

**EXPLANATORY MEMORANDUM TO  
THE COURT OF PROTECTION RULES 2007**

**2007 No. 1744 (L. 12)**

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

**2. Description**

2.1. These Rules set out the practice and procedure to be followed in the Court of Protection.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1. None.

**4. Legislative Background**

4.1. The Mental Capacity Act 2005 (“the Act”) provides the framework for making decisions and acting on behalf of individuals who lack capacity to make those decisions for themselves. These Rules are made under sections 49(5), 51, 53(2) and (4), 65(1) and 67(4)(b) of the Act, which enable rules of court to be made governing the manner in which proceedings are conducted in the new Court of Protection.

**5. Extent**

5.1. These Rules apply to England and Wales only.

**6. European Convention on Human Rights**

6.1. As the Rules are subject to the negative resolution procedure and do not amend primary legislation, no statement is required.

**7. Policy Background**

*Policy aims*

7.1. The Act establishes a new specialist court, to be known as the Court of Protection (“the new court”), with a new jurisdiction to make decisions and to appoint people (deputies) to make decisions on behalf of people who lack capacity to make decisions for themselves. The current Court of Protection (“the current court”) has jurisdiction over the property and financial affairs of people lacking capacity, while the new court will also have the jurisdiction to make

decisions in relation to their personal welfare. Personal welfare decisions are currently made under the inherent jurisdiction of the High Court.

- 7.2. The current court is an Office of the Supreme Court and it operates on a more informal basis than a mainstream court. In contrast, personal welfare cases in the High Court currently proceed under the Civil Procedure Rules 1998 (“the CPR”). One of the main policy aims of the Rules has been to provide a human rights-compliant process equally appropriate for cases relating to property and financial affairs heard in the current court, and personal welfare cases heard under the inherent jurisdiction of the High Court. The Rules adopt many of the provisions of the CPR, therefore, along with certain rules relating to family proceedings, as well as some of the rules of the current court, which have been tailored, where necessary, to accommodate the needs of the new jurisdiction.
- 7.3. The Rules are made by the Lord Chief Justice (or his judicial nominee) with the agreement of the Lord Chancellor. The Lord Chief Justice has nominated the President of the Family Division (who has also been appointed President Designate of the new court) to make the new Rules.
- 7.4. The processes set out in the Rules are necessarily more formal than in the current court, while still catering for all types of cases that the new court will need to decide. Examples of processes which are unique to the new court include:
  - a requirement that the person who lacks capacity who is the subject of the proceedings is to be personally informed of the proceedings in a meaningful way (Part 7);
  - a range of ways for involving the person who lacks capacity in the proceedings, to enable the new court to decide on the best approach in each individual case (Parts 7, 9 and 14);
  - provision for serving the application form and supporting documents on named respondents (who have or may have a direct interest) and also notifying others who might have an interest in the proceedings (Part 9);
  - a general rule that hearings are to be held in private to ensure that the privacy of the person who lacks capacity is safeguarded, while enabling the court to admit the media and members of the public where it considers it is appropriate to do so (Part 13);
  - two different starting points in relation to costs which reflect the status quo; in property and financial affairs cases the starting point is that the costs of the proceedings will be paid from the estate of the person who lacks capacity, and in personal welfare cases the starting point is that each party will bear their own costs – with judicial discretion to depart from these starting points where appropriate (Part 19); and
  - transitory provisions for cases pending in the current court at the time of commencement (cases pending in the High Court will remain in the High Court until finalisation and will not be transferred to the new court) (Part 22).

7.5. The Rules are supported by a series of practice directions which provide more detailed practical guidance on the conduct of proceedings. The practice directions will be made by the President of the new court under the delegated authority of the Lord Chief Justice with the agreement of the Lord Chancellor. These practice directions have been largely modelled on the relevant CPR practice directions, as well as existing practice notes in relation to the current court. New practice directions have also been created to cater for processes that are unique to the new court.

#### *Size and nature of the problem*

7.6. As many as 1.25 million people may be affected by lack of capacity. Since the Act provides for personal welfare decisions to be made in many circumstances without needing to come to court (providing the decision-maker has regard to the relevant provisions of the Act), the expectation is that personal welfare matters should only be brought before the court when they cannot be resolved by any other means, or where the matter is so serious that a judicial decision is needed. It is estimated that the new court will consider approximately 17,000 cases annually. Of those cases, the majority are expected to be in relation to property and financial affairs, and the remainder will be personal welfare cases. This is because, while personal welfare decisions can, generally, be made without a court application, a person wanting to make decisions in relation to the property and financial affairs of a person who lacks capacity will need authority to do so. The new court will have hearing venues in a number of key locations across England and Wales, with a central administration based in London.

#### *Guidance*

7.7. The Act also establishes a new statutory office, the Public Guardian, in place of the existing administrative office of that name (see section 57(1) of the Act). The Public Guardian will be supported by the Office of the Public Guardian (“the OPG”), an executive agency of the department. The OPG will include a customer service unit, which will be the first point of contact and advice for anyone who needs information, help or guidance regarding the practice and procedure of the new court. The OPG website will also contain written guidance, as well as court forms.

#### *Consultation*

7.8. The department has consulted on a number of areas relating to the implementation of the Act. A consultation process on the draft Rules was conducted from 17 July to 6 October 2006. The consultation paper annexed a draft of the main provisions of the rules and invited comments both in relation to the overall framework of the draft rules as well as individual draft rules. A total of 39 responses were received from a wide range of organisations and individuals including voluntary groups and representative bodies (on behalf of people who lack capacity, families and family carers), legal and health care

professionals, local and health authorities, and members of the public. The response to consultation is available via the following link:

<http://www.dca.gov.uk/consult/mentalcapacity/response1006.pdf>

- 7.9. The Rules have been developed having regard to the comments received during this process. Over half the respondents agreed with the majority of proposals in relation to the new procedures for the court.
- 7.10. Respondents were almost equally divided on whether the court should sit in public or private. Those advocating private hearings generally did so to protect people who lack capacity and ensure that sensitive personal information about their finances, health or personal welfare was safeguarded. Almost three-quarters of those who supported public hearings also supported the court having the ability to hear personal matters about a person who lacked capacity in private in certain circumstances. Several thought that this would mean in practice most cases would be heard in private.
- 7.11. Views were also equally divided over whether the Rules should say that each party should pay their own court costs as currently happens in matters heard under the inherent jurisdiction of the High Court, or whether the starting principle should be the same as in the current court where the court generally orders that the costs are paid from the estate of the person who lacks capacity. Having considered the consultation response, it was concluded that the position outlined earlier in this memorandum, which largely preserves the current position, is the best solution for dealing with the different circumstances of the two jurisdictions.
- 7.12. In addition to the public consultation, a group comprising members of the judiciary and legal profession with experience of the operation of the current court and the High Court, under the auspices of the President Designate of the new court, has provided regular advice on the development of the Rules, particularly with respect to their practicality and workability.

## **8. Impact**

- 8.1. A full Regulatory Impact Assessment (RIA) was produced for the passage of the Act, considering the benefits, cost and risks of setting up a statutory framework for decision making. The RIA is available at <http://www.dca.gov.uk/risk/mcbria.pdf>. The department has also produced an Equality Impact Assessment to cover the Act and its implementation, which is available at <http://www.justice.gov.uk/whatwedo/mc-equality-impact.htm>.

## **9. Contact**

9.1. Any enquiries about the contents of this memorandum should be addressed to: Ben Luscombe, Mental Capacity Implementation Programme, Ministry of Justice, email: [Ben.Luscombe@justice.gsi.gov.uk](mailto:Ben.Luscombe@justice.gsi.gov.uk) tel: 020 7210 0051.