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International Journal of Mental Health and Capacity Law

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Review

Book Review: The Spaces of Mental Capacity Law: Moving beyond binaries, by Beverley Clough (Routledge, 2021)

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Submissions must be original, properly reference any third party material and comply with any copyright limitations. Any possible conflicts of interest must be identified. If an article reflects original research involving human participants, a statement is required that relevant ethical requirements have been met, including an indication as to which body gave ethical approval for the research and the relevant reference number.

All submissions will be peer-reviewed by a double blind peer review process before being accepted for publication; naturally, there will be a process whereby an article may be accepted subject to minor or more major amendments being made. We will endeavour to provide feedback as to why any rejected submission has been rejected.

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Articles and pieces in this issue have been edited by:
Kris Gledhill, Piers Gooding, Giles Newton-Howes, Kevin Stone, Penny Weller and Darius Whelan

EDITORIAL

I am happy to be able to present another issue of the International Journal of Mental Health and Capacity Law. The main focus is two articles that present research results in the area of mental capacity law, but in two jurisdictions and from different perspectives. In the first, Watkins, Cooper and Stickler present results from part of a major research project, *Judging Values and Participation in Mental Capacity Law*. More details of this project can be found at its website: https://www.icpr.org.uk/judging-values-and-participation-mental-capacity-law. The article has a focus on participation in proceedings before the Court of Protection, the specialist body existing under the Mental Capacity Act 2005 (UK): the authors conclude that aspirations set out in the statute and supporting legal instruments to secure participation by the person about whom the court makes decisions are not always met. They call for further research on the matter.

The second article takes us across the Irish Sea to the Mental Capacity Act (Northern Ireland) 2016, a major piece of legislation designed to join mental health and mental capacity law when fully implemented. In this article, Boyle, Montgomery and Davidson present their exploratory research on the experience of social workers in operating part of this major new piece of legislation, namely the process of applying to a Trust Panel to authorise what amounts to a deprivation of liberty. They also call for further research to be carried out.

Finally, and maintaining the mental capacity theme, there is a review of Beverley Clough's book, *The Spaces of Mental Capacity Law: Moving Beyond Binaries*, which Alex Ruck Keene finds to be a stimulating read.

I'm grateful to authors, colleagues on the editorial team and also those who provide peer reviews, and those involved at the University of Northumbria who take the final steps in the publishing process. I should note that one member of our editorial team is involved in the *Judging Values and Participation in Mental Capacity Law* project, and I have a role in one publication that will come out of the project, and so steps were taken to secure peer reviewers without any connection.

Kris Gledhill

PARTICIPATION IN THE COURT OF PROTECTION: A SEARCH FOR PURPOSE

MATTHEW WATKINS, PENNY COOPER, REBECCA STICKLER*

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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*Dr Matthew Watkins, Postdoctoral Research Associate, Cardiff University, Professor Penny Cooper, Visiting Professor at the Institute for Crime and Justice Policy, Birkbeck College, Rebecca Stickler, Research Fellow at the Institute for Crime and Justice Policy, Birkbeck College. Our thanks to our colleagues at the *Judging Values and Participation in Mental Capacity Law* project, Dr Camillia Kong, Professor John Coggon, Dr Mikey Dunn, and Alex Ruck Keene QC (Hon), who provided feedback on previous drafts. We are very grateful to the Arts and Humanities Research Council (AH/R013055) for their generous funding which made this research possible. We would also like to thank the individuals who commented on an earlier version of this paper given at the SLS Conference 2021, at Durham University. [1] Part 2, Mental Capacity Act 2005.

[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,

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[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

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[9] Department for Constitutional Affair's, *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

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[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 Friend[22]

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,

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[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

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[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

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[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

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[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 Appeal[43] 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]

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[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

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[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 submissions[55]

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;

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[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 -

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[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 Doughty[58] 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;

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[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

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[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 Lindsey[78] 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

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[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. Hobey-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

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[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

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[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 be 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

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[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

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[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

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[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'.

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[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.'

IMPLEMENTATION OF THE MENTAL CAPACITY ACT (NORTHERN IRELAND) 2016: SOCIAL WORKERS' EXPERIENCES

SHIRLEY BOYLE, LORNA MONTGOMERY, GAVIN DAVIDSON*

ABSTRACT

The Mental Capacity Act (Northern Ireland) 2016 was enacted by the Northern Ireland Assembly in May 2016. The first phase of the Act came into operation during 2019 and includes provisions for Deprivation of Liberty Safeguards (DoLS). When fully implemented this legislation will integrate mental capacity and mental health legislation into a single piece of legislation, for people aged 16 years and over. Given the recent introduction of Trust Panels as a new mechanism for DoLS, this study is the first of its kind. This small-scale exploratory study is a survey of 33 social workers who have made DoLS applications to Trust Panels. The findings illustrate social workers' experiences of applying for Trust Panel authorisation for interventions amounting to deprivation for liberty with adults who lack the capacity to make the relevant decisions.

The findings report on the social workers' level of experience in undertaking applications, their views about training for Mental Capacity Act work, and their perceived confidence levels for this work. The factors that have helped or hindered practitioners are also highlighted. The data collection was undertaken during the COVID-19 pandemic, and the impact of changes to work practices during this time are acknowledged. The study makes recommendations for further developing training, practice, and research.

Keywords: mental capacity, legislation, social workers, assessment, deprivation of liberty, Northern Ireland.

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I. INTRODUCTION

The Mental Capacity Act (Northern Ireland) 2016 was enacted by the Northern Ireland (NI) Assembly in May 2016. When fully implemented the Act will provide a comprehensive legal framework, based on mental capacity, and replace the current mental health legislation, for people aged 16 years and over. The Act is predicated on the basis that people have mental capacity to make decisions. It provides a statutory framework to promote and protect the rights of those who lack capacity to make decisions, or for those who currently have the

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relevant capacity but wish to make arrangements for a time in the future when they lack capacity.

The first phase of the Act came into operation during 2019 and includes provisions for Deprivation of Liberty Safeguards (DoLS). A deprivation of liberty occurs when a service user is in a place where care or treatment is being provided; they are not free to leave; and are under continuous supervision and control. Deprivation of liberty under the Act can be authorised in two ways, either by a short-term detention authorisation (STDA) for up to 28 days in hospital settings, or by a Health and Social Care Trust Panel for community settings and longer-term deprivation in hospital settings. There are five Health and Social Care Trusts in NI, and they are the main statutory providers of health and social care.

The DoLS include arrangements for the assessment of mental capacity and determination of best interests. Health and Social Care (HSC) staff with relevant training and experience can make an application to HSC Trust Panels, who determine whether the DoL is authorised. To support the implementation of the new DoLS procedures, training was commissioned by the Department of Health in Northern Ireland and comprises of: Level 1 (guidance on completing forms); Level 2 (overview of Deprivation of Liberty); Level 3 (Deprivation of Liberty Safeguards; Level 4a (Formal Assessment of Capacity-Theory); Level 4b which is optional (Formal Assessment of Capacity – Practical): and Level 5 for those who wish to sit on Trust Panels. To be suitably qualified under the Act individuals must complete Levels 2, 3 and 4a in order to carry out assessments and make an application to a Trust Panel (Department of Health 2022a).

The process by which applications are made to Trust Panels for approval for intervention, which amounts to deprivation of liberty, involves a number of steps, which are specified in the Act and further explained in the Deprivation of Liberty Safeguards Code of Practice (Department of Health, 2019). Following completion of the capacity assessment, medical assessment and best interests determination, the applicant will make an application to the Trust Panel for their independent full consideration of the person’s circumstances to determine whether the application should be authorised. The Trust Panel consists of an experienced Approved Social Worker (who chairs the panel), an experienced medical practitioner and one other professional. All members must have received the necessary mandatory training and support from the Trust to undertake this role.

The provision of Trust Panels came into operation on 2nd December 2019, and their remit may have far reaching implications for upholding the rights of service users. The safeguards contained within the Act protect the rights and promote the interests of individuals that lack the relevant capacity, and aim to ensure they are given the care they need in the least restrictive way. This includes trying to ensure that people in their own homes, care homes and hospitals receive services in a way that does not inappropriately restrict their freedom.

II. RATIONALE FOR THE STUDY

Given the recent introduction of Trust Panels as a new mechanism for DoLS, this study is the first of its kind. There is no other directly comparable research in Northern Ireland. There has been some research in Northern Ireland focusing on the operation of Mental Health Review Tribunals (Campbell, 2008) and in other jurisdictions (Maylea and Ryan, 2017; Gosney *et al.*, 2019; Macgregor *et al.*, 2019; Markham, 2020) but so far very little research on the implementation of the Act. There is some research from other countries about how similar laws and safeguards have been implemented (Hinsliff-Smith *et al.*, 2017) including a study that focused on social workers (McDonald, 2010). Studies have shown variations in understanding the complexities of mental capacity legislation by health and social care professionals (McDonald, 2010; Hinsliff-Smith *et al.,* 2017; Marshall & Sprung, 2018). While training provides for knowledge of theory and legislative principles, there are challenges in application of the legislation in everyday practice (Jenkins *et al.,* 2020). The literature also highlights inconsistencies in implementing mental capacity law in different care settings and by different professionals. These practice issues are compounded by the level of complexity involved in the decision-making process, subjectivity in assessing capacity, and challenges in balancing competing tensions between rights and risks (Hinsliff-Smith *et al.*, 2017; Macgregor *et al.*, 2019; McDonald, 2010).

This study was conducted in the catchment of one of five Health and Social Care Trusts in Northern Ireland. Northern Ireland is a province within the UK and shares a border with the Republic of Ireland. It has a population of approximately 1.9 million people (NI Statistics and Research Agency, 2020). The Trust in which the service evaluation took place is geographically the largest in NI with a population of approximately 470,000 and 12,000 employees serving both urban and rural communities.

At the inception of this study in May 2020, approximately 200 DoL cases had been reviewed by Trust Panels in the Trust. The majority of these were legacy cases; in other words, people whose care arrangements involved deprivation of liberty before the implementation of the Act. Anecdotal evidence suggested that Panels rejected some applications due to lack of sufficient information to enable the Panel to make a decision. The applications involve multi-disciplinary teamwork, with substantial input from social workers. As such, the need for timely research was identified to further inform the implementation of the new Act.

The objectives of this study were therefore to:

- Explore social workers' experiences of applying for Trust Panel authorisation for interventions amounting to deprivation of liberty with adults who lack the capacity to make the relevant decisions.
- Examine factors that have helped or hindered social workers in undertaking this role.
- Explore social workers' perceptions of their competence and confidence in making applications to Trust Panels.
- Provide suggestions for further developing training, practice, routine data collection and any further research that may be needed.

III. METHODOLOGY

The study was located in one Health and Social Care Trust in Northern Ireland and was undertaken during the COVID-19 pandemic. The need for social distancing and the pressures on front-line staff, were important considerations in the project design. The study was supported by the Trust's Mental Capacity Act Leads, who provided advice about the relevant issues and the research design. The study was a small-scale survey of social workers that have made DoLS applications to Trust Panels. The study population comprised social workers who have completed MCA training (as required by the Department of Health) and made applications to the Trust Panels for authorisation of DoL and/or STDAs. It was envisaged that approximately 50 social workers would be eligible to participate. Since the exact population was unknown and the survey was anonymous, all social workers in the Trust received an invitation to participate subject to meeting the eligibility criteria. Furthermore, the questions posed in the survey meant that those who had not completed applications to Trust Panels and/or STDAs would not have the knowledge or experience that would enable them to respond meaningfully.

Survey methodology was selected as it enabled anonymous participation, was accessible remotely and had the ability to respond to the study objectives. The survey contained a mixture of qualitative and quantitative questions. The survey content was developed in collaboration with MCA Leads. It was initially piloted by three social workers to explore reliability, face and content validity.

Data collection commenced with an invitation email and participant information being sent to a social work distribution list hosted by the Trust's Social Care Governance Department. Respondents completed the anonymous online survey hosted on Survey Monkey. The survey was opened for a 4-week period to maximise response rates and enable participants to complete the survey at a time that was convenient to them.

Quantitative data were analysed using Excel to provide descriptive statistics. Qualitative data were analysed thematically using NVivo. A coding frame and nodes were developed, and the thematic analysis initially conducted separately by the research team to explore intercoder consistency/agreement and identify potential researcher bias. The research received ethical approval from the School of Social Sciences, Education and Social Work Ethics Committee at Queen's University Belfast and the Trust's Research Governance Committee.

Personal and public involvement is a key aspect of social work research, and opportunities for wider involvement were considered. As this project is about professional tasks the key people to involve were social workers undertaking MCA work, so our project advisory group comprised three social work professionals with experience of undertaking and managing this work. There is also a clear and immediate need for the experiences of service users and carers involved in these processes to be explored, but the focus of this study was on the social workers' experiences.

IV. RESULTS

A. Respondents and their roles

Thirty-three social work professionals completed the survey, from approximately 50 social workers that were eligible to participate in the study. This was an exploratory qualitative study that focussed on in-depth experiences and understanding of MCA processes in different service areas. There was less emphasis on gaining a representative sample (due to the small population), but the survey completion rate represented a 66% response rate and is a valid sample size. Respondents were from a range of age groups, with the largest group aged 45-54 (36%, n=12). Most respondents were female (82%, n=27) with 18% male (n=6), (other genders options were provided in the survey). This is similarly representative of the makeup of the social services workforce in Northern Ireland (85% female and 15% male, Department of Health, 2022b). All respondents indicated their ethnicity as white, which is representative of the population of Northern Ireland, with 96.6% of people being white (NISRA, 2022).

Respondents were asked how long they were qualified as a social worker, and this ranged from 2.4 -36 years with an average of 16 years. Over 90% of respondents were qualified more than five years. Over one-third were qualified more than 20 years. Nearly half (45%, n=15) were employed as social workers, while over half were in more senior social work positions such as social work manager or senior social work practitioner (55%, n=18). Nearly three-quarters (70%, n=23) were in their current posts less than five years. Three-quarters (75%, n=25) of respondents worked full-time. Most respondents (97%, n=32) worked in adult services, with just under half (48%, n=16) working in community integrated care teams.

Most respondents (94%, n=31) indicated that they had completed post-qualifying training, achieving both Social Care Council Professional Awards and academic awards. All social workers in Northern Ireland are required to complete a generic, competence-based undergraduate degree, following which they are mandated to engage in Continue Professional Development (CPD), in order to maintain their professional accreditation. CPD options are offered through a range of taught programmes to enhance social work professional practice and competence. Social workers at different stages of their career may choose to embark on formal assessed professional development to consolidate undergraduate learning or to specialise in courses which are specific to their area of work.

Social workers working in mental health settings who wish to be considered for the role of Approved Social Worker (ASW) by their employing Health and Social Care Trust, are required to complete a Mental Health (Approved Social Worker) Programme delivered in partnership between the HSCT and an academic institution, through which they achieve both Social Care Council Professional Awards and academic awards. This training is required for social workers to undertake the role of Approved Social Worker under the Mental Health (Northern Ireland) Order 1986 and the Mental Capacity Act (Northern Ireland) 2016. The ASW role in Northern Ireland enables social workers to exercise specific statutory functions under the mental health and mental capacity legislation, to make decisions that may affect a person's liberty. Just under a quarter of respondents (24%, n=8) were qualified as Approved Social Workers (ASW), with an average of 14 years' experience.

B. Undertaking Trust Panel Applications

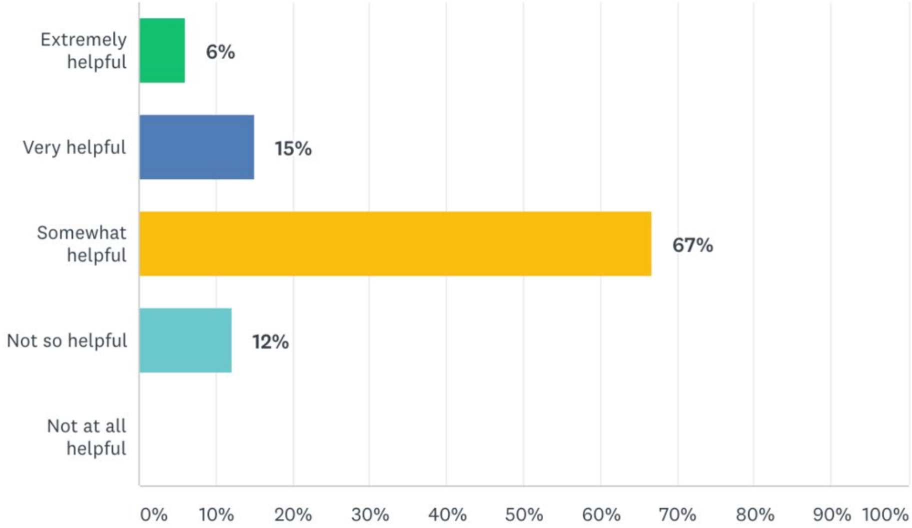
Over half of the respondents (52%, n=17) had completed 5 or fewer applications to Trust Panels; this rises to just over two-thirds when adding in those who have undertaken 6-10 applications (64%, n=21). One-fifth (15%, n=5) have completed between 11-20 applications. Two respondents have completed 30-35 applications while another two have completed approximately 70 applications each.

C. MCA training & preparation for MCA work

To undertake MCA assessments relevant professionals must undertake the Department of Health's Mental Capacity Act Training Levels 2, 3, and 4 (https://www.health-ni.gov.uk/mental-capacity-act-training). (Level 1 is instructional guidance on how to complete the forms). In addition, those who sit on Trust Panels (and consider applications) must also undertake Level 5 training. Most respondents (97%, n=32) had completed the Department of Health's MCA Level 1-4 training. Nearly half of respondents (48%, n=16) have completed only the Department of Health training, while a further five respondents (15%) said they had completed additional 'informal training' and a further 11 (33%) have also undertaken additional formal training such as MCA Level 5 training, Short Term Detention Authorisation Training, ASW and ASW re-approval training.

Respondents were asked about their experiences of MCA training, including how well the training prepared them, how confident they felt after completing the training and their current confidence levels about undertaking MCA applications. They were also invited to comment on other activities that may have contribute to their preparation for MCA work.

D. Perspectives on training



Respondents were asked to comment on how well the training prepared them for making applications to Trust Panels. The bar chart above shows that most respondents (88%) found the training to be helpful to varying degrees. One-fifth (21%, n=7) reported the training to be either very or extremely helpful, while over two-thirds said it was somewhat helpful (67%, n=22). Only 12% (n=4) found it not so helpful and no one reported that it was not helpful.

Most respondents (82%, n=27) provided additional comments about the contribution of training to their preparedness for undertaking MCA work. The benefits of training reported by a quarter of respondents (27%, n=9) indicated that it was good, it helped to clarify expectations around the social work role, and provided information about completing applications:

> *"I completed training at the very start of the role out for MCA and found it useful and clarified my role in capacity assessments and applying to panel."*

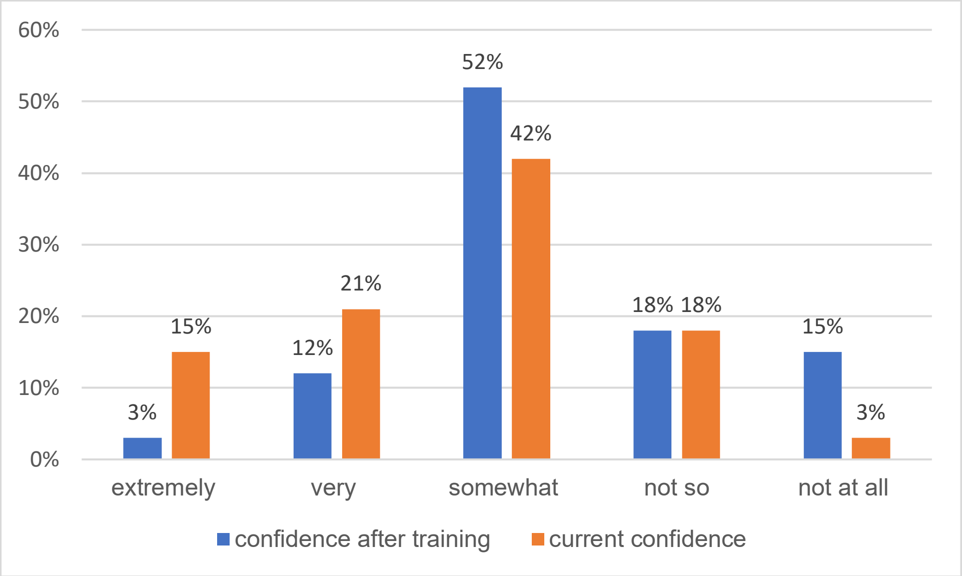
Support from trainers was noted, as was collaboration and discussions with others in the training forum. Some respondents said that the training helped them to feel more confident about undertaking MCA work.

Over half of respondents (58%, n=19) highlighted difficulties with the training, such as it being too basic, intense, or repetitive, or did not like online delivery. Other challenges noted the lack of application to practice, and the need for guidance on completing a capacity assessment. Several felt it was too rushed given that there was lots of information to retain, and would have benefitted from being delivered over a longer time period:

> *"Did not focus on skills required to undertake capacity assessment. Very basic compared to the content expectations."*

> *"Very theoretical. No practice content. It only provided background to MCA and not the practical application of same i.e., how to do assessments, complete forms etc."*

E. Confidence levels after completing training and currently



Respondents were asked how confident they felt after completing the training and also about their current confidence levels. The bar chart above illustrates that just over two-thirds (67%) reported feeling confident (somewhat (42%), very (12%) or extremely (3%)) after completing the training, with this increasing to nearly four-fifths (78%) for current confidence levels about undertaking MCA work. While there were increases in the number of respondents who currently felt extremely confident (rising from 3% to 15%) or very confident (rising from 12% to 21%) compared to after completing training, similarly there was a decline in those who reported feeling not at all confident (reducing from 15% to 3%).

For those who were very or extremely confident, this was attributed to 'putting it into practice' and with increasing experiences of undertaking applications to Trust Panels. It should be noted that two respondents who had completed less than 5 applications reported being very confident, similar to those who completed many more assessments and reported being very or extremely confident.

Some who felt somewhat confident, indicated they had more to learn and needed to gain more experience of making applications. Confidence levels were also impacted by evolving changes to MCA implementation and revisions required for submissions to panels (15%, n=5):

> *"Unfortunately, it feels like an ever moving goal post …what was correct one week is now incorrect."*
>
> *"Confidence has been affected by the changing information requirements on the forms."*
>
> *"I feel somewhat confident however the advice and information to be included or not is constantly changing and it is very difficult to keep on top of it all."*

The MCA training was made available from September 2019 and this retrospective study was completed in January 2021. As such there may have been a period of time between respondents undertaking the training and participating in this study. It is acknowledged that asking respondents retrospectively about confidence levels and the contribution of training, may be affected by recollections of how they felt. It is challenging to determine the degree to which the training and/or subsequent activity (such as putting it into practice, support from managers etc) may have contributed to increasing confidence levels. It is likely that it would have been a mixture of both the training and subsequent experiential learning as reported by respondents. However, 88% of social workers did report that the training was useful, with some stating it did help them to feel more confident, so it did contribute in some way to growing confidence levels. Simultaneously contextual changes to the implementation of MCA legislation and associated policy and practices, may also have impacted confidence levels.

F. Other systemic factors

Other factors contributing to respondents' perceived confidence were reported in the study. The most reported issue (30%, n=10) was the currency of training, due to on-going procedural changes that impacted the Trust Panel application process. This points to the need for refresher training and continued support:

> *"It was only useful to a point as things in MCA changed so rapidly that the original training now bears no relation in how MCA work is completed as per Attorney General's requirements."*

Other issues were reported about the implementation of the MCA, such as challenges with completing documentation to the appropriate standard, and the demands placed upon social workers with the additional workload created by MCA work:

> *"I felt out of my depth- it was a lot of information and a lot of additional work on my existing workload…. I felt very uncomfortable due to the nature of the work, legal documents to be written to a very high standard- not that I would not be able to do this- but the time and effort this would take. Furthermore, in a busy office environment, with constant interruptions, I felt it would be impossible to complete these to a high level of accuracy."*
>
> *"…the number of forms was overwhelming…"*

Six respondents acknowledged that practical application of the training (learning by doing) was an important aspect of building confidence, which was outside of the remit of the MCA training because it was not skills based:

> *"I had the basics but knew it would be on the job learning."*

In addition, nine respondents noted that having prior experience of undertaking capacity assessments contributed to their confidence levels. This was not necessarily related to having additional qualifications or training:

> *"Prior to the implementation of MCA, I completed capacity assessments…my level of confidence completing the role mostly came from this experience and the support of my team rather than the training specifically."*

When asked about what else helped to prepare them for undertaking TPA/STDA work, four themes emerged. These were:

- Shadowing other staff undertaking capacity assessments/MCA work (n=9)
- Discussing cases and peer support from colleagues (n=8)
- Seeing exemplars and examples of completed forms that had been submitted to panel (n=6)
- Role plays and mock panels (n=3)

These responses had a common theme of the importance of the application of knowledge, theory and skills in practice, the 'doing' of MCA work.

G. Time spent on MCA activity per application

Respondents were asked how long it took them (on average) to complete a Trust Panel application. The legal framework for Deprivation of Liberty provided by the Act is supported by a set of forms. It is a requirement that all relevant forms are completed, as a statutory requirement under the legislation (all listed in the table below are statutory). Department of Health guidance recommends that all forms be used. Form 1 is a statement of incapacity, form 2 a best interests determination statement, form 4 is the care plan, form 5 is the application for Trust Panel Authorisation.

Mental capacity assessments are situation specific, as capacity is unique to the individual service user, so this determines whether forms are to be used. Form 7 must be used in applications where the individual lacks capacity about whether an application should be made to the Review Tribunal. (Where the service user has capacity about whether to apply to the Review Tribunal, then Form 7 does not need to be completed). This is predicated on the basis that they understand that someone will always be checking on them as part of their care arrangements, their liberty is restricted, and a meeting can take place to determine whether that should be permitted. The inclusion of Form 7 ensures a decision by the Panel can be challenged, even when service users do not have capacity, as required under the European Convention of Human Rights. This study did not find instances of Form 7 not being used.

The different tasks of the process were segregated out in the survey to show each step of the application process. The average time taken, and the range of each activity is reported in the table below:

Activity	**Average**	**Range**
Preparation & tuning-in	2 hours 15 minutes*	30 minutes - 7.5 hours*
Consultation with nominated person	53 minutes	20 minutes - 3 hours
Capacity assessment	58 minutes	20 minutes - 2.5 hours
Care Plan	1 hour 7 minutes	15 minutes - 4 hours
Completion of Form 1	1 hour 20 minutes	15 minutes - 5 hours
Completion of Form 2	1 hour 26 minutes	20 minutes - 4 hours
Completion of Form 4	1 hour	10 minutes - 4 hours
Completion of Form 5 & 7	55 minutes	5 minutes - 4 hours
Total	11 hours 23 minutes*	4 hours 15 minutes - 30 hours**

* Please note that there were two respondents (not included in this table) who reported that preparation took much longer (3 days), but this is perhaps for exceptionally complex cases, and so have not been included in the average/range.

** One respondent reported that completing an application took four to five days, but this is perhaps in exceptionally complex cases and so has not been included in the average/range.

H. Short-term detention authorisations

The survey contained a section of questions about the undertaking of short-term detention authorisations, however none of the respondents had completed these so this theme could not be explored. STDAs are only required for deprivation of liberty in hospital settings and, until the MCA is fully implemented, the Mental Health (Northern Ireland) Order 1986 is still to be used when relevant, mainly for compulsory admission for assessment and treatment related to mental disorder and risk. The new MCA legislation is being rolled out in stages, requiring an overlap with the 1986 Order, to ensure legal provisions for detention and treatment of people with mental disorders. This means that the circumstances in which a STDA would be required are relatively narrow – a person lacking the relevant capacity, who required in-patient treatment, amounting to deprivation of liberty, for their physical health. It is still important to note that none had been completed.

I. *Factors that assist with undertaking Trust Panel Applications*

Respondents were asked to identify the most helpful factors to aid completion of Trust Panel Applications. Prompts were provided and some respondents noted that all of these were helpful, and these were perhaps unsurprisingly prominent themes:

> - Knowing service users in advance (55%, n=18):
> *"Knowing service users and their backgrounds. I can complete a Trust panel application for a service user on my own caseload in a much shorter amount of time rather than completing for another member of the team who is not trained."*
>
> - Having timely access to prior information such as service users notes, case files, care plans and previously completed assessments (52%, n=17).
>
> - Being able to engage with others involved in service users' care, such as family members, carers/staff, nominated persons, named worker, (64%, n=21):
> *"Talking to key worker where they live, having access to recent reviews /incident reports or care plans."*

Other helpful attributes identified include support from managers and the MCA Leads, access to relevant multi-disciplinary professionals and individuals' Northern Ireland Electronic Care Record (NIECR). This is an electronic system of people's medical records, including referrals, investigations, appointments, test results, and encounters across the health and social care system in Northern Ireland, which can be accessed by health and social care professionals):

> *"Sometimes the hospital paperwork has errors as well as the capacity assessment referral forms - NIECR is what I use which is correct."*
>
> *"I value the support of* [MCA Lead] *to quality assure my paperwork at initial states.* [I] *appreciate the continued efforts of* [MCA Lead] *to keep practitioners informed regarding changes of paperwork and feedback from Attorney General."*

J. Challenges in completing applications to Trust Panels

When asked about the challenges in completing applications for Trust Panel Authorisation, the main theme related to the additional work involved. Many commented that while already working at full capacity, this is additional work and has led to an increase in workload, and this has created tensions with competing priorities on existing cases.

The impact of this was illuminated by reports of social workers feeling overwhelmed, overburdened, stressed, under significant pressure and conflicts over work-life balance. There was also a sense of lack of recognition about the intensity of this work and the interface with other tasks associated with service user needs:

> *"Time. MCA is an addition to an already overburden of work, it is complex time consuming and the nature of it requires a significant amount of preparation and review".*
>
> *"Time constraints and other work pressures. They are intensive pieces of work to complete whilst still trying to manage a full case load."*

One person commented on difficulties completing an application due to lack of experience that was compounded by not undertaking applications on a regular basis. Others reported having to undertake applications for other staff that had not completed the MCA training (also referenced in above quotes):

> *"Many staff are completing the application for their own and other's caseloads which I don't think is being fully accounted for in caseload weighing".*
>
> *"Also being asked to complete for colleagues that have not been trained as yet which adds to my work load without easement or recognition".*

Another significant theme involved the complexities involved in the MCA the process of making an application and completing the paperwork (perhaps not unrelated to issues of time and workload). Social workers reported ongoing changing expectations about the requirements for submission, the volume and complexity of paperwork:

> *"Trying to find a balance between the time constraints associated with the paperwork required* [was] *very difficult when trying to balance daily work load pressures. I also feel the turn around time in trying to get paperwork submitted to panel very tight due to the length of time it takes to complete paperwork alongside other work."*
>
> *"The layout of the forms are not user friendly, and some of the information is quite repetitive."*
>
> *"TIME!! and the extensive paperwork. Not only is it the application that is required, but also for one placement I am required to complete CMA's, summary of need reports, funding request report, care plan, financial paperwork in addition to the application.... At times, I could have 3 patients that require a placement and therefore experience significant pressure in keeping up with all that is required."*

The COVID-19 pandemic was also highlighted as creating additional challenges (and workload) compounding already demanding and complex work (42%, n=14). Examples reported included staffing issues (with colleagues off sick, shielding or isolating), and the pressure placed upon remaining staff. The limitations of social distancing and the less favourable circumstances of using zoom to undertake assessments (compared to face-to-face engagement) were also noted. There was recognition too of the impact of the pandemic on care home staff, while prioritising care of residents could mean delays in MCA applications being completed. In addition, issues for service users that are exacerbated by the pandemic have placed increasing pressure on social workers, to support service users dealing with mental health issues and the impact of shortages in others support services:

> *"Impact of the pandemic has definitely being a challenge in completing the applications. At present our team are down staff due to a number of long-term sick leaves and in relation to Covid-19. This has added additional pressures on remaining staff members. That combined with the impact of the pandemic on our service user group, mental health, and increased shortage of services has made day to day work immensely pressurized in all respects."*

> *"… being unable to meet family face to face due to pandemic, use of PPE impacting on communication with service users, multi-disciplinary working. Continuity of care due to part time working/short staff."*

> *"Pandemic has slowed down capability to complete capacity assessments. Not all assessments can be through zoom. Staff in care homes are overwhelmed by COVID 19 impact... Everyone is working hard during pandemic however 'pool' of assessors is low amongst some areas."*

Furthermore, some illustrated how social distancing requirements affected engagement and communication with service users and assessment work. In a subsequent part of the survey three respondents discussed the impact of working (and undertaking TPAs) during the pandemic on their health and well-being:

> *"Having to enter care homes where Covid-19 is prevalent."*

K. MCA support and management

Most of the respondents (78%, n=26) affirmed that their line manager had also completed MCA training. Everyone who responded to the question (91%, n=30) indicated that MCA work was discussed with managers in supervision. For some this was a mainly administrative function in terms of ensuring training was up-to-date, workload management, and checking if outstanding applications were completed. For others input was more extensive with managers providing support and constructive feedback. Others referenced the role of group supervision and support from the MCA leads:

> *"My line manager who is also an ASW is very supportive re MCA role and gives constructive feedback on my role. She advocates for additional hours to be paid for work completed 'Out of Hours that cannot be managed during normal working hours".*

Most respondents (82%, n=27) also confirmed that managers audit or quality assure their MCA activity. There was consensus from respondents that work was overseen by management, with some acknowledgement of difficulties staff faced in undertaking this work:

> *"Yes, all MCA forms are quality assured and this is beneficial."*

> *"Managers are always aware of changes to meet requirements. It all feels a little trial and error at the minute."*

> *"Despite being quality assured by manager, some MCA assessments have been sent back for more information or amendments."*

It is not the Panel's remit to check if the right forms are filled out correctly. Nor is there a prerequisite for a panel decision that all forms have been submitted, completed by the correct personnel, and timelines adhered to. Their task is to adjudicate whether the criteria for authorization (of detention) are met. Despite having oversight from management (prior to submission) this response suggests that a lack of information means the Panel cannot determine that the grounds for detention have been met, hence the view of the respondent (as an applicant to the panel) that further information could be sought.

L. Perspectives on supervision

Most respondents reported favourably on the provision of supervision. Over three-quarters (76%, n=26) indicated that it was helpful, (14% said it was extremely helpful, 28% very helpful and 34% somewhat helpful), particularly in providing support to complex cases, sharing good practice and assisting with the application process. Just over one-fifth (21%, n=7) said it was 'not so' or 'not at all' helpful.

Two-thirds of respondents (64%, n=21) noted that supervision provided opportunities for reflective practice, discussions about ethical issues/values or an educative component. This was described in terms of getting feedback and guidance, second opinions, time to reflect or express feelings about this work, and was said to be particularly useful when working on complex cases:

> *"Supervision allows for discussion of MCA and DOLS. This enables me to seek feedback and guidance if I am unsure or need guidance."*
>
> *"To ventilate about demands on time and frustration at the amount of changes to the forms which are constantly being changed by the Trust."*
>
> *"In peer supervision I have the opportunity to share my learning and also learn from others - we discuss ethical dilemmas in addition to best practice examples and challenges in the MCA work."*

Others noted that this type of activity was either limited or absent from their supervision:

> *"These aspects are not discussed in supervision."*
>
> *"Yes, we can reflect on all that, it does not change the basic - we need staff to do these."*

The respondents in the study had different managers, so this may account for different approaches to supervision. Some may have been situated in multi-disciplinary teams, so they may have reflected on their line manager who may not have been a social worker, involved in or responsible for MCA work.

Six respondents felt that time and workload pressures were not addressed by supervision, therefore reducing its helpfulness somewhat:

> *"With time being the biggest constraint and pressure in completing the assessment it can sometimes feel somewhat pointless raising it as a concern in supervision as everyone is under pressure and it feels that little can be done to alleviate".*
>
> *"Supervision is not going to help, we need staff to do the MCA work."*

M. How MCA work impacts upon social workers' wellbeing

Two thirds of respondents (66% n=22) reported that MCA work negatively impacted their well-being. There was consistency amongst most respondents in reporting feelings of being under pressure, stressed and anxious. These feelings were often attributed to the additional demands of MCA work (on top of existing work roles), and other social work activity either competing for MCA time or being delayed, ultimately leaving social workers feeling stressed about their workload:

> *"MCA work has had a negative impact on my well-being - there was no consideration given to staff - it has affected my confidence due to feeling of not being able to keep on top of my work load."*
>
> *"It has extended the working day and reduced my time for rest and relaxation. Over time this could lead to compassion fatigue and potential sickness."*
>
> *"It is very stressful the constant changes are difficult to manage as a team leader it has directly led to staff members being off with work related stress, the increase in work load feels unmanageable and appears to continue."*

Five social workers commented positively about MCA work. This was described as a sense of enjoying the work, yet time pressures were simultaneously reported in some responses, suggesting this was a limitation to the positive wellbeing experienced:

> *"Mental capacity awareness is integral to all of my practice.* [I] *welcome MCA work to add accountability, governance and person centred approach to my practice. I consider that this legislation provides practitioners with 'protection' of evidence-based practice to share decision-making processes with clients/ carers/ others."*
>
> *"I enjoy completing the Trust panel applications. I think the process of gathering the information is important and worthwhile, and puts the service user right at the focus of all decisions. If the application process if conducted in a meaningful way I believe it creates better outcomes for service users, however if it becomes a tick-box exercise and a red-tape matter the meaning is lost."*

When asked what employer supports or approaches to self-care might help, respondents overwhelmingly commented on employer supports (rather than self-care), and comments reaffirmed the challenges experienced by social workers in undertaking MCA work.

Nearly one-third (30%, n=10) highlighted that workload needs to be addressed. MCA activity was viewed as additional work that impacted existing workload (with competing priorities) and impacted on colleagues in the team and service users. Respondents felt that it would be helpful if there was recognition of this as extra work that is often time consuming, alongside protected time allocation, weighting or easement from other roles to attend to MCA work:

> *"I think there needs to be a firm acknowledgement that MCA is over and above our normal work load and this needs to be calculated when case loads are being allocated."*
>
> *"Reduced caseload when completing MCA work, time off ward, positive feedback."*
>
> *"A method that truly captures the workload of individual workers."*

Six respondents suggested the need for a team specifically to undertake MCA work:

> *"In reality there is enough work from MCA for a separate team to complete, this may not have been apparent at first implementation but it is becoming increasingly obvious that this is the only course to address the workload associated with MCA."*

Other suggestions included the involvement of other disciplines to complete MCA work, so it is not "*always falling to social work*" and enhanced supervision, including group supervision. The current context was raised and input from the MCA team has been recognised in this study:

> *"Recognition of the changing climate we practice within and the fact we are developing case law and practice as we progress through implementation."*
>
> *"Monthly meetings with the MCA Team. Not just meetings when something new is introduced in relation to MCA. Although that is important also."*

N. Suggestions for improvements in MCA work

The final questions invited respondents to make suggestions to improve MCA work, (such as further support, training, practice development or research). The feedback from respondents reiterates points made in response to previous questions. Again, the possibility of a dedicated MCA team was highlighted, as was the need for sustainability in terms of the model of work, and addressing ongoing staffing issues (such as filling posts for teams with reduced complement) particularly with MCA as additional workload.

The need for revisions to the submission of applications process and expectations of what is achievable was noted:

> *"We need a specialist team of staff to complete these. Furthermore, the Forms are being edited all the time and even the edited versions are sometimes incorrect. I had to move my last MCA forms twice and the forms had changed twice in the time it took me to complete them. This was time consuming."*
>
> *"MCA work is a very big task and would require a team that specifically focuses on this as impossible for staff to on top of their other work commitments."*
>
> *"Needs acknowledged and recognised that this is an additional role added without extra time etc. given to assist with this. Management need to acknowledge this and not dismiss the stress this can cause to staff."*

Other types of support and adaptations to the process were proposed. With reference to administration this included updating trust systems with forms and guidance, and ceasing to make further changes to forms.

Suggestions for training and practice development were also prominent (33% n=11), with requests for ongoing training, expanding training to include how to undertake capacity assessments and best interests, the provision of annual updates, refresher training, sharing exemplars when changes occur (to the MCA process) and extending the provision of training to other settings/professions.

Further ideas included the addition of MCA work to the Professional in Practice (PIP) Programme (a post-qualifying Professional Development Framework for social workers in Northern Ireland), MCA newsletter, a buddy system for practitioners, opportunities for shadowing MCA work for newly trained staff, the provision of written information for service users and carers explaining the MCA process, and a forum (or other means) to be regularly briefed about regional changes and information from the Attorney General.

The survey was undertaken at a time when MCA work was still relatively new. While it is likely to be a core task for social workers the processes are still evolving. The findings reflect a snapshot point in time and as developments are ongoing, it may also be the case that respondents are not aware of progress. However, being kept updated about areas that are new or 'in progress' would be useful for practitioners.

V. DISCUSSION

Respondents generally found the training helpful, and most were 'somewhat' to 'extremely' confident about undertaking MCA work. Benefits and difficulties with training were noted, but as the respondents experienced different types of training, we cannot comment specifically on the impact of any one type of training. However, the application of training to practice is important. The literature suggests that if mental capacity training is not interactive and applied to practice, then training may not be that effective (Jenkins *et al.,* 2020). Social workers are already trained in the processes of assessment, including considering capacity, and report writing, so they are not learning entirely new skills. Specific MCA training is therefore building on core social work skills and experience. It is reassuring nonetheless that most found the training helpful and most felt some degree of confidence in undertaking the MCA role. Limitations of the training highlighted by participants illustrate ways in which it could be improved. In-person delivery may have been helpful, as would delivering the training over a longer time period, given the complexities of MCA work and intensity of the training. Making the theory and legislation more relevant to practice, would also enhance provision. This could include skills-based training via role plays of mock panels or capacity assessments. Refresher training that is agile to a changing landscape of processes and procedures would also be beneficial. This would enable social workers to keep abreast of ongoing changes that impact their MCA work.

While training was reported to have had some effect, the study found other factors that contribute to confidence levels. These included the currency of training, changes with implementation at a regional level, the number of applications completed to date, familiarity with the documentation and application process, and the impact of MCA work on existing workload. In addition, other experiences were influential, such as shadowing staff undertaking MCA work, discussion of cases, support from colleagues, seeing exemplars of completed forms, mock panels and role-plays. These activities serve to embed and apply the theory to practice, further highlighting the need for ongoing consideration of how learning activities and training are applied to the practice context (Jenkins *et al.,* 2020).

The study found that only a small number of social workers have completed a lot of applications, with variations evident across the cohort of respondents. Additionally, there were variations in the time reported for undertaking elements of the Trust Panel application process. Some timings may be unusual, but potentially there are a variety of explanations for that. This was a specifically designed survey, so respondents' interpretation of some questions may have varied. Timings may have been estimates or for some respondents based on a specific case. Interpretations about what needed to be included, the degree of familiarity with the service user and the application process could also account for variations. For example, respondents who reported taking longer may have included a range of activity necessary for completing the forms, such as reading case files, time spent with service users, contacting, and discussing service users' needs with family, carers, and other professionals, dealing with more complex issues, lack of familiarity with the Trust Panel process, and working through the Code of Practice. For those who reported taking several days, this may have included awaiting information from others (the time taken from the process commenced to completion). Shorter times may reflect respondents who have undertaken more Trust Panel applications, have experience of completing the assessments and forms, and/or have prior knowledge of the service user, or these respondents interpreted the question as simply filling in the form. Variations will also arise because people work at different rates.

The study set out to explore social workers' experiences of undertaking Short-Term Detention Authorisations (STDAs). However, none of the respondents reported having undertaken STDAs so we could not report on this. The Project Advisory Group advised that the lack of responses was due to an extremely small workforce engaged in the process; there are only a few social workers who complete the STDA as the authoriser.

The study highlighted the attributes that aided social workers in undertaking Trust Panel applications. These included relationships with service users and other professionals, core skills of engagement and assessment, and practice that is person-centred and informed by professional social work values. These skills, values and relational ways of working are of central importance to the effective social work practice (Winter, 2019).

Challenges in undertaking MCA work were also evident. Time constraints and workload pressures were the most prominent theme, and for some respondents this could be compounded by lack of experience or undertaking applications infrequently. Some social workers reported feelings of being overwhelmed. The nature of the Trust Panel/MCA work may also contribute to the potential stress involved. This is especially so because it involves formal legal requirements, complex issues, interventions that involve deprivation of liberty and so what can be difficult, professional decisions for which the social worker is responsible and accountable It is important that practitioners are supported to prevent potential consequences of getting it wrong or experiencing burnout (McDonald, 2010; McFadden *et al.*, 2018).

Most of the respondents' managers were trained in MCA work. Supervision was helpful when opportunities to discuss MCA work were provided. Social workers benefit from reflective practice, getting feedback and guidance, particularly when dealing with ethical issues or complex cases. It is important that MCA work forms part of the discussions in supervision particularly around caseload management. The research illustrated social workers operating in different roles, with some working more closely at the MCA interface (for example specialist roles), while others are undertaking MCA work within generic roles. While it is important that MCA is prioritised and meets legislative requirements, it must be considered alongside other tasks in workload management.

Employer supports and self-care activity

There were unambiguous concerns reported about the workload generated by MCA work. There was a process (prior to implementation), to estimate the amount of additional work that would be involved, but respondents were repeatedly describing their MCA work as additional to their existing work, without additional time being protected for it. They also highlighted the implications this had on their existing work and, in some cases on their work/life balance. It may be that the impact of MCA is not evenly distributed across all of health and social care, so the areas and workers who are experiencing the most additional work should be prioritised for resources and support. It is also important to acknowledge that this additional work is in the context of services that are already under considerable pressure.

Prior to this study being concluded a programme of service improvement for MCA work has been progressing within the Trust. Training has been rolled out across a range of MCA activities including capacity assessments, best interest decisions, form filling, and application of criteria for referral to the Tribunal. A MCA Professional Forum (operating monthly) and a buddy system have been established, and shadowing is available upon request. The addition of MCA work to the PIP programme is a regional issue that merits consideration. There is regional literature for service users (provided by the Department of Health) and the Trust also has an amended version of this. A MCA Newsletter is being progressed and this help to keep practitioners informed about service improvements that have or will be implemented with regards to MCA work.

There is also the general challenge of implementing any new legislation or major change and how it can affect staff. Work is also ongoing to recruit additional staff. While the possibility of creating a dedicated MCA team was reported in the study, there are no plans to create a separate MCA team, mainly as the MCA is relevant to everyone working in health and social care, so there would be a concern about locating this expertise in a specialist team. Supervision must ensure that workload is manageable and that it enables MCA work to be prioritised. Investment is a contributing factor; so mental health funding must deliver on the needs of service users and ensure staff can respond appropriately. The issue remains that while the overall prevalence of mental health issues within the population of Northern Ireland is estimated to be 25% higher than the rest of the UK, this is not matched by 25% higher funding. Despite this higher level of need, the Northern Ireland Affairs Committee (2019) also highlighted that the proportion of spending within health and social care on mental health services was much lower in NI (5.2% in 2016-17) than in England (13% in 2016-17).

There are also some aspects of the MCA that may create additional concerns for staff. The general approach in the MCA is to provide protection from liability for people who are intervening if all the relevant safeguards are in place. This is different from the previous legal framework, the Mental Health (NI) Order 1986, which mainly provided powers to intervene. The level of external scrutiny, including having to apply to a panel for authorisation, is also increased. It could be argued that these changes are positive and are aimed at better protecting and promoting the rights of service users, but they may also have unintended effects on staff if they are not appropriately resourced and supported. The complexity of the issues and processes may also create further potential stressors for professionals, and these may also mean that service users and carers may not find these processes and safeguards easy to understand and indeed a challenge. It should also be noted that this survey was conducted relatively soon after initial implementation and in the wider context of the pandemic, so the timing and context could have added to the reported stress. On the other hand, many of the applications in this period would have related to people who had already been receiving care which amounted to deprivation of liberty, and so may not have involved the added complexity of identifying and planning the necessary care and support. It is also the case that the survey was completed by a relatively small number of respondents and in one Trust area and so may not be generalizable to all relevant professionals and across all Trusts. However, the survey findings do highlight some important experiences and issues that should be considered and further explored for the full implementation of the Act.

VI. CONCLUSION

The aim underpinning this new legislation is that the safeguards (including making applications to Trust Panels for authorisation) will better protect the rights of service users and carers. However, whether this aim is being achieved is not yet known and this does need to be explored from the service users' and carers' perspectives.

This study provides an insight into the experiences of social workers undertaking MCA work, and the roll out and impact of the new legislation upon social work practice. The results of this study have the potential to inform improvements in training and practice; specifically, the importance of applied training, the workload issues that staff are experiencing, and the complexity of the issues and processes involved. It may also provide useful suggestions for what data should be routinely collected and monitored. The central issue, though, is whether these additional safeguards are effective in protecting and promoting rights and further research is needed to explore that, and to identify how this area of practice develops over time. Future research that expands upon these findings, explores alternative viewpoints or changes over time would be a useful addition to the evidence base for social work practice.

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THE SPACES OF MENTAL CAPACITY LAW MOVING BEYOND BINARIES, BY BEVERLEY CLOUGH (ROUTLEDGE, 2021)

ALEX RUCK KEENE[*]

Dr Beverley Clough, Associate Professor in Law and Social Justice at the University of Leeds, has established herself in a relatively short space of time as one of those whose works go straight onto the reading list for students (in all senses) of matters capacity related. Her latest work, the fruits of a ISRF Early Career Fellowship, is "The Spaces of Mental Capacity Law: Moving Beyond Binaries," and should equally find its way onto the reading list. It is a stimulating, and very challenging, exploration of both the conceptual spaces and the contexts which mental capacity laws exist, focusing primarily upon England & Wales.

After two largely conceptual chapters, drawing out, in particular, a model with which to interrogate the space occupied by the Mental Capacity Act 2005, the central spine of the book is a dissection of five binaries that Clough identifies as pervading mental capacity laws in jurisdiction such as England & Wales: (1) capacity/incapacity; (2) care/disability; (3) state/individual; (4) freedom/deprivation of liberty; and (5) the distinction between public law and private law. In each of the chapters, Clough identifies ways in which the binary in question is perhaps not as fixed as is assumed, either by current law, or by those who apply it. She is particularly interested in, and critical of, the ways in those binaries are embedded in the broader logics of liberalism, and one of the signal services of the book is to bring those links into the light.

Refreshingly, at least to this reader, whilst Clough is clear that her goal is to open up new ways of thinking about mental capacity law, the book adopts a subtle and nuanced approach to some of the ways in which current legal frameworks relating to capacity have been challenged by those dissatisfied with the ways in which they serve (or do not serve) those with impairments of different kinds. She has, for instance, some acute, and interestingly sceptical observations about the debates relating to relational autonomy and vulnerability. She also asks some particularly pertinent questions about the potential for the UN Convention on the Rights of Persons with Disabilities to allow an escape from the binaries that she identifies, noting the extent to which (perhaps ironically) that the "residue of liberal legal ideals is present across the Articles of the Convention in terms of the language used and a focus on autonomy" (page 191).

I noted at the outset that the book is challenging, a word that I chose carefully for its multiple meanings. The more conceptual chapters, in particular, are definitely not an easy read, and those new to the field might find themselves at times having to wrap the wet towel around their heads whilst they trace the development of the

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arguments through. The wet towel would be well-used, though, because the chapters which follow amply bring the theoretical into close and detailed contact with 'real life.' As both an academic and a practitioner before the Court of Protection, I must also confess to giving the odd hollow laugh at the sustained analysis of judgments[1] which I am well aware reflect as much the vagaries and contingencies of fate than they do of the workings out of any very considered philosophy. That having been said, of course: (a) the judgments reflect the written record, and are therefore fair game for dissection; and (b) Clough's analysis of what is not said, or what is assumed, in those judgments is always stimulating.

The major reason for saying that I find the book challenging in what could be taken as a negative fashion is perhaps a little unfair, but it is only a function of it being so stimulating in what it covers. What the book left me wanting was a second volume in which Clough grapples with the ways in which the binaries that she so interestingly challenges play out in two key areas.

The first is where questions of disability are simply not in play (or not in play in the same way) in relation to capacity than in the ways she carefully analyses in chapter 3. For instance, what is a doctor to do in relation to a patient who is unable to consent to a life-saving procedure not because of any underlying cognitive challenges, but because they are unconscious having been brought in after a car-crash? It would certainly be possible to find other ways of directing and/or limiting the doctor's approach[2] but it does seem very difficult not to find a route which does not, at some level, engage questions of capacity.

The second is where there is no direct state involvement. Each of the binaries that she describes arises in situations where the state is in some way involved in the life of the individual(s) concerned, and Clough makes a powerful case for revisiting the very foundations of that involvement. It is, however, not so obvious that the state is intervening in a situation where someone seeks to enter into a contract, to make a gift, or to make arrangements to dispose of their property after death. All of those are situations where the capacity/incapacity binary arises (although largely unmediated by the Mental Capacity Act 2005[3]). I hope that Clough can be persuaded to offer some thoughts in her future work as to whether (and if so) how the binary needs to be revisited in such contexts. For my part, and accepting that I may be incapable of escaping the coils of liberal legal ideals, I might still require some persuasion that – for all its flaws – there is any other model that commands greater legitimacy for all the purposes for which it is which it is required than that of mental capacity.

I reiterate, though: that I make these observations is primarily a function of how stimulating the work itself is, and I recommend it highly to all those interested in

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[1] Some of which relate to cases I have been in.

[2] There are some civil law jurisdictions, for instance, there is general health legislation providing for treatment to be provided in an emergency absent consent.

[3] The test for capacity to contract, to make a gift, and to make a will are all governed by the common law, save that the Mental Capacity Act 2005 governs the situation if the Court of Protection is being asked to act on behalf of the person.

thinking more broadly about mental capacity law than is sometimes possible in the thickets of the MCA 2005 itself.