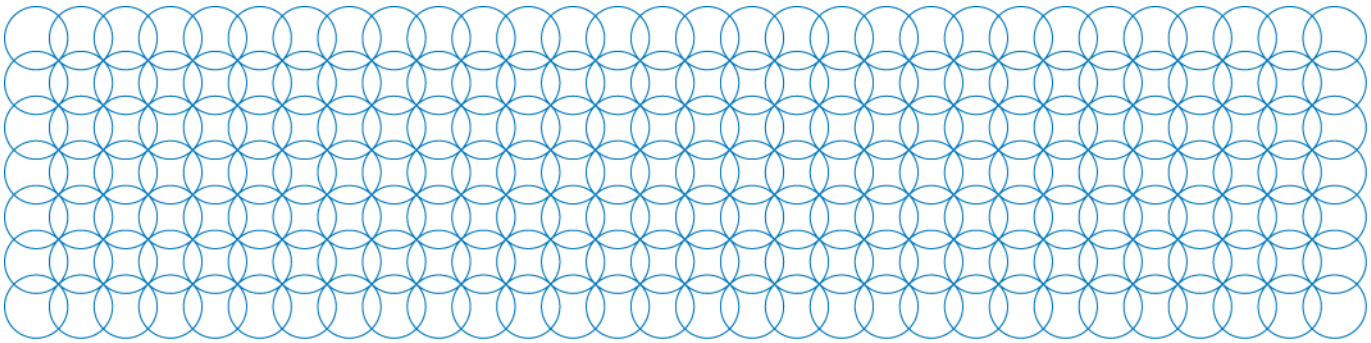
Ministry of JUSTICE

Court Of Protection: Authorised Officers

A consultation on the delegation of some decisions in the Court of Protection to court officers.

Consultation Paper CP9/2011
This consultation begins on 28 June 2011
This consultation ends on 20 September 2011



Ministry of JUSTICE

Court Of Protection: Authorised Officers

A consultation on the delegation of some decisions in the Court of Protection to court officers

A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at www.justice.gov.uk

About this consultation

To:	This consultation is aimed at the public, the legal profession , the judiciary, the advice sector and all with an interest in this area in England and Wales
Duration:	From 28 June 2011 to 20 September 2011
Enquiries (including requests for the paper in an alternative format) to:	Joan Goulbourn Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3019 Fax: 020 3334 3147 Email: joan.goulbourn@justice.gsi.gov.uk
How to respond:	Please respond on line at www.justice.gov.uk/consultations/consultations.htm by 20 September 2011 Alternatively please respond by post or fax to Joan Goulbourn Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3019 Fax: 020 3334 3147 Email: joan.goulbourn@justice.gsi.gov.uk
Response paper:	A response to this consultation exercise is due to be published within three months of the closure date at: www.justice.gov.uk/consultations/decisions-court-protection.htm

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Executive summary

The Court of Protection is the specialist court created in 2007 under the Mental Capacity Act to make specific decisions or appoint other people known as deputies to make decisions on behalf of people who lack capacity.
The Court of Protection has faced several challenges since its establishment. The numbers of applications have exceeded the predicted volumes and there has been insufficient judicial resource to keep pace with demand.

At the end of 2009, the President of the Court of Protection announced that he was setting up a committee to undertake a review of the Court of Protection Rules 2007 and the practice directions and forms which accompany the Rules. The committee's report was published in July 2010. Having established that many of the issues placed before the court are in effect administrative, or are straightforward and undisputed, the committee recommended that some applications be dealt with by court officers to free up judicial time and reduce delay.

The Mental Capacity Act 2005 enables rules to be made that provide that the jurisdiction of the court may be exercised by its officers and staff. We propose amending the Court of Protection Rules to provide for authorised court officers to deal with specified types of applications. Provision would be made for the officers to refer the case to a judge on grounds of either contention or complexity. Court officers would not be authorised to adjudicate at attended hearings.

Introduction

This paper sets out for consultation the introduction of authorised court officers in the Court of Protection. It consults on the types of applications to be considered by the authorised officers and the provisions for the reconsideration of decisions made by an authorised officer

This consultation is conducted in line with Code of Practice on Consultation and falls within the scope of the Code. The consultation criteria, which are set out on page 17, have been followed.

Copies of the consultation paper are being sent to:

The President of the Supreme Court

The Lord Chief Justice of England and Wales

The Master of the Rolls

The Lord President of the Court of Session

The Lord Chief Justice of Northern Ireland

The Lord Justice Clerk

The President of the Queen's Bench Division

The President of the Family Division

The Chancellor of the High Court

Association of District Judges

Council of Circuit Judges

Nominated Judges of the Court Of Protection

Members of the Court of Protection Rules Group

The General Council of the Bar of England and Wales

The Law Society of England and Wales

The Official Solicitor

The Public Guardian

Association of Contentious Trust and Probate Solicitors

Association of Public Authority Deputies

Association of Directors of Social Services

The British Medical Association

The British Medical Association Wales

British Bankers Association

Building Societies Association

Citizens Advice Bureau

Family Law Bar Association

General Medical Council

Healthcare Commission

Institute of Mental Health Law

Law Centres Federation

Local Government Association

Mental Health Alliance

Mental Health Foundation

Medical Defence Union

Medical Protection Society

Mental Health Lawyers Association

NHS Confederation

NHS Confederation Wales

NHS litigation Authority

Solicitors Family Law Association

Solicitors for the Elderly

Department of Health

Welsh Local Government Association

Welsh Assembly Government

Members of the Office of the Public Guardian Stakeholder Groups

Members of the Court of Protection User Group

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

The Proposals

1. **Background and strategy**

The Court of Protection [the Court] was established in 2007 under the Mental Capacity Act (2005) [MCA] to take decisions (or to appoint others – known as deputies – to take decisions) on behalf of those who lack capacity. From its inception, it became clear that the number of cases it had to deal with was far higher than had been expected. As a result, judges of the Court of Protection are spending a very large proportion of their time dealing with routine matters, rather than using their valuable skills making decisions on contentious and sensitive issues. The effect of this is that relatively simple applications to the Court take an unnecessarily long time to be dealt with, and that the resolution of difficult and important cases involving extremely vulnerable people may be delayed.

We believe that it would be appropriate for simple, non-contentious applications to be dealt with by officers of the court, freeing up the judiciary to focus on more complex work. More detail of our proposals is given below (section 5), and we would welcome your comments on them. If, after consultation, we decide to proceed with these proposals, a draft Statutory Instrument will be the subject of a further brief consultation.

2. **The Court of Protection**

The Court was established in 2007 by the MCA. Its remit includes taking decisions on behalf of people who are unable to do so for themselves. It can also appoint someone (called a deputy) to act for people who are unable to make their own decisions. These decisions relate to issues involving the person's property, financial affairs, health and personal welfare.

The Court can:

- decide whether a person is able ('has capacity') to make a particular decision for themselves
- make decisions on financial or welfare matters on behalf of people who are unable to do so

- appoint a deputy to act for someone who is unable to make their own decisions
- remove deputies or attorneys who fail to carry out their duties
- decide whether a Lasting Power of Attorney [LPA] or an Enduring Power of Attorney [EPA] is valid
- hear cases concerning objections to the registration (by the Office of the Public Guardian) of an LPA or an EPA.

Prior to the implementation of the MCA, the personal welfare jurisdiction now vested in the Court was exercised by the High Court judges of the Family Division. Decisions about the property and financial affairs of those who, by reason of mental disorder, were incapable of managing and administering their own property and financial affairs were taken by an Office of the Supreme Court (also called the Court of Protection), which derived its jurisdiction from the Mental Health Act (1983) [MHA] and the Enduring Power of Attorney Act (1985).

Section 93(4) of the MHA provided that: "*the Lord Chancellor may nominate other officers of the Court of Protection (to be referred to as "nominated officers") to act for the purposes of this part [Part VII] of this Act".* Nominated officers under the MHA (experienced civil servants assigned full time to the Court) were permitted to exercise all the functions of a nominated judge, subject to *"any express provisions to the contrary expressed [in the Act]"* and to (section 94 (1) (b)) *"any directions of the Master, and only so far as may be provided by the instrument, by which he is nominated"* (section 94 (1) (a)). Two forms of nomination were required: one signed by the Lord Chancellor, and the other by the Master. The former gave the nominated officer effectively the same powers as the Master, *"to act for the purposes of Part VII"* of the MHA. The nomination by the Master essentially provided that the nominated officer could "*exercise all powers conferred on"* the Master, except those specified in a list incorporated in the nomination document. The range of work undertaken by nominated officers under the MHA was, therefore, extremely wide. We are not proposing that authorised officers of the current Court should have such wide powers. Section 51(2)(d) of the MCA provides that Court of Protection Rules may make provision for ".. *the exercise of the jurisdiction of the court, in such circumstances as may be specified, by its*

officers or other staff ." Rule 196 of the Court of Protection Rules (2007) and practice direction 22B contained transitory provisions that allowed court officers to deal with certain applications made by former receivers appointed under the MHA for a 9 month period after enactment of the MCA. The transitory provisions also provided for a nominated court officer to refer any proceedings or any question arising in proceedings to a judge, which in the officer's opinion ought to be decided by a judge and also set out procedure for appealing against a nominated officer's decision. Currently all applications are decided by nominated judges

3. Court of Protection Business

The majority of applications to the Court relate to property and affairs, and nearly all of these are non-contentious. The MCA does not permit the use of deputy judges, for example to cover holiday absences, and the Court has struggled to deal with the volume of applications, resulting in delays, an unacceptably high level of complaints and low public confidence. Using authorised court officers would allow district judges to spend more time on the difficult, contentious cases, and would give the court managers greater flexibility to deal with increasing volumes of work.

	2008	2009	2010
Property & affairs applications	18,697	17,068	18,360
Property & affairs orders issued	15,269	13,641	15,624
Property & affairs deputies appointed	8,155	9,982	9,437
Health & welfare applications	1,164	1,531	1,283
Health & welfare orders issued	140	182	218
Health & welfare deputies appointed	83	112	106

As the table above shows, in 2010, 93.5% of applications received by the Court related to property and affairs, and only 6.5% to health and welfare decisions. A high proportion of applications – 93% in 2009/10 - were dealt with without a hearing, indicating that they were non-contentious. The full time

judges of the Court estimate that they spend around two thirds of their time on "box work", which clearly reduces the time they can spend hearing more complex or contentious cases, and this contributes to delay. In 2010-11, the largest category (34%) of complaints received by the Court related to delays.

4. Court of Protection Rules Committee

Following concerns about the Court's processes, an ad hoc Rules Committee was set up in 2009 by Sir Mark Potter, then President of the Court, to review the Court of Protection Rules 2007 [the Rules]. The Committee's report was published in July 2010. Recommendation 5 of the Committee was: "*Strictly defined and limited non-contentious property and affairs applications should be dealt with by court officers (e.g. applications for a property and affairs deputy by local authorities and in respect of small estates that do not include defined types of property). The provisions will also have to provide for an automatic right to refer any such decision to a judge and internal monitoring and review by the judges".* The Committee made this recommendation since "*many of the issues placed before the court are in effect administrative, or are straightforward and undisputed*" and delegation of this work to authorised court officers would "*free up judge time and reduce delay in respect of all decision making*",

5. Proposals

We propose that the Rules are amended to provide for authorised court officers to deal with specified types of applications. Provision would be made for the officer to refer the case to a judge on grounds of either contention or complexity. Under no circumstances would court officers adjudicate at attended hearings.

Under our proposals, applications to be dealt with by authorised officers would include:

- Applications to appoint a deputy for property and affairs
- Applications to vary the powers of a deputy appointed for property and affairs under an existing order
- Applications to discharge a deputy for property and affairs and appoint a replacement deputy
- Applications to appoint and discharge a trustee

- Applications to sell or purchase real property on behalf of P (the person without capacity)
- Applications to vary the security in relation to a deputy for property and affairs
- Applications to discharge security when the appointment of a deputy for property and affairs comes to an end
- Applications for the release of funds for the maintenance of P, or P's property, or to discharge any debts incurred by P
- Applications to sell or otherwise deal with P's investments
- Applications for authority to apply for a grant of probate or representation for the use and benefit of P
- Applications to let and manage property belonging to P
- Applications to end proceedings on the death of P
- Applications to obtain a copy of P's will
- Applications to inspect or obtain copy documents from the records of the court

These types of applications are usually non-contentious and are dealt with by issuing standardised orders prepared on behalf of the judge by administrative staff. "Non-contentious" in this context means that the court has not received an acknowledgment of service contesting the proposed order or application from any person (including the person without capacity) served or notified of the application. Should a case become contentious, there would be provision for the court officer always to refer the matter up to a judge.

Under our proposals, applications which would continue to be decided by a judge include:

- All applications relating to the court's personal welfare jurisdiction, including where part of the application relates to property and affairs
- Applications for a report under section 49 of the MCA
- Applications under Part 10A of the Rules Deprivation of Liberty
- Applications for the settlement of P's property whether for P's benefit or for the benefit of others
- Applications for a statutory will or codicil
- Applications to vary the terms of a trust or will in which P has an interest

- Applications to manage a business or partnership belonging to P or in which P has an interest
- Applications to start, continue or defend litigation on behalf of P
- Applications relating to the enforcement or recognition of protective measures taken outside England and Wales
- Applications to remove a deputy where concerns have been raised about the actions of the deputy
- Applications relating to the registration of an LPA or EPA
- Application relating to the validity of an LPA or EPA
- Applications to reconsider an order under rule 89
- Appeals against any decision of the court

Authorised court officers would only deal with applications without holding a hearing and would not be allowed to hear applications asking for reconsideration of their own decision or the decision of another authorised court officer. The Senior Judge or the President would authorise officers of the court to determine specified applications. It is envisaged that these officers will be senior staff with at least three years' experience of supporting judges in the Court Of Protection and with a working knowledge of the operation and provisions of the MCA.

The initial allocation of applications would be an administrative task, performed by administrative staff (as it is now). There would be discretion for the authorised court officer to refer the case to a judge, if he/she considered it was too complex or contentious for him/her to deal with. There may also be situations where a judge would wish to refer a case to an authorised officer.

It is proposed that the Rules should make provision for reconsideration of orders made by authorised court officers, similar to the existing provisions for orders made by judges. Any party to the application, or any person affected by the order, including P (the person without capacity), should be able to apply for reconsideration. Such reconsideration must be by a judge. The judge would confirm the decision, make a different order or fix a date to hear the matter. Setting out this process aims to comply with article 6.1 of the European Convention on Human Rights – the right to a fair hearing.

Authorised court officers would be accountable to the Senior Judge for the way they discharged their duties when exercising the jurisdiction of the court.

Questionnaire

We would welcome your comments on these proposals and, specifically:

1. **Do you agree that some types of application to the Court of Protection should be dealt with by authorised officers?**
2. **Do you agree that the applications above which we propose would be dealt with by authorised officers are appropriate for this treatment?**
3. **Are there other types of application (or other Court of Protection business) which you believe could be dealt with by an authorised officer, rather than a judge?**
4. **Do you agree that the provisions for reconsideration of decisions made by an authorised officer, proposed above, provide an adequate safeguard and, if not, what further safeguards do you believe should be put in place?**

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

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

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

Contact details/How to respond

Please send your response by 20 September 2011 to:

Joan Goulbourn
Ministry of Justice
Justice Policy Group
Location 4.10
102 Petty France
London SW1H 9AJ

Tel: 0203 334 3019
Fax: 0203 334 3147
Email: joan.goulbourn@justice.gsi.gov.uk

Extra copies

Paper copies of this consultation can be obtained from this address and online at www.justice.gov.uk/consultations/decisions-court-protection.htm

Alternative format versions of this publication can be requested from the contact above.

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at www.justice.gov.uk/consultations/decisions-court-protection.htm

Representative groups

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

Confidentiality

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

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

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

Impact Assessment

The Government is mindful of the importance of considering the impact of these proposals on different groups, with particular reference to users.
We have therefore considered the impact on client groups and on providers in both the private and not for profit sector of all the measures in the package in line with the existing duties on gender, race and disability.

Our assessments of the potential impact of these policy proposals is that a formal impact assessment is not required as the proposals are not Government intervention, do not relate to regulation on the private sector or Civil Society and are unlikely to result in costs/benefits for these sectors.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk

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

Ministry of Justice Consultation Co-ordinator
Legal Policy Team, Legal Directorate
6.37, 6th Floor
102 Petty France
London SW1H 9AJ

Produced by the Ministry of Justice

Alternative format versions of this report are available on request from
joan.goulbourn@justice.gsi.gov.uk