

PARTICIPATION IN THE COURT OF PROTECTION: A SEARCH FOR PURPOSE

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ABSTRACT

The Mental Capacity Act 2005 ('the Act') (UK) and associated rules and guidance aim to support the person with impaired decision-making to participate in decisions about their life. More than a decade after the Act came into force, there is uncertainty about what it means for the person ('P') who is the subject of proceedings in the Court of Protection ('CoP') to participate in court hearings. This paper reviews the law and guidance on participation of P as well as the limited published research on P's participation. The authors identify gaps in the current legal framework and conclude that research which captures the views of judges, practitioners, and not least, P and their families and carers, is a necessary step towards improved CoP guidance and practice promoting the participation of P.

I. INTRODUCTION

The Court of Protection is invested with the power to make decisions about the health, welfare, and property and affairs of a person who lacks decision-making capacity.¹ The Mental Capacity Act 2005 (UK) (the Act) includes a requirement that a decision-maker 'so far as reasonably practicable' must 'permit and encourage the person to participate,' which includes making reasonable adjustments to 'improve his ability to participate.'² This requirement is consistent with the right of an individual to have the opportunity to be present in decisions regarding their finance, welfare, and private life more generally.³

The Act also requires that a person making a determination in a person's best interests, must take into account the past and present wishes and feelings, beliefs and values and other factors the person (known in practice as 'P') would be likely to

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¹ Part 2, Mental Capacity Act 2005.

² s. 4(4) Mental Capacity Act 2005.

³ For example, the 'rule of personal presence' in relation to Art 5 ECHR, see *Shtukaturov v Russia* (App no 44009/05) [2008] ECHR 223. Also United National Convention on the Rights of persons with Disabilities, Art 13 & Council of Europe Committee of Ministers, *Recommendation No. R(99)4 on principles concerning the legal protections of incapable adults*. (Adopted on 23rd February 1999).

consider.⁴ In practice this information may be obtained via P's participation *during* the hearing, though more usually the information is presented by legal representatives in the form of written evidence gathered from or about P *before* the hearing. Facilitating P's participation before or during the court process may require specialist communication support from family, carers, healthcare professionals, lawyers and the court.

Despite the legal and practical significance of participation, and its role in the judicial decision-making process, facilitating P's participation is largely overlooked as an area of substantive enquiry in academic literature. This paper describes the legal framework promoting the participation of P in CoP hearings and the procedural guidance for judges and practitioners, the most recent of which was published in February 2022.⁵ This paper reviews existing research into how P's participation manifests in practice and why some practitioners and judges may be avoiding opportunities to ensure and support participation.⁶ The authors highlight the lack of specificity within the current law and ambiguity within the guidance and argue that this leads to uncertainty and inconsistency in relation to P's participation. The authors propose research that would increase understanding of P's participation in their own hearing and argue that such research is a necessary step to improve guidance for practitioners and judges regarding participation of P.

II. PARTICIPATION: LAW, PROCEDURE AND GUIDANCE

A. *The Act in Practice*

The Act aims to provide a comprehensive legal framework for making decisions about whether P lacks capacity to make a particular decision and if so, what decision(s) should be made on their behalf.⁷ Any decision must be made in P's best interests.⁸ The Act is supported by the Mental Capacity Act Code of Practice (2007) ('the Code'); which provides guidance about how the Act should be applied. The Act and the Code do not apply solely to decisions made within legal proceedings; the legal framework is applied daily by professionals and non-professionals making decisions on behalf of P.

In 2007, the Lord Chancellor heralded the MCA as important new legislation,

⁴ s. 4(6) Mental Capacity Act 2005.

⁵ P, *Official Judicial Visits to (Guidance)* [2022] EWCOP 5 (10 February 2022): (<https://www.bailii.org/ew/cases/EWCOP/2022/5.html>)

⁶ J. Lindsey, 'Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection.' (2019) 28(4) *Social and Legal Studies* 450-469

⁷ The Act applies to adults (18 and over) and 16 & 17-year olds. However, the Court of Protection can make decisions in relation to property and affairs for those under 16 in cases where the person is likely to still lack capacity to make financial decisions after reaching the age of 18: ss.2(5), 2(6) and 18(3).

⁸ s. 1(4) Mental Capacity Act.

[...]that will make a real difference to the lives of people who may lack mental capacity [and] ensure that they participate as much as possible in any decisions made on their behalf, and that these are made in their best interests.⁹

What is often said to be the ethos of 'empowering P' is demonstrated in the five principles set out in section 1 of the Act:

1. A person must be assumed to have capacity unless it is established that he lacks capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.¹⁰

In addition to the commitment to taking 'all practical steps' to help a person make a decision, the Act requires information to be understandable, so that P can participate in decisions being made on their behalf, and that P's wishes and feelings can be considered. Specifically:

- 'A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).'¹¹

- Anyone determining what is in the best interests of the person with impaired decision-making capacity must 'so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.'¹²

- Anyone making a best interest decision must also 'consider, so far as is reasonably ascertainable—

- (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
- (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
- (c) the other factors that he would be likely to consider if he were able to do so.'¹³

The majority of applications made to the CoP relate to property and affairs, particularly the appointment of deputies to manage P's financial affairs and/or applications by attorneys for authority to make specific decisions in relation to P's affairs.¹⁴ These cases tend to be uncontested and are normally dealt with 'on the papers'. Cases with

⁹Department for Constitutional Affairs, *Mental Capacity Act 2005 Code of Practice*. (TSO, 2007), Foreword by Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor

¹⁰ s.1 Mental Capacity Act 2005.

¹¹ s. 3(2) Mental Capacity Act 2005.

¹² s. 4(4) Mental Capacity Act 2005.

¹³ s. 4(6) Mental Capacity Act 2005.

¹⁴ A. Ruck Keene, *et al*, 'Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection.' (2019) 62 *International Journal of Law and Psychiatry* 56-76. (<https://doi.org/10.1016/j.ijlp.2018.11.005>).

disputed issues about P's personal welfare, medical treatment and/or deprivation of liberty will normally involve several parties; including family members and the relevant public body responsible for providing health and social care services and/or those responsible for safeguarding P. In such proceedings, P will usually be a party but in most cases will act through a litigation friend (often, but not always, the Official Solicitor) on account of them lacking capacity to litigate the proceedings.¹⁵ In short, the litigation friend is appointed to "stand in the shoes of P" and they will provide instructions to P's legal representatives about what position should be taken during proceedings.

The CoP has wide case management powers to control the evidence and the conduct of proceedings. Section 48 of the Act provides the CoP with power to make interim orders and declarations about capacity and best interests, pending the CoP being in a position to consider all the relevant evidence and make final determinations. Very frequently, interim and final orders or declarations are agreed between the parties and placed before the judge by way of a consent order for scrutiny and approval. In the event that an agreement is not reached, the CoP will hear oral evidence and/or submissions from the parties and their legal representatives, in addition to considering all of the documentary evidence, and make any necessary interim or final determinations.

B. The Code of Practice

Chapter 3 of the Code provides guidance as to how P should be supported to make their own decisions. Support may include, *inter alia*:

- i. communicating with P in a manner that meets their specific verbal and non-verbal communication needs. This may include obtaining any specialist help and/or using visual or pictorial aids or other mechanical devices;
- ii. observing any changes of feelings through P's non-verbal communications. Sometimes that which a person does not say can, in context, be every bit as articulate as wishes stated explicitly.¹⁶
- iii. providing P, in an accessible manner, with all the relevant information;
- iv. making P feel at ease i.e. consider the best person, location and timing to speak with P; and
- v. identify any person (e.g. family member or carer) that may be able to assist with the above steps and more generally, supporting P to make their own decisions.

C. The Rules

The Court of Protection Rules 2017 ('the Rules') prescribe the practical steps that should be taken in court proceedings. The Rules have the 'overriding objective of enabling the Court to deal with a case justly and at proportionate cost'¹⁷ and this

¹⁵ There are cases where P is considered to have capacity to conduct the proceedings themselves, although these are unusual (and most often arise where the issue is whether P has capacity to make the underlying decision(s) in issue). For example, *Cheshire & Wirral Partnership NHS Foundation Trust v Z* [2016] EWCOP 56.

¹⁶ See Hayden J in *Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26, at [25].

¹⁷ r.1.1(3) Court of Protection Rules 2017.

includes 'so far as is practicable' amongst other objectives, 'ensuring that P's interests and position are properly considered.'¹⁸

The CoP can 'admit, accept and act upon such information, whether oral or written, from P, any protected party or any person who lacks competence to give evidence, as the court considers sufficient, although not given on oath and whether or not it would be admissible in a court of law apart from this rule'¹⁹ (Rule 14.2(e)).

D. P participating in CoP proceedings

Rule 3A came into force in July 2015 requiring the CoP to consider making a direction that P is made a party, has representation (including legal representation), has an opportunity to address the judge, or 'an alternative direction meeting the overriding objective'.²⁰ Clearly the scope for making participation directions is wide and any directions ought to reflect the individual circumstances of a case. There are several different ways P can participate in CoP proceedings, including one or more of the following:²¹

- Attending the hearing (sitting through the proceedings)
- Attending the hearing (giving evidence in court)
- Meeting the judge face to face at court 'in chambers', in front of some or all of the parties
- Meeting the judge face to face away from court (judge travels to meet P)
- Telephone/video call with the judge
- Judge reading a letter/email/statement from P
- Through the Official Solicitor/litigation friend
- Through a legal/other representative
- Through an advocate
- Through a McKenzie Friend²²

There are no specific provisions about the type of communication assistance, or procedural accommodation, that will be necessary to ensure effective participation in any of these particular circumstances. Instead, the rules recognise that accommodation will need to be assessed on an individual basis. As such, the rules grant very broad discretion to the judge to 'give such directions as the court may see fit';²³ which can be taken 'on its own initiative' or 'on the application of a party'.²⁴ Whether or not P participates in any of the ways listed above, inferences may be drawn about P, their views etc. based on testimony from people who have met/observed P (for example, social/care workers, treating or assessing physicians,

¹⁸ r.1.1(3)(b) Court of Protection Rules 2017.

¹⁹ r. 14.2(e) Court of Protection Rules 2017.

²⁰ Participation of "P" Rule 3A (2), 2015, now found in the Rules 1.2 in the 2017 edition of the Rules.

²¹ List adapted from A. Eldergill, 'Participation and the Court of Protection', Mental Health Collective, PowerPoint presentation, 2 April, 2019.

²² A McKenzie Friend is a lay person who, with permission from the judge, can assist a litigant-in-person with taking notes and can quietly give advice during a court hearing within England and Wales. See, *McKenzie v McKenzie* [1970] 3 All ER 1034, CA.

²³ r. 3.7(2)(j) Court of Protection Rules 2017.

²⁴ r. 3.7(3)(a)-(b) Court of Protection Rules 2017.

expert witnesses appointed and reporting especially for the proceedings) and documentary evidence such as medical and professional records.

The court has a wide discretion when it comes to deciding how P should participate. A CoP judge contemplating making a participation direction will make the decision in the context of the overriding objective and any submissions made by the parties about how the court should permit and encourage P to participate, if at all. In making the determination the court will have regard to not only what is said to be the Act's ethos of empowering and supporting P to participate, but also to more practical issues such as whether and how P wishes to participate, any potential benefit/detriment to P, P's ability to participate and the time and resources available to make practical arrangements to enable participation.

E. Practice Direction 1A

Supplementing the Court of Protection Rules 2017, 'Practice Direction 1A – Participation of P'²⁵ ('the Practice Direction') begins with an acknowledgment that '[d]evelopments in the case law both of the European Court of Human Rights and domestic courts have highlighted the importance of ensuring that P takes an appropriate part in the proceedings and the court is properly informed about P.'²⁶ Paragraph 2 goes on to describe Rule 1.2 as making provision to:

- (a) ensure that in every case the question of what is required to ensure that P's "voice" is properly before the court is addressed; and
- (b) provide flexibility allowing for a range of different methods to achieve this, with the purpose of ensuring that the court is in a position to make a properly informed decision at all relevant stages of a case.'

Though most cases are 'non-contentious' and can be dealt with 'on paper', other cases 'involving a range of issues relating to both property and affairs and personal welfare do or may call for a higher level of participation by or on behalf of P at one or more stages of the case'.²⁷ For example, in *Bagguley v E*, Hayden J took the opportunity to make observations about participation in emergency applications, such as those relating to urgent out of hours care. He stated:

'Court of Protection Rules 2017 rule 1.2 and Practice Direction 1A place a duty on the Court to consider the participation of P and as to whether or not to join P as a party to the proceedings. In doing so the Court is directed to have regard to a number of matters including the nature and extent of the information before the Court; the issues raised by the case; whether a matter is contentious; and whether P has been notified.'²⁸

The Practice Direction underscores the requirement for flexibility and the importance of tailoring provisions for P's participation in the individual case. However, the Practice

²⁵ PD 1A: (<<https://www.judiciary.uk/wp-content/uploads/2017/12/pd-1a-participation-of-p.pdf>>)

²⁶ *Ibid*, [1].

²⁷ *Ibid*, [4].

²⁸ *Bagguley v E* [2019] EWCOP 49, per Hayden J at [49]. See also, *Re X (Court of Protection Practice)* [2015] EWCA Civ 599

Direction stops short of giving examples; what constitutes flexibility and tailoring to the individual case remains left to the imagination of the judges and practitioners.

F. The Guidance on Participation in the CoP

In addition to the framework established by the MCA, the Code and the Rules, non-statutory guidance ('the Guidance') was published, in 2016, by Mr Justice Charles: *Facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings*.²⁹ The Guidance is primarily directed at health and welfare cases though it is 'also likely to be of assistance in some' property and affairs cases. It notes that identification of P's participation needs is not the same as determining P's needs for the purposes of 'best interests as regards the decision ... to be made on their behalf' or their 'past or present wishes and feelings as to that decision'.³⁰ The Guidance continues:

'Sometimes what is necessary will be self-evident; sometimes it will not, especially with more subtle cognitive or other impairments. In some cases, the person's impairments will be sufficiently severe that they will be unable to participate in any meaningful fashion within the court process. In other cases, they will be able to participate with appropriate support and assistance. Consideration of the nature of that support and assistance should start at the earliest possible stage – in many cases, in the first meeting between the person and their representative, which should be arranged (especially in the case of P) as soon as possible in the proceedings.'³¹

The Guidance aims 'to provide helpful suggestions as to how practitioners might consider enhancing the participation of P in proceedings in the Court of Protection'³² and emphasises ascertaining P's wishes and feelings.³³

'In order for P to be placed at the centre of the proceedings P's wishes and feelings on the issues to be determined by the Court are of vital importance in Court of Protection proceedings. Third party reports of P's wishes and feelings regarding the issues before the Court can be obtained from a variety of sources, including from carers, care staff, relatives, professionals concerned with P, IMCAs and other advocates (e.g. Care Act advocates, lay advocacy services, IMHAs) etc.'³⁴

Suggestions are made as to how practitioners might enhance their communication with P to elicit their wishes and feelings, as well as guidance on P's '[a]ttendance at a hearing or hearings', '[m]eeting with the Judge', 'P giving 'information' to the Court' and 'P giving evidence to the Court.' Understandably, the Guidance cannot prescribe what to do in individual cases but it lists extensive practical considerations if P wishes

²⁹ Mr Justice Charles. *Facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings*. (2016): (<https://courtofprotectionhandbook.files.wordpress.com/2016/11/practice_guidance_vulnerable_persons.pdf>)

³⁰ *Ibid*, [6 (a)] and [(6)(b)].

³¹ *Ibid*, [7].

³² *Ibid*, [1].

³³ *Ibid*, [9].

³⁴ IMCA stands for Independent Mental Capacity Advocate and IMHA stands for Independent Mental Health Advocate. Advocate refers to a person who can help put forward the views of the person with impaired capacity, as opposed to a legally qualified advocate in court.

to attend a hearing.³⁵ The list includes the impact on P, liaising with court staff, practical arrangements for a video call, face to face attendance at the courtroom, or breaks.

'Meeting with the judge' is a relatively short section (reproduced in full below):³⁶

'If P wishes to meet with the Judge, it must first be determined what the purpose of such a meeting would serve and the court and the parties must be clear about that in the particular case. In addition consideration should be given to:

- (a) Informing the Judge/regional hub of P's wish, and seeking the Judge's views as soon as possible, providing the Judge and court staff with any relevant information about how such a meeting might take place to maximise P's participation, and seeking their views about what is practicably possible, taking into account the above suggestions;
- (b) Alerting the Judge and court staff to any risk issues which may be relevant for a visit by P to see the Judge at the Courtroom or in the Court building, or for the Judge visiting P at a care home or hospital;
- (c) Who else might attend such a meeting?
- (d) Whether the meeting should be video or audio recorded and if so how and by whom?
- (e) Whether a note is to be taken of the meeting and if so by whom?

Participation in the form of a face-to-face meeting has been characterised by some judges as an essential tool. For example, Jackson J noted in *Wye Valley NHS Trust v B*:

'There is no substitute for a face-to-face meeting where the patient would like it to happen. The advantages can be considerable, and proved so in this case. In the first place, I obtained a deeper understanding of Mr B's personality and view of the world, supplementing and illuminating earlier reports. Secondly Mr B seemed glad to have the opportunity to get his point of view across. To whatever small degree, the meeting may have helped him to understand something of the process and to make sense of whatever decision was then made.'³⁷

Similarly, in *CC v KK and STCC*, Baker J gave greater weight to the testimony of an 82 year old woman who wished to return home in part because he had met her face- to face.³⁸ Kong *et al* have argued that participation allows the contextualisation of P's values; for example, in *Wye Valley*, it allowed the judge the opportunity to understand that even though P's wishes and feelings were influenced by delusions and hallucinations (that psychiatrists deemed to be caused by mental disorder), such delusions were judged to be long-standing beliefs that were constitutive of P's character.³⁹

The judge in *Wye Valley* also recognised that participation had an instrumental value to P's emotional wellbeing. As Series *et al* argued, denying a face-to-face meeting has the potential to harm P, and leave them with a sense of injustice, if they are denied

³⁵ *Ibid*, [13].

³⁶ *Ibid*, [14].

³⁷ *Wye Valley NHS Trust v B* [2015] EWCOP 9, [18].

³⁸ *CC v KK and STCC* [2012] EWHC 2136.

³⁹ C. Kong, *et al*, 'Judging Values and Participation in Mental Capacity Law.' (2019) 8(1) *Laws* 1-22,7-8.

the right to communicate directly with the judge, and have their voice heard.⁴⁰ 'A vital part of human life is to be able to express experienced phenomena, or communicate our own perceptions and values or goals that matter to us – generally, where we can give account to others.'⁴¹ Failing to provide a space for that interaction can therefore injure the person on various levels by denying P 'autonomy, deliberative respect and recognising the epistemic moral standing of individuals.'⁴²

III. AMBIGUITY AND GAPS IN LAW AND GUIDANCE

A. Law

In November 2021 the Court of Appeal⁴³ considered the case of *Re AH*.⁴⁴ It was an appeal by the children of AH following a decision made by Hayden J that it was not in AH's best interests for her to continue to receive ventilatory treatment after 31 October 2021. The declaration did not take immediate effect and the order was stayed pending the appeal.

For the purposes of this article, the key ground of appeal was based on the fact that the appellants 'received a Note (prepared by a representative of the Official Solicitor) of the Judge's visit to hospital to see AH, which had taken place after the parties had made their respective final submissions and before the Judge gave judgment.' The appellants contended that 'the Judge's visit was wrongly used by him as an "evidence gathering exercise to establish what AH's views were", which "likely influenced his overall conclusions", and that this rendered his decision procedurally unfair because the parties were not given the Note of the visit, nor given an opportunity to make submissions in respect of the visit, prior to the judgment.'⁴⁵

Despite the fact that Hayden J 'clearly gave this case a great deal of careful consideration', the Court of Appeal 'regrettably' concluded that his decision could not stand for two reasons:⁴⁶

'First, it is strongly arguable that the Judge was not equipped properly to gain any insight into AH's wishes and feelings from his visit. Her complex medical situation meant that he was not qualified to make any such assessment. If the visit was used by the Judge for this purpose, the validity of that assessment might well require further evidence or, at least, further submissions.'⁴⁷

'Secondly, in order to ensure procedural fairness, the parties needed to be informed about this and given an opportunity to make submissions.'⁴⁸

⁴⁰ L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017), 119.

⁴¹ C. Kong, *et al*, 'Judging Values and Participation in Mental Capacity Law.' (2019) 8(1) *Laws* 1-22, 7.

⁴² *Ibid*, 8.

⁴³ The unanimous judgment was delivered by Lord Justice Moylan with an addendum at paragraphs 77 to 80 by Sir Andrew McFarlane, President of the Court of Protection.

⁴⁴ [2021] EWCA Civ 1768.

⁴⁵ *Ibid*, [4].

⁴⁶ *Ibid*, [69].

⁴⁷ *Ibid*, [71].

⁴⁸ *Ibid*, [72].

The CoP President's additional comments included:

'This appeal has demonstrated that it is now the practice of some, and it may be many, judges in the Court of Protection [CoP] to visit the subject of the proceedings, P, when it is not possible for P otherwise to join in the proceedings. Such a practice may well be of value in an appropriate case. It is, however, important that at all stages and in every case there is clarity over the purpose of the encounter and focus on the fact that at all times the judge is acting in a judicial role in ongoing court proceedings which have yet to be concluded.

In the present case there was, regrettably, a lack of clarity over the purpose of the visit and the role of the Judge in undertaking it. If, as my Lords and I have accepted, it may have been the case that Hayden J was seeking to obtain some indication of AH's wishes and feelings, then great care was needed both in the conduct of the judicial interview and the manner in which it was reported back to the parties so that a fair, open and informed process of evaluation could then be undertaken within the proceedings.⁴⁹

He went on to acknowledge 'a pressing need for the CoP to develop some workable guidance for practitioners and judges in a manner similar to that which is available in the Family Court with regard to judges meeting with children who are subject to contested proceedings.'⁵⁰

What followed in February 2022, was guidance issued by Hayden J headed *Judicial Visits to 'P'* declaring that it intended 'to supplement, not to replace the earlier guidance' [by Charles J in 2016].⁵¹ The scope and limitations of this supplementary guidance are discussed below.

B. Procedure and Guidance

Notably absent from Charles J's 2016 guidance was a clear statement on the evidential value of a meeting between P and the judge. By way of comparison, the *Guidelines for Judges Meeting Children who are subject to Family Proceedings* produced by the Family Justice Council and approved by the President of the Family Division (April 2010) state at paragraph 5: 'It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence.'⁵²

The 2022 *Official Judicial Visits to P (Guidance)* aims 'to provide, hopefully helpful, suggestions as to how the Court and practitioners might ensure that meetings between the Judge and P, during proceedings, are conducted most effectively and enhance the participation of P.'⁵³ It is not intended to be a comprehensive checklist

⁴⁹ *Ibid*, [78-79].

⁵⁰ *Ibid*, [80].

⁵¹ [2022] EWCOP 5, [1].

⁵² Family Justice Council, *Guidelines for Judges Meeting Children who are subject to Family Proceedings*. (2010): (https://www.judiciary.uk/wp-content/uploads/JCO/Documents/FJC/voc/Guidelines_Judges_seeing_Children.pdf)

⁵³ P, *Official Judicial Visits to (Guidance)* [2022] EWCOP 5 (10 February 2022)

nor in any way to be taken as an indication that judicial visits will ordinarily be necessary.⁵⁴

The guidance declares the following three principles:

I. A judge meeting with P can achieve a number of important objectives, including (where P lacks capacity) their participation in 'best interests' decision-making, as required by s.4(4) Mental Capacity Act 2005. Which provides:

*(4) He **must**, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*

It is important to emphasise the mandatory nature of this obligation.

II. A decision to meet P is one which must be taken by the judge, having listened to any representations made on behalf of the parties. In particular, there should be discussion directed towards identifying a clear understanding, of the scope and ambit of the visit.

III. However, it is in the nature of such visits that the parameters may become unsettled or expanded by events and exchanges. It is, important to emphasise that:

- i. a judge meeting P will not be conducting a formal evidence-gathering exercise;
- ii. a visit may serve further to highlight aspects of the evidence that the Judge has already heard, in a way which reinforces oral evidence given by either the experts or family members;
- iii. a visit may sometimes lead the Judge to make further enquiries of the parties, arising from any observations during the visit;
- iv. at any visit the Judge **must** be accompanied, usually, by the Official Solicitor or her representative (at Tier 1 and 2 this will usually be the instructed solicitor);
- v. it will be rare for a member of P's family to be present at a Judicial visit. In principle, this should usually be avoided;
- vi. a note **must** be taken of the visit and quickly made available to the Judge for his or her approval. That note should be circulated to the parties for them to consider and where appropriate to make any representations arising from it;
- vii. where the Judge considers that information from, or the experience of, visiting P may have had or might be perceived to have had an influence on the 'best interests' decision, the Judge must communicate that to the parties and, where appropriate, invite further submissions⁵⁵

The guidance then makes five points about the 'Practicalities' of such a visit:

In order to give effect to these principles and where the application is not made in an emergency, the parties should provide the Court with:

- i. **information helping to inform the judge** as to whether a visit to P (remotely or otherwise) is likely to be required;
- ii. **what practical steps require to be taken to facilitate a visit.** Where an in-person visit is canvassed, any relevant risk factors should be identified, and measures thought necessary to mitigate risk. Most judicial visits at Tier 3 are to hospitals which will have their own protocols in place. These have been amended regularly during the course of the pandemic. The formal HMCTS sanctioned risk assessment process, where it is applicable, should apply to Tier 3 judges;

⁵⁴ *Ibid*, [4].

⁵⁵ *Ibid*, [6].

iii. **whether there is any specific assistance that can be given to the judge** to facilitate communication with P most effectively. In this respect, it will always be helpful to have regard to Charles J's guidance at para. 14 which is set out here for convenience:

14. If P wishes to meet with the Judge, it must first be determined what the purpose of such a meeting would serve and the court and the parties must be clear about that in the particular case. In addition consideration should be given to:

(a) Informing the Judge/regional hub of P's wish, and seeking the Judge's views as soon as possible, providing the Judge and court staff with any relevant information about how such a meeting might take place to maximise P's participation, and seeking their views about what is practicably possible, taking into account the above suggestions;

(b) Alerting the Judge and court staff to any risk issues which may be relevant for a visit by P to see the Judge at the Courtroom or in the Court building, or for the Judge visiting P at a care home or hospital;

(c) Who else might attend such a meeting?

(d) Whether the meeting should be video or audio recorded and if so how and by whom?

(e) Whether a note is to be taken of the meeting and if so by whom?

iv. **who will attend the visit** with the judge? Where the Official Solicitor is appointed as litigation friend for P, the expectation is that the attendance would be by a representative from the office of the Official Solicitor. In any other case, the parties should consider, with the judge, who should attend; and

v. **who will take the note of the visit** (audio- or video-recording will not be used to assist in the production of the note unless specifically sanctioned by the Judge).⁵⁶

The guidance clearly focuses on how a visit supports the judge's objective of determining what is in P's best interests when P lacks capacity. The guidance attempts to clarify the status of information gained by the judge: this is 'not a formal evidence-gathering exercise' but 'may serve further to highlight aspects of the evidence that the Judge has already heard, in a way which reinforces oral evidence given by either the experts or family members.' What then is the status of this potentially corroborating information that is not gathered as evidence? A 'visit may sometimes lead the Judge to make further enquiries of the parties, arising from any observations during the visit', but what if the parties are unwilling or unable to undertake further investigation to satisfy the judge's non-evidence-based enquiries? It is a declared principle that 'it will be rare for a member of P's family to be present at a Judicial visit. In principle, this should usually be avoided'. For what reason are family members singled out for exclusion?

Guidance that makes a few practical suggestions aside, the CoP is governed by legislation and specific procedural rules. Notably absent in the legislation and rules is a scheme equivalent to the 'special measures' available in criminal cases (adaptations to standard court procedure for witnesses who are distressed or 'intimidated' by the proceedings of otherwise 'vulnerable') under the Youth Justice and Criminal Evidence Act 1999.⁵⁷ With the exception or 'removal of wigs and gowns' (since wigs and gowns are not worn by barristers in the CoP anyway), these statutory special measures -

⁵⁶ *Ibid*, [7].

⁵⁷ s 23 – 30 Youth Justice and Criminal Evidence Act 1999. HHJ Mark Rogers was unwilling to read into the rules s53 Youth Justice and Criminal Evidence Act 1999, in *A County Council v AB and Ors (Participation of P in Proceedings)* [2016] EWCOP 14, [49].

screening the witness, evidence by live link, evidence in private i.e. excluding people from the courtroom, video recorded evidence in chief/cross-examination/re-examination, intermediaries (specialist communication facilitators) and communication aids - are potentially extremely useful directions to support P or any other vulnerable witness to participate in the CoP. Under Rule 3A such directions could be made in theory, but what is available in practice is limited by the absence of a properly resourced statutory scheme. The absence of a properly resourced special measures scheme may well increase the pressure on judges to meet P as an alternative to traditional courtroom procedures that could be perceived as far too distressing or even damaging to P, a vulnerable adult.

IV. SOCIOLOGICAL RESEARCH ON PARTICIPATION

A. The Court of Protection

A report by Series, Fennel and Doughty⁵⁸ about research conducted prior to the rule changes introduced in 2015, gives specific insights into CoP participation practices. Whilst the study focused on welfare cases, the authors recognised that most of the CoP work related to property and affairs. This is important, as Rees and Ruck Keene argue that dealing with welfare, as opposed to property and affairs, requires lawyers to adopt 'fundamentally different cultures' due to clients funding litigation.⁵⁹ As such, the participation requirements also differ. Property and affairs cases require the adoption of a 'low participation model' to reduce costs.⁶⁰ Conversely, welfare cases which potentially have dramatic effects on the everyday lives of P, provide, and require, more opportunities for participation. Attitudinally, lawyers in welfare cases, who predominantly come from public or family law practice backgrounds, also adopt an approach which affords greater liberty to explore 'issues of principle' with the potential scope for participatory engagement.⁶¹ As administrative and wealth applications make up the majority of the CoP's work, it might be suggested that novel or tailored approaches to participation in welfare proceedings end up being side-lined by the court (both financially, and administratively).⁶²

Series *et al* found that despite the best efforts of the judiciary and those working within the CoP system, several aspects of the model were not working because the system was not set up to facilitate participation on a large scale. Particularly:

1. Difficulties experienced by P in accessing the CoP to challenge a decision made under the MCA or to review a DoLS;

⁵⁸ L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017).

⁵⁹ D. Rees & A. Ruck-Keene, 'Property and Affairs Lawyers are from Mars, Health and Welfare Lawyers from Venus.' (2014) 4(3) *Elder Law Journal* 285, 286.

⁶⁰ L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017), 27.

⁶¹ D. Rees & A. Ruck-Keene, 'Property and Affairs Lawyers are from Mars, Health and Welfare Lawyers from Venus.' (2014) 4(3) *Elder Law Journal* 285, 287.

⁶² L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017), 8.

2. Resource constraints on making P a party to proceedings;
3. The serious detriment to fairness of proceedings done by a decision not to notify P about the case;
4. Uncertainty about whether and how judges should take evidence from P and form their own views as to P's mental capacity;
5. The limited resources available for representation of P within proceedings – either via a legal representative or, in some cases, even a lay representative;
6. Difficulties reconciling the 'best interests' model of representation currently adopted by litigation friends with recent human rights authorities on deprivation of legal capacity and DoLS proceedings;
7. A lack of recognition of the centrality of P's 'personal presence' in proceedings in the CoP's rules and guidance
8. A lack of provision for special measures and reasonable adjustments in the CoP's rules, as well as no specific allocation of resources for this purpose;
9. Inadequate training of legal representatives and judges on disability and access to justice matters;
10. A lack of accessible information about the CoP for those who are subject to its jurisdiction.⁶³

P is likely to face barriers to accessing the CoP (whilst P has a right to issue proceedings in the CoP, proceedings are regularly issued by public authorities, or P's family and friends). Series *et al*, suggest that a barrier of access occurs because of a lack of professional and public awareness about the role of CoP.⁶⁴ Further, P may be in conflict with their carers,⁶⁵ support networks and/or professionals, and may find it difficult to identify a professional or attain funding to support them in seeking an order.⁶⁶ Even if P is made aware of the CoP, they may be reluctant to engage further institutional support because of perceived attitudes of paternalism (resulting from a history of professionals failing to ensure a process of shared decision-making and/or participation in decision-making about their best interests);⁶⁷ and that the institutional structure of the court is exclusionary in design.⁶⁸ Series *et al*, identified that the complexity, formality and language of the forms and guidance when accessing and negotiating the CoP likely exclude P from participation beyond attendance.⁶⁹ The authors argue that the purpose of the CoP is not only to make best interests determinations, but to provide a mechanism whereby a person who is deprived of liberty can assert their rights, or when they have their legal capacity challenged can seek redress. However, rather than facilitating P, the forms and guidance are aimed

⁶³ L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017), 3.

⁶⁴ *Ibid*, 59-60.

⁶⁵ *Ibid*, 60.

⁶⁶ *Ibid*, 61. See also, J. Connelly, 'Transforming legal aid: restricting access to justice in the Court of Protection?' (2013) 3(3) *Elder Law* 293.

⁶⁷ Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: Post Legislative Scrutiny Committee*. (House of Lords, 13 March 2014), (HL, Paper 139), [79]-[83].

⁶⁸ Perhaps as a mechanism to maintain the semblance of professionalism, collectivism and authority: C.L. Wade, 'When Judges are Gatekeepers: Democracy, Morality, Status, and Empathy in Duty Decisions (Help from Ordinary Citizens).' (1996) 1(80) *Marquette Law Review* 1-76; L. Barnes & K. Malleson, 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity.' (2011) 74(2) *MLR* 245-271.

⁶⁹ L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017), 63-64.

at third parties, i.e., either lawyers, health institutions or families.⁷⁰ Series *et al* argue these barriers to the court are especially acute in the wake of the Supreme Court rulings in *P v Cheshire West and Chester Council and another*,⁷¹ as well as the growing European rights jurisprudence relating to Art 6: Access to justice and Art 5: Right to liberty.⁷²

Lindsey produced the only identified empirical study of P and their participation in the CoP. The study included a qualitative review of case files in combination with an observation of 11 CoP cases.⁷³ Lindsey, found that P faced injustice because they were often denied the ability to participate.⁷⁴ This was important, because P was excluded from the practice of conveying their knowledge. Lindsey argues that this denial is motivated by concern for P's vulnerability because of their lack of capacity. From conversations with court users and staff, the author identified that whilst judges, practitioners and court staff were not actively prejudiced against P, if there was doubt about capacity P was stereotyped, and their inherent vulnerability was overemphasised, which triggered paternalistic attitudes.⁷⁵ Lindsey identified individuals who raised concerns about P giving formal evidence because of the potential harm that the process of evidence-giving may have.⁷⁶ As a result, Lindsey found that P rarely attended the hearings:

'Despite the value of embodied presence, P's absence was the most striking theme that emerged from the data. Of the 8 cases observed over 11 hearings, P was present on 3 occasions. Of the case files reviewed, there was no evidence that P attended any hearings, gave evidence or spoke to the judge informally. While I did not attend all the hearings for each case, it is widely accepted that it is unusual for P to attend or give evidence in the COP.'⁷⁷

Both Lindsey⁷⁸ and Series *et al*,⁷⁹ do, however, cite several examples where judges have rejected expert evidence in favour of the testimony of P – indicating the potential benefit which more direct forms of participation can have on the process, and substantive content, of judicial decision-making (in line with the requirements of the

⁷⁰ *Ibid*, 63-64.

⁷¹ *P v Cheshire West and Chester Council and Another* [2014] UKSC 19. Also see, *P and Q v Surrey County Council* [2014] UKSC 19 and *X & Others (Deprivation of Liberty)* [2014] EWCOP 25.

⁷² L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017), 8-9 & Chapter 2.

⁷³ J. Lindsey, 'Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection.' (2018) 28(4) *Social & Legal Studies* 450-469, 454-455.

⁷⁴ *Ibid*, 455, relying on M. Fricker, *Epistemic Injustice: Power and Ethics of Knowing*. (Oxford University Press, 2007).

⁷⁵ *Ibid*, 456 & 459-461, for example, *C Borough Council v (1) DY (2) B Council* [2016] EWCOP 41.

⁷⁶ *Ibid*, 455-456 & 459.

⁷⁷ *Ibid*, 457. Relying on, V. Butler & L. Hobe-Hamsher, 'The assessment of capacity by judges of the court of protection.' (2016) 6 *Elder Law Review* 145-151.

⁷⁸ J. Lindsey, 'Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection.' (2018) 28(4) *Social & Legal Studies* 450-469, 452-454; For example, *CC v KK and STCC* [2012] EWHC 2136 (COP).

⁷⁹ L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017), 98-100. For example, *Re SB (A Patient; Capacity to Consent To Termination)* [2013] EWHC 1417 (COP); *WBC v Z & Ors* [2016] EWCOP 4; *Re M (Best Interests: Deprivation of Liberty) (Rev 1)* [2013] EWHC 3456 (COP).

MCA).⁸⁰ Series *et al* argue, however, that the potential for the judge to gather evidence from participation has created confusion around the legitimate role P should play in the court room - as a source of evidence, or more generally as a source of contextual information.⁸¹ Confusion particularly exists around the weight that can be legitimately placed on the testimony of an individual who lacks capacity, in comparison to expert medical evidence. Judges may place emphasis on the inherent vulnerability of P as a reason to prevent them from formally giving evidence, and/or from accommodating more relaxed forms of participation.⁸² Lindsey argues:

'A cultural stereotype that mentally disabled adults are especially inherently vulnerable permeated COP proceedings. This stereotype of vulnerability led to P's resulting lack of credibility as a knowledge giver.'⁸³

For example,

[...] in *C Borough Council v (1) DY (2) B Council*, the council's position statement stated that DY had an IQ of 47 and a learning difficulty and '[a]s such she is particularly vulnerable and in need of substantial support in all but the most elementary aspects of daily life in order to maintain herself safely'. This shows that DY's vulnerability was linked to her mental functioning (an inherent vulnerability), albeit according to the local authority the matter was before the court because of concerns about an abusive relationship (a situational vulnerability).⁸⁴

Whilst meeting P outside of the courtroom context has the benefit of informality, and thus may be regarded as in P's best interest's, disclosures by P may be evidentially material to the matters at hand. Yet, opposing counsel may not be present to challenge this form of information, or testimony. More difficult, again, is the extent to which the judges own experience of P and their environment contextualises medical evidence, or implicitly (or explicitly) influence their decision. As Series *et al* identified, some judges are reluctant to blur their role (and their status and authority) as decision-maker and take on the responsibility of evidence-gatherer.⁸⁵ However, these authors make the point that this procedural rigidity runs counter to rulings from the European Court of Human Rights on the presumption of 'personal presence' as part of a fair trial.⁸⁶ It also denies P a safe forum to disclose and discuss issues which relate

⁸⁰ s. 4(6) Mental Capacity Act 2005.

⁸¹ L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017), 97-105.

⁸² J. Lindsey, 'Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection.' (2018) 28(4) *Social & Legal Studies* 450-469, 459. This is despite the distinction between the test for litigation capacity, and witness capacity, which requires that the witness understand the solemnity of an occasion and the responsibility to tell the truth (*R v Hayes* [1977] 1 WLR 238). Even if P does not have capacity their testimony can still be used as hearsay evidence: *LB Enfield v SA* [2010] EWHC 196 (Admin).

⁸³ *Ibid*.

⁸⁴ *Ibid*, 459-461.

⁸⁵ L. Series, *et al*, *The Participation of P in Welfare Cases in the Court of Protection*. (Cardiff University & Nuffield Foundation, February 2017), 101, see, *YLA v PM & Anor* [2013] EWCOP 4020

⁸⁶ *Ibid*, 97, relying on, *Ekbanti v Sweden* [1998] ECHR 6; *Igual Coll v Spain* ECHR (10 March 2009), [28]-[38]; *Wye Valley NHS Trust v B* [2015] EWHC 60 (COP). For an explanation of the rule, see L. Series, (2013), *The rule of personal presence – implications for the Court of Protection*, available at (<<https://thesmallplaces.wordpress.com/2013/10/19/the-rule-of-personal-presence-implications-for-the-court-of-protection>>)

to more emotional and less rationalistic evidence, for example, where P has, or will experience: emotional suffering, moral damage or distress and anxiety as a result of a determination.⁸⁷

Lindsey argues that special measures alone are not the answer and there should be a new rule for a rebuttable presumption that P, if they are competent to do, will give evidence through a witness statement [in writing], orally or through special measures. Whilst we acknowledge that such a change might bring greater focus to hearing the 'voice of P', such a rule would almost certainly lead to new and possibly lengthy legal arguments to rebut the presumption and inadvertently bring about binary thinking (participation via witness evidence or no participation). This would run counter to the notion of facilitating participation in, theoretically at least, unlimited ways tailored to P, in the particular cases. In addition, such a rule change would also take the focus off the wide purposes and benefits of P's participation; which go far beyond P being the giver of evidence.

B. Participation in other Courts and Tribunals

Research has not looked directly at how the respective law, codes and rules in relation to participation are understood and utilised by judges and legal practitioners in the CoP. This is particularly important, as this level of understanding will be essential to removing the barriers to participation (identified within the Series *et al*, and the Lindsey studies). Similar barriers to participation have been identified in Jacobson and Cooper's 2020 study, which looked at how court actors conceptualised participation in the criminal and family courts, and the employment, immigration and asylum tribunals.⁸⁸ The study included over 200 hours of court and tribunal hearing observations and 159 qualitative interviews with judges, lawyers court staff, and other professionals.⁸⁹

Within the Jacobson and Cooper study, practitioners were observed to make efforts to ensure the participation of court users but were often frustrated by procedural and practical barriers. One such barrier was the lack of a shared understanding of what participation entails. Whilst actors recognised participation was essential to justice, different actors within the court articulated the essential components of participation in very different ways.⁹⁰ Some practitioners understood participation as instrumental to the legal proceedings, and as an opportunity for judges to gather evidence and elicit information.⁹¹ Participation was also characterised as a mechanism in which the judiciary could talk to, and manage, the court user (to avoid disruption).⁹² Some also saw it as a procedural safeguard to ensure that all parties had a presence during the

⁸⁷ *Ibid*, 97.

⁸⁸ J. Jacobson & P. Cooper, *Participation in Courts and Tribunal: Concepts, Realities and Aspirations*. (Bristol University Press, 2020), ix.

⁸⁹ *Ibid*, 66.

⁹⁰ *Ibid*, 69.

⁹¹ *Ibid*, 71-72.

⁹² This was spoken about mostly by court staff and the judiciary, reflecting their duties to ensure a smooth running of proceedings. *Ibid*, 76-77.

proceedings. Others saw the role of participation as facilitating the needs of the court user, for example, by ensuring that they were informed,⁹³ and/or that they had adequate legal representation.⁹⁴

Disagreements about the essential elements of participation corresponded with the division as to its function. Some saw the functions of participation as exclusively an evidence-gathering exercise which enabled the judge to make a decision; others saw it as having the role of legitimising the processes and outcomes of proceedings;⁹⁵ and some saw it as having a therapeutic benefit for the court user.⁹⁶ Despite this spectrum of views, more than half of the respondents suggested that participation was an essential legal right.⁹⁷ One family judge stated:

[Participation] is essential, absolutely essential, yes...If you're made aware that someone doesn't have the ability to follow proceedings, whether they have some disability, whether they have a lack of ability to concentrate on matters or understand matters, then all those factors need to be taken into consideration in order to ensure that they have a fair trial [...] under Art 6 of the European Convention of Human Rights.' (Judge; family)⁹⁸

Viewing participation as a right was seen as essential in cases where individuals were challenged, or had decisions made by state actors. A right to participate in a hearing was seen as necessary to ensure (at least procedurally) that there was a fair hearing, and that individuals had the ability to present their authentic views and wishes about the issues at hand.⁹⁹ For example, one immigration tribunal judge stated:

Where you have court proceedings where one side is always the government, the government comes to proceedings fully armed, or is capable of coming to the proceedings fully armed [...] So we have to do our best to make sure that there's an equality of arms within court proceedings.¹⁰⁰

The study also examined the experience of court users (as observed by those who work in courts and tribunals) and found that they faced barriers to participation due to mental health problems, learning disabilities and ability to communicate. Court users were also said to find it difficult to bridge social and cultural divides between themselves and their lawyers, the court staff and judges.¹⁰¹ Practitioners also

⁹³ More than half the respondents indicated that ensuring understanding (the law, legal language and their role in the proceedings) was a key purpose of participation, and lawyers were most inclined to do so. The authors suggest that this is because of their professional duty to keep the client informed. J. Jacobson & P. Cooper, *Participation in Courts and Tribunal: Concepts, Realities and Aspirations*. (Bristol University Press, 2020), 72-73.

⁹⁴ More than a quarter associated participation through the conduit of legal representation. If the individual was not represented this was seen as potentially problematic, as they may not be able to communicate their story or negotiate legal procedures and rules. *Ibid*, 73-34.

⁹⁵ *Ibid*, 84-86.

⁹⁶ *Ibid*, 87-89.

⁹⁷ *Ibid*, 80-81: "[Participation] is a fundamental principle of our justice, isn't it? I know we've got human rights legislation in place, but I think that any person who is facing a crime has their absolute right to be heard and participate in that hearing." (Legal Advisor: Crime)

⁹⁸ *Ibid*, 81.

⁹⁹ *Ibid*, 81.

¹⁰⁰ *Ibid*, 81.

¹⁰¹ *Ibid*, 89.

recognised that the historical structure and administration of the legal system are diametrically opposed to the inclusive and transparent orientation of modern participation practices which, according to Jacobson and Cooper, can themselves create significant barriers for participation:

[There are] long-standing structural and cultural features of the justice system, which impede court users' engagement with it – such as its intimidating formality and architectural design, the complexities of the legal language and processes, legal constraints on participation and limits to story-telling, and endemic delay and inefficiencies.¹⁰²

V. CONCLUSION: NEED FOR FURTHER RESEARCH

The Act, Code, Rules and Guidance aspire to ensure that a person with impaired decision-making capacity is supported and enabled to participate in decisions about their health, wellbeing, and property and affairs. Research reveals that these aspirations are not always realised in practice; there may be several reasons for this including conceptual confusion about the meaning of participation, as well as a lack of training, resources, and time. To date there has been a notable lack of special measures legislation for the CoP and of financial backing from the Ministry of Justice for the introduction of participation-enabling technology as standard in CoP courtrooms. The absence of a special measures scheme together with the risks and ambiguity of purpose associated with judges meeting with P, creates the same barriers to participation that have troubled the Family Court in its attempt to support the participation of vulnerable adults and children.¹⁰³

Considering Lindsey's study (research exclusively within the court setting),¹⁰⁴ and Jacobson and Cooper's finding from a study of practitioners and judges in other courts and tribunals,¹⁰⁵ it is highly unlikely that there is a consensus amongst judges and practitioners about the meaning and purpose of participation of P in the CoP.

How P participates, the directions made by a judge and the reasons for participation directions (if any) are seldom included within published CoP judgments. This together with lack of specificity within the rules, and a paucity of research about how P's participation has been achieved in practice, creates overall uncertainty about approaches to P's participation in the past, present and future CoP cases.

A recent project has explored the participation of P in interviews with CoP practitioners and retired judges who have determined cases under the Act. The analysis of those

¹⁰² *Ibid*, 87-88.

¹⁰³ P. Cooper, 'Speaking when they are spoken to: hearing vulnerable witnesses in care proceedings.' (2014) 26(2) *Child and Family Law Quarterly* 132-151. P. Cooper, 'Cross-examination of vulnerable people by alleged abusers in person.' (2017) 46 *Family Law* 245-247.

¹⁰⁴ This may have been unavoidable because access issues in the Court of Protection, for which the author cannot be blamed. However, it does lead to the creation of data which fails to see participation as a process. J. Lindsey, 'Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection.' (2019) 28(4) *Social & Legal Studies* 450-469, 454-455.

¹⁰⁵ J. Jacobson & P. Cooper, *Participation in Courts and Tribunal: Concepts, Realities and Aspirations*. (Bristol University Press, 2020), 70-89.

interviews is, at the time of writing, on-going and will be published in due course.¹⁰⁶ One early finding was that CoP practitioners wished to learn more about meeting with, and supporting, the participation of people with additional communication needs. The research team, working collaboratively with the charity VoiceAbility, and people with learning disabilities and autism,¹⁰⁷ produced a training video for practitioners to support communication and participation in the CoP.¹⁰⁸

Further research with practitioners would be timely following the increase in the use of technology to facilitate remote participation.¹⁰⁹ As Hayden J noted, this has led to the adoption of novel approaches to participation which require further study, both to propagate best practice, and identify if such practices are in alignment with the law, code and guidance relating to participation.¹¹⁰ As Lindsey, rightly, argues: 'As with any radical developments, we must be cautious, consistently evaluate, and subsequently respond to the weight of evidence.'¹¹¹

Undoubtedly, there is a research gap with lay participants in the CoP not least those who are the subject of the proceedings. Further research (for example using semi-structured interviews combined with case-file analysis) would lead to a better understanding of the experiences of lay people (P and their family members) in the CoP and what it means to place P 'at the centre of proceedings'.¹¹²

Research with P and their family members is necessary to understand:

- i. Whether P wished to participate in the CoP case, and if so, how?
- ii. How P participated in their CoP case, if at all?
- iii. How family members and carers experienced P's participation as well as their own participation in the case?

Current research, caselaw and guidance clearly point towards divergent practices and variable interpretations of the law and rules. When filling in the gaps in the legislation, judges determine the purpose and form that P's participation should take. There is a need for further research with legal professionals and most importantly, with P, about the appropriate interpretation of the law, rules and guidance. If the CoP is going to

¹⁰⁶ See the project page for a list of work packages and link to publications: (<<https://www.icpr.org.uk/judging-values-and-participation-mental-capacity-law>>)

¹⁰⁷ VoiceAbility supports people to be heard in decisions about their health, care and wellbeing. See, (<<https://www.voiceability.org> >)

¹⁰⁸ See, P. Cooper, et al, 'Communication and Participation in the Court of Protection.' (YouTube, 2021): (<<https://www.youtube.com/watch?v=WuEtw2rnqBw>>)

¹⁰⁹ Introduced in response to the Covid-19 pandemic.

¹¹⁰ Hayden J. *Remote Access to the Court of Protection Guidance*. (31 March 2020), [73]: (<https://www.judiciary.uk/wp-content/uploads/2020/04/20200331-Court-of-Protection-Remote-Hearings.pdf>)

¹¹¹ J. Lindsey, "Open Justice, Participation: Virtual Hearings and the Court of Protection." In C. Ferstman & A. Fagan (eds.), *Law and Human Rights: Essex Dialogues. A Project of the School of Law and Human Rights Centre*. (University of Essex, 2020), 264.

¹¹² See, U. De Silva, et al, 'Family witnesses in court: Four reflections on Re AH (A Rehearing). (Open Justice, 2021): (<https://openjusticecourtofprotection.org/2021/12/13/family-witnesses-in-court-four-reflections-on-re-ah-a-rehearing/>)

live up to its stated aspiration of being 'P-centric', it must develop guidance grounded on the reality experienced by P. At present, there is an absence of research that would enable such guidance.

The authors recognise that there are significant legal and ethical issues associated with research with those who have been the subject of proceedings and their family members.¹¹³ In addition the effective participation of P in research may require special adjustments, for example the use of communication aids and communication facilitators, to ensure participants' understanding of material information about the research, thus enabling an informed consent. Despite the obvious practical challenges of undertaking such research, the authors believe not only is it possible, but it is essential for ensuring that any future participation regime is reflective of the lived experiences of court users. A regime informed by this research can then, convincingly, be said to place P both symbolically, structurally and literally 'at the centre of proceedings'.

¹¹³ Not least, see s. 30 Mental Capacity Act: 'Intrusive research carried out on, or in relation to, a person who lacks capacity to consent to it is unlawful unless it is carried out—

(a) as part of a research project which is for the time being approved by the appropriate body for the purposes of this Act in accordance with section 31, and

(b) in accordance with sections 32 and 33.'