

**MANAGEMENT OF PROPERTY AND AFFAIRS OF PATIENTS –
Including Provisions Affecting Court Jurisdiction and Related Procedures in the
Mental Health Capacity Act 2005
(August 2006)**

- 1 In dealing with statutory provisions to replace Part VIII of the 1986 Order the wider task of the Sub Group was to consider the specific elements of the English Mental Capacity Act 2005 (the 2005 Act) defining the enlargement of jurisdiction of the Court and related procedures which should be introduced in Northern Ireland. Draft recommendations proposed by the Sub Group are displayed in boxes.

The Court

- 2 All jurisdiction relating to incapacitated persons in Northern Ireland is vested in the High Court by virtue of section 28 (1) of the Judicature (Northern Ireland) Act 1978, including that previously exercisable by the Lord Chief Justice as successor to the Lord Chancellor of Ireland or deriving from the prerogative jurisdiction. In this respect the position in Northern Ireland differs from that in England and Wales in that the Office of Care and Protection (the OCP) is a part of the Family Division of the Court and does not stand outside the High Court, as is the case with the Court of Protection in London. Judicial responsibility lies at present with the Family Judge (or another Judge assigned by the Lord Chief Justice) and with the Master (Care and Protection).
- 3 Taking account of the relatively small population of Northern Ireland, its compact geographical area and the correspondingly low volume of judicial business it is not considered that the creation of a separate Court of Protection would be necessary or appropriate for Northern Ireland. Jurisdiction should remain, as at present, within the Family Division of the High Court (the Court) and all Court business should be transacted through a single, central office. There is adequate provision in the Judicature (Northern Ireland) Act 1978, and amended, to assign responsibilities to Judges and statutory officers and to deal with the arrangement of Court business at specific venues. Appropriate powers in regard to the making of Court Rules, the prescription of forma and orders and the fixing of fees and costs are found in existing legislation.

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| <ol style="list-style-type: none">1. Jurisdiction to dispose of all judicial business arising under new legislation in Northern Ireland should remain within the High Court of Justice and should be transacted by such Judges or statutory officers as may be assigned or nominated in the Judicature (Northern Ireland) Act 1978.2. Specific provisions relating to venues [for the convenience of parties], Court Rules, practice requirements and fees should also be dealt with under existing legislation |
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The Public Guardian

- 4 The 2005 Act creates a new office – the Public Guardian – and the range of functions assigned to that officer by section 58 of the Act includes many of the current responsibilities of the OCP. It is quite clear, however, that the specific management and supervisory role of this newly-created executive post is seen to be quite distinct and separate from the judicial functions of the Court. While there is undoubtedly significant benefit to be derived from maintaining a close working relationship between the OCP and the Court, the Sub Group has taken account of the compelling argument in favour of creating a separate post of Public Guardian for Northern Ireland as has been effected in most Commonwealth countries and other jurisdictions throughout the world.
- 5 It has been noted that in addition to the list of functions defined in section 58 of the 2005 Act the draft Code of Practice issued by the DCA suggests (in paragraph 13.19) that the Public Guardian may undertake investigations of alleged financial abuse by attorneys or deputies and may also have a general supervisory role in relation to personal welfare, health and social care matters as well as inviting police intervention when criminal activity affecting a patient is suspected. A further option which should be considered is whether the Public Guardian (rather than the Official Solicitor, as at present) or an officer of the Court (as provided in the current Rules) should act as deputy of last resort.
- 6 The range of functions currently undertaken in the OCP is significantly greater (and more effective) than is found in neighbouring jurisdictions. The difference arises primarily from the statutory duty to notify the OCP of certain cases – which is described in paragraph 8 below – and also by reason of the close working relationship which has existed hitherto between the Court, the OCP and the Official Solicitor. The availability of legal services to assist the OCP has been an essential component in the present system and experienced lawyers have served as a valuable point of first reference for solicitors, doctors, social workers and others who benefit from expert guidance at the initial stages of a case. The Public Guardian, with appropriate advice, should still be able to direct particular enquiries and advise on appropriate action before matters have to be referred to the Court.
- 7 Having regard to the developing trends in neighbouring jurisdictions to restrict, so far as possible, official involvement in the financial affairs and welfare needs of an individual, it is accepted that in the future the current investigative and management roles of the OCP will have to be critically reviewed and specific responsibilities re-assigned.

3. There should be a Public Guardian for Northern Ireland supported by staff of sufficient numbers and experience to enable the appointee to discharge a clearly defined range of functions
4. In addition to the functions to be discharged by the Public Guardian as set out in section 58 of the 2005 Act a Code of Practice should define the circumstances in which the Public Guardian should intervene to protect the interests of an incapacitated adult and to refer a case of suspected abuse to other agencies (if appropriate) or, if necessary, to refer a case to the Court for a declaration, decision or order.

5. The Public Guardian should have access to expert legal services in discharging the functions assigned to him or his office.
6. A Code of Practice (relating to the distinct but inter-related roles of carers, social workers, legal representatives, Visitor, the RQIA, the Public Guardian and the Court) should provide clear guidance for the resolution of issues relating to the personal welfare, property and affairs of an adult – if possible without the need to involve the Public Guardian or have recourse to proceedings before the Court.
7. The Public Guardian should only be engaged to act as a deputy of last resort in exceptional circumstances and when other clearly defined options are not available.

The Duty to Notify the Office

- 8 It is clear from the arrangements of sections within the 2005 Act and from the draft Code issued by the DCA that an application to the Court is intended to serve as a remedy of last resort and that, so far as possible, the affairs of an incapacitated adult should be resolved without recourse to formal legal proceedings. It is against this background that the Sub Group re-examined the current statutory duty (which is unique to Northern Ireland) imposed upon local Health and Social Services Trusts to notify the OCP of cases where any powers of the Court ought to be exercised with respect to the property and affairs of the adult.
- 9 The specific provisions contained in Article 107 (1) and Article 108 (3) of the 1986 Order, which replace equivalent provisions in section 73 (1) of the 1961 Act, are founded upon the belief that early intervention on behalf of an incapacitated adult must operate for his benefit and should prompt an initiative by the Court or OCP, unless some effective initiative has already been taken by family members, solicitors or other representatives of the adult. While it is accepted that the existing arrangements in Northern Ireland have worked well and have provided a valuable level of protection to individuals and to social work staff involved in their cases, there is a need to define more precisely the circumstances in which formal intervention or “whistle blowing” would be justified.
- 10 If it is assumed that responsibility to make provision for welfare arrangements and personal needs should, in the first instance, lie with the adult himself, his family, carers or nominated persons the involvement of any outside agency should only arise where there is apparent neglect or risk to the adult. The local system of “early warning” of difficulties involving an adult has hitherto provided a higher level of protection than is found in other jurisdictions. It has been firmly represented to the Sub Group that initial enquires to establish the extent of an adult’s assets, income, welfare arrangements and personal needs should be a free service in all cases.

8. The duty to notify the OCP contained in Article 107 (1) of the 1986 Order should be replaced by specific guidance in a Code of Practice explaining the appropriate protective steps (based upon a comprehensive assessment of the needs of the adult) which should be undertaken by carers, family members or other representatives of the adult.
9. In cases where no appropriate action has been undertaken by carers, family members or others, and in any case involving suspected abuse or neglect, a Code of Practice should define the appropriate intervention to be undertaken by social services based upon an initial assessment undertaken free of charge.
10. The investigation role of the OCP, at present defined in Article 108 (3) of the 1986 Order, should re-examined and a Code of Practice should describe who should undertake responsibility in future for initial enquires in sensitive cases.

Visitors

- 11 The service provided for patients in Northern Ireland by Visitors (appointed by the Lord Chief Justice to 3 panels defined in Article 104 (1) of the 1986 Order) has only rarely been used, but should nevertheless be retained.
- 12 The 2005 Act creates 2 new panels – Special Visitors (described in the draft Code as “approved healthcare practitioners with relevant expertise”) and General Visitors. It is contemplated that General Visitors will have a more extensive and important role which will include investigation of possible abuse of an adult, provision of independent advice to the Court and to the Public Guardian and giving help and support to attorneys and deputies.

11. There should be statutory provisions for the creation of panels of Visitors in Northern Ireland equivalent to those set out in section 61 of the 2005 Act and, as stated in Recommendation 6 above, a Code of Practice should set out clear guidance on the scope of their functions and how they may relate to those of other persons involved with an adult’s affairs.

The Convention on the International Protection of Adults

- 13 The International Convention signed at The Hague on 13 January 2000 makes essential provision for the recognition and enforcement of protective measures made in respect of the person or property of an incapacitated adult in other Convention countries. The implementation of the Convention would be a welcome innovation in Northern Ireland having regard to the arrangements frequently made for the benefit of adults in later life who move between this jurisdiction and other countries in the United Kingdom and the Republic of Ireland to live with or close to other relatives. The Convention has already

been ratified in Scotland in the Adults with Incapacity (Scotland) Act 2000 and similar provision is made in the 2005 Act for England and Wales.

12. New legislation for Northern Ireland should incorporate provision to give effect to the Convention on the International Protection of Adults (The Hague Convention of 13 January 2000).

References

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The Adults with Incapacity (Scotland) Act 2000

The (Scottish) Code of Practice on the Adults with Incapacity (Scotland) Act 2000 – March 2002

The Mental Capacity Act 2005

The Draft Code of Practice in relation to the 2005 Act

The Draft Court of Protection Rules issued under the 2005 Act