



Justice Committee

Written evidence received in connection with the work of the Court of Protection

Letter from the Committee to Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, 4 June 2013

Memorandum from Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, 25 September 2013

Letter from the Committee to Jeremy Wright MP, Parliamentary-Under Secretary of State for Justice, 5 November 2013

Response from Jeremy Wright MP, Parliamentary-Under Secretary of State for Justice, 19 November 2013

Letter from Committee to Peter Handcock CBE, Chief Executive, HM Courts & Tribunals Service, 5 November 2013

Response from Peter Handcock CBE, Chief Executive, HM Courts & Tribunals Service, 18 November 2013

Written evidence from Rt Hon Sir James Munby, President of the Family Division and Court of Protection and Hon Sir William Charles, Vice-President of the Court of Protection, 11 March 2014



Justice Committee

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Rt Hon Chris Grayling MP
Lord Chancellor and Secretary of State for Justice
Ministry of Justice
102 Petty France
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4 June 2013

Dear Chris,

Court of Protection

In October 2010 the Ministry sent us a helpful memorandum giving its post-legislative assessment of the operation of the Mental Capacity Act 2005 (Cm 7955). My Committee used this memorandum as the basis for an oral evidence session it conducted in November 2010 with the Public Guardian and the Director of the Royal Courts of Justice Group within HMCTS. This session covered a number of matters to do with the operation of the Court of Protection as established under the 2005 Act, in particular relating to –

- the efficiency and effectiveness of the Court in dealing with its workload, including the adequacy of its judicial and administrative capacity and the appropriateness of its procedures; and
- the openness of the court, including the scope for opening its proceedings and judgments more to the public and the press while protecting the interests of parties to those proceedings.

We did not go on to produce a report on the Court or the operation of the Mental Capacity Act more widely at that time, but we have continued to maintain a watching brief, and you will be aware that the operation of the Court is a matter of recurrent and sometimes acute concern for the public and the media.

We would therefore be grateful if the Ministry could provide us with a brief memorandum updating the section of the 2010 PLA memorandum covering the operation of the Court of Protection. It would be helpful if that Memorandum could cover –

- steps which have been taken since November 2010, including those foreshadowed in the October 2010 memorandum, to improve the efficiency and effectiveness of the Court's processes and procedures
- developments since November 2010 relating to the openness of the proceedings and judgments of the Court

- any other relevant issues concerning the effectiveness of the legislative provisions in the Mental Capacity Act 2005 governing the Court of Protection.

It would be helpful if this memorandum could be with us by the end of September so we could arrange an oral evidence session for the autumn if necessary.

I copy this letter to Sir James Munby, President of the Court of Protection, for his information, and to offer him the opportunity to provide the Committee with his views on these matters if he wishes to do so.

Yours ever



Rt Hon Sir Alan Beith MP

Chairman

Justice Committee



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25 September 2013

Justice Select Committee
Post Legislative assessment of the Mental Capacity Act 2005

Thank you for your letter dated 4 June 2013, concerning the Post Legislative Assessment of the Mental Capacity Act 2005, which was provided to the Committee in October 2010.

I note that in light of the concerns voiced by the public and the media, the Committee has requested an update of the section of the memorandum covering the steps that have been taken to improve the efficiency and effectiveness of the processes and procedures of the Court of Protection and the openness of the court's proceedings and judgments.

I now attach the updated memorandum as requested. Please let me know if the Committee requires any further information.

CHRIS GRAYLING

JUSTICE SELECT COMMITTEE
MINISTRY OF JUSTICE UPDATED MEMORANDUM TO POST LEGISLATIVE
ASSESSMENT OF THE MENTAL CAPACITY ACT 2005

EXECUTIVE SUMMARY:

1. The Court of Protection was established by the MCA 2005 as the specialist court to deal with decision-making for adults who may lack capacity to make specific decisions for themselves. The Court deals with decisions relating to property and affairs and to health and welfare. For those who have not planned ahead by making Lasting Powers of Attorney, the Court is able to make decisions or to appoint a substitute decision-maker known as a deputy. The main registry of the court is based in the Thomas Moore building of the Royal Courts of Justice, but it has a regional presence in Birmingham, Bristol, Cardiff, Manchester, Newcastle and Preston.
2. The Court of Protection receives between 20-25 thousand applications per year¹. The number of hearings has risen considerably over the last twelve months from 1,077 in 2011 to 1,552 in 2012, with many hearings taking place outside London.
3. At its inception in October 2007, the Court of Protection faced a challenging beginning with an increased jurisdiction, applications that exceeded expectations and insufficient numbers of judiciary and an inherited IT system which was unable to cope with the volumes. Since that date, by reviewing its practices and procedures, the Court has made a significant effort to improve delivery.
4. The following paragraphs provide an update to the Court of Protection section of the 2010 Post Legislative Assessment of the Mental Capacity Act as requested by the Committee.

¹ Court Statistics Quarterly, January to March 2013, Table 6.1 (Additional tables)

Steps taken since November 2010 to improve efficiency and effectiveness of the Court's processes and procedures.

5. In the memorandum of October 2010 we reported that an ad hoc committee set up by the then President of the Court of Protection to look at the court rules and procedures had published its report², and that the Ministry of Justice was considering how to take forward its recommendations.
6. The recommendations of the committee included:
 - there should be different approaches for handling non-contentious and contentious applications and those relating to health and welfare;
 - court forms should be revised to cater for these different needs and to remove the duplication contained in the current forms;
 - certain non-contentious property and affairs applications to be dealt with by court officers but with provisions for a judge to review the decision.
 - Changes to court rules to cater for problems identified in the first years of operation of the court, including the incorporation of the application for permission into a generic personal welfare application
7. Recommendation 5 of the Committee was: *“Strictly defined and limited non-contentious property and affairs applications should be dealt with by court officers. The provisions will also have to provide for an automatic right to refer any such decision to a judge and internal monitoring and review by the judges”*. The Committee made this recommendation since, *“many of the issues placed before the court are in effect administrative, or are straightforward and undisputed”* and *delegation of this work to authorised court officers would “free up judge time and reduce delay in respect of all decision making.”*
8. The memorandum of 10 October 2010 noted that there had been a shortage of judges for most of the existence of the Court of Protection. This had led to delays in dealing with applications, an unacceptably high level of complaints and low public confidence in the Court.
9. Ministry of Justice Ministers decided that recommendation 5 should be given priority, in view of the potential benefits it offered both to court users and to HMCTS. On 28 June 2011, the Ministry of Justice held a 12 week consultation³ on the proposals. The response was

² Court of Protection Rules Committee report.

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/committee-report-court-protection-29072010.pdf>

³ Court of Protection: Authorised Officers. A consultation on the delegation of some decisions in the Court of Protection to court officers.

published on 2 November 2011⁴, followed by a short technical consultation on the detailed proposals, with selected practitioners, respondents and members of the ad-hoc committee. New court rules and a practice direction came into force on 12 December 2011.

10. Court officers are permitted to deal with the following types of non-contentious application:
 - All interim applications relating to property and affairs including requests for the release of funds and applications to sell or purchase property
 - Applications to appoint a deputy for property and affairs including a new deputy and requests to appoint a panel deputy;
 - Applications for authority to apply for a grant of probate;
 - Applications to let and manage property or enter into or terminate a tenancy agreement;
 - Applications to obtain copies of documents from the court records;
 - Applications to amend an existing deputy order) including applications to change the amount of security;
 - New trustee applications.
11. Court officers are specifically not permitted to deal with: personal welfare applications; enduring and lasting power of attorney matters and, they must refer to a judge, anything that is complex or contentious. The senior judge has issued a more detailed set of guidance to court officers on when to defer to a judge. He also holds regular meetings with court officers to discuss best practice and continuous improvement.
12. The use of court officers has freed up district judges to spend more time on the difficult, contentious cases, and has given the court managers greater flexibility to deal with increasing volumes of work and cope with shortages of judges. In October 2011, the backlog of work awaiting a judicial decision stood at 2456 cases. In March 2012, 3 months after the appointment of the court officers, this had reduced to 165 cases
13. Although workloads have continued to increase, and despite the fact that court has not always had a full complement of full time judges, these improvements in judicial waiting times have been sustained. Currently 71% of judicial decisions are dispatched within 16 weeks against a target of 75%⁵
14. The other substantive changes to the Court of Protection Rules suggested by the ad hoc Committee have not yet been taken forward. The changes would require a major overhaul of the rules and have not yet been taken forward because of competing priorities, in particular

<http://webarchive.nationalarchives.gov.uk/20110703121151/http://www.justice.gov.uk/consultations/decisions-court-protection.htm>

⁴ Court of Protection: Authorised Officers. Response to Consultation.

<http://www.justice.gov.uk/downloads/consultations/cop-response.pdf>

⁵ Internal Management Information

the work on digitisation of services to support the transformation of the Office of the Public Guardian. In the absence of wholesale changes to rules, the court management has worked with the judiciary and its stakeholders on a wide variety of other improvements that can be delivered without the need for legislative change.

15. New notification and service forms were implemented in early 2011, which addressed the most voiced complaint about the current forms, and reduced their length from around 50 pages to 8 pages. The introduction of the remaining forms designed by the rules committee was put back, as to implement them fully, would have required changes to the rules governing permission. However, these have now been rewritten to work within the current rules, and will be rolled out early next year.
16. The Court of Protection has made improvements to its administrative processes, by using *Lean* continuous improvement methods that have been used successfully in the National Health Service and other public and private sector organisations. *Lean* is a business improvement tool that originated in the manufacturing industry. It aims to deliver rapid business improvement by removing duplicated and wasteful process and introduce new standard operating procedures based around customers' needs.
17. The achievements and benefits within the Court of Protection include:
 - The use of team information boards that give an 'at a glance' visual account of the current work state enabling managers to see which areas of work to prioritise and staff resource to be used flexibly where it is needed most.
 - Internal performance targets and timings for carrying out pieces of work
 - Improving judicial work flow by replacing the 'alphabet lottery' with a *first in first out* system. This has reduced delay and helped manage the volumes of cases awaiting a decision by a judge or court officer.
 - Collecting data on *failure demand*, i.e. recording common problems and examples of where things go wrong. This information is used to update guidance and revise standard letters.
18. These improvements have enabled the Court to absorb the loss of 35 full time staff since April 2010.
19. Other steps taken to improve efficiency and effectiveness of the Court's processes and procedures include:
 - There are now over 90 district and circuit judges nominated to hear cases in courts all over England and Wales as opposed to 47 district and circuit judges at the time of the previous memorandum in 2010. This means that cases can always be heard close to where the

parties live. Many hearings are now heard in the regional courts. During 2012, 1,552 cases were heard in the Court of Protection of which 41% of hearings took place in the regions⁶.

- Improved guidance on how to access the court and a refresh of the information on the HM Courts and Tribunal Service website as well as that appearing on GOV.UK website⁷
- Setting up a dedicated telephone and email enquiry service to provide guidance on how to access the court and to provide updates on the progress of cases.

Developments since November 2010 relating to the openness of proceedings and judgements.

20. From shortly after the Court was established there has been concerted pressure from media organisations to make proceedings more open to the media. Some of the media coverage has been inaccurate; confused the different roles of the court, the Office of the Public Guardian and the Court Funds Office; and much of the coverage was based on events that took place before the present court was set up. Other requests to report on cases show a genuine media and public interest in the workings of the court and in the difficult and emotional issues that the court has to consider when deciding a case.
21. The court has a wide discretion to: authorise the publication of information about private hearings; authorise persons, including the media, to attend a private hearing; exclude persons from attending a hearing and otherwise restrict the publication of information about a hearing. It is open to the media to make an application on these terms. Applications by the media for access or to report on proceedings are considered by the judge on a case by case basis, and will be allowed if they feel it is appropriate, and would not be against the best interests of the person concerned.
22. Although the default position is that court hearings are held in private, the court rules and practice directions provide that hearings relating to serious medical treatment and committal (contempt of court) will be held in public.
23. Although the court has discretion publish judgments, a common complaint of practitioners in the first three years of operation was that there is a shortage of available judgements on Court of Protection cases and where judgements did exist, they were difficult to access. The main reason for this was that the decisions reported were by High Court Judges of the Chancery or Family Divisions, whose cases tended to be reported as if they were Chancery or Family

⁶ Internal Management Information.

⁷ <http://www.justice.gov.uk/protecting-the-vulnerable/official-solicitor/court-of-protection-financial-cases>
<https://www.gov.uk/apply-to-the-court-of-protection>

decisions. For example property and affairs cases were occasionally reported in Wills and Trusts law reports, which did not report personal welfare decisions. People wishing to access Court of Protection judgments were hampered by the lack of a single reporting mechanism for Court of Protection judgments.

24. In October 2010, The Court of Protection arranged with the British and Irish Legal Information Institute (BAILII) to set up a discrete Court of Protection database on its website⁸ It also arranged for Court of Protection cases to be given their own unique neutral citation number to enable easy identification and reporting. Since 2010, over 80 cases have been reported on BAILII.
25. In addition to BAILII, other organisations have set up their own newsletters, websites, etc to report decisions and other information about the court. These include the Mental Health Law online website⁹ which has the most comprehensive selection of case law as it also includes unreported judgments. The barristers' chambers 39 Essex Street publishes a widely read and extremely useful mental capacity newsletter¹⁰ which contains summaries and discussions of cases. 39 Essex Street have also set up their own website of Court of Protection cases online which includes summaries and commentaries as well as the full transcripts of judgments, which makes it accessible to a wider range of audience. Finally, Jordans, the legal publishers, produce a series of Court of Protection law reports¹¹ that are available in print or online.
26. The wider publication of judgments and the development of online forums and newsletters by legal and social care practitioners to discuss Court of Protection cases and practice are a helpful resource to all and seek to increase awareness and knowledge.
27. The Court of Protection has recently refreshed its guidance on how to access the Court and regularly updates a 'frequently asked questions' document that addresses most of the common issues experienced by users. Anecdotal evidence from stakeholders and court users informs us that knowledge about accessing the Court among legal practitioners and social care professionals concerned with the Court's property and affairs jurisdiction is high. The Court of Protection has an active user group and it engages actively with local authorities who make property and affairs applications, including consulting on changes and contributing to respective guidance.
28. However, the level knowledge and awareness about accessing the Court of Protection for personal welfare and deprivation of liberty applications is not as well embedded, particularly

⁸ www.bailii.org/ew/cases/EWHC/COP

⁹ <http://mentalhealthlaw.co.uk/>

¹⁰ http://www.39essex.com/court_of_protection/intro

¹¹ <http://www.jordanpublishing.co.uk/publications/private-client/-court-of-protection-law-reports>

as these applications represent only a small proportion of the Court of Protection's total workload.

29. The Government accepts that there is a need for greater openness in the family courts and the Court of Protection, so that there is public confidence in the court system. This issue has become more acute recently, following media attention during April and May 2013.

30. In response to the renewed interest in the working of the CoP, the Government agreed with the President of the Family Division that the Court of Protection should be brought into the scope of the work he is undertaking in relation to transparency in the family courts.

31. On 12 July 2013, The President issued draft guidance on publication of judgments in the family courts and the Court of Protection¹². The guidance proposes that certain classes of personal welfare Court of Protection judgments delivered by Circuit Judges, High Court Judges and persons sitting as judges of the High Court should be published unless there are compelling reasons why it should not. The classes of judgments include but are not restricted to:

- any order authorising a change of the placement of an adult from one with a family member to a home;
- (any order arguably involving a deprivation of liberty;
- any order involving the giving or withholding of significant medical treatment; or
- any order involving a restraint on publication of information relating to the proceedings.

32. The Ministry of Justice is currently evaluating the impact of that draft guidance and the options for implementing the proposals.

Any relevant issues concerning the effectiveness of the legislative provisions in the MCA that govern the Court.

33. The issues with the Court of Protection Rules identified by the ad-hoc committee have not yet been addressed by further legislation. Many of those issues have been addressed by re-engineering business processes within the court administration, by making improvements to guidance, and by working with stakeholders to make the court more accessible.

34. In the memorandum of October 2010, the Ministry of Justice identified two examples relating to the Court of Protection where technical difficulties with the Mental Capacity Act as drafted had presented operational difficulties.

35. The Mental Capacity Act does not permit deputy district judges to sit in the Court of Protection, and, on occasions, this has led to a build up of cases waiting for a judicial decision.

¹² <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/annex-b-draft-transparency-in-family-courts.pdf>

The Government addressed some of the problems caused by judicial shortages by amending the Court of Protection Rules in December 2011, so certain straightforward and non-contentious applications could be dealt with by authorised court officers – senior court staff with knowledge and experience of the Mental Capacity Act – as outlined above. This change has relieved much of the pressure on the full time Court of Protection judiciary

36. Although these changes delivered significant improvements, the Court of Protection has been restricted by the anomaly relating to deputy district judges and the difficulty in securing sufficient full time judicial resource from the current district judge pool to work in what is a specialised area of work. This anomaly has now been addressed by the Crime and Courts Act 2013, which makes provision for deputy district judges and Upper Tribunal judges to sit in court. This increase in the pool of judges that can be deployed in the court will provide the maximum possible flexibility. The Crime and Courts Act is the subject of a phased implementation which will be completed by April 2014
37. The second issue related to the interaction between the court and the Office of the Public Guardian where objections to registration of an enduring power of attorney were received. These issues have largely been overcome by the court and the Office of the Public Guardian agreeing a memorandum of understanding, where they will share certain limited information required by the court to decide the case. As the number of enduring power of attorney registrations continues to reduce over time, this problem has less significance, and does not justify primary legislation to amend.



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Jeremy Wright MP
Parliamentary Under-Secretary of State for Justice
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5 November 2013

Dear Jeremy,

Data on contemnors

You will be aware that, following public concern about the case of an individual imprisoned for contempt of court in a closed hearing, the former Lord Chief Justice issued practice guidance in May 2013 to the effect that, other than in exceptional cases in the Court of Protection and the Family Division, committal proceedings should take place in open court.

I understand that the Ministry of Justice no longer collects and publishes data on the number of individuals imprisoned specifically for contempt of court, but instead this type of prisoner is subsumed into the broader category of non-criminal prisoners.

It would be easier to assess the extent to which the judiciary are following the Lord Chief Justice's guidance if it was possible to compare the number of published judgments relating to contempt of court with the total number of individuals who are imprisoned on these grounds. I am therefore writing to ask you to consider the case for reintroducing this separate category in the Offender Management Statistics. I look forward to your response.

Yours sincerely,

Rt Hon Sir Alan Beith MP

Chair
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Ministry
of Justice

short note for Alan

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Our ref: 1860

RM November 2013

Dear Alan,

DATA ON CONTEMNORS

Thank you for your letter dated 5 November 2013 in which you asked me to consider reintroducing the category of contempt of court within the Offender Management Statistics.

I am pleased to tell you that we had already planned to reinstate the information on the number of people received into prison for contempt of court within the 2013 annual Offender Management Statistics tables, due for publication in April 2014.

In advance of that publication, I am able to tell you that in 2012, there were 131 people received into prison for contempt of court. I hope that this will aid you in assessing the impact of the Lord Chief Justice's recent guidance.

Yours ever

JEREMY WRIGHT

Justice Committee

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5 November 2013

Court of Protection

We are grateful to the Secretary of State for providing us in September with an updated memorandum on Post Legislative Assessment of the Mental Capacity Act 2005. Following our consideration of this memorandum, we would be grateful if Her Majesty's Courts and Tribunals Service could provide information on two further related issues.

First, we understand that the Official Solicitor wrote to the President of the Family Division in December 2011 to inform him that he had reached the limit of his resources with regard to Court of Protection welfare cases, meaning he would only be able to accept invitations to act in the most urgent cases; other cases which met the acceptance criteria would be placed on a waiting list. Please could you let us know the current position in relation to the resources available to the Official Solicitor to take on Court of Protection cases, and your assessment of the implications.

Secondly, you may be aware that John Hemming MP tabled an early day motion on 24 June 2013 which referred to a "lack of scrutiny" of out-of-hours applications to the Court of Protection and called for the maintenance of statistics as to the number of out-of-hours applications and their outcomes. Please could you respond to us on these points.

Rt Hon Sir Alan Beith MP
Chairman
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HM Courts & Tribunals Service

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Rt Hon Sir Alan Beith MP
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Our ref:
Your ref:

18 November 2013

Dear Sir Alan

COURT OF PROTECTION

Thank you for your letter of 5 November 2013 in which you raised two issues related to the updated memorandum on Post Legislative Assessment of the Mental Capacity Act 2005 which was sent to you in September by the Secretary of State.

The first issue raised in your letter was a request for an update on the resources available to the Official Solicitor to take on Court of Protection Cases. As you may be aware, the Official Solicitor is an independent statutory office holder appointed by the Lord Chancellor under the Senior Courts Act 1981. He is provided with a budget, staff and accommodation, to carry out his role by the Ministry of Justice. His office, which operates separately in respect of their individual functions, but administratively jointly with the Office of the Public Trustee, exists to support his work.

The sponsorship of the Office is by the Ministry, through the Arms Length Bodies Governance Division. They have informed me that the current position of the Official Solicitor in respect of his acceptance of Court of Protection welfare cases is that the waiting list has been eliminated as from last month. In cases where the Official Solicitor has been invited to act as litigation friend and where his acceptance criteria have been met (as to last resort and funding), he aims to allocate cases to a litigation case manager within two to four weeks of such criteria having been met.

On the second issue, the number of out of hours applications to the Court of Protection and their outcomes, I note that the matter was covered in the Secretary of State's letter of 15 August 2013 to John Hemming MP. In that letter, which I hope you received as a copy recipient but which I have enclosed for ease of reference, the Secretary of State explained that the collection of these statistics would incur a disproportionate cost.

Yours sincerely

Peter Handcock CBE
Chief Executive, HM Courts & Tribunals Service

Written evidence from Sir James Munby, President of the Family Division and Court of Protection and Sir William Charles, Vice-President of the Court of Protection

Observations on the Court of Protection

1. These observations have been prepared in connection with the evidence to be given by the President and Vice President of the Court of Protection (the CoP or the Court) to the Justice Committee of the House of Commons on 18 March 2014.

Some Dates and Comments

2.	2003	Mental Capacity Bill
	2005	Mental Capacity Act
	April 2007	Intended start date
	October 2007	Actual start date
	2008/9	Intended CoP Rules review (which did not happen)
	April 2009	The introduction of the amendments relating to Deprivation of Liberty to fill the “Bournewood Gap”
	End 2009	Ad hoc Rules Committee formed
	July 2010	Ad hoc Rules Committee reported making 10 recommendations, all of which were accepted by the President and the Department
	April 2011	The Family Procedure Rules 2010 came into force
	December 2011	One of the recommendations of the ad hoc Rules Committee was implemented by the introduction of Rule 7A (see SI 2011/2753). It allowed court officers to be authorised to exercise the jurisdiction of the Court in defined cases. It is supported by a Practice Direction. <i>(This is the only significant change to the CoP Rules notwithstanding the intention to review them, the acceptance of the recommendations of the ad hoc Committee, and the introduction of new Family Procedure Rules)</i>
	2012	The Court and its administration moved from Archway to the Thomas More Building at the RCJ
	2014	The Court and its administration moved again to First Avenue House in Holborn

The jurisdiction of the Court

3. This is conferred by statute and the court does not have an inherent jurisdiction or an administrative law jurisdiction. So it has no jurisdiction over a vulnerable adult who has the relevant capacity and, subject to some arguments under the Human Rights Act, no power to overturn or declare unlawful decisions of public authorities concerning the provision of care or support on administrative law (judicial review) grounds.

4. The Court has inherited, with changes, the *property and affairs* work of the old Court of Protection. In terms of numbers this work comprises the great majority of the work of the Court (around 95%). Also, around 93% of those applications are non-contentious.

5. This split of work introduces a need to recognise that a significant majority of the applications to the Court involve persons who have lost capacity to manage all or aspects of their financial affairs and whose families and carers need court orders to enable those affairs to be managed. Most of those applicants are honest, loving and supportive family members, or carers, who want a speedy result and, understandably, would resent an intrusive process to check their bona fides.

6. Sadly, this does not apply to all applicants and, so, the Rules and practice of the Court contain some quite complicated provisions directed to demonstrating bona fides and the Office of the Public Guardian has a regulatory role in respect of Deputies appointed by the Court.

7. The Court has inherited with changes the *health and welfare* jurisdiction of the High Court which was based on its inherent jurisdiction. That inherent jurisdiction survives for vulnerable adults.

8. There are significant differences between the issues that arise in the two types of work. The policy directive at the time the CoP Rules were drafted was that one process should fit all. As identified by the ad hoc Rules Committee this caused, and is still causing, problems.

The judges and location of the CoP

9. Before recent changes, to be a judge of the CoP a person had to be the President of the Family Division, the Chancellor, a High Court Judge, a Circuit Judge or a District Judge and be nominated to sit in the CoP. The statute also provides that there is to be a President, a Vice President and a Senior Judge.

10. Four District Judges and the Senior Judge are based in London as are the authorised officers of the Court and its administration. This is therefore the judicial and administrative workforce that deals with the vast bulk in terms of numbers of the applications made to the CoP (i.e. non – contentious and contentious property and affairs applications). They also deal with all other aspects of the work, all of which, at present, have to be issued in London. So they will deal with directions, decide many cases on paper, decide some cases after a hearing and transfer some cases to other judges and places for a hearing.

11. All High Court Judges are nominated to sit in the CoP although the only ones who do so regularly are judges of the Family Division. A total of about 90 Circuit and District Judges who are mainly based outside London are nominated to sit. Many sit more than others and some do not sit at all. In the main this arises because, initially, there was over nomination to try to ensure that there were nominated judges throughout the country.

12. In his first report to the President and Vice President in November 2011 (see **Annex 1**) the Judge in Charge recommended that as a matter of urgency a process for the transfer of cases to High Court Judges and to judges on the circuits be agreed and implemented. He reported that this recommendation related to the issues about which he had heard the most complaints. Since then attempts have been made to achieve this but they have not succeeded.

13. There can be no doubt that the present ad hoc arrangements for transfer are unsatisfactory and are causing problems and justifiable annoyance to litigants, practitioners, judges and court staff.

The two main problems relating to the day to day performance of the CoP

14. These are the long running problems relating to the failure to make amendments to the CoP Rules and to introduce a process for transfer of cases to the circuits. The solution to these problems is not in the hands of the CoP.

Workload and improvements in performance

15. Part of the background to the setting up of the ad hoc Rules Committee at the end of 2009 was that in large measure due to an underestimate of the workload of the new Court a large backlog of work and consequent delays had built up.

16. The Rule change made in December 2011 that enabled authorised officers to do non-contentious property and affairs work was a major factor in bringing about a dramatic reduction in the backlog of work awaiting allocation to a judge and so delay.

17. There has also been a small increase in the complement of the District Judges sitting in London and an improvement in maintaining that complement, week by week, through the use of visiting judges. These visits have also created and promoted relationships with judges on the circuits and have provided those judges with experience in circumstances where they can readily consult experienced colleagues.

18. The District Judges have revisited the recommendation of the ad hoc Rules Committee on forms and drawn up a new set of forms, based on those so recommended. They have been road tested. It is thought that they will be much more user friendly but their introduction has been put on hold until it is known whether resources will be allocated to enable Rule change to be made which, in turn, would enable further improvements to be made.

19. Since 2007, the Court has also introduced against the background of the existing Rules a number of procedural and other changes including: changes to the notification of service forms, the provision of a process for providing interim orders to meet an urgent need and reducing duplication, and a removal of the original direction that Deprivation of Liberty cases had to be heard by a High Court Judge.

20. The Court has also sought to promote an informal system for transferring cases to the circuits. At High Court level this is being achieved by cases being put before the Liaison Judge for the relevant circuit and that judge directing how they are to be dealt with on the circuit. At District and Circuit Judge level it is being dealt with largely

through the relationships that have been built up between judges and staff in London and on the circuits.

21. From 2010 the Court has adopted the “Lean” continuous model. Improvements have enabled the administrative and judicial resources to shorten turn round times. The time it takes to deal with an application also includes periods when the Court cannot do anything because it is waiting for someone else to do something (e.g. file evidence) but the improvements made have enabled the Court to maintain or improve its performance assessed by turn round times for individual tasks and its Key Performance Indicators (KPI) against a background of an ever increasing workload (around 25% since 2009) and a staff reduction of 20% since 2009.

Rule Change

22. The 10 recommendations of the ad hoc Rule Committee were:

1. *The procedure and practice of the court should reflect the differences in the nature of the following categories of its work, namely (a) non-contentious property and affairs applications, (b) contentious property and affairs applications and (c) health and welfare applications.*
2. *This change should be implemented by (a) the introduction of new forms, and (b) relevant changes in the rules and practice directions.*
3. *The distinction between serving and notifying people who are or may be interested in making representations to the court should be preserved. But it should be better explained and some amendments to the present provisions relating to this process should be made.*
4. *The present position relating to the notification and participation of P should be retained (with some minor amendments).*
5. *Strictly defined and limited non-contentious property and affairs applications should be dealt with by court officers (e.g. applications for a property and affairs deputy by local authorities and in respect of small estates that do not include defined types of property). The provisions will also have to provide for an automatic right to refer any such decision to a judge and internal monitoring and review by the judges.*
6. *Separate applications for permission should be abandoned and the application for permission should be incorporated into the main application form.*
7. *The detailed and minor changes set out in annex 1 hereto should be considered. It is recognised that on a detailed consideration some may be rejected and others added and this recommendation and annex is included to assist those who are performing that detailed exercise.*
8. *Issues as to whether and when the court should sit in public or permit its proceedings to be made public should be dealt with by the courts through decisions rather than any rule change.*
9. *The proposed new forms prepared by members of this committee should be “tested” with a range of potential users before they are finalised and the relevant rules and practice directions are altered.*
10. *A Committee should be established to review and make recommendations relating to the procedure and practice of the Court of Protection.*

23. Only recommendation 5 has been implemented. There is a continuing need for the other recommendations relating to Rule change to be implemented. Please see report at **Annex 2**.

24. Issues relating to the appointment of a litigation friend, the representation of P and obtaining the views of P also need to be addressed in the context of amongst other things the resource and other difficulties faced by the Official Solicitor. New provisions need to be introduced relating to costs, to appeals to address the wider pool of judges who can now be nominated to sit and the disclosure of documents to defined people for defined purposes e.g. to researchers, regulators etc. The balance between the provision of a quick, convenient and inexpensive procedure for the honest and checks and balances and the provision of security to guard against the dishonest needs regular review.

Transparency – Public/private hearing – Reporting of judgments

25. Part 13 of the CoP Rules provides that the default position is for a private hearing. This is a change for medical cases but Practice Direction 9E effectively takes one back to the previous practice that these cases were heard in public because it provides that the presumption is that such cases will be heard in public (see *Re G (Adult Patient: Publicity)* [1995] 2 FLR 528 which concluded that there was a clear balance in favour of a hearing in open court). Also applications for contempt have to be in public (Rule 188(2) and Committal for Contempt of Court (Practice Guidance – Supplemental) [2013] EWHC B7 (CoP). This guidance shortly followed reporting about a case in Birmingham in which it was said that a person was imprisoned for contempt in a closed hearing. This was not the case. The relevant hearings were in open court and, although not listed as such, it is unlikely that anyone present would not have realised that this was the case because the judge and the advocates were robed.

26. Rule 85(2)(i) (the General Directions rule) refers to the giving of a direction as to whether there should be a public hearing or that certain persons should be admitted. There is a practice direction (Practice Direction 13A) relating to private / public hearings and reporting restrictions.

27. The ad hoc Committee recommended (recommendation 8) that the issue whether hearings should be in public or private should be dealt with by court decisions rather than Rule change.

28. This was before the Family Procedure Rules 2010 (the FPR 2010) came into force. They make different provisions about media attendance and have now operated for about 3 years. In broad terms, Family proceedings are held in private but duly accredited members of the media have the right to attend most hearings (Part 27.10 and 11 of the FPR 2010 and Practice Directions 27B and C). But these provisions do not cover what the media can read and report and, as in the CoP, this has to be dealt with on a case by case basis.

29. There are strongly held views on both sides of the debate on whether the default position should be that hearings are in private or in public and if in public what the general position should be on what can be reported and so on what restrictions on reporting should generally be imposed.

30. There is much to be said for there being general consistency between the Rules of the two courts. But there are differences between the arguments on the underlying issues. They flow from differences between the relevant factors concerning persons who lack capacity and children and so their respective families and carers. These differences and issues relating to size and resource could lead to the CoP taking a different course to the Family courts on the default position, or to the CoP holding a greater percentage of its hearings in open court.

31. The differences have founded a slightly different and wider approach being taken in respect of the CoP in the Guidance given by the President of the CoP and the Family Division on the reporting of judgments in the Family courts and the CoP (see [2014] 1 WLR 230 and 235) and **Annex 3**. As can be seen from a comparison of the two, the CoP Guidance includes some cases relating to property and affairs, and for clarity includes the Senior Judge (who is treated for all purposes as if he were a circuit judge) and has a different provision on costs.

32. A need exists to include within the judgments that are reported those of District Judges sitting in the CoP and judgments that set out the approach of, and so the tests and procedure adopted by, the CoP in standard cases. All nominated judges are being encouraged to remember this and so to publish more judgments.

Hearings on circuit

33. It needs to be remembered that a very high percentage of the work is non-contentious property and affairs work. There is no need for this work to be done locally to the parties and significant advantages in it being done in one place where the main administration, the nominated officers and a cohort of District Judges are based.

34. In broad terms 6% of the work is welfare work and about 7% of the property and affairs work is contentious. High percentages of this work require hearings and so in broad terms 10% to 12% of the applications require hearings (say 2,500 cases a year). The nature, length and number of hearings that any case will involve will vary considerably.

35. Many of those hearings should be held out of London. This has been and is being achieved on an ad hoc basis that is unsatisfactory and regularly involves unnecessary transfer of papers, the creation of dummy files, unnecessary duplication or additional administrative work. It also means that orders are drafted in London when it would be better for them to be drafted in the court where they were made where the judge who made the order can more easily discuss and check it. Over the years a number of protocols have been drafted and at times it has seemed that a solution is imminent but, thus far, it has not been put into effect.

36. The judiciary across the country and the administration in London would like to put a protocol into effect and the difficulties seem to lie with HMCTS and the management of the administration and workload of the civil courts on circuit. The fact that the CoP was not originally within HMCTS has probably contributed to the problems.

37. The advantages of introducing a protocol through which cases can be heard and appropriately administered on circuit and so minimises the work that needs to be done in London on such cases are obvious. No-one disputes this but still it has not been created.

38. Such a protocol should make the CoP more accessible and able to deal with hearings more quickly and so to promote the best interests of persons who lack capacity, their families and carers more effectively.

Steps being taken to address the two main problems and transparency

39. Following his appointment in January 2014 the Vice President, with the full support of the President, had a helpful meeting with HMCTS and MoJ officials to discuss Rule change and transfer to the circuits. These issues are being addressed again and, hopefully, progress will be made in the near future. If not, the CoP will continue to do what it can to try to overcome these problems and the difficulties they cause.

40. The President's Guidance on the reporting of judgments sets out that he is adopting an incremental approach. If resource is provided to consider and to make changes to the CoP Rules, this exercise would provide an appropriate vehicle to further that approach. Nominated judges have been, and will continue to be, encouraged to report more judgments and to consider under the existing CoP Rules whether there is "good reason" to depart from the default position of the hearing being in private and duly accredited members of the media being excluded from it.

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