

# Use of the Court of Protection's welfare jurisdiction by supervisory bodies in England and Wales

Lucy Series  
Adam Mercer  
Abigail Walbridge  
Katie Mobbs  
Phil Fennell  
Julie Doughty  
Luke Clements

January 2015

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

<http://www.law.cf.ac.uk/chscl/>

## ACKNOWLEDGEMENTS

This report is one in a series about *Welfare Cases in the Court of Protection*. Information about the project is available here: <http://sites.cardiff.ac.uk/wccop/>

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.<sup>1</sup>

We would like to thank Jordan's Publishing for use of material that overlaps with our forthcoming article in the *Elder Law Journal*.

We would like to thank Andy McNicoll of *Community Care* for allowing us to publish some data gathered on Court of Protection applications following *Cheshire West*.

We would like to thank the local authorities in England and Wales, and the Local Health Boards in Wales, who responded to our requests for information for this research. We recognise that some respondents put a great deal of time and care into responding to our request for information and have gone above and beyond their legal obligations to do so. We are very grateful to them for supplying this data, and hope that they find our results interesting.

We would also 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 Martin, Liz Eaton and Joan Goulbourn. We are especially grateful to those who were able to offer comments and corrections on a draft version of this report. However the views expressed in this report, and any mistakes, are the responsibility of the authors alone.

We would also 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.

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<sup>1</sup> [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org)

## SUMMARY

The Court of Protection (CoP) was established by the Mental Capacity Act 2005 (MCA) to adjudicate on issues relating to mental capacity and best interests. It can also determine questions relating to MCA deprivation of liberty safeguards (DoLS) authorisations issued by supervisory bodies, and authorize deprivation of liberty in hospitals and care settings. We requested information from local authorities about their involvement in CoP welfare cases during 2013-14 using the Freedom of Information Act 2000.

### Key findings:

- 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 authorization under Schedule A1 to the MCA 2005.
- In 62% of cases the relevant person was deprived of their liberty, either by an authorization 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.

### Recommendations and conclusions

Those responsible for monitoring health and social care in general, and the deprivation of liberty safeguards in particular, should ensure that authorities understand and comply with obligations to refer cases to the CoP in line with legal guidance.

The high cost of CoP proceedings is a matter of serious concern, especially in light of the ruling in *Cheshire West* which is predicted to lead to an exponential increase in applications in 2014-15.

The underlying reasons for the high cost and lengthy duration of CoP proceedings requires urgent investigation.

# CONTENTS

Acknowledgements.....	2
Summary .....	3
Key findings:.....	3
Recommendations and conclusions .....	3
Contents.....	4
Introduction .....	5
The development of a ‘welfare’ jurisdiction involving local authorities .....	5
The Mental Capacity Act 2005 deprivation of liberty safeguards .....	6
Challenges facing the Court of Protection and local authorities.....	8
Methodology.....	10
Requests.....	10
Response rate .....	10
Analysis .....	11
Findings .....	12
Frequency of involvement in Court of Protection welfare litigation.....	12
Variations in numbers of Court of Protection welfare cases between different local authorities, and between England and Wales .....	13
The nature of the applications made.....	14
Applications about a person who was deprived of their liberty .....	14
The identity of the applicants .....	15
Applicant in cases where the relevant person is subject to the deprivation of liberty safeguards .....	16
The duration of cases.....	18
The costs to the local authority of Court of Protection cases .....	20
Costs for different types of applications.....	23
Discussion.....	24
Appendix A: Request for information letter .....	26

# INTRODUCTION

The Court of Protection (CoP) was established by the Mental Capacity Act 2005 (MCA) to adjudicate on mental capacity, best interests and certain legal instruments created by the MCA 2005. Like the 'old' CoP, which was an Office of the Supreme Court, the court established by the MCA 2005 would largely deal with matters connected with property and affairs<sup>2</sup>. But unlike the 'old' CoP, the new court also had powers to adjudicate on health and welfare matters. Although presently health and welfare applications make up only a small proportion of the CoP's caseload<sup>3</sup>, they tend to attract much greater public interest as they touch upon issues of profound social and political importance. The court has been operational for nearly eight years, but in its short lifetime its role has evolved in important ways. This report focuses on the growing number of welfare cases heard by the CoP which involve local authorities.

## The development of a 'welfare' jurisdiction involving local authorities

The CoP's new health and welfare jurisdiction was based on earlier cases heard by High Court under its 'declaratory' jurisdiction, starting with *Re F (Mental Patient: Sterilisation)*<sup>4</sup>. These cases had mainly concerned *medical* treatments, but the High Court also heard a small number of applications about wider welfare matters, such as where a person should live<sup>5</sup> and with whom they should be permitted to have contact with<sup>6</sup>. Section 15 of the MCA gave the CoP powers to make declarations about a person's mental capacity and the lawfulness of any acts proposed in relation to them; this mirrored the 'declarations' made under the inherent jurisdiction of the High Court prior to the passage of the MCA. Section 16 of the MCA allows the court to make orders in a person's best interests, which it might do in order to make a financial or personal decision on the person's behalf.<sup>7</sup> Section 16 orders can authorise a deprivation of liberty<sup>8</sup>, and can also appoint a deputy with authority to make property and affairs decisions or – more rarely<sup>9</sup> – personal welfare decisions, on a person's behalf.

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<sup>2</sup> Presently, the vast majority of applications to the CoP concern property and affairs. See: Ministry of Justice, *Court Statistics Quarterly January to March 2014* (London 2014)

<sup>3</sup> In 2013, the CoP received 24,923 applications in total, but only 166 of these related to 'one off' welfare decisions and 333 related to welfare deputyships. For further statistics on applications received and orders made by the COP between 2008-2013 see: Ministry of Justice (2014) *Court Statistics Quarterly January to March 2014*, London.

<sup>4</sup> [1990] 2 A.C. 1; [1991] UKHL 1. The development of the declaratory jurisdiction is discussed by: P Fennell, 'Chapter 4: Mental Capacity' in L Gostin, J McHale, P Fennell, D McKay and P Bartlett (eds.), *Principles of Mental Health Law* (Oxford University Press, Oxford 2010); P Bartlett, *Blackstone's Guide to The Mental Capacity Act 2005* (Second ed., Oxford University Press, Oxford 2008).

<sup>5</sup> *Re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 (CA)

<sup>6</sup> *Re C (Mental Patient: Contact)* [1993] 1 FLR 940

<sup>7</sup> Certain decisions, however, are precluded from being made on behalf of a person under the MCA, including voting (s29 MCA), decisions relating to family matters or sexual relationships (s27 MCA), or decisions which are made under the Mental Health Act 1983 (s28 MCA).

<sup>8</sup> Provided the person is not 'ineligible' for the deprivation of liberty safeguards, see s16A MCA and Schedule 1A.

<sup>9</sup> The CoP tends not to appoint welfare deputies if a single order of the CoP would suffice or if the informal framework for making health and welfare decisions under s5 and 6 MCA can be relied upon. See s16(4) MCA and the detailed explanation given in: Judiciary of England and Wales, *Court of Protection Report 2010* (London 2011) pages 7-8. However, health and welfare deputyships are sometimes authorised where there is a need for clear authority to take

Prior to the MCA, healthcare cases greatly outnumbered welfare cases, but the same could not be said today. A large proportion of CoP health and welfare cases involve matters such as a person's residence and care arrangements<sup>10</sup>, and questions connected with relationships such who they have contact with<sup>11</sup>, and their capacity to consent to sex<sup>12</sup>, marriage<sup>13</sup> or cohabitation<sup>14</sup>. In some rarer cases an application might be made for the appointment of a 'deputy' with authority to make ongoing decisions about a person's health and welfare.<sup>15</sup>

The growth of a welfare jurisdiction means that local authorities are now involved in an increasing number of cases, as part of their safeguarding role or their role in providing community care services. Unlike medical treatment cases, which typically involved one-off decisions, these kinds of cases frequently concern matters that will remain yet evolve throughout a person's lifetime, raising the possibility of an increased rate of very long running welfare litigation.

### The Mental Capacity Act 2005 deprivation of liberty safeguards

The role of the CoP and the involvement of local authorities in CoP litigation has also undergone dramatic changes as a result of the insertion of the deprivation of liberty safeguards (DoLS) into the MCA. This responded to the ruling of the European Court of Human Rights' ruling in *HL v UK*<sup>16</sup>. In *HL v UK* the European Court held that HL had been unlawfully deprived of his liberty when Bournemouth Hospital admitted him informally without the safeguards of the Mental Health Act 1983. The Deprivation of Liberty Safeguards (DoLS) were developed following a consultation after this ruling<sup>17</sup>, and were inserted into the MCA through the addition of the highly complex and much criticised Schedules A1 and 1A.

Under the DoLS, supervisory bodies can issue authorisations to deprive a person of their liberty. In England, local authorities perform this function in respect of persons detained in hospitals or care homes and, in Wales, local authorities perform it in respect of care homes and Local Health Boards (LHBs) in respect of hospitals. Under s21A MCA the CoP can determine questions regarding the lawfulness of a DoLS authorisation, and it can also make an order under s16 MCA authorising a deprivation of liberty. A network of special procedural safeguards, including a relevant person's representative (RPR) and independent mental capacity advocates (IMCAs), are supposed to help a person detained under the DoLS to exercise their right to seek a court review of the lawfulness of

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on-going decisions, see: *G v E* [2010] EWHC 2512 (COP); *SBC v PBA and others* [2011] EWHC 2580 (Fam); *London Borough of Havering v LD and KD* [2010] EWHC 3876 (COP); *MK v JK & Ors* [2013] EWHC 4334 (COP).

<sup>10</sup> e.g. *CC v KK and STCC* [2012] EWHC 2136 (COP)

<sup>11</sup> e.g. *A Primary Care Trust v P* [2009] EW Misc 10 (EWCOP); *London Borough of Redbridge v G & Ors* [2014] EWHC 17 (COP)

<sup>12</sup> e.g. *IM v LM* [2014] EWCA Civ 37 and *A Local Authority v TZ (No. 2)* [2014] EWHC 973 (COP)

<sup>13</sup> *Sandwell Metropolitan Borough Council v RG & Ors* [2013] EWHC 23 73 (COP)

<sup>14</sup> *PC & Anor v City of York Council* [2013] EWCA Civ 478

<sup>15</sup> See n9, above.

<sup>16</sup> (App no 45508/990) [2004] 40 EHRR 761

<sup>17</sup> Department of Health, "Bournewood" Consultation: *The approach to be taken in response to the judgment of the European Court of Human Rights in the Bournewood" case* (London 2005); Department of Health, *Protecting the Vulnerable: the "Bournewood" Consultation: Summary of Responses*, (London 2006).

their detention, in accordance with Article 5(4) of the European Convention on Human Rights (ECHR).

The problems with the DoLS are well known and too numerous to describe here.<sup>18</sup> One significant shortcoming is the absence of any administrative procedure for authorising a deprivation of liberty in settings outside of care homes or hospitals, such as supported living<sup>19</sup> or extra care housing. It was held in *Salford City Council v BJ*<sup>20</sup> that this means that any detention in these settings must be authorised by an order of the CoP and reviewed at least annually. Another concern, shared by the House of Lords Select Committee on the MCA, is that RPRs and IMCAs do not in practice provide an effective safeguard for people's rights<sup>21</sup>. The Committee described the DoLS as 'not fit for purpose'<sup>22</sup> and called for them to be repealed and replaced. In response, the government has asked the Law Commission to undertake a program of law reform relating to the DoLS, but its anticipated date of completion is 2017.<sup>23</sup>

The case of *London Borough of Hillingdon v Neary & Anor*<sup>24</sup> highlighted the manifold difficulties that detainees and their families may experience in challenging decisions made by local authorities under the DoLS. In that case, Steven Neary was found to be unlawfully deprived of his liberty for almost a year, and his rights to respect for home, family and private life under Article 8 ECHR were violated. One of many problems highlighted by the judgment was that Steven Neary and his family had been unable to exercise rights to challenge his detention, despite their clear objections to it.

In his ruling in *Neary*, Mr Justice Peter Jackson advised that the DoLS should not be used by supervisory bodies to get their own way, that disputes about serious welfare matters that could not be resolved by other means should be referred to court and that detainees must be 'not only entitled but enabled' to seek a speedy review of the lawfulness of their detention by the Court of Protection.<sup>25</sup> This ruling places the onus on local authorities to make an application to the CoP if a disagreement arises or ensure that the person is supported and enable to do so themselves. However, the House of Lords Committee on the MCA expressed concern that local authorities were

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<sup>18</sup> For early criticisms of the DoLS, see: R Jones, 'Deprivations of Liberty: Mental Health Act or Mental Capacity Act?', (2007) *Journal of Mental Health Law*, November, 170; P Bowen, *Blackstone's Guide to The Mental Health Act 2007*, (Oxford University Press, Oxford 2007); R Hargreaves, 'The Deprivation of Liberty Safeguards - essential protection or bureaucratic monster?', (2009) *Journal of Mental Health Law*, Winter, 117; Mental Health Alliance, *Briefing Paper 1: Deprivation of Liberty Safeguards: an initial review of implementation* (London 2010).

<sup>19</sup> Supported living services have a different legal status to care homes and are regulated differently, see: Care Quality Commission, *A new system of registration. Supported living schemes: Regulated activities for which the provider may need to register. Guidance for providers* (London 2011).

<sup>20</sup> [2009] EWHC 3310 (Fam)

<sup>21</sup> House of Lords Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post-legislative scrutiny* (TSO, London 2014) paragraph 288

<sup>22</sup> Paragraph 257

<sup>23</sup> HM Government, *Valuing every voice, respecting every right: Making the case for the Mental Capacity Act. The Government's response to the House of Lords Select Committee Report on the Mental Capacity Act 2005*, (Cm 8884, London 2014)

<sup>24</sup> [2011] EWHC 1377 (COP)

<sup>25</sup> On referring disagreements to the court §20-23; on not using the DoLS scheme 'as a means of getting its own way' and referring significant welfare disputes which cannot be resolved by other means to the court §33; on enabling a person to exercise their Article 5(4) rights §202.

not doing this when appropriate and called upon the government to provide clearer guidance on when disputes must be referred to the court<sup>26</sup>. The government agreed that clearer guidance was needed on this matter and its publication is awaited.<sup>27</sup>

### Challenges facing the Court of Protection and local authorities

The CoP today faces a number of challenges in relation to its health and welfare jurisdiction. First and foremost among these is the problem of *volume*. The number of health and welfare cases has gradually increased<sup>28</sup> and is currently more than double the 200 cases a year anticipated in the MCA's impact assessment<sup>29</sup>.

In *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council*<sup>30</sup> the Supreme Court held that a person was deprived of their liberty if they subject to continuous or constant supervision and control and were not free to leave. The *Cheshire West* ruling means that many more people will be considered to be deprived of their liberty than hitherto. The Association of Directors of Adult Social Services estimated that in 2014-15 there may be as many as 28,605 applications to the CoP for authorisation of detention of people in settings that are not covered by the DoLS, in accordance with the ruling in *Salford*<sup>31</sup>. The CoP was simply never set up to deal with this volume of health and welfare litigation. In response to this potential exponential increase in volume, the President of the CoP, Sir James Munby, outlined a new 'streamlined' procedure for handling non-contentious post-*Cheshire West* cases in *X & Ors (Deprivation of Liberty)*<sup>32</sup>. However, an appeal to the decision in *Re X* by the Law Society and two of the parties is pending. Early indications suggest that this anticipated 'tidal wave' of applications has not yet materialised, and only a small number of applications concerning supported living have been received following the ruling in *Cheshire West*.<sup>33</sup>

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<sup>26</sup> See n 21 above, paragraphs 46 and 68

<sup>27</sup> See n23 above, paragraph 9.8

<sup>28</sup> Ministry of Justice, *Court Statistics Quarterly January to March 2014* (London 2014), see supplementary tables; see also Office of the Official Solicitor and the Public Trustee, *The Official Solicitor and the Public Trustee: Annual Report 1 April 2012 – 31 March 2013* (London 2013), Annex 3. Please note that these statistics do appear to contradict each other – the Official Solicitor reports a much higher number of new welfare cases for last year than the court statistics.

<sup>29</sup> Department for Constitutional Affairs, *The Mental Capacity Bill: Full Regulatory Impact Assessment*, London 2005; paragraph 43

<sup>30</sup> [2014] UKSC 19

<sup>31</sup> A Ruck Keene, V Butler-Cole, N Allen and M Pratley, *Thirty Nine Essex Street Mental Capacity Act Newsletter: July 2014*, Issue 48, London 2014

<sup>32</sup> [2014] EWCOP 25; see also *Re X and others (Deprivation of Liberty) (Number 2)* [2014] EWCOP 37. Detailed guidance on this procedure, and details of new forms, are now given in Practice Direction 10AA on Deprivation of Liberty Applications, available: <https://courtofprotectionhandbook.files.wordpress.com/2014/07/practice-direction-10aa-consolidated-final.pdf>

<sup>33</sup> Peter Bartlett reports that the Court of Protection had 47 such applications in the quarter before *Cheshire West* was decided, 148 in the quarter immediately following the case (April to June 2014) and 163 between July and September 2014. P Bartlett, 'Reforming the deprivation of liberty safeguards (DoLS): What is it that we want?', (2014) 20 *Web Journal of Current Legal Issue*, 3, <http://webjcli.org/article/view/355>.

In unpublished research, data obtained by Andy McNicoll of *Community Care* ([www.communitycare.co.uk](http://www.communitycare.co.uk)) under the Freedom of Information Act from 99 English local authorities showed that only 48 *Salford* applications were made in 2012-13, 49 in 2013-14 and 227 in the first half of 2014-15. Of fifteen Welsh local authorities providing data to



The House of Lords Select Committee on the MCA also heard evidence that ‘many considered the Court to be remote, inaccessible and not well understood’ (paragraph 203), and expressed concern about delays, which it attributed to increased volume and cuts in staffing. In *A Local Authority v ED & Ors*<sup>34</sup> and *A & B (Court of Protection: Delay and Costs)*<sup>35</sup>, Wood J and Jackson J respectively expressed concern about cost and delay in CoP welfare cases. They called for more stringent case management to keep costs and delay to a minimum.

In light of these concerns, our study sought information on how often local authorities were involved in CoP welfare litigation during 2013-14. We were interested in the nature of the cases (in broad terms), how long these cases lasted for and how much they cost local authorities.

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McNicoll, only two *Salford* applications were made in 2012-13, one in 2013-14 and one in the first six months after *Cheshire West*.

<sup>34</sup> [2013] EWHC 3069 (CoP)

<sup>35</sup> [2014] EWCOP 48

# METHODOLOGY

Local authorities in England and Wales, and LHBs in 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,
- who the applicant had been for each of those cases,
- what sections of the MCA were used in making the application,
- whether the case involved any deprivation of liberty authorised under Schedule A1 (the DoLS) or by the CoP,
- whether or not the case was ongoing and how long it had lasted to date
- an estimate of the overall cost to the local authority of the case.

A copy of this letter is included in Appendix A.

We initially planned to include NHS bodies in England as well, but the NHS in England is so complex that we would have needed to contact over 300 organisations, which would have made the study unfeasible. We included the LHBs in Wales, however, as these are the supervisory bodies for the DoLS in hospital settings<sup>36</sup> and there are only seven of them. In the future we may attempt to repeat this study in relation to NHS bodies in England.

## Requests

Requests for information were sent out in June 2014 by three of the authors – AM, AW and KM – who were participating in an undergraduate research placement program at Cardiff University.<sup>37</sup> The students followed up any requests that remained unanswered after FOIA timescales for responding had expired<sup>38</sup> and – in some cases – sought reviews of decisions by public authorities not to disclose the information if it was felt that these might not be in accordance with the FOIA. Three local authorities<sup>39</sup> were accidentally overlooked and were not sent requests for information.

## Response rate

By the end of September 2014, 82% of public authorities had provided information about their involvement in welfare cases, 9% of public authorities had applied exemptions under the FOIA and refused to disclose the information and we did not obtain any response from the remaining 9% despite follow up emails.<sup>40</sup>

Eleven public authorities refused to disclose any information on grounds that the cost of complying with the request for information would exceed the ‘appropriate limit’.<sup>41</sup> Three responded that

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<sup>36</sup> In England, Primary Care Trusts (PCTs) used to be the supervisory body for hospitals, but when PCTs were abolished this function was transferred to local authorities (s133-136 of Schedule 5 of the Health and Social Care Act 2012).

<sup>37</sup> The Cardiff Undergraduate Research Opportunities Program: <http://learning.cf.ac.uk/curop/>

<sup>38</sup> In general, public authorities must supply the information – or their reasons for not disclosing the information – within twenty working days of receipt of the request for information (s10(1) FOIA).

<sup>39</sup> Two in England, and one in Wales.

<sup>40</sup> Some did consequently supply data after this date, but this was too late for our data analysis and was well in excess of the timescales of the FOIA.

<sup>41</sup> Under s12 FOIA public authorities are not obliged to comply with a request for information if complying with the request would exceed the ‘appropriate limit’ of £450 (for local authorities: see The Freedom of Information and Data

they did not hold the data requested.<sup>42</sup> Six local authorities refused to disclose the data on the basis that it was 'personal information'.<sup>43</sup>

Where local authorities applied the 'personal data' exemption under the FOIA, they often relied upon an outdated rule of thumb that supplying statistical data pertaining to five or fewer cases is automatically 'personal data'. The Office for National Statistics has issued guidance replacing this rule of thumb<sup>44</sup>; the new guidance requires an analysis of the likelihood that individuals could be identified from this data. The test applied by the Information Commissioner's Office for personal data is whether or not 'a member of the general public can, on the balance of probabilities, identify individuals by cross-referencing the anonymised data with other information that was available to them'.<sup>45</sup> We sent this guidance to public authorities who applied 'personal data' exemptions and asked them to review their decision in light of this; three decided to supply some or all of the data requested on this basis. We recognise, however, that in some cases it would be possible to identify individuals from the data supplied as there are details about these cases in the public domain.

### Analysis

Responses were entered into Microsoft Excel spreadsheets, and checked by the researchers. Because in many cases the data was positively skewed by a small number of very high value cases we have reported the median (mdn) as well as the mean (M).<sup>46</sup>

Using SPSS,<sup>47</sup> we used confirmatory statistics to examine whether there were statistically significant relationships between different variables. In the main we used non-parametric statistical tests, as often our data did not meet the assumptions of parametric statistical methods.<sup>48</sup>

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Protection (Appropriate Limit and Fees) Regulations 2004), which is approximately 2.5 days of work by the public authority.

<sup>42</sup> It is unclear precisely what was meant by this.

<sup>43</sup> Section 40 FOIA exempts local authorities from disclosing information if it is 'personal data'.

<sup>44</sup> Office for National Statistics, *Review of the Dissemination of Health Statistics: Confidentiality Guidance* (London 2006) see pages 1 and 15.

<sup>45</sup> Information Commissioner's Office (2011) 'FOI Policy Knowledge Base: FOI s40 Anonymised Personal Data', [online], available: <http://ico.org.uk/foikb/PolicyLines/FOIPolicyPersonaldata-anonymisedstatistics.htm>

<sup>46</sup> The mean is calculated by adding up all the values in a series and dividing it by the number of values. The median is found by selecting the central value (or the halfway point between two central values) when all the values in a series are arranged in order. When a series of data is positively skewed by a number of very high value cases, the mean will appear larger than the median.

<sup>47</sup> A software package used for statistical analysis in the social sciences: IBM SPSS Statistics 20.

<sup>48</sup> All statistical tests are based on certain assumptions about the distribution of data. 'Parametric' methods are based on various assumptions, including that the data is normally distributed and not skewed. If these assumptions are not met, then the results of statistical tests may be misleading. However, for many tests statisticians have developed 'non-parametric' alternatives which do not rely upon these assumptions.

# FINDINGS

## FREQUENCY OF INVOLVEMENT IN COURT OF PROTECTION WELFARE LITIGATION

142 local authorities reported involvement in 468 cases<sup>49</sup> – a figure that is roughly comparable to the court statistics for 2013-14, but which is around 1/60<sup>th</sup> of the anticipated number of cases in 2014-15 resulting from the Supreme Court ruling in *P v Cheshire West and Chester Council*.<sup>50</sup> We hope to repeat this study next year, and anticipate a large increase in the overall number of cases.

Of the seven Local Health Boards (LHBs) in Wales, only one reported involvement in any CoP cases (in this case, two), and the others not at all. This raises question about how effectively LHBs are complying with guidance in *Nearby* to enable those subject to DoLS authorisations to seek a court review of the lawfulness of their detention, and compliance with other obligations to seek court authorisation for certain categories of serious medical treatment.<sup>51</sup>

**Table 1 Number of times individual local authorities were involved in welfare cases in the Court of Protection in 2013-14**

		All local authorities	Local authorities - England	Local authorities - Wales
Summary statistics	N <sup>52</sup>	142	126	16
	Highest	17	17	3
	Lowest	0	0	0
	Mean	3.3	3.6	0.8
	Median	2	3	1
	Standard Deviation	3.5	3.5	0.9
Number of times local authority has been involved in Court of Protection welfare cases	0	31 (22%)	24 (19%)	7 (44%)
	1	27 (19%)	21 (17%)	6 (38%)
	More than 5 times	28 (20%)	28 (22%)	0 (0%)
	More than 10 times	6 (4%)	6 (5%)	0 (0%)

<sup>49</sup> This figure is likely to slightly overestimate the overall number of cases for the 82% of local authorities that responded as in a small number of cases more than one local authority may be involved in a case – and thus it might be counted twice in our study. We believe that such cases are, however, rare.

<sup>50</sup> [2014] UKSC 19.

<sup>51</sup> These are detailed in paragraphs 8.18 – 8.24 of the MCA Code of Practice and CoP Practice Direction 9E; see also *NHS Trust & Ors v FG (Rev 1)* [2014] EWCOP 30.

<sup>52</sup> 'N' is the abbreviation used in statistics for the overall number of cases that data is derived from.

As the information in Table 1 (above) reveals, in England 81% of local authorities responding to our request for information had been involved in at least one CoP welfare case in 2013-14; the average number of cases for an English local authority was three but 24% had more than five and one had as many as 17 cases. The figures for Wales were lower; only 56% of local authorities had been involved in a CoP welfare case; on average each local authority had been involved in only one case and none had been involved in more than three cases.

#### Variations in numbers of Court of Protection welfare cases between different local authorities, and between England and Wales

There were significant variations in the number of CoP welfare cases between individual local authorities. Although there was a relationship between the size of the authority's local population and the number of cases it had been involved in<sup>53</sup>, population size only accounted for 24% of variation in local authorities' involvement in CoP cases<sup>54</sup>. Neither could lower levels of involvement in CoP welfare cases in Wales than in England be explained by differences in the size of local authority populations in the two jurisdictions.<sup>55</sup>

Statistics alone cannot explain these variations in patterns of court activity. They echo the significant variations in levels of applications for authorisation of deprivation of liberty among different supervisory bodies<sup>56</sup> and regional disparities in referrals to IMCAs<sup>57</sup>. A recent national review of the DoLS in Wales found poor knowledge of the MCA and the DoLS<sup>58</sup> but since similar findings are reported by the Care Quality Commission (CQC) in England it is difficult to say with any certainty that implementation is worse in Wales. In the national review of the DoLS in Wales the inspectorates 'tracked' 84 individual DoLS cases and none of these resulted in an application to the Court of Protection. In contrast in England the CQC reported finding roughly one application to the CoP for every 40 DoLS cases.<sup>59</sup> Thus our findings do seem to reflect the findings of others which

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<sup>53</sup>  $r_p = .49$ ,  $p$  (one-tailed)  $< 0.001$ , 95% CI (.29 - .65); because the data were skewed by some very large local authorities and 'super users' of the Court of Protection we also confirmed this finding using a non-parametric measure of correlation:  $r_s = .52$ ,  $p$  (one-tailed)  $< 0.001$ , 95% CI (.38 - .64). Population data taken from: Office for National Statistics, *2011 Census, Population Estimates by five-year age bands, and Household Estimates, for Local Authorities in the United Kingdom*, (London 2014). Table P01UK 2011 Census: Usual resident population by five-year age group, local authorities in the United Kingdom.

<sup>54</sup> This figure is known as  $R^2$ , it is calculated by squaring the correlation coefficient

<sup>55</sup> Local authorities providing us with data were larger and more variable in size in England ( $M=366,868$ ,  $sd=273,879$ ) than in Wales ( $M=145,315$ ,  $sd=76,455$ ). We used a statistical method called an analysis of covariance to factor out the size of the local authority population, and found that local authorities in England reported being involved in significantly more welfare cases in 2013-14 than those in Wales ( $F(2,139)=19.06$ ,  $p<0.001$ ). However, these data did not satisfy all assumptions of parametric tests, as they were skewed and the variance in the size of local authority was markedly larger in England than in Wales.

<sup>56</sup> Care Quality Commission, *Monitoring the use of the Mental Capacity Act Deprivation of Liberty Safeguards in 2013-14*, London 2015.

<sup>57</sup> Department of Health, *The Sixth Year of the Independent Mental Capacity Advocacy (IMCA) Service: 2012/2013* London 2014

<sup>58</sup> Care and Social Services Inspectorate Wales and Health Inspectorate Wales, *A National Review of the use of Deprivation of Liberty Safeguards (DoLS) in Wales*, Merthyr Tydfil 2014

<sup>59</sup> Care Quality Commission, *Monitoring the use of the Mental Capacity Act Deprivation of Liberty Safeguards in 2012/13*, London 2014, p31

suggests that fewer people are able to challenge a DoLS authorisation in court in Wales than in England.

On the one hand, low levels of court cases might be thought to reflect low levels of disputes and the success of alternative dispute resolution mechanisms. However, they might also reflect low levels of compliance with legal obligations to seek authorisation for detention in settings outside of the DoLS, and to refer disputes to court in line with the guidance in *Neary*. This may be a result of the aforementioned lack of clarity over exactly when public bodies should apply to the CoP. These variations might also reflect local difficulties in accessing justice for those subject to the MCA and their families, for example a lack of specialist lawyers in the locality or low levels of IMCA referrals.

Further research is required to explore these variations; we recommend that those responsible for monitoring the implementation of the MCA and the DoLS in England and Wales examine how far local authorities and healthcare providers are complying with their legal obligations to enlist the authority of the CoP where appropriate.

### THE NATURE OF THE APPLICATIONS MADE

Almost three quarters of applicants sought an order under s16 MCA; about 10% sought only a declaration under s15 MCA, and 17% of applications were under s21A MCA. Many applications involved more than one section of the MCA. Table 2 provides more detail on the different combinations found.

**Table 2 Sections of the Mental Capacity Act 2005 used by applicants to the Court of Protection in welfare cases involving local authorities in 2013-14**

	s15	s16	s21A	s48	Total <sup>60</sup>
s15	(only s15) 43	168	7	0	213 (51%)
s16	-	(only s16) 133	11	0	307 (74%)
s21A	-	-	(only s21A) 58	0	71 (17%)
S48 MCA	-	-	-	(only s48) 6	6 (1%)

### Applications about a person who was deprived of their liberty

Overall, 62% of 396 cases which reported sufficient detail involved a person who was deprived of their liberty. 35% of all cases involved a person who was subject to a DoLS authorization issued by a supervisory body and in 42% of all cases the CoP had issued an order authorizing a deprivation of liberty.

In 15% of all cases a person was subject to both a DoLS authorization and an order of the CoP. These are likely to be cases where the court ‘held the ring’ whilst it determined the outcome of an application relating to a DoLS authorization, following guidance in *Re HA*<sup>61</sup>. There are likely to be

<sup>60</sup> NB – In five cases, an application was made under s15, s16 and s21A, so some cases are counted twice in the columns of this row.

<sup>61</sup> [2012] EWHC 1068 (COP)

far fewer of these cases next year as a result of more recent guidance in *Re UF*<sup>62</sup>, which recommended that DoLS authorisations remain in force so that the relevant person's entitlement to legal aid remains intact.<sup>63</sup>

In 28% of all cases (109 in total) the CoP had issued an order authorizing a deprivation of liberty but the person was not subject to the DoLS. We believe these are likely to be cases like *Salford* where a person is deprived of their liberty in a setting such as supported living which falls outside the scope of the DoLS, and which must be authorized by the CoP. These are the types of cases that are predicted to increase exponentially next year as a result of the ruling in *Cheshire West*. They do not necessarily represent disputes about any deprivation of liberty (although they may), but are likely to be long running cases requiring an annual review of any deprivation of liberty.

Because our dataset is incomplete, it is not possible to calculate a rate of 'appeals' under the DoLS. However, we note that despite 82% of local authorities providing us with information about cases they had been involved in, we only found evidence of 137 instances of cases involving DoLS authorisations, of which only four were from Wales<sup>64</sup>. This figure is comparable to that found in a survey by the CQC during 2012-13.<sup>65</sup> In England, 5,244 individuals were subject to a DoLS authorization in 2013-14.<sup>66</sup> Prior to the Supreme Court's ruling in *Cheshire West* in March 2014, the presence of objections, either by the individual or their family, was a key factor in determining whether or not a person was deprived of their liberty.<sup>67</sup> Where a person or their family objects and this dispute cannot be resolved in other ways, it should be anticipated that either the supervisory body would refer any dispute to the CoP in accordance with the guidance in *Neary*, or that the person themselves would be given the requisite assistance to apply for the lawfulness of their detention to be speedily reviewed by a court, in accordance with Article 5(4) ECHR.<sup>68</sup> Whilst we cannot conclude from our data alone that obligations to ensure that cases are referred to court when appropriate are not being complied with, this seems a reasonable interpretation of the very low numbers of cases involving the DoLS found in our study. If our interpretation is correct, this suggests that local authorities may have been widely failing to respect the Article 5 and 8 rights of those subject to the DoLS in 2013-14.

## THE IDENTITY OF THE APPLICANTS

In 74% of 420 cases involving local authorities, the local authority themselves made the application to the CoP. In contrast, very few applications were made by the relevant person themselves (6%),

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<sup>62</sup> [2013] EWHC 4289 (COP)

<sup>63</sup> This is because a person who is deprived of their liberty or their RPR is only entitled to non-means tested legal aid if they are subject to a deprivation of liberty safeguards authorisation and the application is made under s21A MCA. See: The Community Legal Service (Financial) Regulations 2000, rule 3(1)(ea) as amended; Replaced by rule 5 The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 SI 480.

<sup>64</sup> A further case involving the DoLS came from a LHB in Wales.

<sup>65</sup> The CQC surveyed supervisory bodies in England in 2012-13 and found evidence of 125 applications to the Court of Protection in respect of DoLS authorisations. CQC (2014), n56 above, p31

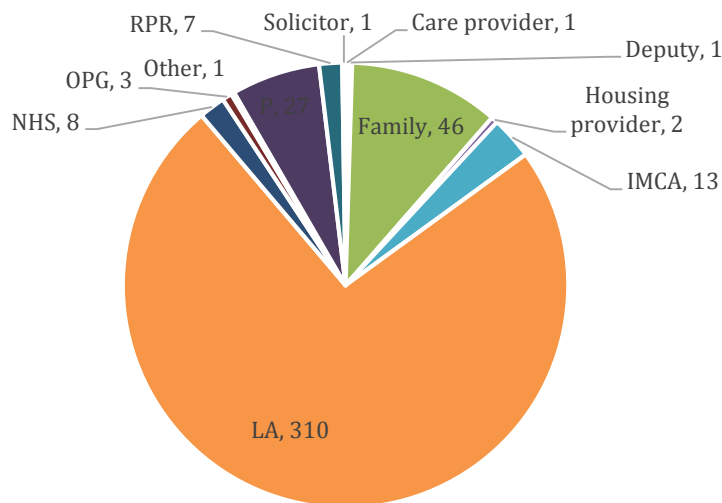
<sup>66</sup> Health and Social Care Information Centre, *Mental Capacity Act 2005, Deprivation of Liberty Safeguards (England) Annual Report, 2013-14*, London 2014

<sup>67</sup> *P & Q v Surrey County Council* [2011] EWCA Civ 190, §25-6; *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257, §58

<sup>68</sup> *MH v UK* (App no 11577/06) [2013] ECHR 1008

their family (11%) or IMCAs (3%). We also found a small number of welfare cases involving local authorities where the applicant was an NHS Trust (2%) or the Office of the Public Guardian (<1%). These findings are depicted in Figure 1, below.

Figure 1 Applicants to the CoP in welfare cases involving local authorities in England and Wales, 2013-14



There are a number of possible explanations for the finding that local authorities are usually the applicant in cases to which they are a party. Since the ruling in *Neary* the onus is on local authorities to ensure that disputes are referred to the CoP. Local authorities are more likely to know about the existence of the CoP than the relevant person or their family, and have the resources and expertise to make an application. Applications to the CoP by local authorities could be viewed in a number of ways. It might, on the one hand, be interpreted as local authorities seeking to exercise more coercive powers over incapacitated adults. On the other hand, it might be regarded in a more positive light, as local authorities inviting independent scrutiny of actions proposed under the MCA and providing the relevant person and their family with greater opportunities to challenge their decisions.

We came across only one application from a care provider. We suggest that local authorities should be extremely cautious about assuming that providers of care, rather than commissioning authorities, will make any applications to the CoP following the ruling in *Cheshire West*.

#### Applicant in cases where the relevant person is subject to the deprivation of liberty safeguards

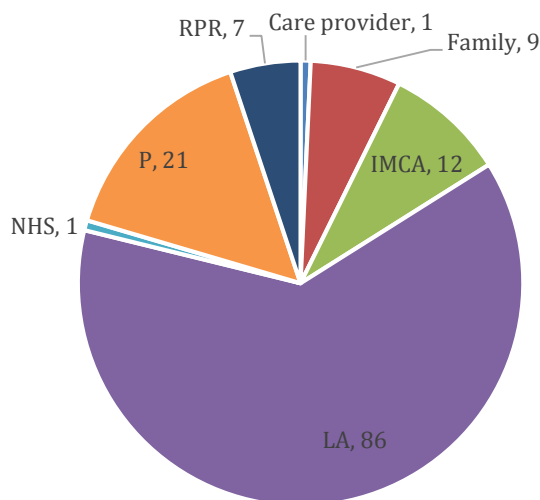
Although overall the relevant person was the applicant in only 6% of cases, this percentage was much higher in cases where they were subject to a DoLS authorization (15% of those cases) in contrast with where they were not (2% of those cases). Differences in the identity of the applicant when the relevant person is subject to a DoLS authorisation are depicted in Figure 2 and Figure 3, below.

A number of factors could make it more likely that a person who is subject to the DoLS would apply to the CoP. One key factor is that their objections to a feature of their care would make it both more likely that they would apply to the CoP and that they would be subject to the DoLS. The DoLS also potentially help a person circumvent a number of barriers to accessing justice, namely

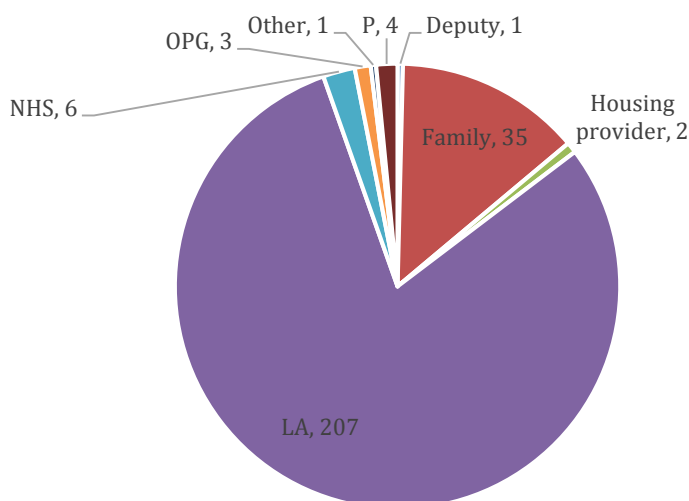


awareness of the right to apply to the CoP<sup>69</sup>, support from representatives or IMCAs in making an application, and – crucially – access to non-means tested legal aid if they apply under s21A MCA.

**Figure 2 Identity of the applicant where P is subject to Schedule A1**



**Figure 3 Identity of the applicant where P is not subject to Schedule A1**



Of the 13 applications we found that were made by IMCAs, 12 involved a case where the relevant person was subject to DoLS.<sup>70</sup> IMCAs may also have been involved in making applications by acting as a litigation friend for the relevant person, or supporting families in making an application or encouraging local authorities to do so. However, it does appear that IMCAs may be more willing to make an application to the CoP where a person is subject to the DoLS than where they are not. This could be because it is only IMCAs who are supporting a person under s39D MCA who have an explicit statutory duty to help a person in challenging decisions if they or their representative

<sup>69</sup> s57-8 of Schedule A1

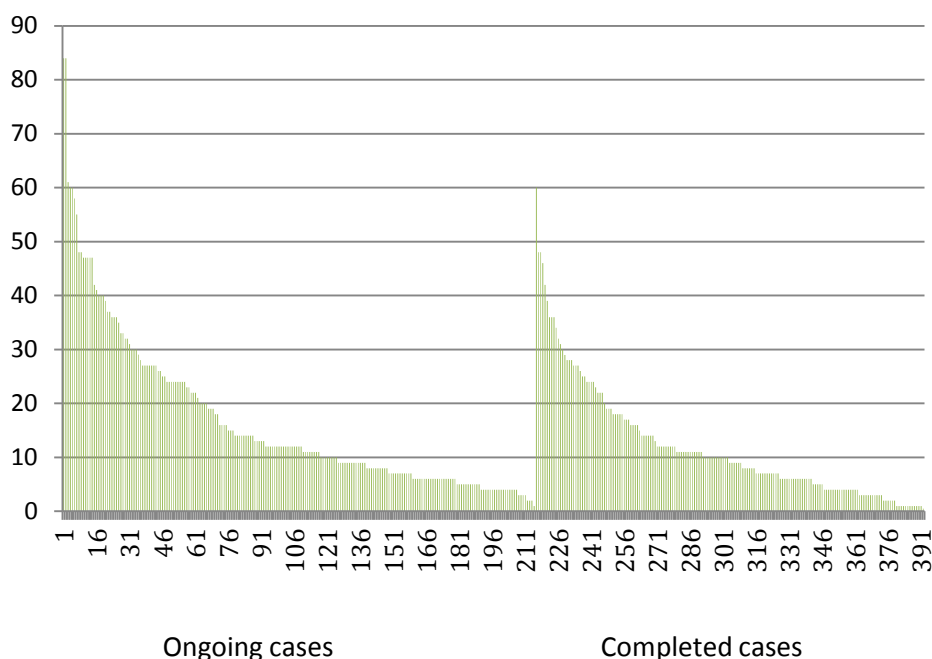
<sup>70</sup> The thirteenth case did not explicitly state that the person was subject to a DoLS authorisation, although it did state that they were deprived of their liberty.

wishes to do so.<sup>71</sup> Or it may be because IMCAs are less willing to initiate litigation where the person they are representing may not be entitled to legal aid, and will have to fund their representation through their own resources.

### THE DURATION OF CASES

We found very wide variation in the duration of cases – from one month to seven years - as Figure 4, below, shows.

**Figure 4 Duration (months) of ongoing and completed welfare cases in the Court of Protection involving local authorities, 2013 - 14**



The median length of an ongoing case was 12 months, and for completed cases was nine months (see Table 1, below). The counterintuitive finding that completed cases lasted less time than ongoing cases is most likely to be explained by a number of long running cases which, following *Salford*, requiring an annual review of a deprivation of liberty authorization issued by the CoP. The longest running cases were cases involving a deprivation of liberty but no DoLS authorization, although we did find a small number of cases involving the DoLS that had lasted several years, suggesting very long running disputes. The median duration of a s21A application concerning a DoLS authorization was ten months.

<sup>71</sup> Section 39D(8) MCA states that: The advocate is, in particular, to take such steps as are practicable to help P or R–

- (a) to exercise the right to apply to court, if it appears to the advocate that P or R wishes to exercise that right, or
- (b) to exercise the right of review, if it appears to the advocate that P or R wishes to exercise that right.

**Table 3 Duration (months) of ongoing and completed welfare cases in the Court of Protection involving local authorities, 2013 - 14**

	Ongoing cases (months)	Complete cases (months)
N	215	177
Shortest	1	1
Longest	84	60
Mean	17	12
Median	12	9
Standard deviation	15	11

These findings do seem to support concerns expressed elsewhere that CoP welfare cases can be very protracted. In *A & B (Court of Protection: Delay and Costs)*, Jackson J expressed alarm about cases lasting five years and eighteen months. We found only five cases lasting five years or more, however, 18% of cases in our sample had lasted 18 months or longer and many were still ongoing.

The reasons for the lengthy duration of CoP litigation are unclear. Those requiring annual authorisation of a deprivation of liberty that cannot be authorized using the DoLS will never truly be 'over' and may not signify long running disputes. Munby LJ (as he then was) commented that DoLS cases can 'have all the complexity of a heavy child care case but, in addition, the extra complexity of disputes about capacity and, sometimes, also about deprivation of liberty'.<sup>72</sup> However, we observe that it takes the First Tier Tribunal (Mental Health) between one and thirteen weeks on average to dispose of an application under the Mental Health Act 1983,<sup>73</sup> and that under the revised Public Law Outline, care proceedings under Part 4 of the Children Act 1989 should take no longer than 26 weeks.<sup>74</sup>

One interesting finding – which we are unable to explain from our statistics alone – is that there was a significant relationship between the identity of the applicant and the duration of the proceedings<sup>75</sup>; see Figure 5, below.

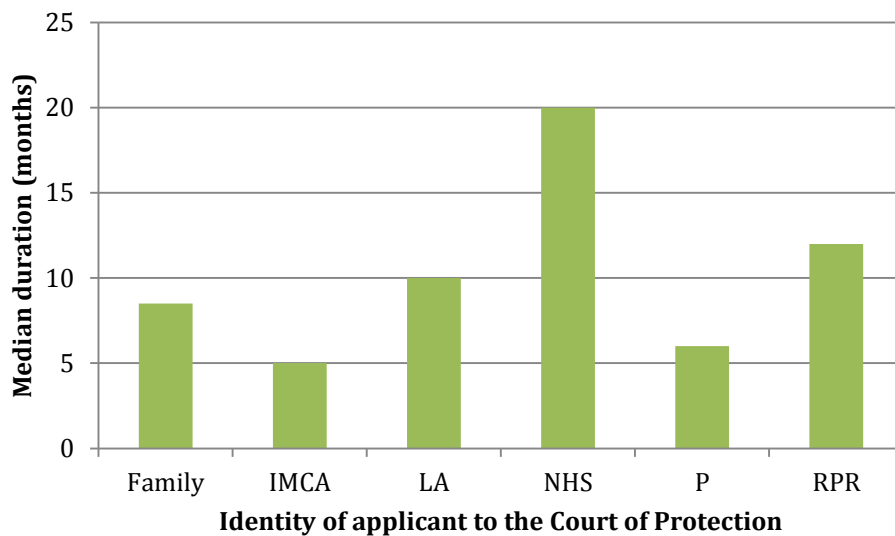
<sup>72</sup> Lord Justice Munby, 'Dignity, Happiness and Human Rights', (2011) 1(1) *Elder Law Journal* p32-38

<sup>73</sup> Ministry of Justice, *Tribunals Statistics Quarterly: 1 January to 31 March 2013*, London 2014

<sup>74</sup> s32 Children Act 1989, as amended by the Children and Families Act 2014

<sup>75</sup> There is a significant relationship between the identity of the applicant and the duration of the proceedings (Using the Kruskal-Wallis:  $H=14.7$ ,  $p=0.012$ ).

Figure 5 Median duration of completed welfare cases in the Court of Protection involving local authorities, by applicant, 2013-14



In particular, cases where the local authority was the applicant lasted significantly longer than cases where an IMCA was the applicant (mdn=11 months vs mdn=4 months).<sup>76</sup> Cases brought by the local authority lasted longer on average than those brought by the relevant person (mdn=11 months v mdn=8 months), a difference which approached statistical significance.<sup>77</sup> We found no other statistically significant contrasts.<sup>78</sup> As Figure 5 suggests, cases where NHS bodies were the applicant appeared to last much longer than average; we are unable to confirm whether this finding is significant because the number of cases in our study where NHS organisations made the initial application was too low (N=8).

### THE COSTS TO THE LOCAL AUTHORITY OF COURT OF PROTECTION CASES

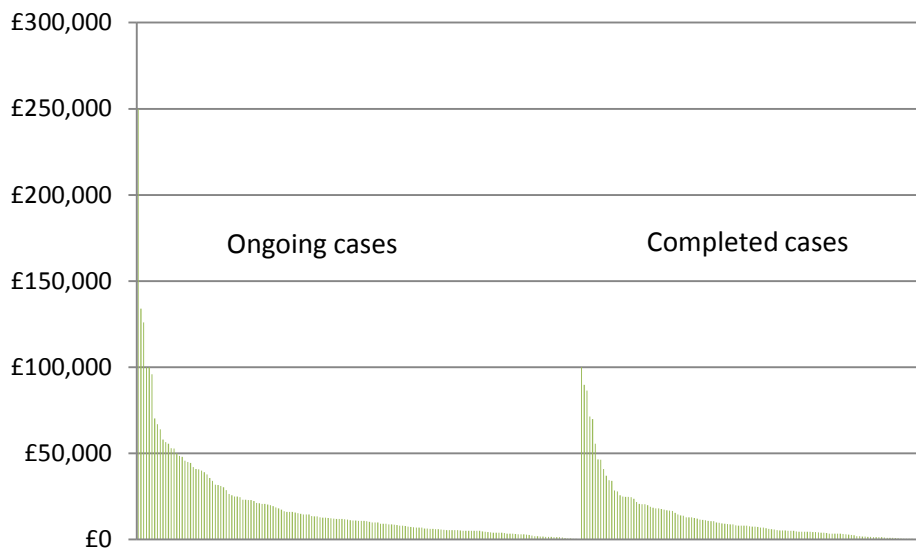
Local authorities provided us with an estimate of how much individual CoP cases had cost them in 293 cases. These data are likely to underestimate their overall costs because the majority of local authorities did not include the cost of social care staff time, and several local authorities did not include the cost of in-house legal staff. Figure 6, below, plots the cost of individual cases reported in our study in order of size.

<sup>76</sup>  $U=1017.5, z=-2.868, p=0.004$

<sup>77</sup>  $U=3013, z=-1.8, p=0.07$

<sup>78</sup> In particular, there was no statistically significant difference in the duration of cases brought by local authorities and the NHS, and local authorities and the family of the relevant person.

Figure 6 Estimated total cost to local authorities of individual welfare cases in the Court of Protection, 2013-14



Half of the cases in our sample cost authorities more than £8,881; 25% of cases cost authorities more than £20,000 and the highest estimated cost to an authority in our sample was £250,000 (for a case which had been running for four years).

Some local authorities provided a breakdown of their costs. In-house legal staff were the most expensive element, with a median cost of £8,150. Counsel fees are also a considerable cost, with a median cost of £3,198, and authorities' median contribution towards the costs of independent expert reports was £1,357. Table 4 gives more detail of cost estimates provided by local authorities.

Table 4 Estimated costs, and breakdown, of expenditure on individual welfare cases in the Court of Protection by local authorities in England and Wales, 2013-14

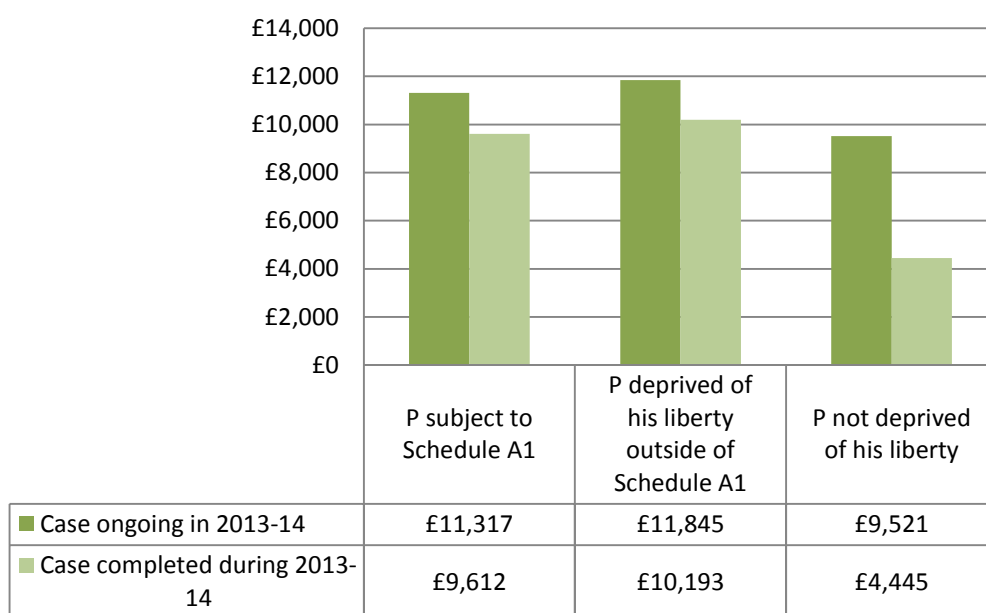
		Estimated total cost	Court fees	Counsel fees	Independent report	Legal department	'Other' costs <sup>79</sup>
All	N	293	60	101	50	71	25
	Highest value	£250,000	£2,727	£63,028	£22,385	£75,570	£11,203
	Lowest value	£137	£400	£125	£50	£140	£9
	Mean	£16,983	£522	£5,347	£2,107	£12,888	£1,161
	Median	£8,881	£400	£3,198	£1,357	£8,150	£179
	SD	£24,872	£340	£7,872	£3,155	£14,406	£2,399
Ongoing	N	161	36	56	32	39	14
	Highest value	£250,000	£2,727	£63,028	£22,385	£75,570	£11,203
	Lowest value	£140	£400	£125	£461	£140	£9
	Mean	£20,170	£518	£6,206	£2,584	£16,615	£1,469
	Median	£10,910	£400	£3,050	£1,736	£11,578	£70
	SD	£29,202	£406	£9,656	£3,824	£17,770	£3,030
Completed	N	125	24	45	18	32	11
	Highest value	£100,000	£900	£24,632	£2,882	£23,597	£4,079
	Lowest value	£137	£400	£192	£50	£270	£100
	Mean	£13,485	£528	£4,279	£1,259	£8,346	£769
	Median	£7,510	£400	£3,200	£991	£6,430	£221
	SD	£17,993	£213	£4,710	£921	£6,540	£1,255

<sup>79</sup> These included: travel; transcripts; teleconference; overnight accommodation; external solicitor fees; process server etc.

### Costs for different types of applications

Cases that involved deprivation of liberty were more expensive than cases not involving deprivation of liberty. Local authorities' estimated overall costs were significantly lower in welfare cases where the relevant person was not deprived of his liberty by either the CoP<sup>80</sup> or Schedule A1<sup>81</sup> (median=£7000, N=103) than in cases where the relevant person was deprived of their liberty (median=£10,907, N=183). However, we found no significant difference between the cost of cases involving a deprivation of liberty which involved a DoLS authorization from those which involved an authorisation by the Court of Protection but no DoLS authorisation.

**Figure 7 Estimated overall median cost to local authorities in England and Wales of welfare proceedings in the Court of Protection, 2013-14 (N=106)**



<sup>80</sup>  $U=3067$ ,  $z=-2.35$ ,  $p=0.019$  (contrasting cases where P was deprived of his liberty by the Court of Protection and not under Schedule A1, with those where there was no authorised deprivation of liberty).

<sup>81</sup>  $U=4388$ ,  $z=-2.132$ ,  $p=0.033$  (contrasting cases where P was deprived of his liberty by an authorisation issued under Schedule A1 with those where there was no authorised deprivation of liberty).

## DISCUSSION

Our study reveals that most local authorities had experience of at least one welfare case in the CoP during 2013-14. When one considers that local authorities were only very rarely involved in applications to the High Court under the declaratory jurisdiction, this suggests that the MCA and the DoLS have significantly increased the potential for local authorities to be involved in litigation on matters pertaining to mental capacity and best interests.

We found significant variations in local authorities' involvement in CoP litigation, and we are especially struck by significantly lower rates of use of the CoP's welfare jurisdiction in Wales than in England. We recommend that those responsible for monitoring the implementation of the MCA and the DoLS explore possible reasons for this variation.

Our study confirms widely expressed concerns that welfare litigation in the CoP can be very long running. We are unable to infer from statistics alone the reasons for this. A significant proportion of the welfare matters which local authorities may refer to the CoP are necessarily open-ended if they require an annual review of a deprivation of liberty. There are likely to be many more of these cases following *Cheshire West*. However, we also found evidence that even cases where a deprivation of liberty had been authorized under the DoLS could last a very long time, and the reasons for this are unclear. It may be that cases in the CoP are simply very complex, or they may return to court over a long duration as a person's circumstances evolve. However, we share Jackson J's concerns, expressed in *A & B (Court of Protection: Delay and Costs)*, that these cases may place the relevant person and their family under protracted stress and 'human misery', as well as diverting the resources of local authority legal and social care staff.

Our findings also confirm that the cost of CoP welfare cases can be very high, which is of real concern. The costs of bringing cases to the CoP may have a chilling effect on local authorities' compliance with the rulings in *Neary* and *Cheshire West* to refer to court disputes and cases involving a deprivation of liberty which cannot be authorized under the DoLS.

It is hoped that the new streamlined procedure laid down in the *Re X* judgments will reduce the costs of non-contentious deprivation of liberty applications. However, the *Re X* procedure may be amended if a forthcoming appeal is successful. The *Re X* appeal raises extremely difficult questions about how the CoP can balance the need to manage applications efficiently whilst complying with the overriding objective to properly consider the interests and position of the relevant person and increasing human rights obligations in relation to the participation of the relevant person in court proceedings concerning them.<sup>82</sup>

Concerns about the accessibility and efficiency of the CoP have recently revived arguments that a tribunal system would be more appropriate for hearing health and welfare cases.<sup>83</sup> Although the

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<sup>82</sup> L Series, *The participation of the relevant person in proceedings in the Court of Protection: A briefing paper on international human rights requirements*, School of Law and Politics, Cardiff University 2014. Available: <http://sites.cardiff.ac.uk/wccop/files/2014/09/Briefing-on-Personal-Participation-in-the-CoP-v1-2.pdf>

<sup>83</sup> The Law Commission's original proposals, which formed the basis of the MCA, discussed whether a court or a tribunal model would be preferable. Respondents to the consultation wanted the new jurisdiction to be 'locally based and easily accessible', and for this reason many favoured a tribunal model – although few suggested that the Mental Health Review Tribunal was suitable. The Law Commission were concerned that a tribunal might not be able to deal with the range of issues the new jurisdiction would need to respond to, that it would not have the necessary standing to deal with issues like life sustaining medical treatment decisions, and it was not clear what specialism the non-legal members



House of Lords Committee on the MCA rejected this argument<sup>84</sup>, Lady Hale recently voiced her support for a tribunal model for DoLS cases.<sup>85</sup> There are many different factors to consider in a shift to a tribunal model, in particular whether a tribunal could cope with the range of matters that may be raised in a CoP welfare application, which would require far broader powers than its obvious comparator – the mental health tribunals. However, given the cost and possible delay in CoP welfare proceedings, we recognise the attraction of considering radical changes to the court’s practice and procedure. It will be interesting to see how these matters are addressed in the current review of the Court of Protection Rules 2007.

We hope to repeat this study again next year in order to look at the impact of *Cheshire West* and *Re X*. We also hope to use the same method to explore the involvement of NHS bodies in CoP proceedings, although this is a far more challenging undertaking given the size and complexity of the NHS. Our findings suggest that unless the CoP and local authorities radically change the conduct of welfare cases, the ruling in *Cheshire West* could have devastating consequences for their resources. We emphasise the urgency of reforms to the DoLS to provide an administrative procedure which can comply with the requirements of Article 5(1) without the need for a court application. Given that our study also suggests that people who are subject to the DoLS, and their families, may have great difficulty challenging decisions made by supervisory bodies in court in accordance with their rights under Articles 5 and 8 of the ECHR, we hope that the Law Commission’s work will also examine the accessibility of the court for these groups.

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should have. They recommended a court, which could incorporate the expertise of the ‘old’ Court of Protection (Law Commission, *Mentally Incapacitated Adults*, Law Com No 231, London 1995), paragraphs 10.3-10.8). Later on, the government would widespread reject calls for a tribunal to adjudicate on issues connected with the DoLS, on the basis that the CoP should hear these cases since it was the same law (Department of Health, *Protecting the Vulnerable: the “Bournewood” Consultation: Summary of Responses*, London 2006, paragraphs 31-36).

<sup>84</sup> House of Lords Committee on the MCA, n21 above, paragraphs 220-223.

<sup>85</sup> (Lady Hale, *The Other Side of the Table?*, paper presented at Mental Health Tribunal Members’ Association 2014, at the Royal College of Psychiatrists on 17 October 2014. Available: <https://www.supremecourt.uk/docs/speech-141017.pdf>

## APPENDIX A: REQUEST FOR INFORMATION LETTER

Dear 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. We want to gather evidence on how often local authorities use the Court of Protection and how much it costs them. We hope to find out more about how the court's welfare jurisdiction impacts on their resources. If you would like to see where our research findings will ultimately be published, you can look on our project website: <http://sites.cardiff.ac.uk/wccop/>

I would like to know about welfare cases for the year **April 1<sup>st</sup> 2013 – March 31 2014**. 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<sup>86</sup>, and other welfare matters.

I have put together a list of questions, and 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 that year*. I have put this in table form at the bottom of this letter in case it is easier for you 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.

In the future, we hope to run some focus groups with local authority staff (including social care and legal staff) to gather *qualitative* information on welfare cases in the Court of Protection. If your local authority would like to be contacted about taking part, please do let us know.

Best wishes,

[Name of sender]

**Please give answers only for cases which were commenced or ongoing during 1<sup>st</sup> April 2013 - 31<sup>st</sup> March 2014 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.**

	Case 1	Case 2	Case 3	Case 4 (etc...)

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<sup>86</sup> Or 'hybrid' deputyship applications, but not property and affairs deputyship applications on their own.

1. 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)				
2. What section(s) of the Mental Capacity Act 2005 was used to make the application: s15 (seeking a declaration); s16 (seeking an order); s21A (review of a deprivation of liberty safeguards authorisation)?				
3. Did the case involve a deprivation of liberty authorised a) under Schedule A1; b) by the Court of Protection (or both for the same case) or c) no deprivation of liberty was involved. <sup>87</sup>				
4. Is the case ongoing? (yes/no)				
5. How long, in total, has the case lasted for to date? (to the nearest year/month)				
6. 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. expert reports, instructing counsel, staff time and travel, etc – then we would be very interested in this as it would provide useful data on the costs of Court of Protection litigation, but we recognise that this information would likely take us beyond the resource limits of the request)				

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<sup>87</sup> We are not gathering information on other kinds of detention, such as under the Mental Health Act 1983.