Transparency in the Court of Protection

Report on a Roundtable

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SUMMARY

Researchers at Cardiff University held a one day roundtable event on *Transparency in the Court of Protection* as part of a wider Nuffield Foundation funded project on welfare cases in the Court of Protection (CoP). The aim of the project is to gather high quality information to contribute to policy debates about transparency, efficiency and accessibility in the Court of Protection, and proposals for reform.

This report describes the discussions at a roundtable on the theme of *Transparency in the Court of Protection*. [1] It was held in September 2014 at the Nuffield Foundation headquarters, and was attended by participants from a range of backgrounds, including members of the judiciary, lawyers with experience of acting for litigants in CoP welfare cases, media lawyers, journalists and other professionals working in media, civil servants and researchers.

Proceedings in the Court of Protection involve a delicate balance between transparency and open justice, on the one hand, and the preservation of the right to respect for privacy for the intimate details of the life of the person who is alleged to lack capacity. All participants expressed support for the principle of 'open justice'. Media reporting on CoP cases, and the publication of judgments, were said to be important for the following reasons:

- To enhance public understanding of the CoP's work;
- To protect against miscarriages of justice;
- To promote public confidence in the court;
- 'Open' and 'accessible' judgments were said to be important for access to justice for litigants in person who might not have access to law reports or legal advice.

It was also suggested that media reporting could include facts and details which were not apparent in a published judgment but which might aid public understanding of a case, whilst published judgments were important as a corrective against poor or inaccurate journalism.

Whilst all participants broadly supported the principle of 'transparency', there was some disagreement about what this entailed in practice. Some participants highlighted the limited evidence base for claims that transparency protected against miscarriages of justice. There was concern about the potential harm to individuals about facts from their private lives being in the public domain, including the distress which could arise from reading published reports about one's own case – even if this did not result in further harms. Lawyers with experience of CoP litigation warned that even with 'watertight' reporting restrictions, anonymity could not always be guaranteed, commenting that although transparency was important 'there is a price to be paid'.

There was unanimous agreement that there were some serious shortcomings with current arrangements for media access and reporting on CoP cases. In particular, representatives of the media argued that the need to apply formally to attend a hearing was costly, and could have a chilling effect on reporting CoP cases – this would have a disproportionate impact on smaller media organisations. All participants felt that arrangements in the CoP for media attendance at health and welfare cases should be brought in line with the family courts, where the media do not need to make an application to attend private hearings, but the court has powers to exclude them on specific grounds and restrict the publication of information.

A significant area of concern was how the media could, or should, be informed about important cases. There was disagreement among the participants about whether it is lawful for a party, or their lawyer, to alert the media to an important case; there is an urgent need for clarity on this issue. Some participants felt

[1] A second roundtable has subsequently been held on 20 March 2015, again at Nuffield Foundation headquarters on The Participation of the Relevant Person in Welfare Cases in the Court of Protection. The relevant person is the allegedly incapacitated person, who is the subject of the proceedings...

that the court listings should be more informative, so that the media could see which cases might be important in order to send a journalist to attend the hearing. There were also concerns about the procedures for notifying the media about reporting restrictions.

On the basis of discussions at the roundtable, we have identified the following issues for further exploration:

1. Consideration should be given to whether the court should adopt a rule change to permit the media to attend important welfare hearings, as well as serious medical treatment cases, without making an application first - mirroring the practice in the Family Court;
2. Consideration should be given to improving the system for informing the media of important CoP cases;
3. There is a need for greater legal clarity about when parties and legal representatives can lawfully inform the media about a case;
4. Practice Direction 13A may need to be updated to remind the parties of the need to notify the media of any order imposing reporting restrictions, in addition to notifying them of any application for reporting restrictions;
5. The court, or researchers, should explore ways to collect statistics on how effectively the transparency guidance on the publication of judgments is being complied with: how many judgments meeting the criteria for publication under the new guidance are, and are not, being published?
6. More research is needed on: the views of litigants about media reporting on CoP cases and the publication of judgments; the users of published judgments and their information and access needs; the effect of 'transparency' on the behaviour of the judiciary and other actors within the legal system.

ACKNOWLEDGEMENTS

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We would like to thank all participants who attended the roundtable, for an interesting, informative and lively discussion. Their comments on a draft of this report were helpful and thoughtful, and we are grateful for their time.

We would also like to thank the members of our advisory group for their support and helpful advice during our study. Our advisory group members are: Alex Ruck Keene, Amanda Milmore, Anna Lawson, Denzil Lush, Jill Peay, Mat Kinton, Neil Allen, Peter Bartlett, Rachel Griffiths, Richard Jones, Tony Holland, Victoria Butler-Cole, Wayne M Martin, Liz Eaton and Joan Goulbourn. 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 support in the empirical aspects of this study; we are very appreciative of the great efforts they have made to facilitate the necessary access to information held by the court to enable this research to take place.

Information about the law contained in this report is not legal advice, and should not be treated as such.

[2] www.nuffieldfoundation.org

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INTRODUCTION

This report describes discussions at a roundtable on transparency in the Court of Protection held on 19 September 2014, convened by researchers at the Centre for Health and Social Care Law at Cardiff University.[3] The roundtable is part of a research project on Welfare Cases in the Court of Protection[4] which is funded by the Nuffield Foundation[5]. The aim of the project is to gather high quality information to contribute to policy debates about transparency, efficiency and accessibility in the Court of Protection, and proposals for reform.

The study comprises several strands of research, including a systematic quantitative analysis of court files, and gathering qualitative data from a range of stakeholders using focus groups, surveys and interviews. The researchers have also used roundtables to explore specific policy issues with experts. This was the first roundtable. [6] It was attended by participants from a range of backgrounds, including members of the judiciary, lawyers with experience of acting for litigants in CoP welfare cases, media lawyers, journalists and other professionals working in media, civil servants and researchers.

The Court of Protection (CoP) is a new court established under the Mental Capacity Act 2005 (MCA). It was created to adjudicate on a range of matters relating to mental capacity, best interests and legal powers and instruments created by the MCA such as advance decisions refusing treatment[7] and Lasting Powers of Attorney[8]. Since 2009 the CoP has also had powers to make determinations regarding authorisations issued by supervisory bodies[9] under the deprivation of liberty safeguards (DoLS)[10]. A person who lacks capacity, or is believed to lack capacity, is referred to in the MCA as 'P'. The CoP has a range of powers, including jurisdiction to make declarations regarding P's mental capacity and best interests, to make orders relating to P's welfare or property and affairs, and to appoint a deputy to make decisions about welfare or property and affairs on P's behalf.

[3] http://www.law.cf.ac.uk/chscl/

[4] More information is available on the project website: http://sites.cardiff.ac.uk/wccop

[5] 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: www.nuffieldfoundation.org

[6] A second roundtable has subsequently been held on 20 March 2015, again at Nuffield Foundation headquarters on The Participation of the Relevant Person in Welfare Cases in the Court of Protection. The relevant person is the allegedly incapacitated person), who is the subject of the proceedings.

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

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

[9] In England, local authorities are supervisory bodies for the DoLS. In Wales, local authorities are supervisory bodies where any deprivation of liberty occurs in a care home, and Local Health Boards are the supervisory body for any deprivation of liberty in hospitals.

[10] See Schedule A1 of the MCA and the *Mental Capacity Act 2005: Deprivation of Liberty Safeguards Code of Practice*, (Lord Chancellor's Office, TSO, London 2008).

The vast majority of the court's work is non-contentious property and affairs matters. At present,[11] health and welfare matters form only a small proportion of applications and orders.[12] Yet, due to their socially and politically sensitive nature, and because they often involve disputes between professionals and families, health and welfare cases tend to have a much higher profile in academic and media commentaries on the court's work.

Since the court was established in 2007, the media have reported on a number of CoP cases, including cases on contraception,[13] abortion and sterilisation[14], sex[15], end of life decisions,[16] the DoLS[17], and contact with family members[18]. Various media commentators have voiced concerns about the court's work, including perceived 'secrecy' in the court's operations[19], people being 'jailed in secret',[20] the cost of proceedings[21], 'out of hours' rulings[22] as well as concern about the merits of welfare decisions taken by the court. Several senior judges have spoken publicly about the importance of transparency, including its former President, Sir

[11] This may change as a result of the Supreme Court's ruling in *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council* [2014] UKSC 19, which means that many more people may now be considered to be deprived of their liberty in a care setting. Because the DoLS only apply in care homes and hospitals, those who are deprived of their liberty in other settings will require a court authorisation to provide legal safeguards. It is estimated that this may mean as many as 31,000 more applications to the CoP relating to deprivation of liberty, more than doubling the current overall number of applications (see n12).

[12] 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. Please note, however, that these data may not accurately reflect all the welfare matters determined by the Court of Protection. Official statistics from the Office of the Official Solicitor reports a much higher number of CoP welfare cases: Office of the Official Solicitor and the Public Trustee (2013) *The Official Solicitor and the Public Trustee: Annual Report 1 April 2012 – 31 March 2013*, London.

[13] Beckford, M. (2010) 'Judge criticises council for trying to force contraception on woman', *The Telegraph,* 18 August 2010.

[14] Beckford, M. (2010) 'Secret Court of Protection can order abortions and sterilisations of mentally ill patients', *The Telegraph,* 28 May 2010.

[15] Beckford, M. (2011) 'Court bans man with low IQ from having sex', *The Telegraph,* 04 February 2011.

[16] Jones, N. (2011) 'When "right to die" really means "right to kill" ', *New Statesman,* 19 July 2011.

[17] McSmith, A. (2011) 'A father and son reunited. A secret court forced to open its doors', *The Independent,* 01 March 2011.

[18] Cassidy, S. (2012) 'Foster parents told to stay away from 'autistic' man', *The Independent,* 11 February 2012.

[19] There are many examples of this, see, for example, this editorial: 'Comment: Who stands to gain from secret justice?', (2013) *Daily Mail,* 03 December 2013.

[20] Doughty, S. and Dolan, A. (2013) 'Jailed in secret - for trying to rescue her father from care home where she believed he would die', *Daily Mail,* 23 April 2013.

[21] Dugan, E. (2013) 'Six years, three judges, £350,000 in costs to the taxpayer... and no change: Judge hits out at 'astonishing' cost of Court of Protection case', *The Independent,* 11 October 2013.

[22] 'Out-of-hours rulings are an affront to justice: Crucial decisions are being made on the basis of the testimony of only one' (2013) *The Independent,* 23 June 2013.

Nicholas Wall[23], the current President Sir James Munby[24], the Vice President, Mr Justice Charles[25], retired judge Sir Mark Hedley[26], and Lord Neuberger, the President of the Supreme Court[27]. Alastair Pitblado – the Official Solicitor - who acts as a 'litigation friend' of last resort for people who lack the capacity to litigate has also expressed support for more transparency in the court.[28] Examples of specific cases that have attracted media interest are described in Appendix 2, below.

'Transparency' is not necessarily synonymous with 'openness',[29] and concerns about transparency might be addressed by different means than complete openness. In the context of the CoP it has commonly been used to refer to whether or not proceedings are heard in public, whether the media may attend and report upon proceedings heard in private, whether judgments are published, and whether the parties to the case and witnesses giving evidence may be identified.

Transparency can also relate to wider concerns regarding the sharing of information about proceedings by the parties themselves – for example whether people may share information with their MP if they are seeking their assistance, their employer – if they need to take time off work for a case, with professionals such as counsellors if a person needs support about a case, and so on. 'Transparency' issues also arise for researchers, for example if they wish to carry out research on litigants' experience of the CoP, which therefore would require them to talk to litigants about proceedings heard in private or access court documents.

TRANSPARENCY: THE WIDER CONTEXT

Questions regarding the 'transparency' of the CoP arise in a wider context of growing public concern about transparency in the courts as a whole, indeed about government in general.[30] Public concern about the abuse of 'privacy' reached fever pitch in 2011 following the use of 'super injunctions' by the multinational corporation Trafigura[31] and by celebrities to restrict reporting not only of material that they sought to keep secret, but also of the fact an injunction had been sought to suppress its publication.[32] It is important to distinguish between the cases involving the secrecy of corporate activities and those involving individual privacy.[33] 'Transparency' concerns have also been raised about the use of closed material procedures under

[23] Hill, A. (2011) 'Court of protection should be open to public scrutiny, says leading judge', *The Guardian,* 06 November 2011.

[24] Doyle, J. (2013) 'Cloak of secrecy to be lifted from family court', *Daily Mail,* 23 July 2013.

[25] Dugan, E. (2013) 'Top judge calls for more Court of Protection cases to be made public', *The Independent,* 19 September 2013.

[26] Dugan, E. (2013) 'Sir Mark Hedley: The judge who opened the doors to Britain's most secretive court', *The Independent,* 16 June 2013.

[27] Doyle, J. (2013) ''I welcome increased openness unreservedly': Supreme Court judge's praise for Mail's open justice fight', *Daily Mail,* 03 October 2013.

[28] Gibb, F. (2011) ''It is right that the public understands what the court does, the why and the how'; Alastair Pitblado, the Official Solicitor, has had a low profile but his work is starting to hit the headlines', *The Times,* 03 March 2011.

[29] Birkinshaw, P.J. (2006) 'Freedom of Information and Openness: Fundamental Human Rights?' *Administrative Law Review* 58, 177-218

[30] Cabinet Office (2011) *Making Open Data Real: A Public Consultation.* London; Committee of Public Accounts (2012) *Implementing the transparency agenda*, (House of Commons, Tenth Report of Session 2012–13, London).

[31] To prohibit reporting of a toxic waste dumping scandal in the Côte d'Ivoire.

[32] Lord Neuberger (2011) *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*, London: Master of the Rolls.

[33] Bok, S. (1984) *Secrecy: On the Ethics of Concealment and Revelation* OUP

anti-terror legislation and, latterly, civil proceedings.[34] These concerns have led to a diverse array of media organisations – including the *Daily Mail*, the *Independent*, the *Guardian*, the *Telegraph* and the *Times* – leading campaigns on 'secret courts' and the use of privacy injunctions, whilst NGOs such as Liberty and JUSTICE have also campaigned on issues such as closed material procedures.

A desire for 'transparency' about the workings of the law has also prompted growing demands for legal materials to be *freely* accessible to citizens, instead of being locked away in expensive law reports and subscription only databases.[35] Free public access to judgments on websites such as the British and Irish Legal Information Institute (BAILII)[36] is seen as an essential component of modern justice.[37] The UK Supreme Court has been praised as an exemplary model of 'open justice', with live streamed hearings, and judgments summaries posted on its website.[38] The advent of social media has seen lawyers blogging and tweeting about the law – offering plain English summaries of cases alongside comment and critical analysis; even the UK Supreme Court now has a Twitter account.[39] In response to journalists and bloggers wanting to 'live tweet' or 'live blog' from hearings, the Lord Chief Justice of England and Wales has issued guidance on tweeting in court.[40] The dawn of social media has allowed information to be disseminated rapidly, widely, often anonymously, and without the filter of publishers and editors; the law has had to catch up.

As a result of various high profile cases involving contempt of court for the publication of information about court proceedings or police investigations, the Law Commission embarked upon a public consultation about 'the challenge that is posed by the new media to the existing laws on contempt of court which pre-date the internet age'.[41] The Commission has made recommendations relating to the publication of information about proceedings on social media[42], and reporting restrictions ordering the postponement of contemporary court reporting in criminal proceedings.[43] The project considered the courts in general and made no specific reference to the Court of Protection.

A close analogy to calls for greater transparency in the CoP can be drawn with longstanding and increasing demands for greater 'transparency' in the family courts,[44] particularly from the media, but also from

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[34] Ip, J. (2012) 'Al Rawi, Tariq, and the Future of Closed Material Procedures and Special Advocates', *The Modern Law Review,* 75(4), 606-623; Phillips, N. (2014) 'Closed Material', *London Review of Books,* 17 April 2014.

[35] Albon, E. (2012) *The free legal info landscape,* translated by Centre for Law, Justice and Journalism, City University, London; Holmes, N. (2012) *Accessible justice,* translated by Centre for Law, Justice and Journalism, City University, London.

[36] www.bailii.org

[37] Lord Neuberger (2012) 'No Judgment – No Justice', in *The First Annual BAILII Lecture*, Freshfields Bruckhaus Deringer LLP, Fleet Street, London, 21 November 2012; Lord Neuberger (2013) 'Justice in an Age of Austerity', in *Justice - Tom Sargant Memorial Lecture*, Freshfields Bruckhaus Deringer LLP, London, 15 October 2013.

[38] Wagner, A. (2013) 'The supreme court's YouTube channel is a welcome step for open justice', *The Guardian,* 21 January 2013.

[39] www.twitter.com/UKSupremeCourt

[40] Lord Judge (2011) *Practice Guidance: The use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting.* The Lord Chief Justice of England and Wales.

[41] Law Commission (2012) *Contempt of Court: A Consultation Paper*, (Consultation Paper No 209) London. Paragraph 1.2

[42] Law Commission (2013) *Contempt of Court (1): Juror misconduct and internet publications*, (Law Com No 340, HC 860) London.

[43] Law Commission (2014) *Contempt of Court (2): Court Reporting*, (Law Com No 344) London.

[44] Wright, M. (1992) 'The Press, Children and Injunctions', *The Modern Law Review,* 55(6), 857-865.

members of the judiciary themselves.[45] The family courts have seen successive waves of consultation and reform in the area of transparency since the 1990s.[46] A recent pilot project carried out a trial of the feasibility and desirability of routinely placing anonymised judgments from certain categories of family cases online.[47] However, there are indications that children and young people themselves may not welcome these developments in transparency.[48]

The President of the Family Division and the Court of Protection – Sir James Munby – is a consistent advocate of greater 'transparency' in court proceedings. In an address to the Family Law Bar Association he stated that transparency was a central element of his vision for reform of the family courts:

> I am determined to take steps to improve access to and reporting of family proceedings. I am determined that the new Family Court should not be saddled, as the family courts are at present, with the charge that we are a system of secret and unaccountable justice. Work, commenced by my predecessor, is well underway. I hope to be in a position to make important announcements in the near future.[49]

Sir James Munby has also stated that issues of transparency in the family courts apply just as much to the CoP[50], and has expressed a desire to harmonise the approach of each court as far as possible in this respect.[51] There are some important differences in the legal regulation of privacy and transparency issues in the CoP and family proceedings – not least that the CoP has no equivalent to section 97 of the Children Act 1989, which makes it a criminal offence to publish any material that is likely to identify a child who is the subject of family court proceedings. However, like the family courts, publication of information about proceedings in the CoP is governed by section 12 of the Administration of Justice Act 1960 and the Contempt of Court Act 1981, which are discussed in more detail below. It also tends to hear cases in private.

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[45] Mr Justice Munby (2005) 'Access to and Reporting of Family Proceedings', paper presented at Jordan's Family Law Conference, London, on 1 December 2005.

[46] Lord Chancellor's Department (1993) *Review of Access to and Reporting of Family Proceedings*, London; Select Committee on Constitutional Affairs (2005) *Family Justice: The operation of family courts. Volume 1*, (HC 116-I) House of Commons, London; Department for Constitutional Affairs (2005) *Disclosure of Information in Family Proceedings Cases Involving Children: Response to the public consultation*, (Cm 6623) London; Department for Constitutional Affairs (2007) *Confidence and confidentiality: Improving transparency and privacy in family courts. Response to Consultation*, (CP(R) 11/06; Cm 7036) Department for Constitutional Affairs and Her Majesty's Courts Service; Ministry of Justice (2007) *Confidence and Confidentiality: Openness in family courts – a new approach*, (Cm 7131) London; Ministry of Justice (2008) *Family Justice in View: Response to consultation*, (CP(R) 10/07) London.

[47] Ministry of Justice (2011) *The Family Courts Information Pilot: November 2009- December 2010* London.

[48] Ministry of Justice (2007) *Confidence and Confidentiality: Openness in family courts – a new approach*, (Cm 7131) London; Brophy, J. (2010) *The views of children and young people regarding media access to family courts*, The Children's Commissioner for England, London; Brophy, J., Perry, K., Prescott, A. and Renouf, C. (2014) *Safeguarding, Privacy and Respect for Children and Young People: The Next Steps in Media Access to Family Courts*, National Youth Advocacy Service and Association of Lawyers for Children.

[49] Sir James Munby (2013) 'Address by the President', paper presented at Annual Dinner of the Family Law Bar Association, Middle Temple Hall, London, on 22 February 2013.

[50] Sir James Munby (2013) 'Opening up the Family Courts: Transparency in the Family Court and the Court of Protection', paper presented at Annual Conference of the Society of Editors 'Freedom to Inform' London, on 11 November 2013.

[51] Judiciary of England and Wales (2014) *Transparency in the Court of Protection. Publication of judgments, Practice Guidance issued on 16 January 2014 by Sir James Munby, President of the Court of Protection*, London.

Following reforms in the family courts in 2009[52], accredited journalists have a right to attend most hearings unless narrowly defined grounds for excluding them can be established,[53] whereas in the CoP, the media must seek permission to attend court. The President has stated his intention to align the practice of the CoP in this respect.[54] In his first year as President, Sir James Munby issued practice guidance relating to 'transparency' in the area of committals and the publication of judgments, and announced further possible reforms for both the family courts and the CoP. These are discussed below.

Concerns about transparency in the CoP have a very high profile in the media. Alongside this there are also growing concerns about the culture, ethics and practices of the media regarding privacy.[55] Appendix 2 summarises key CoP cases concerning transparency. These cases reveal very variable reporting of CoP proceedings by the mainstream media. There are many examples of accurate and responsible media reporting of CoP cases, and on many occasions – perhaps most notably the cases of Steven Neary and 'RGS'- journalists have been praised by judges for their coverage and approach. It seems likely that publicity in the *Neary* case, which concerned a young man who was unlawfully deprived of his liberty in a care home, has also been a factor behind growing awareness of the need to refer welfare disputes to court. Yet there are also examples of highly inaccurate reporting of cases, of which the case of Alessandra Pacchieri – an Italian woman who underwent a caesarean operation against her will, after an order of the Court of Protection - is one of the most prominent examples.

In contrast to the family courts, there is as yet no empirical research on the views of litigants in the CoP about 'transparency' issues such as media attendance and reporting, and the publication of judgments. The cases summarised in Appendix 2 and described in this report reveal a diversity of views on media attendance and reporting of proceedings. In some cases families have been so frightened of being 'doorstepped' by the media during what are already extremely distressing proceedings, there are concerns that they may be prevented from accessing justice at all. In other cases, families have gone to the media to express outrage and a sense of injustice at what has happened to them in court and in doing so have risked proceedings for contempt of court. Other families wish to speak to the media to tell them about an injustice that the court has helped to set right. Some people are not told about media coverage of their own case because it could upset them, and in some cases the publication of a judgment has been delayed because the person the case is about was not to be notified about the proceedings. There are accounts of the court choosing to identify individuals and public authorities whose behaviour has been less than exemplary, and conversely where their conduct has been praised by the court in order that they can publicly rebut criticism. There are also accounts of people who are themselves the subject of CoP proceedings, who have actively sought the involvement of the media as a political act to draw attention to the predicament of older people in our society, but in some cases there is also concern that this might have been a result of undue influence exercised by others. How can we frame the law to best accommodate these diverse situations?

This report describes discussions at the roundtable on transparency in the CoP, which brought together people from a range of backgrounds – including those working within the court system, those who use it and those whose work involves reporting on or researching it. It also describes the law relating to 'transparency' and privacy in the Court of Protection, including key cases, and makes recommendations regarding specific issues raised by roundtable participants as requiring further exploration.

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[52] Ministry of Justice (2009) *Practice Direction 27B, Attendance of Media Representatives at Hearings in Family Proceedings*.

[53] Family Procedure Rules 2010, rule 27.11

[54] Sir James Munby (2013) 'Opening up the Family Courts: Transparency in the Family Court and the Court of Protection', paper presented at Annual Conference of the Society of Editors 'Freedom to Inform' London, on 11 November 2013.

[55] Lord Justice Leveson (2012) *An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary*, London.

THE LEGAL FRAMEWORK

This section contains a detailed description of the legal framework governing transparency in the Court of Protection.[56] It discusses the 'automatic restraints' on publishing information under section 12 of the Administration of Justice Act 1960 and what 'publication' means in this context, the Contempt of Court Act 1981, the Court of Protection Rules which govern who may attend hearings and what may be reported, human rights and common law principles that apply to transparency and privacy issues in the Court of Protection, and recent guidance on transparency produced by the President of the Court of Protection.

We have also included some case studies to illustrate how the CoP has applied the law and developed important principles, but these are described in more detail in Appendix 2 below. We have also provided a short summary of the basic principles of the law governing transparency and privacy in the CoP in Appendix 1.

SECTION 12 OF THE ADMINISTRATION OF JUSTICE ACT 1960

Section 12 of the Administration of Justice Act 1960 (AJA)[57] restricted those situations where courts might find that a person was in contempt of court for reporting proceedings. It applies to cases brought under the

[56] We also provided this information as a background briefing for participants at the roundtable.

[57] The complete text of s12 AJA (as amended) reads:

(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—

(a) where the proceedings—

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or

(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;

(b) where the proceedings are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or a county court the county court;

(c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;

(d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;

(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

(3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court).

MCA, before the Mental Health Tribunals (discussed below) and also in certain family proceedings relating to children. The publication of information regarding the specified cases under s12 AJA is not *automatically* a contempt, rather it *may* be a contempt if the publisher has the requisite *mens rea.*[58]

The automatic restrictions in s12 AJA do not apply to CoP proceedings heard in public, nor to proceedings under the inherent jurisdiction of the High Court,[59] nor to proceedings which may involve the MCA but which were not brought under the MCA.[60]

What information is restricted under s12 AJA?

Munby J (as he then was) considered the nature of the information that is restricted from publication by s12 AJA in *Re B (A Child)*[61] (right). He found that s12 AJA does prohibit the publication of:

a) accounts of what has gone on in front of the judge sitting in private;
b) documents such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions, and transcripts or notes of the judgment (this list is not necessarily exhaustive);
c) extracts or quotations from such documents;
d) summaries of such documents. [62]

Perhaps surprisingly, he found that s12 AJA does not prohibit the publication of identifying information, including:

a) the fact, if it be the case, that a child is a ward of court and is the subject of wardship proceedings or that a child is the subject of residence or other proceedings under the Children Act 1989 or of proceedings relating wholly or mainly to his maintenance or upbringing;
b) the name, address or photograph of such a child;
c) the name, address or photograph of the parties (or, if the child is a party, the other parties) to such proceedings;
d) the date, time or place of a past or future hearing of such proceedings;

Re B (A Child)

The events in *Re B* took place in the context of a Government review of care proceedings where findings had been based solely on medical evidence, following controversy about criminal convictions based on expert evidence later found to be unreliable. Sarah Harman was a solicitor acting for a mother who wanted to appeal against findings that had led to care orders being made; the findings included suspected factitious illness (Munchausen's syndrome by proxy). The mother was anxious to refer her case to the review, and passed some court papers to MPs and journalists. Sarah Harman also passed papers to her sister, Harriet Harman MP, who was then Solicitor General and to Margaret Hodge MP, whose department was conducting the review. These actions all took place without any application to the court for leave. Munby J subsequently found both the mother and the solicitor to be in contempt under s 12 Administration of Justice Act 1960.

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(5) Subsection (1) is subject to Part 2 of the Children, Schools and Families Act 2010 (family proceedings), and nothing in subsection (2) applies in relation to a contempt of court under section 11 of that Act (restriction on publication of information relating to family proceedings).

[58] *Re F (a minor) (publication of information)* [1977] 1 All ER 114 (Court of Appeal); see also *Wookey v Wookey* [1991] Fam 121 and *P v P (Contempt of Court: Mental Capacity)* [1999] 2 FLR 892.

[59] *RB (Adult) (No 4)* [2011] EWHC 3017 (Fam)

[60] For example, proceedings in the Administrative Court or the Queen's Bench (e.g. *ZH v The Commissioner of Police for the Metropolis* [2012] EWHC 604 (QB))

[61] [2004] EWHC 411 (Fam); see also *X v Dempster* [1999] 3 FCR 757

[62] *Re B (A Child),* paragraph 82

e) the nature of the dispute in such proceedings;
f) anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place;
g) the name, address or photograph of the witnesses who have given evidence in such proceedings;
h) the party on whose behalf such a witness has given evidence; and
i) the text or summary of the whole or part of any order made in such proceedings.[63]

Unlike proceedings under the Children Act 1989[64], therefore, there are no automatic restrictions on identifying the subject of proceedings before the CoP. In this respect, the current framework for the publication of information in the CoP offers weaker protection of privacy than proceedings concerning children. However, restrictions on the publication of identifying information may be imposed by court order under the Court of Protection Rules 2007, or by the Contempt of Court Act 1981 – see below.

What is meant by 'publication' under s12 AJA?

In *Re B* Munby J also considered what is meant by 'publication' under s12 AJA. He concluded that 'There is a "publication" for this purpose whenever the law of defamation would treat there as being a publication', including oral and written communication. The only exception to this 'is where there is a communication of information by someone to a professional, each acting in furtherance of the protection of children.' This meant that there is 'publication' where information or documents are disseminated 'to a journalist or to a Member of Parliament, a Minister of the Crown, a Law Officer, the Director of Public Prosecutions, the Crown Prosecution Service, the police (except when exercising child protection functions), the General Medical Council, or any other public body or public official'.[65] This is a much broader definition of publication than that applied under the Contempt of Court Act 1981 (below), which must be 'addressed to the public at large'.

Exemptions to s12 AJA in the family courts

Following the ruling in *Re B*, there was concern at the level of restrictions on the 'publication' of information, especially for people who might be seeking help regarding their case – for example from their MP. The government consulted on relaxing these restrictions[66] and the Family Procedure Rules were amended[67] to permit certain classes of communication of information about proceedings heard in private, which were set out in a practice direction. These amendments were carried forward under the Family Procedure Rules 2010[68], which specify that information about proceedings heard in private may be communicated for purposes specified in two associated practice directions: Practice Directions 14E and 12G.[69] The practice directions permit the communication of information to, *inter alia*, McKenzie Friends 'To enable the party to obtain advice or assistance in relation to the proceedings', close family members 'For the purpose of confidential discussions enabling the party to receive support from his spouse, civil partner, cohabitant or close family member', healthcare professionals 'To enable the party or any child of the party to obtain health

[63] *Re B (A Child),* paragraph 82

[64] Where it is an offence under s97 Children Act to publish material which is intended or likely to identify any child involved in proceedings in which a power under the Children Act may be exercised by the court, or the address or school of that child.

[65] *In the Matter of B (A Child),* paragraph 82

[66] Department for Constitutional Affairs (2005) *Disclosure of Information in Family Proceedings Cases Involving Children: Response to the public consultation*, London.

[67] *The Family Proceedings (Amendment No 4) Rules 2005*

[68] Under rules 12.73 and 14.14

[69] *Practice Direction 14E - Communication of information relating to proceedings*; *Practice Direction 12G - Communication of Information*.

care or counselling', and so on. They also permit parties and others to communicate information about proceedings to researchers conducting approved research projects.

At the time of the roundtable, there was no equivalent practice direction in the CoP, which meant that the full restrictions of s12 AJA described in *Re B* applied there until very recently. The President of the Court of Protection, and the Vice President (Mr Justice Charles) publicly expressed a desire for a similar rule change and Practice Direction in the CoP.[70] In 2015, amendments to the Court of Protection Rules (discussed below) included a provision that has permitted a similar practice direction to be adopted in the CoP.[71]

COURT OF PROTECTION RULES 2007

The CoP has its own rules of procedure, the Court of Protection Rules 2007, which may make provision 'for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public'[72]. These were recently amended in response to a range of procedural issues, some of which have a bearing on transparency matters.[73] It is likely that the Court of Protection Rules will undergo further review in relation to transparency issues in the future.

Consultation on privacy issues under the Court of Protection Rules

Shortly before the MCA came into force and the CoP began receiving applications the Department for Constitutional Affairs consulted on draft court rules in 2006. Surprisingly, the consultation document did not mention the issues raised in *Re B*. The government initially proposed that 'hearings of the Court of Protection should be in public but that a hearing, or any part of it, may be held in private if the court considers any of the circumstances set out at draft Rule 45(3) are met'.[74] Provision for private hearings included, *inter alia,* cases where 'publicity would defeat the object of the hearing', it involves 'confidential information (including information relating to personal financial matters) and publication would damage that confidentiality' or is 'necessary to protect the interests of P'.[75]

There were 39 responses to the consultation; none of these responses seem to have come from representatives of the media.[76] Representatives of the media who attended the roundtable observed that they were not specifically invited to respond, unlike other agencies.[77] Of the 27 respondents who commented on the publicity questions, 12 supported the proposal that there should be a presumption that

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[70] The Select Committee on the Mental Capacity Act 2005 (2013) *Evidence Session No. 14. Tuesday 26 November 2013. Witnesses: Mr Justice Charles, Senior Judge Denzil Lush, District Judge Margaret Glentworth and District Judge Elizabeth Batten*. House of Lords: London. Q292; House of Commons Justice Committee (2014) *Written evidence received in connection with the work of the Court of Protection*. London.

[71] s47 The Court of Protection (Amendment) Rules 2015 SI 2015/549 (L6), amendments to Rule 91. See Practice Direction 13A - Hearings (Including reporting restrictions)**.**

[72] s51 MCA

[73] The Court of Protection (Amendment) Rules 2015 SI 2015/549 (L6). See the Explanatory Notes for background to the changes not relating to transparency.

[74] Department for Constitutional Affairs (2006) *Draft Court Rules: Mental Capacity Act 2005 Court of Protection Rules*. London.

[75] Draft rule 45(3)

[76] Department for Constitutional Affairs (2007) *Draft court rules: Mental Capacity Act 2005. Court of Protection Rules: response to a consultation carried out by the Department for Constitutional Affairs.* London.

[77] At the front of the consultation document is a list of organisations to whom the consultation was circulated. No media organisations are on that list, although the consultation was open to them to respond should they have learned of it by other means. Department for Constitutional Affairs (2006) *Draft Court Rules: Mental Capacity Act 2005 Court of Protection Rules*, (CP 10/06, London).

hearings of the CoP should be held in public, whilst 11 opposed it. Even among those who favoured a starting point of publicity, there was a general view that in practice most proceedings would need to be held in private. Among the reported reasons given for favouring privacy, respondents felt that it would be 'less daunting for vulnerable individuals and their families'. However, one respondent commented that publicity might protect the relevant person 'by allowing public scrutiny of the conduct of those intending to benefit from any lifetime gift'.

Those favouring a starting point that proceedings should be held in private contended that there was not sufficient public interest to justify hearings in public. They argued that the relevant person's interests of confidentiality and privacy were best served by private hearings, that the process could be distressing for the person and their family and if the person had capacity 'they would not want their financial information to be in the public domain'. One respondent stated:

> 'An individual's right to privacy in this case is greater than the need for a public policy of openness. The individuals concerned have already suffered the indignity of losing capacity and having to live by the decisions of others. The presumption should, therefore, be that hearings should be in private, unless the court considers it in the interests of public policy to be otherwise.'

The general rule on privacy

Following the consultation, the government changed its position on the presumption of publicity. Accordingly, the Court of Protection Rules 2007 start from a presumption that hearings will be held in private, but with powers to order that a hearing be held in public. Rule 90 provides that 'The general rule is that a hearing is to be held in private', and – subject to any court order permitting or excluding others from attendance – the only persons who may attend the hearing are the parties, the relevant person, and their legal representatives.

The CoP also has powers under Rule 91 to authorise the publication of information about proceedings held in private, or to restrict the publication of any identifying information or other information about the proceedings. The CoP may make an order under Rule 92 for a hearing to be in public, but it may exclude from that hearing any person or class of persons by court order. The case of Steven Neary (right) is one example of the CoP using these powers. When a hearing is in public the automatic restrictions of s12 AJA (above) do not apply, but the CoP may make an order under Rule 92 imposing reporting restrictions.

Orders under Rules 90-92 may only be made 'where it appears to the court that there is good reason for making the order', and can be made at any time on the court's own initiative or upon application by any person.[78]

Steven Neary

In 2010 Mark Neary, the father of a young man with autism and learning disabilities, began an online campaign to 'Get Steven Home'. Steven Neary had gone to spend a few days in respite care as his father was unwell, but when his father got better the London Borough of Hillingdon – who provided Steven's care – refused to let him return home. Steven was detained under the MCA deprivation of liberty safeguards. Local news outlets reported on his father's campaign. When the case eventually reached the CoP, several media organisations applied for permission to attend and report on the proceedings, and to identify Steven and Mark Neary. Jackson J granted this on the basis that many details of the case were already in the public domain, there was no evidence that this would cause detriment or distress to Steven or that irresponsible journalistic practices were likely. Steven Neary was returned home by the Court of Protection, and his father gave several interviews in the media – helping to raise public awareness of problems with the deprivation of liberty safeguards.

[78] Rule 93

Committal proceedings

The CoP has powers to punish individuals for contempt of court.[79] These punishments are made by an order of committal, and can include directions that the individual is to be arrested and imprisoned, subject to a hearing.[80] The imprisonment of Kathleen Danby (right) is a recent example of the CoP exercising these powers. Special rules govern transparency arrangements regarding committal hearings – the general presumption that hearings are in private is reversed, and where committal hearings are not held in public and the court finds that the person has committed a contempt of court, the court must publicly name the individual who has committed contempt, the nature of their offence and the punishment imposed.[81]

Kathleen Danby

The CoP had issued orders prohibiting Kathleen Danby from having contact with her grand-daughter, B. B has learning disabilities, and there had been care proceedings in the family court when she was a child, concerning her relationship with her father. It was said that when she saw her father or paternal grandmother this caused her distress and was unsettling, although she herself expressed a desire to see them. The council responsible for B's care applied for a committal order, because Danby had breached the court orders and had been in contact with her granddaughter. Danby, who lived in Orkney, did not attend the hearing – although she was notified of it. HH Cardinal J sentenced her to three months in prison for contempt of court. Danby chose not to attend a subsequent hearing to review this decision. Eventually, Danby was arrested when she was in England to see a concert. She spent two nights in jail before being brought before a CoP judge, where she purged her contempt and was released from prison. Although the committal hearings were in public and judgments naming Danby were published on BAILII, the media were critical of her treatment, and argued that there was not sufficient information in the public domain to say whether or not her punishment had been fair.

Documents and court records

There are also additional rules that permit the supply of documents to a non-party from court records[82] and the subsequent use of court documents.[83]

Recent amendments to the Court of Protection Rules

Following the roundtable, amendments to the Court of Protection Rules 2007 were laid before Parliament and come into force in April and July 2015.[84] Some of these changes have a bearing on the transparency framework for the CoP.

Rule 91 was amended to introduce a similar exemption to s12 AJA to that which exists in family proceedings to permit the communication of information for specified purposes (discussed above). These purposes are elaborated in Practice Direction 13A, which was amended following the rule change (discussed below; the amended version is given in Appendix 3). The legal framework now permits the communication of information for a range of specified purposes, including making complaints, making applications to the European Court of Human Rights or enabling the parties – or their families – to obtain healthcare or counselling.

[79] Part 21 Court of Protection Rules 2007

[80] Court of Protection Rules 2007 rules 185 - 194

[81] Rule 188

[82] Rule 17

[83] Rule 18

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

One important change for transparency purposes is that people will now be permitted to communicate information to researchers for the purpose of research projects authorised by the President of the CoP or the Lord Chancellor. Until this rule change was introduced, researchers faced particular difficulties in speaking to litigants about their experiences, or doing research on court files or documents (discussed below).

The rule changes also require the court to consider 'whether any hearing should be held in public' and 'whether any document should be a public document and, if so, whether and to what extent it should be redacted.'[85] A new rule, 9A, makes provision for the operation of pilot schemes for assessing new practices and procedures. These provisions are not discussed in the Explanatory Notes for the amendments, but may form the foundations of further transparency reforms in the future.

PRACTICE DIRECTIONS

Practice directions are issued by courts as a supplement to rules of procedure, to regulate procedural matters and provide additional information and guidance not contained within the rules.

Practice Direction 13A

The CoP has issued general guidance on the law and procedure relating to reporting restrictions in *Practice Direction 13A – Hearings (including reporting restrictions)*; a full copy of the amended version is given in Appendix 3.

PD13A reiterates that the general rule is that proceedings in the CoP will be held in private and so s12 AJA means that publication of any information about these proceedings will generally be a contempt of court. PD13A explains the content of Court of Protection Rules 90-93, set out above, and explains that an application for a reporting restrictions order under these rules must be made by filing a COP9 form.[86]

PD13A draws attention to s12 Human Rights Act 1998 (HRA), which applies where a court is considering granting any relief which might affect the exercise of the right to freedom of expression.[87] Section 12 of the HRA states that in such circumstances if the person whose right to freedom of expression would be affected is not present or represented the court not grant such relief unless they are satisfied 'that the applicant has taken all practicable steps to notify the respondent' or 'that there are compelling reasons why the respondent should not be notified'. As the media will not typically be represented in CoP cases, this means that s12 HRA will generally require that they are notified of any applications for reporting restrictions, enabling them to make representations relating to their right to freedom of expression.

PD13A also emphasises the 'need to ensure that P's Convention rights are protected' when 'the court is considering whether to make an order that a public hearing should be held', and the general duty to act in P's best interests.[88] Further on, PD13A specifies that the court will need to balance Article 8 (right to respect for private and family life) and Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR).

On making orders to protect identities, the guidance states that:

> The aim should be to protect P rather than to confer anonymity on other individuals or organisations. However, the order may include restrictions on identifying or approaching specified family members, carers, doctors or organisations or other persons as the court directs in cases where the absence of such restriction is likely to prejudice their ability to

[85] Rule 5, as amended

[86] Application notice form.

[87] Under Article 10 of the European Convention on Human Rights

[88] Paragraph 11

> care for P, or where identification of such persons might lead to identification of P and defeat the purpose of the order. In cases where the court receives expert evidence the identity of the experts (as opposed to treating clinicians) is not normally subject to restriction, unless evidence in support is provided for such a restriction.[89]

On the duration of reporting restriction orders, PD13A states that:

> Orders should last for no longer than is necessary to achieve the purpose for which they are made. The order may need to last until P's death. In some cases a later date may be necessary to maintain the anonymity of doctors or carers after the death of a patient.[90]

The problem of confidentiality and publicity following the death of the relevant person has arisen in a number of recent cases,[91] these are described in Appendix 2.

PD13A says that orders will not generally be made restricting the publication of information already in the public domain.

Guidance on notifying the media and the CopyDirect service

PD13A also gives guidance on how to effect notification of the media about the possibility of reporting restrictions. It advises that service on national newspapers and broadcasters can be effected via the Press Association's CopyDirect service (recently renamed the Injunction Application Alert Service), and states that making reporting restrictions without notifying the press should only occur in exceptional circumstances. Both the court when acting on its own initiative, and applicants relying upon Convention rights in seeking reporting restrictions, must effect service via this method, and details of how to do this are given.

The PD also highlights that the CopyDirect service 'does not extend to local or regional media or magazines'. Therefore, if reporting restrictions are required for any specific organisation or person not covered by the CopyDirect service, then it should be effected directly.[92]

If the media decides that it wishes to respond to notice of an application for reporting restrictions it must file an acknowledgment of service using the COP5 form within 21 days. Acknowledging service does not mean one becomes a party to the proceedings unless the court directs that it should.[93] PD13A also includes as an annex an example of an explanatory note setting out the nature of the proceedings, which should be issued when serving notice of reporting restrictions.

Reversal of presumption of private hearings for serious medical treatment cases

Practice Direction 9E - Applications relating to serious medical treatment includes an important provision that reverses the general rule that the court will sit in private for serious medical treatment cases:

> The court will ordinarily make an order pursuant to rule 92 that any hearing shall be held in public, with restrictions to be imposed in relation to publication of information about the proceedings.[94]

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[89] Paragraph 27

[90] Paragraph 29

[91] *Newcastle Upon Tyne Hospitals Foundation Trust v LM* [2014] EWCOP 6; *Re Meek* [2014] EWCOP 1

[92] Paragraph 18

[93] On media applications to become a party to proceedings see *G v London Borough of Redbridge, Associated Newspapers Limited and Others* [2014] EWHC 1361, discussed in Appendix 2, below.

[94] Paragraph 16

Practice Direction - Committal for Contempt of Court

On 26 March 2015, a new Practice Direction was issued by the Lord Chief Justice which applies across the civil courts, including the CoP. It requires, in all cases where an individual is found to have committed a contempt of court and been sentenced to a term of imprisonment or a suspended term of imprisonment, that the court making the order must sit in public and set out: the name of the person; the nature of the sentence; and, in general terms, the nature of the contempt. These details and a written judgment are to be provided to the press and the Judicial Office website.[95]

HUMAN RIGHTS AND THE COMMON LAW

Under English common law the courts must generally sit in public, but there are some traditional exemptions to this rule. In *Scott v Scott*[96] Lord Shaw outlined three exceptions to the general rule of 'publicity' in court proceedings: wardship proceedings concerning children; 'lunacy proceedings' and proceedings where the 'essence of the case' concerned some secret process (such as a trade secret) where publicity would defeat the purpose of the proceedings. He described the first two categories as 'truly domestic affairs' within the *parens patriae* protective jurisdiction.

A similar qualified presumption that courts will sit in public can also be found under Article 6(1) of the European Convention on Human Rights (ECHR) – the right to a fair trial. This provides that:

> Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Although Article 6 includes a presumption that courts will sit publicly, publicity can also impede Article 6 rights to a fair trial where 'it is asserted that the publication of information relating to proceedings, or attempts by the media to contact litigants, would affect the capacity or willingness of a party to participate in the litigation'.[97]

W v M

M was in a minimally conscious state after a serious infection. Her family felt that she would not wish to live in such circumstances and applied to the Court of Protection for her feeding tube to be withdrawn. Her family were very distressed at the thought of being contacted by the press. Baker J held that the hearing should be in open court, but made orders prohibiting identification of M, her family or those caring for her, and orders prohibiting the media from approaching 65 people involved in caring for her. Following a media outcry, this was later reduced to a smaller number of people. The Court of Protection did not grant the order sought by the family to remove M's feeding tube.

'Transparency' issues also engage the right to freedom of expression under Article 10 ECHR. Article 10 is a qualified right to 'hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.' However, since the exercise of these freedoms include 'duties and responsibilities' they may be subject to 'such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the

[95] Judiciary of England and Wales (2015) *Practice Direction: Committal for Contempt of Court – Open Court,* London.

[96] [1913] A.C. 417 at 33

[97] *W v M & Ors* [2011] EWHC 1197 (COP) Paragraph 38

disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

Transparency issues also engage the right to respect for private and family life, home and correspondence under Article 8 ECHR. Article 8 is a qualified right, and any interference with it must be 'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Although the United Nations Convention on the Rights of Persons with Disabilities (CRPD)[98], as an unincorporated treaty, is not directly binding on the domestic courts, it is increasingly relied upon as a source of persuasive authority, particularly in relation to the interpretation of ECHR and also the Equality Act 2010.[99] In *AH v West London MH NHS Trust*[100] Albert Haines, a patient detained under the Mental Health Act 1983, applied for a public tribunal hearing. The Mental Disability Advocacy Centre intervened in the case. They highlighted the significance of the CRPD in prohibiting discriminatory treatment of people with disabilities, and drew the Upper Tribunal's attention to Article 13 CRPD, which obliges states to guarantee 'effective access to justice for persons with disabilities on an equal basis with others'. Counsel for Haines argued that it would be 'unjustifiably stigmatising and discriminatory to insist that the public only be able to observe by video-link and would increase the social isolation of AH'.[101] Carnwath LJ held that Article 6 ECHR, reinforced by Article 13 CRPD, 'requires that a patient should have the same or substantially equivalent right of access to a public hearing as a non-disabled person who has been deprived of his or her liberty, if this article 6 right to a public hearing is to be given proper effect'.[102]

Manuela Sykes

Manuela Sykes, born in 1925, was a British politician who left the Liberal party and joined the Labour party. She campaigned on a wide range of issues, including feminist and socialist causes. When her mother developed dementia, she campaigned about the treatment of the elderly in care homes. Sykes herself developed dementia, and was admitted to a care home under a deprivation of liberty safeguards authorisation issued by Westminster council. Sykes was very unhappy in the care home, and her representative helped her to appeal to the CoP. The court heard that there were serious risks of a return home, but felt these were risks that Sykes would have been prepared to take, and terminated the deprivation of liberty authorisation, meaning that Sykes returned home. At her request, she was identified in the media and her case received much publicity.

Publicity may also be a political act on the part of the relevant person, and therefore attract protection under Article 29 of the CRPD – the right to participation in political and public life. In the case *Westminster City Council v Sykes*[103] (above), Ms Sykes expressed a 'strong wish' for situation to be reported and for her to be named. Although her specific rights in relation to publicity were not discussed, Eldergill DJ characterised this wish for publicity as political in character, stating:

> 'She has always wished to be heard. She would wish her life to end with a bang not a whimper. This is her last chance to exert a political influence which is recognisable as her

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

[99] *Burnip v Birmingham City Council & Anor (Rev 1)* [2012] EWCA Civ 629; *R (Bracking & Ors) v Secretary of State for Work and Pensions* [2013] EWHC 897 (Admin).

[100] [2011] UKUT 74 (AAC)

[101] §20

[102] §22

[103] [2014] EWHC B9 (COP)

> influence. Her last contribution to the country's political scene and the workings and deliberations of the council and social services committee which she sat on.'

He made orders giving the media permission to publish a photograph of her from when she was a well known campaigner, and to name her but not her relatives.

TRANSPARENCY GUIDANCE: COMMITTALS

Following critical media coverage of the case of Wanda Maddocks (right), who was jailed by the CoP for contempt of court, the President issued practice guidance on committal proceedings.[104] This Practice Guidance primarily reiterated existing court rules which specify that committal proceedings must – as a general rule – be heard in public, and if in an exceptional case the court sits in private the judge must publish the contemnor's name, the nature of the contempt (in general terms) and any punishment imposed.[105] The guidance also specified that where a committal order, or suspended committal order is made, judges should ensure that a judgment or statement containing this information is prepared at public expense and published on the British and Irish Legal Information Institute (BAILII) website.[106] Supplementary guidance was issued a month later which stated that 'every committal application without exception' should be publicly listed as such, with the names of the alleged contemnors. It also emphasized that the court's discretionary power to hear committal proceedings in private 'should be exercised only in exceptional cases'. The supplementary guidance also stated that the court may authorize disclosure of the application notice to a person who is not a party, unless there are exceptional circumstances.[107]

Wanda Maddocks

Wanda Maddocks was jailed by the Court of Protection for breach of court orders relating to her father's care. The committal hearing was in 'open court' but the media were not notified and did not attend. Maddocks herself chose not to attend the committal hearing. An anonymised judgment was placed on a specialist mental health law website. Six months later, Maddocks gave interviews to the media, who described her as having been 'jailed in secret'. Following a media outcry, Munby P issued guidance reminding judges of the general rule that Committal hearings be heard in public and the individual identified. He also stated that judgments should be published on the more widely read BAILII website.

This guidance preceded new committal guidance (discussed above) for all courts which requires the media to be notified and a judgment to be placed on the Judiciary website[108] in all cases where the court finds that a person has committed a contempt of court.[109]

TRANSPARENCY GUIDANCE: JUDGMENTS

Prior to his appointment as President of the Family Division and the Court of Protection, Sir James Munby had expressed the view that these courts needed to make more anonymised judgments publically accessible, stating:

> I am not merely referring to judgments which are thought to be reportable because of their perceived legal interest. Releasing for publication only those judgments which are

[104] *Committal For Contempt Of Court (Practice Guidance)* [2013] EWHC B4 (COP) 2013

[105] Court of Protection Rules 2007 rule 188.

[106] www.bailii.org

[107] *Committal For Contempt Of Court (Practice Guidance – Supplemental)* [2013] EWHC B7 (COP) 2013.

[108] www.judiciary.gov.uk/

[109] Judiciary of England and Wales (2015) *Practice Direction: Committal for Contempt of Court – Open Court* London.

> 'reportable' means that the public obtains a seriously skewed impression of the system. What one might call 'routine' judgments in 'ordinary' care cases and private law cases should surely also be published -- all of them, unless, in the particular case, there is good reason not to.[110]

In 2013, the President published draft practice guidance on the publication of judgments[111], and in 2014 – shortly after a widespread media outcry over Alessandra Pacchieri's case (right) - he issued practice guidance based on this consultation.[112]

In this guidance he stated that 'Very similar issues arise in both the Family Court... and the Court of Protection in relation to the need to protect the personal privacy of children and vulnerable adults', and his starting point was that 'so far as possible the same rules and principles should apply in both the family courts... and the Court of Protection.'[113] The guidance distinguished between two classes of judgments: those which *should* ordinarily be published, and those which *may* be published.[114] The guidance states that judgments of the CoP should ordinarily be published if they relate to any of the following matters:

- any application for an order involving the giving or withholding of serious medical treatment and any other hearing held in public;
- any application for a declaration or order involving a deprivation or possible deprivation of liberty;
- any case where there is a dispute as to who should act as an attorney or a deputy;
- any case where the issues include whether a person should be restrained from acting as an attorney or a deputy or that an appointment should be revoked or his or her powers should be reduced;
- any application for an order that an incapacitated adult (P) be moved into or out of a residential establishment or other institution;
- any case where the sale of P's home is in issue
- any case where a property and affairs application relates to assets (including P's home) of £1 million or more or to damages awarded by a court sitting in public;
- any application for a declaration as to capacity to marry or to consent to sexual relations;

Alessandra Pacchieri

In November 2013 Christopher Booker reported in the *Telegraph* that a pregnant Italian woman had been detained under the Mental Health Act 1983 whilst visiting the UK, and that at the request of local authority social workers the courts had granted permission for her child to be delivered by a forcible caesarean in a hearing in which she was represented by lawyers appointed by the local authority. At the time of publication, no judgments were available about the case to confirm or refute this report. When the judgments were published, it transpired the order for a caesarean was granted by the Court of Protection at the request of doctors rather than social worker, who were concerned about health risks from labour not child protection. Pacchieri was represented in court by the Official Solicitor not local authority lawyers. However, academic and professional lawyers raised concerns about the case.

Following the media outcry about this case, the President issued guidance on the publication of judgments.

[110] Lord Justice Munby (2010) 'Lost opportunities: law reform and transparency in the family courts', *Child and Family Law Quarterly,* 273.

[111] Sir James Munby, President of the Family Division and President of the Court of Protection, (2013) *Draft Practice Guidance: Transparency in the Family Courts and the Court of Protection: Publication of Judgments*, London.

[112] Practice Guidance (Transparency in the Court Of Protection) [2014] EWCOP B2 (see also: Practice Guidance (Transparency in the Family Courts) [2014] EWHC B3 (Fam))

[113] Paragraph 6

[114] Paragraph 15

- any application for an order involving a restraint on publication of information relating to the proceedings.[115]

In all other cases, judgments *may* be published if a party or an 'accredited member of the media' makes an application and the judge – having considered the relevant rights[116] – concludes that it may be.[117] Permission to publish a judgment should also be given 'whenever the judge concludes that publication would be in the public interest and whether or not a request has been made by a party or the media.'[118]

Where permission to publish a judgment is given, the following guidance was given regarding anonymity:

- public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named;
- the person who is the subject of proceedings in the Court of Protection and other members of their family should not normally be named in the judgment approved for publication unless the judge otherwise orders;
- anonymity in the judgment as published should not normally extend beyond protecting the privacy of the adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so.[119]

Guidance was given as to the rubric (or implied rubric) at the top of the judgment, setting conditions of anonymity.[120]

The guidance applies to 'all judgments in the Court of Protection delivered by the Senior Judge, nominated Circuit Judges and High Court Judges.'[121] However, this does not preclude district judges from publishing judgments in the CoP.[122]

One of the issues that arose during the consultation was who should bear the cost of transcribing the judgments. The guidance states that where a person has made an application for the judgment to be published, they should bear the cost of transcription, but in all other cases the cost of transcribing the judgment should be at public expense.[123] The guidance also stated that where a judgment fell into the category meaning it should ordinarily be published, 'it shall as soon as reasonably practicable be placed by the court on the BAILII website', and that for other judgments consideration should be given to placing it on BAILII.[124]

[115] Paragraph 17

[116] Paragraph 18

[117] Paragraph 17

[118] Paragraph 16

[119] Paragraph 20

[120] Paragraph 21

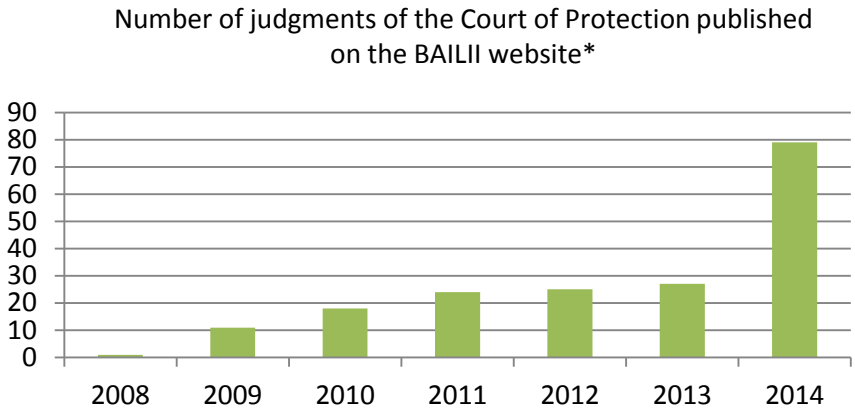
[121] Paragraph 14

[122] *Westminster City Council v Sykes* [2014] EWHC B9 (COP)

[123] Paragraph 22

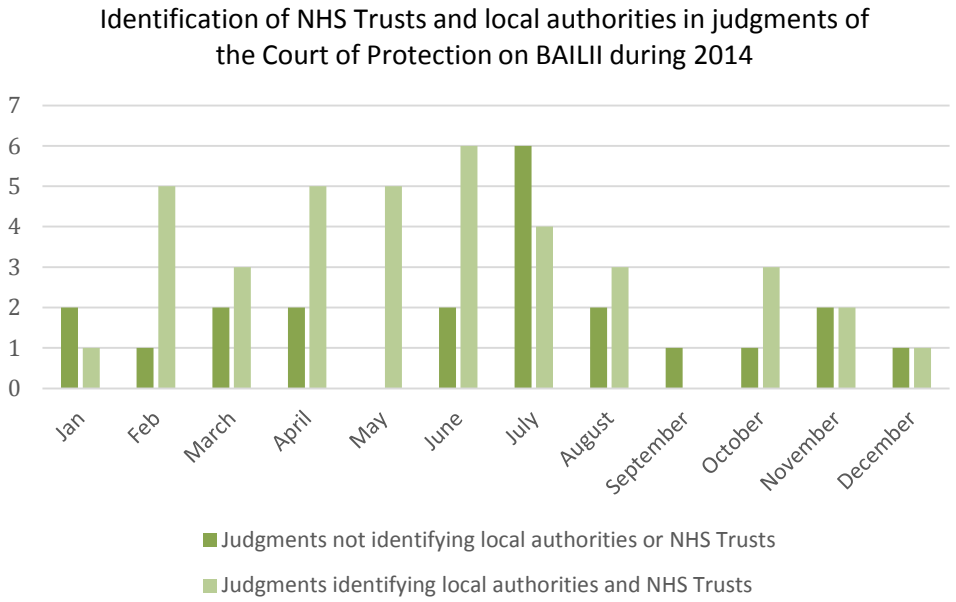
[124] Paragraph 23

This guidance has already had a noticeable impact on the number of judgments published on the BAILII website:



*Some judgments on BAILII are categorised under a different year to the date on the judgment; I have included these in the correct year. Data collected on 19 January 2015

Since the practice guidance on judgments was published, 63% of all judgments published on BAILII that have involved a public authority have identified it in the judgment.



A Healthcare NHS Trust v P & Q and the Contempt of Court Act 1981

Following the roundtable, further clarification of the legal framework governing transparency in the CoP was provided by *A Healthcare NHS Trust v P & Q*[125]. This case also highlighted potential limitations in the protection of privacy in the CoP which may need to be addressed in due course.

The case concerned an application from an NHS Trust to withhold and potentially also to withdraw life sustaining treatment from a man who had experienced severe hypoxic brain damage from a cardiac arrest. The Trust believed he was unlikely to regain consciousness, the family objected, and so the Trust made an

[125] [2015] EWCOP 15

application to the CoP for declarations as to his best interests. The family sought a reporting restriction order to protect their identities.

A question arose as to whether the media, when being notified of the application for a reporting restriction order, should also be provided with the names of the parties. The family's solicitors were concerned that providing the media with information about the family's identities could itself be a contempt of court.[126] The question addressed by court was whether the media *must* be provided with this information.

Counsel for the family expressed concern that when providing the media with this information, before any reporting restrictions came into force, it was unclear what prohibited the media from publishing the information. As discussed above, the 'automatic' restraints of s12 AJA do not extend to prohibiting the publication of information about the identities of the parties or the subject matter of the dispute. It was suggested by counsel for the family that there was either a lacuna in the law, which meant that there was a theoretical risk that the media could publish information they were notified of before the reporting restriction order was made, or that the criminal offence of publishing information that could identify a child in family proceedings[127] should extend - by analogy - to the CoP.[128] Mr Justice Newton rejected this latter suggestion as an unsound analogy,[129] but the question remained as to what prevented the media from publishing information about the identities of parties if they were notified of it.

Media representatives argued that this risk had never materialised in over ten years of using the CopyDirect service to notify the media of applications for reporting restrictions in family proceedings. If a media organisation were to take a 'maverick course' and publish this information, it would 'at a stroke' destroy this established practice.[130] Newton J stated that the hypothetical risk that one 'rogue editor' could abuse their position should not mean that 'freedom is lost by all members of the Press'.[131]

Media representatives also pointed towards contractual obligations with CopyDirect which prevented them for using this information for editorial purposes.[132] Moreover, Newton J held that on any reasonable view this information was *confidential* and so media organisations were under an equitable duty to treat it as such.[133]

Ultimately, however, Newton J held that the publication of this information would be a contempt of court under the Contempt of Court Act 1981 and/or the common law.[134] The 1981 Act prohibits publication 'addressed to the public at large or any section of the public' at a time when proceedings are active, which 'creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'.[135] Newton J held that 'publication by the media of the identity of P or the parties is likely to amount to a contempt under' the 1981 Act because this would be publication addressed to the public at large that would carry a 'more than a remote risk of serious prejudice or impediment to the course of justice (since it would render the application for reporting restrictions redundant)'.[136] In the 'unlikely event' that

[126] §41

[127] s97 Children Act 1989

[128] §46

[129] §47

[130] §65

[131] §50

[132] §61-2

[133] §63-4

[134] §56

[135] s1 Contempt of Court Act 1981

[136] §56

strict liability statutory contempt was not established under the 1981 Act, common law contempt 'could clearly be established'.[137]

This case highlights a degree of uncertainty about the 'automatic' restraints prohibiting the publication of information about the identity of parties in CoP proceedings. The restrictions imposed by the common law and the Contempt of Court Act 1981 against publishing identifying information about the parties and the relevant person apply once an application for reporting restrictions has been made. It does not appear that these restrictions would apply in the absence of any such application. Thus it seems that privacy may not be fully protected in the CoP unless with a specific application for reporting restriction.

FUTURE DEVELOPMENTS?

New Court of Protection Rules on 'transparency'?

Following the report of the House of Lords Committee on the MCA[138] the government committed to a revision of the Court of Protection Rules 2007, with a view to having new rules in place by April 2015.[139] A written memorandum from Sir James Munby and Mr Justice Charles to the House of Commons Justice Committee expressed the view that new provisions needed to be considered for 'the disclosure of documents to defined people for defined purposes e.g. to researchers, regulators etc'.[140]

An ad hoc committee was established to consider changes to the rules, whose primary focus was on providing a 'streamlined' procedure for handling non-contentious deprivation of liberty applications.[141] The amendments were laid before Parliament in March 2015, and introduced the changes described above which permit the communication of information about proceedings for certain purposes, such as research, and laying the framework for future potential reforms which may involve making public certain court documents or embarking upon pilot projects relating to transparency.

Media attendance in Court of Protection Proceedings?

As noted earlier, Sir James Munby has in the past expressed the view that the CoP should be brought into line with the family courts regarding the default position that accredited journalists are allowed to attend proceedings except in certain narrowly defined circumstances.[142] It is possible that reforms of this nature may be considered in the future, in a further review of the Rules.

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[137] §57, citing *A-G v Newspapers Publishing plc* [1997] 1 WLR 926 at 936B-D

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

[139] HM Government (2014) *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. Paragraph 2.7

[140] House of Commons Justice Committee (2014) *Written evidence received in connection with the work of the Court of Protection*, London. Paragraph 24.

[141] *X & Ors (Deprivation of Liberty)* [2014] EWCOP 25

[142] Sir James Munby (2013) 'Opening up the Family Courts: Transparency in the Family Court and the Court of Protection', paper presented at Annual Conference of the Society of Editors 'Freedom to Inform' London, on 11 November 2013.

A new Court of Protection website?

The House of Lords Committee on the MCA heard evidence from staff and judiciary at the CoP that they themselves were unable to communicate information to the public directly as they had no control over the information published on the central government website dedicated to the CoP.[143] The Committee stated:

> 'We are persuaded that the Court of Protection has a range of audiences requiring access to information for professional or personal reasons, and that the staff and judiciary of the Court are best placed to determine what that information should be recommended in its report that the Court of Protection establish its own website.'[144]

However, the government stated in their response:

> 9.3 The Government's Digital Strategy is for a single government web domain for the public to access information about government services. Government Digital Service (GDS) sets standards for information provision, web best practice and user needs.
>
> 9.4 The Government agrees that the availability of increased information regarding the Court of Protection would go some way to improving accessibility of the Court and we will work with GDS to develop the content on the Court of Protection. We will also consider other means of releasing information about the court appropriate to different users.[145]

Accordingly, information about the Court of Protection may appear on either the central Gov.UK website[146] or may be published on the Courts and Tribunal Judiciary website.[147]

Access to court documents, listing of cases and more public hearings?

In 2014 the President issued a new consultation on the 'next steps' for transparency in the Family Courts.[148] This consultation invites views on the operation of the practice guidance for the publication of judgments – and in particular the impact on children and families, local authorities and 'Any change in the level and quality of news and reporting about the family justice system'. The consultation also canvassed views on steps which could be taken to enhance the listing of Family Division and Family Court cases so that the court lists are more informative for the media. He also canvassed views about a possible pilot project to explore the disclosure of documents prepared by advocates and *some* expert reports[149] to the media.

The President also sought 'preliminary, pre-consultation' views on hearing certain types of family case in public. This latter suggestion drew criticism from children's groups and family lawyers, who warned that children may decline to give evidence if they know that the public will attend out of fear of inadvertent

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[143] https://www.gov.uk/court-of-protection

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

[145] HM Government (2014) *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.

[146] https://www.gov.uk/court-of-protection

[147] http://www.judiciary.gov.uk/

[148] Sir James Munby (2014) 'Transparency – The Next Steps: A Consultation Paper issued by the President of the Family Division on 15 August 2014', *Family Law*, available: http://www.familylaw.co.uk/news_and_comment/transparency-the-next-steps-a-consultation-paper-issued-by-the-president-of-the-family-division-on-15-august-2014#.U_HF5PldV8G [accessed 20 August 2014]

[149] In the first instance, confined to those from the 'hard sciences'.

identification.[150] The results of the consultation and reform proposals arising from it have not yet been published.

Nothing in this consultation document refers to the CoP, however it seems possible that given the President's preference for harmonizing the practices of the CoP and the Family Court that similar consultations may eventually follow for the CoP.

COMPARISON: MENTAL HEALTH TRIBUNALS

The CoP was established to adjudicate on issues arising under the MCA connected with a person's mental capacity and best interests. This spans a range of different matters, including property and affairs, health and personal welfare, and also issues connected with deprivation of liberty under the MCA.

The Mental Health Act 1983 (MHA) regulates detention and compulsory treatment for mental disorder. The MHA and the MCA are distinct legal instruments, with different powers and underlying principles, although in some cases they do intersect with each other – giving rise to a highly complex area of law.[151] A person who is detained under the MHA may seek review of the awfulness of that detention before a Mental Health Tribunal[152]. This offers an interesting contrast to the CoP in terms of its legal framework for transparency and public perceptions of secrecy. However, it should be remembered that the Mental Health Tribunals deal only with the issue of detention or whether the patient should remain subject to a community treatment order or guardianship.[153] The Court of Protection deals with a much broader range of health and personal welfare issues, including, but not confined to, deprivation of liberty.

Public hearings

In England, the First Tier Tribunal (Mental Health), which hears appeals under the Mental Health Act 1983, sits in private 'unless the Tribunal considers that it is in the interests of justice for the hearing to be held in public'.[154] The Mental Health Review Tribunal for Wales sits in private 'Except where a patient requests a hearing in public and the Tribunal is satisfied that that would be in the interests of the patient, all hearings must be held in private.'[155] Only a very small number of Tribunal hearings have been held in public, including that of Albert Haines[156], Ian Brady[157] and Jared Britton.[158] As discussed above, Haines successfully argued for a public hearing, relying upon Article 6 ECHR, reinforced by Article 13 CRPD.

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[150] Gibb, F. (2015) 'Judge attacked over bid to hold family cases in public', *The Times,* 01 January 2015.

[151] Clare, I. C. H., Redley, M., Keeling, A., Wagner, A., Wheeler, J., Gunn, M. and Holland, A. J. (2013) *Understanding the interface between the Mental Capacity Act's deprivation of liberty safeguards (MCA-DOLS) and the Mental Health Act (MHA)*, University of Cambridge.

[152] In Wales these are known as Mental Health Review Tribunals and in England, the tribunal is the First Tier Tribunal (Mental Health).

[153] Community treatment orders and guardianship are legal powers to impose certain requirements relating to care, treatment and residence for patients living in the community.

[154] Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 SI 2008/2699, Rule 38.

[155] Mental Health Review Tribunal for Wales Rules 2008Rule 25

[156] AH v West London MH NHS Trust [2011] UKUT 74 (AAC)

[157] *In The Matter of an Application by Ian Stuart Brady* [2014] FTT MH

[158] *Re Jared Britton* [2013] MHLO 146 (FTT)

Reporting restrictions

Section 12 of the AJA applies to the private hearings in the Mental Health Tribunals,[159] imposing similar restrictions on the communication of information to those in the CoP discussed above. Unlike the CoP, however, the Tribunals do have explicit restrictions on the publication of identifying information. The English and the Welsh Tribunal Rules contain a presumption that 'Unless the Tribunal gives a direction to the contrary, information about mental health cases and the names of any persons concerned in such cases must not be made public.' [160]

A similar provision prohibiting the naming of patients existed under the 1983 Mental Health Review Tribunal Rules and was considered in *Pickering* v *Liverpool Daily Post and Echo.*[161] As well as confirming that s12 AJA did not prohibit the naming of patients, Lord Bridge construed the rules as only 'dealing with proceedings at the hearing'[162] rather than the fact an application had been made by the patient to the tribunal. The new construction of the rules is more expansive and applies to 'information about mental health *cases*' (emphasis added) rather than 'proceedings'. They might therefor be considered to restrict the publication of information about an application to the tribunal about a particular patient, as well as what occurred in a hearing. One potential concern remains, however. In *Pickering* Lord Bridge expressed doubt that the power to make tribunal rules of procedure conferred by s78 MHA conferred sufficient authority to impose a ban on the publication of this information, but this point was not fully reasoned or argued.[163] Consequently, the legal authority of the existing tribunal rules to restrict the publication of information was called into question – but not wholly determined – in *Pickering* and may require further clarification.

Although Mental Health Tribunals only very rarely sit in public, they do not appear to have been labelled as a 'secret courts' in the media. The reasons for their different treatment by the media from the Court of Protection are unclear.

[159] Section 12 AJA also applies to applications to the county court to displace a person from the role of nearest relative to a patient who is subject to the MHA.

[160] Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 SI 2008/2699, rule 14(7); Mental Health Review Tribunal for Wales Rules 2008,SI 2008/2705, rule 10 (1).

[161] [1991] 2 AC 370 (HL)

[162] p423

[163] p423

THE ROUNDTABLE

The roundtable discussion brought together people from different backgrounds and with differing perspectives on 'transparency' to discuss the current legal framework in the CoP. Participants included researchers in mental capacity and mental health law, judges of the CoP, solicitors and barristers and litigation friends with considerable experience of CoP welfare cases, civil servants, and representatives of three media organisations – including print and broadcast media, and those who have campaigned for greater 'transparency' in the CoP. A person with experience of being a litigant in a CoP welfare case and a social worker with considerable experience of the MCA and experience of a publicised court case were invited to attend, but unfortunately they were unable to do so due to unforeseen circumstances. In total, 23 people attended on the day.

The roundtable was held at the Nuffield Foundation headquarters in London, in September 2014. It was structured so that participants heard short presentations on the following topics, followed by a chaired discussion of the issues raised:

- Media attendance and reporting restrictions in the CoP
- Research in the CoP
- The publication of CoP judgments

Attendance at the roundtable and the discussions were held under the Chatham House Rules, a system named after the headquarters of the Royal Institute of International Affairs, which is designed to facilitate full and frank discussion whilst protecting anonymity.[164] Roundtables held under the Chatham House Rules have been very effective in promoting discussion of key policy issues relating to the MCA.[165]

This report is based on notes and recordings of the roundtable. It is organised according to the themes that were discussed by participants, rather than chronologically.

GENERAL VIEWS ON TRANSPARENCY AND PRIVACY

All participants expressed support for the principle of greater transparency in the CoP. One media representative quoted a colleague as saying:

> 'The Court of Protection deals with issues of the utmost seriousness, including the deprivation of liberty safeguards. The idea that anyone should be able to apply to have someone effectively locked up for any amount of time without the press, and through the press the public, being able to scrutinize what is going on is surely contrary to good sense and open justice.'[166]

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

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

[166] One issue that was not discussed during the roundtable was that the Mental Health Tribunals in England and Wales routinely hear cases in private that concern the liberty of patients detained under the Mental Health Act 1983. For reasons unknown, the media have not described this as a secret court nor expressed the view that these cases should also be subject to public scrutiny. The rules governing 'privacy' and 'transparency' in the Tribunals are discussed in the outline of the legal framework, above.

Open justice was said to be the 'defining norm', against which exceptions must be justified. Participants stressed not only the Article 10 rights of the media to impart information, but also the Article 10 rights of the public to *receive* information. Lord Neuberger's view that 'Open justice is an essential feature of the rule of law' was endorsed, as was his comment that in some cases 'secrecy' is necessary but 'should only be permitted if it is absolutely necessary, and, even then, it should be kept to a minimum.'[167] However, one participant drew a distinction between 'open justice' and 'transparency'; they felt that if everything was published nobody would take any notice.

Enhancing public understanding of the work of the Court of Protection

A recurring theme throughout the day was the importance of 'transparency' in improving public understanding of the work of the CoP. Media representatives argued that a lack of media scrutiny could engender public suspicion of the justice system. A journalist with experience of reporting on CoP cases expressed the view that no-one who sat in the CoP and witnessed a case could fail to be favourably impressed by the judges, and that the public needed to know that they made the most difficult decisions.

Lawyers expressed concern about use of the word 'secrecy' to describe the CoP, feeling it was very emotive and inaccurate. However, they maintained that the public needed to know what the CoP did and the issues needed to be discussed.

In a discussion on the value of public hearings for public education, a researcher highlighted that there are other ways of educating the public than hearings in open court.

Protection against miscarriages of justice

A number of participants felt that publicity could play in protecting against miscarriages of justice.

One participant described importance of publicity in highlighting flawed expert evidence. They cited the role of publicity in drawing attention to concerns about expert evidence provided by Professor Roy Meadow, which had been relied upon in the prosecutions of a number of women for the murder of their infant children. Following publicity about the quashed convictions of Sally Clark[168] and Angela Cannings'[169], the Criminal Cases Review Commission reviewed several other cases, and other convictions were found to be unsafe. It was suggested at the roundtable that if this had not been a criminal case, where Meadow's claims received public scrutiny and were widely discredited, then experts might still be making such pronouncements.

The case of Steven Neary was also cited as an example of the media playing a role in protecting against miscarriages of justice. Steven Neary was a young man with autism and learning disabilities. He had been unlawfully deprived of his liberty by the London Borough of Hillingdon. In his autobiographical account of his experiences of trying to get his son home, Mark Neary wrote that he approached the media out of desperation, 'I knew I needed support from different angles. I wasn't getting anywhere trying to carry the fight on my own and… I was frightened that the bulldozer would carry Steven away for good.'[170] Similarly,

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[167] Lord Neuberger (2014) 'The Third and Fourth Estates: Judges, Journalists and Open Justice', paper presented at The Hong Kong Foreign Correspondents' Club, on 26 August 2014. Paragraph 12.

[168] *R v Clark* [2003] EWCA Crim 1020. Although, note that the statistical fallacy committed by Professor Meadow was not regarded as sufficient for quashing the conviction in an earlier appeal, *R v Clark* [2000] EWCA Crim 54, and it was more recent medical findings that proved decisive in the second appeal.

[169] *R v Cannings* [2004] EWCA Crim 1

[170] M Neary, *Get Steven Home* (Lulu.com, London 2011). For Mark Neary's account of the media involvement in his case, see: J Taylor, M Neary and R Canneti, 'Opening closed doors of justice', (2012) 23 *British Journalism Review* p42.

the case of Ashya King[171] was also cited as a case which required media scrutiny because the police and prosecutors had been accused of acting unlawfully.

One participant cited a report by the Queensland Law Reform Commission entitled *Public Justice, Private Lives.*[172] The report identifies 'disciplinary', 'educative' and 'investigative' rationales for 'open justice', which it describes as follows:

> Central to the *disciplinary* rationale of open justice is that it acts as a safeguard against judicial 'partiality, arbitrariness, or idiosyncrasy' and is thus a means of accountability. The disciplinary rationale also views open justice as acting as a check on legal counsel and against dishonest testimony.
>
> An open court has also been said to fulfil an *educative* function by informing the public about the law and legal process, and by prompting judicial arbiters to educate themselves in 'prevailing public morality and thereby avoid public criticism'. Open justice also promotes predictability and consistency in decision-making in that both decision-makers and those advising people about the law are aware of previous decisions and can act accordingly.
>
> Finally, under the *investigative* rationale, it has been argued that an open court facilitates the production of additional witnesses and therefore plays an important part in securing completeness of testimony.[173]

A researcher questioned whether there was any evidence that judges might 'misbehave' without greater transparency, and asked whether this had been studied systematically.[174] Another researcher observed that the reasoning in judgments of cases concerning interventions during pregnancy and childbirth was much better in the published judgments that came after the decision in *Re AA*[175]- the case concerning Alessandra Pacchieri[176] – which was not published until after the media drew attention to the case.[177] A lawyer commented that a large number of cases followed in the wake of Pacchieri's case, and the courts were asked to give guidance on when they needed to go to court and how they should be approached.[178] Thus, it was suggested, the negative publicity surrounding this case increased awareness of the need for these matters to be referred to the court, prompted better guidance and led to more satisfactory judicial reasoning.

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[171] *Re Ashya King* [2014] EWHC 2964 (Fam). Ashya King is a young boy who had cancer. His parents removed him from hospital because they preferred a treatment for cancer that the hospital refused to offer in the belief that it would cause him less harm. On finding the child gone and being concerned for his health, the police issued an European Arrest Warrant. The parents were found to be in Spain, and were remanded in custody. Following their arrest, the case attracted considerable publicity and the authorities were criticised – particularly for the arrest of the parents. The case came before the family court, where Baker J ordered that the parents did have permission to take their son to Prague to receive their preferred treatment.

[172] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System. Report* (Report No 62, Volume 1, Brisbane 2007)

[173] Paragraphs 3.29-3.31

[174] The authors have been unable to find any such studies in a literature search.

[175] [2012] EWHC 4378 (COP)

[176] This case is described in more detail in Appendix 2

[177] For a similar view, see: Walmsley, E. (2014) 'Mama Mia! Serious shortcomings with another '(en)forced' caesarean section case *Re AA* [2012] EWHC 3278 (COP)', *Medical Law Review*, doi: 10.1093/medlaw/fwu034

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

Publicity as a corrective to misinformation in the public domain

Publicity was claimed to be a corrective to judgments that did not fully report the facts; conversely it was also said that open judgments could be a corrective to inaccurate journalism.

One media representative argued that judgments only give a 'potted summary' of the facts and can be open to misinterpretation. They highlighted that where there was a delay in publishing the judgment this could lead to inaccurate reporting, and they argued that accurate reporting would be assisted by responsible reporters sitting in court, which is not facilitated by the rules as they are currently drafted.

Another participant, however, highlighted the important role that published judgments could play in helping to check the facts of cases described in media reports. Although the availability of judgments does not guarantee accurate reporting, it does allow the public to check for themselves at source. Adam Wagner, the founder of the UK Human Rights Blog[179], advanced arguments to the Leveson Inquiry that bloggers could use published judgments to correct inaccurate or otherwise poor journalism.[180]

Journalists working in print media discussed the loss of expertise in legal journalism. There are now fewer court specialists who regularly check BAILII for new cases. One journalist described a news editor who did not understand what was meant by Ashya King being made a ward of court. They commented that nobody knows how the system works because they cannot get in.

One participant highlighted concerns that publicity about CoP cases tended to be skewed towards situations where things had gone wrong. They were concerned that advance planning tools such as Lasting Powers of Attorney (LPAs) might come to be seen as tools for abuse, deterring people from engaging in advance planning for future loss of mental capacity. They argued that good reporting on what was done well and to prevent abuse was also necessary.

The value of open and accessible judgments

The roundtable participants discussed the value of publishing more judgments of the CoP. 'Open judgments' were said to serve an increasingly important function in ensuring 'access to justice' for litigants in person. A solicitor with considerable experience of acting for the families of disabled children agreed that parents often have difficulties accessing justice, and commented that they 'devour' judgments. The author of a legal blog found that search terms used by people arriving at her blog indicated that people were looking for reliable sources of legal information.

Some participants expressed concern that judgments could be unnecessarily 'long winded' and inaccessible. For truly 'open justice', it was argued, information needs to be easily accessible, affordable and simple to understand and apply; Lord Neuberger has commented that judgments must 'be capable of speaking clearly to a lay audience'.[181]

At various points during the roundtable, discussion arose as to who the intended 'audience' of a judgment was. Judges agreed that the main intended audience for the judgments are the litigants, so that they understand the judge's reasoning and can appeal if they disagree with argument or the weighting of the facts. One participant with past experience of being a lay advocate for people detained under the Mental Health Act 1983 prior to the Human Rights Act 1998 (HRA) coming into force stated that they had experience of tribunal cases where people were often not aware of the reasons for their detention.

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[179] http://ukhumanrightsblog.com/

[180] Wagner's evidence can be downloaded from here: http://webarchive.nationalarchives.gov.uk/20140122145147/http:/www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Adam-Wagner.pdf

[181] Lord Neuberger, 'No Judgment – No Justice', paper presented at *The First Annual BAILII Lecture*, Freshfields Bruckhaus Deringer LLP, Fleet Street, London, on 21 November 2012. Paragraph 56.

A proponent of open judgments argued that they served wider audiences than lawyers, journalists and academics - pointing to the recent example of Ian McEwan's novel *The Children Act.*[182] McEwan is said to have been inspired to write the book by reading family court cases[183]. Whilst this might sound like a 'frivolous' example, literature is an important form of public engagement with the law.

Not all participants, however, took the view that judgments should be aimed at a wider audience than litigants and specialists. There was concern that the media becomes the 'audience' for the judgment, when the primary audience should be the parties and the specialists. A discussion arose as to whether judgments should be published if they did not establish any new legal principles. One lawyer said that they were not persuaded that mass publication of CoP judgments served a public education purpose since most did not contain legal argument or reasoning, but simply applied established legal principles to a particular case. This participant maintained that cases that are important and educative are those which establish new legal principles (which were said to be few and far between) or where legal principles were applied to new areas – such as sterilisation. Cases that did not fall into these categories were described as 'nosing about in people's lives'.[184] To this point of a view, a judge responded that legal education should not be confused with legal precedent.

Sometimes cases in the CoP or the family court may concern issues that are also being examined in criminal proceedings. For example, if a relative is being prosecuted for a serious offence against the person the case is about and the CoP proceedings are about their welfare in relation to that person. In such circumstances, the CoP may need to arrive at a determination of a welfare matter, but publishing the full details of their findings and reasoning may risk prejudicing ongoing criminal proceedings.[185] A journalist commented that in such circumstances, cases sometimes might have two separate judgments, one published and one not, because of the need to keep confidential some of the reasoning relating to any ongoing criminal proceedings.

The importance of privacy

Whilst all participants agreed that transparency was important, several expressed concern about the privacy of parties to cases – both in relation to media reporting and attendance, and the concerns about the publication of judgments discussed above. One researcher highlighted that people are not usually 'willing' parties to CoP proceedings, and that academic researchers would not be permitted to use personal data in this way without their consent. Or as one lawyer put it, the relevant person 'hasn't chosen to bring the litigation – or to fight rather than to concede'. They also commented that there may be different considerations in favour of publicity or privacy in non-contentious property and affairs cases, which form the vast majority of Court of Protection cases.

Journalists and those working in the media were aware of a number of cases where families and parties to cases welcomed publicity – citing, for example, the case of Steven and Mark Neary. However, lawyers also described cases where families had been very distressed by publicity. In *W v M*[186], discussed in Appendix 2 below, the family found media interest in the case very distressing. One lawyer felt that a 'media circus'

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[182] I McEwan, *The Children Act,* (Jonathan Cape, London 2014).

[183] I McEwan, 'The law versus religious belief', *The Guardian,* (London 5 September 2014)

[184] This view was not extensively debated. A contrary view has been expressed in the past by Sir James Munby, who has written that 'Releasing for publication only those judgments which are 'reportable' means that the public obtains a seriously skewed impression of the system'. Lord Justice Munby 'Lost opportunities: law reform and transparency in the family courts', (2010) *Child and Family Law Quarterly* 273.

[185] For information about the law governing reporting of criminal proceedings, see: Judicial College, *Reporting Restrictions in the Criminal Courts* (London 2014).

[186] [2011] EWHC 2443 (Fam)

could place families under 'unbearable pressure', and can mean that everyone loses sight of what matters, which is the best interests of the person.

A number of participants expressed concern at the level of detail about people's private lives contained in some judgments. A researcher observed that such comprehensive reporting was a feature of common law jurisdictions and contrasted this with judgments in civil code traditions, commenting that 'It is possible to be a lot more boring than an English judge'. Lawyers with experience of representing families in CoP cases commented that 'almost without exception' families find it an invasion of privacy for lawyers to read about their private lives, let alone the general public. Cases can involve very personal matters, for example they might concern sexual relationships between a person's parents, and in such circumstances the proceedings alone are already a significant invasion of privacy. In some cases the person at the heart of the proceedings may have no concept of invasion of privacy, but several participants highlighted that almost nothing was known about the impact of publishing a judgment on the person who is subject to the proceedings and others involved in the case.

Even where reporting restrictions are used, this may not offer 'watertight' guarantees of privacy. A participant described a case where a family made an application to bring welfare proceedings and far-reaching reporting restrictions were imposed. Nevertheless, the neighbours of the family were able to identify them from the facts of the case – they alerted the local media and a journalist arrived at their house and tried to get in. This was extremely distressing for the family. Journalists who attended the roundtable were troubled by this 'doorstepping' incident, and one expressed concern about inexperienced reporters who were used to the criminal courts and reporting on 'bad people'. In the CoP, they commented, 'nobody wears a black hat', the situation is much more delicate and the parties much more vulnerable; they felt that younger reporters may not be aware of that.

Participants discussed a series of recent and highly publicised cases concerning pregnant women and childbirth.[187] One participant commented on how 'existentially distressing' it would be to find an account of your experience of childbirth in law reports. A lawyer with experience of a case concerning involuntary treatment of a person with mental health problems described how carefully they had to proceed to ensure that any court reporting did not have an adverse impact on them. A journalist commented that not many journalists think about what happens to the person themselves if they find out about the reporting of the proceedings. One participant asked, however, whether it mattered if a person 'in Newcastle' has information about a person 'in London' who is not aware of this.

A researcher commented that more empirical research was needed on the impact of judgment publication on the affected parties. There was no equivalent in the CoP to research in the family court on the views of children about media reporting and publication of judgments.[188]

ANONYMISATION

Discussions explored issues around the anonymity of the people whom the case was about, the other parties and witnesses in both media reports and published judgments. One lawyer helpfully identified different 'levels' of anonymisation, ranging from decisions about whether or not to identify the individual at the heart of the case, identifying their relatives, identifying any public bodies or providers involved in their care,

[187] These include: *Re AA* [2012] EWHC 4378 (Court of Protection); *Re P* [2013] EWHC 4037 (Fam); *Re P* [2013] EWHC 4581 (COP); *Great Western Hospitals NHS Foundation Trust v AA & Ors (Rev 1)* [2014] EWHC 132 (Fam); *North Somerset Council v LW & Ors* [2014] EWCOP 3; *The Mental Health and the Acute Trust v DD & Anor* [2014] EWCOP 8; *The Mental Health Trust & Anor v DD & Anor* [2014] EWCOP 11; *The Mental Health Trust & Ors v DD & Anor* [2014] EWCOP 13; *NHS Trust & Ors v FG (Rev 1)* [2014] EWCOP 30; *Re DM* [2014] EWHC 3119 (Fam)

[188] J Brophy, *The views of children and young people regarding media access to family courts*, (The Children's Commissioner for England, London 2010); J Brophy, K Perry, A Prescott and C Renouf, *Safeguarding, Privacy and Respect for Children and Young People: The Next Steps in Media Access to Family Courts*, (National Youth Advocacy Service and Association of Lawyers for Children, 2014).

identifying individual professionals, or 'blanket' restrictions on any information being published which identifies any persons or organisations involved in the case. Different issues were raised by different 'levels' of anonymisation.

Naming the relevant person and their family

The point was made by a media representative that without identifying individuals in some cases, the wider impact of their case would have been reduced. The media want to report 'colour and facts'.; the difficulty with removing identifying information from a judgment is that it gives the case less 'colour', and it is less likely that they will pick up on the case and report it, and therefore the less likely the public would hear those stories.

The case of Mark and Steven Neary was referred to as an example of a situation where identifying the individuals concerned had enhanced the positive impact of the ruling. The case of Ashya King was another, rare, example of when the subject of the proceedings was identified – it was said that nobody argued about whether this should occur in this case.

However, it was suggested by a lawyer that the relevant person should be identified only very rarely. Another participant suggested that anonymised published judgments may inhibit 'reportability', but may still hold social value. It was suggested that identifying relatives could be very distressing, and could deter them from bringing an application at all.

From a historical point of view, it was observed that in the 19th century the practice was to report the full names and addresses of those subject to Chancery lunacy proceedings, and often to report the proceedings in full. It was observed that at the present time, a lot of personal details are published in personal injury claims. Subsequent to the roundtable, however, the Court of Appeal ruled that limited derogations from the principle of open justice may be lawful in some personal injury cases 'to enable the court to do justice to the claimant and his or her family by ensuring respect for their family and private lives'.[189]

The risk of 'jigsaw identification'

It was pointed out that 'jigsaw identification' was sometimes possible, even with very wide reporting restrictions, because a person's circumstances as described by the media or in a judgment were so unique. This was not said as an argument that cases should not be reported, rather that even with 'watertight' reporting restrictions 'there is a price to be paid'.

Lawyers and judges with experience of the CoP highlighted a tension between including enough information in a published judgment to make plain the reasoning of the judge, whilst protecting the privacy of litigants. Concerns were expressed that because of the level of detail in some judgments it might be possible for those who are familiar with the relevant person to identify who they are. Two lawyers said they had been involved in cases where the information about the facts in a published judgment was significantly cut down to minimise ongoing upset to the people involved in the case. A journalist agreed that too much information could be included in judgments – they highlighted a specific recent case where they felt the judgment had gone into too much detail. They had chosen not to report the case out of concern that local people could identify the parties. They argued that there was a need for the courts to restrict the publication of information that could be used to 'triangulate' the identities of the individuals concerned.

Whereas the media prefer to identify individuals if possible, researchers tend not to want to do so, and take precautions to avoid publishing any information which could contribute to 'jigsaw identification'. This is because research tends to report on general themes in people's accounts, rather than a single account. Research will therefore tend to present less of a threat to anonymity than individual published judgments or media reports. Yet research on the CoP can present even more technical challenges that media reporting.

[189] *MX v Dartford & Gravesham NHS Trust & Ors* [2015] EWCA Civ 96,s §31

Identifying public authorities and professionals

The new guidance on transparency, discussed above, says that the 'starting point' should be that public authorities and professionals should not be granted anonymity by the court. One participant pointed out that factual details such as identifying professionals can narrow down the location of the parties, and may contain data which help to 'triangulate' their identity. Identifying the NHS Trust which provides a person's care some sometimes increase the likelihood that a person will be identified if other people in the hospital 'make it their business' to identify the patient.[190]

A lawyer who had acted for an NHS Trust pointed to instances where the media had published allegations about a named NHS Trust that had already been contradicted by published judgments. They noted that NHS Trusts tended not to respond to incorrect claims – which the media then interpret as 'if it wasn't true, then you'd put out a statement contradicting it'.

In some cases Trusts may find themselves at the centre of a 'media frenzy' and are not property resourced to deal with press inquiries. This can impact upon the care that they can give. In a blog post the CEO of the University Hospital Southampton, where Ashya King had been treated, described the impact of the case:

> Our switchboard and patient support services were overwhelmed with calls from irate members of the public. Our security team were busy trying to manage multiple camera crews and satellite vans, the clinical site team were attempting to maintain control of the situation alongside all the usual challenges of bed availability and our press team were besieged by the media, whilst trying to make measured judgements about how to respond to this unprecedented situation.
>
> And many other people working here were being questioned by patients or the public about this situation, sometimes in a very aggressive way.
>
> But through all of this we still had thousands of patients who needed care and treatment. [191]

DIFFERENT APPROACHES TO TRANSPARENCY AND PRIVACY FOR DIFFERENT KINDS OF CASE

As discussed earlier, there are different rules governing media access to hearings in the CoP and the family court, and between different kinds of CoP case. In the Family Court, the media are generally permitted to attend hearings without having to make a formal application, but in the CoP they must make an application to attend any hearings heard in private. In serious medical treatment cases, the CoP generally sits in public, meaning that the media can attend without making an application. However, this is not the case for other kinds of welfare matters – for example, many cases concerning the deprivation of liberty safeguards or a person's capacity to consent to marriage would not be covered.

Participants were critical of the differences between the access regimes. A lawyer questioned what principled or practical difference there was between these different types of case, and could not see why this distinction was made. They could not see why the privacy of children in the Family Court should be treated differently to an adult in the CoP, nor why medical cases were treated different to welfare cases.

However, other participants expressed concern that the CoP was becoming 'subsumed' into the Family Court, despite important differences. In particular, there was concern that the President had initially

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[190] For an example of concerns like this arising in case law, see *NHS Trust & Ors v FG (Rev 1)* [2014] EWCOP 30 §67-9, where there was concern that if the judgment in this case was published, FG's fellow patients in hospital might recognise her and discuss her and this could lead to a deterioration in her mental health.

[191] F Dalton, 'Chief executive's blog' (9 September 2014), http://www.uhs.nhs.uk/AboutTheTrust/Newsandpublications/Chief-executives-blog/Chief-executives-blog-9-September-2014.aspx

intended to draft guidance on transparency that covered both courts. It was argued that a separate consultation was needed on media attendance in the CoP, as it raised different issues to the Family Court.

When asked by the chair of the discussion whether people felt that the default position in the CoP should be that journalists should be able to attend court without making an application, on the same basis as they are in the family court, there was unanimous approval of that proposition.

THE NEW TRANSPARENCY GUIDANCE

Some participants felt that the new guidance on the publication of judgments, and forthcoming guidance which was anticipated to recommend more public hearings and increasing media attendance, was 'definitely a good thing'. Yet others expressed misgivings. One described the current approach to transparency as 'unprincipled and incoherent'. They suggested that there needed to be more guidelines for judges in how to exercise their discretion under the guidance.

There was also felt to be a need to address practical and administrative issues (discussed below), as well as issuing guidance. Some participants questioned whether the transparency guidance was being complied with in practice, and highlighted the difficulty of knowing whether or not it was without accurate recording of when judgments were and were not being published in relation to cases falling within the scope of the new transparency guidance.[192]

It was also highlighted that the new practice guidance on transparency in relation to the publication of judgments does not appear to protect the identity of friend, even a close friend, of the relevant person, who may be involved in making the application.

PRACTICAL CHALLENGES

A recurring theme in discussions at the roundtable was the practical challenges for realizing various forms of transparency.

Judgments

One participant said that there is a need to address administrative and IT issues in the publication of judgments, and not merely legal and ethical issues. They proposed that experts should liaise with the government as it develops new IT systems and CoP online resources. A shortcoming of the current system was said to be the absence of accurate records to see whether the transparency guidance on the publication of judgments was being complied with.

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[192] Since the roundtable, in *Justice for Families Ltd v Secretary of State for Justice* [2014] EWCA Civ 1477, the President of the Family Division and the CoP rejected an application for a writ of habeas corpus by John Hemming MP in respect of a woman whose name he did know, describing the application as 'hopeless'. However, during the course of the case John Hemming MP drew the Court of Appeal's attention to a discrepancy between the number of committal cases reported by official Ministry of Justice statistics and the number of judgments appearing on BAILII. Sir James Munby P stated:

> The latest figures from the Ministry of Justice of receptions into prison for contempt of court, show that in the twelve months from April 2013 to March 2014, a total of 116 contemnors arrived in prison (monthly totals 15, 11, 8, 13, 14, 7, 12, 7, 6, 8, 7, 8). These figures are broken down into County Court (aggregate total 36), Crown Court (5), Magistrates (4), High Court (5) and "Not recorded" (66). Mr Hemming's point, which appears to be borne out by an analysis he has conducted for us of the committal cases which appear on BAILII, is that for a very large number of these committals there is no judgment to be found on BAILII. This, if true, and every indication is that unhappily it is true, is a very concerning state of affairs. (§44)

Sir James Munby P drew the attention of judges sitting in the Family Court to the Practice Guidance issued in relation to committal proceedings (discussed above).

Another participant, whilst praising BAILII's work in general, highlighted some of its limitations. There were some BAILII judgments where people's names had slipped in.[193] They were aware of a family court decision where the judge had explicitly written that they wanted publicity, but the case could not be found on BAILII so could not be cited. This is likely to represent a problem with the courts sending the judgments to BAILII, rather than BAILII themselves. There was also concern that interim decisions made by a district judge reported on BAILII had misled social workers who did not realise that this did not carry precedent.[194]

There were also practical challenges concerning transparency for judgments that are given *ex tempore* as they need to be transcribed, although some judges preferred to always give a written judgment for the parties.

Media attendance and reporting on cases

A number of practical – and legal – difficulties for media attendance and reporting on CoP cases were discussed.

A general concern was that there were large discrepancies in approach towards media attendance and reporting between individual judges. Particular concerns were expressed by participants from the media about judges in regional courts, who might have less experience of media applications to attend and report on CoP cases.

A key concern was how the media could, or should, learn about a case in the CoP. As discussed earlier, it may be a contempt of court under s12 AJA to disclose certain information about proceedings heard in private, or where there are reporting restrictions prohibiting discussion of a case. A question which recurred throughout the discussions was whether or not a person may be in contempt of court if they informed the media about a case.

One participant who had considerable experience of applying on behalf of media organisations to attend and report on proceedings in the CoP argued that it could be lawful for a person to inform the media about their case. They argued that any blanket prohibition on informing the media would impair their rights under Article 10 of the ECHR. They cited, by way of analogy, the following passage from guidance written by Adam Wolanski and Kate Wilson, published by the President of the Family Division (then Sir Nicholas Wall), the Judicial College and the Society of Editors:

> Note, however, that FPR 2010 r.12.75(1)(d) uses the phrase "to make and pursue a complaint….." In *Re N (Family Proceedings: Disclosure)* [2009] EWHC 1663 (Fam)]… at [58] to [62], Munby J (as he then was) suggested that the word "complaint" might have a wider meaning and be sufficiently broad as not to be confined to complaints made to disciplinary or regulatory bodies. The case itself concerned a "complaint" to the GMC, which was plainly within the rule, and the judge was at pains to say that the meaning of the crucial word "complaint" would have to be elucidated on a case by case basis.[195]

This statement relates to an earlier passage[196] discussing an exemption under the Family Procedure Rules (rule 12.75) where the authors stated that 'a party may… be able to make disclosures to a journalist if this is necessary to enable that party to make a complaint against a person or body concerned in the proceedings

[193] It should be noted that BAILII do not perform the screening of judgments for anonymisation, but expect that this has taken place before it is sent to them. BAILII do remove personal information that has been left in judgments very swiftly when alerted to this.

[194] See also, regarding problems with media use of BAILII: P Magrath, S Phillimore and J Doughty 'Transparency: the curious case of the judge with no name' *Family Law* (forthcoming April 2015)

[195] A Wolanski and K Wilson, *The Family Courts: Media Access & Reporting. July 2011* (President of the Family Division, Judicial College and the Society of Editors 2011). Footnote 173, page 36

[196] At paragraph 40

or regarding the law, policy or procedure relating to private family proceedings'. The exemption permitting parties to disclose information about proceedings to others for the purpose of making a complaint, even construed sufficiently broadly to include speaking to the media, would not, however, apply to the CoP as this is governed by the Court of Protection Rules 2007 not the Family Procedure Rules.

Lawyers who acted for parties in the CoP, however, felt less confident that it was lawful if they, or any party, disclosed information about proceedings to the media. Their view was that at face value there was no lawful mechanism for informing the media about a genuinely important case without making an application to the court to inform the judge. They felt this was disproportionate, and that there needed to be a proper mechanism for drawing the media's attention to the case. They stated that the legal profession was very anxious about its role and responsibilities in informing the media.

Participants with experience of making applications for media attendance and reporting on cases pointed out that if it were unlawful to disclose the case number and sufficient information about a case to show 'good reason' for the media to attend, they would be revealing unlawful activity in their applications. To date, nobody has been in trouble for this and so the issue has not been tested in court. A judge highlighted the case of *Pickering v Liverpool Daily Post*[197], commenting that s12 AJA does not prevent the publication of the name of the person and therefore citing their name in making an application.[198] Another participant pointed out that in *Re B (A Child)*[199] a solicitor had got into trouble for alerting MPs to family court proceedings, and there was no precedent that it is permissible for a solicitor to alert the media.[200]

The participants also discussed who, if anyone, should alert the media to an important case. A lawyer commented that it typically required a family to do so as the Official Solicitor (who acts as a litigation friend for the relevant person in many CoP cases) would be unlikely to actively seek press involvement. They said that unless there happened to be a family member who wanted the press involved, these cases will not be brought to the attention of the media.

Some journalists had experience of judges who they felt were very good at notifying them of important cases. One described a judge who would alert them to an important case, allow them to attend and then discuss at the end what could be reported when the media knew what they wanted to report. They felt that this was a good system. They commented, however, that emergency applications – like recent cases concerning emergency interventions regarding childbirth – were more problematic. They asked how the media should know that the court is sitting in emergency hearings, especially if these cases were heard out of hours.

In some cases which are heard in open court, the media may learn of a case via the CopyDirect notification service (discussed above) giving them notice of reporting restrictions. The CopyDirect notice usually arrives the night before, but there have been cases where it has arrived whilst the hearing is already underway. One journalist had received notice of a case three hours after the hearing had finished. Typically if the media learns of a case in this way, only those journalists who are based in the courts would be able to attend at such short notice. It would be impossible for anyone to attend at minus three hours' notice.

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[197] [1991] 2 A.C. 370

[198] In the *Pickering* case, the House of Lords held that s12 AJA did not make it a contempt of court for the media to publish the fact that a named patient had applied for their release from detention to a mental health tribunal, nor the fact that he had been discharged. However, publishing the evidential basis for the Tribunal's decision, and any conditions imposed on discharge, was prohibited by the Tribunal rules.

[199] [2004] EWHC 411 (Fam)

[200] See *Re B*, p. 13 above, where both a mother who believed herself the victim of an injustice in the family courts and her solicitor had both gone to MPs. They were criticised by Munby J (as he then was) for having 'disseminated documents containing information within the ambit of section 12 of the 1960 Act' (§149).

The discussion turned to whether the court listings themselves could give some kind of indication to the media of the subject matter of the case, so that they could decide whether or not to make an application to attend the hearing. One participant likened the current court listings system, where cases are typically listed as 'In the Matter of P', as being like football match fixtures listed as 'P v P' and 'P v P'. A representative of the media argued that cases should be listed with a case number and an indication of what the case is about – its approximate subject matter. A journalist pointed to the system in the family court, where the listings used a 'code' which gave some indication of what the case is about; for example, a case listed with a 'D' was a divorce case. The President is currently working on a more refined listing system in the family court in order to assist the media.[201]

Informative listings were said to be more challenging in the CoP where, for example, cases involving LPAs might also involve many other substantive issues. It would have to be a more complex classification system. It was suggested that if we want to enhance public understanding of the work of the CoP what was needed was more than a code; it needed somebody to highlight which cases were 'interesting' and which were not. Lawyers had experience of reporters being invited in to listen to a case which they felt was 'boring', and which lasted for five days. There are cases that are 'unbelievably important', but who is going to distinguish between 'serious medical treatment' and 'serious medical treatment three stars' cases?

Sometimes the media learned of cases because a judgment had been placed on BAILII. One participant estimated that as many as seven or eight CoP judgments published on BAILII had been picked up by the press.

Reporting restrictions and the CopyDirect service

Under section 12 of the Human Rights Act 1998 (HRA), when any court is considering granting any relief which may affect the exercise of the right to freedom of expression, all practicable steps must be taken to notify those whose rights will be restricted, or else there must be compelling reasons why they should not be notified. Practice Direction 13A (reproduced here in Appendix 3) describes the procedure for notifying the media of an application for reporting restrictions in CoP cases. It advises that notice should be served on the media via the CopyDirect service, to which national newspapers and broadcasters subscribe,[202] and gives details on how to do this. One of the requirements of the Practice Direction is that any applications for reporting restrictions of which the media are notified should be accompanied by an explanatory note 'from which persons served can readily understand the nature of the case'[203].

During the roundtable, some representatives of the media argued that this system was unsatisfactory. There was the difficulty, discussed above, of notification being effected without sufficient time for the media to attend a hearing. One representative of the media described experiences of reporting restrictions being circulated by local authorities without an explanatory note, or with an explanatory note that is password protected but without any password. They also expressed concern that the 'vast majority' of legal advisors were not serving notice of the orders imposing reporting restriction on media organisations; they were receiving notice of the application, but not the final order. This was said to be potentially dangerous, as not all media organisations would circulate the notice of application to impose reporting restrictions, as this is only an application and not an order, and so if any orders were imposed media organisations might not be aware of them.

[201] Sir James Munby, 'Transparency - The Next Steps: A Consultation Paper issued by the President of the Family Division on 15 August 2014', *Family Law*, available: http://www.familylaw.co.uk/news_and_comment/transparency-the-next-steps-a-consultation-paper-issued-by-the-president-of-the-family-division-on-15-august-2014

[202] Practice Direction 13A, paragraph 13.

[203] Practice Direction 13A, paragraph 16.

Lawyers present pointed out that the requirement to serve the media with notice of the order, as well as the application, is contained in the Practice Direction[204] and should be stated in the orders. It may be stated in the orders, however closer scrutiny of Practice Direction 13A after the roundtable revealed that whilst it does give extensive guidance on serving notice via CopyDirect for *applications* for reporting restrictions, or where the court is considering an own-initiative order imposing reporting restrictions, it does not explicitly state that the orders themselves must be served on the media.

The cost of applying to attend a hearing and report on a case

Representatives of the media argued that the current process for applying to attend a hearing and reporting on a case could be costly, and this could have a chilling effect on reporting CoP cases. An example was given of a case where a media organisation made a very costly application to attend a hearing, a journalist consequently spent several days in court, only for reporting restrictions to prohibit them from publishing any information about the hearing. Cost was less of a concern in the Family Court, where the media did not need to make an application to attend a hearing.

One representative of the media expressed concern that the adverse costs ruling in *Re G (Adult)*[205] could have a chilling effect, albeit they felt that it was probably not appropriate for the media to apply to be a party in the case (this case is described in Appendix 2).

It was suggested that any chilling effect arising from the cost of making an application would be felt more keenly by smaller media organisations. As a result of this, it would increasingly be only well-resourced media organisations who could afford to make an application to attend and report on a CoP hearing.

Research in the Court of Protection

The roundtable also included a brief discussion of some of the 'transparency' challenges facing researchers in the CoP. These challenges came from the multiple layers of regulation of research in this area. Researchers hoping to conduct research on CoP hearings, files or with litigants will need, at the very least, authorisation from their university Research Ethics Committee (REC) and the Ministry of Justice's Data Access Panel. Whilst these processes contained some quite detailed and challenging requirements, they were also experienced as useful in producing more focussed research and the Ministry of Justice Data Access Panel process was experienced as broadly supportive and helpful.

However, until the 2015 amendments to the Court of Protection Rules the 'automatic' reporting restrictions imposed by s12 AJA presented a very serious difficulty to researchers, as it meant that researchers would need an order in each and every case where they sought to observe a hearing, speak with somebody about a case they were involved in, or consult a court file. This could impose a very arduous process on researchers and court staff alike. It was suggested at the roundtable that a rule change and practice direction similar to that adopted by the family court would be beneficial for facilitating research on the CoP. Following the roundtable, as discussed above, a rule change was introduced which allows the adoption of a similar practice direction in the Court of Protection (see Practice Direction 13A in Appendix 3).

Even setting aside the difficulties posed by s12 AJA, however, research in the CoP would still be challenging, especially if researchers sought to use data that would ordinarily require the person's consent where participants lack the mental capacity to consent to its use. This is because under the MCA, they would need to invoke special procedural safeguards and also seek authorisation from a specialist Research Ethics Committee which had authorisation from the Secretary of State. Some researchers working in this area described difficulty obtaining the requisite authorisation. Approval from the Ministry of Justice Data Access Panel would also be required.

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[204] Practice Direction 13A, at paragraph

[205] [2014] EWCOP 5

There is also a danger that different bodies from whom authorisation must be sought might impose conflicting requirements, or requirements which meant that a researcher could end up going back and forth between different bodies in order to ensure that adjustments required by one body were agreed by the other bodies from whom authorisation must be sought.

In a discussion of the challenges posed by the MCA itself in conducting research on litigants in the CoP who may lack the mental capacity to consent to participate in a research project, it was suggested by one participant that research involving people who *have* the mental capacity to consent to participate would be a possibility, even in the CoP, as mental capacity is 'decision specific' and can fluctuate. This means that they may be able to consent to participate in a research project about their experiences of the court even if their capacity to make a particular decision has been questioned in the past.

The difficulties of navigating multiple layers of regulation in research on the CoP will form the focus of a future publication, offering practical guidance to researchers working in this area.

DISCUSSION

The roundtable brought together participants from a range of backgrounds, with different perspectives on 'transparency' issues in the CoP. Despite these differing backgrounds and perspectives, there was considerable common ground among the participants.

All participants agreed that it was important that the media were able to report on CoP cases and that judgments were published. However, there was disagreement among participants about which cases the media should be able to report, or which judgments should be published, and what level of detail about these cases that should be in the public domain. There was a tension between ensuring there was enough detail concerning the facts of the case to make the judge's reasoning clear, or to provide the media with sufficient 'colour' to report a case, and protecting the privacy of the individuals concerned. It was suggested that guarantees of anonymity could never be absolute, even with 'watertight' reporting restrictions, and that even if a person was not identified by third parties, reading about oneself in a report of a case could be 'existentially distressing'. One participant commented that whilst transparency is important, 'there is a price to be paid'.

Several themes recurred through the discussions. One was the absence of research or robust evidence to support both claims made in favour of greater 'transparency' or a greater emphasis on privacy. For example, it was argued that transparency could help to protect against miscarriages of justice and protect against judicial 'misbehaviour', but there was no research basis for this claim. Meanwhile, it was acknowledged that there was no research on how litigants in the CoP felt about their cases being publicly reported. A third area where it was felt that more research was needed was the 'audience' for published judgments on BAILII, so that more could be known about who uses published judgments and what they would find useful.

Another recurring theme was that whilst it is important to consider the principles of transparency and privacy, it is also important to focus on the practical and administrative matters which facilitate media reporting and the publication of judgments. In particular, there was concern that the process for ensuring that judgments are published on BAILII in accordance with the new transparency guidance was insufficiently robust.

A key difficulty for the media was knowing when an important case was occurring; there was a lack of clarity over who could lawfully inform them of proceedings. It was suggested that the court listings could be adapted to contain more information about the subject matter of the case. Media representatives also expressed concern about the cost of applying to attend a hearing, saying that this could have a chilling effect. Participants at the roundtable supported a change in the CoP rules to permit members of the media to attend a hearing without making an application, as they are in public law cases in the family court. Media representatives also expressed concern that they were not always being served with notice of applications for reporting restrictions in good time, and in some cases were not being given notice of orders imposing reporting restrictions at all.

On the basis of these discussions, we have identified the following issues for further exploration:

1. Consideration should be given to whether the court should adopt a rule change to permit the media to attend important welfare hearings, as well as serious medical treatment cases;
2. Consideration should be given to how to improve the system for informing the media of important CoP cases;
3. There is a need for greater legal clarity about when parties and legal representatives can lawfully inform the media about a case;
4. Practice Direction 13A may need to be updated to remind the parties of the need to notify the media of any order imposing reporting restrictions, in addition to notifying them of any application for reporting restrictions;
5. When judgments by district or circuit judges are published on BAILII, it may be useful to include a note that the judgment does not establish any legal precedent;

6. The court, or researchers, should explore ways to collect statistics on how effectively the transparency guidance on the publication of judgments is being complied with: how many judgments meeting the criteria for publication under the new guidance are, and are not, being published?
7. More research is needed on: the views of litigants about media reporting on CoP cases and the publication of judgments; the users of published judgments and their information and access needs; the effect of 'transparency' on the behaviour of the judiciary and other actors within the legal system.

APPENDIX 1: SUMMARY OF THE LAW

A more detailed description of the legal framework governing transparency and privacy issues in the Court of Protection is given in the body of this report. However, the key elements of this legal framework can be summarised as follows:

- Where proceedings of the CoP are held in private, section 12 of the Administration of Justice Act 1960 (AJA) means that it may be a contempt of court to publish any information about the proceedings.
- In *Re B (A Child)*[206] Munby J (as he then was) interpreted 'publication' of information very broadly, and as including not just information communicated to the media but also private communications to individuals[207].
- Unlike the family court, there are not 'automatic' restraints on identifying the individuals involved in CoP proceedings, but the court may make an order[208] imposing reporting restrictions on publishing the identity of the individuals or information relating to the proceedings. The media must be notified of any applications for reporting restrictions[209], but if they use this information for editorial purposes before an order is made this would be a contempt of court.[210]
- The case of *Re B* raised questions about whether litigants were permitted to disclose information about proceedings to third parties such as their MP, other family members, or professionals such as their doctor or counsellors who might be involved in supporting them. In response, a rule change and practice direction was adopted which permits disclosure of information for certain purposes to specified individuals. This practice direction also permits the disclosure of information to researchers for authorised research projects. There is no equivalent rule or practice direction in the CoP.
- The general rule is that CoP hearings are heard in private[211], meaning that the restrictions of s12 AJA will usually apply and in general the media will need to make an application to attend and report on a hearing. Unlike the Family Court, there is no provision allowing media attendance without application.[212]
- However, the CoP has the power to order that a hearing will be heard in public.[213] Where cases are heard in public, the court may make orders imposing reporting restrictions.[214]
- Practice Direction 9E states that 'ordinarily' serious medical treatment cases will be heard in public.[215] This does not apply to wider 'welfare' issues, for example disputes over a where a person should live or whether they should have contact with their family.
- When the court hears an application for committal for contempt of court, the general rule is that the hearing will be in public. If the committal hearing is held in private the court must state publicly the

[206] [2004] EWHC 411 (Fam)

[207] §68

[208] Under Court of Protection Rules 2007 rule 91

[209] s12 Human Rights Act 1998

[210] *A Healthcare NHS Trust v P & Q* [2015] EWCOP 15; Contempt of Court Act 1981.

[211] Court of Protection Rules 2007 rule 90

[212] Family Procedure Rules 2010 r 27.11(2)(f)

[213] Court of Protection Rules 2007 rule 92

[214] Court of Protection Rules 2007 rule 91

[215] Court of Protection, *Practice Direction 9E - Applications relating to serious medical treatment*, (Judiciary of England and Wales, London 2007)

name of the person to whom the committal application relates, 'in general terms the nature of the contempt in respect of which the order of committal is being made' and any punishment imposed.[216] Recently the President of the CoP, Sir James Munby, issued practice guidance reminding judges and practitioners of these rules, and additionally requiring that in every case where a committal order is made a transcript of the judgment should be prepared at public expense and placed on the BAILII website.[217]

- The President has also published practice guidance on the publication of judgments of the CoP.[218] This states that judgments regarding certain types of case – chiefly serious medical treatment cases, cases about serious welfare matters and deprivation of liberty, and property and affairs cases involving disputes or very high value property decisions – the 'starting point' is that the judgment should be published and placed on BAILII. For other types of case, the starting point is that the judgment may be published if there is an application from a party or accredited member of the media.
- The President's guidance on the publication of judgments also states that where a judge gives permission for the judgment to be published, public authorities and expert witnesses should be named 'unless there are compelling reasons why they should not be so named', but the person who is the subject of proceedings and their family should not be named.
- In deciding whether to hold a hearing in public, to allow the media to report on the proceedings, whether to impose reporting restrictions or permit information to be published and deciding whether or not to publish a judgment, the courts must consider the rights of the parties and the media under Article 6 of the European Convention on Human Rights (ECHR) (the right to a fair trial), Article 8 (the right to respect for home, family and private life) and Article 10 (freedom of expression).

[216] Court of Protection Rules 2007 rule 188

[217] *Committal For Contempt Of Court (Practice Guidance)* [2013] EWHC B4 (COP) 2013; *Committal For Contempt Of Court (Practice Guidance - Supplemental)* [2013] EWHC B7 (COP) 2013

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

APPENDIX 2: KEY CASES ON TRANSPARENCY IN THE COURT OF PROTECTION

Case and judgments	Summary	Legal Issues
E v Channel Four Television Corp [2005] EWHC 1144 Judge: Munby J (as he then was)	This High Court case preceded the MCA. On behalf of E, the Official Solicitor sought an injunction under the inherent jurisdiction of the High Court to prevent a film about E being broadcast by Channel Four and the publication of an article about her, on the basis that public dissemination of intimate personal information about her would cause her harm. E had herself consented to the making of this film, but it was asserted that she lacked the mental capacity to consent to this. The court was not satisfied that E was 'likely' to lack capacity to consent to the broadcast of the film, and even if it was it was not satisfied that it was contrary to her best interests, especially given her own wishes and feelings. The court declined to make an injunction restricting the broadcast of the film.	- Use of the inherent jurisdiction to restrain publication - Capacity to consent to publicity about one's personal affairs when the relevant person wants publicity.
A v Independent News & Media Ltd & Ors [2010] EWCA Civ 343; [2010] 3 All ER 32 Judges: The Lord Chief Justice of England and Wales (Lord Judge); The Master of the Rolls (Lord Neuberger) and Sir Mark Potter, President of the Family Division (On appeal from Mr Justice Hedley in [2009] EWHC 2858 (Fam))	Derek Paravicini is an accomplished pianist who has disabilities. His parents and sister applied to the CoP to be appointed as deputies for his property and affairs. However, the Royal National Institute for the Blind, who provided his accommodation, invited the court to appoint an independent deputy. The media applied to attend hearings in the CoP, citing the common law principle of open justice and their Article 10 ECHR rights. This application was opposed by Paravicini's family and the Official Solicitor, acting on his behalf. In the High Court, Hedley J found that the media must first show 'good reason' why they should be permitted to attend, and if that was established then the court should consider the balance of Paravicini's Article 8 rights and the media's Article 10 rights. He held that the media should be allowed to attend hearings and report on materials that was already in the public domain and 'which answers the legitimate questions of a reasonable person who knows what is presently within the public domain'. Other matters, such as his earnings, care arrangements and medical treatment matters, were not reportable. Upon appeal, it was held that the CoP starts from the assumption that 'just as the conduct of their lives by adults with the necessary mental capacity is their own affair, so	- Media attendance of CoP hearings and right to report on them and identity 'P' - Two-stage criteria for applications to attend court and report on proceedings: 'good reason' for bringing the application must be shown, before proceeding to the balancing exercise competing Article 8 and Article 10 rights - Reporting on matters that are already in the public domain

	too the conduct of the affairs of those adults who are incapacitated is private business'. The Court of Appeal held that because many aspects of Paravicini's life were already in the public domain, the public and media interest was engaged, and it was an appropriate hearing for the media to understand the CoP's processes. After considering the relevant case law on Article 10 ECHR rights of the media, the appeal was dismissed.	- The distinction between the public interest and matters that the public find interesting
G v E, Manchester City Council and F [2010] EWHC 2042 Judge: Baker J (See also: *G v E, A Local Authority & F* [2010] EWHC 621 (Fam); *G v E* [2010] EWCA Civ 548; *G v E & Ors* [2010] EWCA Civ 822; *G v E* [2010] EWHC 2512 (COP); *G v E & Ors* [2010] EWHC 3385 (Fam))	In this long running case, Baker J had found that a local authority had violated E's Article 8 ECHR rights to respect for home, family and private life, and had unlawfully deprived him of his liberty, when it had moved him from living with his foster mother to supported living accommodation on the basis of safeguarding concerns, without any formal legal authority to do so ([2010] EWHC 621 (Fam)). Mike Dodd from the press Association submitted that this was 'clearly a case of great public interest, and one which should be reported' and that given the gravity of the errors made by the local authority they should be publicly identified so that the public could hold them to account. Publication was not opposed by any of the parties; even the local authority 'ultimately accepted that its identification was unavoidable.' Baker J therefore publicly named Manchester City Council as the local authority in the case.	- Identification of public authorities responsible for wrongdoing[219]
P v Independent Print Ltd. & Ors [2011] EWCA Civ 756 Judges: Lord Justice Ward, Lord Justice Carnwath and Lord Justice Tomlinson (see also: *A Primary Care Trust v AH* [2008] EWHC 1403 (Fam); *A Primary*	P was the subject of long running welfare proceedings in the CoP concerning where he should live and restrictions on contact with his mother. A hearing was fixed for a review of his case by Hedley J on 8th December 2010; on 22nd November 2010 *The Independent* newspaper's legal department emailed the CoP with an application to attend and report upon this hearing. The court office did not reply until 7th December, when it stated that the media application would be heard before Hedley J immediately before the welfare hearing. The *Independent*'s appearance was said to take the other parties by surprise, since the *Independent's* email application had not resulted in an application being issued by the court which could be served on the parties. Hedley J cautioned against relying	- Media application to attend and report upon a case that was not already in the public domain - Procedural fairness in media applications to attend and report on hearings (need for proper notice for all parties)

[219] For an example of a local authority who was found to have violated a couple's human rights, but who was not identified, see: *The Local Authority v Mrs D & Anor* [2013] EWHC B34 (CoP)

Care Trust v P [2009] EW Misc 10 (EWCOP))	upon email applications and stated that this illustrated that working procedures had not yet been fully established for media applications. Hedley J found that P's mother – AH – had been encouraging publicity to increase her influence over him, but that since this could be managed via the contact regime this did not mean that his Article 8 rights outweighed the media's Article 10 rights. Hedley J commented that in his experience where journalists had attended court, the reporting had been fair, accurate and impartial. He made an order permitting media attendance. However, he also ordered that AH 'whether by herself or the instruction or encouragement of any other person, shall not, by any means, bring to the attention of [P] the fact of, nor the content of, any media reporting of this case'. Expert evidence acquired after the hearing held that P was unlikely to identify himself in media publications, however if he 'believes that information about him is being shared with the media it will contribute to a sense of distrust. This will seriously undermine his care plan and developing therapeutic relationships.' The Court of Appeal heard that the hearing of 8th December was for pressing welfare matters. Because the parties were unaware of the *Independent*'s application, they complained that it had been 'hijacked'. This had incurred costs for the parties. The Court of Appeal held that Hedley J had to deal with the matter there and then as to do otherwise would be to deny the *Independent* the privilege they sought, however it also held that 'Their attempts to issue the application were totally inadequate and rightly the subject of criticism by the judge'. The Court of Appeal upheld Hedley J's decision to permit the media to attend court.	- Orders that P should not be made aware of media coverage of his case
London Borough of Hillingdon v Neary & Anor (Rev 2) [2011] EWHC 413 (COP) Judge: Jackson J (See also: *London Borough of Hillingdon v Neary & Anor* [2011] EWHC 1377 (COP); *Re Steven Neary; LB*	Steven Neary was detained by the London Borough of Hillingdon in a care home under the DoLS for nearly a year. During this time his father, Mark Neary, began a public campaign to 'Get Steven Home', which had attracted some media interest. Eventually, the DoLS authorisation for Steven's detention was terminated by Mostyn J in the High Court. A future hearing was scheduled to determine whether Hillingdon had acted lawfully or violated Steven's human rights. Five media organisations (Independent Print Ltd, Guardian News and Media Ltd, Times Newspapers Ltd, the BBC and the Press Association) applied to attend the hearing and report on the case, and to identify the parties. The Official Solicitor, on behalf of Steven, argued that the court should take a	- Media application to report a case about alleged wrongdoing by a public authority and identify all the parties, including P - Significance of the story and identities of the parties already being in the public eye

Hillingdon v Steven Neary [2011] EWHC 3522 (COP); Re Steven Neary; LB Hillingdon v Steven Neary [2012] MHLO 71 (COP))	cautious approach and he could not see further publicity as being in Steven's best interests. The media argued that there was good reason for the orders as there was a public interest in the work of the CoP, it was alleged that Steven and his father's rights were seriously infringed by a public authority and the issues had already been aired to some extent in the public domain. Jackson J affirmed the starting point of handling the affairs of incapacitated people privately (*Independent News and Media v A*) but observed that the rules did permit public hearings. He observed that publicity can 'have a strong effect on individuals', but stated that there had to be a 'proper factual basis' for these concerns. There was a genuine public interest in the CoP's work being understood, in part to dispel misunderstandings – it is not in the interests of litigants for the court to be characterized as 'secretive'. Media participation need not be limited to 'exceptional' individuals like Derek Paravicini. A distinction can be drawn between cases that are already in the public eye and those that are not. Where the proceedings themselves do not 'create the story' the question is whether an already existing story can be followed in court. Jackson J recognized that stories about particular individuals are more attractive to the media than stories about unidentified people. But once a person is identified the court's ability to control the information about them is lost. Jackson J authorised the media's attendance in court and the identification of the parties in the case. In the subsequent hearing ([2011] EWHC 1377 (COP)), Hillingdon circulated a 'contentious and inaccurate' briefing note to the media to counteract adverse publicity, which painted a 'particularly unfair and negative picture of Steven'. Hillingdon had attempted to counteract its effects by informing the media that Jackson J had directed that no part of it should be published. Jackson J affirmed that he had given no such direction, trusting the media to 'continue to respect Steven's need to be left in peace, as it has done since the hearing in February'.	- Requirement for a proper factual basis for claims that publicity may have an adverse effect on individuals - Publicity may enhance public understanding of the CoP's work and dispel misunderstandings, which is in the public interest and the interests of litigants - Stories about identified individuals are more attractive to the media than unidentified individuals, but once identified the court's ability to control information in the public domain about them is lost.
W v M & Ors [2011] EWHC 1197 (COP) Judge: Baker J	M had been in a minimally conscious state since contracting brain stem encephalitis at the age of 43. Her family believed that she would not wish to continue living in her present situation. They applied to the CoP for a declaration that it was not in her best	- Family application to restrict publicity - Public interest in medical cases

(See also: *W v M* [2011] EWHC 2443 (Fam))	interests to continue to receive artificial nutrition and hydration or other life-sustaining treatment, and for it to be withdrawn so that she might be allowed to die. Baker J directed that all hearings should be in open court, but invited applications for injunctions preventing publication of identities. The media were notified of a directions hearing and journalists, but not lawyers, from *The Times* and the Press Association attended. The family said that bringing the proceedings had been extremely difficult and they would 'struggle to cope with the possibility of being contacted by the press'. Being contacted or identified by the media might cause them to think twice about bringing the case and affect their ability to visit M. Baker J made an order prohibiting publication of 65 identities, or contact with them by the media, including that of M and her family, and people involved in her care. This injunction provoked considerable criticism from the media (John Hemming MP was reported as calling this injunction 'evil'[220]), however media representatives who were served with the order did not object to the 'doorstepping' restrictions, although they did object to the long list of names and prohibitions on taking photographs of M when there was no evidence that they would do this. Baker J reviewed the injunction. He considered the balance of Article 8 rights to privacy of M and her family and the Article 10 rights of the media (applying the evidence test in *Neary*). He considered the public interest in medical treatment cases concerning life and death decisions. He cautioned practitioners against allowing 'naturally protective instincts' to underestimate Article 10 rights. He commented that the conduct of the balancing exercise of competing ECHR rights was different in the CoP than 'superinjunction' cases in the Queen's Bench Division. He also considered that Article 6 rights to a fair trial might weigh against publicity where 'the publication of information relating to proceedings, or attempts by the media to contact litigants, would affect the capacity or willingness of a party to participate in the litigation'. A revised injunction reduced the number of people who must not be identified or approached, specified that restrictions on publication applied to social media such as Twitter and Facebook, but also specified those matters not covered by the injunction.	- Injunctions to prohibit 'doorstepping' - Consideration of Article 6 rights where publicity might affect the willingness or capacity of litigants to bring a case - Restrictions on publication of information on social media

[220] Doughty, S. (2011) 'Judge makes first ever order banning publication of information on Facebook and Twitter to prevent woman in coma from being named', *Daily Mail,* 13 May 2011.

RB (Adult) (No 4) [2011] EWHC 3017 (Fam) Judge: Munby LJ See also: *Re RB (Adult)* [2010] EWHC 2423 (Fam), *Re RB (Adult) (No 2)* [2011] EWHC 112 (Fam) and *Re RB (Adult) (No 3)* [2011] EWHC 2576 (Fam)	The local authority began proceedings concerning RB under the inherent jurisdiction because of concerns about the behaviour of her partner, MF. The Official Solicitor inquired whether a judgment in this case had been released for publication. Munby LJ (as he then was) instructed his clerk to reply that he wondered whether it was the case that this was a matter for him as s12 AJA does not apply to proceedings under the inherent jurisdiction; he sought the views of the parties about publication. Munby LJ stated that 'so far as I am aware, no statutory provision regulating the publication or reporting of judgments given or handed down in the Family Division in proceedings under the inherent jurisdiction in respect of adults', unlike proceedings in the CoP. He also considered the effect of the 'rubric', clarifying that 'The rubric is not an injunction' and has no penal notice, but that this does not mean it is unenforceable. Munby LJ held that it was 'binding on anyone who seeks to make use of a judgment to which it is attached' and 'anyone who disobeys it is, in principle, guilty of a contempt of court.'	- No automatic reporting restrictions on proceedings under the inherent jurisdiction - The 'rubric' above a judgment restricting the publication of information about a case is not an injunction and nor a penal notice. However it is enforceable as it is binding on anybody seeking to make use of a judgment to which it is attached and anybody disobeying it is in principle guilty of a contempt of court.
Stoke City Council v Maddocks [2012] B31 COP; MHLO 111 (COP) Judge: HH Cardinal J See also: SCC v LM & Ors [2013] EWCOP 1137	Sometime before 11 December 2012[221], the website Mental Health Law Online[222] (MHLO) published an anonymised judgment relating to the committal of Wanda Maddocks (WM) for contempt of court. WM's father, John Maddocks, lived in a care home subject to an order of the CoP, as WM had previously removed him and taken him to Turkey. Further orders forbade WM from using or threatening violence against her father or the care home staff, from intimidating, harassing or pestering her father or any employee of the local authority or the home. In contravention of these orders, WM had taken her father to see a solicitor, had distributed a leaflet giving details of the case and containing a photo of him, and was alleged to have threatened local authority staff and left abusive answerphone messages for them. The judgment also detailed how WM had	- Committal for contempt of court for: i) removing a person from a care home to see a solicitor, in contravention of a court order; ii) distribution of leaflets containing information about the case and identifying the person;

[221] The date my reference manager software (Endnote) records my having added the case.

[222] www.mentalhealthlaw.co.uk

	caused her father to cry. WM had attempted to evade service of notice for the application for her committal for contempt. She was eventually served, but did not come to the hearing. HH Judge Cardinal ordered that she be sent to prison for a period of five months. She was not named in the judgment that was initially published on MHLO. The following March, the *Daily Mail* reported that Maddocks had been 'Jailed in secret - for trying to rescue her father from care home where she believed he would die'.[223] The article stated that the judge had ruled that she had been jailed when she was not present or represented by a lawyer. The article complained that the judge had 'gone through the motions' of observing open justice by ordering ushers to announce the hearing in the corridor, but complained that 'there was no wider announcement of the judgment'. There was extensive coverage of the case by the *Daily Mail* and the *Telegraph*. Following this coverage, the President issued the practice guidance on committals, outlined above.	iii) harassing local authority staff and the relevant person in contravention of court orders. - Publication of judgments, and identification of the individual, in committal proceedings - Case prompted new practice guidance for transparency in committal proceedings
Re RGS [2012] EWCOP 4162, ***Re RGS (No 2)***[224] and ***Re RGS (No. 3)*** [2014] EWCOP B12 Judge: Eldergill DJ	RGS's son, RBS, felt that RGS was not being adequately cared for in his care home. RBS objected to RGS's deputy's proposal to sell some of his paintings, including a Pissarro worth £20-30,000, to fund RGS's care, and had contacted the media. RBS had published information about the proceedings in the form of a publicly displayed poster inviting the general public to attend the hearing, as well as posting information on social media. At the hearing, he displayed an inconsistent understanding of the nature of the proceedings and the consequences of breaching court orders. A question arose as to his litigation capacity: if he had litigation capacity, then 'the counterpart of capacity and autonomy is accountability for acts autonomously done', including potentially prison, fines and costs orders for violation of court orders. If he lacked litigation capacity, then 'subject to certain relatively rare exceptions, taking a punitive approach to someone who is unable to comply with litigation rules and directions would be unjust. I would be punishing him for something beyond his control or in respect of which his responsibility is clearly diminished' ([2012] EWCOP 4162). Eldergill DJ concluded that on the evidence available, RBS lacked the capacity to conduct this litigation, however he 'reserved the right' to take	- Contempt of court by a person who lacks litigation capacity: even if a person does not have an absolute defence against contempt, 'taking a punitive approach to someone who is unable to comply with litigation rules and directions would be unjust' - Refusal to lift reporting restrictions although

[223] Doughty, S. and Dolan, A. (2013) 'Jailed in secret - for trying to rescue her father from care home where she believed he would die', *Daily Mail,* 23 April 2013.

[224] The transcript for this can be found as an Appendix to *Re RGS (No. 3)* [2014] EWCOP B12.

	action about further breaches of reporting restrictions. Eldergill DJ considered how to balance RBS's rights to criticize him and the court with RGS's rights to privacy, and concluded that it was in RGS's best interests to remain anonymous. Because of media interest in the case, in *Re RGS (No 2)*, Eldergill DJ published his reasons for approving a consent order. Eldergill DJ stated that the press had worked 'constructively' with the parties,[225] and stated that when speaking to RBS he felt sure he could rely on them 'to have regard to his health and welfare'. He authorized the identification of Essex County Council because its staff had 'stoically borne a lot of undeserved and inaccurate criticism'. In 2013 the CoP, of its own motion, initiated a review of RGS's care arrangements after he had been assaulted in his care home. RBS had continued to publish information about the case online in violation of reporting restrictions and s12 AJA. Eldergill DJ held it 'highly unlikely' that he could rely upon an absolute defence to enforcement proceedings.[226] However, the 'compassionate and long suffering' local authority had not made a committal application, and Eldergill DJ continued to hold that 'taking a punitive approach to someone who is unable to comply with litigation rules and directions would be unjust'. The Official Solicitor submitted that the court should seek to ensure that the publicity did not come to RGS's attention and does not interfere with his care. Eldergill DJ agreed with the latter point, but considered it unachievable for RGS not to be informed of the publicity by RBS. RBS wished the court to identify him and RGS. There was collective concern that he might not understand the potential implications of this, in particular that his conduct might be subject to adverse comment. Eldergill DJ held that 'RBS may make all the points he wishes, and may criticise the court and me publicly, including to the press, without being identified as the critic. Any advantage to him in being named is overwhelmed by the disadvantages to him and his health of being the subject of adverse public comment.' The media made no application for wider lifting of reporting restrictions, but engaged in 'a constructive and informative dialogue' about the advantages and disadvantages of naming parties. Eldergill DJ held that there was 'good	some facts are already in the public domain - Published reasons for approving a consent order - Identification of a local authority who had provided a very high level of service and been the subject of inaccurate criticism - Refusal to identify a protected party (other than P) who wishes to be identified, on the basis that they do not understand the potential adverse implications for themselves - Permission for local authority staff to identify themselves in the judgment to others in order to rebut unfair criticisms

[225] He thanked Ms Canneti of *The Independent* and Mr Farmer of the Press Association in particular.

[226] Under the old *M'Naghten Rules* (*Wookey v Wookey* [1991] Fam 121; *P v P (Contempt of Court: Mental Capacity)* [1999] 2 FLR 892)

	reason' for considering permitting identification of all parties, but after conducting a balancing exercise concluded that the existing restrictions were appropriate. Eldergill DJ also granted local authority staff permission to identify themselves to rebut unfair criticisms of their conduct by reference to judgments indicating that they had the support of the court. He invited them to circulate the judgment to 'irresponsible' local newspapers which had breached reporting restrictions in the case and request removal of unauthorized content.	
Re AA [2012] EWHC 4378 (COP) and ***P (A Child)*** [2013] EWCC B14 (Fam) Judges: Mostyn J (*Re AA*) and Munby P *(P (A Child))* See also: *P (A Child) [2013] EWCC B14 (Fam)*; *Re P* [2013] EWHC 4037 (Fam); *Re P (A Child)* (2013) EWHC 4383 (Fam)	On 30th November 2013, Christopher Booker reported in the *Telegraph* that a pregnant Italian woman who was detained under the Mental Health Act 1983 had been forcibly sedated and when she woke up her child had been delivered by caesarean section and removed from her care.[227] In his original article[228] Booker alleged that 'Mr Justice Mostyn, had given the social workers permission to arrange for the child to be delivered' and that 'she was represented by lawyers assigned to her by the local authority'. The story received widespread critical coverage in the UK and worldwide media. The woman identified herself as Alessandra Pacchieri, and she – and her family – gave several media interviews giving their accounts of the case. At the time of publication, there was no transcript relating to the case in the public domain. A few days later, a county court judgment relating to the care of the baby appeared on BAILII. Shortly after that, a transcript of High Court proceedings before Mostyn J concerning Pacchieri's mental capacity and best interests in relation to the birth of her child appeared on BAILII (*Re AA*). It transpired that an urgent application relating to the birth of her child had been brought by the NHS Trust, not the local authority, although Mostyn J gave guidance relating to the local authority's plans for after the birth of the child. Pacchieri was represented by the Official Solicitor, who supported the NHS Trust's application for delivery by caesarean, but who opposed the local authority's plans for the involvement of police to remove the child from her care. Following release of the transcripts, the media eventually corrected earlier accounts that the local authority had applied for the operation.	- Release of transcripts following adverse media coverage relating to a case in the CoP and the family courts. - The importance of publishing judgments to enable inaccurate media coverage to be corrected. - Rights of parties to 'tell their story' and competing rights of relatives to privacy - The purpose of reporting restrictions is not to exercise editorial control over media comment and criticism, nor to prevent defamation (where the

[227] Booker, C. (2013) ''Operate on this mother so that we can take her baby'', *The Telegraph,* 30 November 2013.

[228] The article on the *Telegraph* website now appears to have been updated.

	Essex County Council subsequently sought reporting restrictions (*Re P (A Child)*). In hearing the application,[229] Munby P commented on inaccuracies in media coverage, but also stated 'How can the family justice system blame the media for inaccuracy in the reporting of family cases if for whatever reason none of the relevant information has been put before the public?' He held that the mother has an 'obvious and compelling claim to be allowed to tell her story to the world' and that 'If ever there was a case in which that right should not be curtailed it is surely this case'. However, the child also had 'an equally compelling claim to privacy and anonymity'. He reiterated principles from *Re J (A Child)*[230] that it is not the role of the judge to exercise editorial control over the content of media coverage; even if comment or criticism is ill informed, outspoken, crude, vulgar, or insulting, that is not in itself a basis for reporting restrictions by the CoP. Neither is it the role of the court to restrict the publication of comment that might be defamatory, as the remedy for that is an action in defamation not to the Family Division. He ordered that the name and address of the child and carers must remain confidential. Following this case, a relatively large number of CoP cases concerning matters relating to childbirth were published;[231] it is unclear whether the media coverage prompted NHS bodies to seek court applications in matters where they hitherto had not, or whether they were simply more likely to be published as a result of the case and the new guidance.	correct remedy is an action in defamation)
Westminster City Council v Sykes [2014] EWHC B9 (COP) Judge: Eldergill DJ	Westminster CC applied to the CoP to determine whether it was in Manuela Sykes' best interests to be deprived of her liberty in a care home against her strongly held wishes to the contrary. Eldergill DJ concluded that it was not, notwithstanding the risks of living at home, and authorised a trial period at home. Sykes had expressed a 'strong wish' for her situation to be reported and for her to be named. There was no assessment of her mental capacity to consent to this at the time of	- Best interests decisions concerning publicity where 'P' seeks publicity and wishes to be identified

[229] It seems the application was initially dealt with by Charles VP in *Re P (A Child)* (2013) EWHC 4383 (Fam), but there does not appear to be any transcript of this judgment available on the BAILII or Judiciary website.

[230] [2013] EWHC 2694 (Fam).

[231] *Re P* [2013] EWHC 4581 (COP); *Great Western Hospitals NHS Foundation Trust v AA & Ors (Rev 1)* [2014] EWHC 132 (Fam); *North Somerset Council v LW & Ors* [2014] EWCOP 3; *The Mental Health and the Acute Trust v DD & Anor* [2014] EWCOP 8

	the hearing. Following Eldergill DJ's discussion with Ms Sykes, he notified the Press Association (PA) of the hearing, who produced an anonymised report. The PA then applied to identify Sykes. Eldergill DJ stated that not to allow an 'incapacitated person' privacy would amount to discrimination on grounds of mental illness or disability, but also recognised a public interest in hearings that determine their rights. He rejected arguments that if Westminster CC were named Sykes might be identifiable on the basis of the large size of the population, noting that most people are not 'intent' on identifying the person and in any case would be prohibited from publishing their identity. He also rejected argument that the transparency guidance did not apply to cases decided by district judges, on the basis that 'the public interest and level of interference with a citizen's ordinary legal rights in a deprivation of liberty case is not less because it has been authorised by a district judge rather than a circuit judge'. He lifted reporting restrictions and permitted publication of an old photograph of her that was already in the public domain. Sykes' personality was the 'critical factor', Eldergill DJ said: > She has always wished to be heard. She would wish her life to end with a bang not a whimper. This is her last chance to exert a political influence which is recognisable as her influence. Her last contribution to the country's political scene and the workings and deliberations of the council and social services committee which she sat on. Eldergill DJ also commented in passing (as he had in RGS' case) that a private court is not the same as being 'secretive': 'a GP is not a 'secret doctor' because the press have no unqualified right to be present during patient consultations or to report what is said.'	- Publicity and identification of P as a political act by P - Realistic appraisal of risk of identification should the public authority be identified - Difference between a private court and a 'secret court'
Re Meek [2014] EWCOP 1 Judge: HH Hodge J See also: *Re GM, MJ & JM v The Public Guardian* [2013] EWHC 2966	In an earlier decision, Lush SJ had refused an application by GM's nieces for retrospective approval of gifts they had made to themselves from her estate totalling £231,259.50 (in addition to expenses of £46,552.24). Lush SJ discharged the deputies and ordered them to repay GM over £200,000. The new deputy sought to make a statutory will on behalf of GM benefitting two charities. A postscript to the judgment about the statutory will reports that GM died shortly afterwards. HH Hodge J sought representations from the parties on whether the judgment should be published. The panel deputy had no views either way. The Official	- The CoP has jurisdiction to make an order authorising publication of a judgment of proceedings heard in private after the death of P. - It will not automatically follow from P's death

	Solicitor took the view that his role ceases upon the death of his client, but drew attention to the Article 8 rights of friends of GM involved in the case. It was acknowledged that this might be difficult for the discharged deputies, but observed that 'they would not be entitled to anonymity in any other form of equivalent civil recovery action'. It was accepted that the CoP has jurisdiction to authorise publication of the judgment after the death of the relevant person under rule 91(2)(b) as it may be made 'at any time' (rule 93(1)(b)). It does not automatically follow from P's death that it is appropriate to authorise a non-anonymised judgment, but 'P's death means that P no longer has any need for the special protection afforded by anonymity'.	that a non-anonymised judgment should be published, but 'P's death means that P no longer has any need for the special protection afforded by anonymity'
Newcastle Upon Tyne Hospitals Foundation Trust v LM [2014] EWCOP 6 Judge: Jackson J See also: *Newcastle Upon Tyne Hospitals Foundation Trust v LM* [2014] EWCOP 454	The NHS Trust had sought a declaration that it was lawful to withhold a blood transfusion from LM, a 63 year old woman who was a Jehovah's Witness. LM died shortly before the judgment was handed down. A question arose as to whether the CoP had jurisdiction to issue a reporting restriction when the subject of the proceedings has died before the making of the order[232]. Jackson J initially made an order 'that preserves the situation until the time comes when someone seeks to present full argument on the question' (EWCOP 454). The PA subsequently applied to lift restrictions on identifying LM. Jackson J observed that PD13A implied that reporting restrictions would not extend beyond the death of P unless the interests of others required it. Jackson J concluded that there was 'no good reason to conclude that the person's death should lead automatically to all protection being lost'. Therefore, where publication of information has been restricted during the person's lifetime, the CoP must consider whether this protection should continue after their death. In LM's particular case, however, the balance fell in favour of discharging the anonymity order.	- Rights to anonymity for people who are the subject of CoP proceedings do not cease upon their death. - The CoP may make an order restricting reporting when the subject of that order has already died - The CoP must consider whether such an order should be made
London Borough of Redbridge v G & Ors (No. 2) [2014] EWHC 959 (COP) and ***G v London Borough***	G was a 94 year old woman with a diagnosis of dementia. Two individuals – C and F – moved into her home and provided 'care' for her. LB Redbridge received safeguarding referrals from a large number of independent sources - including a care provider, a solicitor, her neighbours, church, friends, family and police – concerned about witnessing	- Capacity and best interests to consent to contact with the media where there is concern

[232] As opposed to making an order whilst they are alive, which continues in effect after they have died, which the court can already make: *Re C (Adult Patient: Restriction of Publicity After Death* [1996] 1 FCR 605

of Redbridge, Associated Newspapers Limited and Others [2014] EWHC 1361 and ***Re G (Adult)*** [2014] EWCOP 5 Judges: Russell J, Cobb J and Munby P See also: *London Borough of Redbridge v G & Ors* [2014] EWHC 485 (COP) and *London Borough of Redbridge v G & Ors* [2014] EWHC 17 (COP)	them shouting and screaming at her and her being frightened of them. They initiated proceedings in the CoP to prevent C and F from registering a Lasting Power of Attorney (LPA) that would place them in charge of her property and affairs, and seeking a capacity assessment and best interests declaration regarding whether C and F should live with her. When in the presence of C and F, G would state that she wished them to remain living with her, but in private she confided to a doctor and an independent social worker that she felt like a spider in a web, and she had told a neighbour that she wanted the government to intervene as she was being bullied. G believed, because C and F had told her, that if she asked them to leave she would be placed in a care home; the local authority stated they would ensure she was cared for in her own home. On 15 February 2014 Christopher Booker reported on the 'the bizarre story of a frail but otherwise capable 94-year-old woman' where social services aimed 'to take control of her £350,000 home and her substantial savings, to transfer her against her will to a care home and then to evict from the house a niece and her husband who look after her'.[233] Booker described how his friend Ian Josephs had arranged for a capacity assessment by Dr Ludwig Lowenstein. The media attended the hearing on 26 February 2014 (EWHC 485). Under cross-examination it transpired that Dr Lowenstein had no expertise in capacity assessment or dementia, had assessed G's capacity in the presence of C and had not been given full information about the background to the case. In March, C took G on a public protest about her case. An off-duty police officer passing by at the time was concerned and found upon speaking to G that she wanted to go home, and noted that she was shaking. LB Redbridge subsequently applied for an order forbidding C from taking G on public protests, demonstrations or meetings with the press (*London Borough of Redbridge v G & Ors (No. 2)*). Cobb J heard evidence that G had expressed conflicting views to different people about whether she wanted the press involved in her case. The court concluded that it was in G's best interests not to speak to the press pending a capacity assessment on this matter. The *Daily Mail* described this as	that a person may be acting under undue influence - Restrictions on taking a person to talk to the media or protest about CoP proceedings - Application by the media to become a party to a CoP case (refused) - Costs orders are not to be used to punish inaccurate or critical reporting, but may be awarded against the media if it makes inappropriate applications to become a party in proceedings in which it has no legitimate interest -

[233] Booker, C. (2014) 'Will this OAP be robbed of her house and money?', *The Telegraph,* 15 February 2014.

	'gagging' Ms G[234], subsequently alleging that G herself could face 'face a prison sentence or stiff financial penalty' if she spoke to the media.[235] In April the Official Solicitor wrote to Associated News Ltd (ANL) expressing concern at overheard plans for Sue Reid, a *Daily Mail* journalist, to have social contact with G. Munby P expressed the view that there was no proper basis for the contention that Reid could not do this. In a highly unusual move, ANL then applied to become a party to the case ([2014] EWCOP 1361), saying that it had a legitimate interest as the outcome of G's capacity assessment would affect their ability to communicate with her, and that there was a strong public interest in allowing G to exercise her Article 8 and 10 rights to communicate with third parties. ANL expressed concern that without their involvement the Official Solicitor and other parties would not adequately explore these issues, and the instructions to the capacity assessor might be 'weighted to lead Dr Barker to make an assessment that G lacks capacity' to choose to speak with the media. Munby P rejected the argument that without ANL's involvement there might not be full argument on these issues – stating that the CoP's processes are inquisitorial rather than adversarial. He contended that if G is found to have capacity the CoP has no role in restricting contact with the media, and if she lacks capacity the CoP may stand in her shoes and make the decision on her behalf. If the CoP decides that she should not speak to the media, the media have no more right to dispute that than they would to dispute a capacitous person closing the door on a journalist. Following this decision, LB Redbridge and the Official Solicitor sought a costs order against ANL for their application to become a party to the case ([2014] EWCOP 5). The general rule for welfare proceedings is that each party should pay their own costs, and these proceedings were welfare proceedings.[236] It was said that the court should depart from this rule as the application 'was fundamentally misconceived. ANL failed on every part of its application' and was 'a fishing expedition for its own gain'. They also complained that ANL's conduct during the proceedings had 'been far from exemplary',	

[234] Reid, S. (2014) '94-year-old is gagged by secret court: Draconian order silences pensioner in row with council social workers', *Daily Mail,* 28 March 2014.

[235] Reid, S. (2014) 'Gagged by the secret courts: Spinster, 94, banned from speaking publicly about her legal battle with social workers after judge rules she's not mentally well enough', *Daily Mail,* 03 May 2014.

[236] Rule 157 Court of Protection Rules 2007

	citing Cobb J's criticisms of its reporting of the proceedings. ANL stated that the Official Solicitor did not need to instruct two counsel. Munby P was 'troubled by the suggestion that ANL's conduct during the proceedings should be visited in an adverse costs order', saying that it might reflect a mindset that did not recognise the media's vitally important role. Even if there could be criticism of the reporting, 'Orders for costs are not to be made as a back-door method of punishing inaccurate or even tendentious reporting', and such a suggestion could have a chilling effect. Holding that ANL had made an application to be joined to proceeding sin which it had no recognised interest, which was 'misconceived and which failed completely', Munby P held that they should pay 30% of the costs of the Official Solicitor and the local authority. In a final hearing in the case ([2014] EWHC 17 (COP)), Russell J reported that in May all parties had agreed that G lacked mental capacity to make decisions about speaking to the media. She concluded that G lacked mental capacity to make decisions about whether or not C and F should live with her and was subject to their undue influence, being 'almost paralysed with fear by the threats regarding her removal to a care-home'. In these circumstances it was hard to discern her true wishes and feelings, however – observing the importance to G of her home, and the longstanding importance to her of her friends and her church – she made an order that it was in G's best interests not to live with C and F, for the LPA she made giving them control of her financial affairs to be revoked, for her to remain in her home with support from the local authority and be re-integrated into her local church. Christopher Booker subsequently complained in *The Telegraph* that C had been portrayed 'in a very unfavourable light' in the judgment, that this decision was contrary to the findings of an 'eminent psychologist', that the litigation had been funded out of G's savings and that now they were 'all gone to pay the costs of the case, she must still be allowed to remain in her own home' and 'taxpayers must foot the bill'.[237]	
Public Guardian v JM (Rev 1) [2014] EWCOP 7 Judge: Munby P	In *Re DP* Lush SJ revoked an LPA made by DP that appointed JM to manage her property and affairs because JM had contravened his authority and had not acted in DP's best interests. JM had sold DP's house and placed the proceeds in his own bank account, he	

[237] Booker, C. (2014) 'How the Court of Protection left a 94-year-old without savings or dignity', *The Telegraph,* 16 August 2014.

See also: *Re DP (Revocation of Lasting Power of Attorney)* [2014] EWCOP B4	had attempted to transfer DP's investment bonds into his own name, had 'gifted' himself £38,000 of DP's money, was unable to account for £10,020 of her savings and had paid himself a salary of £8,340. Lush SJ had not named JM in his judgment. In an article, the *Daily Mail* criticized his decision not to name JM, saying that the 'ruling wrongly protects the gardener and leaves other elderly and vulnerable people and their families without warning of his record'[238]. ANL applied for an order permitting the identification of JM. JM stated that he was being unfairly painted as a thief and being made a scapegoat by ANL. Munby P reiterated his comments in *Re P (Enforced Caesarean: Reporting Restrictions)*, that remedies for defamation or unfair treatment by a newspaper lie elsewhere than the CoP. Munby P accepted ANL's submission that the impact of identifying JM on DP was likely to be minimal, because of her state of health and because it was unlikely that anyone would identify her who could not already do so from the anonymised judgment. Regarding JM's Article 8 rights, Munby P recognized the potential for identification to have 'a very significant additional and unpleasant impact on him'. ANL countered that his rights to privacy were outweighed by the strong public interest in exposing his wrongdoing. Munby P agreed, and also commented 'Why should JM be any more entitled to anonymity, just because the only judicial finding thus far has been made by the Court of Protection, than he would be if his self-same conduct was being considered in the Chancery Division or the Crown Court?' At the end of the judgment, Munby P himself identified JM by name. The *Daily Mail* subsequently published an article about 'unmasking' JM,[239] although the story was not on their website at the time of writing or published elsewhere.[240]	
NHS Trust & Ors v FG (Rev 1) [2014] EWCOP 30 Judge: Keehan J	Two NHS Trusts applied to the CoP seeking orders relating to the ante-natal care, and interventions relating to childbirth, of FG – a pregnant woman who was detained under the Mental Health Act 1983. FG had paranoid thoughts and believed that medical professionals were conspiring to murder her. The applications were made without	- Reporting restriction granted to prevent the relevant person from learning about

[238] Doughty, S. (2014) 'Handyman took £200,000 from woman, 89, after secret court gave him control of her bank account', *Daily Mail,* 17 March 2014.

[239] Sears, N. (2014) 'Unmasked, gardener who took £200k from pensioner and was shielded', *Daily Mail,* 7 July 2014.

[240] It is, however, still available on Nexis.

	notice to FG, the Trusts contending that if she learned of the proceedings she would perceive them as part of a state conspiracy against her, that this in turn could further damage her relationship with those treating her, and increase her distress – increasing the likelihood of her impulsive acts during labour that might harm her or her baby. Not telling FG about the proceedings was said to be an 'exceptional step' and 'at the extremity of what is permissible under the European Convention.' The Trust therefore applied for reporting restrictions, reasoning that if the case was in the public domain and the hospital were identified, other patients might identify FG and word would get back to her of the proceedings. The court criticised their giving late notice to the media of this application. Keehan J granted the reporting restrictions, but set a date for them to terminate with the parties at liberty to apply for them to be extended. After FG gave birth (without complications or the need to use the orders), her doctor recommended that she be told about the proceedings. The reporting restrictions were lifted and the judgment published, but the Trust was not to be identified because there was held to be a 'real risk' that FG could be identified because of the unusual circumstances of the case. Keehan J was invited to give guidance to Trusts regarding use of the MCA relating to ante-natal care and childbirth in circumstances such as these. In that guidance he reiterated that 'If an application is made by either the Trusts or by the local authority for permission not to notify P of the application(s) and it is thought appropriate to apply for a Reporting Restrictions Order, the applicant(s) must give full and proper notice to the print and broadcast media of the same.'	proceedings which she had not been notified of; - A 'step by step' approach to reporting restrictions – subject to review of changing circumstances; - Restrictions on identifying an NHS Trust where there is a 'real risk' that the mother could be identified; - Guidance reminding NHS Trusts to give 'full and proper notice' to the media if they are making applications for permission not to notify the relevant person and seeking reporting restrictions
A Local Authority v B & Ors [2014] EWCOP B21 Judge: HH Cardinal J See also: *Derbyshire County Council v Danby* [2014] EWCOP B22; *A Local Authority v B, F & G* [2014] EWCOP B18; *Derbyshire County Council*	Derbyshire County Council sought an order for the long term placement of a young woman with learning disabilities, B, and restrictions on contact with her father and paternal grandmother (but not her mother). The CoP proceedings followed on from earlier public law family court proceedings. At the time of the hearing, the father was already in contempt of court in relation to breaching earlier orders by meeting with B covertly. He lived in Scotland, and did not attend court as there was a warrant for his arrest in England. He disputed expert evidence that B lacked mental capacity but provided no evidence to support this claim. The CoP made a Hadkinson order (*Hadkinson v Hadkinson* [1952] 2 All ER 567) which prevents a person who is in contempt of court from making further applications until they have purged their contempt. In a later hearing, holding that B required a period of 'peace' from the litigation, he restricted	- Committal application for breaching restrictions on contact with a family member; - Cross-border limitations in arrest warrants for contempt of court; - Hadkinson orders – preventing applications from those in contempt of court

v Danby [2014] EWCOP B26	applications to vary the orders for a period of four years. Anonymised judgments for these decisions were placed on BAILII. Subsequently the council applied for a committal order against B's grandmother, Kathleen Danby, whom they alleged had breached orders prohibiting contact with her granddaughter. CCTV footage recorded them meeting outside a pub near B's care home. The court heard evidence that whenever B had contact with her father or paternal grandmother she became very distressed and unsettled, although she expressed a desire to see them. Danby lived in Orkney and did not attend court for the committal application, although she was served notice of the application. HH Cardinal J sentenced Danby to three month's imprisonment for contempt and issued a warrant for her arrest. The judgment named Danby and was placed on BAILII. A second judgment on BAILII stated that the case was listed for a review, to reduce or mitigate the sentence, but that Danby had not availed herself of that opportunity. It was subsequently reported in the media that Danby had been arrested whilst attending a Ken Dodd concert in England, and that after two nights in prison she had attended court and purged her contempt. The *Daily Mail* stated 'Refused access to the Court of Protection, this paper has no idea whether or not there were good reasons for banning Mrs Danby from contacting her granddaughter'.[241] At the time of writing, there is no judgment on BAILII concerning the hearing where Danby purged her contempt.	

[241] A Martin, 'Treated worse than a dog: Grandmother freed after three days in jail for a hug reveals how she was bruised by police officers; deprived of sleep and access to her lawyer and not allowed to take her liver pills', *Daily Mail* (London 31 December 2014)

APPENDIX 3: COURT OF PROTECTION *PRACTICE DIRECTION 13A – HEARINGS (INCLUDING REPORTING RESTRICTIONS)*

This practice direction supplements Part 13 of the Court of Protection Rules 2007, and was amended following The Court of Protection (Amendment) Rules 2015 SI 2015/549 (L6). It substitutes an earlier version of Practice Direction 13A

General

1. Hearings before the court will generally be in private but the court may order that the whole or part of any hearing is to be held in public. The court also has power to:

(a) authorise the publication of information about a private hearing;

(b) authorise persons to attend a private hearing;

(c) exclude persons from attending either a private or public hearing; or

(d) restrict or prohibit the publication of information about a private or public hearing.

2. Part 1 of this practice direction applies to any application for an order under rules 90 to 92.

3. Part 2 of the practice direction makes additional provision in relation to orders founded on Convention rights which would restrict the publication of information.

(Section 1 of the Human Rights Act 1998 defines "the Convention rights".)

PART 1

Applications under rules 90, 91 or 92

4. An application for an order under rule 90, 91 or 92 must be commenced by filing an application notice form using COP9 in accordance with Part 10.

5. For the purposes of rules 90 to 92, a statement of truth in an application notice may be made by a person who is not a party.

6. For an application commenced under rules 90, 91 or 92, the court should consider whether to direct that the application should be dealt with as a discrete issue.

PART 2

Powers of the court to impose reporting restrictions

Court sitting in private

7. Section 12(1) of the Administration of Justice Act 1960 provides that, in any proceedings brought under the Mental Capacity Act 2005 before a court which is sitting in private, publication of information about the proceedings will generally be contempt of court. However, rule 91(1) makes it clear that there will be no contempt where the court has authorised the publication of the information under rule 91 or the publication is authorised in accordance with Part 3 of this Practice Direction. Where the court makes an order authorising publication, it may (at the same time or subsequently) restrict or prohibit the publication of information relating to a person's identity. Such restrictions may be imposed either on an application made by any person (usually a party to the proceedings) or of the court's own initiative.

8. The general rule is that hearings will be in private and that there can be no lawful publication of information unless the court has authorised it or the publication is authorised in accordance with Part 3 of this Practice Direction. Where reporting restrictions are imposed as part of the order authorising publication, they will simply set out what can be published and there will be no need to comply with the requirements as to notice which are set out in Part 2 of this practice direction. But if the restrictions are subsequent to the order authorising publication, then the requirements of Part 2 should be complied with.

Court sitting in public

9. Where a hearing is to be held in public as a result of a court order under rule 92, the court may restrict or prohibit the publication of information about the proceedings. Such restrictions may be imposed either on an application made by any person (usually a party to the proceedings) or of the court's own initiative.

Notification in relation to reporting restrictions

10. In connection with the imposition of reporting restrictions, attention is drawn to section 12(2) of the Human Rights Act 1998. This means that where an application has been made for an order restricting the exercise of the right to freedom of expression, the order must not be made where the person against whom the application is made is neither present nor represented unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

11. The need to ensure that P's Convention rights are protected may be at issue when the court is considering whether to make an order that a public hearing should be held. Part 2 of this practice direction should therefore be complied with where the court is considering making an order under rule 92(2) of its own initiative.

12. In summary, the requirements to notify in accordance with the requirements of Part 2 of this practice direction will apply in any case where—

(a) the court has made an order for the publication of information about proceedings which are conducted in private and, after the order has been made:

(i) an application founded on P's Convention rights is made to the court for an order under rule 91(3) which would impose restrictions (or further restrictions) on the information that may be published, or

(ii) of its own initiative, the court is considering whether to impose such restrictions on the basis of P's Convention rights; or

(b) the court has already made an order for a hearing to be held in public and:

(i) an application founded on Convention rights is made to the court for an order under rule 92(2) which would impose restrictions (or further restrictions) on the information that may be published, or

(ii) of its own initiative, the court is considering whether to vary or impose further such restrictions.

Notice of reporting restrictions to be given to national news media

13. Notice of the possibility that reporting restrictions may be imposed can be effected via the Press Association's CopyDirect service, to which national newspapers and broadcasters subscribe as a means of receiving notice of such applications. Such service should be the norm. The court retains the power to make orders without notice (whether in response to an application or of its own initiative) but such cases will be exceptional.

14. CopyDirect will be responsible for notifying the individual media organisations. Where the order would affect the world at large this is sufficient service for the purposes of advance notice. The website: http://www.medialawyer.press.net/courtapplications gives details of the organisations represented and instructions for service of the application.

Notice of an application to be given by applicant

15. A person who has made an application founded on Convention rights should give advance notice of the application to the national media via the Press Association's CopyDirect service. He should first telephone CopyDirect (tel. no 0870 837 6429). Unless an order pursuant to rule 19 has been made, a copy of the following documents should be sent either by fax (fax no 0870 830 6949) or to the e-mail address provided by CopyDirect—

(a) the application form or application notice seeking the restriction order;

(b) the witness statement filed in support;

(c) any legal submissions in support; and

(d) an explanatory note setting out the nature of the proceedings in the form set out in the Annex to this practice direction.

16. It is helpful if applications are accompanied by an explanatory note from which persons served can readily understand the nature of the case (though care should be taken that the information does not breach any rule or order of the court in relation to the use or publication of information). In any case where notice of an application has not been given, the explanatory note should explain why.

17. Unless there is a particular reason not to do so, copies of all the documents referred to above should be served. If there is a reason for not serving some or all of the documents (or parts of them), the applicant should ensure sufficient detail is given to enable the media to make an informed decision as to whether it wishes to attend a hearing or be legally represented.

18. The CopyDirect service does not extend to local or regional media or magazines. If service of the application on any specific organisation or person not covered is required, it should be effected directly.

19. The court may dispense with any of the requirements set out in paragraphs 15 to 18.

Notice of own-initiative order to be given by court

20. In any case where the court gives advance notice of an own-initiative order to the national media, it will send such of the information listed in paragraph 15 as it considers necessary.

Responding to a notice

21. Where a media organisation or any other person has been notified of an application or own-initiative order, they may decide that they wish to participate in any hearing to determine whether reporting restrictions should be imposed. In order to take part, the person must file an acknowledgment of service ("the acknowledgment") using form COP5 within 14 days beginning with the date on which the notice of the reporting restrictions was given to him by CopyDirect.

22. The acknowledgment must be filed in accordance with rule 75.

23. A person who has filed an acknowledgment will not become a party to the substantive proceedings (ie. the proceedings in relation to which an application form was filed) except to such extent (if any) as the court may direct.

The hearing

24. Any application or own-initiative order which invokes Convention rights will involve a balancing of rights under Article 8 (right to respect for private and family life) and Article 10 (freedom of expression). There is no automatic precedence as between these Articles, and both are subject to qualification where (among other considerations) the rights of others are engaged.

25. In the case of an application, section 12(4) of the Human Rights Act 1998 requires the court to have particular regard to the importance of freedom of expression. It must also have regard to the extent to which material has or is about to become available to the public, the extent of the public interest in such material being published and the terms of any relevant privacy code (such as the Editor's Code of Practice enforced by the Independent Press Standards Organisation).

26. The same approach will be taken where the court is considering an own-initiative order imposing reporting restrictions.

Scope of order

Persons protected

27. The aim should be to protect P rather than to confer anonymity on other individuals or organisations. However, the order may include restrictions on identifying or approaching specified family members, carers, doctors or organisations or other persons as the court directs in cases where the absence of such restriction is likely to prejudice their ability to care for P, or where identification of such persons might lead to identification of P and defeat the purpose of the order. In cases where the court receives expert evidence the identity of the experts (as opposed to treating clinicians) is not normally subject to restriction, unless evidence in support is provided for such a restriction.

Information already in the public domain

28. Orders will not usually be made prohibiting publication of material which is already in the public domain, other than in exceptional cases.

Duration of order

29. Orders should last for no longer than is necessary to achieve the purpose for which they are made. The order may need to last until P's death. In some cases a later date may be necessary, for example to maintain the anonymity of doctors or carers after the death of a patient.

PART 3: COMMUNICATION OF INFORMATION RELATING TO PROCEEDINGS HELD IN PRIVATE

Introduction

30. Rule 91 deals with the communication of information (whether or not contained in a document filed with the court) relating to proceedings in the Court of Protection which are held in private.

31. Subject to any direction of the court, information may be communicated for the purposes of the law relating to contempt in accordance with paragraphs 33 to 37.

32. Nothing in this Part of this Practice Direction permits the communication to the public at large or any section of the public of any information relating to the proceedings.

Communication of information – general

33. Information may be communicated where the communication is to—

(a) a party;

(b) the legal representative of a party;

(c) an accredited legal representative or a representative within the meaning of rule 3A;

(d) a professional legal adviser;

(e) the Director of Legal Aid Casework;

(f) an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;

(g) any person instructed to make a report under section 49 of the Mental Capacity Act 2005;

(h) the Official Solicitor (prior to the Official Solicitor becoming a litigation friend);

(i) the Public Guardian.

Communication of information for purposes connected with the proceedings

34. (1) A party or the legal representative of a party, on behalf of and upon the instructions of that party, may communicate information relating to the proceedings to any person where necessary to enable that party—

(a) by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings;

(b) to engage in mediation or other forms of non-court dispute resolution;

(c) to make and pursue a complaint against a person or body concerned in the proceedings; or

(d) to make and pursue a complaint regarding the law, policy or procedure relating to proceedings in the Court of Protection.

(2) Where information is communicated to any person in accordance with sub-paragraph (1)(a), no further communication by that person is permitted.

(3) When information relating to the proceedings is communicated to any person in accordance with sub-paragraphs (1)(b),(c) or (d)—

(a) the recipient may communicate that information to a further recipient, provided that –

(i) the party who initially communicated the information consents to that further communication; and

(ii) the further communication is made only for the purpose or purposes for which the party made the initial communication; and

(b) the information may be successively communicated to and by further recipients on as many occasions as may be necessary to fulfil the purpose for which the information was initially communicated, provided that on each such occasion the conditions in sub-paragraph (a) are met.

Communication of information by a party etc. for other purposes

35. A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose or purposes specified in the fourth column –

A party	A lay adviser, a McKenzie Friend, or a person arranging or providing pro bono legal services	Any information relating to the proceedings	To enable the party to obtain advice or assistance in relation to the proceedings
A party	A health care professional or a person or body providing counselling services for persons lacking capacity or their families		To enable the party or a member of the party's family to obtain health care or counselling

A party	The European Court of Human Rights		For the purpose of making an application to the European Court of Human Rights
A party, any person lawfully in receipt of information or a court officer	A person or body conducting an approved research project		For the purpose of an approved research project
A legal representative or a professional legal adviser, and the Public Guardian	A person or body responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers		For the purposes of the investigation or determination of a complaint in relation to a legal representative or a professional legal adviser
A legal representative or a professional legal adviser	A person or body assessing quality assurance systems		To enable the legal representative or professional legal adviser to obtain a quality assurance assessment
A legal representative or a professional legal adviser	An accreditation body	Any information relating to the proceedings providing that it does not, or is not likely to, identify any person involved in the proceedings	To enable the legal representative or professional legal adviser to obtain accreditation
A party, or the Public Guardian	A police officer	The text or summary of the whole or part of a	For the purpose of a criminal investigation

		judgment given in the proceedings	
A party or any person lawfully in receipt of information	A member of the Crown Prosecution Service		To enable the Crown Prosecution Service to discharge its functions under any enactment

Communication to and by Ministers of the Crown and Welsh Ministers

36. A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose or purposes specified in the fourth column –

A party or any person lawfully in receipt of information relating to the proceedings	A Minister of the Crown with responsibility for a government department engaged, or potentially engaged, in an application before the European Court of Human Rights relating to the proceedings	Any information relating to the proceedings of which he or she is in lawful possession	To provide the department with information relevant, or potentially relevant, to the proceedings before the European Court of Human Rights
A Minister of the Crown	The European Court of Human Rights		For the purpose of engagement in an application before the European Court of Human Rights relating to the proceedings
A Minister of the Crown	Lawyers advising or representing the United Kingdom in an application before the European Court of		For the purpose of receiving advice or for effective representation in relation to the application before the

	Human Rights relating to the proceedings		European Court of Human Rights
A Minister of the Crown or a Welsh Minister	Another Minister, or Ministers, of the Crown or a Welsh Minister		For the purpose of notification, discussion and the giving or receiving of advice regarding issues raised by the information in which the relevant departments have, or may have, an interest

37. (1) This paragraph applies to communications made in accordance with paragraphs 35 and 36 and the reference in this paragraph to 'the table' means the table in the relevant paragraph.

(2) A person in the second column of the table may only communicate information relating to the proceedings received from a person in the first column for the purpose or purposes –

(a) for which he or she received that information;

(b) of professional development or training, providing that any communication does not, or is not likely to, identify any person involved in the proceedings without that person's consent; or

(c) of fulfilling a statutory process.

38. In this Practice Direction –

'accreditation body' means –

(a) The Law Society, or

(b) the Lord Chancellor in exercise of the Lord Chancellor's functions in relation to legal aid;

'approved research project' means a project of research-

(a) approved in writing by a Secretary of State after consultation with the President of the Court of Protection, or

(b) approved in writing by the President of the Court of Protection.

'body assessing quality assurance systems' includes –

(a) The Law Society,

(b) the Lord Chancellor in exercise of the Lord Chancellor's functions in relation to legal aid, or

(c) The General Council of the Bar;

'body or person responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers' means –

(a) The Law Society,

(b) The General Council of the Bar,

(c) The Institute of Legal Executives,

(d) The Legal Services Ombudsman; or

(e) The Office of Legal Complaints.

'criminal investigation' means an investigation conducted by police officers with a view to it being ascertained –

(a) whether a person should be charged with an offence, or

(b) whether a person charged with an offence is guilty of it;

'health care professional' means –

(a) a registered medical practitioner,

(b) a registered nurse or midwife, or

(c) a clinical psychologist.

'lay adviser' means a non-professional person who gives lay advice on behalf of an organisation in the lay advice sector;

'McKenzie Friend' means any person permitted by the court to sit beside an unrepresented litigant in court to assist that litigant by prompting, taking notes and giving advice.

ANNEX

Application for a Reporting Restriction Order

EXPLANATORY NOTE

1 AB is in a permanent vegetative state. An application has been made by the NHS Hospital Trust responsible for his care for the Court of Protection to make a decision on the question of withdrawing artificial nutrition and hydration. This course is supported by AB's family.

2 On [date] the application will be heard by the Court of Protection [in public].

3 A Reporting Restriction Order has been [made/applied for] to protect AB's right to confidentiality in respect of his medical treatment. This does not restrict publication of information or discussion about the treatment of patients in a permanent vegetative state, provided that such publication is not likely to lead to the identification of AB, those caring for him, the NHS Trust concerned or the establishment at which he is being cared for."

FURTHER READING AND RESOURCES

Coleman, L. (2013) 'Secrecy and the Court of Protection', *Solicitors Journal,* 157(18).

Doughty, J. (2010) 'Opening up the family courts - what happened to children's rights?', *Contemporary Issues in Law,* 10, 52-75

Fairbairn, C. and Gheera, M. (2010) *Transparency in the family courts: media attendance*, (SN/HA/4844) House of Commons Library.

Hanna, M. (2012) 'Irreconcilable Differences: The Attempts to Increase Media Coverage of Family Courts in England and Wales', *Journal of Media Law,* 4(2), 274–301.

Lord Justice Munby (2010) 'Lost opportunities: law reform and transparency in the family courts', *Child and Family Law Quarterly,* 273.

Phillips, G. (2011) 'Family Courts and transparency', in *All Party Parliamentary Group on Family Law and The Court of Protection* House of Commons, 29 March 2011, London. Available: http://familylaw.allpartyparliamentarygroup.org.uk/transparency/docs/APPG4_Gill_Phillips_Speech.pdf

Ruck Keene, A., Edwards, K., Eldergill, A. and Miles, S. (2014) *Court of Protection Handbook: A User's Guide,* London: Legal Action Group. (Chapter 14)

Taylor, J., Neary, M. and Canneti, R. (2012) 'Opening closed doors of justice', *British Journalism Review,* 23, 42.

Townend, J. (Ed) (2012) *Justice Wide Open: Working Papers*, Centre for Law Justice and Journalism, City University London. Available: http://openaccess.city.ac.uk/1926/ (Papers by: Emily Allbon, David Banisar, Heather Brooke, Professor Ian Cram, Mike Dodd, Dr David Goldberg, Nick Holmes, Dr Lawrence McNamara, Lord Neuberger, William Perrin, Geoffrey Robertson QC, Lucy Series, Hugh Tomlinson QC, Professor Howard Tumber & Adam Wagner.)

Wall, N. (2012) 'Privacy and Publicity in Family Law: Their Eternal Tension', in *Gray's Inn Reading lecture*, Barnard's Inn Hall, 28 June 2012 Gresham College, London. Available: http://www.gresham.ac.uk/lectures-and-events/privacy-and-publicity-in-family-law-their-eternal-tension

Wolanski, A. and Wilson, K. (2011) *The Family Courts: Media Access & Reporting. July 2011*, President of the Family Division, Judicial College, Society of Editors.

ONLINE INFORMATION AND RESOURCES

Website for the Centre for Law and Information Policy, based at the Institute for Advanced Legal Studies: http://ials.sas.ac.uk/research/clip/clip.htm

The International Forum for Responsible Media Blog: https://inforrm.wordpress.com/

The Transparency Project: http://www.transparencyproject.org.uk/

Media Law and Ethics blog: http://meejalaw.com/

British and Irish Legal Information Institute: http://www.bailii.org/

Mental Health Law Online: http://www.mentalhealthlaw.co.uk/

Mental Capacity Law and Policy: http://www.mentalcapacitylawandpolicy.org.uk/

The Small Places: https://thesmallplaces.wordpress.com/