

Title: Routes of Appeal in the Court of Protection IA No: MoJ027/2014 Lead department or agency: Ministry of Justice (MoJ) Other departments or agencies: n/a	Date: 29/07/2014 Stage: Final Source of intervention: Domestic Type of measure: Primary legislation Contact for enquiries: John Hall john.hall@justice.gsi.gov.uk
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Summary: Intervention and Options	RPC Opinion: Not Applicable
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as
£164m	£m	£m	No	N/A

What is the problem under consideration? Why is government intervention necessary?

A recent Supreme Court Judgment regarding deprivation of liberty safeguards cases is expected to result in a substantial increase in the volume of cases which will come before the Court of Protection. To meet the additional resource requirement, deputy district judges and judges from other jurisdictions will be deployed in the Court of Protection, as facilitated by the Crime and Courts Act 2013. The current legislation allows appeals to district judges to remain in the Court of Protection. However, the current process for appeals to the additional judges' decisions would be heard in the Court of Appeal. Given the anticipated increase in cases, this would lead to substantial additional costs in the Court of Appeal. It is disproportionate and costly for appeals of this type to be heard in the Court of Appeal in the first instance and therefore government intervention is necessary to amend the route of appeal.

What are the policy objectives and the intended effects?

- To have a proportionate and efficient system which deals with appeals at the appropriate level making efficient use of judicial and court resources.
- To reduce the need to transfer cases between courts.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0- Do nothing (Base Case)

Option 1 – Amend existing primary legislation, to allow Court of Protection Rules to provide for an appeal from a decision made by any judge, officer or member of staff of the Court of Protection to lie to a judge within the Court of Protection rather than to the Court of Appeal. Amendment to s53(2) of the Mental Capacity Act 2005 would allow all appeal routes in the Court of Protection to be determined by Rules.

The government's preferred option is Option 1 as it would meet the policy objectives.

Will the policy be reviewed? It will not be reviewed

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro No	< 20 No	Small No	Medium No	Large No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: n/a	Non-traded: n/a	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:



Date: 5 August 2014

Summary: Analysis & Evidence

Policy Option 1

Description: Amend s53(2) of the Mental Capacity Act 2005 allowing all appeal routes in the Court of Protection to be determined by Rules.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014/15	PV Base Year 2014/15	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: £164m

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	£7.2m	1	£7.9m	£67m

Description and scale of key monetised costs by 'main affected groups'

- A resource cost to HMCTS having the appeals in the Court of Protection of around £1.8m in 2014/15 and £2.0m thereafter.
- An income cost to HMCTS of lower fee income of around £3.6m in 2014/15 and around £4.0m thereafter from cases not being heard at the Court of Appeal.
- Court fees payable by court users to have their appeals heard in the Court of Protection of around £1.8m in 2014/15 and around £2.0m thereafter.

Other key non-monetised costs by 'main affected groups'

- There would be additional resource costs to HMCTS for cases that are reviewed.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	£24.8m	1	£27.2m	£232m

Description and scale of key monetised benefits by 'main affected groups'

- A resource benefit to HMCTS from the cases not being heard in the Court of Appeal: around £19.4m in 2014/15 and around £21.3m thereafter.
- An income benefit to HMCTS from the Court of Protection fees; around £1.8m in 2014/15 and around £2.0m thereafter.
- Court users will benefit by not having to pay court fees at the Court of Appeal which are around £3.6m in 2014/15 and around £4.0m thereafter.

Other key non-monetised benefits by 'main affected groups'

- There would be additional fee income to HMCTS for cases that are reviewed.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5%
<ul style="list-style-type: none"> - It has been assumed that 15% of deprivation of liberty safeguards cases will be appealed. - It has been assumed that the annual volume of cases is around 29,300 in 2014/15 and 32,200 thereafter. - It has been assumed that each case of deprivation of liberty safeguards would need to be reaffirmed by a Court of Protection judge on an annual basis. - It has been assumed that there will be no impact on legal service providers. 		

BUSINESS ASSESSMENT (Option 1a)

Direct impact on business (Equivalent Annual) £m:			In scope of	Measure qualifies
Costs:	Benefits:	Net: n/a	No	N/A

Evidence Base

Introduction

- 1.1 A recent Supreme Court judgment '*P v Cheshire West and Chester Council*' and '*P&Q v Surrey County Council*' is likely to result in a substantial increase in the number of cases coming before the Court of Protection for declarations authorising deprivation of liberty. The effect of the judgement is to expand the categories of case in which such authorisation is required.
- 1.2 Estimates from the Association of Directors of Adult Social Services suggest that this will result in around 28,600 deprivation of liberty safeguards requests in 2014/15 and around 31,500 in 2015/16 from English local authorities compared to around 200 in 2013/14¹. In addition, the majority of cases would be subject to ongoing review, the frequency of which is yet to be determined. This will have substantial impact on the workload of the Court of Protection.
- 1.3 An immediate concern is ensuring the Court of Protection can handle the additional cases. Deputy district judges, tribunal judges and judges from other jurisdictions will be deployed in the Court of Protection in order to cut through the existing cases and handle new cases as they arise.
- 1.4 It is not yet clear how these applications for deprivation of liberty safeguards will be handled. It may be that all the additional cases will be decided using paper applications and without oral hearings, minimising costs and delays, or it may be that all the cases will require a full hearing increasing costs and delays. A decision by the President of the Family Division (and Court of Protection) is imminent on the process. This decision may affect the proportion of cases that go on to be appealed. The decision will also clarify the frequency of review for each case.
- 1.5 Currently, within the Court of Protection, appeals from district judge decisions lie to circuit judges sitting in the Court of Protection. However the arrangements for hearing appeals do not provide for appeals from non district judges to be heard by circuit judges also in the Court of Protection. Instead, appeals from these judges' decisions lie to the Court of Appeal. This anomaly needs to be addressed as it is costly and disproportionate.

Policy rationale and objective

- 1.6 The principal objective of the policy measure is to create a simpler, more efficient court system for the hearing of appeals within the Court of Protection. The Court of Protection should be flexible, allow for efficient use of judicial and court resources and easy for court users to navigate. The proposed reform should reduce delay and there should be a reduced requirement to transfer cases between courts.

Description of options

Option 0 – Do Nothing (Base Case)

¹ Emerging Headline Findings from the ADASS Deprivation of Liberty Survey: 12th June 2014
<http://eservices.solihull.gov.uk/mginternet/documents/s9198/Appendix%20-%20ADASSDoLS%20-%20Emerging%20FindingsJune14.pdf.pdf>

1.7 Under the 'do nothing' base case the current situation would continue to apply. Appeals of decisions by judges sitting as deputies in the Court of Protection will fall to the Court of Appeal.

Option 1 - Amend existing primary legislation (Section 53 of the Mental Capacity Act 2005) to allow rules to provide for an appeal from a decision made by any judge, officer or member of staff of the Court of Protection to lie to that court, rather than the Court of Appeal.

1.8 These changes do not alter the substance of the existing legislation, but intend to be a broader version of the existing powers, in that it will allow Rules to provide the destination of an appeal.

Costs and Benefits

1.9 This Impact Assessment identifies impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are important aspects that cannot sensibly and proportionately be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

1.10 An indicative assessment of the costs and benefits has been provided where possible based on estimates of future volumes. The key assumptions and background data are considered below.

1.11 Costs and benefits over £10 million have been rounded to the nearest million and those less than £10 million have been rounded to the nearest £100,000.

Key data and assumptions

1.12 Revised court fees², which achieve cost recovery over the entire court system, are due to be implemented in October 2014. The court fee for an appeal in the Court of Protection will be £410. The fees in the Court of Appeal will be £480 for an application for permission and £1,090 for a hearing.

1.13 Although the court fees achieve cost recovery over the entire court system, fees are charged at below full-cost level in the Court of Appeal, as at full-cost level they may prohibit some from accessing the Court of Appeal. The full-cost level is calculated at around £850 for permission to appeal and £11,230 for a hearing².

1.14 There were 3,577 permissions to appeal and 1,142 filed appeals in the Court of Appeal in 2013³. Therefore, around 30% of permissions in the Court of Appeal go on to a hearing. Using this figure, the average fee paid for an appeal in the Court of Appeal is around £830. It is assumed that the case progression of a deprivation of liberty safeguard case is the same as all cases in the Court of Appeal.

1.15 Given the assumption that 30% of permissions in the Court of Appeal go on to a hearing, the average cost of an appeal in the Court of Appeal is around £4,400.

² MoJ Consultation response *Court fees: proposals for reform - part one: cost recovery* (2014) <https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/results/cm8845-court-fees-proposals-for-reform.pdf>

³ Court statistics (quarterly) January to March 2014, Court of Appeal tables (civil division) <https://www.gov.uk/government/statistics/court-statistics-quarterly-january-to-march-2014>

- 1.16 As set out in the MoJ consultation *Court fees: proposals for reform – part one: cost recovery*⁴ reports that Court of Protection hearing and appeal fees broadly achieve cost recovery. Therefore the appeal fee in the Court of Protection, £410, is taken to be the resource cost of an additional appeal in the Court of Protection.
- 1.17 A survey of English local authorities by the Association of Directors of Adult Social Services suggest that there may be around 28,600 deprivation of liberty safeguards cases in 2014/15 and around 31,500 in 2015/16 compared to only around 200 in 2013/14⁵. The increase in anticipated cases is due to the recent Supreme Court judgement. Based on external stakeholder engagement with Welsh local authorities an estimate of around 700 deprivation of liberty cases will commence annually.
- 1.18 We therefore assume that in future, around 29,100 additional cases would be heard in 2014/15 and 32,000 additional cases would be heard from 2015/16 onwards in England and Wales, taking into account that around 200 are currently heard in the Court of Protection.
- 1.19 Based on stakeholder engagement with HMCTS, we have made the assumption that 15% of cases will be appealed. We therefore assume that this would result in around 4,400 appeals in 2014/15 and around 4,800 from 2015/16 onwards.
- 1.20 It is assumed that the workload of the current district judges sitting in the Court of Protection does not change and they continue to hear around 200 deprivation of liberty safeguarding cases annually. Therefore all the additional appeals would be heard by the additional judges brought in rather than the current district judges sitting in the Court of Protection whose appeal route is currently to the Court of Appeal
- 1.21 It has been assumed that an appeal against a deprivation of liberty safeguarding order from a non-district judge sitting in the Court of Protection requires the same legal resource as in the Court of Appeal. Therefore the proposed reforms will have no impact on legal service providers.
- 1.22 It is anticipated that each case of deprivation of liberty safeguards would need to be reaffirmed by a court of protection judge on a regular basis. A decision on the frequency of the review has yet to be determined.

Option 0 – Base Case: Do Nothing

- 1.23 Under the 'do nothing' base case the current situation would continue to apply. The 'do nothing' option is compared against itself and therefore its costs and benefits are necessarily zero, as is its Net Present Value (NPV).
- 1.24 Under the base case, it is assumed that the additional cases as a result of the Supreme Court judgement would be heard in the Court of Protection by the additional non-district judges. Appeals would therefore lie within the Court of Appeal as the initial judgement will have been given by a non-district judge.

Option 1: Amend existing primary legislation

Costs of Option 1

⁴ MoJ Consultation Court fees: proposals for reform (2013) https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/courtfeesconsultation.pdf

⁵ Emerging Headline Findings from the ADASS Deprivation of Liberty Survey: 12th June 2014
[http://eservices.solihull.gov.uk/mginternet/documents/s9198/Appendix%20-%20-%20ADASSDoLS%20-%20Emerging%20FindingsJune14.pdf.pdf](http://eservices.solihull.gov.uk/mginternet/documents/s9198/Appendix%20-%20ADASSDoLS%20-%20Emerging%20FindingsJune14.pdf.pdf)

HMCTS

- 1.25 **Income Cost:** HMCTS would receive a reduction of fee income from appeals that would not be heard in the Court of Appeal. It has been assumed that 15% of cases would be appealed resulting in around 4,400 appeals in 2014/15 and around 4,800 thereafter. The average fee in the Court of Appeal is around £830. This results in an annual loss to HMCTS in fee income of £3.6 million in 2014/15 and £4.0 million thereafter.
- 1.26 **Resource Cost:** HMCTS would have an increase in resource costs at the Court of Protection from an increase in appeals moving from the Court of Appeal. As HMCTS broadly achieves cost recovery in the Court of Protection the resource cost is approximately equal to the fee income. In 2014/15 this would result in a resource cost of £1.8 million and thereafter £2.0 million.
- 1.27 There would be additional resource costs to HMCTS in the Court of Protection if deprivation of liberty cases require regular review. It is not yet clear how reviews would be handled or how frequently they would be required, this is due to be clarified by the president of the family division.

Court users

- 1.28 There would be a fee to court users having their appeals heard in the Court of Protection. Assuming that there are around 4,400 appeals in 2014/15 and 4,800 annually thereafter, and that the fee for an appeal is £410, total cost of these appeals is around £1.8 million for 2014/15 and £2.0 million thereafter.

Benefits of Option 1

HMCTS

- 1.29 **Income benefit:** There will be an increase in fee income from appeals that would be heard in the Court of Protection. It has been assumed that 15% of cases would be appealed resulting in around 4,400 appeals in 2014/15 and around 4,800 thereafter. The fee to bring an appeal in the Court of Protection is £410. This results in an annual gain to HMCTS in fee income from 2014/15 of £1.8 million and £2.0 million thereafter.
- 1.30 **Resource benefit:** There would be resource savings to HMCTS from not having cases heard in the Court of Appeal. The average cost of an appeal in the Court of Appeal is £4,400 therefore HMCTS would save £19 million in 2014/15 and £21 million thereafter.
- 1.31 There would be additional fee income for HMCTS in the Court of Protection if deprivation of liberty cases require regular review and there is an associated fee for review. It is not yet clear how reviews would be handled or how frequently they would be required, this is due to be clarified by the president of the family division.

Court users

- 1.32 Court users would not have to pay the court fees to have their appeals heard in the Court of Appeal. Assuming, around 4,400 appeals in 2014/15 and 4,800 appeals thereafter, the fee saving of these appeals in the Court of Appeal is around £3.6 million in 2014/15 and £4.0 million annually thereafter.

Net Impact of Option 1 (monetised annual costs)

	Costs	Benefits	Net Benefit
HMCTS			
2014/15	Court of Appeal income cost £3.6m Court of Protection resource cost £1.8m	Court of Protection income benefit £1.8m Court of Appeal resource benefit £19m	£16m
2015/16 onwards	Court of Appeal income cost £4.0m Court of Protection resource cost £2.0m	Court of Protection income benefit £2.0m Court of Appeal resource benefit £21m	£17m
Court Users			
2014/15	Court fees in the Court of Protection £1.8m	Court fees in the Court of Appeal 2014/15 £3.6m	£1.8m
2015/16 onwards	Court fees in the Court of Protection £2.0m	Court fees in the Court of Appeal thereafter £4.0m	£2.0m

2.1 In conclusion, the total costs and benefits as follows:

- HMCTS would be around £16 million better off in 2014/15 and £17 million annually thereafter.
- Court users would be around £1.8 million better off in 2014/15 and £2.0 million annually thereafter.

2.2 Relative to the base case the proposed reforms would result in efficiency savings for HMCTS generated by using fewer resources to process the same number of appeals. Whilst the proposed reforms generate less fee income than the base case of appeals being heard in the Court of Appeal, the fee income in the Court of Protection recovers the full costs for cases, which is not the case in the Court of Appeal. Court users gain by paying lower court fees to have their appeal heard in the Court of Protection rather than the Court of Appeal.

Risks and assumptions

- 1.33 It has been assumed that the volume of cases would be 29,300 in 2014/15 and 32,200 thereafter. If the volume of cases was higher then HMCTS would gain a higher net benefit as additional appeals would go to the Court of Protection rather than the Court of Appeal. Court users would gain higher net benefits as they pay lower court fees in the Court of Protection.
- 1.34 If the volume of cases was lower then HMCTS would gain a lower net benefit as there would be fewer appeals routing to the Court of Protection from the Court of Appeal. Court users would gain a lower net benefit also as there would be fewer cases where they make a court fee saving.

- 1.35 It has been assumed that the appeal rate would be 15%. If the percentage of cases appealed increased then HMCTS would gain a higher net benefit as additional appeals would go to the Court of Protection rather than the Court of Appeal. Court users would gain higher net benefits as they pay lower court fees in the Court of Protection.
- 1.36 If the percentage of cases appealed decreased then HMCTS would gain a lower net benefit as there would be fewer appeals routing to the Court of Protection from the Court of Appeal. Court users would gain a lower net benefit also as there would be fewer cases where they make a court fee saving.
- 1.37 If the frequency of review of deprivation of liberty safeguarding cases was higher then there would be an increased volume of cases annually. HMCTS would gain a higher net benefit as additional appeals would go to the Court of Protection rather than the Court of Appeal. Court users would gain higher net benefits as they pay lower court fees in the Court of Protection.
- 1.38 If the frequency of review of deprivation of liberty safeguarding cases was lower then there would be a decreased volume of cases annually. HMCTS would gain a lower net benefit as additional appeals would go to the Court of Protection rather than the Court of Appeal. Court users would gain lower net benefits as they pay lower court fees in the Court of Protection.

Enforcement and Implementation

- 1.39 HMCTS and the judiciary will be responsible for implementing these proposals, once the bill receives Royal Assent and the relevant Court of Protection rule changes have been completed.