

**Draft Court Rules:  
Mental Capacity Act 2005  
Court of Protection Rules**

**Consultation Paper**

**CP 10/06**

**17 July 2006**

**This consultation will end on 6 October 2006**

**A consultation produced by the Department for Constitutional Affairs.**

## Contents

<b>Contents</b>	<b>1</b>
<b>Ministerial Foreword</b>	<b>3</b>
<b>Executive summary</b>	<b>4</b>
<b>Introduction</b>	<b>5</b>
<b>1. The proposals</b>	<b>8</b>
<b>2. Resolving Disagreements</b>	<b>11</b>
<b>3. The Court of Protection Rules</b>	<b>13</b>
<b>4. The Provisions of the Rules</b>	<b>15</b>
<b>Annex A – Draft Court of Protection Rules 2007</b>	<b>31</b>
<b>Annex B – The Informal Rules Group</b>	<b>33</b>
<b>Annex C – Partial Regulatory Impact Assessment (PRIA)</b>	<b>35</b>
<b>Questionnaire</b>	<b>57</b>
<b>About you</b>	<b>59</b>
<b>How to respond</b>	<b>60</b>
<b>The Consultation Criteria</b>	<b>62</b>
<b>Consultation Co-ordinator contact details</b>	<b>63</b>

---



## Ministerial Foreword



I am pleased to introduce this consultation on rules of court for the new Court of Protection.

The Mental Capacity Act received Royal Assent on 7 April 2005. The Department for Constitutional Affairs (DCA), the Department of Health (DH) the National Assembly for Wales and the Public Guardianship Office are working together to implement the new Act in April 2007.

The Act provides for a new Court of Protection with the ability to make decisions in relation to the property and affairs (as the current Court of Protection can) and also in relation to the personal welfare of people who lack capacity. The new court will decide both the types of cases that come to the current Court of Protection and those cases which are currently heard under the inherent jurisdiction of the High Court. These two courts decide different matters under very different procedures. The real challenge will be to produce rules of court that are appropriate to both and allow all cases to progress quickly and smoothly, enabling the new Court of Protection to deal with cases justly. For these reasons, I am keen to encourage you to reply to the questions set out in this document and I hope that you will send us your thoughts and comments on our proposals.

A handwritten signature in black ink that reads "Catherine M. Ashtons". The signature is written in a cursive, flowing style.

**Baroness Cathy Ashtons**

Parliamentary Under Secretary of State, Department for Constitutional Affairs

## **Executive summary**

The Mental Capacity Act 2005 received Royal Assent in April 2005. The Act establishes a new specialist court, to be known as the Court of Protection, with a new jurisdiction to deal with decision-making for adults who lack capacity. This court will have important structural differences from the current office of the Supreme Court (also known as the “Court of Protection”). The new court will be able to make decisions both, as the current court can, about ‘property and affairs’ (the term the Act uses to describe the financial decision-making jurisdiction) and also about ‘personal welfare’ matters. The court will also have the power to make a declaration as to whether or not a person has capacity to make a particular decision or in relation to a particular matter.

The procedures of the new Court of Protection will be set out in ‘rules of court’ and ‘practice directions’ made under the authority of the Lord Chief Justice with the agreement of the Lord Chancellor. The draft rules annexed to this consultation paper set out the overall framework of a new set of rules for a new court of Protection. For the purposes of consultation we have concentrated on setting out the main provisions of the new rules for consultation. The final rules will also make provisions for enforcement and in relation to contempt which are in line with those already available in the civil courts.

The Government’s intention is that the regulations, court rules and necessary guidance to implement the new Act, and establish the new Court of Protection, will come into effect in April 2007.

This consultation seeks views on the provisions of the draft rules of court that will govern proceedings before the new Court of Protection. The draft rules are at Annex A. The following sections of this consultation paper contain questions to seek your views on particular aspects of the rules. In addition to this, we welcome both general comments as to the framework that the draft rules provide and comments on individual rules are also welcomed (please make sure in your response that you identify the particular rule to which your comments refer).

## Introduction

This paper sets out for consultation the main provisions of draft rules of court for the new Court of Protection in order to seek views on consultation. The consultation is aimed at the legal profession and anyone with a particular interest in finding out about the new Court of Protection for England and Wales.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 62, have been followed.

This consultation paper contains, at Annex C, a Partial Regulatory Impact Assessment. Comments on this Partial Regulatory Impact Assessment are particularly welcomed.

Copies of the consultation paper are being sent to:

President of the Family Division

Chancellor of the High Court

Members of the High Court Judiciary

HM Council of Circuit Judges

Association of District Judges

Master of the Court of Protection

Official Solicitor and Public Trustee

Informal Rules Group

Advice UK

Association of Authority Public Receivers

Association of Contentious Trust and Probate Specialists (ACTAPS)

Association of Directors of Social Services

Bar Council

BMA Wales

British Bankers Association

British Medical Association

Building Societies Association

Citizens Advice Bureaux

Family Law Bar Association

General Medical Council

Healthcare Commission

Institute of Mental Health Law

Law Centres Federation

Law Society of England and Wales

Local Government Association

Making Decisions Alliance

Medical Defence Union

Medical Protection Society

Mental Health Lawyers Association

NHS Confederation

NHS Litigation Authority

Solicitors Family Law Association

Solicitors for the Elderly

Solicitors firms who have responded to previous consultations

Department of Health

NHS Confederation Wales

Welsh Language Board

Welsh Local Government Association

Welsh Assembly Government

Constitutional Affairs Select Committee

This list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

## **1. The proposals**

### **1.1. A New Framework**

The Mental Capacity Act 2005 (the Act) provides a framework within which to provide both empowerment and proper protection for people aged 16 and over who cannot take all decisions for themselves (and in rare instances it will apply to those under 16). It provides the framework for deciding whether people have the mental capacity to take decisions for themselves, and for making decisions on behalf of people who lack the mental capacity to make decisions for themselves.

### **1.2. What is Mental Capacity?**

In a day-to-day context, mental capacity means the ability to make decisions or take actions affecting daily life, for example, when to get up, what to wear, what to eat, whether to go to the doctor when feeling ill. In a legal context, it refers to a person's ability to do something, or make a decision, which may have legal consequences for the person themselves or for other people.

### **1.3. A New Court of Protection**

The Act establishes a new specialist court, to be known as the Court of Protection, with a new jurisdiction to deal with decision-making for adults who lack capacity. This court will have important structural differences from the current office of the Supreme Court which is also known as the 'Court of Protection'. The new court will be able to make decisions both, as the current court can, about 'property and affairs' (which is the term used in the Act to describe the wide financial decision-making jurisdiction) and also about 'personal welfare' matters. The term 'personal welfare' comprises both welfare and healthcare matters. The court will also have the power to make a declaration as to whether or not a person has capacity to make a particular decision or in relation to a particular matter.

### **1.4. The Judiciary**

As a Superior Court of Record, the new Court of Protection will have a President at its head. The President of the Family Division has been appointed as President

Designate of the new Court of Protection, the Chancellor of the Chancery Division has been appointed Vice President Designate and the Master of the current Court of Protection has been appointed Senior Judge Designate of the new Court of Protection. They will take on their full roles and titles upon the Act coming into force.

The range and number of judges who hear Court of Protection cases will increase significantly. Cases will be heard by specially nominated High Court, Circuit and District Judges and will go to different levels of judge depending on their complexity, sensitivity and urgency.

### **1.5. Hearing Venues**

The current Court of Protection has been based solely in London for many years; although since late 2001 it has also had a hearing centre in Preston. The new court will have hearing venues in a handful of key locations across England and in Wales from April 2007. There will be a central administration (Registry) based in London. Final decisions will be taken later in the year on where the new venues will be. Beyond 2007, there are longer term plans to further increase the numbers of hearing venues as they are needed. It is believed that the number of cases coming to the new Court of Protection will build gradually over time and that the new court should grow in size and have an increased geographical spread gradually as case numbers increase.

### **1.6. The Public Guardian**

The Act establishes a new statutory office, the Public Guardian. The Public Guardian is appointed by the Lord Chancellor. Richard Brook has been appointed as the Public Guardian Designate and as Chief Executive of the current Public Guardianship Office. He will take up his statutory role as Public Guardian from April 2007. From this date, the Public Guardianship Office will cease to exist and the Public Guardian will be supported by the Office of the Public Guardian, an executive agency of the DCA.

The statutory functions of the Public Guardian are set out at Section 58 of the Act. They include establishing and maintaining registers of Lasting Powers of Attorney and of Court of Protection orders appointing deputies. The Public Guardian also has the function of supervising deputies. The Public Guardian is responsible for ensuring that people chosen to take decisions on behalf of those who lack capacity discharge their role properly and do not abuse their responsibilities to act in the

best interests of the person who lacks capacity. The Public Guardian may make enquiries or refer matters to the Court of Protection where there are concerns that attorneys or deputies are not acting appropriately.

The Office of the Public Guardian will provide a Customer Service Unit. This will be the first point of contact and advice for anyone who needs information, help or guidance on the role or procedures of the Public Guardian or the Court of Protection. It will be able to provide information where people are considering applying to the Court of Protection or considering taking steps to provide for someone else to take key decisions for them, should they lose the capacity to do so themselves, via a Lasting Power of Attorney. The Public Guardian will provide information on the Mental Capacity Act and issue leaflets and information in a range of forms and languages to assist people. A public consultation was held at the start of 2006 on the making and registering of Lasting Powers of Attorney and regulations will set out in more detail how the Public Guardian will operate. The Public Guardian will publish an Annual Report and Accounts in respect of the office's work during the year.

#### **1.7. The Public Guardian Board**

The Lord Chancellor will appoint a Public Guardian Board to scrutinise and review the Public Guardian's work and make recommendations. It is planned that members will be appointed towards the end of 2006. Lay members will be appointed by the Lord Chancellor and will be chosen for their particular skills and expertise. One member will be a judge of the Court of Protection.

The Act, the new framework it provides and statutory bodies that it establishes, are intended to bring about better treatment for vulnerable adults who lack capacity in any area of their lives — by protecting their interests effectively, and ensuring that those interests are at the heart of the decision-making process.

## 2. Resolving Disagreements

Where someone needs to be granted the power to take decisions in respect of the money or assets of a person who lacks capacity, the authority granted by a Lasting or Enduring Power of Attorney or an order of the Court of Protection will be needed. In many other day-to-day decisions, however, the best interests of a person who lacks capacity may be most appropriately served by decisions being made by those closest to them, taken at the time they need to be taken and on an informal basis.

To help people who care for or work with people who may lack capacity, the Act provides for a statutory Code of Practice to clarify people's responsibilities under the Act and the considerations that they need to take into account in considering whether a person has capacity to make a particular decision or in making decisions for those who may lack capacity. A draft Code of Practice was put out to public consultation earlier this year. It is planned that the final Code will be laid before Parliament towards the end of 2006.

Someone acting on behalf of a person who lacks capacity will need to reach a conclusion about the best interests of that person, having considered the provisions of the Act and all relevant circumstances. If someone else disagrees with that conclusion, a range of options may be explored. These include:

- involving an advocate, who is independent of all of the parties, to work with the person who lacks capacity and help them understand the situation or act as an advocate of their best interests. The Act provides for Independent Mental Capacity Advocates (IMCAs) to be appointed in certain specified circumstances for people who lack capacity and who have no friends or relatives who can help them to make decisions;
- getting a second opinion in cases where the decision relates to medical treatment, for example concerning the options for medical treatment or a course of therapeutic help;
- holding a formal or informal case conference if the decision relates to medical treatment or social care;

- using the informal or formal complaints processes if the decision in question is to be taken by the health, social or other welfare services;
- participating in mediation or other forms of dispute resolution. This may be most appropriate to decisions on the day-to-day care or welfare of a person.

The aim is not merely to reach consensus, but to do so having primary regard to what is in the best interests of the person who lacks capacity. Nevertheless, the methods of solving problems outlined above will generally be more appropriate, simpler, faster, less distressing and less expensive for all involved than a formal application to court. Many decisions will be able to be made in the person's best interests without needing to come to the Court of Protection. If all other attempts to resolve a dispute fail, however, then it may be appropriate to apply to the court for a ruling on what particular decision or course of action is in the person's best interests.

### **3. The Court of Protection Rules**

The procedures of the new Court of Protection will be set out in ‘rules of court’ and ‘practice directions’ made under the authority of the Lord Chief Justice, with the agreement of the Lord Chancellor. Draft rules are included in this consultation paper at Annex A. The draft rules set out the overall framework of a new set of rules for a new Court of Protection. For the purposes of consultation we have concentrated on setting out the main provisions of the rules. The final rules will also make provision for enforcement and in relation to contempt which are in line with those already available in the Civil Courts.

We welcome your views on all aspects of the rules and on the questions contained in this consultation paper. In addition a partial Regulatory Impact Assessment (RIA) of the court rules and the setting up of a new Court of Protection is annexed to this paper at Annex C. This document addresses potential impacts of the court and court rules on various groups and industries, and we welcome any comments that you may have on it. Following consultation, we will update the RIA in the light of the comments which we receive.

#### **3.1. The Informal Rules Group**

This consultation is the beginning of the process of developing effective new rules for the new Court of Protection. In the light of the views expressed within this consultation, a group of judiciary and legal practitioners with knowledge of the operation of the current Court of Protection and the High Court, under the auspices of the President Designate of the new Court of Protection, will provide advice on the further development of the rules and related practice directions to refine them into their final form. The role and membership of the Informal Rules Group are set out at Annex B.

#### **3.2. Jurisdiction**

The Court of Protection will have jurisdiction over the property and financial affairs and the health and welfare of people of 16 years of age and over. A personal welfare case relating to a 16 or 17 year old who lacks capacity could be heard either in a court dealing with family proceedings or in the Court of Protection. The new Court of Protection will have power, in certain circumstances, to transfer

cases concerning children between a court that has jurisdiction under the Children Act 1989 and the Court of Protection. This is to ensure that cases involving vulnerable 16 and 17 year olds are handled in the most appropriate way. The new Court of Protection also retains the jurisdiction of the current court over the finances of those under 16 if there is evidence that the child will not have capacity to make decisions over his or her finances on attaining 18 years of age.

## **4. The Provisions of the Rules**

### **4.1. The Overriding Objective**

The draft rules which have been produced for this consultation draw on the extensive work done by the judiciary, the rules committees and the DCA to modernise and improve court procedures and rules over recent years. This work has led to the Civil Procedure Rules 1998, the Criminal Procedure Rules 2005 and the Family Procedure (Adoption) Rules 2005. Like those models, the new Court of Protection Rules will state the 'overriding objective' of enabling the Court of Protection to deal with cases justly (see rule 3). Draft rule 4 places all parties under a duty to help the court further the overriding objective. Setting out the overriding objective of the rules at the beginning ensures that all those who use them are aware that they are required to act to support that objective.

**Question 1: Do you agree with the proposed overriding objective for the new Court of Protection Rules?**

### **4.2. Pre-action Protocols**

Applications made to the court should focus on the issues that need to be resolved and progress quickly and smoothly through the court. Consideration is being given to whether applications coming to the Court of Protection should be subject to pre-action protocols before an application may be made to the court, as well as being backed by active case management once an application is made.

Pre-action protocols would set out what must be done by anyone considering applying to the Court of Protection. This is to ensure that people only apply to the court when it is really necessary to do so, and that cases come to it with preparation undertaken to ensure that they can be dealt with by the Court in the most effective way. Under draft rule 12, it is proposed that Practice Directions contain pre-action protocols to govern action which must be taken before applying to the court. Such protocols should encourage co-operation and the resolution of disputes without court proceedings. They should also support efficient management of those cases which do come to court.

**Question 2: Do you agree that pre-action protocols would help resolve disputes that might come to the new Court of Protection? Are there particular matters that you consider should be addressed in rules or a practice direction or set out in protocols to govern action that should be taken before an application is made to the Court of Protection?**

#### **4.3. The Permission Stage**

In order to ensure that other people only intervene in the life of a person who lacks capacity where it is really necessary, the Act requires certain people to obtain the permission of the Court of Protection to make an application.

Section 50(1) of the Act lists the people who will be able to apply to the Court of Protection without permission, as of right. These people are:

- a person who lacks, or who is alleged to lack, capacity (or anyone with parental responsibility if the person is under 18 years);
- a donor of, or attorney appointed under, a Lasting Power of Attorney to which the application relates;
- a court-appointed deputy acting for the person concerned;
- a person named in an existing court order to which the application relates.

The aim is to ensure that those who will be the subject of applications to the Court of Protection do not require permission to apply to the court. Other people generally will be required to obtain permission from the Court before making an application. However, section 50(2) of the Act provides for Court of Protection Rules to provide for certain types of applications where permission to apply is not required. Draft rule 23 sets out the circumstances where, in addition to those in section 50(1), permission will not be required. In particular, draft rule 23(2)(e) says that the court's permission will not be required where the application relates to a financial application in respect of a person who lacks capacity. This is because most cases that the current Court of Protection decides are undisputed finance cases, where a quick decision is needed to ensure the financial security and well-being of a person who is losing capacity. Applicants are obliged to seek an order from the court because a third party (such as a bank, building society or pension fund) cannot accept a receipt or signature from anyone other than the person who lacks capacity; but the person concerned has lost the capacity to deal with the matter in hand. It is doubtful that unnecessary and disruptive applications would

be made in financial cases and it is considered that adding a permission stage would add unnecessary delay and complexity.

**Question 3: Do you agree that the applications referred to at draft rule 23 cover the circumstances where applicants should not require permission to apply? Are there any other circumstances that should be covered?**

#### **4.4. The Core Court Process**

It is intended that the Court of Protection will manage how applications progress to their resolution to ensure that each application progresses in the most appropriate way. The draft rules also require this approach. It is proposed that people will have to complete the following documents to apply to the court:

- an application form, in a prescribed form, containing the information set out in draft Rule 24 and seeking permission to apply (where it is needed);
- evidence that the person lacks the capacity to make the decision for which the applicant is seeking a decision of the court (where it is needed). This will often come, as now, from a medical practitioner, but could also come from a psychologist or other suitably qualified professional;
- any written evidence on which the applicant intends to rely, but no other experts' evidence at this stage.

All applications to the Court of Protection will start off down a single route, but draft rule 37 provides that, where the application is solely about the property and affairs of a person without capacity, and no one has objected, then the court may make a final decision on the application. In the current Court of Protection, a large proportion of cases are decided on the basis of the papers. Straightforward cases are often determined by specialist “nominated officers” who work in the Court of Protection. Cases can be dealt with effectively and speedily and without the need for those involved to have to travel to attend court or incur the costs of doing so. We think it is right to make provision for decisions on the papers in suitable cases involving property and financial affairs. Although the Act allows the making of rules whereby decisions could be made by court officers, we have decided, at this stage, to make no such rules. Under draft rule 7, court staff may, where the rules

require or permit the court to perform an act of a formal or administrative nature, perform that act.

Applications to the court which are about the person who lacks capacity's finances and are contested or are about the person's health and welfare will proceed via the court giving directions (draft rules 38-43) as to the filing of evidence, any further directions and the final hearing.

**Question 4: Do you agree with this core procedure for the new Court of Protection? Given that there will be training provided to the judiciary and to staff on the new rules and information provided to the public, do you see any difficulties that may arise for the judiciary or the court from the use of the new rules?**

#### **4.5. Service, responding to service and the parties**

In proceedings before the new Court of Protection, the identity of parties to an application will depend on the nature and circumstances of the case. Applicants may be family members, an NHS Trust or other body responsible for a patient's care, or a local authority seeking decisions affecting the personal welfare of a person lacking capacity. The Public Guardian may also be an applicant: for example, the Public Guardian may wish to refer a deputyship back to court if there are concerns that it is being abused.

The applicant will name respondents to the application in the application form. These may include people such as family, carers or close friends of the person who lacks capacity whose views should be taken into account (the position of the person who lacks capacity who is the subject of the application is considered in the next section). If the application concerns property in joint names, the other owners may need to be named as respondents. Rules 28 to 35 provide for the applicant to serve the application form on persons named in the application form and sets out who these persons should be. They specify how persons served should respond to an application and they also provide for other people with an interest to apply to the court to be joined as a party. Rule 34 provides that where a person notified of an application in accordance with rules 27 (which deals with the notification of the person who lacks capacity), 28, 29 or 30 has failed to file an acknowledgement of service and has not been made a party, that person will, nevertheless, be bound

by any order or directions that the court makes. Rule 35 governs who the parties to any proceedings will be.

**Question 5: Do you consider that the provisions for service, responding to service and as to the parties to the proceedings set out at rules 28 to 35 are the right ones?**

## **The Person Who Lacks Capacity**

### **4.6. The Current Position**

In the current Court of Protection, the rules simply require an applicant to complete a form applying for an order about the person who is alleged to be a "patient". The form does not ask the applicant to name any other party to the case. The current Court of Protection Rules require the "patient" to be given personal notice of the basic facts of the application and they also require advance notification to close relatives. In the great majority of cases, neither the patient, nor any relative, nor the applicant actually attends court; the application proceeds uncontested to final decision or order. In some cases, the applicant or relatives will attend court, but they do not always instruct solicitors. In some cases, the patient will attend court to dispute the fact that he lacks capacity to manage his affairs. In some contentious or complex cases (for example, concerning high-value estates and tax planning matters) applicants or relatives will instruct lawyers; and in some, the Official Solicitor will represent the interests of the person lacking capacity. However, cases are always conducted in a relatively informal, non-adversarial manner.

By contrast, in the High Court, where serious health and welfare cases currently proceed under the Civil Procedure Rules, current practice is that the person who lacks capacity is invariably named as a defendant to the claim. A litigation friend may be appointed (a litigation friend may be a relative, a friend or a person in another representative capacity (such as an attorney); the litigation friend is able to conduct a case on behalf of the person who lacks capacity and instruct lawyers). The Official Solicitor usually acts as the person who lacks capacity's litigation friend. When the Official Solicitor is appointed, he either instructs a solicitor to represent the person concerned, or also undertakes the litigation aspect of the case himself in-house (alongside the "litigation friend" aspect of the case).

#### **4.7. How should the person who lacks capacity be involved?**

We have given careful consideration to the question of how the person who lacks capacity can be most appropriately involved in cases in the new Court of Protection. We have two very different starting-points in the current Court of Protection and current High Court procedures. We would wish to retain the best aspects of both.

Current Court of Protection procedures have the advantage that they promote timely decisions without inordinate distress or cost to the person who lacks capacity or his family. They have an “inquisitorial” flavour, without the naming of people as “defendants”. They do not require the person who lacks capacity to be visited or interviewed by strangers whose involvement the person who lacks capacity may not welcome. They do not necessitate the involvement of lawyers in cases where there is no particular legal dispute.

In contrast, current High Court procedures provide a very high level of protection for the person who lacks capacity and his or her interests. The person who lacks capacity is normally joined as a party to the proceedings and provided with a litigation friend (and provision is made for the appointment of litigation friends in the new procedure at draft rules 47 to 52). Often the Official Solicitor is appointed as litigation friend, and a lawyer, who may be funded via the Legal Services Commission, is appointed. Either or both the lawyer and the litigation friend who are appointed will usually visit the person who lacks capacity in order to provide information and evidence to the court.

#### **4.8. Family Proceedings**

In trying to identify a new procedural approach which can accommodate the wide range of cases which will come to the new Court of Protection, we have found it helpful to consider the arrangements for the involvement of children in family proceedings. The law makes provision for a range of different ways in which children can become involved in cases such as care proceedings, where a local authority has concerns about a child and wishes to take it into its care; or “private law” residence or contact disputes, usually between the parents or other close family, in relation to a child.

In care proceedings, the child is always made a respondent to the local authority’s application. Unless the child is old enough and competent enough to give instructions to a solicitor, the court will appoint a “children’s guardian”, almost always an officer of the Children and Family Court Advisory and Support Service

(“CAFCASS”). The guardian instructs a specialist solicitor to file evidence on behalf of the child. The guardian’s fees and costs are borne by CAFCASS while the lawyer’s fees and costs are borne by the Legal Services Commission.

In most “private law” children cases, a different arrangement is made. The child is not made a respondent to the application. However, the court may ask for CAFCASS to provide a report on matters relating to the welfare of the child. The officer will invariably see and interview the child, but will not instruct a lawyer.

We consider that the range of arrangements that may be made for the involvement of children in family proceedings, depending on the extent and seriousness of the matters at issue, provides a useful basis for considering how arrangements might be made for the involvement of the person who lacks capacity in the wide range of cases which will come before the new Court of Protection.

#### **4.9. Notice to the person who lacks capacity**

The draft rules provide (at rule 27) that the applicant will inform the person who lacks capacity personally that an application has been made and provide information about the application as rule 27 requires. Where either the applicant fails to do this or the court decides to dispense with the requirement to do so, the draft rules provide that the court should not deal with the application on the basis of the papers, but will give directions as to how the application is to progress. In doing so, the court will consider whether the person who lacks capacity should be joined as a party to the proceedings and consider giving directions as to the appointment of a litigation friend.

#### **4.10. Court Reporting Service**

We consider that the advantages provided by the current Court of Protection procedures in promoting timely decisions without requiring the person who lacks capacity to be visited or interviewed by strangers whose involvement the person who lacks capacity may not welcome, should be retained in cases where there is no particular legal dispute.

We also recognise that, just as currently, there will be cases in the new Court of Protection where the interests of the person who lacks capacity require a very high level of protection and where the court will wish to join the person who lacks

capacity as a party to the proceedings and provide for him or her to have a litigation friend and a lawyer.

We consider that there will also be cases in the middle of the spectrum where it would assist the court in reaching a decision, or help the court to solve a particular dispute, if it was to be provided with an impartial report on the person who lacks capacity.

Section 49 of the Act makes provision for the new Court of Protection to ask for a report on matters relating to the person who lacks capacity, to assist it in determining a case. A new independent Court Reporting Service will be set up by the Public Guardian to provide reports to the court in respect of the person who lacks capacity, where the court decides that this would be helpful. The Act provides that reports may also be commissioned from local authorities, NHS bodies, or the Court of Protection Visitors (the Court of Protection Visitors is the new name for the Lord Chancellor's Visitors who currently undertake visits for the Public Guardianship Office) where the court would find that helpful.

At the first directions hearing of an application, under draft rule 40(1)(a), the court may require a report. Draft rule 42 makes provision for this and sets out the matters that the court may require to be covered in the report. The rules also provide for the court to direct that the report should cover any other matter that the court wishes.

These provisions offer more flexibility in the arrangements which can be made to ensure that the person who lacks capacity is appropriately involved and the court gains all the information it needs. In particular, a court report will be a valuable alternative to full, formal representation by a "litigation friend" and lawyer which is arguably more suitable to adversarial litigation but which has had to be used in the High Court to date. In our view, the provision for an impartial report to be provided to the court allows us to develop a flexible scheme where the person who lacks capacity is offered all appropriate protection within the court case but is not forced to accept (or pay for) a level of involvement which is distressing, unwanted or unnecessary.

**Question 6: Do you consider that the approach set out above is the right approach for the range of cases that will come before the Court of Protection? If not, how do you consider that the person who lacks capacity should be involved in the proceedings?**

**Question 7: Do you agree that the matters set out at Rule 40 are the right matters to be covered by a report to the court?**

#### **4.11. Evidence**

Part 10 of the draft rules relates to admissions, evidence and depositions. It provides that the court may control the evidence in a case by giving directions as to the issues on which it requires evidence, the nature of the evidence it requires to make a decision on those issues and as to the way in which evidence is placed before the court. Under this Part, the court may also exclude evidence which might otherwise be admissible. The draft rules provide that the general rule to be applied is that evidence of witnesses should be provided orally at final hearings and in writing at any other hearing. The rules make provision as to how and when witness statements are to be provided to the court and served on the other parties.

**Question 8: Are the provisions of Part 10 appropriate to new rules for the Court of Protection? Are there any other matters for which Part 10 should make particular provision?**

#### **4.12. Expert Evidence**

Part 11 makes provision for expert evidence to be placed before the court. Draft rule 83 places a duty on the expert to help the court on matters within the expert's field of expertise, which overrides any obligation to those who have instructed or are paying the expert.

The filing of voluminous or conflicting evidence by parties to a case may tend to heighten animosity, make it less clear what the issues are in the case and increase costs and case duration significantly. The draft rules give the court power to restrict expert evidence once a case begins. This allows the court to control the evidence in the case and focus on the key issues on which it wishes to hear

evidence. Draft rule 87 also gives the court power, where two or more parties wish to submit expert evidence, to direct that evidence is given by one expert only who is instructed jointly by the parties. The court also has power to give directions as to what is to be covered in the expert's report.

**Question 9: Do you agree that the Court should have these powers in relation to expert evidence? Are there any other matters in relation to expert evidence which should be provided for?**

#### **4.13. Openness of Proceedings**

Currently applications to the Court of Protection which are attended are generally heard in private. The Family Courts have, for many years, also heard many of their cases, particularly in respect of the welfare and best interests of children, in private. A separate consultation paper, "Confidence and Confidentiality: Improving transparency and privacy in family courts" CP11/06, published on 11 July considers options for improving openness and privacy in respect of the family courts. It is our intention to consider providing for more openness in respect of how the new Court of Protection will decide applications before it.

The proposals set out at draft rule 45 have been based on the Civil Procedure Rules which govern cases currently heard under the inherent jurisdiction of the High Court. In the draft rules, we have proposed that the general rule is that hearings of the Court of Protection should be in public but that a hearing, or any part of it, may be held in private if the court considers any of the circumstances set out at draft Rule 45(3) are met. The court may order that identities of people involved in a case are not disclosed if it is considered necessary to protect their interests. Part 12 of the draft rules also makes provision as to the disclosure of documents to the parties and to others unless the court directs otherwise.

The circumstances, provided for in the draft rules, under which the court may consider that all or part of a hearing should be heard in private are wide and we seek views as to whether a presumption of hearings being in public - backed by wide provision for the court to decide to hear matters in private - is the right basis for providing for greater openness in respect of hearings in the new Court of Protection.

**Question 10: Do you consider that the principle that Court of Protection hearings should be heard in public unless certain circumstances apply is the correct principle to apply?**

**Question 11: If your answer to the previous question is 'yes', do you consider that there are fewer or more circumstances under which the court might decide to hold all or part of a hearing in private under draft Rule 45?**

#### **4.14. Reviews and Appeals**

Section 53 of the Act allows the court rules to provide that an appeal in respect of a decision of the Court of Protection may be heard by a higher judge of the Court of Protection rather than being heard by the Court of Appeal. It is proposed that an appeal from a decision of a District Judge is heard by a Circuit Judge, and that an appeal from a decision of a Circuit Judge is heard by a High Court Judge. Appeals from decisions of a High Court Judge would be heard by the Court of Appeal.

Section 53 of the Act also provides that the Court of Protection Rules may state: who should grant permission to appeal; what to take account of when granting or refusing permission to appeal; and when appeal cases may need to go to the Court of Appeal.

Part 16 makes provision for appeals. The rules provide that an appeal against a decision of the Court of Protection should not be made without permission and set out, at draft rule 107, who is able to grant permission to appeal. Draft rule 108 sets out the matters that the court will take into account when considering an application for permission to appeal. Draft rules 109 to 113 govern the process by which and time limits within which applications in respect of an appeal against a decision of the court must be made.

As in Civil Procedure Rule 52.10(1), draft rule 114 provides that an appeal judge will have all the powers of the deciding, to:

- (a) affirm, set aside or vary any order made or given by the deciding judge;
- (b) refer any application for determination by the deciding judge;
- (c) order a new hearing;

(d) make a costs order.

**Question 12: Are these the right provisions to make in the rules as to how appeal applications will be considered?**

**Question 13: Are there any exceptions which should be made to the proposal that all appeals from decisions of the Court of Protection, should require the grant of permission to appeal?**

#### **4.15. Fees**

Sections 54 and 58 of the Act provide for the setting of the fees which the Court of Protection and the Public Guardian will charge. These fees will be set out in an order made by the Lord Chancellor with the consent of the Treasury. Fees Orders will set out the level of fees that the Court of Protection and the Public Guardian will charge. Work to set the level of fees that the Court and the Public Guardian will need to charge is currently being undertaken. A separate public consultation on fees is planned for later this year.

#### **4.16. Remission and exemption of fees**

The Act provides for remissions or reductions from paying the full fees or exemptions from paying any fees. This is in line with what happens in respect of other fees in other courts. The current Court of Protection has power to remit all or part of a fee that is payable, but does not currently have power to exempt certain categories of people from paying fees.

We think that fees should be paid where people are able to do so, but that access to justice should be protected for those who are not able to pay. Protection should be provided for clients of modest means as fees should not prevent access to justice. We are considering an exemptions policy based both on the receipt of certain benefits and capital assets. In addition to this, we are looking at a remissions policy of discretionary waiver, postponement or reduction of the whole or part of the fee on the basis of the circumstances of the party in question. This would be on a statutory basis of exceptional circumstances or undue financial hardship to the party or, where the party is the person who lacks capacity, to him or her, and his or her dependants. Remissions would be discretionary but are

likely to be based on the provision of evidence of income, expenditure and other relevant financial information. Guidance would be provided on the remissions criteria. Development of this exemptions and remissions policy is being taken forward in consultation with colleagues in Her Majesty's Courts Service.

#### **4.17. Costs**

Applications to the Court of Protection will be considered generally on the basis of what is in the best interests of the person who lacks capacity, rather than on an 'adversarial basis' based on which of the parties has best proved their case.

Currently the Court of Protection's jurisdiction is a financial one. In the majority of cases coming before the Court of Protection, the court and legal costs incurred are paid from the person who lacks capacity's estate. The new Court of Protection will hear applications concerning personal welfare where the person who lacks capacity may not have an estate.

We are considering proposals whereby the parties to a case should each fund their own costs, but with a wide discretion for the court to order, as the current Court of Protection does now, that the costs incurred by parties and court fees are to be paid from the estate of the person who lacks capacity.

The court would also have power to make costs orders against other parties where they had acted unreasonably, or in a manner that was clearly not in the best interests of the person who lacks capacity (as the current Court of Protection can).

Costs are a complex matter and the development of detailed costs rules will be the subject of further work in the coming months. We have provided draft rules on costs at Part 15 to provide an outline of how the general principles outlined above might operate and we welcome your views on these provisions.

**Question 14: Do you agree that the court should start from the principle of the parties funding their own costs in the new Court of Protection? Do you consider that any other particular principles should be set out in the court rules or in a practice direction?**

#### **4.18. Publicly Funded Legal Assistance**

Where an application needs to be made to the Court of Protection, publicly funded legal assistance may be available. Publicly funded legal advice will be available to those that qualify under the 'Legal Help' scheme through Community Legal Service solicitors or advice agencies. Applications for full publicly funded legal representation before the Court of Protection may be made to the Legal Services Commission (LSC) by a solicitor, for cases where this is necessary.

#### **4.19. Legal Help**

Applicants for publicly funded Legal Help to advise them prior to applying to the Court will need to satisfy the standard 'means test', (confirming receipt of specified benefits or income and capital below a specified amount), and 'merits test' (confirming that there is sufficient benefit to the applicant to justify providing the advice and that no other source of funding is available). People in receipt of 'passported' benefits (including income support) automatically qualify financially for legal aid.

Legal Help can cover advice and assistance on matters affecting a person lacking mental capacity including preparation work for Court hearings. It will be available if an applicant satisfies the means and merit tests. Under the Legal Help scheme, applicants can receive initial assistance, to cover help from a solicitor in writing letters, getting a barrister's opinion, help with mediation and preparation for Court of Protection hearings. Legal Help is not available to make a Lasting Power of Attorney or an advance decision to refuse treatment.

#### **4.20. Legal Representation**

Publicly funded legal representation will only be available for representation at the Court of Protection where the applicant meets the Funding Code criteria. The court will have a role in determining who the parties to a case should be, and whether a particular litigation friend is suitable.

Where the Court has decided to join a person who lacks capacity as a party to the application, the person who lacks capacity may need a litigation friend and the Court will make directions as to the appointment of a litigation friend. A litigation friend could be a relative, friend, attorney, or the Official Solicitor. A litigation friend is able to conduct a case on behalf of a person lacking capacity and instruct lawyers. Where lawyers are to be instructed on a publicly funded basis, they would apply to the Legal Services Commission and the means and merits test would be applied to the person who lacks capacity's circumstances (rather than the litigation friend's).

#### **4.21. Transition provisions and legacy cases**

Schedule 5 of the Act contains transitional provisions that will apply where a receiver has been appointed before the Act takes effect. The Act provides that in such circumstances its provisions are to apply as if the receiver were a deputy, but with the functions and powers given to the receiver in any orders made before enactment.

The Public Guardianship Office will communicate with all receivers in advance of April 2007, explaining how they will be affected by these provisions and the steps that the Court and the Public Guardianship Office propose to take in order to ensure that these provisions can take effect.



**Annex A – Draft Court of Protection Rules 2007**



## **Annex B – The Informal Rules Group**

### **Informal Rules Group - Members**

Mr Justice Charles (Chair)

Mr Justice Rimer

Master Denzil Lush, Master of the Court of Protection

District Judge Ashton, Deputy Master of the Court of Protection

District Judge Harper

Laurence Oates, the Official Solicitor and Public Trustee

Niall Baker, solicitor

Caroline Harry Thomas, barrister

Nicola Mackintosh, solicitor

Peter Marquand, solicitor

David Rees, barrister

Martin Terrell, solicitor

### **Informal Rules Group - Role**

Members are invited to:

- act as an advisory forum for the development of effective court rules to govern the procedure and practice of the new Court of Protection having regard to the response to the Department for Constitutional Affairs' public consultation on the draft rules; and
- advise and comment on successive drafts of rules and practice directions having regard to the effectiveness and practical effects of the draft rules in implementing the Programme's plans for the new Court of Protection.



## **Annex C – Partial Regulatory Impact Assessment (PRIA)**



## **Partial Regulatory Impact Assessment**

### **The Rules of Court for the new Court of Protection established by the Mental Capacity Act 2005**

#### **Purpose and Intended Effect of Measure**

##### **Objective**

The objective is to produce a clear and coherent set of court rules to govern the practice and procedure of the new Court of Protection to enable it to deal justly, efficiently and accessibly with matters coming before it.

##### **Background**

The new Court of Protection will deal with all cases involving persons aged 16 or over who lack mental capacity in health and welfare as well as financial matters<sup>1</sup> in England and Wales.

The Mental Capacity Act 2005 ('the Act') received Royal Assent on 7 April 2005 and is due to come into force in April 2007. It creates a new Court of Protection, a superior court of record with all the powers of the High Court, and the Public Guardian, whose role is briefly described below.

The new Court of Protection will be able to make such decisions as it considers to be in the best interests of the person who lacks capacity, including appointing deputies (who will replace receivers) to make decisions on their behalf. The Court will also be able to make a ruling as to whether someone has the capacity to make their own decisions or not. The Court's jurisdiction will cover England and Wales.

---

<sup>1</sup> It is important to note here that section 18(3) of the Mental Capacity Act provides that the Court of Protection may make, or appoint a deputy to make, decisions regarding the property and financial affairs of someone aged under 16, where their lack of capacity is expected to last past the age of 18.

The Public Guardian (PG) will have several functions, set out in section 58 of the Act. These include supervising deputies, making reports to the Court of Protection, and dealing with representations about the way deputies and attorneys are carrying out their roles.

### **Rationale for government intervention**

Currently, the Court of Protection deals only with the financial affairs of people who lack capacity to do so themselves; in such cases, the Court may appoint receivers to manage their financial affairs. The performance of these receivers is regularly monitored by the Public Guardianship Office (PGO) on behalf of the Court.

Currently, decisions about property and affairs on behalf of a person who lacks capacity can be taken under the Enduring Powers of Attorney Act 1985 and Part VII of the Mental Health Act 1983. Nothing allows someone to make healthcare or welfare decisions on behalf of another adult, and where there are issues regarding a person's ability to make such decisions for themselves, these matters are currently referred to the High Court. The High Court may issue a declaration of "best interests" thereby enabling the proposed action to be taken.

### **Code of Practice and the Court of Protection**

The Code of Practice is statutory guidance, explaining how the Act will work in practice. It contains scenarios to illustrate the major points of the Act. Chapter seven of the Code deals with the Court of Protection, explaining how to make an application to the court, and who should make the application, as well as the role and functions of the court and the duties and responsibilities of deputies appointed by the court. It makes clear that the Court of Protection provides a judicial forum for dealing with particularly complex decisions, or difficult disputes. It will be most appropriate for the majority of decisions to be made outside of a Court setting.

### **Consultation**

#### **Within government**

In deciding the policy that underlies these Court Rules, the Mental Capacity Implementation (MCI) Programme has consulted with colleagues in the PGO. There is also wider consultation between the DCA, the Department of Health and the Welsh Assembly Government as part of the MCI Programme.

This PRIA has been submitted to the Cabinet Office for consideration and approval.

### **Public consultation**

These Rules have been published as part of a public consultation exercise. The main organisations to which this consultation has been sent are listed at the beginning of the consultation paper.

Informing the policy behind these rules has involved consulting with health and social care professionals and legal practitioners to seek their views on probable workload and the impacts of a new Court of Protection, and the Act in general.

An Informal Rules Group, consisting of members of the judiciary and legal practitioners, will begin to scrutinise the draft Rules and will provide advice on the further development of the rules to refine them into their final form, in the light of the responses received to this consultation. The members of this group are listed at Annex B of this consultation paper.

### **Options**

#### **Option 1: Do nothing**

Regulatory Impact Assessments require us to consider various options, including consideration of the position if we were to do nothing. If we do nothing and, therefore, do not implement the Mental Capacity Act or introduce Court Rules, the current position will continue, as detailed above in the background section of this document.

At present, cases involving the financial affairs of adults who lack capacity are dealt with by the current Court of Protection, which will cease to exist upon the implementation of the Act. Cases involving healthcare and welfare decisions, however, are heard in the High Court. This process is potentially confusing for people, particularly members of the public, who will be bringing these cases to court at what is likely to be a very difficult time in their lives.

The Court of Protection, if we do nothing, would remain a specialist and little-known jurisdiction with the Court sitting only in London and (part-time) in Preston. There would be no new Court of Protection with an expanded jurisdiction and an increased presence in terms of hearing venues for England and Wales. The aim

to have a new, unified and more accessible jurisdiction in an increased number of venues across England and Wales would not be realised.

An option that does not allow the implementation of the Act and give proper underpinning to a new Court of Protection will not address the issues for which the Court of Protection was designed.

Parliament has, in passing the Act, agreed that the new Court of Protection is necessary, as are the new safeguards and protections provided in the Act. This option therefore, of doing nothing, would be contrary to the will of Parliament.

### **Option 2: Legislative Amendment**

The best interests of a person who lacks capacity are, in most cases, served by having decisions made by those closest to them in their day-to-day life on an informal basis. This is recognised in the Act and the accompanying Code of Practice. It is expected that where a person lacks mental capacity, the vast majority of decisions will be able to be made in the person's best interests without needing to come to the Court of Protection. Documentation such as the Code of Practice will invite people to consider alternatives wherever practicable, and give guidance on how best to proceed, with the minimal impact on the person who lacks capacity. Administrative staff of the PG will also be able to signpost options and guidance.

Where the Court is needed, however, the Court of Protection will have a dedicated set of Court Rules to govern its operation. This consultation paper presents new draft Court Rules for the new Court of Protection.

The underlying principles of the draft court rules are that they should:

- Ensure that the Court of Protection is accessible, fair and efficient; and
- Be as simple and simply expressed as possible.

In line with this, therefore, the draft rules have been drafted to be as concise as possible and accessible.

### **Option 3: Administrative Reform**

This option would, rather than introducing a new Court of Protection, reform the administration of the current court system that deals with adults who lack capacity. Limited changes to administrative procedures could be made under this option which would have some benefits to court users. It would not, however, create a single court where all cases relating to adults who lack capacity were heard and thus would not address the need for which the Court of Protection was designed.

### **New Court of Protection, without Rules**

Section 51(1) of the Act states that “the Lord Chancellor may make Rules of Court (to be called “Court of Protection Rules”) with respect to the practice and procedure of the court.” An alternative option would, therefore, be to implement the Act, but not to make Rules of Court for the Court of Protection. Thus, the Court of Protection, a Superior Court of Record, would come into existence when the Act comes into force. The legislative burden of the previous option is removed, if no Court Rules are passed.

The procedure and practice of the court would have to be governed by practice directions and guidance, which are limited in scope as to what they can address. The current Court of Protection would cease to exist, as per section 45(6) of the Act and, without Court Rules, the new Court of Protection would be ineffective, as there would be no detailed legislative code governing its operation.

This option therefore would have a significantly negative impact on the ability of the Court to operate and the service the Court of Protection can offer the public and would be unlikely to address the issues around the current situation.

We are currently taking steps towards administrative reform in any event, and only limited change can be made by administrative reform. In order to meet the needs of a new and accessible court covering both financial and health and welfare jurisdictions, we believe that new rules are necessary.

For all these reasons, we consider that option 2, the legislative option creating Court of Protection Rules, is the best way forward. We have attempted to make this legislation as non-intrusive, simple and concise as possible, in an effort to reduce the legislative burden. Suggestions as to alternative options received from responses to the public consultation on the Rules will be carefully considered.

## **Costs and Benefits**

### **Sectors and groups affected**

Section 2 of the Act defines someone as lacking capacity in relation to a matter if “at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.” This may be because of learning difficulties, an illness or brain injury, mental health problems or other reasons.

As the Court considers whether people have the mental capacity to make key decisions in respect of their own lives, potentially every adult in the country could come into contact with the Court of Protection. These decisions will include decisions about selling the house of a person who lacks capacity, with whom a person who lacks capacity should live, major medical treatments and resolving disputes. The Act requires the Court of Protection to prefer making single decisions to appointing a deputy, where circumstances are appropriate.

Major sectors involved will be medical and healthcare professionals, the legal profession, organisations in the voluntary sector and local authorities. They will deal with people who lack the capacity to make their own decisions, their carers, their court-appointed deputies, and other supports provided by the Act. The banking and finance sectors will also be involved where the Court of Protection makes a decision relating to the financial affairs of a person who lacks capacity. Banks and financial service providers will need to know what the Act says, and they will need to understand the role of the Court of Protection.

We have engaged with stakeholders from these sectors, particularly over the last year of implementing the Act. Representatives from a wide variety of voluntary sector organisations, banking and financial services professionals and legal practitioners attended a consultation event held last October to discuss the Code of Practice and other elements of the Act. Local Authority representatives attended a workshop in February this year, to discuss the impact the Act – and particularly the Court of Protection – will have on them.

Overall, we expect there to be a positive impact on these sectors, as the Court of Protection provides greater legal clarity as to who can make decisions, and the Act gives express legal protection to those who make decisions on behalf of (and in the best interests of) a person who is 16 or over and who lacks capacity.

There will be a more significant impact on the PG. He is required by the Act to establish and maintain a register of deputies. He will also supervise deputies in line with the terms of the Court of Protection order appointing them. The Court of Protection will be able to request reports from the PG on such matters relating to a person who lacks capacity (where proceedings have been brought in respect of that person) as it considers necessary.

The Court of Protection will also have an impact upon Her Majesty's Courts Service (HMCS). The effect on HMCS is expected to be limited to the use of HMCS estate and administrative staff, however, and training for HMCS staff will be provided as part of the implementation programme.

The Department of Health and the Welsh Assembly Government will have a role in training health and social care professionals, and producing guidance for them on the Act in general, and the DCA will contribute to this, in particular, by providing information on the Court of Protection. The Department for Work and Pensions, and particularly their staff in Jobcentre Plus, will also need to be aware of the role of the Court of Protection, and the Act more generally, when dealing with clients who receive benefits who may lack capacity.

### **Diversity Impact Assessment**

Government policies should be assessed specifically to ensure that they do not discriminate against anyone on the grounds of:

- race
- disability
- gender
- gender identity
- sexual orientation
- age
- religion or belief
- caring responsibilities
- flexible working arrangements

The Court of Protection will be guided by the principles contained in the Act and the Court Rules will allow us to embed these in the practice and procedures of the Court. One of the underlying principles of the Act is that a person cannot be treated as unable to make a decision merely because he makes a decision that

others may perceive as unwise, and section 2 of the Act emphasises that a lack of capacity cannot be established solely on the basis of:

- A person's age or appearance, or
- A condition of his or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

This may help to reassure people from minority groups, people with disabilities, older people and young adults that decisions they make while they have capacity must be respected, and will not lead to an assumption of a lack of capacity.

All decisions made on behalf of people who lack capacity must be made in their best interests, including those made by the Court of Protection. Section 4(6) of the Act emphasises that anyone deciding what is in a person's best interests must consider:

- The person's past and present feelings and wishes
- The beliefs and values that would be likely to influence his decision if he had capacity, and
- The other factors that he would be likely to consider if he were able to do so

This would naturally include consideration of any cultural values and religious or other beliefs that a person who lacks capacity may have, as well as consideration of a person's sexual orientation and gender identity. Section 4(7) requires anyone making a decision about what is in someone's best interests to take into account the views of:

- anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
- anyone engaged in caring for the person or interested in his welfare,
- any donee of a lasting power of attorney granted by the person, and
- any deputy appointed for the person by the court

This would give friends and family, where appropriate, the right to be consulted on what the person who lacks capacity would want.

### **Race equality assessment**

Some cultures may be less likely to involve the Court in decision-making. Figures from the PGO show that all BME groups are less likely to use the current Court of Protection. People of Chinese ethnic origin, for example, are significantly less likely to use these services, making up just 0.09% of current Court of Protection cases

where an ethnicity has been recorded, whilst the 2001 census shows that they form 0.86% of the population. For comparison purposes, the white British population forms 92.95% of current Court of Protection cases where an ethnicity has been recorded, and 87.49% of the population.

There are likely to be many reasons for this. Recent studies, including a review of evidence regarding the issues surrounding access to health services for BME groups in London conducted by Centre for Health Studies at Warwick University in 2001 and the Ethnic Differences in the Context and Experience of Psychiatric Illness: A Qualitative Study (EDCEPI) report of 2002, suggest that two of the main barriers to accessing health care for ethnic minorities are difficulties with language, and lack of knowledge about available services.

To make sure that the Act is accessible to as many of the people it affects as possible, a summary of the Act was translated into Welsh and eight other languages in common use within England and Wales: Arabic, Bengali, Chinese, Gujarati, Punjabi, Somali, Urdu and Vietnamese.

In addition, the PGO produces a range of leaflets in a similar variety of languages, to ensure people from minority ethnic backgrounds are not disadvantaged in their access to or knowledge of the PGO's services. The PG will produce similar leaflets and, where necessary, interpreters will be available for Court of Protection cases, in line with other courts in England and Wales.

Given the measures and safeguards we will put in place, we do not believe that the Court of Protection will have a disproportionate negative impact on people of black or minority ethnic origin. If members of the public indicate as part of their response to this consultation paper (or further stakeholder engagement) that they feel, to the contrary, that the race impact of the Court Rules will be disproportionately negative, this will be considered very carefully and appropriate changes will be made in response where possible.

A consultation event took place on 24 May with representatives from BME organisations in the voluntary sector to seek their views on a number of issues. No major issues regarding the Court of Protection were raised. Ongoing stakeholder engagement will further involve members of BME groups in the implementation of the Act and the set-up of the Court of Protection, and this will help us identify and manage any issues that may come up during the implementation process.

## **Religion or beliefs**

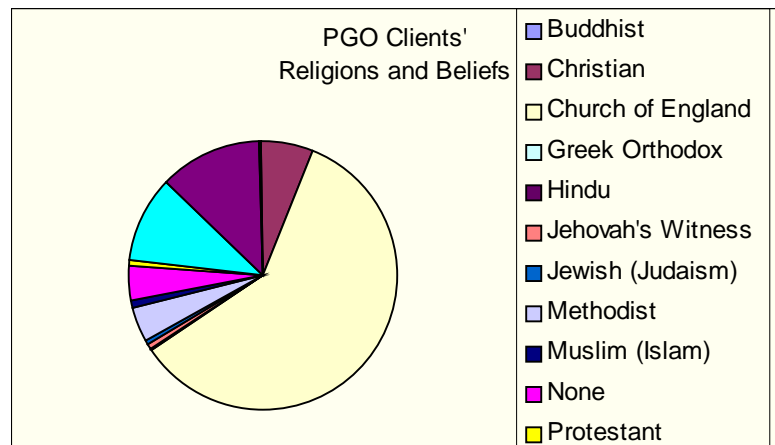
In the 2001 UK Census, 71.6% of respondents (37 million) stated their religion as Christian, while 15.5% (9.1 million) stated they have no religion and a further 7.3% (4.2 million) did not respond to the question. Some 3.1% of England's population and 0.7% of the Welsh population give their religion as Muslim, making this the most common religion after Christianity. Some 8.5% of London's population give their religion as Muslim; 4.1% are Hindus and 2.1% are Jewish<sup>2</sup>.

---

<sup>2</sup> All figures are from [http://www.jsboard.co.uk/etac/downloads/belief\\_systems.doc](http://www.jsboard.co.uk/etac/downloads/belief_systems.doc)

The following table and graph show the religious beliefs of new PGO clients between February 2005 and March 2006:

<b>PGO Clients Religion</b>	<b>TOTAL</b>
Not Available	4497
Buddhist	4
Christian	206
Church of England	1975
Greek Orthodox	6
<i>Hindu</i>	5
Jehovah's Witness	13
Jewish (Judaism)	24
Methodist	133
Muslim (Islam)	35
None	137
Protestant	29
Religion Not Stated	346
Roman Catholic	422
Sikh	9
<b>TOTAL</b>	<b>7841</b>



As can be seen from the above, Christians (including the Church of England, Methodists, other Protestant churches, Greek Orthodox and Roman Catholics) form the clear majority (92.43%) of applicants who state a religious faith. Muslims and Jews make up important smaller groups (1.18% and 0.8%, respectively) of (religious) applicants. Those who do not have a religion form 4.6% of the total.

Clearly, any needs clients have relating to their religion and beliefs will need to be taken into account by the Court of Protection, including, for example, any need for prayers at specific times of day. Judges will need to be aware of restrictions some religions place on the handling of money, for example Sharia law forbids the use of interest bearing accounts<sup>3</sup>. Currently, the Court of Protection takes this into consideration when making decisions. Training for judges of the new Court of Protection will include information on possible issues of concern to people because of their religion and beliefs. Judges who sit in the Court of Protection will, as in other courts in England and Wales generally, have regard to the Equal Treatment Bench Book<sup>4</sup>, produced by the Judicial Studies Board, which gives clear guidance on particular issues that may be of concern to members of BME groups, including, for example, forms of address and guidance on religion and beliefs.

As mentioned above, the Act also makes it clear that decisions by the Court of Protection can only be made in a person's best interests. This would clearly include a consideration of any religious or other beliefs and values, for example a need for single-sex care facilities, access to religious rites and ceremonies or specific dietary requirements.

### **Disability impact assessment**

At some point in their lives, millions of people in the UK lose their ability to make decisions that affect their lives - either through illness, disability or injury. And some people are born with disabilities that affect their capacity to make decisions.

Up to 2 million people may be affected by a lack of capacity. For example:

- Over 700,000 people in the UK currently suffer from dementia and this figure is likely to increase to about 840,000 by 2021.
- Around 145,000 adults in England have severe and profound learning disabilities and at least 1.2 million have mild to moderate disability. In

---

3 <http://news.bbc.co.uk/1/hi/business/3548656.stm>

4 <http://www.jsboard.co.uk/etac/etbb/index.htm>

Wales over 12,000 people were registered as having a learning disability in 2001.

- 10-15 people per 100,000 of the population will suffer a severe head injury each year, and there are currently an estimated 120,000 people in the UK suffering from the long-term effects of severe brain injury.
- At some point in their lives approximately 1 per cent of the UK population will suffer from schizophrenia, 1 per cent will be subject to manic depression and 5 per cent will have serious or clinical depression<sup>5</sup>

People with these conditions are more likely to lack capacity to make some decisions for themselves and so the Court of Protection is likely to have an increased impact on these groups of people. The Mental Capacity Act was designed with the intention of putting in place a clear, unified code of law for people who lack capacity and a single court able to make decisions in the best interests of people who lack capacity, where they are not able to do themselves. The Act and the Court have been designed to have a positive impact on the often-confusing situation people who lack capacity and their families and carers can find themselves in. The Court Rules will further enable the Court of Protection to reach decisions in the best interests of the person who lacks capacity.

To help people, particularly those with learning difficulties, understand the Act and its impact on them and their lives, we have produced a range of documents written in Easy Read language, including a summary of the Act, a guide to the Code of Practice and summaries of consultation papers we have issued.

The Court of Protection will use court buildings which are accessible to those who may have mobility difficulties, and will have induction loops to aid those who have hearing difficulties, to ensure that they can fully follow court proceedings.

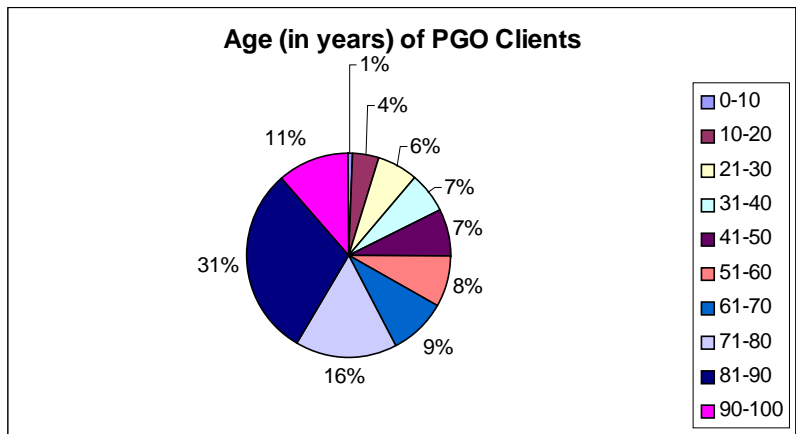
---

5 <http://www.dca.gov.uk/menincap/mcbfactsheet.htm>

## Age

The following table and graph show the ages of current clients of the PGO:

Age bracket (years)	Total no of clients
0-10	191
10-20	823
21-30	1260
31-40	1321
41-50	1473
51-60	1636
61-70	1767
71-80	3266
81-90	6070
90-100	2292



It is clear from these that a large majority (66.65%) of PGO clients are aged over the age of 60 and more than 50% are aged over 70. More than a third are aged over 80. We anticipate that this proportion will continue to be reflected when the Mental Capacity Act comes into force and the new Court of Protection is set up.

Although the conditions that may lead to a lack of capacity are found disproportionately in older people, and so the majority of applications are likely to be made on behalf of older people, the proposed Court Rules will directly affect those who lack capacity, not older people in general.

Measures will be taken to ensure that older people are able to access and take part in court proceedings comfortably, such as ensuring access to court buildings, providing facilities for those with hearing difficulties, or the timetabling of more frequent breaks where necessary. In addition, judges of the Court of Protection will

be empowered to hold hearings away from courtrooms (for example, in care homes or private homes) where necessary. These measures will also benefit those younger clients who, albeit rarely, will need to have cases brought before the Court of Protection. To this end, we hope to use judges who are used to dealing with vulnerable people and children already, who will have experience in these matters.

Given the nature of the proposals, and the safeguards and measures we will put in place, we believe that there is no evidence that people will be discriminated against, or disproportionately affected in an unfair way, on the basis of their age.

### **Caring responsibilities**

5.9 million people in England and Wales are estimated to be carers, including family and unpaid carers, and this number is likely to only increase, with an ageing population. The Carers UK report, *Could It Be You*, estimated that 3 out of 5 adults will, over the course of their lifetime, become a carer of a person with a long-term medical condition or disability. By 2037, 9.6 million people are expected to have caring responsibilities<sup>6</sup>.

The new Court of Protection has been conceived to support people who lack mental capacity, and their carers. Clearly the new Court of Protection will have an impact on those who care for people who lack mental capacity. The new Court, and the MCA as a whole, have been designed to help people who lack capacity and their carers. The Act provides legal clarity around what carers can and cannot do, and simplifies the often-confusing process those who care for people who lack mental capacity must go through to get the necessary authority to act in the best interests of the person they care for. Effective Court Rules will enable this to happen, and so the Court of Protection will have a positive impact on those with caring responsibilities.

### **Rural considerations**

The current Court of Protection has been an office of the Supreme Court, based in London, for many years, although since late 2001 it has also had a pilot hearing venue in Preston. The new Court of Protection will be a superior court of record with an increased number of hearing venues across England and Wales. A central administration office (which will be based in London) will support these courts.

---

<sup>6</sup> <http://news.bbc.co.uk/1/hi/uk/1551514.stm>

Final decisions have not yet been taken on the regional locations of the new Court. The intention, however, is to have selected hearing venues within the HMCS regions across England and in Wales from April 2007. Beyond 2007, there are longer-term plans to further increase the numbers of regional courts hearing cases, as they are needed.

There will be an impact on more rural areas, but this impact will be a positive one. The Court of Protection will use existing court buildings and facilities, allowing greater accessibility than is currently the case. Paper applications and a greater use of technology such as video-conferencing will further ensure that the rural impact of the Court Rules is limited, while maintaining accessibility.

### **Gender**

Figures from the PGO show that 60% (12,228) of their clients (i.e. people who lack capacity and require assistance with their financial affairs) are female, and 40% (8,051) are male<sup>7</sup>. The 2001 census shows that 48.67% of the general population is male and 51.34% are female.

The number of female clients of the Court of Protection is higher than one would expect, given the proportion of women in the general population, although this may be explained by the age of clients of the Court, as women on average live longer than men. The Court Rules themselves, however, will not target women generally. The impact on people on the basis of gender is expected to be largely neutral.

### **Gender identity and sexual orientation**

The Department for Trade and Industry has estimated that the number of lesbian, gay and bisexual people in Britain is between 5% and 7% of the population<sup>8</sup>. Leading rights groups, such as Stonewall, agree that this is a reasonable estimate. This can, however, only be an estimate, as hard data on sexual orientation is not currently officially collected.

The Act in general will be of interest to lesbian, gay, bisexual and transgendered (LGBT) people as it mandates that, as mentioned above, all decisions must be made in someone's best interests. These will include, where relevant, consideration of a person's sexual orientation and gender identity. Judges must, where relevant, take these into account when deciding what is in someone's best

---

<sup>7</sup> Discrepancies between figures for PGO clients by age, gender and religion are explained by the client choosing to withhold certain information.

<sup>8</sup> [http://www.dti.gov.uk/access/ria/pdf/final\\_ria\\_for\\_cp\\_bill.pdf](http://www.dti.gov.uk/access/ria/pdf/final_ria_for_cp_bill.pdf) Section 6.1, page 20

interests. For example, when deciding who is an appropriate person to act on behalf of someone who lacks capacity, judges should consider same sex partners, where relevant.

The JSB Equal Treatment Bench book provides guidance for judges on working with cases involving people who identify as LGBT, and Court of Protection judges will have regard to this.

The impact of the Court Rules and the new Court of Protection on LGBT people is expected to be small, but positive, making it more difficult for people to discriminate on the basis of sexual orientation or gender identity.

### **Flexible working arrangements**

The Court of Protection will hear cases during normal working hours. Outside of these times, an out-of-hours service will operate, similar to that in other courts in England and Wales, allowing people to approach the court in emergency situations.

Staff working in the Court of Protection will be employed by the DCA, and so will be subject to their terms and conditions. These include a commitment to work/life balance and flexible working arrangements. DCA's policy is that:

“All DCA employees, regardless of their position or length of service have the right to apply for flexible working. Employees may make an application whenever their circumstances require. Any reasonable request will be considered. “

The impact on people with flexible working arrangements is expected to be neutral.

### **Breakdown of costs and benefits**

#### **Legislative amendment**

##### **Benefits**

Economic benefits of setting up the Court of Protection will be limited. The Court of Protection and the Act as a whole have been created to give increased rights and protection to some of the most vulnerable people in our society, and as such are difficult to quantify in terms of economic value. Social benefits, however, will be various. A major benefit will be a greater understanding of procedures surrounding

decision-making on behalf of adults who lack capacity. The new Court of Protection will simplify and clarify the current judicial processes for dealing with adults who lack capacity, ensuring that all cases which relate to them are dealt with in one court, by judges who will become expert in this field. This greater clarity will benefit people who lack capacity, their families and carers, professionals who work with them and members of the judiciary.

Similarly this new, regional court will provide greater access to justice to people around England and Wales. In addition, cases will now be able to be heard by circuit and district judges, as well as high court judges. This will ensure that cases are heard at the most appropriate level, to minimise the stress on the person who lacks capacity and those who care for them.

The introduction by the Act of the presumption of capacity means that someone must be assessed in terms of their capacity to make specific decisions. This removal of the blanket label “incapable” will aid in de-stigmatising the situation in which people who may lack capacity find themselves.

### **Costs**

Work is progressing on the costs of the new Court and will be addressed as part of a separate consultation on Court of Protection fees and Office of the Public Guardian (OPG) fees later this year.

Assumptions have been made on probable workload for the new Court of Protection. Most likely estimates of cases coming to the new Court show a total of 12,000 cases a year. Of these, approximately 2,000 of them are expected to require an oral hearing, with the remaining 10,000 being dealt with on paper. Contingency arrangements will be in place, in the event that workload is significantly higher or lower than these estimates.

### **Environmental**

Environmental costs of the new Court of Protection are not expected to be significant. A greater regional presence will limit the amount of traffic to and from the capital, as cases will be able to be heard more locally. The Court of Protection will use existing buildings and facilities, minimising the environmental impact of the new court. Paper applications and a greater use of technology such as videoconferencing and e-communications will help to further reduce the environmental impact of the Court.

### **Small Firms' Impact Test (SFIT)**

In the course of drafting these Rules and considering the implementation of the Court of Protection, the Programme has consulted with stakeholders in a range of disciplines, including members of the judiciary and legal practitioners, health and social care professionals, members of voluntary sector organisations and individual carers. Workshops are planned to further seek views of legal practitioners and health and social care professionals around workload and impact of the Act and the Court of Protection.

These preliminary consultations have indicated that there will be an impact on small businesses, such as solicitors' firms, doctors' surgeries and independent care homes. However the impact on these areas is expected to be limited to understanding the changes the Act makes, and the role of the new Court of Protection, and so is not expected to be large.

Training for those small businesses affected on the role of the new Court of Protection, and the Act as a whole, is being undertaken by the Department of Health and the Welsh Assembly Government. The consultation paper that accompanies this PRIA will also be sent to small firms for their views and any impact that emerges from these will be carefully considered.

### **Competition Assessment**

An initial competition assessment test was undertaken, in line with Cabinet Office guidance. The main markets affected by the proposed Court Rules are the legal, social care (including care homes) and healthcare sectors. These markets are not dominated by a small number of large firms and are not characterised by rapid technological change. The proposed Court Rules would affect existing and new or potential firms in the same way, regardless of their size. As such, the new Court Rules are not expected to have an impact on competition.

### **Enforcement, Sanctions and Monitoring**

#### **Enforcement**

The Court of Protection will have a Visitors' Service, appointed by the Lord Chancellor, who may make reports to the Court about the person alleged to lack

capacity and may be directed by the Public Guardian to report on attorneys and court-appointed deputies. If the Public Guardian has concerns, it may refer the matter to the Court.

### **Sanctions**

The Court of Protection has all the powers and authority of the High Court (which includes the power to send someone to prison for contempt of court). Given the nature of the proposal, however, we do not expect there to be significant levels of non-compliance. Non-compliance may be punished by placing someone in contempt of court. Where an application to the Court has been judged to be unnecessary or 'frivolous', we are considering proposals under which costs may be awarded against the applicant.

Sanctions for not complying with an order of the Court will usually be limited to the revocation of the authority given by the Court. In certain circumstances, however, criminal charges may be brought for abuse or neglect of a person who lacks capacity. These are expected to be limited in number, and consequently not expected to have a significant impact on police or criminal court procedures.

Prior to appointment, property and affairs deputies will normally be required to lodge a security bond with the Public Guardian. In the event that the deputy does not comply with the terms of the order, he may forfeit this bond. This is expected to be rare and, indeed, has only happened 27 times in 3 years, out of 22,000 receiverships under the current Court of Protection.

### **Monitoring and review**

It is expected that management information will be collected in order to monitor the numbers and types of cases that come to the Court of Protection. In the event that it becomes necessary, in light of practice and experience, it is expected that Court Rules will be reviewed, updated and re-laid before Parliament for approval.

The Public Guardian will have an ongoing monitoring function in relation to decisions made by the Court. He may refer any causes for concern to the Court of Protection and, where appropriate, to social services or the police.

## Questionnaire

<p><b>Question 1</b></p>	<p><b>Do you agree with the proposed overriding objective for the new Court of Protection Rules?</b></p>
<p><b>Question 2</b></p>	<p><b>Do you agree that pre-action protocols would help resolve disputes that might come to the new Court of Protection?</b></p> <p><b>Are there particular matters that you consider should be addressed in rules or a practice direction or set out in protocols to govern action that should be taken before an application is made to the Court of Protection?</b></p>
<p><b>Question 3</b></p>	<p><b>Do you agree that the applications referred to at draft rule 23 cover the circumstances where applicants should not require permission to apply? Are there any other circumstances that should be covered?</b></p>
<p><b>Question 4</b></p>	<p><b>Do you agree with this core procedure for the new Court of Protection? Given that there will be training provided to the judiciary and to staff on the new rules and information provided to the public, do you see any difficulties that may arise for the judiciary or the court from the use of the new rules?</b></p>
<p><b>Question 5</b></p>	<p><b>Do you consider that the provisions for service, responding to service and as to the parties to the proceedings set out at rules 28 to 35 are the right ones?</b></p>
<p><b>Question 6</b></p>	<p><b>Do you consider that the approach set out above is the right approach for the range of cases that will come before the Court of Protection? If not, how do you consider that the person who lacks capacity should be involved in the proceedings?</b></p>
<p><b>Question 7</b></p>	<p><b>Do you agree that the matters set out at Rule 40 are the right matters to be covered by a report to the court?</b></p>
<p><b>Question 8</b></p>	<p><b>Are the provisions of Part 10 appropriate to new rules for the Court of Protection? Are there any other matters for which Part 10 should make particular provision?</b></p>

<p><b>Question 9</b></p>	<p><b>Do you agree that the Court should have these powers in relation to expert evidence? Are there any other matters in relation to expert evidence which should be provided for?</b></p>
<p><b>Question 10</b></p>	<p><b>Do you consider that the principle that Court of Protection hearings should be heard in public unless certain circumstances apply is the correct principle to apply?</b></p>
<p><b>Question 11</b></p>	<p><b>If your answer to the previous question is ‘yes’, do you consider that there are more circumstances or fewer circumstances under which the court might decide to hold all or part of a hearing in private under draft Rule 45?</b></p>
<p><b>Question 12</b></p>	<p><b>Are these the right provisions to make in the rules as to how appeal applications will be considered?</b></p>
<p><b>Question 13</b></p>	<p><b>Are there any exceptions which should be made to the proposal that all appeals from decisions of the Court of Protection, should require the grant of permission to appeal?</b></p>
<p><b>Question 14</b></p>	<p><b>Do you agree that the court should start from the principle of the parties funding their own costs in the new Court of Protection? Do you consider that any other particular principles should be set out in the court rules or in a practice direction?</b></p>

**Thank you for participating in this consultation exercise**

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>1.1. Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>1.2. Address</b>	
<b>1.3. Postcode</b>	
<b>If you would like us to acknowledge receipt of your response, please tick this box</b>	<input type="checkbox"/> (please tick box)
<b>Address to which the acknowledgement should be sent, if different from above</b>	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

---



---



---

## **How to respond**

Please send your response by **Friday 6 October 2006** to:

**Eddie Coleman**  
**Department for Constitutional Affairs**  
**Mental Capacity Implementation Programme**  
**5<sup>th</sup> Floor Steel House**  
**11 Tothill Street**  
**London**  
**SW1H 9LH**  
**Tel: 020 7210 0038**  
**Fax: 020 7210 0007**  
**Email: eddie.coleman@dca.gsi.gov.uk**

### **Extra copies**

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.dca.gov.uk/index.htm>

### **Publication of response**

A paper summarising the responses to this consultation will be published by end January 2007. The response paper will be available on-line at <http://www.dca.gov.uk/index.htm>

### **Representative groups**

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

## **Confidentiality**

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## **The Consultation Criteria**

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

## **Consultation Co-ordinator contact details**

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at [consultation@dca.gsi.gov.uk](mailto:consultation@dca.gsi.gov.uk)

Alternatively, you may wish to write to the address below:

**Laurence Fiddler  
Consultation Co-ordinator  
Department for Constitutional Affairs  
5th Floor Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper.

© Crown copyright  
Produced by DCA  
[July/2006]  
[CP 10/06]