EXPLANATORY MEMORANDUM TO

THE COURT OF PROTECTION (AMENDMENT) RULES 2022

2022 No. 1192 (L. 12)

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The instrument amends the Court of Protection Rules 2017 (S.I 2017/1035) ("the Rules") which govern practice and procedure in proceedings before the Court of Protection; and references to a rule or Part in this Memorandum are to a rule or Part of those Rules. The amendments to rules 6.3 and 9.1 provide for changes made in the supporting Practice Directions; and Part 21 of the Rules, about procedure in relation to proceedings concerning contempt of court, is replaced by a new Part 21 which is drafted to align with recent changes to the corresponding parts of the Civil Procedure Rules and Family Procedure Rules.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

6.1 The power to make Court of Protection Rules is contained in section 51 of the Mental Capacity Act 2005 ("the 2005 Act"). The power is a broad one, similar to the powers to make Civil Procedure Rules and Family Procedure Rules, and as with those Rules, the Court of Protection Rules are supported by practice directions, made under section 52 of the 2005 Act, and Court of Protection Rules may, instead of making provision about a matter, refer to provision made or to be made about that matter by practice direction.

6.2 Court of Protection Rules are made in accordance with the procedure in Part 1 of the Schedule 1 to the Constitutional Reform Act 2005, which provides for rules to be made by the Lord Chief Justice or a judicial office holder nominated by the Lord Chief Justice, and approved by the Lord Chancellor. The President of the Family Division (who is also the President of the Court of Protection), is the judicial office holder nominated for this purpose

6.3 Unlike the position for Civil Procedure Rules and Family Procedure Rules, there is no standing rule committee for making Court of Protection Rules. The President nominated an *ad hoc* committee ("the Committee") to advise on the detail of amendments to the rules, and this instrument reflects the recommendations of that committee.

7. Policy background

What is being done and why?

7.1 *Service by electronic means.* Rule 6.3 of the Rules contains provision relating to methods of service for the delivery of court documents.

7.2 The Rule provides that service can be effected either by personal delivery to the person, their home address or their last known address or by first class post sending it to that address, or last known address or by an alternative method of service which provides for delivery on the next working day.

7.3 Although the supporting Practice Direction 6A refers to service by electronic means court users have doubted that service by electronic means includes email and have sought specific directions from the court. This has led to unnecessary applications for directions.

7.4 The Committee recommended that minor amendments should be made to rule 6.3 to make it clear that electronic service includes the use of email and that a direction from the court is not required.

7.5 *Applications for property and affairs deputyship.* Part 9 of the Rules contains provisions governing how to start and respond to proceedings in the Court of Protection.

7.6 The Committee previously recommended a pilot of a new process in the court for applications for property and affairs deputyship, allowing notifications to interested parties to be given before the application was issued by the court, with the intention of speeding up the application process.

7.7 The pilot, undertaken by way of a practice direction, proved successful, and the Committee accordingly recommended that rule 9.1 be amended to provide, by way of a practice direction, different provisions for property and affairs applications.

7.8 *Contempt proceedings.* Part 21 of the Rules contains provision governing the procedure in relation to proceedings for contempt of court in the Court of Protection. Part 21 as included in the Rules on their introduction in 2017 was modelled on Part 81 of the Civil Procedure Rules ("CPR") at the time, which was itself a new Part introduced in 2012 and representing a considerable revision and consolidation of rules previously preserved from the Rules of the Supreme Court and County Court Rules in the Schedules to the CPR. Part 81 of the CPR was subsequently, in 2019, replaced by a new Part 81 which was then mirrored in Part 37 of the Family Procedure Rules, and the Committee recommended that the Court of Protection Rules should follow suit with a new Part 21. This instrument carries through that recommendation.

7.9 The principal issue to which the codification is addressed arose in *R v Stephen Yaxley-Lennon* (aka Tommy Robinson) [2018] EWCA Crim 1856, following which proposals for recasting the rules relating to contempt of court in courts to which the CPR apply were developed and put out to public consultation by the Civil Procedure Rule Committee

7.10 The consultation on recasting the rules relating to contempt of court proposed a number of changes, which were adopted and resulted in extensive revisions to Part 81 of the CPR to condense the rules and set out a uniform procedure, reducing the number of rules in Part 81 of the CPR from 38 to 10 and dispensing with two practice directions and a Practice Guidance document.

7.11 The existing Part 21 of the Court of Protection Rules and its associated practice directions mirror in large part the previous Part 81 of the CPR and the associated Practice Direction 81; and the amendments to the Court of Protection Rules made by this instrument similarly mirror, for Part 21 of those Rules, the new Part 81 of the CPR, save for those changes required to reflect the difference in structure between the civil courts covered by the CPR and the Court of Protection

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union

9. Consolidation

9.1 The 2017 Rules were themselves a consolidation, and have been very little amended since they came into force. There are no immediate plans for consolidation following the present amendments.

10. Consultation outcome

10.1 The amendments are considered to be straightforward and not to require a full public consultation. They have, however, been fully explored through the representation on the Committee, of a wide range of practitioners, judges and professional bodies with particular expertise in this area of work.

11. Guidance

11.1 Amendments to the Court of Protection Rules are drawn to the attention of solicitors and other Court of Protection practitioners by correspondence addressed to members of the judiciary, to relevant representative bodies (for example the Law Society, Bar Council) and to the editors of relevant legal publications; as well as by publicity within HM Courts and Tribunal Service.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because the reforms affect only a specialist group of businesses.

13. Regulating small business

13.1 The Rules relate to activities that are undertaken by small businesses engaged n Court of Protection applications.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is through the Court of Protection Rules being kept under continuous review by the President of the Court of Protection and

the Lord Chancellor. HM Courts and Tribunals Service has regular stakeholder engagement with professional representatives on the Court of Protection.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Joan Goulbourn at the Ministry of Justice Telephone: 0203 334 3019 or email: joan.goulbourn@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Abigail Plenty, Deputy Director for Vulnerabilities Policy – Mental Capacity Act Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Mike Freer MP, Parliamentary Under Secretary of State at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.