

EXPLANATORY MEMORANDUM TO
THE COURT OF PROTECTION RULES 2017
2017 No. 1035 (L. 16)

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument revokes the Court of Protection Rules 2007 (“the 2007 Rules”) and the amendments made to those rules by the Court of Protection (Amendment) Rules of 2009, 2011, 2015 and 2017 (S.I. 2009/582, S.I. 2011/2753, S.I. 2015/548 and S.I. 2017/187), and replaces them with a consolidated set of rules governing practice and procedure in the Court of Protection, which has the jurisdiction to make decisions regarding individuals who lack capacity to make such decisions themselves (commonly referred to as “P”). The new rules are arranged in Parts with separately numbered rules within each Part, following the model of the Civil Procedure Rules, Family Procedure Rules and Criminal Procedure Rules. They also adopt a different order from the 2007 Rules – which was piloted over 2016-2017 by a practice direction under the 2007 Rules (the *Practice Direction – Case Management Pilot*) – and introduce some new rules which were also piloted in that practice direction.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory instruments

- 3.1 There are no matters of special interest to the Committee.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The power to make Court of Protection Rules is contained in section 51 of the Mental Capacity Act 2005 (“the 2005 Act”). The power is a broad one, similar to the powers to make Civil Procedure Rules and Family Procedure Rules, and as with those Rules, the Court of Protection Rules are supported by practice directions, made under section 52 of the 2005 Act.
- 4.2 Court of Protection Rules are made in accordance with the procedure in Part 1 of the Schedule 1 to the Constitutional Reform Act 2005, which provides for rules to be made by the Lord Chief Justice or a judicial office holder nominated by the Lord Chief Justice, and approved by the Lord Chancellor. The President of the Family Division (who is also the President of the Court of Protection), is the judicial office holder nominated for this purpose.

- 4.3 Unlike the position for Civil Procedure Rules and Family Procedure Rules, there is no standing rule committee for making Court of Protection Rules. The President nominated an *ad hoc* committee (chaired by the Vice-President of the Court of Protection, and including among its members judges of the Court of Protection, experienced solicitor and barrister practitioners, representatives of local authorities, court staff and the Official Solicitor) to advise on the detail of amendments to the rules, building on the work of a previous similar committee. This instrument reflects the recommendations of that *ad hoc* committee. The proposed amendments are a continuation of the committee's work during 2015-16 to update the rules so that they are fit for purpose and reflect the Court of Protection's present challenges.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales
5.2 The territorial application of this instrument is England and Wales

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 Amendments to the Court of Protection Rules are long overdue: no comprehensive update of rules has been done since they were first introduced in 2007, and there have been only very limited amendments in 2009 and 2011, and some more substantial amendments in 2015 and 2017. The changes made by this instrument will strengthen the Court of Protection's powers to deal with current challenges particularly the increase in caseloads and complexity of cases.
- 7.2 The changes contained in this instrument, over and above the consolidation of the previous rules, are—
- (a) the arrangement of the rules in separate Parts on the model of the Civil, Family and Criminal Procedure Rules;
 - (b) their arrangement in a different order, which was piloted over 2016-2017 by a practice direction under the 2007 Rules (the *Practice Direction – Case Management Pilot*), together with the introduction of some new rules in relation to case management and expert evidence which were also piloted in that practice direction; and
 - (c) the replacement of the rules relating to contempt of court by fuller freestanding rules.
- 7.3 The overriding objective, which is to be applied whenever the court exercises its powers under the Rules, is now set out at the very start of the rules in Part 1 (it was previously in Part 2), together with rules about the participation of P and the duties of the court, the parties, legal representatives and unrepresented litigants. Part 2 contains interpretation and general provisions. Part 3 contains the rules about the court's powers of case management together with rules about dealing with applications, directions and allocation to judiciary, together with the main new rule

piloted in the *Practice Direction – Case Management Pilot* (rule 3.9, which makes provision for the allocation of cases to case management pathways).

- 7.4 There are also some amendments in Part 15 concerning experts, aligning the approach to control of expert evidence by the court more closely to that taken by the Family Procedure Rules 2010 (Part 25), which were piloted in the *Practice Direction – Case Management Pilot*. In particular, the changes to what were rules 121 to 123 (now rules 15.3 to 15.5) import the Family Procedure Rules approach of enabling the court to have greater control over expert evidence and to restrict such evidence to where it is genuinely necessary to assist the court to resolve the issues in the proceedings. The rules accordingly now list the matters of which the court must be satisfied before giving permission for expert evidence (including that the information could not be provided in any other way) (rule 15.3); provide that the expert's overriding duty to the court overrides any duty to the person instructing or paying the expert (rule 15.4); and list the matters to which the court is in particular to have regard in deciding whether to give permission for expert evidence in any case (rule 15.5).
- 7.5 New Part 21 of the Rules is modelled on provisions in Civil Procedure Rules 1998 (Part 81) and Family Procedure Rules 2010 (Part 37) and now contains comprehensive freestanding provision for proceedings in relation to contempt of court.
- 7.6 While not part of the Rules, the package of practice directions supporting the Rules incorporates on an established basis (as Practice Direction 4C) provision in relation to transparency of proceedings in the Court of Protection, which was piloted in the Practice Direction – Transparency Pilot launched in January 2014.

Consolidation

- 7.7 This statutory instrument is a consolidation, revoking and replacing the 2007 Rules and the instruments which previously amended those Rules with a single instrument.

8. Consultation outcome

- 8.1 The rules are, as explained above, in large part a consolidation of earlier rules and the amendments to them. Although, as explained above, some new rules have been included, they are considered to be straightforward and not to require a full public consultation. They have, however, been fully explored through the representation on the committee (and on the earlier committee whose work forms the basis of much of the changes), of a wide range of practitioners, judges and professional bodies with particular expertise in this area of work.
- 8.2 The meetings of the committee have been held on the basis that they are public in the sense that those who attend (some of whom represent organisations) can tell anyone about what has been said. There has been one public meeting in July 2017
- 8.3 As explained above, two pilots were conducted – one on transparency, and one on case management. Representatives of the media were consulted about the transparency pilot (which piloted public hearings with a standard form of injunction to restrict reporting of P's identity), and some changes, focused on administrative matters, were made to that pilot to address comments raised following an analytical survey. The President also sought comments on both pilots during his regular visits to the regions, in particular the views of Court of Protection judges at a refresher

training event attended by judges from all over the country. A large majority of the judges favoured the pilot's approach to public hearings and supported the changes in the case management pilot. Analysis of the pilots has also revealed that court users feel that the changes are beneficial, and that there is no desire to return to the former practice.

9. Guidance

- 9.1 The rules will be supported by amendments to relevant practice directions and new and amended forms and guidance for use of the forms, which will be available via the Gov.uk website.

10. Impact

- 10.1 There is no, or negligible, impact on business, charities or voluntary bodies.
- 10.2 There is no, or negligible, impact on the public sector.
- 10.3 In view of 10.1 and 10.2 above, an Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to small businesses. Any impact would not be significant, being limited to familiarisation with the changes.

12. Monitoring & review

- 12.1 There is no standing Court of Protection Rules Committee (unlike the position for Civil Procedure Rules and Family Procedure Rules). Rules are made by the President of the Family Division with the approval of the Lord Chancellor. However, the *ad hoc* committee appointed to review the current Court of Protection Rules is likely to be convened as necessary in the future.

13. Contact

- 13.1 **Joan Goulbourn** at the Ministry of Justice Tel: 020 3334 3019 or email: Joan.Goulbourn@justice.gsi.gov.uk can answer any queries regarding the instrument.