other public body					2						2
P himself	2										2
Parent	1	1	2								4
Relative - other							1				1
Son or daughter	1										1
Spouse or civil partner				1							1
Total	**28**	**2**	**4**	**11**	**5**	**3**	**9**	**1**	**28**	**1**	**92**

Outcomes of COP3 capacity assessments

The functional test of mental capacity provided by s3(1) MCA defines a person as unable to make a decision if they are unable:

a) to understand the information relevant to the decision,

b) to retain that information,

c) to use or weigh that information as part of the process of making the decision, or

d) to communicate his decision (whether by talking, using sign language or any other means).

We looked at the outcomes of 95 COP3 assessments found on the files in our sample against each of these bases for a finding of incapacity. Any given assessment might find that P lacked mental capacity on multiple different grounds; for example, a person might be found to both lack understanding and the ability to retain the relevant information. Table 26 indicates that an inability to 'use and weigh', and to understand, was the most common basis for a finding that a person lacked mental capacity. In 67% of cases the person was found to be unable to retain the relevant information long enough to make the decision. In 25% of cases the person was considered to be unable to communicate their decision.

Table 26 Functional basis upon which P was said to lack mental capacity

Basis upon which P was said to lack mental capacity		% of sample of 95 COP3 forms
Understand	80	84%
Retain	64	67%
Use or Weigh	81	85%
Communicate	24	25%

We mapped these findings of incapacity across the kind of disability reported for P in the case file. These data are reported in Table 27 and presented graphically in Figure 12. Because an individual might be found to lack mental capacity on several functional grounds, and might have multiple diagnoses or disabilities, the same person might be represented across different categories in this table.

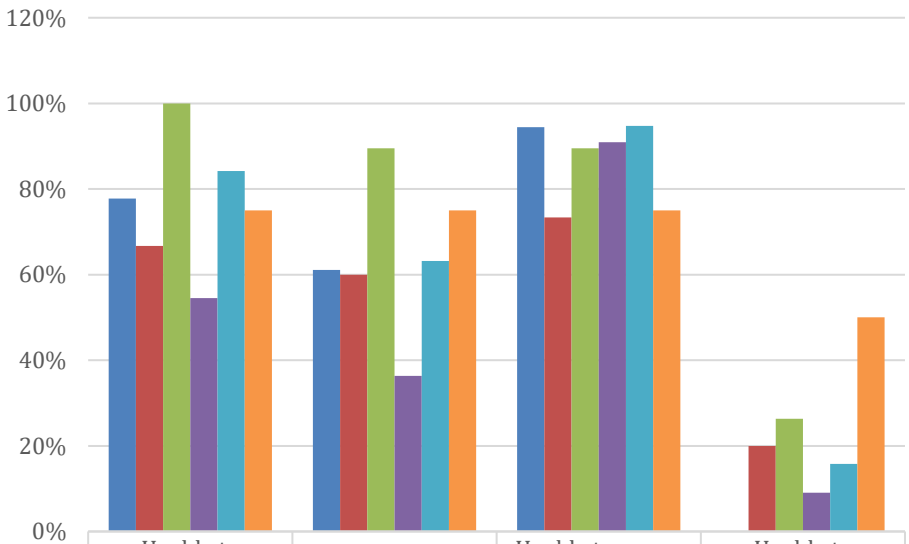
These data show different patterns of findings for functional incapacity for people with different diagnoses. All Ps with dementia were found by COP3 assessors to lack the ability to understand the relevant information, for other groups it was the ability to use and weigh information that was more frequently given as a reason for a finding of incapacity. Around 90% or more of people with autistic spectrum disorders, dementia, mental illness or learning disabilities were considered unable to use or weigh the information relevant to a decision.

The number of people with chronic disorders of consciousness such as a permanent vegetative state (PVS) or minimally conscious state (MCS), who were not found to be unable to communicate was surprisingly low. However it seems likely that this might have been presumed as implicit by those completing the COP3 assessment form since *by definition* a person in PVS should not be in a position of use and weigh the information relevant to the decision.

Table 27 Functional basis upon which P was said to lack mental capacity on COP3 forms, by disability of P

	N	Unable to understand	Unable to retain	Unable to use or weigh	Unable to communicate
Autistic Spectrum Disorders	18	14	11	17	0
Brain injury	15	10	9	11	3
Dementias	19	19	17	17	5
Mental illness	11	6	4	10	1
Learning disability	19	16	12	18	3
Chronic disorders of consciousness	4	3	3	3	2

Figure 12 Functional basis upon which P was said to lack mental capacity on COP3 forms, by disability of P



	Unable to understand	Unable to retain	Unable to use or weigh	Unable to communicate
Autistic Spectrum Disorders	78%	61%	94%	0%
Brain injury	67%	60%	73%	20%
Dementias	100%	89%	89%	26%
Mental illness	55%	36%	91%	9%
Learning disability	84%	63%	95%	16%
Chronic disorders of consciousness	75%	75%	75%	50%

We also looked at findings of incapacity by COP3 assessors according to the subject matter of the litigation; see Table 28 below. Excluding those categories for which there was a very small sample size (N<5), there were no obvious differences in the pattern of results between different kinds of CoP case.

Table 28 Functional basis upon which P was said to lack mental capacity on COP3 forms, by subject matter of litigation

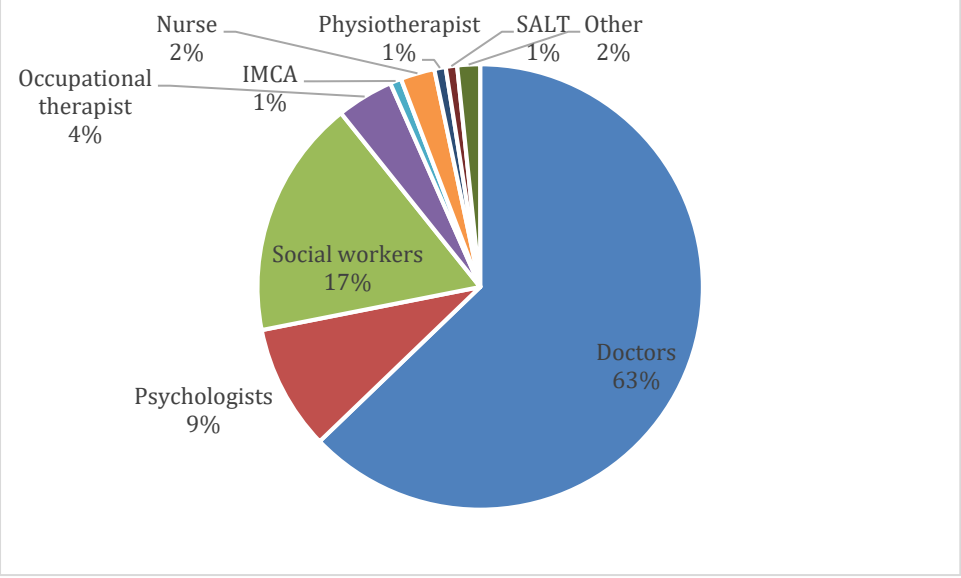
Subject of litigation	N	Unable to understand		Unable to retain		Unable to use or weigh		Unable to communicate	
Care arrangements	63	54	86%	42	67%	53	84%	18	29%
Residence	63	55	87%	45	71%	52	83%	19	30%
Contact	15	13	87%	11	73%	11	73%	3	20%
Treatment for mental illness	2	2	100%	2	100%	2	100%	0	0%
Treatment for physical illness	18	14	78%	12	67%	16	89%	4	22%
Consent to sex	4	4	100%	1	25%	2	50%	1	25%
Consent to marriage	2	2	100%	0	0%	2	100%	0	0%

Expert reports found in the files

Because all the files in our sample were potentially incomplete, and few contained all the materials that would be submitted with the bundles, we are unable to say how many expert reports were typical in a given case. However, we were able to conduct an analysis of the nature of the expertise sought by the CoP of those expert reports that were found in the files.

Figure 13 indicates that medical expertise predominated in the CoP files examined for this study, with the majority being psychiatric reports (Table 29). A significant proportion of the reports examined were by social workers or psychologists. Reports by other kinds of professionals, including IMCAs, were comparatively rare.

Figure 13 Expert reports on file in the Court of Protection



Only 25% of the reports examined were written by NHS or local authority staff under s49 MCA.

Table 29 Expert reports found on the CoP files

Expert profession		Non-s49 reports	S49 reports		Total
			local authority	NHS	
Medical doctors	Psychiatrist	46	2	12	60
	Neurologist	4		1	5
	Medical practitioner - other	10		1	11
Psychologists	Clinical psychologist	5	1	3	9
	Psychologist - other	1		1	2
Social workers		18	3		21
IMCA		1			1
Other professionals					
	Nurse	3			3
	Occupational Therapist	2	2	1	5
	Physiotherapist		1		1
	Speech and Language Therapist		1		1
	Total	**90**	**12**	**19**	**121**

Table 30 Instructions for independent expert reports on file shows who instructed the experts writing the reports found on the files. The majority (78%) were joint instructions between all the parties.

Table 30 Instructions for independent expert reports on file

Independent experts	Applicant instructed	Jointly instructed	P instructed	Respondent instructed	Other	Total
Psychiatrist	4	51		1	2	58
Neurologist	1	3			1	5
Medical practitioner - other	2	4	5			11
Social worker		19		2		21
Clinical psychologist		5			2	7
Psychologist - other		2				2
Occupational Therapist	3	1				4
Nurse	2	1				3
IMCA		1				1
Total	**12**	**88**	**5**	**3**	**5**	**113**

3.8 TRANSPARENCY

We looked for evidence of reporting restrictions, media attendance at hearings, orders relating to reporting and the publication of judgments, as important indicators of 'transparency' in CoP cases.[117]

We found a large number of what we termed 'privacy injunctions' in the CoP files: 16 in the 'complete' files (16%), 27 in the 'dummy' files (27%) and 6 in the High Court files (12%). These were orders issued by a judge, usually a district judge in an initial directions order to the parties, which included provisions prohibiting the parties from sharing information about the proceedings and identifying any of the parties with any third party. These were not explicitly directed towards restricting the publication of information by the media, and so we distinguished these from reporting restriction orders (RRO), which explicitly prohibited the media from publishing information about a case. Privacy injunctions did not appear to be treated like RROs – they were not accompanied by a notification being shared with the media of the case or any specific reporting restrictions.

We found 11 examples in all the files examined of RROs that were explicitly directed towards the media; 7 of these were found amongst the High Court files. The cases involving RROs spanned a wide range of issues, including care arrangements, residence, contact and medical treatments.

There was only one example on the file of an application from the media to attend a hearing. This indicates that media RRO's were issued in anticipation that the media might wish to attend or report upon the case, or to restrict reporting of the identities of the parties in connection with anonymised judgments or other materials that were in the public domain, rather than in response to media interest.

Published judgments

There were 6 cases examined in which a judgment was published; each of these were files from the High Court. This is unsurprising, since the guidance on the publication of judgments[118] applies only to High Court judges[119].

Other studies on the Family Court indicate that the practice guidance requiring publication has not always been complied with.[120] We found one instance of a file from the High Court which contained a written judgment which appeared to meet the criteria for the transparency guidance but where we could find no published judgment on BAILII at the time of writing. However, we are unable to draw conclusions about the overall degree of compliance with the transparency guidance in the CoP since the files are incomplete and written judgments would not always be placed on the file.

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[117] Series, Fennell, Doughty and Clements (2015) fn13; Julie Doughty and Paul Magrath, 'Opening up the courts: the Court of Protection transparency pilot' (2016) 21(2) *Communications Law* 36-44.

[118] *Practice Guidance (Transparency in the Court of Protection)* [2014] EWCOP B2

[119] And the Senior Judge of the CoP.

[120] J Doughty, A Twaite and P Magrath, 'Transparency through publication of family court judgments: An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people' (Cardiff University, 2017) < http://orca.cf.ac.uk/99141/> [accessed 22 September 2017].

3.9 How personal welfare cases end

Final declarations of capacity and incapacity

Out of 53 'complete' personal welfare files examined, we found two examples of a declaration that P had mental capacity in a final order. Both these declarations of capacity arose from applications by local authorities for declarations of incapacity in relation to residence and care arrangements.

Of the 53 'complete' personal welfare applications, 31 ended with a final declaration that P lacked mental capacity. These declarations were in relation to residence (29), care arrangements (29), contact with a named person (3), and making an LPA (1). No examples were found in the 'complete' files of declarations of incapacity relating to medical treatments, sex or marriage. However, this is likely to be because such cases would be transferred to the High Court, and so would not be included amongst the 'complete' files stored at the CoP.

The data on final orders from the High Court files should be treated with caution, as they were potentially ongoing and may not have a final order on file at the High Court if the case was remitted back to the CoP. Nevertheless, examination of what final orders were found on these files does give an indication of the kinds of final orders being issued by the High Court.

Of the 35 High Court personal welfare case files examined, there was 1 containing a declaration that P had mental capacity. This case had originated in an application by a local authority for a declaration that P lacked mental capacity in relation to residence, care arrangements, contact and consent to sex; the case had ended with a declaration by the High Court that P had mental capacity in relation to all these matters.

We examined 14 High Court files containing final orders with a declaration that P lacked mental capacity. These declarations related to care arrangements (5), residence (6), contact (2), treatment for a mental illness (1), treatment for a physical disorder (11) and the withdrawal of ANH (1). There were no final declarations of incapacity in relation to sex or marriage on the files examined.

The 'dummy' files are more representative of *all* traffic through the CoP, as they retain files for cases transferred to regional courts or the High Court. However, like the High Court files, the chances of finding a final order were lower than for a 'complete' file – in part because the case might be ongoing and in part because a final order made by a regional court or High Court judge may not have made its way to the file in the central London registry at the time the file was examined. Nevertheless, they were worth examining for the pattern of distribution of declarations of capacity and incapacity.

Of the 65 'dummy' files examined, there was only one example of a final declaration that P had mental capacity. This application was made by a local authority for a declaration of incapacity in relation to care arrangements and residence; the case ended with a final declaration that P had mental capacity in relation to those matters.

Of the 65 'dummy files' examined, 21 contained final declarations that P lacked mental capacity. These declarations were in relation to care arrangements and residence (19 cases), contact with named persons (6) and treatment for physical conditions (3).

In summary, of those final declarations that were found on the files in our sample, it was rare indeed for the CoP to conclude that P had mental capacity in relation to a matter. Such examples that we did find were cases where the applicant was a public authority seeking a declaration of incapacity. We therefore found no evidence that the CoPs personal welfare application process was

being used by P to successfully assert that they had mental capacity in relation to a particular matter. This pattern is, however, different for the s21A cases we examined, discussed below.

Ps wishes and feelings about best interests decisions made by the CoP

We had hoped in our study to track those cases where the outcome of a case was the result that P wished for. However, it transpired that this was not possible with the information available on the of the files. Although the COP3 form does ask those assessing Ps mental capacity for any information they have about P's wishes and feelings[121], this section was often not completed or else it was difficult to map the information provided here in any consistent way onto the final orders made by the CoP. Although sometimes information about P's wishes and feelings was available from the COP3 forms, or might sometimes be contained in witness statements, expert reports or skeleton arguments found on some of the files, this information was simply too fragmentary, and was often too contested or uncertain, to form the basis of a robust statistical analysis. Therefore, with regret, we are unable to report how often P gets the outcome they 'want' from a CoP final order.

As a wider observation, given the growing emphasis in law and policy on placing P's wishes, feelings, values and beliefs at the centre of any decisions, it might be desirable to redesign the CoP application forms to positively require those making the application and assessing P's mental capacity to try to ascertain what P's wishes and feelings are in relation to the matter, and to report their success or otherwise at obtaining this information, and what they found. Annex C to the COPDOL10 application form for authorisation of a non-contested deprivation of liberty would provide a useful template for this.[122]

Best interests decisions

Of the 53 'complete' files examined, we found 22 examples of final orders relating to P's best interests. These included best interests decisions relating to a change of residence for P (10), P remaining in their current place of residence (13), restrictions on contact with named persons (1), the facilitation of contact (1), and the use of force (in relation to a change of residence) (1). Again, we found no orders relating to medical treatment, sex or marriage[123], but this is in part because such matters tend to be transferred to the High Court and so would not be represented amongst the 'complete' files.

Of the 65 'dummy' personal welfare files examined, we found 21 examples of final orders relating to P's best interests. These related to a change of residence (5), a decision that P should remain in their current residence (14), restrictions on contact with named persons (5), a decision that contact

[121] Question 7.5 asks 'Has the person to whom this application relates made you aware of any views they have in relation to the relevant matter'? It provides a yes/no tick box option, and then 'If Yes, please give details'.

[122] This Annex must be completed by 'someone who knows the person the application is about, and who is best placed to express their wishes and views'. It asks for information on what has been explained to P in relation to the proceedings, and asks for information about any views they have expressed, or other information pertaining to their wishes, feelings, values and beliefs.

[123] Notwithstanding that best interests decisions cannot be made on behalf of an adult who lacks mental capacity consenting to sex or marriage; however they can be *about* sex or marriage in the sense of imposing restrictions in relation to those matters.

should be facilitated or permitted (2), the administration of medical treatment (2), and the use of force to enable medical treatment (1).

Of the 35 High Court personal welfare files examined, we found 14 examples of final orders relating to P's best interests. These included best interests decisions relating to a change of residence for P (4), P remaining in their current place of residence (2), restrictions on contact with named persons (2), the administration of medical treatment (7), use of force to administer medical treatment (5), the withdrawal or withholding of live saving or life sustaining treatment (2) and withdrawal of ANH (1).

These final orders suggest that the most common kind of matters decided by the CoP are questions of where P should live. The High Court does deal with a number of medical treatment cases, many of which concern end of life decisions or the administration of medical treatments by force. Both the High Court and the lower tiers of the CoP also deal with a number of cases concerning contact with named persons; their orders more frequently impose restrictions on contact but sometimes require that contact is permitted or facilitated.

Consent orders

We examined those cases where the CoP had made a final order concerning P's best interests, to look at how often these final orders were made by the consent of all the parties. Of the 22 best interests final orders on file from the 'complete' cases, 50% were made with the consent of the all the parties. Of the 21 best interests final orders from the 'dummy' files, 38% were made with the consent of all the parties. Of the 14 best interests final orders from the High Court files, 29% were made with the consent of all the parties.

Table 31 shows the number of final orders made with, or without, the consent of the parties for different kinds of best interests decision. The only areas where a consent order seemed to be more common than not was a change of P's place of residence and the facilitation of contact with named persons. Medical treatment decisions, especially those involving the use of force, seemed to be the least likely to gain the consent of all the parties.

Table 31 Subject matter of final orders with, or without, consent orders

Subject matter of final orders	No consent order	Consent order
Change of residence	8	11
Remain in place of residence	19	11
restrictions on contact	4	4
Facilitate contact	1	3
Medical treatment	7	2
Medical treatment involving the use of force	6	1
Life saving treatment withdrawn or withheld	1	1
Withdrawal ANH	0	1

Other ways that COP1 personal welfare cases ended

COP1 cases might end without any final order relating to P's mental capacity or best interests. Out of 153 personal welfare cases examined, we found 11 examples of cases where the CoP had granted permission to the applicant to withdraw the application. We also came across 7 examples of cases where P had died, and that is how the case had ended. Given the incomplete nature of

many of the files examined, it is entirely possible that these data underestimate the number of cases that end in this way.

3.10 How s21A deprivation of liberty safeguards cases end

Overall we examined 104 files that used the s21A review procedure – either from the outset, or they were transferred to this procedure by the CoP (see Table 32, below).

Table 32 Cases using the s21A review procedure

	COPDLA applications	COP1 applications transferred to s21A cases	All s21A cases
Complete files	47	2	49
Dummy files	32	6	38
High Court files	16	1	17
Total	**95**	**9**	104

We started our analysis by looking at all the final orders we found on these files. However, because many of the 'dummy files' and High Court files were not completed at the time they were examined, the data presented in this section should not be relied upon for calculating proportions of s21A cases ending in particular ways; we take a closer look at the 'complete' files for this analysis later on.

What is a 'successful' s21A outcome?

One of our research questions concerned how often 'appeals against detention' under the DoLS to the CoP were 'successful'. At the outset of this research we had hoped to compare the proportion of 'successful appeals' against detention under the DoLS to official data collected on appeals against detention under the MHA in England. Data from 2015-16[124] show that around 20% of all applications to the First Tier Tribunal (Mental Health) are withdrawn before a hearing[125], and in around 26% of cases the patient is discharged after making an application to the tribunal but before a hearing.[126] Of those initial applications, only around 6% result in a discharge (which might be conditional or delayed), of which only around 3% is in an absolute discharge.[127] Thus, for the tribunals, the most common 'successful' appeal is actually a discharge by a clinician prior to any hearing; discharges from detention by the tribunal itself are relatively rare.

We had tremendous difficulties categorizing different outcomes for s21A reviews in a way that clearly mapped onto particular outcomes. Answering the question of how often an 'appeal against

[124] Care Quality Commission (2017) *Monitoring the Mental Health Act in 2015/16*. Appendix B.

[125] This is 8% of all s2 applications, 24% of all other unrestricted patients and 26% of restricted patients.

[126] This is 32% of all applications from s2 detained patients, 28% of all applications from other unrestricted patients, but only 2% of restricted patients.

[127] 4% of all applications from s2 detained patients, and 2% from other unrestricted and restricted patients,

detention' was 'successful' proved to be an almost impossible question to answer from the data in the final orders. The most obvious indication of a 'successful appeal' against a DoLS authorisation is a court order under s21A(5) terminating a DoLS authorisation or directing the supervisory body to do the same. Yet such orders were surprisingly rare in the files we examined; we found only 4 examples of these in all 104 files examined. Very often it might be presumed that the termination of a DoLS authorisation must follow given the outcome of the case, but this was rarely expressed explicitly in the final orders in our sample.

The CoP was inconsistent in whether it used s21A(2) or other parts of the MCA (s15 or s16) to make final orders determining matters relating to P's mental capacity and best interests for those cases brought under s21A. So, for example, an application might be made to the CoP using the COPDLA form, and seeking a review of whether the mental capacity or best interests requirements for the DoLS were met. During the proceedings it would become apparent that the substantive dispute was actually about P's mental capacity or best interests in relation to a connected matter, such as consenting to sex, contact with a named party, or medical treatment, and so the final order would make a declaration or decision about that matter without speaking directly to the question of whether the DoLS criteria were met and whether the original authorisation should be terminated or not. Sometimes a s21A(2) determination of whether a particular qualifying requirement was met would appear alongside a declaration or decision under s15 and s16 MCA in the final order, but more frequently the only final orders on the file made were using s15 and s16 and not s21A. Thus, it is impossible for us to say how often a DoLS authorisation was in effect terminated by the CoP. Under these circumstances, we hope the reader will appreciate our difficulty in presenting our findings in a clear way. They do, nevertheless, show that the s21A review route through the CoP is important for determining a very wide range of questions, and that it would be difficult to disentangle these ancillary matters from 'pure' questions of detention.

Outcomes of s21A proceedings in relation to P's mental capacity

Table 33 presents our findings for final orders containing declarations either that P had mental capacity in relation to a particular matter, or s21A determinations that the DoLS mental capacity requirement was not met, or both. In 2 cases the CoP simply made a determination under s21A(2) that the DoLS mental capacity requirement was not met. In 8 cases the final order concluded that P had mental capacity to make decisions around residence; in 4 of these it issued an additional order under s21A(2) that the DoLS mental capacity requirement was not met. It can presumably be inferred that in the other 4 cases the DoLS authorisation must be terminated because P has mental capacity to decide their place of residence. However, the picture is less clear cut for the declarations that P has mental capacity in relation to contact, medical treatment or consent to sex; would these outcomes necessarily mean that the DoLS authorisation should be terminated? We cannot infer this from these data.

Table 33 Final orders in s21A procedure cases finding that P had mental capacity

CoP declarations that P has mental capacity in relation to a specific matter	No additional s21A determination on file	s21A(2) determination that DoLS mental capacity requirement not met on file
P has mental capacity in relation to residence	4	4
P has mental capacity in relation to contact		1
P has mental capacity in relation to medical treatment		1
P has mental capacity in relation to consent to sex	1	
Standalone s21A(2) determinations that mental capacity requirement is not met		2

Table 34 presents our findings for final orders that P lacked mental capacity in relation to a specific matter. In three cases, the CoP made a determination under s21A(2) that the DoLS mental capacity requirement was met; these determinations were accompanied by a specific declaration that P lacked mental capacity in relation to residence. Yet, in a further 20 cases, the CoP simply made a declaration that P lacked mental capacity in relation to residence; it can probably be inferred from these that this meant the DoLS mental capacity requirement was met. In 8 cases, the CoP made a declaration that P lacked mental capacity in relation to contact and, in 3 cases, the CoP made a declaration that P lacked mental capacity in relation to medical treatment. These indicate that these were the substantive questions that the parties wished the court to address, but they do not help us answer the question of whether a DoLS 'appeal' was 'successful' in terms of the future of the authorisation itself.

Table 34 Final orders in s21A procedure cases finding that P lacked mental capacity

CoP declarations that P lacks mental capacity in relation to a specific matter	No additional s21A determination on file	s21A(2) determination that mental capacity requirement met
P lacks mental capacity in relation to residence	20	3
P lacks mental capacity in relation to contact	8	
P lacks mental capacity in relation to medical treatment	3	

Our difficulty categorizing the outcomes of these cases reveals that the 'successful' outcome of an 'appeal' is in many ways an unhelpful construction imposed on the s21A process: the issue in dispute is very often not the detention itself but the matters that have resulted in the authorisation being imposed in the first place. The s21A review is thus a vehicle for bringing those wider questions before the CoP.

Outcomes of s21A proceedings in relation to P's best interests

Perhaps surprisingly, we found no final orders containing determinations under s21A(2) that the best interests requirement of the DoLS was not met. However, as Table 35 shows, we did find two standalone determinations under s21A(2) that the best interests requirement of the DoLS was met,

and three cases where a s21A(2) determination that the DoLS best interest requirement was met along with a best interests decision that P should remain in their current place of residence. We also found one example of a case where the CoP concluded that P should remain in their current place of residence, but used its powers under s21A(5) to vary the conditions of the authorisation.

We also found 8 examples of decisions that it was in P's best interests to change their place of residence. Presumably, in these cases, the existing DoLS authorisation which had brought the parties to the CoP would be discharged, although it is possible that new authorisations would be issued for the new location. In 4 cases the CoP ordered restrictions on contact with a named person (or persons), in 2 cases it required contact to be facilitated, and in 3 cases it made decisions about medical treatments for P. It is impossible to determine from this alone what that meant for the DoLS authorisation that underpinned the s21A review process.

Table 35 Final orders in s21A procedure cases regarding P's best interests

CoP decisions on P's best interests in relation to a specific question	No s21A determination on file	s21A(2) determination that best interests requirement met	s21A(5) variation of conditions of authorisation
Change of residence	8		
Remain in current residence	9	3	1
Restrictions on contact	4		
Facilitate or permit contact	2		
Medical treatment decision	3		
Standalone s21A(2) determinations that best interests requirement is not met		2	

Outcomes of all 'completed' cases tracked in the study

The findings reviewed above included all cases in our study containing substantive orders on the file, however many of these cases were ongoing (many High Court and dummy files) or were missing final orders because they had not yet been transferred to the file (dummy files). Therefore we conducted a deeper analysis looking at how the 'completed' cases that were archived in the CoPs central registry ended.

We excluded from our analysis 3 withdrawn applications made by NHS Trusts using the COPDLA forms to seek an authorisation of a deprivation of liberty in a hospital. These trusts had issued an urgent authorisation but had been advised by the supervisory body they would be not be able to conduct the assessments in the near future, and the Trusts sought authorisation from the CoP out of concern that this represented an unlawful deprivation of liberty. However revealing about the wider landscape of the DoLS, these were not appropriate uses of the s21A review process and so have been excluded from the analysis.

Table 36 presents our findings from 52 'complete' files on how cases that used the s21A review procedure ended. It is sad to report that in 8% of cases in our sample P died before a final decision could be made by the CoP. In 17% of cases the DoLS authorisation was terminated by the supervisory body after the application was issued; notes on these files suggest that this was often due to a reassessment of P's mental capacity and the conclusion that this requirement was not met. In 8% of cases (other than those where P died or the authorisation was terminated) the application was withdrawn, and in a further 2 cases the CoP dismissed the proceedings of its own motion. In one of these cases, a relative had attempted to use the s21A review procedure to argue

that P was unlawfully deprived of their liberty. However, as no DoLS authorisation was in place, they were unable to use this procedure and the case was dismissed.

Table 36 How s21A procedure cases end (complete files only, N=52)

	Further details	Number of 'complete' s21A procedure cases ending this way	% of all cases in sample ending this way
P died before a final decision could be made		4	8%
DoLS authorisation terminated by supervisory body after application issued		9	17%
Applications withdrawn for other reasons	1 failure of a trial at home 1 application issued in error 2 cases withdrawn with consent of all parties	4	8%
Cases dismissed by the CoP	1 case P became subject to the MHA 1 application by relative alleging an unlawful deprivation of liberty, but no DoLS authorisation so s21A review procedure not available	2	4%
Final orders with consent of all parties	3 cases CoP best interests decision that P should remain in current place of residence 3 cases CoP best interests decision P should change place of residence 2 cases agreement that mental capacity requirement not met 1 case agreement that best interests and mental capacity requirements met	10	19%
Final orders by the CoP (not consent orders)	5 s21A determinations that the best interests requirement is met	17	33%

	4 s21A determinations that the mental capacity requirement is not met 1 use of s21A(5) power to vary a standard authorisation 2 declarations that P has mental capacity in relation to residence and care arrangements 5 declarations that P lacks mental capacity in relation to residence and care arrangements		
No final orders on file		6	12%

In 19% of cases final orders were made by the CoP with the consent of all the parties and in 33% of cases the matters were ultimately decided by the CoP itself. Within these cases, there are 8 (15% of all cases in the sample) examples of a final order confirming that P had mental capacity, 10 (19%) confirming either that the best interests requirement for the authorisation was satisfied or otherwise deciding that it was in P's best interests to remain in their current setting, and 3 (6%) where the CoP concluded that it was in P's best interests to move to another setting.

As we have noted throughout this section, it is very difficult to map these results onto an idea of 'successful appeals'. In addition, this sample is relatively small and only includes cases that were dealt with in the CoPs central London registry (not those transferred to the High Court). However, we can say that in this sample an application to the CoP to review the lawfulness of a DoLS authorisation using s21A MCA was followed in significant proportion of cases by the supervisory body reviewing and terminating the authorisation (19%), by a final order by the CoP (with or without the consent of the parties) that P had mental capacity in relation to residence (15%), or making best interests decisions that resulted in a change of residence for P (6%). In other words, in almost 40% of cases the s21A application appeared to precipitate a change in P's circumstances in relation to the care arrangements authorised under the DoLS. This suggests that of those DoLS cases that actually get to court, the CoP cannot be accused as merely operating as rubber stamp on DoLS authorisations.

4 Findings of the Freedom of Information Act study of local authorities, NHS Trusts and CCGs

During the summer of 2015, in parallel to this study of the CoP files, we undertook another study using the Freedom of Information Act 2000 (FOIA) to find out more about the use of the CoP by local authorities and NHS bodies. This replicated and extended an earlier study of their involvement in CoP cases during 2013-14.[128] The key findings of the 2013-14 study were that:

- 81% of authorities in England reported at least one welfare case, the average number for a local authority in England was three and 4% of authorities had been involved in more than ten.
- In Wales, 56% of local authorities reported at least one welfare case, the average number was one and none had been involved in more than three.
- Variations in the number of cases between local authorities could not be explained by population size alone, and neither could lower patterns of use of the court in Wales.
- Almost three quarters of applications to the court were made by local authorities; applications by the relevant person, their family or an advocate were rarer.
- Applications from the relevant person or an advocate were more common where the relevant person was subject to a deprivation of liberty authorisation under Schedule A1 to the MCA 2005.
- In 62% of cases the relevant person was deprived of their liberty, either by an authorisation under Schedule A1 (25%), by order of the CoP (43%) or both (15%).
- Half of all completed cases reported in our study lasted nine months or longer; half of all ongoing cases lasted twelve months or longer.
- Some cases had lasted as long as seven years; these are likely to be situations where a person is deprived of their liberty but its continuation must be regularly authorized by a court because it is in a setting where the DoLS administrative procedures do not apply.
- Half of all cases reported in our study were estimated to have cost local authorities £8,881 or more, but this figure is likely to be an under-estimate. One case was estimated to have cost a local authority £250,000.
- The greatest cost to a local authority was the time of in-house legal staff - costing £8,150 or more. The next greatest cost was fees for counsel, with half costing £3,198 or more, followed by the local authorities' contributions to independent expert reports, with half costing £1,357 or more.

Our study was repeated to examine the impact of the *Cheshire West* decision on the involvement of local authorities and NHS bodies in CoP litigation. It also sought to examine how frequently they used the *Re X* procedure and whether that had any impact on the cost and duration of cases.

The data collection from local authorities was conducted by Adam Mercer, under the supervision of LS, PF and JD, and was funded by a generous grant from the Cardiff University School of Law and Politics' Research Committee.

[128] Series, Mercer, Walbridge, Mobbs, Fennell, Doughty and Clements (2015) n 13.

4.1 METHOD

Local authorities

Local authorities in England and Wales were contacted by email with a request made under the Freedom of Information Act 2000 (FOIA) seeking information on:

- the number of CoP welfare cases they had been involved in during 2014-15, and of those cases:
    - which used the *Re X* streamlined procedure
    - which involved a s21A MCA application
    - which applications concerned another welfare matter, and whether or not that was connected to any deprivation of liberty
- who the applicant was in each case
- whether the case involved any deprivation of liberty authorised under Schedule A1 (the DoLS) or the CoP
- whether or not the case was ongoing and how long it had lasted to date
- An estimate of the costs to the local authority of the case

In recognition that public authorities are not obliged to provide information under the FOIA that would exceed two days of work by local authority staff to obtain and prepare, we framed the request in such a way that local authorities could supply whatever data they were able to prepare in the time available.

Response rates and refusals of requests for information for local authorities in England and Wales are given in Table 37 below.

Table 37 Response rates and refusals from local authorities in England and Wales

	England	Wales	England and Wales
No Response	29 (19%)	2 (10%)	31 (18%)
Refusal	5 (3%)	0 (0%)	5 (3%)
Response	117 (75%)	20 (95%)	137 (78%)

NHS bodies

In our 2013-14 study we had requested information from the seven Local Health Boards (LHBs) in Wales, who act as supervisory bodies under the DoLS and are responsible for both commissioning and providing most healthcare in Wales. However, because of the sheer complexity of the NHS in England, and the hundreds of NHS Trusts and Clinical Commissioning Groups (CCGs) commissioning and providing healthcare, we took a decision that we did not have the resources to conduct a similar study there. In the study reported here, we decided to attempt to contact a randomly selected sample of NHS Trusts and CCGs in England, as well as including LHBs in Wales again, to get a sense of how often they were involved in CoP litigation.

Response rates and refusals of requests for information from CCGs and NHS Trusts in England are given in Table 38 below.

Table 38 Response rates and refusals by CCGs and NHS Trusts in England

Response Status	CCG	Acute Trust	MH Trust	Total
No response	5 (15%)	6 (17%)	4 (11%)	15 (14%)
Refusal	0 (0%)	1 (3%)	3 (9%)	4 (4%)
Response	29 (85%)	29 (81%)	28 (80%)	86 (82%)
Total	**34**	**36**	**35**	**105**

4.2 Overall numbers of CoP welfare cases involving local authorities

Table 39 provides summary statistics showing the frequency of involvement of local authorities in welfare litigation in the CoP for England and Wales, for 2013-14[129] and 2014-15.

Table 39 Number of times individual local authorities in England and Wales were involved in welfare cases in the CoP in 2013-14 and 2014-15

		2013-14			2014-15		
		England	**Wales**	**Total**	**England**	**Wales**	**Total**
Summary statistics	N	126	16	142	115	20	135
	Highest	17	3	17	38	5	38
	Lowest	0	0	0	0	0	0
	Mean	3.6	0.8	3.3	5.7	1.3	5.1
	Median	3	1	2	4	1	4
	Standard Deviation	3.5	0.9	3.5	6.1	1.4	5.9
	Total number of cases reported	453	13	466	660	26	686

Contrasting rates of CoP litigation in 2013-14 and 2014-15

Despite a slightly lower overall response rate for England and Wales in 2014-15 than the previous year, the overall number of cases reported increased from 466 to 686, an increase of around 47%. This is likely to be explained by the *Cheshire West* judgment, which means that more local authorities need to apply to the CoP for authorisation of a deprivation of liberty in settings that do not fall within the DoLS administrative framework.

The increase in the average number of CoP welfare cases reported by local authorities from 2013-14 to 2014-15 was statistically significant.[130] In 2013-14, 22% of local authorities had not been involved in any CoP welfare cases; by 2014-15 this had fallen to 16%. The number of local authorities who were only involved in one case had fallen from 19% in 2013-14 to 11% in 2014-15. In England, there was an increase in the number of 'super-users' of the CoP – local authorities involved in more than 5 cases in one year. Whereas in 2013-14 22% of local authorities in England had been involved in more than 5 cases, and 5% in more than 10 cases, in 2014-15 this had risen to 40% of local authorities in England being involved in more than 5, 12% involved in more than 10 and 3% involved in more than 20 cases. One local authority reported involvement in 38 cases

[129] Reported in Series, Mercer, Walbridge, Mobbs,.Fennell, Doughty and Clements (2015) 13.

[130] An independent samples t-test contrasting the number of cases for each local authority in 2013-14 (M=3.3, sd=3.5, N=142) with the number of cases report in 2014-15 (M=5.1, sd=5.9, N=135) showed a statistically significant increase: $t(275)=3.106$, $p < 0.05$.

during 2014-15, of which 27 were *Re X* cases. In 2013-14 the highest number of cases a single local authority reported involvement in was 17.

Types of cases local authorities in England and Wales are involved in

111 local authorities (99 from England and 12 from Wales) kindly provided more detailed data on the types of CoP welfare litigation they had been involved in during 2014-15, covering 684 cases in total. These included:

- cases involving the *Re X* streamlined procedure to authorise a non-contentious deprivation of liberty that fell outside the DoLS administrative procedures;
- a review or determination relating to a standard or urgent authorisation issued under Schedule A1 (the DoLS) using s21A MCA;
- a personal welfare application that fell outside *Re X* and s21A MCA but still involved a deprivation of liberty;
- a personal welfare application that did not involve a deprivation of liberty;
- or 'other' kinds of cases not included in the categories listed above.

Table 40, below, provides summary statistics for these data.

Table 41 Summary statistics for number of cases English and Welsh local authorities were involved with for different types of CoP welfare litigation

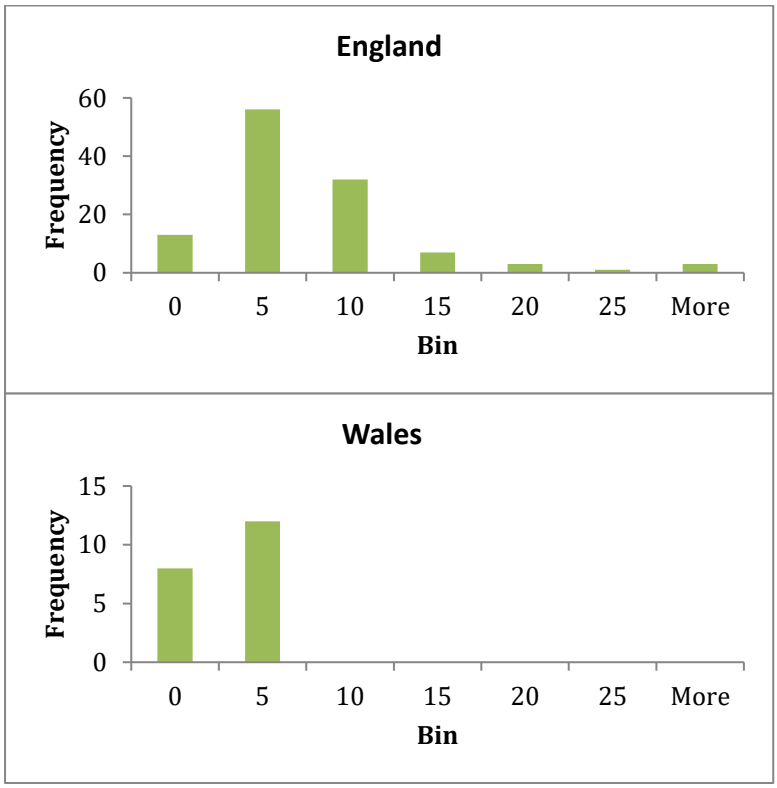
Total	***Re X***	**s21 A review**	**Personal welfare (with deprivation of liberty)**	**Personal welfare (without deprivation of liberty)**	**Other**	
England and Wales						
N	111	111	111	111	111	**Total**
Sum	159	182	208	96	39	684
% of all cases	23%	27%	30%	14%	6%	
Max	27	20	13	6	8	
Min	0	0	0	0	0	
Mean	1.4	1.6	1.9	0.9	0.4	
SD	3.3	2.6	2.5	1.3	1.2	
Median	0	1	1	0	0	
England						
N	99	99	99	99	99	**Total**
Sum	142	178	205	94	39	658
% of all cases	22%	27%	31%	14%	6%	
Max	27	20	13	6	8	
Min	0	0	0	0	0	
Mean	1.4	1.8	2.1	0.9	0.4	
SD	3.5	2.7	2.5	1.4	1.3	
Median	0	1	1	0	0	
Wales						
N	12	12	12	12	12	**Total**
Sum	17	4	3	2	0	26
% of all cases	65%	15%	12%	8%	0%	
Max	5	1	1	1	0	
Min	0	0	0	0	0	
Mean	1.4	0.3	0.3	0.2	0.0	
SD	1.6	0.5	0.5	0.4	0.0	
Median	1	0	0	0	0	

Contrasting England and Wales

In our report on use of the CoP during 2013-14 we found that Welsh local authorities reported involvement in markedly fewer cases than in England. This difference was statistically significant and not explained by differences in the size of local authority populations between the two jurisdictions.

In our data for 2014-15 the overall number of cases reported by local authorities in Wales appears at first glance to be markedly lower than in England (see Table 41). The histograms in Figure 14 show that local authorities in England were involved in more cases during 2014-15 than local authorities in Wales. Overall 40% of local authorities in England were involved in ten or more CoP welfare cases in 2014-15, but no local authority in Wales reported more than 10 for that year.

Figure 14 Histograms depicting number of CoP welfare cases for local authorities in England and Wales, 2014-15



However, larger local authorities are likely to be involved in more cases, and local authorities are on average larger in England than in Wale (see Table 42, below). A more detailed statistical analysis found that after controlling for differences in the size of the local authority population between England and Wales[131], there was no effect of jurisdiction on the number of cases reported by individual Welsh local authorities.[132] This suggests that the difference found in our study of local authorities' involvement in CoP welfare cases during 2013-14 had disappeared by 2014-15.

[131] In England, local authorities tend to be larger, and the size of the population is more variable (M= 369,097, sd= 281,023) than in Wales (M= 147,610, sd= 67,668).

[132] We used a method called Analysis of Covariance to look at the separate contributions of jurisdiction (England v Wales) and population size of a local authority area to the number of cases reported by each local authority. We found that even after looking at the effect of the covariate, population size, on the dependent variable (number of CoP cases reported by a local authority), there was no statistically significant residual effect of the jurisdiction (p=0..09).

Table 42 Contrasting population size, sample size and number of CoP welfare cases reported for local authorities in England and Wales[133]

	Population sampled	%	Total population	%	Total number of CoP cases reported	%
Wales	2,952,193	7%	3,092,036	5%	26	4%
England	42,446,168	93%	54,316,618	95%	658	96%
All	45,398,361		57,408,654		684	

Nevertheless, there were different *patterns of use* of the CoP between the two countries. Although the overall number of cases was comparable, once adjusted for population size, the *types* of case local authorities from each jurisdiction were involved in differed.

As the pie charts in Figure 15 show (the full data can be found in Table 43, above), in England *Re X* applications made up only 22% of all CoP welfare cases that local authorities were involved in, but this rose to 65% in Wales. In England the largest proportion of cases involved general personal welfare applications (45%)[134], whereas only 20% of reported Welsh cases involved a personal welfare application.[135] In England, 27% of cases involved a s21A determination in relation to a standard or urgent authorisation issued under Schedule A1 (the DoLS), whereas in Wales only 15% of cases involved a s21A determination.

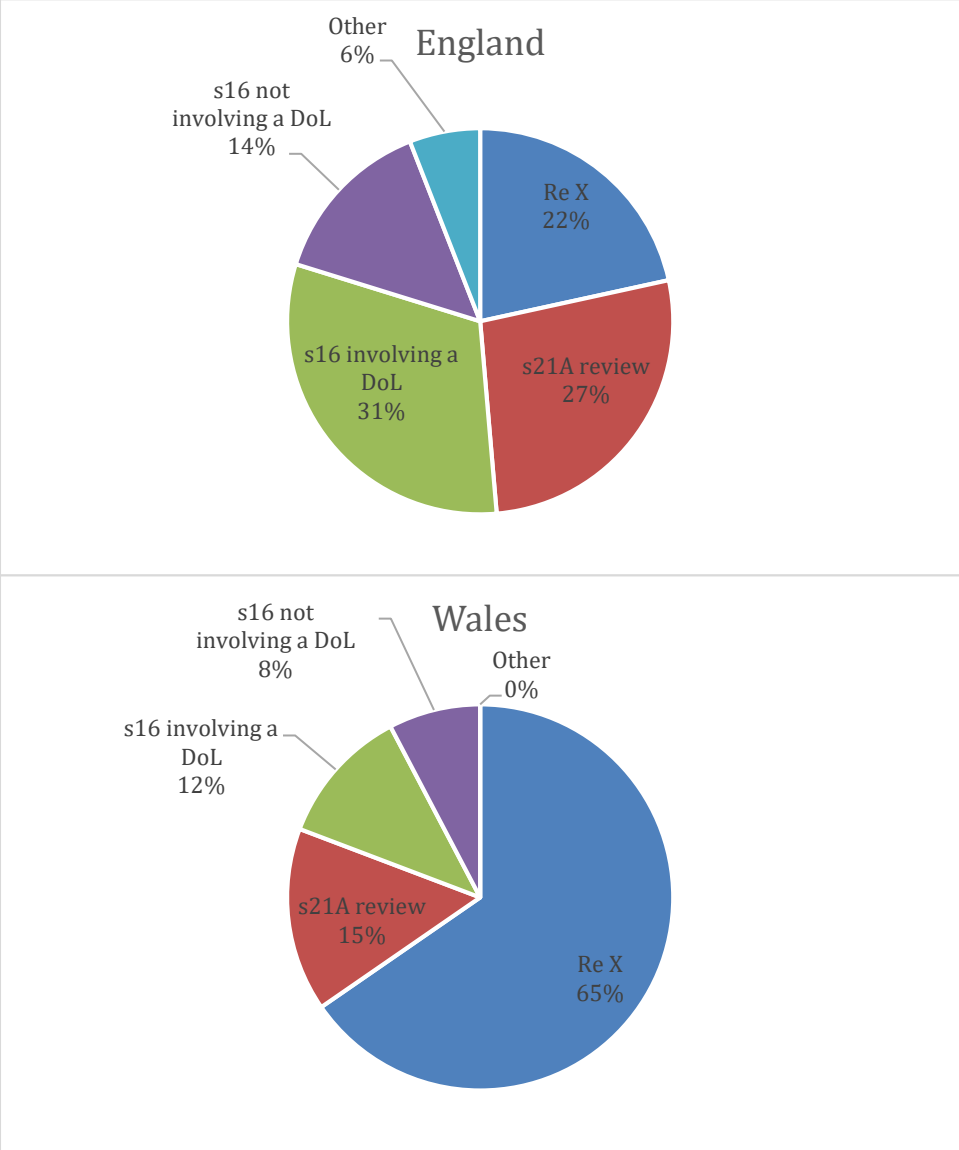
In general, personal welfare and s21A applications to the CoP are made in situations of conflict between the person, or their family, and a public authority, whereas in theory *Re X* applications involve situations where there is no conflict but authorisation is sought for a deprivation of liberty that falls outside of the DoLS administrative procedures. Our findings suggest that in England a much higher proportion of CoP litigation involves situations of conflict that in Wales. It is unclear why this is the case, whether there is simply less conflict over decisions made under the MCA and the DoLS in Wales than in England, whether English local authorities are more pro-active in ensuring that disputes under the MCA or the DoLS reach the CoP for adjudication, or whether other factors – such as more activity by IMCAs or mental capacity law solicitors – can explain the difference.

[133] Population statistics for local authorities taken from Office for National Statistics (2016) 'Population estimates and components of population change. Detailed time series 2001 to 2015 United Kingdom, local authorities, sex and age', *Online dataset*, <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/datasets/populationestimatesforukenglandandwalesscotlandandnorthernireland>

[134] 31% of the overall number involved a personal welfare application with a deprivation of liberty and 14% involved a personal welfare application without any deprivation of liberty.

[135] 12% of the overall number involved a personal welfare application with a deprivation of liberty and 8% involved a personal welfare application without any deprivation of liberty.

Figure 15 Pie charts showing percentages of different kinds of CoP welfare cases local authorities in England and Wales were involved in during 2014-15



4.3 LOCAL AUTHORITIES' USE OF THE *RE X* STREAMLINED PROCEDURE IN 2014-15

Table 44, above, reveals that *Re X* cases constitute 23% of all cases in England and Wales, but this breaks down into 22% of all cases in England and 65% of all cases in Wales.

Following *Cheshire West* it was estimated that local authorities in England would need authorisation directly from the CoP for around 28,500 cases.[136] The increase of a few hundred cases found here is therefore a fraction as high as had been anticipated, confirming reports elsewhere that the *Cheshire West* 'tidal wave' had not materialised.[137] Our data suggests that half or more of

[136] Association of Directors of Adult Social Services and Local Government Association (2014) *LGA and ADASS warn changes to safeguarding rules could take £88 million from care budgets*, London.

[137] Andy McNicoll (2015) 'Councils' failure to make court applications leaving 'widespread unlawful deprivations of liberty' a year after Cheshire West ruling', *Community Care,* 17 June 2015, <

all local authorities in England and Wales did not make a single application to the CoP using the *Re X* streamlined procedure during 2014-15. In contrast, in Wales, half of all local authorities have made at least one *Re X* application. However, some isolated local authorities did appear to be taking the ruling very seriously – with one English local authority making 27 applications.

Our findings on the limited use of the *Re X* procedure during 2014-15 indicate that large numbers of people across England and Wales are likely to be deprived of their liberty without authorisation in accordance with Article 5(1) ECHR.

Applicants in *Re X* cases

Local authorities supplied data on the applicant for 159 *Re X* cases. Unsurprisingly, the vast majority of *Re X* applications were made by local authorities (153 cases, 96%), but a small fraction were made by the NHS (1 case, 1%), a family member (2 cases, 1%) or an IMCA or advocate (3 cases, 2%).

The duration of completed and ongoing *Re X* cases

Table 45 provides summary statistics for the duration, in months, of completed and ongoing cases involving local authorities and using the *Re X* streamlined procedure for authorising a deprivation of liberty. We found that for completed cases, the mean duration was 2.9 months, with half of all cases lasting under two months. We found that for ongoing cases the mean duration was 8 months, with half of all cases lasting 4 months or less.

Re X cases involve those where a deprivation of liberty is occurring that cannot be authorised by other means, and where the matter is non-contentious. It is anticipated that this authorisation from the CoP will need to be renewed at least annually, so long as the deprivation of liberty continues to exist and no other means of authorising it are available.[138] Data on the duration of *Re X* cases was supplied in response to the questions 'is the case ongoing?' and 'How long, in total, has the case lasted for to date? (to the nearest year/month)' (as was all duration data). With hindsight, this question was not sufficiently clear about the start point of litigation to gather data on *Re X* cases, nor what constituted a 'completed case'. This is because although the *Re X* procedure itself was only introduced after the *Cheshire West* judgment, many cases that are now dealt with under the *Re X* procedure are long running deprivations of liberty that have been authorised by a CoP welfare order for many years. Some local authorities have interpreted the duration of the case as when they started seeking authorisation; hence some reported durations of 84 months that preceded the introduction of the *Re X* procedure. Meanwhile, it is unclear when a case is 'completed': is it when the deprivation of liberty is authorised by the CoP (only to start up again the following year), or is it when a CoP authorisation for deprivation of liberty is no longer required? In addition, some *Re X* cases may bring to light conflicts which meant that they cannot be dealt with under the streamlined procedure; we do not know whether local authorities continued to categorise these as *Re X* cases in this sample.

This diversity of possible ways of counting the duration of a *Re X* case makes it difficult to draw any firm conclusions about the time taken for a local authority to seek and obtain authorisation for a

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http://www.communitycare.co.uk/2015/06/17/councils-failure-make-court-applications-leaving-widespread-unlawful-deprivations-liberty-year-cheshire-west-ruling/>

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

deprivation of liberty under the streamlined procedure from the data reported here, and should be taken into account when designing future research on this question.

Table 45 Summary statistics for the duration (in months) of completed and ongoing Re X *streamlined procedure cases involving local authorities*

	Completed	Ongoing
N	86	63
Max	18	64
Min	0.2	0.0
Mean	2.9	8.3
SD	3.2	11.5
Median	2	4

In our report on local authorities' use of the CoP during 2013-14, we reported that the median duration of a personal welfare application was 12 months for an ongoing case and 9 months for a completed case, and the longest running case had lasted 7 years. At that time there was no separate *Re X* streamlined procedure, and no way of separating out those cases in our study that would today be brought under the *Re X* procedure. Caution should be exercised in presuming that the *Re X* procedure has therefor shortened the typical duration of cases, since it is not possible to pick out which cases in our sample from 2013-14 would today fall within the *Re X* procedure.

The cost of *Re X* cases to local authorities

Overall, 20 local authorities supplied us with data about their costs for 44 individual *Re X* streamlined procedure cases. Table 46, below, provides summary statistics for these data. The mean cost of a completed case under the *Re X* procedure is £2,546 and for an ongoing case is £3,334. However, these mean values are skewed by a small number of very high cost cases, with one case which was (initially at least) dealt with under the *Re X* procedure reported to cost a local authority £103,132. This case had lasted under one year in duration, and so we suspect it is likely to represent a case that became contested after the initial application was made, thus leading to higher costs for the local authority. Such examples were relatively rare, with only three *Re X* cases reported to cost local authorities more than £10,000. Nevertheless because of the skew in this data, the median value is preferable to represent the typical cost of a *Re X* application to a local authority. For completed cases this was £429 per case, and for ongoing cases this was £1,400.

Table 46 Summary statistics for the reported cost to local authorities of completed and ongoing cases under the Re X *streamlined procedure*

	Completed	Ongoing
N	61	35
Max	£103,132	£21,340
Min	£160	£35
Mean	£3,334	£2,536
SD	£13,159	£3,780
Median	£429	£1,400

These estimated costs are markedly lower than those supplied by local authorities for general personal welfare applications in 2013-14. For completed cases where P was deprived of his liberty outside of the DoLS, the estimated median cost to a local authority was £11,845 for an ongoing case and £10,193 for a completed case. The lower cost of *Re X* procedure cases reported here is

likely to be driven by two factors: 1) a reduction in the cost of the process itself, due to the streamlining of the procedure; and 2) the filtering out of most contentious cases during the application process. It is therefore not possible to ascertain whether the streamlined procedure itself reduces costs, as we have no way of filtering out the increased cost of contentious cases from the 2013-14 cohort. Nevertheless, the typical cost of *Re X* cases to a local authority is significantly lower than other kinds of CoP welfare litigation.

One of the difficulties with the total cost estimates provided in this report is that different local authorities take into account different kinds of costs in calculating this value. For example, some appear only to take into account the cost of the application to the CoP itself (£400), and not other costs such as the time of in-house legal and social care staff. Table 45 provides a more detailed breakdown of the different contributing costs to local authorities of *Re X* litigation. These indicate that the greatest driver of cost is the time of in-house legal and social care staff, with a median value of £2,539 per case. Insufficient data was received on the cost of expert reports, but this is likely to be low because the *Re X* procedure is designed to minimise the need for independent expert reports. It is unclear why some local authorities required the use of counsel for *Re X* applications.

Table 47 Detailed breakdown of costs to local authorities of Re X *streamlined procedure cases*

	Court fees	In house staff time	Counsel	Other
N	53	18	7	2
Max	£1,200[139]	£5,267	£21,340	£500
Min	£400	£160	£600	£500
Mean	£434	£2,226	£5,220	£500
SD	£144	£1,656	£7,437	£0
Median	£400	£2,539	£2,600	£500

4.4 LOCAL AUTHORITIES' INVOLVEMENT IN S21A MCA APPLICATIONS TO REVIEW A DEPRIVATION OF LIBERTY UNDER THE DOLS

Overall local authorities reported involvement in 161 cases involving s21A MCA, the mechanisms for seeking a review or a determination for an urgent or standard authorisation under the DoLS. Only 2 of these reported cases came from Wales. Even taking into account the different population size, and size of local authorities, between England and Wales, the lower number of s21A reviews in Wales than in England is statistically significant.[140] We reiterate the concerns expressed in our previous report that people who are deprived of their liberty under the DoLS in Wales appear to be less able to exercise their right of appeal in accordance with Article 5(4) than in England. We recommend that the Health Inspectorate for Wales, the Care and Social Services Inspectorate Wales and the Department of Health and Social Services in the Welsh Government consider the

[139] We presume this value reflects the cost of successive applications regarding the same case.

[140] English local authorities had on average a higher number of s21A reviews (M=1.6, sd=2.6) than Welsh local authorities (M=0.2, sd=0.4). Using an analysis of covariance to control for the effects of the size of a local authorities' population, there was still a statistically significant different in the number of s21A reviews per local authority between England and Wales ($F(2,134)=8.1$, $p<0.01$).

reasons why this might be, and what steps can be taken to improve the ability of those deprived of their liberty in Wales to exercise their right of appeal.

Applicants in s21A cases

60 local authorities supplied further data on 161 s21A applications (Table 48). Some care should be taken contrasting the 2013-14 and 2014-15 data as these were obtained using slightly different questions. In 2013-14, we asked for cases where P was subject to schedule A1, rather than for applications under s21A (as we did in 2014-15). This was because at the time of conducting that research there was anecdotal evidence that local authorities preferred to use the COP1 application process when they were applying to the CoP, even if the subject matter of the dispute concerned a DoLS authorisation, because of a perception that the COPDLA form (for s21A applications) was not intended for use by the supervisory body. However, since Mr Justice Charles handed down judgment in *Re UF*[141] in November 2013, it has been clear that local authorities can make applications using the COPDLA form and s21A procedure. To do so is beneficial to P and any family appointed as RPR as it entitles them to non-means tested legal aid, and so this procedure is preferred to an application for a personal welfare order under s16 MCA to review any deprivation of liberty in the CoP. Thus the overlap between these two groups is not exact, but it should be similar enough to facilitate a meaningful comparison.

Table 48 Applicants in s21A reviews

	Number of cases			
Applicant	**2013-14**	**%**	**2014-15**	**%**
Local authority	86	63%	77	48%
NHS	1	1%	0	0%
P	21	15%	39	24%
Family or friend	16	12%	17	11%
IMCA or advocate	12	9%	27	17%
Other	1	1%	1	1%
Total	137		161	

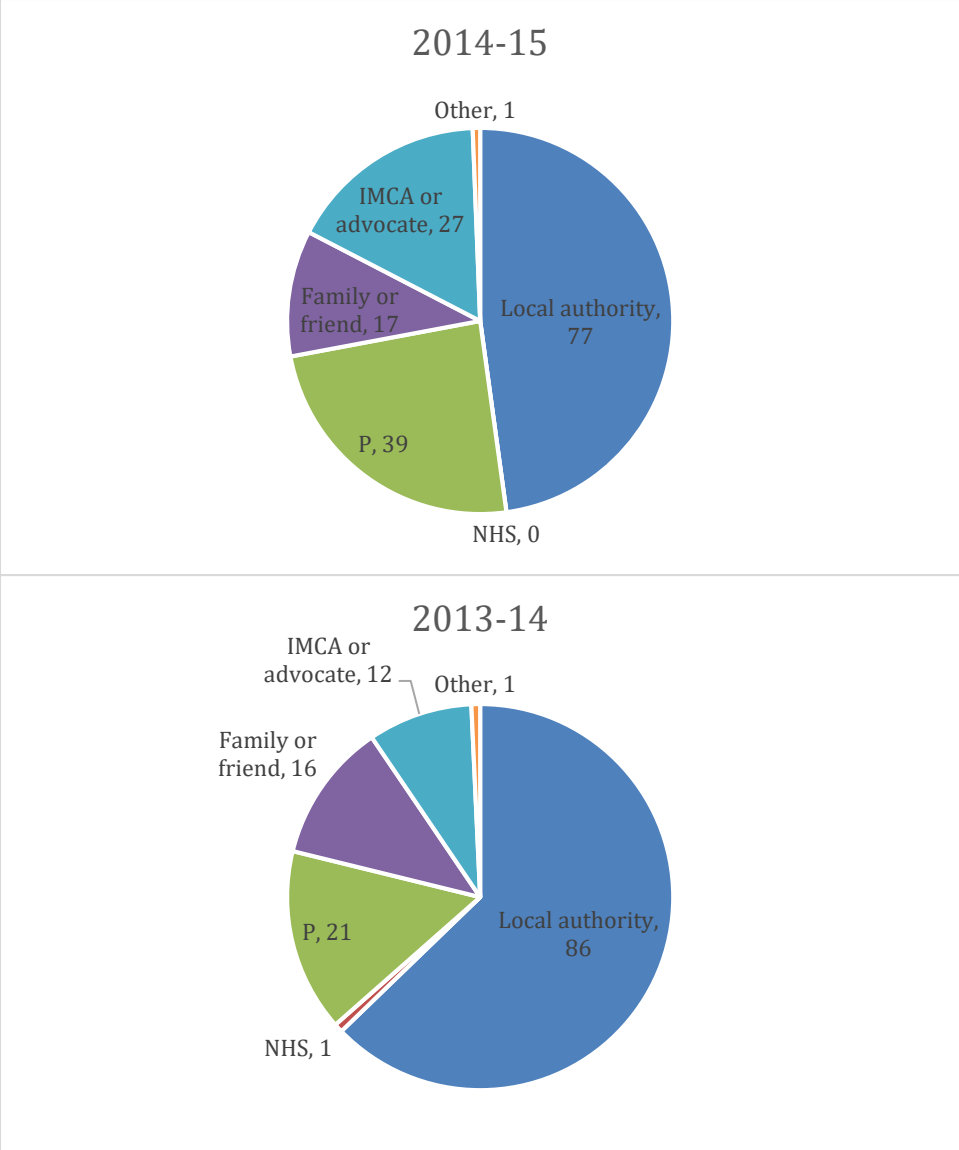
In both 2014-15 and 2013-14, local authorities were the single largest group of applicants. However, although the overall number of s21A applications was larger in our 2014-15 sample (despite the reduced response rate in comparison to 2013-14), there were fewer applications by local authorities. Our sampling period only slightly overlapped the decision of Mr Justice Baker's in *AJ v A Local Authority*[142], which was handed down in May 2014. However this decision does emphasise the importance of the RPR and IMCA supporting P to exercise their rights of appeal, with the local authorities referring disputes under the DoLS to the CoP as a last resort. Our data suggests a marginal improvement in the ability of P to exercise rights of appeal under the DoLS on 2013-14, although we continue to observe that rates of appeal under the DoLS are extremely low and may reflect difficulties for DoLS detainees' ability to exercise their rights under Article 5(4) ECHR.

Figure 15 shows the different applicants in the s21A cases reported in this study of 2014-15, and in the cases concerning reviews of DoLS authorisations during 2013-14 found in our previous study.

[141] [2013] EWHC 4289 (COP)

[142] [2015] EWCOP 5

Figure 16 Applicants for reviews of DoLS authorisations in 2014-15 and 2013-15



The duration of s21A cases

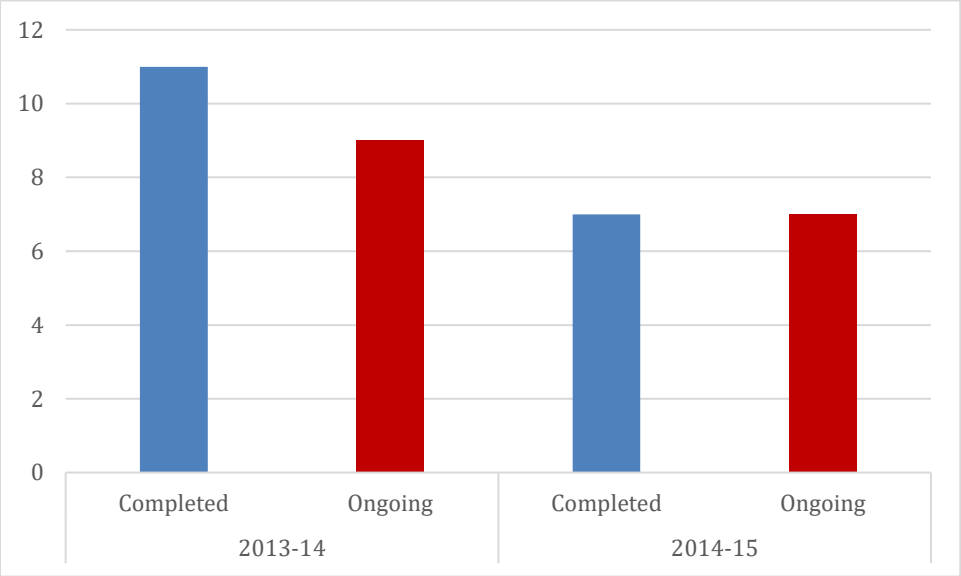
Of those cases where local authorities supplied details on the duration of the case, we found that half of all s21A reviews during 2014-15 lasted 7 months or less. As with our study of 2013-14, there are some very long running outlier cases that skew mean values, meaning the median is a more accurate reflection of the typical duration of a s21A case. A comparison between the median values of ongoing cases in 2013-14 (9 months) and 2014-15 (7 months), and completed cases in 2013-14 (11 months) and 2014-15 (7 months) suggests that the duration of s21A cases has decreased in this time.

Figure 17 Summary statistics for completed and ongoing cases involving a review of a DoLS authorisation, for 2013-14 and 2014-15

	2013-14		**2014-15**	
	Completed	Ongoing	Completed	Ongoing
N	68	63	71	84
Max	48	48	96	94
Min	2	1	1	1

Mean	15.2	13.1	10.0	11.0
SD	11.4	11.6	12.8	13.7
Median	11	9	7	7

Figure 18 Median duration of reviews of DoLS authorisations, 2013-14 and 2014-15



It is not clear why court reviews of DoLS authorisations have decreased in duration over this time. One possibility is that there has been a shift in the kinds of cases coming to court. We looked to see whether the identity of the applicant influenced the duration of the case. However, a statistical analysis revealed no significant differences in duration between applicants. Although the mean values were greater for cases brought by local authorities or IMCAs than those brought by P or P's family, these were skewed by a small number of outlier cases of very long duration; the median value is a more accurate representation of the duration of the case, and these are broadly similar regardless of the applicant (see Table 49).

Table 49 Summary statistics for the duration of a s21A review, by applicant

	Local authority	**P**	**Family**	**Advocate**
N	76	36	17	26
Max	94	23	13	96
Min	0.5	1	1	1
Mean	13	7	7	11
SD	15	5	4	19
Median	7	6.5	7	6

Another possible explanation is that the CoP has become more efficient at dealing with these cases, perhaps linked to its increasing regionalisation. An alternative is that more cases are being brought that have poorer prospects of success, and which are dealt with more speedily by the CoP. This could be the case if these cases fell after the decision was handed down in *AJ*, which requires RPRs, IMCAs and the local authority to assist P in exercising rights of appeal if P is objecting, even if they feel P's prospects of success are weak. Yet the decision in *AJ* fell towards the very end of the period this data refers to, so is unlikely to explain these findings.

The cost of s21A cases

Local authorities supplied us with further data on the cost of s21A cases for 89 separate cases. These costs were based on local authorities estimates of the costs incurred by them. The mean estimated cost for all s21A cases reported in this study was £11,226, however this figure is likely to be inflated by some very costly outlier cases. Therefor the median value - £6,102 – is a more reliable description of costs for s21A cases estimated by local authorities. However, this is likely to underestimate the true cost of a s21A case to a local authority, because as for the *Re X* figures quoted above, different local authorities took into account different kinds of costs when providing us with estimates of the overall costs. Some local authorities only took into account the court fees (accounting for the handful of cases that were reported to cost under £500), whereas others factored in the costs of in-house legal staff time.

For this reason we have supplied a more detailed breakdown of the estimated costs for each of these components, to provide a more accurate picture of the kinds of costs local authorities may incur when involved in s21A proceedings (Table 50). Assuming a case involved experts and counsel, local authorities could typically expect a s21A case to cost them in the region of £10,000.

Table 50 Estimated costs to local authorities of s21A proceedings

	Overall estimated costs to local authorities							
	Completed cases	Ongoing cases	All cases	**Court fees**	**In house staff time**	**Experts**	**Counsel**	**Other**
N	39	50	89	17	27	9	27	5
Max	£45,000	£117,334	£117,334	£900	£50,031	£10,131	£74,294	£500
Min	£420	£400	£400	£400	£340	£173	£405	£57
Mean	£10,229	£12,004	£11,226	£520	£10,194	£2,734	£6,795	£322
SD	£10,889	£20,186	£16,699	£217	£12,085	£3,105	£14,493	£191
Median	£6,102	£6,190	£6,102	£400	£5,615	£1,500	£2,880	£344

The median values reported here are slightly lower than those reported in our 2013-14, which found a median cost of £11,317 for ongoing cases and £9,612 for completed cases. This is likely to be linked to our finding reported above, that s21A cases appear to be shorter in duration in 2014-15 than in 2013-14.

4.5 LOCAL AUTHORITIES' INVOLVEMENT IN GENERAL PERSONAL WELFARE APPLICATIONS

111 local authorities provided information on the number of personal welfare cases they had been involved in during 2014-15 that were not *Re X* streamlined procedure cases or s21A reviews. These cases are likely to include wider welfare matters than simply authorising a deprivation of liberty, for example safeguarding cases, cases about a person's mental capacity to consent to contact, sex or marriage, medical treatment cases, and so on. However, as s21A reviews may be used to address wider welfare matters than the mere question deprivation of liberty, sometimes enabling P and families to take advantage of the 'gold plated' funding attached to s21A reviews that is not available for other personal welfare applications,[143] the distinctions between personal welfare applications and s21A reviews may sometimes be procedural rather than substantive.

[143] See, for example, *Briggs v Briggs* [2016] EWCOP 48 and 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 26 April 2017]

The 99 local authorities in England supplying us with detailed data reported involvement in 299 personal welfare cases overall. Local authorities in Wales gave detailed data on 5 cases. Although the number of personal welfare cases from England is markedly higher than from Wales, when we controlled for the effect of population size we found no significant difference in rates of involvement in personal welfare litigation (outside of s21A, discussed above) between the jurisdictions.[144]

We found greater numbers of personal welfare cases where local authorities reported that P was deprived of their liberty (208) than where P was not (96). This is unsurprising since in many cases where there is a dispute, or a concern about P's relationships with others, this is likely to trigger arrangements where P is considered to be deprived of their liberty.

Table 51 Local authorities' involvement in personal welfare cases other than Re X *and* s21A reviews

	All personal welfare cases			**Personal welfare cases where P is deprived of their liberty**			**Personal welfare cases where P is not deprived of their liberty**		
	All	England	Wales	All	England	Wales	All	England	Wales
N	111	99	12	111	99	12	111	99	12
Sum	304	299	5	208	205	3	96	94	2
Max	13	13	1	13	13	1	6	6	1
Min	0	0	0	0	0	0	0	0	0
Mean	1.4	1.5	0.2	1.9	2.1	0.3	0.9	0.9	0.2
SD	1.0	2.1	0.4	2.5	2.5	0.5	1.3	1.4	0.4
Median	1	1	0	1	1	0	0	0	0

Applicants in personal welfare cases

46 local authorities provided data on the identity of the applicant in the personal welfare cases they had been involved in (a total of 273 cases). These figures show that in 87% of all cases, the applicant in personal welfare cases involving local authorities that are not *Re X* or s21A cases is the local authority itself (Table 53). In only one reported case was P the applicant, and in only 1 reported case was an IMCA the applicant. This is a very different pattern to that found for s21A reviews, where although the local authority was the applicant in around half of cases, it was fairly common for P or an advocate (usually an IMCA) to make the application. One possible explanation for this is that the DoLS provide an 'enabling framework' for P to make applications to the CoP, through requirements that P is supported and enabled to understand and exercise their right – by the IMCA and RPR, and because P will be entitled to 'gold plated' legal aid where they are subject

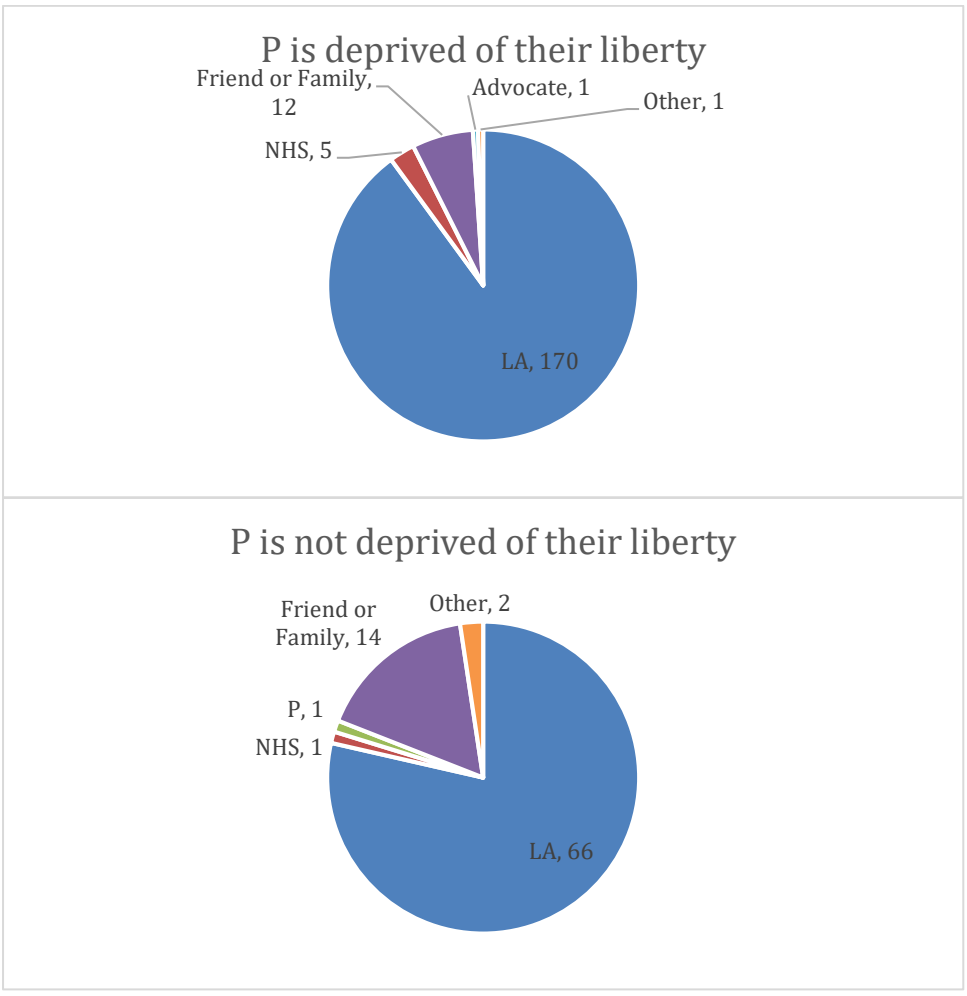
[144] In our sample, local authorities in Wales had a smaller population size (M= 156,384, SD= 74,037) than in England (M= 391,386, SD= 286,792). We used an Analysis of Covariance to control for this difference in population size in the numbers of personal welfare cases reported by local authorities in England and Wales. After controlling for population size, there was no statistically significant difference between the number of cases from English and Welsh local authorities.

to a DoLS authorisation, but for personal welfare applications this would be subject to a financial assessment.

Table 52 Identity of the applicant in personal welfare cases

	P is deprived of their liberty	%	P is not deprived of their liberty	%	All PW cases	%
LA	66	79 %	170	90 %	236	87 %
NHS	1	1%	5	3%	6	2%
P	1	1%	0	0%	1	0%
Friend or Family	14	17 %	12	6%	26	10 %
Advocate	0	0%	1	1%	1	0%
Other	2	2%	1	1%	3	1%
Total	84		189		273	

Figure 19 Applicants in personal welfare applications during 2014-15



The duration of personal welfare cases

45 local authorities provided data on the duration of 254 personal welfare cases (of which P was deprived of their liberty in 172, and not deprived of their liberty in 82). A small number of these were very long running cases, with the longest reported lasting over 7 years. However, such cases were atypical: the median length of a case was 9 months, and only slightly longer at 10 months if P was deprived of their liberty. This is slightly longer than the typical duration of a s21A review, which was typically 7 months duration during 2014-15. It is also shorter than the typical duration of a personal welfare case we found in 2013-14. However, it is not possible to effect a meaningful comparison with the previous year's data, because the definition of deprivation of liberty has changed so significantly following *Cheshire West* and because of the difficulty separating out those cases that would now be dealt with via the *Re X* streamlined procedure in 2014-15.

Table 53 Summary statistics on the duration of personal welfare cases

	P is deprived of their liberty	P is not deprived of their liberty	All personal welfare cases
N	172	82	254
Max	91	36	91
Min	1	1	1
Mean	14.7	11.6	13.7
SD	14.8	8.7	13.2
Median	10	9	9

Differences in the duration of personal welfare cases brought by different applicants approached, but did not quite reach, statistical significance.[145] This seems to be driven by the lower typical duration of cases brought by NHS applicants than local authority or family applicants:[146] the median duration of a case brought by the NHS was 6 months, whereas the median duration of a case brought by a local authority, or family or friend of P, was 9.5 months. This is likely to be because NHS applications would concern serious medical treatment, which would usually have a more limited timescale than the kinds of welfare matters that local authorities apply to the CoP to be considered. This echoes our findings from the court files study, described above at section 3.5.

Table 54 Summary statistics for the duration of case by applicant

	LA	NHS	Family or friend
N	218	4	25
Max	91	12	43
Min	1	2	2
Mean	13.8	6.5	13.3
SD	13.5	4.8	10.7
Median	9.5	6.0	9.0

[145] We used a one-way analysis of variance to compare the average duration of cases brought by different applicants. However, the probability of a difference in average duration occurring by chance was 9% (p=0.09), and would not be considered statistically significant.

[146] Because we found only 1 example of a personal welfare case where P was the applicant, and one where an IMCA was the applicant, we have excluded these from this analysis.

The cost of personal welfare cases

29 local authorities provided estimates of the total cost to them of personal welfare cases that they had been involved in. As for the s21A and *Re X* estimated costs, discussed above, different local authorities took into account different costs – for example, not all included the cost of in-house staff time. This means that the typical values reported here will *underestimate* the typical costs of a case.

The maximum estimated cost of a case to a local authority was £100,000. In those cases where local authorities provided an estimated overall cost, 44% cost more than £10,000, 18% cost more than £20,000 and 4% were estimated to cost more than £50,000.

The mean estimated cost of a case to a local authority was £14,258 but this figure is skewed by the handful of very high cost cases. Thus the median value - £8,400 – is a more appropriate estimated average cost of a case to a local authority.

Table 55 Estimated costs to local authorities of personal welfare cases in the CoP

	All costs	Court fees	In house costs	Experts	Counsel	Other costs
N	164	59	54	38	60	19
Max	£100,000	£910	£93,000	£5,000	£30,709	£8,249
Min	£400	£400	£500	£31	£462	£74
Mean	£14,258	£550	£13,054	£1,457	£5,187	£890
SD	£17,187	£227	£18,811	£959	£6,254	£1,788
Median	£8,400	£400	£8,075	£1,500	£3,257	£500

As mentioned above, however, it was unclear which costs some local authorities were taking into account; in particular not all local authorities appeared to take into account in house legal costs. Thus these figures underestimate the likely true cost of a case to a local authority. A more accurate impression of the typical costs of personal welfare cases can be gained by looking at the estimates some local authorities gave for particular kinds of costs. The greatest single contribution to the costs of a case was the time of in-house legal staff (a median of £8,075 per case). Then next greatest cost is fees for counsel (a median of £3,257 per case), followed by expert reports (a median of £1,500). Assuming a case involved experts and counsel, local authorities could typically expect a personal welfare case to cost them in the region of £13,000. Our findings suggest that greater savings in the cost of CoP litigation could be achieved by focusing on those factors that increase the time that legal staff spend on a case and reducing reliance on counsel, rather than targeting the costs of expert reports.

4.6 NHS BODIES' INVOLVEMENT IN COURT OF PROTECTION CASES

82 NHS bodies from England provided us with data on the number of CoP cases they had been involved in during 2014-15; of these 29 were acute trusts, 26 were CCGs and 27 were mental health trusts. Most NHS Trusts, of any kind, had not been involved in any CoP cases during 2014-15. The most cases any NHS Trust reported being involved in during that year was 7, perhaps unsurprisingly this was an NHS mental health Trust. No CCG or acute Trust had been involved in more than 2.

Table 56 Summary statistics showing number of cases NHS bodies involved in during 2014-15

	Acute Trust	CCG	MH Trust	All NHS bodies
N	29	26	27	82
Max	2	2	7	7

Min	0	0	0	0
Mean	0.2	0.4	1.3	0.6
SD	0.5	0.7	2.0	1.3
Median	0	0	0	0

NHS bodies' involvement in different kinds of Court of Protection case

24 NHS bodies (6 acute trusts, 7 CCGs and 11 mental health trusts) supplied us with data on the kinds of cases they had been involved in. These data show that NHS bodies are very rarely involved in *Re X* litigation, they are slightly more likely to be involved in s21A reviews of DoLS cases and most NHS bodies had been involved in 1 or more personal welfare application during 2014-15.

Table 57 Summary statistics showing NHS bodies' involvement in different kinds of CoP cases

	Acute Trusts			**CCGs**			**MH Trusts**			**All NHS bodies**		
	Re X	s21A	PW	Re X	s21A	PW	Re X	s21A	PW	Re X	s21A	PW
N	6	6	6	7	7	7	11	11	11	24	24	24
Min	0	0	1	0	0	0	0	0	0	0	0	0
Max	0	0	2	2	1	1	1	2	7	2	2	7
Mean	0.0	0.0	1.2	0.7	0.1	0.6	0.3	0.8	2.0	0.3	0.4	1.4
SD	0.0	0.0	0.4	1.0	0.4	0.5	0.5	0.9	2.1	0.6	0.7	1.6
Median	0	0	1	0	0	1	0	1	2	0	0	1

Figure 19 displays the mean number of times different kinds of NHS body were involved in different kinds of case. These show that personal welfare applications are the most common kind of case for NHS bodies in England to be involved in. Mental health trusts are more likely to be involved in these cases, followed by acute trusts, then CCGs. CCGs are the most likely to be involved in *Re X* cases, which is to be expected as they are likely to be involved in the capacity as commissioners of community care arrangements that may constitute a deprivation of liberty. Mental Health Trusts were most frequently involved in s21A reviews of DoLS. These are likely to be cases where they themselves are the detaining authorities, where P is detained in NHS accommodation (most likely a hospital, but possibly an NHS residential care setting), but it is also possible that the NHS body is involved in a s21A review where P is detained in in a non-NHS setting but is subject to a community regime under the Mental Health Act 1983 such as guardianship or a compulsory treatment order at the same time as the DoLS.

Figure 20 Mean number of Court of Protection cases for different kinds of NHS body, 2014-15

	Re X	s21A	PW
Acute Trust	0.0	0.0	1.2
CCG	0.7	0.1	0.6
MH Trust	0.3	0.8	2.0

No NHS body provided us with data on the duration of cost of cases, so we are unable to make any comment on how these compare to the duration and costs of cases involving local authorities.

4.7 Data on the cost of legal aid certificates for representation in the Court of Protection

In response to a request for information under the FOIA,[147] the Ministry of Justice confirmed the following average costs of a legal aid certificate for the representation of a litigant in the CoP for different kinds of case, during 2014-15:

Type of CoP proceedings	Number of closed certificates	Mean certificate cost	Median certificate cost
Medical	3	£15,277	£7,672
Non-medical	114	£29,855	£20,874
Deprivation of liberty[148]	56	£14,665	£7,288

These data confirm the view that medical treatment cases tent to be less resource intensive than other kinds of welfare case. They also indicate that deprivation of liberty cases are less costly than other kinds of welfare case, although it is not entirely clear what 'counts' as a deprivation of liberty case for this data – whether only s21A review cases, or also cases under the main personal welfare route that involve a deprivation of liberty.

[147] Ministry of Justice reference 96009, response to request for information sent on 16 March 2015.

[148] NB: The Ministry of Justice were unable to disaggregate legal aid certificates relating to deprivation of liberty under a deprivation of liberty safeguards authorisation from other kinds of deprivation of liberty case.

5 DISCUSSION OF FINDINGS

5.1 ACCESS TO JUSTICE

The CoP's jurisdiction can be viewed as both conferring authority upon clinical and welfare professionals for acts in P's best interests, and as a means to contest that authority for P or others acting on P's behalf. This latter judicial review function is extremely important under the European Convention on Human Rights, which emphasises that a person who has been deprived of their legal capacity must have direct access to a court to seek its restoration. As we discussed in our recent report on P's participation in CoP welfare cases[149], there are difficulties translating this framework directly onto the MCA's 'informal' mode of deprivation of capacity in health and welfare matters, but, nevertheless, for best interests decisions engaging fundamental human rights, it is important that P is able to access the CoP to challenge these decisions where they wish to do so. Our findings from the two studies reported here are mixed in this regard.

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 any applicants using the personal welfare route 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. Thus the personal welfare application process, initiated by submitting the COP1, COP1B and COP3 application forms, does appear to be mainly a vehicle for public authorities to seek authority, or overcome objections, for interventions in P's best interests.

The same cannot be said of the s21A DoLS review process, however. The majority of s21A reviews examined in the CoP files study were initiated by P, and a large minority of those reported in the FOIA study by local authorities were also initiated by P. This indicates that the s21A route into the CoP's welfare jurisdiction is much more accessible for Ps wishing to contest decisions made by public authorities under the MCA than its personal welfare route. Meanwhile, our findings on the outcomes of the 52 s21A reviews tracked from beginning to end in our court files study suggests that in 17% of cases they resulted in the DoLS authorisation being terminated, and that in 15% of cases the CoP made a final order that P has mental capacity in relation to the relevant matter. In a further 6% of cases the CoP made a best interests decision that resulted in a change of residence for P. We recognise that our sample size of s21A reviews examined here is fairly small, yet our findings suggest that the CoP is not operating as a 'rubber stamp' on authorisations issued by a supervisory body: very often a s21A application does result in a different outcome for P than that authorised by the supervisory body. Thus whereas the CoPs 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 a more 'enabling framework' for P to be able to do so.

There are many possible reasons for this difference. The duty to notify P of rights of appeal under the DoLS (but not the MCA) and the existence of 'gold plated' legal aid for s21A reviews (but not personal welfare applications) are important factors. Our findings also suggest that IMCAs acting under the DoLS play an important role in helping people to initiate applications under s21A MCA, but this did not seem to be the case with IMCAS acting under other parts of the MCA.

However, lest we celebrate too soon that this is evidence that the mechanism for protecting Article 5(4) rights of 'appeal' against detention under the DoLS is working, it should be remembered that

[149] L Series, P Fennell and J Doughty (2015) n 14.

our survey of local authorities indicates that such cases still represent only a very small fraction of the entire detained population, and Ps in some areas appear to be less able to exercise these rights than in others. This is of particular concern for those subject to the DoLS in Wales.

5.2 PARTICIPATION OF P IN WELFARE CASES

In our recent report on the participation of P in CoP welfare cases[150], we emphasised the importance of P directly participating in CoP cases concerning his legal capacity and deprivation of liberty, including through attending hearings, giving evidence and meeting the judge. Our findings in this regard were not especially heartening: we found very few cases where it was recorded that P had attended a hearing in person, had given evidence (sworn or unsworn) or met in private with the judge.

It is possible that this is because of the limited information recorded on the files about P's participation. However, if judges were routinely making orders regarding P's participation in CoP proceedings it seems likely we would have found evidence of these among the other orders on the files, and we did not.

We should emphasise that our study of the court files took place during the summer of 2015, and the new rule 3A on the participation of P only came into force in July 2015. Thus it is likely that there would be both more evidence pertaining to whether P participated or not on the files if they were examined today, and we hope that in future the evidence would point to greater levels of participation by P than we found in our study.

5.3 TRANSPARENCY

The media often depict the CoP as a 'secret' court. Stories regularly appear concerning committal proceedings, alongside allegations that the CoP and local authorities engage in unfair practices such as holding *ex parte* hearings without notice to families. Our study found little evidence of committals or *ex parte* hearings, indicating these practices are rare. However, we also found relatively little evidence of key 'transparency' markers such as media attendance and the publication of judgments. We found fairly frequent use of 'privacy injunctions' that would make it difficult for the parties to inform the media (or others) about their case. We are unable to comment on the merits of the use of privacy injunctions in these cases. We also observe that this study took place *before* the current 'transparency pilot' in the CoP, and so practices will have changed substantially in the intervening years.

5.4 THE DURATION OF PROCEEDINGS

The CoP's welfare jurisdiction has sometimes been criticised for being costly, protracted and with poor case management practices. 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 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 be that the kinds of proceedings that involve local authorities - – cases about care, residence and relationships - do tend to take longer than cases about medical treatment that they are less likely to be involved in. The sample of files consulted in the CoP is also likely to be skewed according to

[150] L Series, P Fennell and J Doughty (2015) n 14.

those returned by regional courts and the High Court in a timely fashion, and so may underestimate the overall timescales where cases take longer to complete and to return files to the main registry.

Our FOIA study does suggest that the duration of cases during 2014-15 was slightly shorter than in 2013-14. This may result from case management improvements, or it may be because a greater number of cases are reaching the court that are more easily decided.

Even allowing for the improvement in duration since 2013-14, and the discrepancy between the durations estimated in each of our studies, these findings on the duration of CoP proceedings do not compare favourably with the waiting times for Mental Health Tribunals in England. In response to a request for information under the FOIA, the Ministry of Justice provided the information presented in Table 58, below, on the typical time from receipt to disposal. A person detained under section 2 MHA 1983 would typically have a tribunal within a week; a non-restricted detained patient would typically have a tribunal within two months of applying and restricted patients within 4 months. It is, however, worth observing that our research also indicated that the substantive questions addressed by the CoP in the course of a s21A review was far wider ranging, and in many ways more complex, than those addressed by a Mental Health Tribunal.

Table 58 Time for a Disposal by a Mental Health Tribunal (England) April 16 to March 17

		Time from Receipt to Disposal in Weeks					
Section 2	Total	0	1	2	3	4 or more	Median age (weeks)
	10,617	2,604 24.5%	5,629 53.0%	1,931 18.2%	252 2.4%	201 1.9%	1
Restricted	Total	0-3	4-9	10-15	16-18	19 or more	Median age (weeks)
	3,449	275 8.0%	530 15.4%	2055 59.6%	177 5.1%	412 11.9%	10-15
Non Restricted	Total	0-3	4 to 7	8 to 9	10 to 12	13 or more	Median age (weeks)
	21,065	4,648 22.1%	10,094 47.9%	3,687 17.5%	1,361 6.5%	1,275 6.1%	4-7

One of the saddest findings in our sample of s21A reviews from the CoP files was the surprisingly high number of cases (8%) where P died before a final decision could be made by the CoP. Because our sample size is relatively small we do not know how widespread this phenomenon is, but we note that this is a particular risk with the DoLS population who tend to be older and to have conditions such as dementia that directly affect mortality. The risk that a person could die before enjoying their last chance of liberty is an important spur to addressing the timeliness and duration of DoLS reviews.

5.5 THE COST OF PROCEEDINGS

Our FOIA study enable us to calculate rough estimates of the costs to local authorities of litigation in the CoP. For reasons outlined above, the estimates provided to us by local authorities are likely to under-estimate the total costs because many did not take into account the cost of in-house legal staff's time spent on a case. By piecing together the median costs for in house legal staff, counsel, expert reports and court fees, we estimate that a typical personal welfare case costs a local authority in the region of £13,000 and a s21A review in the region of £10,000. These estimates do not take into account the considerable time required of social care staff by litigation. The costs of legal aid certificates were also very high, suggesting that a typical CoP welfare case can easily cost the public purse tens of thousands of pounds. The costs to self-funding litigants will be even higher.

The cost of CoP welfare proceedings is a very serious concern. It not only places a very serious strain on the resources of public authorities, and individual litigants, at a time of very limited public

resources. It also presents a very real threat of a chilling effect on cases being brought to the CoP when they should - public authorities may be discouraged from making an application or supporting and enabling P to do so where they may incur such significant costs. Meanwhile for those directly affected by best interests decisions – including P and those close to P – the possibility of challenging such decisions may be literally unaffordable if they are not eligible for legal aid. These considerations are even more acute for those who are not eligible for the DoLS. As discussed in section 5.2 above, s21A reviews offer an important route to the CoP's welfare jurisdiction not only for challenging detention in the conventional sense of where a person lives, but also for ancillary issues such as contact with others, consent to sex or marriage, and serious medical treatment.

Recent rulings by the Court of Appeal in *R (Ferreira) v HM Senior Coroner for Inner South London*[151] and *Director of Legal Aid Casework & Ors v Briggs*[152] 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. Under the personal welfare route, eligibility for legal aid is means tested and many Ps and relatives will not quality. The high financial cost of CoP welfare proceedings may reflect the very detailed analysis the CoP brings to such cases – often with a very real possibility of changing the outcome of a decision made under the MCA – but the wider cost is that many be unable to afford to challenge decisions in the court. Without an alternative and less costly avenue for challenging decisions under the MCA, the CoP cannot offer effective oversight for decisions made under the MCA.

5.6 The future of the Court of Protection

Since our studies took place, several important developments have occurred in the CoP, including pilot schemes for transparency and case management, and the introduction of Rule 3A on the participation of P. Further reforms to enhance P's participation, transparency and case management seem likely, especially if, or when, the government comes to consider the proposals of the Law Commission for reforms to the MCA and the DoLS. We hope this research, although no longer reflective of the current practices and work of the court, will help to provide an important benchmark for future progress.

Our study suggests that further work exploring accessibility and participation in the CoP is important. There are many barriers to applications from P or family members who might wish to challenge decisions made under the MCA. These are partially, but not wholly, overcome by the availability of the s21A review procedure under the DoLS. Further research is needed to examine how effectively Rule 3A is enhancing the participation of P. We hope that future research will find evidence of much higher levels of direct participation of P in CoP proceedings.

The study of the court files reported here represented an important step for transparency in itself, resting as it did on navigating (and amending) complex legal and procedural hurdles for researchers interested in the court. It is proof that, despite the challenges, it can be done. In the future it would be useful to conduct a more systematic study of how the transparency guidance on the publication of judgments is being implemented. Although we were not able to offer a detailed analysis of this

[151] [2017] EWCA Civ 31

[152] [2017] EWCA Civ 1169

upon the available data, our findings do not contradict the possibility that the CoP, like the Family Court[153], is not always publishing judgments in accordance with the guidance. Likewise, it will be important to review the impact of the transparency pilot on the practices of the CoP, and interesting to examine in how many cases it has made a difference to those attending a hearing, reporting a case and the wider impact on litigants.

Hanging over the CoP is a big question about its future as the destination for reviews of deprivation of liberty under the DoLS. When the Law Commission consulted on the possibility of such reviews being carried out by a tribunal the proposal that received widespread support from almost all of those consulted who were not 'stakeholders' in the CoP system.[154] The primary reasons given for favouring a tribunal over the CoP were 'efficiency gains …accessibility for users, and its flexibility and simplicity'.[155] Our studies certainly provide support for arguments that the CoP system of review of deprivation of liberty is less accessible to detained persons, significantly slower than the tribunal system and incurs very significant costs. However, whilst care should be taken extrapolating from our relatively small sample of completed s21A cases examined, our study also suggests that an application to the CoP may be much more likely to result in a discharge from detention than a mental health tribunal, and unlike the tribunal the CoP can make binding orders addressing wider issues in a person's care and treatment. The CoP does not seem to be operating as a 'rubber stamp' for authorisations of detention issued by supervisory bodies under the DoLS.

Our findings also suggest, as the Law Commission observed in its final report,[156] that many s21A reviews during 2014-15 concerned much wider questions than deprivation of liberty – including issues around medical treatment, consent to sex, contact and other matters that are beyond the traditional remit of Article 5(4) reviews. No doubt this is in part because of the preferential legal aid regime for s21A reviews, but it is also because detention under the DoLS does not fit the profile of a binary distinction between being detained within an institution and discharged out of it; nor are the reasons for detention as singular as they are under the MHA. Thus any regime for review of deprivation of liberty under the DoLS must be capable of addressing the wide variety of issues raised, quite possibly a greater number of interested parties than one typically sees for medical treatment matters, and calling upon a wider variety of expertise.

Our statistical studies depict 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 CoP's health and welfare jurisdiction today is no longer primarily medical, but largely concerned with decisions by local authorities about where people live, how they are cared for and their relationships with others. These cases appear to be lengthier, more complex more costly than the medical cases that the CoP's predecessor welfare jurisdiction of the Family Division of the High Court. The CoP also hears a far greater volume of cases than it was initially designed to hear, although not nearly as many as one would expect to find if local authorities were routinely applying the findings of the Supreme Court in *Cheshire West* in supported living and similar services. The human rights landscape has shifted to place a much

[153] Julie Doughty, Alice Twaite and Paul Magrath, 'Transparency through publication of family court judgments: An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people' (Cardiff University 2017) http://orca.cf.ac.uk/99141/ [accessed 17 May 2017}

[154] Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017). Paragraphs 12.60 – 12.61.

[155] Ibid.

[156] Ibid, para 12.64.

greater emphasis on access to justice to challenge decisions concerning legal capacity, and direct participation by the person. Radical reform to balance the competing pressures of access to justice, participation and efficiency seems essential if the CoP is to fulfil the functions the law requires of it.

APPENDIX: FOIA REQUEST LETTER

Dear Local Authority FOI Officer,

I am writing to request some information under the Freedom of Information Act 2000 about your local authority's use of the Court of Protection. The information is for a research project examining the impact of the Mental Capacity Act 2005 and the deprivation of liberty safeguards on public authorities, including the impact on local authorities of *P v Cheshire West and Chester Council and another* and *Re X*. We want to gather evidence on how often local authorities use the Court of Protection, how much it costs them and how long it takes. We conducted a similar study for the year 2013-14, and you can read our findings online at:

http://sites.cardiff.ac.uk/wccop/local-authorities-in-the-court-of-protection-new-research/

I would like to know about welfare cases for the year **April 1st 2014 – March 31 2015**. By 'welfare' cases, I mean any cases before the Court of Protection which are *not* about a person's property and affairs (or a property and affairs deputyship on its own), but which could include matters about where a person lives, who they have contact with, any possible deprivation of liberty, medical treatments, welfare deputyship applications[157], and other welfare matters.

I have put together a list of questions. If it is possible within the resource limit of this request, I would appreciate it if you could answer these questions *for each case in the Court of Protection for the year 2014-15*. I have put this in table form at the bottom of this letter to make it easier to answer the questions that way and to make it easier to understand the kind of information I am asking for.

It may not be possible to answer all of these questions within the resource limit, in which case, they are given in order of priority. Please could you answer them in that order, stopping when you reach the resource limit.

If you have any questions about this request for information, please do not hesitate to contact me. I would like to thank you in advance for your assistance in responding to our request for information.

We are also conducting a survey about the experiences of professionals of the Court of Protection's welfare jurisdiction. This is not under the Freedom of Information Act. If, however, any of your legal, health or social care staff would like to contribute to the survey, it can be found online here:

http://sites.cardiff.ac.uk/wccop/for-research-participants/welfare-cases-in-the-court-of-protection-the-views-of-professionals/

Best wishes,

Adam Mercer

Please give answers only for cases which were commenced or ongoing during 1st April 2014 - 31st March 2015 where you were a party to the proceedings.

It may not be possible to answer all of these questions within the resource limit, in which case, they are given in order of priority and please could you answer them in that order.

[157] Or 'hybrid' deputyship applications, but not property and affairs deputyship applications on their own.

1. How many welfare cases in the Court of Protection was your local authority a party to during 2014-15?

2. Of those cases, how many were of the following kinds:
    a. An application to authorise a deprivation of liberty in a setting not covered by the MCA DoLS, using the *Re X* streamline procedure described in *X & Ors (Deprivation of Liberty)* [2014] EWCOP 25 and *Re X and others (Deprivation of Liberty) (Number 2)*[2014] EWCOP 37
    b. An application to the Court of Protection to seek a review of a deprivation of liberty that was authorised by the local authority in its capacity as supervisory body (either under s21A MCA or for declarations/orders under s15 and s16 MCA)
    c. An application relating to another welfare matter about a person who is deprived of their liberty
    d. An application relating to another welfare matter that was not connected with any deprivation of liberty
    e. Other welfare cases not falling into the above categories

3. If it is possible to do so within the available resources, please could you tell us for each Court of Protection case you were involved in during 2014-15 the following information. We recognise that some of this information may be too resource-intensive to provide, so we have listed the questions in order of priority.

	Case 1	Case 2	Case 3	Case 4 (etc...)
4. Which category (of those listed in Q2 above) did the case fall into? (e.g. *Re X*, DoLS review, other welfare and deprivation of liberty matter, other welfare matter not involving deprivation of liberty, other)				
5. Who made the initial application to the Court of Protection? (e.g. The local authority, an NHS body, 'P', a family member of P, a friend of P, an IMCA, another kind of advocate, or some other person)				
6. Is the case ongoing (yes/no)?				
7. How long, in total, has the case lasted for to date? (to the nearest year/month)				
8. Please estimate the overall cost to the local authority of this case (to date). (If you are able to share with us more detail about the nature of those costs – e.g. time of in-house legal and				

social care staff, expert reports, instructing counsel, application fee, payments to IMCAs acting as litigation friends, etc – then we would be very interested in this as it would provide useful data on the costs of Court of Protection litigation. However, we recognise that this information would likely take us beyond the resource limits of the request.)