

EXPLANATORY MEMORANDUM TO
THE COURT OF PROTECTION (AMENDMENT) RULES 2025
2025 No. 866 (L. 5)

1. Introduction

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

2. Declaration

- 2.1 Sarah Sackman, Minister for Courts and Legal Services at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.
- 2.2 Laura Beaumont, Deputy Director for Victims and Vulnerabilities Policy, at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

- 3.1 Joan Goulbourn, Senior Policy Advisor, Mental Capacity Policy at the Ministry of Justice. email: joan.goulbourn@justice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

- 4.1 The instrument makes limited amendments to the Court of Protection Rules 2017 (SI 2017/1035) (“CoPR 2017”) so that the procedural framework for proceedings for contempt of court is clearer and more consistent with other relevant law and practice
- Where does the legislation extend to, and apply?
- 4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. Policy Context

What is being done and why?

- 5.1 Part 21 of the CoPR 2017 contains provision governing the procedure in relation to proceedings for contempt of court in the Court of Protection. Part 21 as included in the CoPR on their introduction in 2017 was modelled on Part 81 of the Civil Procedural Rules (“the CPR”). It was intended that there be a consistent regime for determining applications of contempt of court under each of the CPR, Family Procedural Rules and the CoPR.
- 5.2 The judgment in *Esper.v.NHS NW London ICB* [2023] EWCOP29 highlighted a number of inconsistencies between the CoPR 2017 and the CPR. It further highlighted

inconsistencies between the CoPR 2017 and the Lord Chief Justice's Practice Direction: Committal for Contempt of Court. March 2015 (as amended in 2020).

- 5.3 These amendments make the Rules for contempt proceedings clearer and eliminate such inconsistencies.

What was the previous policy, how is this different?

- 5.4 The policy was and remains to achieve consistency between the CPR, Family Procedure Rules (FPR) and CoPR in the determination of contempt applications.

6. Legislative and Legal Context

How has the law changed?

- 6.1 This instrument amends Parts 4 and 21 of the CoPR 2017(S.I. 2017/1035) Rule 3 amends CoPR 2017 4.1(4) to remove a defunct cross-reference to Rule 21.27
- 6.2 CoPR 2017 21.4(2) previously set out that a contempt application must include a statement that [21.4 (n)] a defendant has the right to remain silent and decline to answer any question that may incriminate them. Rule 4 amends CoPR 2017 21.4 (n) to insert that the court may draw adverse inferences if the right to silence is exercised. This follows the decision in *Inplayer Ltd. and another v. Thoroughgood* [2014] EWCA Civ 1511 and aligns with the position in criminal proceedings
- 6.3 Rule 5 amends CoPR 2017 21.7 to add an additional requirement that the court must consider, before the first hearing of any contempt proceedings, whether to make an order under rule 21.8(5) for the non-disclosure of the identity of the defendant in the court list. This is to prevent the utility of any subsequent rule 21.8(5) order being undermined by the prior public notice of the identity of the defendant. It also adds a requirement to consider at the first hearing whether to vary or continue the order.
- 6.4 Rule 6 amends CoPR 2017 21.8(5). First, it ensures that the court has a discretion to order the non-disclosure of the identity of "any person" during contempt proceedings, where certain criteria are satisfied. Previously, the Rule mandated non-disclosure where those criteria were satisfied, but only in respect of "a party or witness" to the contempt proceedings. This is to align with the CPR. Secondly, it allows that non-disclosure can be ordered to protect the interests of "any person" (so long as the criteria is met) not just the person whose identity is not disclosed. This gives the Court wider discretion to consider the best interests of P (the party who lacks capacity) when making a non-disclosure order.
- 6.5 Rule 6 also inserts Rule 21.8(11A) to clarify that the court's discretion does not extend to restricting the disclosure of the identity of a defendant who has been convicted and sentenced to a committal order. An amendment to rule 21.8(13) clarifies that the judgment is transcribed and published solely where the court has made an order for committal. This clarifies matters that were previously inconsistent with the practice directions. It upholds the principles of open justice.

Why was this approach taken to change the law?

- 6.6 Court of Protection procedure is set out in secondary legislation in the form of the court rules. As a result, amending the rules is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 The amendments are considered to be straightforward and not to require a full public consultation. They have, however, been fully explored through the representation on the Court of Protection Rule Committee, of a wide range of practitioners, judges and professional bodies with particular expertise in this area of work and no concerns were raised.

8. Applicable Guidance

- 8.1 Amendments to Court of Protection Rules are drawn to the attention of solicitors and other Court of Protection practitioners by correspondence addressed to members of the judiciary, to relevant representative bodies (for example the Law Society, Bar Council) and to the editors of relevant legal publications and by publicity within HM Courts and Tribunals Service

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 A full Impact Assessment has not been prepared for this instrument because there is not expected to be a significant impact for business.

Impact on businesses, charities and voluntary bodies

- 9.2 There is no, or no significant, impact on business, charities or voluntary bodies because instances of contempt proceedings in the court is infrequent.
- 9.3 The legislation does not impact small or micro businesses.
- 9.4 There is no, or no significant, impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

- 10.1 The Court of Protection Rules are kept under continuous review by the President of the Court of Protection and the Lord Chancellor. HM Courts and Tribunals Service has regular stakeholder engagement with professional representatives on the Court of Protection Rules Committee.
- 10.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Sarah Sackman MP has made the following statement:

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

- 11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

- 13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).