

**NHS Shropshire, Telford & Wrekin  
Integrated Care System**

# **Court of Protection Policy**

**Document Control Sheet**

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1		
2		

The formally approved version of this document is that held on the NHS Shropshire, Telford and Wrekin ICB website:

<https://www.shropshiretelfordandwrekin.nhs.uk/>

Printed copies or those saved electronically must be checked to ensure they match the current online version.

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# 1 How to use this Policy

The purpose of this Policy is to provide all Shropshire, Telford & Wrekin Integrated Care System (ICS) colleagues with practical information about the Court of Protection, the Mental Capacity Act and the circumstances when the ICS may have a role before the Court. It is envisaged that the Individual Commissioning Team are the group of clinicians that are most likely to come into contact with the Court owing to the fact that they will be involved in assessing, reviewing and commissioning care for people who may lack capacity to make specific decisions for themselves. It is important to read this policy in conjunction with the ICS Multi-agency Mental Capacity Policy.

To ensure that any action taken by the ICS complies with best practice it is essential that all work with service users/patients and their families or representatives adhere to the five statutory principles of the Mental Capacity Act.

Principle 1: “a person must be assumed to have capacity unless it is established that he lacks capacity.” [section 1(2)]

Principle 2: “A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.” [section 1(3)]

Principle 3: “A person is not to be treated as unable to make a decision merely because he makes an unwise decision.” [section 1(4)]

Principle 4: “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.” [section 1(5)]

Principle 5: “Before the action is done, or the decision, 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.” [section 1(6)].

This means that formal assessments of capacity, best interest decision making and consultation with others must be a routine part of the ICS’s work when it is suspected that someone may lack capacity for a specific decision.

This will help support actions when an application to the Court of Protection;

- a. May be required; or
- b. Is required.

The policy sets out;

- a. The circumstances when an application must be made;
- b. The circumstances when an application should be made;
- c. The circumstances when an application may be made;
- d. How to access the Court of Protection forms (COP forms);
- e. When different COP forms should be used;
- f. How to complete the COP1 application form;
- g. How to prepare and submit the mental capacity assessment;
- h. How to prepare and submit other evidence;
- i. How to complete the COP24 witness statement; and
- j. Top tips for providing an oral testimony in Court.

If a member of staff from the ICS encounters a situation which may require an application to the Court or become aware that someone else is likely to make an application that will involve the ICS it is essential to inform your manager and the Associate Director for the Individual Commissioning Team immediately and that advice is sort from the adult safeguarding lead or their deputy. At this point approval will also be required to approach the ICS's solicitors as legal advice will be required at the earliest opportunity.

It is noted that the Mental Capacity Amendment Act has now been passed by Parliament and this will ensure that the Deprivation of Liberty Safeguards will be replaced by Liberty Protection Safeguards. These new arrangements have necessitated a comprehensive revision of the Mental Capacity Act Code of Practice. When the implementation dates for the new scheme come into place the ICS may be involved in cases when someone appeals against their care arrangements and the Court of Protection will also hear those cases.

## **The Court of Protection and the Mental Capacity Act**

### **The role of the Court of Protection**

[Click here](#) to access information about the role and remit of the Court of Protection under the Mental Capacity Act.

### **The Court of Protection Rules 2017**

The Court of Protection Rules 2017 set out the statutory requirements of;

- a. Applicants;

- b. The Court; and
- c. Others involved in proceedings.

This guidance has been written in line with current rules, which can be accessed in full by [clicking here](#).

## 2 Your Role

Usually, the lead team for Court of Protection work within the ICS is likely to be the Individual Commissioning Team with ongoing support from the Adult Safeguarding Lead or their deputy. The member of staff with responsibility for commissioning the care may therefore be asked to produce a witness statement (COP24) outlining the assessment and review process associated with the commissioned care. However the application to the Court of Protection is made;

- a. By the ICS; and not
- b. By you as an individual practitioner.

It is the role of the ICS, as the applicant to;

- a. Manage the application; and
- b. Support you in your role as their representative and witness

Your role is to support the ICS application by providing;

- a. Information about the circumstances of the case;
- b. Evidence to support the application; and
- c. Where necessary, oral evidence in Court.

You should provide information;

- a. Whenever it is requested; and
- b. In the format requested by the organisation.

You may be asked to carry out certain tasks, such as;

- a) Helping to fill out a range of Court forms;
- b) Gathering evidence from records;
- c) Reviewing evidence and arranging it for submission; and
- d) Writing evidence statements.

You should be provided with appropriate legal support to carry out your role and any tasks asked of you.

## 3 The Role of the Legal System

It is important that a person with relevant legal expertise manages and co-ordinates;

- a. The application process;
- b. Any correspondence to or from the Court;
- c. How and when evidence is provided;
- d. How evidence is organised and submitted to the Court;
- e. How others are involved in the process, including how tasks may be delegated.

It is also important that they support you in your role, which includes;

- a. Developing your understanding of Court processes;
- b. Supporting you to evaluate the robustness of the evidence you provide;
- c. Advising you about how to complete various court forms appropriately; and
- d. Supporting you during any oral hearings.

This will be undertaken by the ICS's solicitors who will provide ongoing advice and information about the process and will take the lead in submitting the application, or oversee any papers that need submission in response to another party being the applicant

## **4 The Court of Protection, Deputyship and the Public Guardian**

The Court of Protection is a court that was established through Part 2 of the Mental Capacity Act 2005. Prior to the Act the Court of Protection existed as an office of the Supreme Court only.

The Court has jurisdiction to decide all matters relating to the Mental Capacity Act and to make decisions about what is in the Best Interests of a person who lacks capacity with regard to their;

- a. Personal welfare; and/or
- b. Property and Affairs.

## **5 General Powers of the Court**

### **The Power to make Declarations**

The Court of Protection has the power to make declarations regarding;

- a. Whether a person has or lacks capacity to make a decision specified in the declaration;
- b. Whether a person has or lacks capacity to make decisions on such matters in general as specified in the declaration; and
- c. The lawfulness of any act done, or yet to be done, in relation to that person.

### **The Power to make Decisions**

Following a declaration that the person lacks capacity to make a decision about the matter in hand, the Court has the power to;

- a. Make a decision (or decisions) on behalf of the person; or
- b. Appoint a Deputy to make decisions on behalf of the person.

When deciding to make a decision itself the Court must be satisfied that this is more preferable to appointing a Deputy and vice versa.

Decisions must relate to either;

- a. The person's property and affairs; and/or
- b. The person's personal welfare.



When making decisions the Court is subject to the same rules as any Decision Maker in that;

- a. The 5 statutory principles of the Act apply; and
- b. Any decisions must be in the Best Interests of the person.

The Court has the power to make decisions regardless of whether there has been a request for them to do so, as long as this is in the person's Best Interests.

The Court has the power to amend any order it makes at any time if it feels that this is no longer in the person's Best Interests.

### **The Power to Appoint a Deputy**

Following a declaration that the person lacks capacity to make a decision about the matter in hand, the Court has the power to;

- a. Make a decision (or decisions) on behalf of the person; or
- b. Appoint a Deputy to make decisions on behalf of the person.

For further information about appointing a Deputy, and the role of a Deputy [click here](#).

### **The power to authorise a detention that deprives a person of their liberty**

The Court has the power to authorise a detention in a care home or hospital when making a decision about the person's welfare if;

- a. It deems this in the person's Best Interests; and
- b. In the case of a deprivation under DoLS, the person is eligible to be deprived of their liberty under Schedule 1A of the Mental Capacity Act.

Although the Court has the power to authorise detention it cannot authorise a Deprivation of Liberty under the Deprivation of Liberty Safeguards. If a DoLS authorisation is required the Court must either;

- a. Direct the supervisory body (Local Authority) to authorise a deprivation;  
or
- b. Direct the managing authority to request a standard authorisation.

### **The power to transfer proceedings relating to people under 18**

The Court of Protection and the High Court both have powers to transfer proceedings relating to a person under 18 from one Court to the other when granted the authority to do so by the Lord Chief Justice.

## 6 Specific Powers of the Court

### **The power to amend or withdraw an authorised Deprivation of Liberty Safeguard (DoLS)**

Under section 21A of the Mental Capacity Act the Court has powers to review any standard or urgent DoLS authorisation at any time that it deems it in the person's Best Interests to do so. If the person's care is funded by NHS Shropshire, Telford & Wrekin Integrated Care System then it is likely that the ICS, as the responsible commissioner, will be joined as a party to the proceedings. This is because the Court will be attempting to determine that the person lacks capacity specific to his care, treatment, and residence and that the care which the DOLS authorises is the least restrictive and in his best interest. In which case the Individual Commissioning Team will need to assist the Court with evidence about assessments, consultations and reviews which have been used to inform the decision to place that person in this environment. When you have information that the person is unhappy with their care you should take steps to review the arrangements to see if it could be delivered in a less restrictive way and to explore why the care is unsatisfactory. It is important to receive management support during this time and to seek advice from adult safeguarding colleagues as well as liaising with the Local Authority DOLS Team.

As soon as an ICS colleague becomes aware that an application is likely under Section 21A and the ICS is the responsible commissioner you should contact your manager and seek advice from the adult safeguarding leads. Permission will be needed to consult with the ICS's solicitors, and this will require senior manager approval.

The Court can question;

- a. In the case of standard authorisations, whether the person (known as the relevant person) meets the qualifying requirements;
- b. In the case of standard authorisations, the conditions upon which the authorisation was given;
- c. In all cases, the period of which the authorisation has been, or will be in force;
- d. In all cases, the purpose for which the authorisation was given; and
- e. In the case or urgent authorisations, whether the urgent authorisation should have been given at all.

Following a review of the authorisation that has been given the Court has powers to;

- a. Vary or terminate a standard or urgent authorisation;
- b. Direct (order) the Local Authority (the supervisory body) to vary or terminate a standard authorisation; or

- c. Direct the registered person of a care provider or hospital (the managing authority) to vary or terminate an urgent authorisation.

The Liberty Protection Safeguards will have a similar referral mechanism under section 21ZA of the Mental Capacity Amendment Act.

### **The power to revoke a Lasting Power of Attorney**

Under section 22 of the Mental Capacity Act the Court has powers to review the validity of a registered Lasting Power of Attorney.

The Court has the power to determine specifically whether;

- a. The requirements for creating a Lasting Power of Attorney have been met; and
- b. The Lasting Power of Attorney remains valid.

The Court can revoke any Lasting Power of Attorney when it finds;

- a. The donee has behaved, or is behaving in a way that contravenes the authority given to them; or
- b. The donee has behaved, or is behaving in a way that is not in the person's Best Interests; or
- c. The donee proposes to behave in a way that contravenes the authority given to them or would not be in the person's Best Interests.

The Court can also revoke a Lasting Power of Attorney if it finds that;

- a. Undue pressure was placed on the person to create or register the Lasting Power of Attorney; or
- b. Fraud was used to induce the person to create or register the Lasting Power of Attorney.

If there is more than one donee of a Lasting Power of Attorney the Court can decide to revoke the authority of as many donees as it deem necessary.

The power to alter and monitor a Lasting Power of Attorney

If the Court deems it in the Best Interests of the person it may;

- a. Amend the nature or scope of any decision that the donee has been authorised to make;
- b. Give additional authority to the donee to make decisions outside of those in the Lasting Power of Attorney;
- c. Permit the donee to purchase gifts with the person's financial resource outside of the gifts they are permitted to buy; and
- d. Authorise expenses or remuneration to the donee in carrying out their role.

If the Court deems it necessary it can direct (order) a donee to provide reports, accounts and other information regarding their role.

## **7 Decisions that can be made by the Court**

**Decisions made by the Court must relate to either;**

- a. The person's property and affairs; and/or
- b. The person's personal welfare.

### **Property and Affairs**

The Court has powers to make decisions (determinations) about matters such as;

- a. The control and management of the person's property;
- b. The sale, exchange, gift or other disposition of the person's property;
- c. The acquisition of property on the person's behalf;
- d. The carrying on, on the person's behalf of any business or trade;
- e. Decisions that will lead to the dissolving or a partnership to which the person is a member;
- f. The carrying on of any contract entered into by the person;
- g. The discharge of the person's debts and any other obligations, including moral obligations;
- h. The settlement of any property , whether for the person's benefit or the benefit of anyone else;
- i. The execution of a will for the person (when they are 18 or over);
- j. The exercise of any power invested in the person as a trustee or otherwise; and
- k. The conduct of legal proceedings in the person's name, or on their behalf.

With the exception of making a will (which can only be done from the age of 18) the Court can make decisions relating to all of the above for a person from the time that they are 16, so long as the Court reasonably believes that the person will continue to lack capacity when they become 18.

### **Personal welfare**

The Court has powers to make decisions (determinations) about matters such as;

- a. Deciding where the person is to live;
- b. Deciding what contact the person should have, if any, with specified persons;
- c. Making an order prohibiting a named person from having contact with the person;

- d. Giving or refusing consent to the carrying out or continuation of medical treatment; and
- e. Giving a direction to change arrangements for the provision of healthcare to the person.

## 8 Deputies

### The power to appoint a Deputy

The following section provides information about Deputyship. It is important to understand when a person may have a Court appointed Deputy. The Individual Commissioning Team must ensure that they work with the Deputy when taking steps to commission care. The information below explains the Deputy's powers and responsibilities and the steps that can be taken to remove a Deputy if they are deemed not to be acting in the person's best interest. Occasionally someone applying to become a deputy will notify the ICS of their intention this is to ascertain if the ICS has a view on the application. In which case the ICT will need to consider if they have any information about that person's suitability to act as a Deputy. This information will be shared with the applicant so must be clear, fair and supported by evidence.

Following a declaration that the person lacks capacity to make a decision about the matter in hand, the Court has the power to;

- a. Make a decision (or decisions) on behalf of the person; or
- b. Appoint a Deputy to make decisions on behalf of the person.

The Court has the power to appointment a Deputy regardless of whether there has been a request for them to do so, as long as this is in the person's Best Interests.

### Appointing a Deputy

When deciding to appoint a Deputy the Court must be satisfied that this is more preferable to making a decision itself and vice versa.

The Court can only appoint a Deputy when;

- a. The Deputy is over 18 years of age; and
- b. The Deputy consents to the appointment.

If decisions relate to property and affairs the Deputy can also be a trust corporation.

When deciding to appoint a Deputy the Court must limit the scope and duration of the powers it gives to the Deputy to reflect the circumstances of the case.

## Multiple Deputies

The Court has the power to appoint two or more Deputies if it deems this in the person's Best Interests. Where there is more than one Deputy the Court must set out;

- a. Whether the Deputies must act jointly; or
- b. If they can act independently; and
- c. Any specific conditions or circumstances that apply for particular decisions.

## Successions

The Court has the power when appointing a Deputy to appoint a 'back up' Deputy who can succeed the appointed Deputy in such specific circumstances or on the happening of particular events as determined by the Court, on either a permanent or temporary basis.

### EXAMPLE:

Mary is appointed by the Court of Protection as John's Deputy to make decisions regarding his property and affairs. Mary notifies the Court that she is going on a lengthy holiday later that year and is not going to be able to carry out the Deputy role while she is away. The Court appoints Geoff to succeed Mary as Deputy for the time that she is away on holiday.

If there is a Lasting Power of Attorney

The Court can only give power to a Deputy to make a decision when it is not a decision that can be made by a donee of a Lasting Power of Attorney.

The Requirements of Deputies when making decisions

When making decisions the Deputy is subject to the same rules as any Decision Maker in that;

- a. The 5 statutory principles of the Act apply; and
- b. Any decisions must be in the Best Interests of the person.

Decisions that can and cannot be made by the Deputy

The Deputy is only permitted to make decisions;

- a. As set out by the Court; *and*
- b. At times when the Deputy has taken reasonable steps to determine that the person lacks capacity to make their own decision.

### NEED TO KNOW

Regardless of an appointment by the Court a Deputy **cannot** make a decision, or carry out an act if they know that the person has capacity to make the decision for themselves at the time that it is to be made.

The Court may provide the Deputy with powers to;

- a. Take possession or control of all or a specified part of the persons property or finances; and
- b. Exercise specified powers in respect of that property or finance, for example investment.

There are also specific decisions set out under section 20 of the Mental Capacity Act that a Deputy is **not** permitted to make. These decisions must be made by the Court and are as follows;

- a. Decisions to refuse or withdraw life sustaining treatment;
- b. Decisions that prevent a named person from having contact with the person;
- c. Decisions that consent to a direction to change arrangements for the provision of healthcare to the person;
- d. Decisions to sell the person's property, regardless of whether this is for the person's benefit or the benefit of others;
- e. The execution of the person's will;
- f. The exercise of any power invested in the person as a trustee or otherwise.

### **Decisions made by a Deputy**

When a Deputy has been appointed by the Court to make a particular decision (or decisions) the decision should be given the same regard as if the person had made it themselves.

### **Deputies and reimbursement**

The Deputy is entitled to;

- a. Be reimbursed out of the person's financial resource for reasonable expenses in discharging their functions; and
- b. If the Court directs it, payment for carrying out the function of being a Deputy.

### **Restraint**

A Deputy that also provides direct care to the person is not permitted to use restraint when carrying out any acts unless;

- a. They believe that it is necessary in order to prevent the person from being harmed; and
- b. There is evidence that restraint is a proportionate response to the likelihood and seriousness of harm.

Restraint is defined under the Mental Capacity Act as;

- a. Any act that uses, or threatens to use, force to carry out another function to which the person resists; or
- b. Any act that restricts the person's freedom of movement, whether or not they resist.

### **Monitoring Deputies**

Under section 58 of the Mental Capacity Act it is the statutory function of the Office of the Public Guardian to monitor generally all Deputies appointed by the Court.

If the Court determines it necessary take additional monitoring steps it has the power to require the Deputy;

- a. Provides specific information to the Public Guardian to verify the appropriateness of the appointment; and
- b. Submit reports or information to the Public Guardian at predetermined intervals.

[Click here](#) for further information about the role and powers of the Office of the Public Guardian.

### **Power of the Court to amend or revoke an appointment**

The Court has the power to amend an appointment it makes at any time if it feels that this is no longer in the person's Best Interests.

The Court has the power to revoke the appointment of a Deputy if it is satisfied that;

- a. The Deputy has behaved, or is behaving in a way that contravenes the powers given to them by the Court; or
- b. The Deputy has behaved, or is behaving in a way that is not in the person's Best Interests; or
- c. The Deputy proposes to behave in a way that contravenes the Court or would not be in the person's

## **9 Applications to the Court of Protection**

### **Permission to apply to the Court**

The following people **do not** need permission from the Court in order to apply;

- a. A person who lacks, or is alleged to lack capacity;
- b. Where the person is under 18, anyone with parental responsibility for them;
- c. By the donee of a Lasting Power of Attorney for the person;
- d. By a Court appointed Deputy for the person;
- e. By anyone named in an existing Court order, if the application relates to the existing order; or



- f. A Relevant Person's Representative (RPR) making a request to the Court under section 21A for the review of a DoLS.

All other persons **must** seek permission of the Court before making an application. When a request has been made to the Court for permission to apply the Court must have regard to;

- a. The applicants connection with the person who lacks capacity, or is alleged to lack capacity;
- b. The reasons behind the application;
- c. The benefit to the person of the order or direction being sought; and
- d. Whether the benefit can be achieved in any other way.

### **Interim orders and directions**

Upon receipt of an application to the Court, the Court can make any order or give any direction that it deems necessary whilst the case is waiting to be heard so long as;

- a. There is reason to believe that the person lacks capacity in relation to the matter;
- b. The matter is one that the Court is permitted to make a decision or order about; and
- c. It is in the person's Best Interests to make the order or give the direction without delay.

### **The power to request reports**

Under section 49 of the Mental Capacity Act, the Court has powers to request any specific reports (written or verbal) to be prepared that it deems necessary to support the process of making an order or direction (final or interim).

The Court can;

- a. Require the Public Guardian prepare and provide a report;
- b. Appoint a Court of Protection Visitor to prepare and provide a report;
- c. Require a Local Authority prepare and provide a report;
- d. Require a Local Authority arrange for a report to be made (for example an Independent Social Work report); and
- e. Require an NHS body prepare, or arrange for a report to be prepared.

### **Powers of the Court of Protection Visitor and Public Guardian when preparing reports**

Anyone outside of the Court's own employ that it appoints is called a Court of Protection Visitor. Visitors can be 'Special' or 'General' in nature, normally depending on whether they hold a medical qualification or not.

To enable the Court of Protection Visitor to fulfil their functions, the Mental Capacity Act gives them powers to;

- a. Interview the person in private;
- b. Examine and take copies of health records;
- c. Examine and take copies of any record of the Local Authority (in respect of Adult Care and Support or Children's Services functions);
- d. Examine and take copies of any other record held by the Local Authority (in respect of Adult Care and Support or Children's Services functions);
- e. Examine and take copies of any records held by a registered service provider; and
- f. In the case of Special Visitor's, carry out a private medical, psychiatric or psychological examination of the person.

### **Appeals**

Under section 53 of the Act, appeals can be made to the Court of Appeal regarding any decision made by the Court of Protection unless the local Court of Protection Rules set out that appeals are to be made to the Court of Protection.

### **Costs and fees**

The fees payable for anything dealt with by the Court are set by the Lord Chancellor, with permission of the Treasury.

Under section 55 of the Act, the Court has the full power to determine who pays what costs on a case by case basis unless the local Court of Protection Rules specify differently.

## **10 Court of Protection Rules and Practice Directions**

The Court of Protection Rules (2017) and Practice Directions set out;

- a. The manner and form in which proceedings are to be commenced;
- b. The person's entitlement to be notified of, and be made parties to proceedings;
- c. The allocation of judges to specific cases and in specific circumstances;
- d. The role of other judicial officers in exercising the powers of the Court;
- e. Arrangements for enabling the Court to appoint a suitable person to represent the person;
- f. Arrangements for enabling the Court to dispose of an application without a hearing;
- g. Arrangements for enabling the Court to proceed with a hearing in the absence of the person about whom it relates;
- h. Arrangements for enabling the Court to conduct private hearings or to exclude certain person's from attending hearings;
- i. Rules around admissible evidence, including what should be admitted and how;
- j. How the Court makes decisions about costs, including who pays costs and how costs are reimbursed;
- k. How any orders or directions will be enforced;
- l. When and how appeals can be made, and how appeals will be considered.

[Click here to access the Court of Protection Rules \(2017\).](#)

## 11 The Public Guardian

The Public Guardian is an office set up in section 57 of the Mental Capacity Act, for the specific purpose of;

- a. Establishing and maintaining a register of Lasting Powers of Attorney;
- b. Establishing and maintaining a register of Deputies appointed by the Court;
- c. Supervising Deputies appointed by the Court;
- d. Directing Court of Protection visitors to visit the person, a donee or a Deputy;
- e. Receiving information specifically requested by the Court of Protection from donees or Deputies upon appointment (as part of verifying the appropriateness of a Deputy or donee);
- f. Receiving reports from donees and Deputies appointed by the Court;
- g. Reporting to the Court as required regarding proceedings;
- h. Dealing with representations (including complaints) about donees and Deputies appointed by the Court;
- i. Publishing information about its role.

To enable the Public Guardian to fulfil their functions, the Mental Capacity Act gives them powers to;

- a. Interview the person in private;
- b. Examine and take copies of health records;
- c. Examine and take copies of any record of the Local Authority (in respect of Adult Care and Support or Children's Services functions);
- d. Examine and take copies of any other record held by the Local Authority (in respect of Adult Care and Support or Children's Services functions);  
and
- e. Examine and take copies of any records held by a registered service provider.

If you need to consult with the Office of the Public Guardian or need to find out more about their role please note the following contact details

Office of the Public Guardian  
[opg.safeguardingunit@publicguardian.gov.uk](mailto:opg.safeguardingunit@publicguardian.gov.uk)  
Telephone: 0115 934 2777  
Textphone: 0115 934 2778  
Monday to Friday, 9.30am to 5Pm  
Wednesday, 10am to 5pm

Office of the Public Guardian  
PO Box 16185  
Birmingham

B2 2WH

<https://www.gov.uk/report-concern-about-attorney-deputy-guardian>

The Court of Protection Rules 2017

<http://www.legislation.gov.uk/uksi/2017/1035/contents/made>

## **12 Audit Arrangements**

The Adult Safeguarding lead will undertake an audit to provide assurance of the utility of the Policy by the main target audience within the ICS. This will be augmented by additional training and supervision to the Individual Commissioning Team surrounding the Court of Protection Policy.