



Ministry of
JUSTICE

Court of Protection Rules

Partial regulatory impact assessment

Mental Capacity Implementation Programme

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Purpose and intended effect

Objective

The Court of Protection Rules 2007 (“the rules”) set out the practice and procedure to be followed in the Court of Protection and have the overriding objective of enabling the court to deal with a case justly, having regard to the principles contained in the Mental Capacity Act 2005 (“the Act”).

Background

The Act provides the framework for making decisions and acting on behalf of individuals who lack capacity to make those decisions for themselves. The Act establishes a new specialist court, to be known as the Court of Protection (“the new court”). The rules are made under section 51 of the Act, which provides for rules of court to govern the manner in which proceedings are conducted in the new court.

The new court has a jurisdiction to make decisions and to appoint people (known as deputies) to make decisions on behalf of people who lack capacity. The current Court of Protection (“the current court”) has jurisdiction over the property and affairs of people lacking capacity, while the new court will also have the jurisdiction to make decisions in relation to personal welfare. Personal welfare decisions are currently made under the inherent jurisdiction of the High Court. The court will also be able to make a ruling as to whether someone has the capacity to make their own decisions or not.

When reaching any decision the court must apply all of the principles set out in section 1 of the Act and must decide the matter before it in the best interests of the person lacking capacity.

The new Court of Protection begins operating and the rules come into force on 1 October 2007, at which time the current court ceases to exist.

The Act recognises that 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. It is expected that where someone lacks capacity to make particular decisions, the vast majority of those decisions will be able to be made in the person’s best interests without needing to come to the new

court. An application to the court may be necessary for particularly difficult decisions, disagreements that cannot be resolved any other way, or situations where on-going decisions will need to be made. An order of the court will usually be necessary for matters relating to the property and affairs of people who lack capacity to make specific financial decisions for themselves.

The Mental Capacity Act 2005 Code of Practice provides guidance to all those working with and/or caring for adults who lack capacity, including family members, professionals and carers. It describes their responsibilities when acting or making decisions with or on behalf of people who lack the capacity to do so themselves. The Code also provides guidance on the best ways to settle disagreements and disputes about issues covered in the Act.

Rationale for government intervention

Property and affairs cases in the current court proceed under the Court of Protection Rules 2001 and personal welfare cases in the High Court proceed under the Civil Procedure Rules 1998 (“the CPR”). The new rules are necessary to provide a process equally appropriate for cases relating to property and affairs heard in the current court, and personal welfare cases heard under the inherent jurisdiction of the High Court.

Consultation

Within government

The rules have been developed in consultation with the Public Guardianship Office (PGO). The Department of Health and the Welsh Assembly Government have also been consulted.

Public consultation

A consultation process on the draft rules was conducted from 17 July to 6 October 2006. The consultation paper invited comments both in relation to the overall framework of the draft rules as well as individual draft rules. The consultation paper included a draft partial regulatory impact assessment.

The Mental Capacity Implementation Programme stakeholder database is made up of over 1100 stakeholders. All stakeholders were made aware of the consultation through the bimonthly electronic newsletter and could download the consultation document or request a paper copy.

The Mental Capacity Implementation Programme also organised events for stakeholders in Leeds, Cardiff and London in October 2006. Information about the events was circulated via the newsletter and over 250 stakeholders attended. The purpose was to continue engaging the stakeholder community, to provide information on the implementation of the Act and to listen to any issues and concerns stakeholders had. The events were also used to draw attention to the consultation on the Court of Protection rules.

A total of 39 formal responses were received from a range of organisations and individuals including voluntary groups and representative bodies (on behalf of people who lack capacity, families and family carers), legal and health care professionals, local and health authorities, financial institutions, regulatory bodies and members of the public.

Two responses to the draft partial regulatory impact assessment noted that it did not contain a legal aid impact assessment, or comment on access to legal aid in the new Court of Protection. The department conducted a separate consultation on bringing certain Court of Protection cases within the scope of legal aid between 30

November 2006 and 2 February 2007. The legal aid consultation paper is available on the archived Department of Constitutional Affairs web site:

<http://www.dca.gov.uk/consult/court-protection-cases/cp2606.htm>

In addition to the public consultation, an Informal Rules Group comprising members of the judiciary and legal profession with experience of the operation of the current court and the High Court have provided regular advice on the development of the rules, particularly with respect to their practicality and workability.

Options

Option 1: Do nothing

If we were to do nothing the Court of Protection would come into existence when the Act comes into force on 1 October 2007 and the current court would cease to exist (as per section 45(6) of the Act). The new court would begin operating without appropriate rules to govern the manner in which proceedings are conducted.

The Court of Protection Rules 2001 would not be appropriate for the expanded jurisdiction of the new court, which has the jurisdiction to make decisions in relation to personal welfare in addition to the jurisdiction the current court has over the property and affairs of people lacking capacity.

The procedure and practice of the new court would have to be governed by practice directions and guidance, which are limited in scope as to what they can address.

This option therefore would have an adverse impact on the ability of the new court to operate and provide appropriate services to people lacking capacity, their families and carers. In order to meet the needs of a new and accessible court covering both property and affairs and personal welfare jurisdictions, we believe that new rules are necessary and that doing nothing is not a suitable option.

Option 2: New Court of Protection Rules (recommended option)

Section 51(1) of the Act provides for the Lord Chancellor to make rules of court with respect to the practice and procedure of the court.

The new rules have been developed to be suitable for all types of cases that could potentially go through the new court. The rules adopt many of the provisions of the CPR, along with certain rules relating to family proceedings and some of the rules of the current court, which have been tailored, where necessary, to accommodate the needs of the new jurisdiction.

Having rules of court to govern the manner in which proceedings are conducted is in line with other mainstream courts and ensures that the new court operates in a way that is compliant with Human Rights legislation. The new rules ensure that

court processes are open and transparent. They provide certainty to applicants about the way in which applications are made and assurance that cases will be dealt with expeditiously and fairly in line with the objectives set out in the rules.

Costs and benefits

Sectors and groups affected

The main people affected by the new rules are people who lack capacity, their families and carers. Mental capacity issues potentially affect everyone. At some point in their lives millions of people in the UK lose their ability, temporarily or permanently, to make decisions that affect their lives – either through illness, disability or injury. 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 learning disabilities. In Wales over 13,000 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; and
- up to 6 million family and unpaid carers and people involved in health and social care provide care or treatment for people who lack capacity.

In most cases concerning personal welfare matters the principles and provisions of the Act will be enough to help people to make decisions in the best interests of a person who lacks capacity or find ways of settling disagreements about such decisions. An application to the court may be necessary for particularly difficult decisions, disagreements that cannot be resolved any other way, or situations where on-going decisions will need to be made.

An order of the court will usually be necessary for matters relating to the property and affairs of people who lack capacity to make specific financial decisions for themselves.

Other sectors and groups affected will be medical and healthcare professionals, legal practitioners, organisations in the voluntary sector and local authorities where they deal with people who lack the capacity to make particular decisions, their families and carers. The banking and financial sectors will be affected where the Court of Protection makes a decision relating to the financial affairs of a person who lacks capacity.

Stakeholders from these sectors have been involved during the implementation programme. Representatives from a wide variety of voluntary sector organisations, banking and financial service professionals and legal practitioners have attended events to discuss the Act and the services it establishes. Local Authority representatives attended a workshop in February 2006, to discuss the impact that the Act – and particularly the Court of Protection – will have on them. Overall the impact is expected to be positive because of the clear legal framework that the Act provides around making decisions for a person who cannot make particular decisions for themselves.

The Act also establishes a new statutory office holder, the Public Guardian. The functions of the Public Guardian set out in the Act include creating and managing a register of court-appointed deputies and supervising deputies in line with the terms of the order appointing them. The new court will be able to request reports from the Public Guardian 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 rules make provision in relation to the Public Guardian to clarify how certain matters involving the Public Guardian are brought before the court.

Equality Impact Assessment

The Race Relations Amendment Act 2000, Disability Discrimination Act 1995 and Equality Act 2006 all include statutory duties that require Government departments to eliminate unlawful discrimination and to promote equality of opportunity.

The potential impacts of the Rules have been assessed on the grounds of:

- race;
- disability;

- gender;
- sexual orientation;
- age;
- religion or belief; and
- caring responsibilities.

In order to assess the impact of the rules on the specified, diverse groups a partial regulatory impact assessment was included in the consultation document on the Court of Protection Rules.

The MCIP stakeholder database includes, for example, approximately 320 stakeholders representing ethnic minority and faith groups, 70 stakeholders representing people with learning disabilities and 50 stakeholders representing older people. All stakeholders were made aware of the consultation on the draft Court of Protection Rules through the bimonthly electronic newsletter and could download the consultation document or request a paper copy.

MCIP stakeholder events in Leeds, Cardiff and London in October 2006 were also used to draw attention to the consultation on the Court of Protection rules.

An event specifically for black and minority ethnic (BME) stakeholders was held in London in May 2006. Over 70 organisations were invited and 23 attended the event. It was aimed at organisations representing BME communities, particularly organisations working with people who could be directly affected by the Act. The purpose was to increase awareness of the Act, hear views on how its implementation might effect BME communities, and to encourage involvement and ongoing contact with the implementation programme team.

There was no evidence from stakeholders or elsewhere to suggest that the rules would have an adverse impact on any group. The impact of the court is expected to be positive overall. As with all decision-makers, the court must have regard for the principles of the Act and must take a wide range of factors into consideration in determining a person's best interests. These factors include the person's wishes, feelings, values and beliefs, and may be reflected by, for example, their culture, religion, beliefs or sexual orientation. Decision-makers must take into account, if it is practical and appropriate to consult them, the views of family members, partners, carers and other relevant people before reaching a decision about what is in the best interests of a person who lacks capacity. The rules set out the practice and

procedure to be followed in the new Court of Protection and help to embed the principles contained in the Act.

Race equality impact assessment

Stakeholders representing BME groups did not raise any concerns about the impact of the Court of Protection Rules. Overall the court is expected to have a positive impact – BME people who might lack capacity and their families and carers are seen to be just as likely to benefit from the court as other people.

Comments received more generally from BME stakeholders about the Court of Protection and the Act included the need to provide information about the Act and the services introduced by it in the most accessible ways possible to engage with the diverse groups affected. During the implementation programme a summary of the Act, a leaflet and a series of five booklets for people lacking capacity, their families, carers and professionals have been published in a variety of languages and formats to ensure the information is accessible.

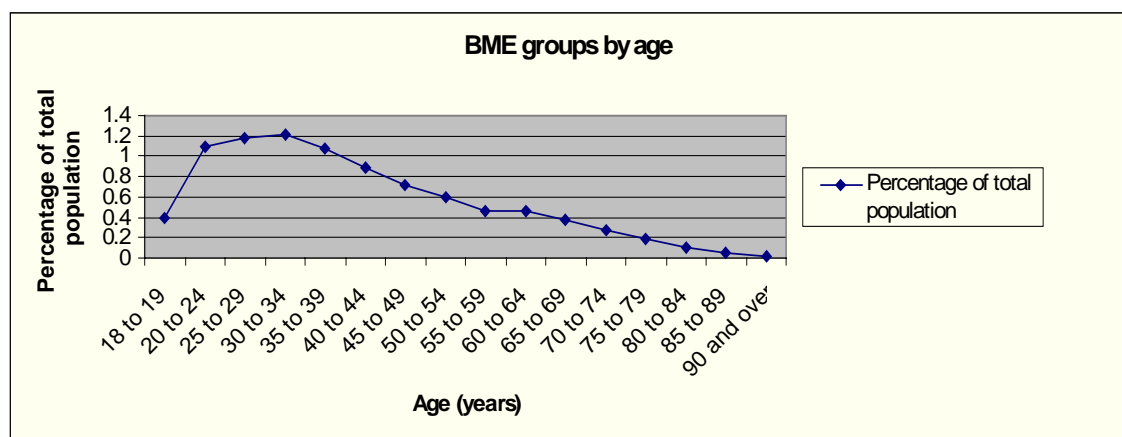
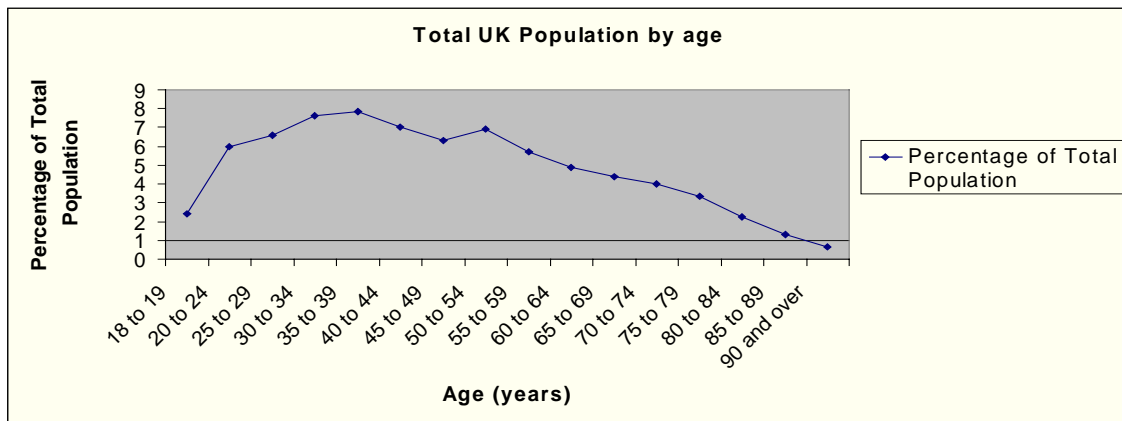
Where practicable, other measures have been put in place to ensure the services provided under the Act are accessible. For example, the Office of the Public Guardian will have a customer contact centre for people with enquiries about court services and making an application to the court. Contact centre operators will be given diversity awareness training as part of their core induction training, which may be supplemented by other specialised training.

Training for judges and court staff includes training on cultural awareness and diversity. Judges who sit in the Court of Protection, as in other courts in England and Wales, have to have regard to the Equal Treatment Bench Book produced by the Judicial Studies Board and provided to the judiciary, which gives information and guidance on diversity issues including race.

While the impact of the new court is expected to be positive overall, PGO figures do show that some BME groups are less likely to involve the current court in decision-making. The 2001 census shows that 12.5% of the population for England and Wales are from BME groups, while PGO figures show that 7% of current Court of Protection clients are from BME groups (where an ethnicity has been recorded). The white English and Welsh population forms 87.5% of the population, and 93% of current clients.

This under-representation may in part, be explained by the correlation between age and lack of mental capacity, and the lower concentration of people of older age

in BME groups than is present in the general population. The following charts show the total UK population by age groups and the UK BME population by age groups. Data comes from the 2001 census.



There is a higher concentration of people of working age in BME groups than is present in the general population. This may partly be explained by patterns of migration – people who immigrate to a country tend to be of working age, or children accompanying their parents. The higher concentration of people of working age in BME groups is likely to change, albeit slowly, to reflect the pattern of the ethnic majority as earlier ‘waves’ of immigrants who have settled in the UK reach retirement age.

Ethnicity statistics will be collected in order to monitor the diversity of court users. The results from monitoring will assist the court to tailor its services to meet different customer needs. Where a particular group is not using the services, this can be investigated and, where practicable, steps taken to make the service more accessible.

Disability equality impact assessment

Stakeholders representing people with disabilities did not raise any concerns about the impact of the rules. The impact of the Act on people with disabilities is expected to be positive overall because of the principles set out in the Act, such as the presumption of capacity, and the need to take all practicable steps to help a person make their own decisions.

In general, stakeholders noted the importance of making information about the Act and the services provided by the Act accessible to people with disabilities. A summary of the Act has been produced in Easy Read, which, in particular, will assist people with long term cognitive difficulties such as learning disabilities and dementia to understand the Act. In addition, as part of the suite of information booklets on the Act there is a more narrative, pictorially based storybook in Easy Read for this audience. MCIP also produced an Easy Read version of the bi-monthly e-newsletter, which provided information and updates about the implementation of the Act and publicised consultation papers and stakeholder events.

The Office of the Public Guardian will have a customer contact centre (as the PGO does now) to provide information about court services and to assist people making applications. People with speech or hearing difficulties with access to a text phone will be able call the customer contact centre text phone for assistance. Operators will be given diversity awareness training as part of their core induction training, which may be supplemented by other specialised training.

Training for judges and court staff will include training on diversity issues and the Equal Treatment Bench Book produced by the Judicial Studies Board for the judiciary has information and guidance for judges on disability issues.

Many cases before the new court will not require a hearing but will be considered on the papers. Where hearings are required, the Act allows them to be held away from courtrooms (for example, in care homes or private homes) to help make the court accessible. The court can allow a witness to give evidence through a video link or through other means.

Court forms will have a section where parties to proceedings can advise if they require any special assistance or facilities to attend a hearing, for example, because of a physical or hearing disability. Where it is known that a party has a disability, measures will be taken to ensure that they are able to access and take part in court proceedings. There is a directory of courts with facilities for people

with disabilities, such as wheelchair access, toilet facilities and a loop system for people with hearing difficulties.

Gender equality impact assessment

Very few comments have been received from stakeholders about the impact of the Act on groups by gender. No concerns were raised about the impact of the rules.

Figures from the PGO show that women are more likely to be subject to applications to the Court of Protection than men are. Statistics show that 60% of clients of the current Court of Protection (i.e. people who lack capacity and require assistance with their financial affairs) are female, and 40% are male. The 2001 census shows that 51% of the general population is female, and 49% is male. The number of female clients is higher than would be expected 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. There has been no evidence from stakeholders or elsewhere to suggest that once cases come before the court, it will have an adverse impact on groups by gender.

Sexual orientation equality impact assessment

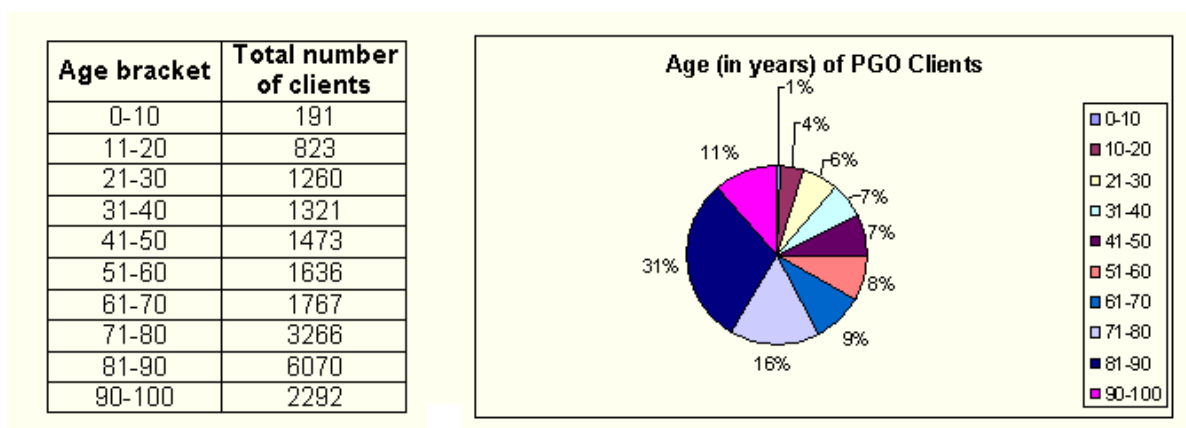
Very few comments have been received from stakeholders about the impact of the Act on groups by sexual orientation. No concerns were raised about the impact of the rules.

The impact of the Act on groups by sexual orientation is expected to be positive overall, because of the principles of the Act and the need to take a wide range of factors into consideration in determining a person's best interests. The Act establishes the right for partners to be consulted on decisions affecting a person who lacks capacity and what might be in that person's best interests. People with a right to be consulted include anyone engaged in caring for a person lacking capacity or interested in their welfare.

Age equality impact assessment

In general, stakeholders representing older people welcome the Act because of the principles in the Act and the introduction of safeguards that will help protect people who lack capacity from abuse. No concerns were raised about the impact of the rules on groups by age.

The Act and the services introduced by the Act are likely to have an increased impact on older people because of the correlation between increased age and a lack of mental capacity. Recent figures from the PGO show that 67% of their current clients (i.e. people who lack capacity and require assistance with their financial affairs) are aged over 60, and 58% are aged over 70. More than a third of their clients are aged over 80. The following table and graph show current clients of the PGO grouped by age.



It is likely that older people will continue to make up the majority those who are subject to Court of Protection applications because of the link between dementia and age. Dementia becomes an increasing risk with age rising from a 2% chance at 65 years to 20% at 80 years. Dementia currently affects over 700,000 people with the UK, and by 2010 this is expected to rise to 850,000.

Religion or belief equality impact assessment

The impact of the Act on people with particular religious or other beliefs is expected to be positive overall because of the principles of the Act and the need to take a wide range of factors into consideration in determining a person's best interests, including the person's wishes, feelings, values and beliefs. No concerns were raised about the impact of the rules groups with religious or other beliefs.

The Court of Protection must consider a person's religious or other beliefs in deciding what is in their best interests. The court will be responsive to any needs relating to a person's religion and beliefs such as any need for prayers at specific times of day, access to religious rites and ceremonies, specific dietary requirements, restrictions relating to the handling of money or placement in single-sex care facilities. Training for judges, court staff and customer contact centre

operators will include training on diversity issues and the Equal Treatment Bench Book provided to the judiciary has information and guidance for judges on religious or other beliefs.

Statistics on religion will be collected in order to monitor the diversity of court users. The results from monitoring will assist the court to tailor its services to meet different customer needs. Where a particular group is not using the services, this can be investigated and, where practicable, steps taken to make the service more accessible.

Caring responsibilities

The Act is expected to have a positive impact overall on people who care for adults who lack capacity. The Act as a whole is designed to help carers by providing a clear legal framework on how to act and make decisions on behalf of people who lack capacity to make particular decisions for themselves. All decision-makers, including the Court of Protection must take into account, if it is practicable and appropriate to consult them, the views of anyone engaged in caring for a person who lacks capacity in determining what is in that person's best interests. No concerns were raised about the impact of the rules groups with caring responsibilities.

Costs and benefits of new Court of Protection Rules

Economic benefits of the rules will be limited. The new court and the Act as a whole have been created to give increased 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 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

It is estimated that the new court will consider approximately 17,000 cases annually. The vast majority of cases are not expected to require an oral hearing but instead will be dealt with on the papers. Contingency arrangements will be in place, in the event that workload is significantly higher or lower than estimated.

Small Firms' Impact Test

The Mental Capacity Implementation 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 sought views of legal practitioners and health and social care professionals around workload and impact of the Act and the Court of Protection.

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.

Competition Assessment

An initial competition assessment test was undertaken, in line with Cabinet Office guidance. The main markets affected by the new Court of Protection 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 new Rules would affect existing and new or potential firms in the same way, regardless of their size. As such, the new 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. The new Rules make provision for enforcement of court orders.

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', 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 but may include committal to prison. 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 and updated.

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.

