

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

Response to Consultation

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**Response to consultation carried out by the Department
for Constitutional Affairs.**

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Introduction

This document is the post-consultation report for the consultation paper, 'Draft Court Rules: Mental Capacity Act 2005 Court of Protection Rules'.

It will cover:

- the background to the report;
- a summary of the responses to the report;
- a detailed response to the specific questions raised in the report; and
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **the Communications Team** at the address below:

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Background

The consultation paper 'Draft Court Rules: Mental Capacity Act 2005 Court of Protection Rules' was published on 17 July 2006. It invited comments on draft rules of court to govern applications to the new Court of Protection.

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 to take particular decisions for themselves. 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 a person's '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 governed by 'rules of court' and 'practice directions' made under the authority of the Lord Chief Justice with the agreement of the Lord Chancellor.

The consultation paper invited comments on the main provisions of draft rules for consultation. Comments both as to the overall framework that the draft rules provided and on individual rules were invited. The consultation period closed on 6 October 2006 and this report summarises the responses, including how the consultation process is influencing the further development of the rules of court for the new Court of Protection.

A list of respondents is at Annex A.

Summary of responses

The consultation on the draft rules of court for the new Court of Protection ran from 17 July to 6 October 2006. A total of 39 formal responses were received to the consultation paper. Responses were received from a wide range of organisations and individuals. Those who responded can be broken down as follows:

Respondents	Number	Percentage %
Financial sector	1	3
Health care professionals (including individuals and representative groups)	3	8
Legal profession (including judges, individual practitioners, firms and representative groups)	14	36
Local authorities and health authorities	6	15
Members of the public	3	8
Peers	1	3
Public Guardianship Office staff	4	10
Regulatory bodies	1	3
Voluntary groups/ representative bodies on behalf of people who lack capacity, families and family carers	6	15

Once the consultation period ended, all responses were analysed. Responses were analysed to find out if respondents were in favour of the proposals where this was the question asked. We were interested in seeing where consensus lay on key issues as to how the new Court of Protection should operate. We were also interested in capturing the points that were made perhaps only once or twice but that, nevertheless, highlighted a particular aspect of a rule needing consideration.

Where we were seeking further opinion or information, we have summarised the range of different views received to that particular question. As a general rule, we have not attributed comments. We have often included a quotation from or

summary of the different views received. We found that this was helpful in illustrating the range of comments and viewpoints held in respect of each question asked in the consultation paper. Square brackets in a quotation indicate that we have added wording to aid understanding of the point being made. Where a quotation refers to “P” that is the term used in the Act to describe the person who lacks capacity.

Over half of the responses received, 21, addressed all of the 14 questions that were set out in the consultation paper. 18 further responses either focussed on issues that were of particular interest to them in respect of the rules of court or on particular draft rules upon which they wished to express views.

The questions that received the highest number of responses or comments were question two about pre-action protocols, questions 10 and 11 on whether hearings should be in public or private and question 14 on the rules in relation to costs.

One response focussed on the safeguards that it is proposed should be incorporated into the Act by the Mental Health Bill 2006 following the European Court of Human Rights decision in *HL v UK* (5 October 2004), commonly known as the ‘Bournemouth’ case. The draft rules were not intended to cover the future Bournemouth proposals which are contained in the Mental Health Bill 2006 currently undergoing Parliamentary scrutiny. It was helpful, nevertheless, to receive views on how rules might provide, in future, for Bournemouth authorisations to be reviewed by the Court of Protection.

Responses to Specific Questions

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

22 of the 39 respondents either answered this question or commented on the overriding objective set out at draft rule 3 of the consultation paper.

All those who commented broadly agreed that the rules should have an overriding objective.

Seven respondents also made additional comments, with a few suggesting additions to the overriding objective. One proposed adding reference to the Human Rights Act 1998 within the overriding objective; another suggested that the overriding objective should refer to the speed with which cases should be dealt with by the court. A further respondent said that, in dealing with cases justly, the court should be looking at what was just for the person who lacks capacity rather than for the parties to the matter.

Two made points about the application of the overriding objective. One noted that, as the definition differed from that of the overriding objective within the Civil Procedure Rules 1998, the differences might be “...*likely to invite forensic interpretation and comparison.*”. One noted that the rules on serving the court application on people with an interest in it might lead to an increased number of parties to a case, some without legal representation. They thought that greater numbers of parties involved might lessen practical co-operation in furthering the objective and any sanctions that might be considered for failure to do so should take this into account.

Question 2: Do you agree that pre-action protocols would help resolve disputes that might come before 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?

27 out of the 39 respondents answered this question or commented on whether there should be provision for pre-action protocols in the rules of court for the new Court of Protection. 20 respondents' views indicated that they saw pre-action protocols as being useful in some form. Three respondents commented that they would not find them useful or limited their comments to raising circumstances where they considered that pre-action protocols would not be useful.

The majority of respondents considered that pre-action protocols in some form may help to clarify the issues which the court must resolve. However, a large number of respondents who held this view also raised the need for their flexible or selective use in cases before the new Court of Protection, because of the nature of the cases coming to the court. They pointed to applications or circumstances where pre-action protocols would not be of value.

In particular, respondents made the point that many property and affairs cases that currently come to the Court of Protection, and which will also come to the new court, involve matters which are non-contentious. They are matters where a court order is needed in any event to give authority for the future handling of the person who lacks capacity's financial affairs. Respondents questioned the value of pre-action protocols for these cases:

“Pre-action protocols may be of some use where there is a serious dispute for the court to adjudicate on. But many applications to the court may not be contentious, especially subsequent applications from LPA/ EPA attorneys/ deputies seeking an extension of their powers.”

“Pre-action protocols may help to clarify the issues which the Court of Protection must resolve. In many (perhaps most) cases, proceedings will need to be issued in any event..... For this reason we take the view that the pre-action protocol in the Court of Protection should allow flexibility in the detail of pre-action correspondence which is required and the attitude of the court in the event of failure to enter into substantial pre-action correspondence.”

Various respondents noted that any pre-action protocols needed to be simple enough to be followed by the many people who come to the current Court of Protection (and who will come to the new court) without legal representation or by a person disputing that they lack capacity.

“Yes, these pre-action protocols will act as a useful shield against spurious or unjustified applications to the court. However they will need to be straightforward, easy to complete and couched in terms which can be understood by a lay applicant.”

Others were keen that pre-action protocols should be flexible enough not to delay urgent cases or cases where a person who lacks capacity is at risk of harm.

“We accept that a pre-action protocol for the Court of Protection is more likely to be relevant and useful in healthcare and personal welfare cases where there is genuine disagreement and where permission is needed to apply to the court. It will however be necessary to include provisions in the protocol that cater for serious healthcare and treatment decisions where a declaration is required from the court as a matter of urgency... in such cases a fast-track procedure may be necessary to avoid any delay in the case coming to court.”

Individual respondents made the following further points:

- querying whether mandatory compliance with a pre-action protocol would work when the issue of whether the person who lacks capacity was to be a party to the application was not decided until the directions hearing;
- noting that it was important that attorneys and carers using the court received simple guidance on court processes; and
- stating that pre-action protocols should make it clear that resolving a dispute is not necessarily about coming to a consensus or compromise but about the best interests of the person who lacks capacity.

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?

This question sought respondents' views as to whether, in addition to those circumstances set out at section 50(1) of the 2005 Act, the following (as set out at draft rule 23) should not need the court's permission to bring an application:

- the Official Solicitor;
- the Public Guardian;
- applications concerning Enduring or Lasting Powers of Attorney; and
- applications relating solely to the property and affairs of the person who lacks capacity.

24 respondents answered this question or commented on the issue. Of those, 14 agreed with the provisions in the draft rules as set out above. 13 respondents, including many who agreed with the provisions of draft rule 23, also suggested further circumstances where the court's permission should not be required.

As noted above, 13 of those who commented on this part of the rules suggested further circumstances where the court's permission should not be required. Further circumstances where more than one respondent suggested that the court's permission should not be needed were:

- for urgent health and welfare matters;
- for applications concerning the giving or withholding of urgent medical treatment;
- where any person had reported abuse or where a local authority suspects that a vulnerable person who lacks capacity might be being subjected to physical or sexual abuse;
- those applying to be deputies as well as those already appointed as deputies;
- local authorities; and
- for cases involving issues of deprivation of the person who lacks capacity's liberty.

Other circumstances suggested by individual respondents were:

- carers of adult children who have been without capacity since birth;
- banks and other financial institutions; and
- family members making applications.

Respondents also made comments about the permissions process:

- noting that waiving the requirement for permission to apply for all applications about the property and affairs of a person who lacks capacity was wider than the position in the current Court of Protection and, therefore, too wide;
- suggesting that a report on whether the person who was the subject of the application to the court lacked capacity to take the decision concerned should be filed with the court at the outset;
- suggesting that the application forms should be clear and simple and the rules should make it clear whether a special application form was needed for permission or not and whether the same application form was to be used for application for a single order and for a deputyship; and
- suggesting that the court could have a discretion to waive the need for permission in exceptional cases.

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?

23 respondents answered this question or commented on the issue. 13 respondents agreed with the core procedure. 13 respondents, including some who agreed with the core procedure, raised a range of further matters which they considered should be covered by the core procedure.

13 out of the 23 respondents who commented on this part of the rules agreed with the core process. Where respondents provided their views on the core process their views ranged over many different aspects of the process:

Four welcomed or commented on the necessity of the plans and resources for training of judiciary and staff:

“We agree with the core procedure set out. Training is clearly necessary. As with any new procedure, some difficulties will arise in practice which will have to be resolved by judicial decisions.”

“We are concerned that the judges of the Court of Protection will need substantial training to deal with the wide remit of the court - especially when deciding healthcare and personal welfare cases.”

Some respondents thought that the informal approach of the current Court of Protection would be lost:

“We accept that the new court requires a unified set of rules. We further welcome the fact that the judges will have training in and gain specialist experience over time with the new rules.... We fear, however, that many of the advantages of the current Court of Protection will be lost under the new system: in particular the current advantages of speed (subject to the resources allocated to the new court), ease of use (subject to the personnel to be involved) and accessibility.”

Respondents also made a range of other points:

- for clarity, the rules should explicitly state: that an applicant may apply for a single order or to be appointed as a deputy; the need to provide evidence

that the person who is the subject of the application lacks the capacity to make the decision in question; that the applicant should be required to set out that the decision is in the best interests of the person who lacks capacity and that they have worked through the checklist of factors in section 4 of the Mental Capacity Act and other relevant factors;

- there was a need to distinguish between first applications and subsequent applications to the court by a deputy or attorney as subsequent applications might often be relatively simple and non-controversial;
- deciding to move away from using the current process of nominated officers underestimated the volume and diversity of the work they currently do;
- the timescales provided for were incorrect. One respondent said that the provisions for directions within four weeks was wrong for disputes over life-sustaining treatment;
- parties in person who were disputing a decision by a NHS Trust would find it difficult to do so without legal representation and, without it, might have their case challenged on a technicality by the trust involved;
- the standard written directions that the current Court of Protection makes would also be useful for the new court in the future; and
- it should be possible to submit papers electronically.

Question 5: Do you consider 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?

22 respondents answered this question on what the new rules of court should say about how applicants should serve their court application on others with an interest or commented on the issues. 13 generally agreed that the provisions were the right ones.

Where respondents commented, most comments focussed on the provisions for deciding who should be parties to or notified of an application to court. Four respondents considered that the provisions for relatives to be parties should be considered further. There were concerns that the rules allowed the applicant to make subjective or uncertain decisions as to who should be the parties. This could mean that a multiplicity of parties could result in some circumstances or that key people in the life of the person who lacks capacity could be omitted.

One proposed that *“...a list should be provided in the draft rules, similar to the nearest relative list set out in section 26 of the Mental Health Act 1983, to clearly define which relatives should be served.”*

Another suggested that the rules should define relatives to include civil partners. Also, that the rules for service relating to Lasting Powers of Attorney should provide, as the general service rules did, that the applicant should serve a copy of the application on any other person that they reasonably considered had an interest.

Three did not consider that the provisions for service, responding to service and as to the parties were the right ones, considering that:

- the rules were cumbersome and could cause potential delays;
- welfare attorneys would need guidance on what was an acceptable address for service; and
- the current Court of Protection was more informal and a more formal structure could add to cost and time taken.

Three commented on the timetable envisaged by the rules:

“The rules are silent as to the period of validity of an application once issued and the date by which the application must be served. Service on relatives may be protracted if the qualifying ones are many and/ or need to be traced. A timetable for service ought to be considered. Rule 39 sets the first direction hearing for within 4 weeks of the date of issue of the application, unless otherwise directed by the court. This indicates a degree of promptness of service is envisaged. Otherwise, the rules are the right ones.”

“Consider relaxing the 14 days [to respond to being served with information about an application] for P who may need assistance to file and have difficulty in filing within 14 days.”

“...there may be circumstances where a 7 day time period for serving the application on the person who lacks capacity may not be practical. Also there may be some clients who will be unable [to] understand the implications regardless of how it is presented.”

Two respondents stated that the court should be able to consider issues relating to disputing the court’s jurisdiction at all stages of deciding the application and not just in the first 14 days as the draft rules provided.

One questioned the need to serve the person who lacks capacity with lower level or subsequent applications. They suggested that the rules should tailor the provisions for service dependent on the nature of the case and should not need the court to consider every time.

Another commented more generally that the rules made the right provisions for service but that they were more complex than for the current Court of Protection so could discourage lay applicants.

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?

The consultation paper proposed that the new Court of Protection should be able to make a range of arrangements for involving the person who lacks capacity who is the subject of the application in the court process. It said that such arrangements might range from notifying the person who lacks capacity that an application has been made, to the court seeking an impartial report on their circumstances, to joining them as a party, represented by a litigation friend as necessary.

23 respondents answered this question or commented on the issue. 12 agreed with the consultation paper proposals. 5 respondents did not agree with the proposals as to how the person who lacks capacity should be involved in proceedings.

As noted, 12 respondents agreed with the proposals set out in the consultation paper. Where they gave reasons, they believed that the consultation proposals gave the flexibility to take account of the particular circumstances of the person who lacks capacity and the nature and seriousness of the court decision sought.

“We feel that the flexibility, and in particular the provision of an impartial report provided to the court, will allow the person who lacks capacity appropriate protection without the distress usually evoked by court proceedings.”

“Each case must be fact specific. I can recall cases in practice where patients were distressed by involvement and others who were angry at not being sufficiently involved. Courts should control subject to professional advice.”

“In general, we favour the approach adopted in private law children applications, where the child is not made a party to the action, but their interests can be represented if the court thinks it appropriate.”

“The need for service [on the person who lacks capacity] should be considered in relation to the nature of the decision and the degree of incapacity to make that decision, and it would be helpful if the rules made this clear, rather than the court considering each time.”

5 respondents did not agree with the proposals as to how the person who lacks capacity should be involved. Their reasons focused on ensuring the centrality of the person who lacks capacity and their best interests to the proceedings:

“We believe that in straightforward applications to become a financial deputy or for a single order in relation to finances where there is no dispute it may be adequate to serve the individual with notice as under the current system. In all other cases we consider it is vital that the individual concerned is at the heart of the case and we do not see how this can happen if the individual themselves is not considered to be a party to the case. They are after all the primary party and the reason why the case is being heard.”

“... as a general presumption the person who lacks or is alleged to lack capacity should always be joined as a party to the proceedings in cases before the new Court of Protection. This is an important principle because the ‘patient’ will always be at the centre of a Court of Protection case.... We accept that there will be undisputed financial applications for single orders where, in order to avoid unnecessary delay and costs, the person who lacks capacity would not need to be joined. However this does not apply to welfare cases where the ‘patient’ should always be joined and be given the opportunity of participating through the appointment of a litigation friend.”

Question 7: Do you agree that the matters set out in rule 42 are the right matters to be covered by a report to the court?

23 respondents answered this question or commented on the matters to be covered by a report to the court under section 49 of the Mental Capacity Act 2005.

18 respondents agreed with the proposed matters to be covered in a report to the court. Of those who gave additional comments, a range of views were expressed:

“The process seems fine. The implementation may be more difficult. I particularly refer to those situations where the person who is being investigated for lack of capacity also has communication difficulties and physical difficulties that make assessment complicated.... The assessor must be trained in assessing people with these complex problems. Evenwith considerable expertise in this field it can be difficult and time consuming.”

“...it may be sensible to expand the rule to acknowledge the temporary or limited extent of “P”s mental capacity.”

“[the rule] sets out the right matters to be covered by a report. However, we have concerns about whether sufficient resources will be allocated to fund an effective reporting service.”

Two respondents, while generally supporting the proposal for a court reporting service expressed concern that the person who lacks capacity should be expected to pay for a report, particularly where they were not a party to the proceedings.

One respondent agreed with the proposals *“...providing the cost is not disproportionate in respect of the patient’s estate and/ or generally.”*

Two respondents did not agree with the proposals. One was not sure that the matters listed should be covered by a report. The other considered that the person who lacks capacity should have a litigation friend if there was no deputy appointed.

Question 8: Are the provisions of Part 10 (admissions, evidence and depositions) appropriate to new rules for the Court of Protection? Are there any other matters for which Part 10 should make particular provision?

22 respondents answered this question or commented. 14 agreed with the proposals. Many of those who agreed the proposals did not comment further:

“Yes, they appear comprehensive and appropriate.”

“The provisions of Part 10 are appropriate to new rules for the Court of Protection. We cannot consider any other matters for which Part 10 should make particular provision.”

Several respondents mentioned matters for which Part 10 might make particular provision or take into account. Three of these were concerned that the court, in seeking to draw reasonable limits on what evidence could be introduced into proceedings, should not be able to exclude admissible evidence:

“We do not see why the court should be able to exclude admissible evidence.”

“The draft rules give a very wide ranging power to the court to exclude evidence. We recommend that if the court decided to exclude evidence it should give reasons for doing so.... We recommend that the rules should give clear timescales [for sending all papers to all parties in good time], and that if further written evidence is produced after that time, the other parties can be granted an adjournment.”

A couple questioned whether all facts which needed to be proved as evidence by a witness must be proved orally at the final hearing.

Four were concerned about creating a cumbersome process and considered that the rules could be simplified.

One noted that where abuse of a vulnerable adult may have occurred, the evidence may be limited and those who were aware of it reluctant to give evidence and the provisions in Part 10 might be too prescriptive in such circumstances.

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?

This question asked about the provisions for use of experts and expert evidence set out in Part 11 of the draft rules in the consultation paper. 23 respondents answered this question or commented. 18 agreed with the consultation proposals.

There was a high level of agreement with the proposals. Where respondents commented, the main themes were that the court needed powers to deal with the filing of voluminous or conflicting evidence. It should have powers to control evidence and to limit it to what was needed by the court. The provision in the draft rules placing a duty on experts requiring them to assist the court and overriding any obligations to those instructing or paying them was welcomed. So was the provision that evidence should be in writing unless the court directed otherwise.

“We agree that the court should have the power to control expert evidence, and limit such evidence to that which is required to assist the court in dealing with the issue.”

“We ...applaud the decision in Draft Rule 87 giving the court power, where two or more parties wish to submit expert evidence to direct the evidence to be given by one expert only, who will be jointly instructed by both parties.”

“In particular we welcome the general requirement that expert evidence must be written unless the court directs otherwise and that the court will only direct an expert to attend a hearing if this is necessary in the interests of justice.”

“In helping the court the overriding of any obligation to those who have instructed or are paying the expert is accepted. We presume that applies also to authorities who are paying the expert, and in any event should always be in the best interests of ‘P’.”

Respondents also suggested other matters that might be covered in the rules:

- the court should also be able to *“consider whether party should have the right to ask their two witnesses to prepare a single report or statement...”*
- *“It ought to be an express part of the rule that the court’s permission is required to call an expert or put in an expert’s report.... We also think that*

the rules should state expressly whether (i) expert reports which have been commissioned need to be disclosed (whether intended to be relied upon or not) and (ii) whether draft versions of any expert report need to be disclosed.”;

- the rules needed “...to ensure that no artificial distinction is drawn between experts who had been instructed prior to the issue of proceedings and those instructed for the purposes of the proceedings.”;
- no distinction should be made between the evidence of healthcare professionals as experts and that of carers or family who are closest to the person who lacks capacity;
- there should be an appeal process.

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 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?

27 respondents answered these questions or commented on the issues. Views were, numerically, almost equally divided. 12 respondents agreed that the starting principle should be proceedings heard in public unless certain circumstances applied. 11 did not agree and those who supported their views with comments generally said that the governing principle should be hearings in private with a discretion for the court to give judgment or hear applications in public.

Nine of the 12 respondents who agreed that the starting principle should be proceedings in public unless certain circumstances applied, supported their answers with comments. Almost all referred to the need to back an initial presumption of open court hearings with powers (as provided in draft rule 45) for the new court to hold all or part of any hearing in private in appropriate circumstances. Several respondents noted that this would mean that in practice the majority of cases would, rightly in their view, be heard in private.

"...this is a difficult issue. On the one hand there are strong arguments in favour of all Court of Protection hearings being held in private; this would, for example, be less daunting for many vulnerable adults and their families, and would prevent the disclosure of private and confidential information. However there are also strong public interest arguments in favour of public hearings. On balance we agree with the general principle that hearings of the Court of Protection should be in public but with wide provision for the court to decide that a hearing, or any part of it, may be held in private..."

"Yes. However, in addition, the rules should make clear that (i) confidential material includes information relating to the physical or mental health of P (or any party to the proceedings) and (ii) the court may restrict the level of publicity involved by the suitable anonymisation of material."

“Due to the broad provision the Court of Protection has for making hearings private this is an appropriate provision.”

“The nature of the decisions that will be made by the Court of Protection mean that most if not all of the cases heard will end up being heard in private as they concern confidential information, such as finances and medical information and perhaps to a lesser extent social welfare matters. We are pleased however that the starting point should be one of openness as transparent decision-making benefits others, as it will be clearer how the process of the decision has been arrived at.”

“Public hearings would also protect the interests of the donor by allowing public scrutiny of the conduct of those intending to benefit from any lifetime gift.”

11 respondents said that the new court should start not from a presumption of open court hearings. Almost all advocated a starting presumption of private hearings because of the effect of a public hearing variously on the person who lacks capacity, their family and friends, or the disclosure of sensitive personal financial, medical or healthcare information given to the court, leading them to advocate a starting presumption of private hearings.

“We considered that the correct principle to apply should be that Court of Protection hearings should be in private unless particular circumstances apply. We did not consider that there was, in general, sufficient or persuasive public interest to justify hearings in public in relation to the property or personal welfare of those who lack mental capacity.”

“We understand the need for transparency within the court arena, but feel that in the circumstances of mental capacity the patient’s confidentiality and privacy would best be served within a private hearing.”

“The process can be a very distressing one for the person who lacks capacity and for close relatives and friends. If the person who lacks capacity had capacity, they would not want their financial information to be in the public domain.”

“As the ‘patient’ is incapacitated and generally not in a position to comment or consent I am uncomfortable about details of their personal finances and property (and very personal social welfare issues) being aired ‘in public’.”

“An individual’s right to privacy in this case is greater than the need for a public policy of openness. The individuals concerned have already suffered the indignity of losing capacity and having to live by the decisions of others. The presumption

should, therefore, be that hearings should be in private, unless the court considers it in the interests of public policy to be otherwise.”

Four respondents commented on the issues but it was not possible to tell whether they agreed or disagreed with the principle:

“From a clinical point of view it is less important whether they are heard in public but that the names of the patient, clinical team or treating organisation should not be published in the media or placed in the public domain.”

“[The person who lacks capacity] or their representatives should be the arbiter of whether proceedings are in public. Anything else would be paternalistic and against the spirit of the legislation.”

Two had particular concerns that the rules should ensure that personal confidentiality was maintained.

Finally, several respondents, whether advocating a starting principle of hearings in public or in private, supported anonymised reporting of court decisions. They believed that transparency and greater understanding of the decision-making process was beneficial. It should be backed, however, by provisions to ensure anonymity for the person who lacks capacity who is the subject of the application and for the parties and confidentiality of personal information.

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?

22 respondents answered these related questions or commented on the issues. 17 agreed that these were the right provisions for appeals. Three disagreed. Two respondents did not explicitly agree or disagree but set out their views.

The draft rules provided in the paper were general provisions of rules for consultation purposes. While the majority of respondents who commented on the provisions agreed with them, a number said that they should make more detailed provision for the circumstances under which an appeal would be considered.

One said that the rules should clearly set out the jurisdiction of the appellant judge: whether the appeal should be a redetermination or a review, the circumstances in which an appellant judge would intervene in relation to a decision and whether different principles would apply depending on whether the decision being appealed was interim or final.

Other respondents commented or made suggestions about the appeal process:

One commented on the power of the appeal court to make costs orders: *“Whilst we understand the need for this, we hope that the court will take into account the financial impact on someone who has lost capacity.”*

Another commented on the levels of judge who they considered should hear different appeals: *“In general we believe that cases before the new Court of Protection should be conducted before District Judges, with the most serious cases being conducted before Circuit Judges or High Court Judges. An appeal from a District Judge should go to a Circuit Judge. If some cases are conducted before Circuit Judges an appeal should lie to a High Court Judge.”*

One respondent considered that there should be an appeal mechanism to apply when a person who lacks capacity regains capacity to make that decision.

“As long as the appeal procedure is not a long and complicated system and can be understood by members of the public and not just solicitors or local authorities then these provisions are the right ones.”

Question 13 went on to ask whether there should be any exceptions to the proposal that all appeals from decisions of the Court of Protection should require the grant of permission to appeal. 21 respondents answered this question, with the vast majority considering that there should not be any exceptions to the need to seek permission to appeal. However, one did not consider that there should be any exceptions so long as there were not lengthy waits for appeals to be heard.

A handful of respondents proposed exceptions. One considered that any disputes over life-sustaining treatment should not need permission to appeal. Two considered that there should be no requirement for permission where the applicant was the person who lacks capacity or their independent representative. One said there should be exceptions but did not elaborate on what these should be.

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?

28 respondents answered the question or commented on the draft costs rules. 12 respondents who answered the question, indicated that they agreed with the proposal. Where they commented further, they gave a range of different reasons. 12 respondents disagreed with the proposal, with ten citing the deterrent effect, on applicants, of being liable for their own costs.

As noted above, views were equally divided over the principle that should govern the costs of proceedings in the Court of Protection. 12 respondents said that a starting principle of each party funding their own costs was the right one:

“We agree with the principle that parties should fund their own costs. This will support the early resolution of cases and ensure that the financial burden is not placed solely on the person who lacks capacity.”

Where respondents gave a reason in support, the main one was that it was an equitable approach, although some respondents noted that it was equitable only where the parties had the ability to pay:

“The principle is a good starting point, and where parties can afford fees, the reasonable ones should be paid but that where parties are unable to afford these fees then remissions criteria would be very welcome... but the Court need to look at the whole picture of a client’s circumstances.”

Four raised applications where they thought the court should have the power to order applicants to pay their own costs as they might benefit from the application such as applications for statutory wills where the applicant would benefit, or applications to mitigate inheritance tax in an estate that would pass to the applicant.

One said in relation to applications relating to estate planning for people who lack capacity “...it would make sense that the parties to the application, generally family members who seek to benefit from the application, should meet their own costs, unless otherwise directed.”

Three respondents said that costs orders should not be made against the estate of the person who lacks capacity who is the subject of the application if they are not a party to the proceedings:

“We are fundamentally opposed to the fact that people who lack capacity may well have to pick up the costs of the case if they are not even a party to the case...”

12 respondents opposed starting from a principle in the rules that each party should pay their own costs. Almost all feared that a starting principle that parties should pay their own costs would discourage applicants who are concerned with the person who lacks capacity’s best interests. The principle which governs costs in the current Court of Protection provides, in general terms, for court costs to be paid by the estate of the person who lacks capacity. Respondents noted that the current court deals (as the new one will) with many applications where there are no contested issues and where the court is being asked to grant a financial authority to allow someone to look after the person who lacks capacity’s finances. Many believed that, as such applications were being made in the best interests of the person who lacks capacity, their estate should rightly pay the costs. Others felt that people who were genuinely concerned for the person who lacks capacity, might not be prepared to pay the costs of applying to court if required by the court rules to do so:

“There is a risk of deterring genuine whistleblowers who wish to report financial abuse, and genuine applicants whose main concern is P’s best interests.”

“... I cannot see that the parties who have, apparently, the client’s ‘best interests’ at heart should be expected to fund their own costs from the outset... we may be discouraging applicants from approaching the court where their application may well be genuine and in the client’s best interests?”

“where the application is made by a Deputy or Attorney acting in their appointed role I think the assumption should be made that the costs should be paid from the estate of the person who lacks capacity unless the Court feels the application was inappropriate or the Deputy/ Attorney was not acting in the best interests of the person who lacks capacity.”

In terms of other comments about costs rules received, six respondents commented on the proposals for the court to be able to consider the conduct of the parties in making a costs order, so allowing the court to make a party pay costs if they had acted unreasonably. Two were concerned about the proposed provision:

“...that people with legitimate concerns are not deterred from taking action where this is appropriate.... It is important that it be made clear that a costs order would be awarded only in extreme cases and give some indication of what this might include in order to reassure people who have a genuine concern which cannot be resolved by other means.”

Three thought that the rules should allow the court to consider the conduct of the parties in making a costs order and to make a party pay costs if they had acted unreasonably:

“It is also important that the court would 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.”

One respondent considered that draft rule 103(3) restricted the court’s discretion to make orders as to costs, and that the rule *“...should not simply be limited to orders for costs being made on the basis of the conduct of a party ...but should repeat the provisions of s.55 and give the Court an overall discretion.”*

There were also other comments made about other aspects of the court costs:

- noting that the draft rules on costs were only the main provisions of rules on the costs of court proceedings and a range of further costs rules. The response made helpful proposals as to these rules;
- suggesting that the issue of costs could be included on the originating application form to allow the applicant to say why the costs should be paid from the person who lacks capacity’s estate rather than by the applicant or another party;
- stating that *“In the case of life-sustaining treatment disputes, access to the court should be free with costs awarded against a Trust if its application fails.”*; and
- suggesting that *“Special consideration should be given for a principle affording protection for adults with severe learning disabilities against any prevention to their access to justice because of fees.”*

Five respondents raised issues relating to legal aid and the new court. One considered that legal aid should support a person who lacks capacity in proceedings where the Official Solicitor is invited to act for them. One had a concern as to which benefits could offer automatic qualification for legal help. One

raised the restrictive effect on firms if Court of Protection matters were included within the types of application attracting 'legal help' under legal aid but the number of matters that the firm was allowed to undertake was not also increased. Two wished to see an impact assessment for legal aid.

In relation to fee remissions and exemptions, one respondent said that “...*[it] may be too generous to exempt people based on their benefits/ capital alone. May need to take a holistic view of the individual case circumstances.*”

Conclusion and Next Steps

We welcome the interest and continuing engagement of those who responded to this consultation. The views expressed have been very helpful in guiding our thinking. We are very grateful to everyone who took the time to respond.

As the consultation paper said, the rules put out to consultation were the main provisions of draft rules for consultation and extensive work is being taken forward to further develop these rules. We will continue to give consideration to people's comments as we develop the new draft rules of court. We will update the Partial Regulatory Impact Assessment published with the consultation and place it on the DCA website.

The following paragraphs set out how we are developing the different aspects of the rules, in the light of the views that were expressed.

The Overriding Objective

In line with recent sets of rules since the Civil Procedure Rules 1998, we proposed an overriding objective of enabling the new Court of Protection to deal with cases justly. Respondents who commented on the overriding objective either wholly or partially agreed with it and we propose to adopt it in a largely unchanged form.

Pre-Action Protocols

Most respondents supported the idea of some form of pre-action protocols, but many questioned whether they were useful for all the cases coming to the Court of Protection. They noted that the majority of applications that come to the current Court of Protection (and are likely to come to the new court in the future), are applications where a court order is needed to give another person decision-making authority over the property and affairs of a person who lacks capacity. These applications are commonly uncontested and cannot be decided by other means. As such matters have to come to court in any event, requiring parties to undertake actions under a pre-action protocol would have little practical benefit in progressing the court application. In addition, for urgent matters where a court decision is needed, respondents feared that requiring compliance with a pre-action protocol could cause delay. We agree with respondents' views that pre-action protocols are

not appropriate for all cases coming to the new Court of Protection. We are looking at whether pre-action protocols would be of particular benefit for some types of case coming before the new court and whether, if that is the case, they should be introduced when the new Court of Protection comes into being or, at a later stage, once the new court has established operating procedures.

Permission to apply

The Act imposes a general requirement to seek the court's permission to make an application and says that certain groups of people (set out at section 50(1) of the Act) are exempt from that requirement. The consultation paper proposed further circumstances that it said should also be exempt from needing permission to apply.

In response to views expressed, the rules will provide that permission is not required for applications made by the Official Solicitor, the Public Guardian or applications relating to a Lasting or Enduring Power of Attorney as set out in the consultation paper.

Some respondents noted that the current Court of Protection rules restrict who may make certain property and affairs applications. They said that the new rules should make similar provision and we will ensure that this is the case.

Since the Act allows personal welfare decisions to be taken in many circumstances without needing to come to court (providing the decision maker has regard to the relevant provisions of the Act), personal welfare matters should only be brought before the court when they cannot be resolved by any other means or where the matter is so serious that the court needs to decide on the matter. The provisions for the seeking of permission in the Act provide a 'check' to ensure that applications are necessary and well-founded. For this reason, we have decided not to extend the types of applications which can be made to the court without permission to include personal welfare applications in general or to applications in relation to personal welfare when made by other particular types of applicants (such as NHS Trusts or Local Authorities).

In response to respondents' concerns about the progress of urgent applications, we are developing processes within the court rules to allow urgent matters to be considered quickly by the court. These would allow the court to make any urgent orders that are needed and to make directions for the further consideration of the case, so that the permission stage should not delay urgent matters.

The Core Process and Provisions for Service

Several respondents said that the rules should provide for urgent cases where an interim, and in some cases, a final order needs to be made before all the rules can be complied with. We agree and are developing these processes.

A few respondents suggested that there should be a different process for originating or first applications to the court, and for subsequent applications. In particular, where someone was appointed as a property and affairs deputy and, having been appointed, needed to apply to court again in respect of matters outside the initial authority granted, such as paying for an expensive holiday or for renovations to the person's home. We are looking at whether we can provide in the rules for a simpler process for people who already have the court's authority, to apply again to court in respect of limited changes to that authority.

Three respondents wanted the rules to make specific provision for carers of people with severe learning disabilities to apply to be appointed as their personal welfare deputies. We want the rules to provide a process for all applications, under which they can be decided in the most appropriate way for each. For this reason, we do not propose to provide a different application process for personal welfare deputyships from other applications. Respondents will be reassured that written guidance will be produced to assist those considering applying to the court and the Customer Service Unit in the Office of the Public Guardian will be able to provide advice about how to make an application.

A couple of respondents raised the current Court of Protection's use of nominated officers to make decisions. We do not plan to set the new court up to make extensive use of nominated officers as we wish to reinforce the judicial character of the new court. There will be increased numbers and levels of judiciary, from High Court Judges to District Judges, sitting in the new court so that it is appropriately resourced to make decisions.

Some respondents feared that the informal approach of the current court could be lost and possible delay caused, if rules for service of documents were too complex. A wider range of applications will come to the new Court of Protection than come to the current court, so the new rules will require more formal processes. Nevertheless, we wish to make the procedures for identifying and serving prospective parties to an application, and other people who might need to be notified, as straightforward as possible. A couple of respondents queried whether the timetable for service was the right one and we will look at the appropriateness of the different time limits.

Involvement of the person who lacks capacity in the proceedings

The consultation proposed that the court rules should provide a range of different ways for involving the person who lacks capacity who is the subject of the application in the court proceedings. These ranged from: personally informing the person who lacks capacity that an application had been made; to the court ordering an impartial court report or asking a Court of Protection Visitor to visit them; to joining them as a party to the application represented by a litigation friend. Over half of respondents who commented on this issue agreed with the consultation paper proposal. Some respondents felt strongly that the person who lacks capacity should be joined as a party to all applications. We consider, however, that providing in the rules for a range of different ways for involving the person who lacks capacity in an application will allow the court to decide on the best approach in each individual case. Where the court considers that the person who lacks capacity should be joined as a party to a particular matter it will be able to do so.

The majority of respondents agreed with the consultation proposals on the rules governing reports to the court under Section 49 of the Act. We wish to ensure that, when the court considers that a report would be useful, that it has the flexibility to decide what particular matters should be covered in reports.

Admissions, Evidence and Depositions and Expert Evidence

The majority of respondents agreed with the provisions of the draft rules relating to evidence. We will consider all the comments made in refining the rules on evidence and expert evidence. In particular, we will ensure that there is a clear distinction between providing for evidence at start of proceedings to enable the court to establish whether the person who is the subject of the application lacks capacity to make the decision in question, and allowing the court to control filing of subsequent evidence and ensure the appropriate provision of expert evidence.

Should the new Court of Protection sit in public or in private?

Respondents' views were almost equally divided on this issue. Broadly half agreed with a general principle of hearings in open court, so long as it was backed by a wide discretion to sit in private to protect the person who lacked capacity and personal information relating to them. The other half considered that a starting presumption of private hearings, with just the parties and any legal representatives present, better protected people who lack capacity.

The majority of applications to the new Court of Protection will be applications for the court to grant a financial authority to allow someone to make decisions about the finances of the person who lacks capacity to do so. Such applications are often made by family members and others in order to continue to look after the person's well-being effectively. These applications are often uncontested and decided on the papers without those involved attending court. There may be limited wider public interest in such cases. Rather, respondents highlighted a need to protect the person who lacks capacity and ensure that sensitive personal information about their finances, health or personal welfare is safeguarded. This needs to be balanced against the smaller number of cases, where the court is asked to decide on the legality of serious medical treatment which may have a significant effect on a person who lacks capacity's quality of life and where there may be a much greater public interest in knowing about such decisions and how they are taken by the court.

We have considered the arguments and the finely balanced response to consultation. We propose to provide in the court rules that the default position for hearings in the new Court of Protection will be that only the parties to an application and their representatives and the person who lacks capacity (whether they are a party or not) should have an automatic right to attend hearings. But the rules will enable the court to admit the media or general public to all or part of a hearing or to report a judgment publicly, either of its own motion or upon application to it. The court would then be able to make arrangements for the judgment in the case to be reported or to allow the public or media to attend the hearing. This will provide the protection for people who lack capacity that respondents considered was important, whilst also providing for the court to give public judgments and to open hearings to people to provide transparency and recognise where there is a wider public interest in matters before the court.

Finally, a number of respondents supported reporting of court decisions with the identities of the person who lacks capacity and the parties anonymised. We support this as a way to promote greater openness and transparency in the new court. We expect a greater number of judgments to be reported in the new Court of Protection and that these will be suitably anonymised as respondents wished.

We will also wish to look at possible alignment, in the future, with proposals for reform of reporting and attendance rights in the family courts following the consultation '*Confidence and Confidentiality: Improving transparency and privacy in family courts*' (DCA consultation paper CP 11/06) which closed in October 2006.

Appeals

The consultation paper provided an outline process for appeals and respondents helpfully suggested areas for further delineation which we are looking at. The majority of respondents supported applicants needing to seek permission to appeal. Some respondents suggested that the person who lacks capacity who is the subject of the application or their representative, or matters where the original court decision related to life-sustaining treatment should not need permission to appeal. We agree both that the person who lacks capacity is central to proceedings and that processes need to operate speedily when serious medical treatment or other urgent matters are at issue. We consider, nevertheless, that a general requirement to seek permission is appropriate, should not delay urgent matters and will prevent applications that are not well-founded being made.

Costs

Respondents' views were equally divided over whether the court rules should provide that each party should pay their own costs of court proceedings, or whether, as in the current Court of Protection, the court should start from a principle that the costs are paid from the estate of the person who lacks capacity who is the subject of the proceedings.

In the current court, applications are made in respect of the person who lacks capacity's property and affairs. They are often uncontested and cannot be dealt with other than by seeking the court's authority. In these matters the court generally orders that their costs are paid for from the estate of the person who lacks capacity. Half of respondents felt that this gave certainty to applicants that they would not have to pay the costs of applying to court and that this was the right approach as they were applying to court for the benefit of the person who lacks capacity. Conversely, the new personal welfare jurisdiction will bring to the new court cases (currently heard under the inherent jurisdiction of the High Court) which may involve applications as to the legality of medical treatment. These are often brought by NHS Trusts contemplating serious medical treatment decisions in respect of the person who lacks capacity, the costs of which it would not be appropriate for NHS Trusts or local authorities to seek to recoup from the person who lacks capacity. There may also be applications where parties cannot agree on matters relating to a person who lacks capacity's personal welfare (for example, with whom they should live). Allowing the costs of such court applications to be paid from the estate of the person who lacks capacity who is the subject of the proceedings may mean that there is less of an incentive to resolve such cases than

would be the case if each party expected to pay their own court costs. These may be also cases where the person who lacks capacity does not have financial assets.

Having considered the different arguments and the equally divided response to consultation, we propose to explore providing different costs rules for personal welfare applications and property and affairs applications:

- in relation to personal welfare applications the presumption would be that there will be no order as to costs (i.e. that each party would pay their own costs); and
- in relation to property and affairs applications the presumption would be that costs should be paid out of the estate of the person who lacks capacity who is the subject of the application.

We also plan to provide in the rules that the court may make an order that one party pays their own costs or possibly pays the costs of another where the first-mentioned party has acted unreasonably. Although some respondents feared that this might make people less likely to apply to court for fear of being ordered to pay costs, this is an approach commonly available in relation to costs in other courts. This provision would be aimed at those who bring or pursue manifestly ill-founded applications or who, by their deliberate actions, have made the case unnecessarily prolonged or complex. It would take into account matters such as whether any of the parties were acting without legal representation and whether their actions had been inadvertent, which should allay respondent's concerns.

We are developing these and other costs rules to provide an effective framework for the new court. The Regulatory Impact Assessment completed as part of the Mental Capacity Act 2005 costed the legal aid impact of this legislation. A limited consultation on bringing certain cases in the Court of Protection within the scope of legal aid funding was held between 30 November 2006 and 2 February 2007.

Next Steps

In addition to all the helpful views received from this consultation, we have been assisted by the views of the Informal Rules Group, 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. We are continuing to develop the rules of court for the new Court of Protection, the supporting practice directions and new court forms taking into account the views expressed during this consultation and the advice of the Informal Rules Group. We will finalise the rules to come into force on the implementation of the Mental Capacity Act 2005.

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

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 on page 3.

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 timescale 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.

Annex A – List of Respondents

Age Concern

Professor Keith Andrews MD FRCP

The Association of District Judges

District Judge Bazley White

Brecknock and Radnor Community Health Council (Advocacy Office)

The British Bankers' Association

Bromley Hyde and Robinson Solicitors

Dr. Maurice Brook, St. Ebba's Parents and Relatives Group

Sheila Campbell, Knocker and Foskett Solicitors

Cardiff Community Health Council

Lord Christopher CBE

Commission for Social Care Inspection

Conway County Borough Council

East Sussex County Council

Catherine Fehler, Michael Simkins LLB

Judith Feld

The General Medical Council

Ross Hamilton, Public Guardianship Office

Andrew Harding, Hugh James Solicitors

Her Majesty's Circuit Judges (Civil Sub-Committee)

Michael Hewitt, South Gloucestershire Council

Law Reform Committee of the Bar Council of England and Wales

The Law Society

Making Decisions Alliance

Making Decisions Alliance and Mental Health Alliance

Lesley McDade

Margaret O'Grady, Public Guardianship Office

Laurence Oates, Official Solicitor and Public Trustee

Patient Concern

Mary Pearson

Powys County Council

RESCARE

David Richards, Public Guardianship Office

The Royal College of Nursing

Paul Saunders FCIB TEP

Solicitors for the Elderly

The Supreme Court Costs Office

Thomas Eggar Solicitors

Bill Webster, Public Guardianship Office

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