

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: the Court of Protection and the Public Guardian

The Court of Protection

Section 45: The Court of Protection

130. This section establishes a superior court of record, called the Court of Protection, which will be able to sit anywhere in England and Wales. Welfare matters previously referred to the High Court may be referred to this court. It is intended that the Court of Protection will have a regional presence but will have a central office and registry as designated by the Lord Chancellor. Additional registries (being High Court district registries or county courts) may also be designated. *Subsection (6)* provides that the former office of the Supreme Court known as the Court of Protection will cease to exist.

Section 46: The judges of the Court of Protection

131. The Lord Chancellor or an appropriate person acting on his behalf will nominate judges to exercise the jurisdiction of the Court of Protection. *Subsection (2)* sets out which judges may be nominated. *Subsection (3)* gives the Lord Chancellor the power to appoint one of the senior nominated judges to be designated President of the Court of Protection and another to be Vice-President of the Court of Protection. *Subsection (4)* gives the Lord Chancellor the power to appoint a judge to be Senior Judge of the Court of Protection, with various administrative functions.

Supplementary powers

Section 47: General powers and effect of orders etc.

132. *Subsection (1)* gives the Court of Protection the same powers as the High Court, for example in relation to witnesses, contempt and enforcement.

Section 48: Interim orders and directions

133. This section allows the court to make interim orders even if evidence as to lack of capacity is not yet available, where there is reason for the court to believe that the person lacks capacity in respect of a particular matter and it is in his best interests for the court to act without delay.

Section 49: Power to call for reports

134. This section makes provision for reports to assist the court in determining a case. Such reports can be commissioned from the Public Guardian, local authorities, NHS bodies or Court of Protection Visitors. The Public Guardian is a new statutory official (see [section 57](#)) and the Court of Protection Visitors replace current “Lord Chancellor’s Visitors” (see section 102 of the Mental Health Act 1983 and [section 61](#)). Local

authority staff or NHS staff may already be providing services to the person concerned and be able to report to the court on the basis of their existing involvement.

135. *Subsections (7) to (9)* allow the Public Guardian or Court of Protection Visitor who is reporting to the court to have access to health, social services or care records relating to the person and interview him in private. Where a Court of Protection Visitor is a Special Visitor (e.g. a registered medical practitioner or someone with other suitable qualifications or training) he may, on the directions of the court, carry out medical, psychiatric or psychological examinations.

Practice and procedure

Section 50: Applications to the Court of Protection

136. This section provides that persons listed in *subsection (1)* can apply to the Court of Protection as of right while others generally will be required to obtain permission from the court. Court of Protection Rules can, however, provide that certain types of application will not require permission. The factors that the court must have regard to when considering whether to grant permission are listed in *subsection (3)* and are designed to ensure that any proposed application will promote the interests of the person concerned, rather than causing unnecessary distress or difficulty for him.

Section 51: Court of Protection Rules

137. The specialist jurisdiction of the new court calls for specialist rules of court, which will be made by the Lord Chancellor. *Subsection (2)* lists different matters in relation to which rules may be made and *subsection (4)* permits different provisions to be made for different geographical areas.

Section 52: Practice directions

138. This section gives power to make practice directions. These are directions about a court's practices and procedures, issued for the assistance and guidance of litigants. They often support and add detail to rules of court. Practice directions for the Court of Protection will have to be made by the President with the approval of the Lord Chancellor or by another person (for example, the Vice-President) with the approval of the President and the Lord Chancellor. *Subsection (3)* provides that the Lord Chancellor need not approve any directions giving guidance about the law or the making of judicial decisions. *Section 51(3)* enables Court of Protection Rules, instead of providing for any matter, to refer to provision made or to be made by these directions. The intention is to make rules accompanied by practice directions, on the model of the Civil Procedure Rules 1998.

Section 53: Rights of appeal

139. This section concerns appeals from the Court of Protection and will be supplemented by Court of Protection Rules. Subject to such rules, an appeal will lie from any decision of the court to the Court of Appeal. However, the Court of Protection will comprise a range of judges at different levels. It is therefore intended to make provision by rules of court, by virtue of *subsection (2)*, so that decisions made at a lower level of the Court of Protection are appealed to a higher judge within the Court of Protection. Rules may make further detailed provision as to permission to appeal and may provide that where an appeal has already been made to a higher judge of the Court of Protection no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that the appeal would raise an important point of principle or practice or there is some other compelling reason to hear the appeal. This matches the "2nd appeal" test in the Civil Procedures Rules 1998, Rule 52.13.

Fees and costs

Section 54: Fees

140. This section concerns the setting of fees chargeable by the Court of Protection (which will be by order of the Lord Chancellor with the consent of the Treasury). The order will be subject to the negative resolution procedure (see *section 65(2)*). The order may set the level of fees, any exemptions from and reductions in the fees and any partial or whole remission of fees. Prior to making the order the Lord Chancellor must consult with the President, Vice-President and Senior Judge of the Court of Protection. The Lord Chancellor must take reasonably practicable steps to give out information about fees. Similar provision is made about other court fees in section 92 of the Courts Act 2003.

Section 55: Costs

141. This section concerns the costs of Court of Protection proceedings and will be supplemented by Court of Protection Rules. Subject to such rules, the court will have discretion to make costs orders, including wasted costs orders, against legal or other representatives. It seeks to put the new court in the same position as the other civil courts.

Section 56: Fees and costs: supplementary

142. This section provides that the Court of Protection rules can deal with the way in which, and funds from which, fees and costs are to be paid and make provision for them to be charged against the estate of the person concerned. It is modelled on the Mental Health Act 1983, section 106.

The Public Guardian

Section 57: The Public Guardian

143. This section provides for a new public official, the Public Guardian, to be appointed by the Lord Chancellor. The Public Guardian will have staff and officers so that he can discharge his duties. The Lord Chancellor may also enter into contracts with other persons for the provision of officers, staff or services for the discharge of the Public Guardian's functions.

Section 58: Functions of the Public Guardian

144. This section sets out the role of the Public Guardian and may be supplemented by regulations made by the Lord Chancellor. It is intended that regulations will set out in more detail how the Public Guardian will exercise his administrative duties in connection with court-ordered security and reports. The regulations will also deal with fees and the sources from which they may be met.
145. The functions of the Public Guardian are set out in *subsection (1)*. They include establishing and maintaining registers of lasting powers of attorney and of orders appointing deputies and supervising deputies. He may also direct Court of Protection Visitors to visit donors or donees of LPAs, deputies or those appointing them. He may deal with complaints and concerns expressed to him about how an attorney or deputy is exercising his powers. He may also publish any information he thinks appropriate about his work.
146. *Subsection (2)* provides that certain functions may be discharged in co-operation with any other person who has functions in relation to the care or treatment of the person to whom the power of attorney or appointment of a deputy relates. It is intended that the Public Guardian will work closely with organisations such as local authorities and NHS bodies.

*These notes refer to the Mental Capacity Act 2005
(c.9) which received Royal Assent on 7 April 2005*

147. *Subsection (4)* provides for regulations made by the Lord Chancellor to make provision for the setting of fees which may be charged by the Public Guardian, and for any exemptions from and reductions in the fees and any partial or whole remission of fees.
148. *Subsections (5) and (6)* allow the Public Guardian to examine and take copies of relevant health, social services or care records, and to interview the person concerned in private. This is to ensure that the Public Guardian will be able to carry out his functions. The Public Guardian has similar rights when reporting to the Court of Protection (see *section 49(7) and (8)*). Court of Protection Visitors are given similar rights (see *section 61(5) and (6)*).

Section 59: Public Guardian Board

149. This section provides for a body, to be known as the Public Guardian Board, members of which are to be appointed by the Lord Chancellor. The Board will scrutinise and review the Public Guardian's work and make recommendations to the Lord Chancellor.
150. The Board must have at least one member who is a judge of the Court of Protection and at least four members with appropriate knowledge or experience of the Public Guardian's work. *Subsection (6)* provides a regulation-making power that will allow the Lord Chancellor to set out in more detail how members will be appointed and how the Board will operate.
151. *Subsection (8)* provides for the Lord Chancellor to make payments to members of the Board for reimbursement of expenses, allowances and remuneration. *Subsection (9)* requires the Board to make an annual report to the Lord Chancellor.

Section 60: Annual report

152. This requires the Public Guardian to make an annual report about his work to the Lord Chancellor, who must within one month of receipt lay a copy of the report before both Houses of Parliament.

Court of Protection Visitors

Section 61: Court of Protection Visitors

153. Court of Protection Visitors are appointed to carry out visits and produce reports, as directed by the court (*section 49(2)*) or the Public Guardian (*section 58(1)(d)*) in relation to those who lack capacity. Their functions and powers are similar to those of Lord Chancellor's Visitors appointed under Part 7 of the Mental Health Act 1983.