

# The Mental Capacity Act and the new Court of Protection

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## **Introduction**

The Mental Capacity Bill was introduced in the House of Commons on 17 June 2004,<sup>2</sup> and received the Royal Assent on 7 April 2005.

The Act, which has been fifteen years in gestation and involved an extensive consultation process,<sup>3</sup> abolishes the existing Court of Protection, and replaces it with a new court, also to be known as the Court of Protection, which will have jurisdiction to deal with all areas of decision-making for people who lack capacity. Thus, it will combine the personal welfare and healthcare jurisdiction currently exercised by the Family Division with the property and financial decision-making jurisdiction of the present Court of Protection. The new court will be regional, served by a centralised administration office and registry.

It is important for people with disputes or problems to have access to the most effective means of resolving them, and in many cases the existing health and social welfare mechanisms, mediation or discussion will be sufficient. Although no one will be compelled to mediate before going to court, the current policy is that the new court should be the last resort for the resolution of complex or particularly sensitive cases, or when other forms of dispute resolution have been tried without success.

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- 1 *Master of the Court of Protection. This article is an amended version of a paper presented at the North East Mental Health Law Conference in November 2004. It has been updated at proof-reading stage to reflect the fact that on 7th April 2005 the Mental Capacity Bill received the Royal Assent.*
  - 2 *The Bill was re-published with amendments on 4 November 2004, 15 December 2004 and 8 February 2005.*
  - 3 *In 1989 the Law Commission embarked on an "investigation into the adequacy of legal and other procedures for decision-making on behalf of mentally incapacitated adults". It published four consultation papers – An Overview (1991), A New Jurisdiction*

*(1993), Medical Treatment and Research (1993), and Public Law Protection (1993) – before producing its final report, Law Com. No. 231, Mental Incapacity, on 1 March 1995, which contained a draft Mental Incapacity Bill. The Lord Chancellor's Department issued a further consultation paper, Who Decides? followed by its own report, Making Decisions (1999). In June 2003 the Lord Chancellor's Department (then recently renamed the Department for Constitutional Affairs) issued a draft Mental Incapacity Bill, which was subjected to pre-legislative scrutiny by a joint committee of members of the House of Commons and the House of Lords. The Joint Scrutiny Committee reported on 28 November 2003, <http://www.publications.parliament.uk/pa/jt/jtdmi.htm>*

## The court's clientele

The Court of Protection is unique. It is the only specialised court of its kind in the world, and is eyed with envy by most other jurisdictions. Its origins go back to at least the second half of the thirteenth century, when the crown assumed responsibility for the estates of lunatics and idiots, and this jurisdiction was certainly in place by 1324, when the Statute *de Praerogativa Regis* confirmed its continuation.

The court's current clientele fall into four main constituent groups:

- people with psychiatric illnesses, such as schizophrenia or bipolar affective disorder.
- people with learning difficulties or intellectual disabilities.
- the elderly mentally infirm, mainly suffering from Alzheimer's disease or multi-infarct dementia; and
- people who have acquired brain damage as a result of an accident, assault, or clinical negligence, and have been awarded compensation for their personal injuries.

It may come as a surprise to note that the present court has comparatively little involvement with the mainstream mentally ill or people with learning difficulties, the two constituent groups for whom it was originally created. Most of the court's time is spent on matters relating to elderly patients or people with damages awards, principally because these generally tend to be the more complex, higher value cases. The court takes on about 400 new personal injury and clinical negligence cases each year. The average award for a road traffic accident is in the region of £900,000. The average award in a clinical negligence case is about £2,500,000, and the largest award the court is currently handling is £12,000,000.<sup>4</sup> I anticipate that the new court, with its jurisdiction embracing healthcare and personal welfare decision-making, as well as decisions on property and financial matters, will involve a re-alignment in terms of meeting the needs of all four groups.

## Children

The original intention was that the legislation would only involve adults who lack capacity, as does the Adults with Incapacity (Scotland) Act 2000. Section 2(5) of the Act still states that no powers under the Act are to be exercised in relation to a person under 16. However, approximately 70% of the clinical negligence cases the present court deals with result from perinatal injuries, and often the patients are under 16. Accordingly, section 18(3) provides that, as far as property and financial affairs are concerned, the powers under the Act may be exercised even though the person concerned has not reached 16, if the court considers it likely that they will still lack capacity to make decisions in respect of such matters when they reach 18. The converse of this is that the Family Division will retain its jurisdiction to make healthcare decisions on behalf of children, as it did recently, for example, in the two cases involving babies, Charlotte Wyatt in Portsmouth, and

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<sup>4</sup> *Parkin v. Bromley Hospitals NHS Trust* [2002] EWCA Civ. 478. Kerstin Parkin was born in 1968. She and her husband, Mark, were world-class Latin American dance champions. She suffered profound brain damage following a cardiac arrest whilst in labour at Farnborough Hospital, Orpington, on 26 November 1996. The total compensation awarded was £12,000,000, of which £7,000,000 was received as a lump sum, and the remaining £5,000,000 was used to fund an annuity (known as a "structured settlement"), yielding an index-linked income of £250,000 a year for the rest of her life.

Luke Winston-Jones at Alder Hey.<sup>5</sup> Section 21 provides for the transfer of proceedings to the court best suited to deal with the particular issues involved. So, for example, it may be more appropriate for the Court of Protection to deal with a case involving a seventeen-year-old who lacks capacity, since any order under the Children Act 1989 would expire on the child's eighteenth birthday, at the latest.

## **The principles**

Before I comment on the expanded role of the new Court of Protection, I think it is important to consider the basis on which the court will make its decisions in future. Any legislation on mental incapacity involves striking a balance between two extremely important values: the value we place on the freedom of individuals to make their own choices about how they live their lives (*autonomy* or *self-determination*), and the value we place on promoting their well-being (*paternalism* or *protection*).

Benjamin Disraeli once said, in the context of the repeal of the Corn Laws, that “protection is not only dead, but damned.” The Mental Capacity Act doesn't go quite that far, but it certainly gives autonomy and self-determination the upper hand, and almost grudgingly concedes that protection and paternalism have a subordinate role to play, once it is established that a person lacks the capacity to make a particular decision. In this respect the Act endorses the views of the liberal school of philosophy, of which the leading British exponent was Disraeli's contemporary, John Stuart Mill (1806–1873). In his essay *On Liberty*, first published in 1859, Mill said:<sup>6</sup>

“The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”

If you read them in sequence, the principles in section 1 of the Mental Capacity Act form a flowchart or blueprint of how in future all of us – parents, carers, doctors, lawyers, social workers, and the court itself – should deal with people who are unable to make decisions for themselves in

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5 Charlotte Wyatt (*Mr Justice Hedley*, 8 October 2004), Luke Winston-Jones (*Dame Elizabeth Butler-Sloss*, 22 October 2004).

6 John Stuart Mill, *On Liberty*, Penguin Classics, pages 68 and 69. Mill suffered from several nervous

breakdowns and, although he was never the subject of a *commissio de lunatico inquirendo*, he reserved his fiercest invective for a description of such proceedings: *ibid*, page 134.

relation to a particular matter at a particular time because of an impairment of, or a disturbance in the functioning of, their mind or brain.

We must start by assuming that they are entirely autonomous, regardless, at this stage, of whether they are actually capable of making the decision in question.<sup>7</sup>

We must take all practicable steps to help them make the decision that needs to be made.<sup>8</sup> This involves providing information relevant to that decision, including information about the reasonably foreseeable consequences of deciding one way or another, or not deciding at all.<sup>9</sup> It also involves taking all practicable steps to help them communicate their decision, whether by speech, sign language, or any other means.<sup>10</sup>

Even though they may be suffering from a condition that restricts their ability to govern their life and make independent choices, as long as they have the basic ability to consider the options and make choices, we must not intervene against their will. By intervening against their will, even for their own good, we show less respect for them than if we had allowed them to go ahead and make a mistake. This lack of inter-personal respect is potentially a more serious infringement of their rights and freedom of action than allowing them to make an unwise decision.<sup>11</sup>

A paternalistic intervention is only justified when all practicable steps to help a person make a decision have been taken without success, and it is established that they do not have the basic ability to consider options and make choices. And such an intervention must be in their best interests.<sup>12</sup> The idea of “best interests” is not the traditional one that parents, carers, doctors and social workers are used to. It is heavily permeated by the principle of “substituted judgment”, which in recent years, particularly in the United States, has been identified as a preferred alternative to best interests as the standard for substitute decision-making.<sup>13</sup> It is a mandatory requirement, so far as is reasonably ascertainable, to consider the person’s past and present wishes and feelings, the beliefs and values that would be likely to influence his decision if he had capacity, and the other factors that he would be likely to consider if he were able to do so.<sup>14</sup> Similar requirements are expected when consulting others as to what would be in a person’s best interests.<sup>15</sup>

Even then, before intervening in a person’s best interests, we must explore other ways of overcoming the particular problem, and, where feasible, choose the option that restricts the individual’s autonomy and freedom of action to the least extent.<sup>16</sup> I shall be returning to this idea of “the least restrictive alternative” later, when considering the court’s appointment of deputies.

7 Section 1(2): “A person must be assumed to have capacity unless it is established that he lacks capacity.”

8 Section 1(3): “A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success.”

9 Section 3(3).

10 Section 3(1)(d).

11 Section 1(4): “A person is not to be treated as unable to make a decision merely because he makes an unwise decision.”

12 Section 1(5): “An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.”

13 The modern literature on capacity generally considers that the origin of the doctrine of “substituted

judgment” was the decision of Lord Chancellor Eldon in *Ex parte Whitbread, In the matter of Hinde, a lunatic* (1816) 2 Mer. 99, in which an allowance or gift was made to a member of the family who was not dependent upon the lunatic. The present Court of Protection exercises substituted judgment when authorising the execution of a statutory will on behalf of a patient pursuant to the Mental Health Act 1983, s 99(1)(e): see *Re D(J)* [1982] 2 All ER 37.

14 Section 4(6).

15 Section 4(7).

16 Section 1(6): “Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”

During the Bill's second reading in the House of Lords on 10 January 2005, the Rt. Rev Dr Peter Selby, Bishop of Worcester, said:<sup>17</sup>

“Clause 1 contains a statement about a vision of humanity and how humanity is to be regarded. I hope children in generations to come will study that as one of the clearest and most eloquent expressions of what we think a human being is and how a human being is to be treated. ....

I renew my congratulations to those who brought the Bill forward and to all those who worked to make it what it is. I believe that it states what is fundamentally right. In the course of Committee we shall no doubt improve and tighten some of the wording, but we shall never take away the powerful and eloquent statement in Clause 1. That should underlie our treatment of one another in all circumstances and for all purposes.”

### **The new Court of Protection**

The new Court of Protection will be a superior court of record, as distinct from the present court which is an office of the Supreme Court.<sup>18</sup> It will be able to sit at any place in England and Wales, on any day, and at any time.<sup>19</sup> Like the High Court, it will be able to respond appropriately to emergency cases that need to be heard urgently.<sup>20</sup> If need be, part of a hearing can be conducted outside a conventional courtroom, for example in hospital, or at the home or bedside of the person who lacks capacity.

At this stage, it is not certain where the more formal, permanent venues will be. Since 1 October 2001 the present court has had a regional centre at Preston, where District Judge Gordon Ashton sits as a Deputy Master and deals with Court of Protection matters most Thursdays, and we will build on this experience when expanding the court's presence nationwide. Technology, such as e-mail links, electronic case management systems and video-conferencing facilities, will play a pivotal role.

The new court will have a central office and registry at a place appointed by the Lord Chancellor.<sup>21</sup> We expect the central administration to be based in London, mainly because this is where the expertise currently is, in terms of the Family Division, and the existing Court of Protection and Public Guardianship Office. However, this will need to be considered further in the light of two recent reviews: Sir Michael Lyons' review of public sector relocation, *Well placed to deliver? – Shaping the pattern of Government Service* (March 2004),<sup>22</sup> and Sir Peter Gershon's review, *Releasing resources to the front line: Independent Review of Public sector Efficiency* (July 2004).<sup>23</sup>

The judges of the new Court of Protection will be nominated from various levels of the judiciary, ranging from the President of the Family Division and the Vice-Chancellor, through puisne judges

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17 *Hansard*, vol 668, no 18, pages 54 and 55.

18 Section 45(1) and (6).

19 Section 45(4).

20 Section 48 confers an emergency jurisdiction on the court to make interim orders and directions where there is reason to believe that a person lacks capacity, and it is in their best interests to make the order or give the directions without delay.

21 Section 45(4). Under the proposals in the Constitutional Reform Bill, the functions of the Lord

Chancellor under the Mental Capacity Bill will become the responsibility of the Lord Chief Justice, either after consultation with, or with the concurrence of, the Secretary of State for Constitutional Affairs or the Lord Chancellor.

22 The text is available online at [http://www.hm-treasury.gov.uk/consultations\\_and\\_legislation/lyons/consult\\_lyons\\_index.cfm](http://www.hm-treasury.gov.uk/consultations_and_legislation/lyons/consult_lyons_index.cfm)

23 The text is available online at [http://www.hm-treasury.gov.uk/media/B2C/11/efficiency\\_review120704.pdf](http://www.hm-treasury.gov.uk/media/B2C/11/efficiency_review120704.pdf)

from all three divisions of the High Court,<sup>24</sup> to circuit judges and district judges.<sup>25</sup> I imagine that the jurisdiction will be confined, initially at least, to two or three judges per circuit, and specific individuals will be named for the purpose, rather than a generic class of judiciary. At present, appeals and references can be heard by any judge of the Chancery Division or Family Division, some of whom have had little or no experience, either in practice or on the bench, of matters involving people who lack capacity.

The new court will have a President and Vice-President, who will be nominated from the two heads of divisions or from the High Court bench,<sup>26</sup> and a Senior Judge, who will be nominated from the circuit or district bench.<sup>27</sup> It has been assumed that the President of the Family Division will also be the President of the new Court of Protection, though there is no specific requirement that the same person should hold both offices. It may be advantageous for the independence of the fledgling court not to be seen as an adjunct to the Family Division. One of the main functions of the President will be to give directions relating to the practice and procedure of the court.<sup>28</sup>

Individual cases will be dealt with by a judge at the appropriate level. For example, nominated district judges will hear cases similar in nature to their existing jurisdiction in family proceedings, or where local knowledge may be an important factor. Nominated circuit judges will deal with difficult residence and access disputes, and cases involving complex financial issues. The nominated High Court judges will deal with more high profile cases, such as those involving end-of-life decisions. There is a right of appeal to a higher judge of the Court of Protection and thereafter, for cases involving important points of law, practice or procedure, to the Court of Appeal.<sup>29</sup>

In connection with its jurisdiction, the new court will have the same powers, rights, privileges and authority as the High Court.<sup>30</sup> At present, it is unclear whether this provision merely relates to matters such as evidence, enforcement of orders, and contempt, or whether the new court will have the powers that the Chancery Division has to make freezing injunctions or search orders in abuse cases.

Section 51 provides that the Lord Chancellor may make rules of court with respect to the practice and procedure of the court. As the Court of Protection is a relatively small and highly specialised jurisdiction, no provision has been made for a formal statutory rules committee. However, it is envisaged that a wide range of stakeholders will be invited to contribute to the process of drawing up the rules, and that the consultation will take place before the end of 2005, with a view to publishing the rules by the end of 2006, in readiness for the implementation of the Act in April 2007.

## The functions of the new Court of Protection

In brief, the new Court of Protection will be able to:

- make declarations as to whether or not someone has the capacity to make a particular decision; for example, where professionals disagree on whether someone with learning difficulties has the capacity to refuse major heart surgery;<sup>31</sup>

24 It was originally intended that the nominated High Court judges would come from either the Family Division or the Chancery Division. However, this has been extended to all three divisions because of the expertise within the Queen's Bench Division in handling personal injury and clinical negligence cases.

25 Section 46(2).

26 Section 46(3).

27 Section 46(4).

28 Section 52.

29 Section 53.

30 Section 47(1).

31 Section 15(1). It is likely that these declarations will be dealt with by a circuit judge, or, if the issues are particularly complex, by a High Court judge.

- make declarations as to the lawfulness or otherwise of any act done, or yet to be done, in relation to a person.<sup>32</sup>
- make single, one-off orders; for example, the sale of a house and the investment of the proceeds of sale.<sup>33</sup>
- appoint a deputy to make decisions in relation to the matter or matters in which a person lacks the capacity to make a decision.<sup>34</sup>
- resolve various issues involving lasting powers of attorney.<sup>35</sup>
- make a declaration as to whether an advance decision to refuse treatment exists, is valid, or is applicable to a particular treatment.<sup>36</sup>

The power to make declarations is similar to, though slightly wider than, the present declaratory jurisdiction of the Family Division. I am concerned, however, that the new court may be deluged with applications to make a definitive decision on capacity, where there is a respectable body of evidence on either side of the line. Since the decision of the Court of Appeal in the personal injury case, *Masterman-Lister v. Brutton & Co.*,<sup>37</sup> there has been a steady stream of applications for the court to decide in cases of borderline capacity to manage property and financial affairs.<sup>38</sup> I can also envisage solicitors coming to the court to declare whether a client has testamentary capacity or the capacity to make a lasting power of attorney.

### **Appointing deputies**

There is a widespread misunderstanding that deputies appointed by the court will simply be receivers with a new name. This is not the case at all, and the Act provides that, when deciding whether it is in a person's best interests to appoint a deputy, the court should have regard to the principles that (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and that (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.<sup>39</sup>

This is a good illustration of the operation of the principle of the least restrictive alternative, which requires the existence of alternative courses of action to be investigated and compared, and the preferred course of action to be the one that achieves the desired objective in a manner that interferes least with the rights and freedom of action of the person concerned. The modern origin of this principle is generally acknowledged to be the decision of the United States Supreme Court in *Shelton v. Tucker* (1960),<sup>40</sup> in which the court said:

“In a series of decisions this court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle

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32 Section 15(1)(c).

33 Section 16(2)(a). It is anticipated that decisions of this kind will be made at district judge level.

34 Section 16(2)(b).

35 Sections 22 and 23. These are likely to be dealt with by a judge at district bench level.

36 Section 26(4).

37 *Masterman-Lister v. Brutton & Co.* [2003] 3 All ER 162. The decision of Mr Justice Wright, at first instance, is reported at [2002] Lloyds Rep Med 239.

38 Capacity is now also raised more frequently in personal injury proceedings. See, for example, the judgment of Mrs Justice Cox in *Mitchell v Alasia*, which was handed down on 11 January 2005. At paragraph 76 her ladyship decided that Russell Mitchell, now 23, is currently a patient, but should no longer be a patient in approximately three years time after intensive rehabilitation.

39 Section 16(4).

40 *Shelton v. Tucker*, 364 U.S. 479 (1960).

fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.”

This doctrine was first applied in the context of mental health law in *Lessard v. Schmidt* (1972)<sup>41</sup> by a Wisconsin district court, which placed the burden of exploring alternatives on the person recommending full-time involuntary hospitalisation. They have to prove (1) what alternatives are available; (2) what alternatives they investigated; and (3) why the investigated alternatives were considered unsuitable.

In the United States the principle of the least restrictive alternative also applies to adult guardianship and conservatorship proceedings, which are broadly similar to the appointment of a receiver under the Mental Health Act 1983. The Uniform Guardianship and Protective Proceedings Act, which was finalised for adoption by states in 1982, introduced the concept of a “limited guardianship” in response to a call for more sensitive procedures, and for appointments to be fashioned so that the authority of the protector would only intrude on the liberties and prerogatives of the protected person to a degree that was absolutely necessary.

The Uniform Guardianship and Protective Proceedings Act 1982 was replaced by a new Act in 1997, which provides that guardianship should be viewed as a last resort, that limited guardianships should be used whenever possible, and that the guardian or conservator should always consult with the ward or protected person, to the maximum extent feasible, when making decisions.<sup>42</sup>

The National College of Probate Judges issues guidance for its judges: the *National Probate Court Standards* (1993).<sup>43</sup> Standard 3.3.10, which is headed “Less Intrusive Alternatives”, states as follows:

- (a) The probate court should find that no less intrusive alternatives exist before the appointment of a guardian.
- (b) The court should always consider, and utilize, where appropriate, limited guardianships.
- (c) In the absence of governing statutes, the court, taking into account the wishes of the respondent, should use its inherent or equity powers to limit the scope of and tailor the guardianship order to the particular needs, functional capabilities, and limitations of the respondent.
- (d) The court should maximize co-ordination and co-operation with social service agencies in order to find alternatives to guardianships or to support limited guardianships.

It is likely that the new Court of Protection will apply similar criteria when deciding whether or not to appoint a deputy.

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41 *Lessard v. Schmidt*, 349 F.Supp.1078 (E.D.Wis.1972).

42 See text at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ugppa97.htm> See, in particular, section 311.

43 See text at [http://www.probatect.org/ohioprobatecourts/pdf/national\\_probate\\_standards.pdf](http://www.probatect.org/ohioprobatecourts/pdf/national_probate_standards.pdf)

## **Applications to the court**

The present Court of Protection has rules as to who may make an application, as of right, and who needs to obtain leave to make an application, but these are contained in secondary legislation.<sup>44</sup> The Act will make similar provisions within the primary legislation.<sup>45</sup> As a general rule, the court's permission will need to be obtained before an application can be made, but some categories of person can apply as of right, without the need to obtain permission. These are:

- a person who lacks, or is alleged to lack, capacity.
- if that person is under 18, anyone with parental responsibility for him or her.
- the donor or donee of a lasting power of attorney.
- a deputy appointed by the court; or
- any person named in an existing order of the court, if the application relates to that order.

Interestingly, this list does not include the Public Guardian, the Official Solicitor,<sup>46</sup> health authorities, social services, the independent consultee service, and, in many cases, the next-of-kin or close family members. They will need to obtain the court's permission before they can make an application, and I am concerned that, particularly in abuse cases, there may be satellite litigation as to whether an organisation has sufficient standing to make an application. When deciding whether to grant permission, the court is required to have regard to:<sup>47</sup>

- the applicant's connection with the person.
- the reasons for the application.
- the benefit to the person of any proposed order or direction, and
- whether that benefit can be achieved in any other way.

## **The relationship between the court and the Office of the Public Guardian**

At present, the Public Guardianship Office (PGO) operates as the administrative or executive arm of the Court of Protection, and the two organisations are accommodated in the same building, Archway Tower, 2 Junction Road, London N19 5SZ. The PGO is an executive agency of the Department for Constitutional Affairs, and its existence is not formally recognised in any statute. The Act provides for the creation of a new, statutory office-holder to be known as the Public Guardian,<sup>48</sup> and confers on him or her various functions, such as:

- establishing and maintaining a register of lasting powers of attorney.
- establishing and maintaining a register of orders appointing deputies (though not a register of the one-off decisions of the court, which, in accordance with clause 16(4)(a) of the Act are to be preferred to the appointment of a deputy).
- supervising deputies appointed by the court.

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44 For example, rule 18 of the Court of Protection Rules 2001 (SI 2001/824), which sets out the persons who are entitled to apply for a statutory will, and rule 21 of the Court of Protection (Enduring Powers of Attorney) Rules 2001 (SI 2001/825)

45 Section 50(1).

46 Section 50(2) provides that the Court of Protection Rules can specify others who can apply to the court without permission, and it is probable that they will specify the Public Guardian and the Official Solicitor.

47 Section 50(3).

48 Section 57.

- directing Court of Protection Visitors to make visits.
- receiving security.
- receiving reports from donees of lasting powers of attorney and deputies.
- reporting to the court on such matters as the court requires.
- dealing with representations and complaints about attorneys or deputies.

Although there is provision for the Lord Chancellor to make regulations conferring additional functions on the Public Guardian, the list of functions conferred by the Act does not expressly include the PGO's present functions of processing originating applications to the court, and acting as the receiver of last resort.

So, it is envisaged that in future there will be two distinct organisations, of broadly similar size, in separate offices, and that the court will have an administrative staff as well as members of the judiciary. This is designed to create a clearer and sharper distinction between the work of the new Court of Protection and the Office of the Public Guardian. In practical and change management terms, there is a need to disentangle the close relationship that currently exists between the Court of Protection and the PGO in a way that achieves a proper distinction between the two organisations, whilst retaining the positive aspects of the present close working arrangements.

### **Preliminary costings**

It is possible that an increased awareness of capacity issues during the passage of the Bill and in the lead up to and implementation of the Act will result in a higher number of cases than usual. I have seen somewhere that the cost of establishing the new Court of Protection and the Office of the Public Guardian will be £4,700,000 for the set-up costs prior to implementation, and that the annual running costs will be £8,600,000 thereafter. The annual running costs have been calculated on the basis that the number of health and welfare cases, which currently go to the High Court, but in future will go to the new Court of Protection, will double to 200, and that of the estimated 1,200,000 people who might have recourse to the Bill because they lack capacity, 1.5% will seek and receive legal advice and assistance each year.

### **Conclusion**

In conclusion, I must apologise for not being able to be more informative and precise about the new court and its expanded role. For those of you who have studied the Mental Capacity Act, I will have told you nothing you didn't know already. So far, the main focus of the Department for Constitutional Affairs has been to ensure the safe passage of the Bill, make positive messages known, rebut inaccuracies, and engage groups with particular concerns. The finer points of detail relating to the new jurisdiction will need to be considered after the Act has been passed and during the two years' lead-up to its implementation.