



JUDICIARY OF  
ENGLAND AND WALES

**MR JUSTICE HAYDEN**  
VICE PRESIDENT OF THE COURT OF PROTECTION

On 23<sup>rd</sup> March 2020, I announced the formation of the Hive group which has been established to secure and support the work of the Court of Protection throughout the present covid-19 health crisis. In my email of that date I emphasised the importance of seeking to ensure that P's voice would not be lost amongst the many competing demands on a heavily burdened State. The group consists of the following members:

The Vice President  
The Senior Judge, HHJ Hilder  
Sarah Castle, the Official Solicitor  
Vikram Sachdeva QC  
Lorraine Cavanagh QC  
Nicola Mackintosh QC (Hon)  
Alex Ruck Keene  
Kate Edwards  
Mary Macgregor, Office of Public Guardian  
Joan Goulbourn, Senior Policy Advisor, Ministry of Justice

The further objective of the group was to coordinate the various professional disciplines, in order to establish clear avenues of communication and, so far as it was possible, to seek to ensure consistency of approach. The intention is that the group should operate as a "think tank" and gain access to medical and welfare information which enables the Court most effectively to organise its resources.

Alex Ruck Keene has provided a helpful summary of the Hive's work to date. We thought that this might be of general interest and so, with a few amendments of my own, I set it out:

The group has met three times since its formation, with regular communication between members between meetings. Its immediate focus was upon developing guidance for remote hearings, promulgated on 31 March 2020; that guidance is being kept under review, mindful of the need to balance the changing demands of the situation with not swamping already overloaded practitioners (and judges) with too many documents. The group has also had sight of, and via the Vice-President, approved the guidance on advocacy at remote hearings prepared by the Court of Protection Bar Association (6 April 2020) reflecting the very specific demands imposed upon both practitioners and the judiciary by the constraints of remote hearings.

The participation of P, and also of unrepresented litigants, has formed a regular focus of the group's considerations. Of particular importance has been identified the need for applicants to ensure that they provide information which will enable the judge to determine how best to ensure P's participation in the particular – individual – circumstances of their case.

Very practical problems have dominated the group's work since its formation:

- (1) In the context of **Property and Affairs**, which is almost entirely paper-based, and is therefore particularly problematic in the current situation where facilities to send and process paper applications are substantially reduced, a 3-month pilot has been started, starting on 4 May 2020, for the making of applications electronically. The pilot is limited to a small group of practitioners; parallel to this pilot, work is underway to develop a wider ability to handle digital applications. The group has also been working with financial institutions to develop mechanisms to enable the secure processing of orders with electronic seals;
- (2) Particular problems have been identified in relation to welfare cases in the context of deprivation of liberty, not least because of the statutory bar upon the court using its powers under s.21A MCA 2005 to extend DoLs authorisations for more than a year. It is likely that the consequential impact upon public funding for P can only be resolved by amendments to the relevant legal aid regulations; the group is working with the Ministry of Justice and the Legal Aid Agency upon possible solutions. The group is working more widely with the Legal Aid Agency in relation to overcoming operational matters that are impacting upon legal aid provision in relation to matters before the Court of Protection;
- (3) Work has also been done (within the constraints of the statutory framework) to make the process for applying for 'community DoL' orders under COP DOL11 workable for public bodies within the constraints imposed by the pandemic.
- (4) The Vice President and the Hive group are particularly keen to ensure that the considerable efforts made to achieve a properly transparent Court of Protection are not undermined by the exigencies of the social distancing imperatives. The guidance of 31 March reflects the compromises that are currently required, but emphasises the need for applicants – especially in serious medical treatment cases – to consider the steps identified as necessary to alert the press.

The group has also taken steps to ensure that it remains apprised of the wider impact of the pandemic on the operation of the MCA 2005. This is of considerable importance, not least in light of the fact that the Court of Protection – self-evidently – only receives those applications that are made to it, and there has, for instance, been a notable downturn in the number of s.21A applications being made. The Hive is taking steps to signal to the appropriate bodies that whilst it is recognised that all parts of the system will be under great

strain in this national emergency, the need for rigorous protection of the rights of the incapacitous is not in any way diminished. If anything, the increased vulnerability and isolation which are the characteristics of this viral pandemic require scrutiny of the basis of any deprivation of liberty to be both scrupulous and vigilant.

In addition to these meetings, Judge Hilder, the Official Solicitor and I were able to speak directly with Senior front-line consultants prior to the peak in covid-19 presentations, in order to evaluate the nature and extent of the applications that were likely to come before the court. This was arranged, very helpfully, by Michael Mylonas QC. Last week Judge Hilder and I met with very senior Care Home specialists to gain some insight in to the reality of the situation in Care Homes, behind what is often referred to as “the ring of steel”. This was arranged by Alex Ruck Keene. All this information was fed back to and discussed by the wider group. (I should say, for the avoidance of doubt, that all references to meetings should be read as remote).

On this last point the Hive group is acutely aware of the extent to which day to day life has transformed in the court process. The Court of Protection was dropped from the reform programme, 18 months ago, entirely for reasons of cost. The Hive group strongly considers that this decision needs to be revisited as soon as possible. First Avenue House is an almost entirely paper based court and the challenges to working remotely have been considerable and the costs involved in achieving this have no doubt been substantial. The paucity of IT provision means that many of the hearings must be by telephone and court files couriered to Judge’s homes. Around the country at Tier 2 and Tier 3, judges have been hearing cases via social media platforms. This has been very successful but, the Hive group has recognised that the assumption that cases can be listed remotely in the same way that live hearings were, is entirely misconceived. The strain on concentration placed on all, but particularly the judge, is of a different complexion and requires an appropriately tailored approach. This will include proper constraint on the hearing times, appropriate breaks and advocacy which recognises the weaknesses as well as some of the strengths of remote hearings.

The HIVE mailbox ([hive@justice.gov.uk](mailto:hive@justice.gov.uk)) can be used as the first point of contact to raise specific issues relating to the operation of the Court of Protection during the pandemic. It is not to be used for issues relating to specific cases (for instance case progression or appeals).

4<sup>th</sup> May 2020