

# Protecting the vulnerable

*Stephen Knafler QC, who will chair the opening and closing sessions of LAG's community care conference 'Protecting Liberties' later this month, writes:*

**T**he Court of Protection (CoP) came into existence on 1 October 2007, created by the provisions of Part 2 of the Mental Capacity Act (MCA) 2005. The *Court of Protection: 2009 report*, which was published last month, covers its first 27 months of operation. There are some illuminating insights into the CoP's workload:

- Over 40 per cent of applicants had no professional support.
- Over 60 per cent of oral hearings took place outside London.
- The CoP received 39,579 applications relating to property and affairs, made 31,063 orders and appointed 18,306 deputies.
- The CoP received 2,734 health and welfare applications but made only 324 orders and only appointed 195 deputies.
- About 7,000 Mental Health Act 1983 receiverships were converted into deputyships.
- The CoP refused permission to proceed in up to 80 per cent of health and welfare applications.
- The CoP received only 13 deprivation of liberty (DoL) applications (from April 2009).
- Only six per cent of cases resulted in a hearing.

On the basis of these figures, there is clearly a case for reviewing the CoP's rules, forms and practice directions to make them simpler and more streamlined, in particular, in property and affairs cases. At the end of 2009, Sir Mark Potter, the President of the CoP, set up a committee to undertake such a review, which is expected to make recommendations this summer.

Otherwise, the dignified language of the report indicates something of the difficulties of setting up and running a new court in an era of restrained public spending and enlarged demand. The report may not be 'The Wire', but it recounts a gripping story, nonetheless, of the struggle to mesh together law, administration, personnel, budgets, targets and litigants; and, in particular, the struggle to get hold of enough district judges (finally achieved with the appointment of three new ones, in April 2010).

What do not fall within the report's ambit are the larger questions: where does the CoP go – and where does the

protection of vulnerable adults go – from here? I have a miscellany of suggestions:

- The CoP should have its own website, including information, materials and provision for e-mail enquiries/applications.
  - The CoP should publish (including on its website) copies of all of its judgments, some of which should be 'starred'. It should include in that body of jurisprudence relevant judgments of the Family Division and higher courts.
  - The CoP rules should formalise a role for mediation in all disputed cases, including DoL safeguards cases.
  - The CoP should move towards a wider jurisdiction. For a start, it should have jurisdiction over adults who have capacity but who are vulnerable and at risk of duress, undue influence or coercion, including statutory forced marriage cases. In the longer term, it should become a specialist tribunal with jurisdiction over all issues that touch and concern vulnerable adults, for example, it should determine community care disputes.
  - In any event, the CoP should have power to make relevant, factual findings and then to direct third parties, including private persons but also social services, housing and health authorities, to provide specified services to vulnerable adults, where that is necessary in order to sustain the health or welfare arrangements that are in the best interests of such adults.
  - Court fees should be abolished. No one should have to pay for justice, let alone the vulnerable or those concerned with their welfare. Raise taxes instead.
  - Subject to rules about publication, accredited journalists and other suitable categories of persons should be allowed to witness all hearings; no proceedings should be wholly private.
  - The Official Solicitor (OS) should be separately and properly funded so that he is not reliant on legal aid and/or the existence of court proceedings in order to be able to take appropriate action. However, the important work the OS does ought to be reviewed publicly and transparently.
  - In some cases, high-functioning, incapacitated adults who disagree with the OS's approach ought to have separate representation.
  - There should be a duty on social workers completing community care assessments to provide information about the steps that can be taken, relating to property and affairs but also to health and welfare, under the MCA. In general, more should be done to publicise both the MCA's protective and enabling aspects.
- With those thoughts, I should like to wish LAG's staff and all *Legal Action* readers a safe, contented and, above all, litigation-free old age.

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