



JUDICIARY OF
ENGLAND AND WALES

THE HON MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

Dear Colleagues,

Earlier this week I met with the NHS Mental Health Directors along with Her Honour Judge Hilder. Concern had been expressed about the scope and ambit of Section 49 reports. There was a strong feeling that some of the Section 49 requests are disproportionate, overly burdensome, and wrongly authorised. There are obvious reasons (i.e., costs) why a Section 49 report might be preferred where what is truly required is an independent expert report.

Section 49 reports are, paradigmatically, appropriate where the NHS body (typically a Mental Health Trust) has a patient within their care, who is known to them. This ought to enable the clinician to draw quickly on his knowledge of the patient and respond concisely to the identified questions, which will be directed to the issues clearly set out in the Practice Direction. Importantly, it avoids the patient having to meet with a further professional with whom, he or she, has no existing relationship.

Instructions under Section 49 should be clearly focused with tight identification of the issues. It should be expected that the reports will be concise and will not require extensive analysis across a wider range of questions than those contemplated in the Practice Direction. Reports requiring that kind of response should be addressed to an independent expert.

I have taken this opportunity to re-circulate the Practice Direction which requires no gloss or embellishment. However, I have highlighted those paragraphs which I consider need to be restated.

PRACTICE DIRECTION 14E – SECTION 49 REPORTS

This practice direction supplements Part 14 of the Court of Protection Rules 2017

General

1. Attention is drawn to—

- (a) section 49 of the Act – which makes provision for the court to require a report in proceedings brought in respect of P where the court is considering a question relating to P;
- (b) rule 3.7(2)(a) – which provides that the court, when giving directions, may require a section 49 report and give directions about any such report;

(c) rule 14.24 – which sets out the duties of a person required to prepare a section 49 report and specifies to whom the report may be sent; and

(d) rule 14.25 – which makes provision for the court to permit written questions to be put to a person who has made a section 49 report.

The court's direction for a report

2. The Annex to this Practice Direction contains the form of an order requiring a report under section 49 of the Act and the forms of directions relating to the report. When requiring a section 49 report, the court will as far as possible base its order and directions on those forms. For practical reasons, the order should be self-contained and not form part of other directions.

3. The following are common factors which the court may consider when deciding whether to order a section 49 report—

(a) where P objects to the substantive application or wishes to be heard by the court and does not qualify for legal aid;

(b) where it has not been possible to appoint a litigation friend or rule 1.2 representative, including where the court has made a direction under rule 1.2(5);

(c) where a party is a litigant in person and does not qualify for legal aid;

(d) where the public body has recent knowledge of P; or it is reasonably expected that they have recent knowledge of P; or should have knowledge due to their statutory responsibilities under housing, social and/or health care legislation;

(e) the role of the public body is likely to be relevant to the decisions which the court will be asked to make;

(f) the application relates to an attorney or deputy and involves the exercise of the functions of the Public Guardian;

(g) evidence before the court does not adequately confirm the position regarding P's capacity or where it is borderline; or if information is required to inform any best interests decision to be made in relation to P by the court.

Reports by Public Guardian or a Court of Protection Visitor

4. Where a report is to be prepared by either the Public Guardian or a Court of Protection Visitor¹, a copy of the approved order, the directions and the information described in paragraph 14 below will be sent by the Court to the Public Guardian.

¹ See section 49(2) of the Act.

5. In the case of a report which is to be made by a Court of Protection Visitor, the Public Guardian must ensure that a person is nominated from the panel of the General Visitors or the panel of Special Visitors, as appropriate.

6. The nomination of a Court of Protection Visitor should be made before the end of the period of 7 days beginning with the date on which the Public Guardian received a copy of the order.

Reports under arrangements made by a local authority or an NHS body

7. Wherever practicable, before making an application for an order requiring a report under section 49, a party to proceedings should use their best endeavours to:

(a) make contact with an appropriate person within the relevant local authority or NHS body so they are made aware that an application is to be made; its purpose; and the issues or questions which are hoped to be addressed within the report;

(b) identify a named person or by reference to their office (“the senior officer”) within the relevant local authority or NHS body who will be able to receive the court order on its behalf; and

(c) enquire as to the reasonableness and time scales for providing the report should the court order it.

8. The party making the application must submit a draft letter of instructions for the purpose of accompanying the order.

9. The court will make enquiry of the party making the application as to what efforts have been made to comply with paragraph 7 above, and the response of the relevant local authority or NHS body, and will take this into consideration before making an order.

10. Where a report is to be prepared under arrangements made by a local authority or an NHS body², a copy of the approved order (which is binding, notwithstanding that it may not yet be sealed), the information described in paragraph 14 below and the accompanying letter of instruction will be served by either (i) the party who made the application for a section 49 report or (ii) in the event that no party made the application, by the party determined by the court to be the most appropriate party to arrange service on the senior officer as soon as is reasonably practicable but in any event within 48 hours of the making of the order.

² See section 49(3) of the Act

11. Upon receipt of the order the senior officer must ensure that—

(a) a person with appropriate expertise/knowledge is nominated to make the report; and

(b) the parties are notified of the name and contact details of the nominated person as soon as practicable.

12. The nomination should be made before the end of the period of 7 days beginning with the date on which the senior officer received a copy of the order.

13. The order must follow the format as set out in the Annex to this Practice Direction and specify the matters required to be addressed in paragraphs 9 and 10 therein.

Access to Information and interview P

14. The court will generally provide, or give permission to the party applying for the section 49 order to provide, to the person who is to produce a report—

(a) a copy of the application form, its annexes and any supporting evidence as may be redacted by direction of the court;

- (b) the name and contact details of P;
- (c) the name and contact details of the parties;
- (d) the name and contact details of any legal representative of a person specified in (b) or (c); and
- (e) name and contact details of such other persons who are reasonably likely to be able to provide assistance to the nominated person for the completion of the report.

15. The court order requiring the report, the directions relating to it and the information described in paragraph 14 will generally be sent when the order is served by the party who is required to do so, by first class mail, electronic mail or by facsimile. If the circumstances warrant a different form of communication, the documents and information will also be sent by first class mail, electronic mail or by facsimile at the first available opportunity.

16. Section 49(7) of the Act sets out other documents relating to P which the Public Guardian or a Court of Protection Visitor may examine or take copies of for the purpose of making the report. Where appropriate, the order may also allow the same documents to be examined and copied by the nominated person who is to prepare the section 49 report under arrangements made by the relevant local authority or NHS body.

17. Sections 49(8) and (9) of the Act sets out that the Public Guardian or a Court of Protection Visitor may interview P in private. Where appropriate, the order may also allow P to be interviewed in private by the nominated person who is to prepare the section 49 report under arrangements made by the relevant local authority or NHS body.

The contents of the report

18. The person required to prepare a section 49 report must—

- (a) prepare it having regard to the provisions of rule 14.24;
- (b) produce it in the manner specified in this Practice Direction (subject to any directions given by the court); and
- (c) produce it in accordance with the timetable set out in the court's directions.

19. The report should contain four main sections. These are—

- (a) the details of the person who prepared the report;***
- (b) the details of P;***
- (c) the matters and material considered in preparing the report; and***
- (d) the conclusions reached.***

20. In the first section (details of the person who prepared the report), the report should—

- (a) state the full name of the person who prepared the report;
- (b) state whether that person was appointed under section 49(2) or (3) of the Act;
- (c) state whether that person is—

- (i) the Public Guardian;
- (ii) a General Visitor;
- (iii) a Special Visitor;
- (iv) an officer, employee or other person nominated by a local authority; or
- (v) an officer, employee, or other person nominated by an NHS body;
- (d) state that person's occupation or employment (for example, social worker employed by a local authority or general practitioner in private practice); and
- (e) list that person's qualifications and experience.

21. In the second section (P's details), the report should (unless an order to the contrary pursuant to rule 5.11 has been made)—

- (a) state P's full name, date of birth and present place of residence;
- (b) state P's nationality, racial origin, cultural background and religious persuasion (if appropriate);
- (c) identify P's immediate family (specifying their relationship to P and contact details;
- (d) identify any other person who has a significant role in P's life (for example, a close friend or a carer) specifying their role and contact details; and
- (e) give a summary of P's medical history.

22. In the third section (matters and material considered), the report should—

- (a) list any interview conducted with P (specifying time and place)³;

³ The person preparing the report should ensure that any notes made during the interview with P are kept so that the notes are available for production to the court if necessary.

⁴ The person preparing the report should ensure that any notes made during the interview with any person other than P are kept so that the notes are available for production to the court if necessary.

- (b) list any interview conducted with one or more persons other than P (specifying time and place)⁴;

(c) state—

(i) whether any examination of P was conducted by a Special Visitor under section 49(9) of the Act; and

(ii) the name and qualifications of any person who assisted with any such examination;

(d) give a summary of any key events in P's life which appear to have a direct bearing on the matters to be dealt with in the report;

(e) set out the details of any of the following material which was relied on in the preparation of the report—

- (i) any literature or other material;
- (ii) any records obtained under section 49(7) of the Act;
- (f) set out the details of facts and opinions relied on in the preparation of the report (ensuring that there is a clear distinction between the two);
- (g) where there is a range of opinion on an issue addressed in the report—
 - (i) summarise the range of opinion,
 - (ii) state the views held by the person who prepared the report and give reasons for them; and
- (h) indicate which of the facts are within the knowledge of the person who prepared the report.

23. In the fourth section (conclusions), the report should—

- (a) identify any issues or questions which were specified in the directions given by the court as being matters in which the court had a particular interest;
- (b) address clearly such issues or questions;
- (c) state clearly all conclusions reached by the person who prepared the report;
- (d) state clearly the recommendations made by the person who prepared the report; and
- (e) contain a statement of truth in the following terms—

“I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are, and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.”

ANNEX

Order for section 49 report

Requirement for section 49 report

1. A report is required pursuant to section 49 of the Mental Capacity Act 2005 in relation to [*insert name of P*], under Court of Protection case number [*insert case number*].

Person required to prepare the report (the author)

2. The report must be prepared by [the Public Guardian] [a Court of Protection Visitor who is a General Visitor] [a Court of Protection Visitor who is a Special Visitor] [a person nominated by the local authority] [XX, a person nominated by the local authority and considered by them to have the appropriate expertise/knowledge to provide the report][a person nominated by the NHS body][YY, a person nominated by the NHS body and considered by them to have the appropriate expertise/knowledge to provide the report].

3. [In the case of a report to be prepared by [a Special Visitor, the Visitor] [a medically qualified practitioner, the practitioner] may carry out in private a [medical] [psychiatric] [psychological] examination of P’s capacity or condition].

Producing the report

4. [The report must be made to the court in writing]. [The report must be made orally to the court].

5. The report must be produced on or before *[insert date]*.

6. [Where the report is made in writing, it must be delivered to the court by [first class post][electronic mail][facsimile].

Context of report

7. The court has received an application for the following [order/direction/ declaration]:

[insert brief details of application, for example,

(a) XY be [appointed][removed] as the [deputy][attorney] for property and affairs/personal welfare for *[insert the name of P]*;

(b) *[insert the name of P]* lacks mental capacity to *[insert decision, for example conduct the proceedings/ objects to...../ decide where to reside]*;

(a) it is in the best interests of *[insert the name of P]* that *[insert issue]*;¹

1 This is only appropriate where an order is being sought.

2 See comments of the President in Re: MN [2015] EWCA 411 “it is to be noted that section 15(1)(c) does not confer any general power to make bare declarations as to best interests; it is very precise in defining the power in terms of declarations as to ‘lawfulness’.”

(b) it is lawful in respect of *[insert name of P]* that *[insert issue]*.²

8. [insert case summary].

Content of report

9. Subject to any directions given under paragraph 11, the report must contain all the material required by relevant practice direction and be prepared in the form there specified.

10. The court is particularly interested in the following issues or questions and these must also be addressed in the report:

[for example

(a) whether *[insert the name of P]* has capacity in accordance with sections 2 and 3 of the Mental Capacity Act 2005, to *[insert issue, for example, object to/conduct proceedings/decide where to live]*;

(b) if [he/she] lacks capacity, ascertain to the extent it is practicable and appropriate [his/her] present wishes and feelings and the beliefs and values that would be likely to influence [him/her] with regard to *[insert the matter to which the application relates]*;

(c) if [he/she] lacks capacity, ascertain [his/her] present wishes and feelings as to how [his/her] participation could be secured by the appointment of a representative pursuant to Rule 1.2 of the Court of Protection Rules 2017;

(d) whether [he/she] should have the opportunity to address (directly or indirectly) the judge determining the application and the circumstances in which that should occur;

(e) describe [*insert the name of P*]’s circumstances;

(f) what services and support would be provided to [*insert the name of P*]/funded for [*insert the name of P*] by [*insert the name of the public body*];

(g) whether what is sought by the application could be effectively achieved in a way which is less restrictive of [*insert name of P*]’s rights and freedom;

(h) the Public Guardian’s views as to].

11. The report need not address the following:

[(a) ;

(b)].

Persons to whom report is likely to be disclosed

12. The report is to be prepared on the assumption that the court will pursuant to rule 14.24(4) of the Court of Protection Rules 2017 send a copy of it to the parties and such other persons as the court may direct. The court further directs that the report be sent to [*insert the name of P*][*members of P’s family*][*XX County Council/ NHS Hospital Trust/ Clinical Commissioning Group/Local Health Board*][the parties only] [the parties and their legal representatives] [*such other persons as the court may direct*].]

Persons to contact

13. The author of the report is authorised to contact and seek to interview the following person(s) for the purpose of preparing the report, with their contact details provided with this order:

(a) [*insert the name of P*] [in private][in the presence of XX];

(b)[the parties];

(c)[their legal representatives];

(d) [*Others which may include for example, family, care and health providers*].

14. The author of the report [may interview [*insert the name of P*] in private] [may not interview [*insert the name of P*]].

Access to records

15. For the purpose of enabling the author to prepare the report, [he/she] is authorised to examine and have a copy of the following, which relate to *[insert the name of P]* and are relevant to the application:

[for example,

(a) a copy of the application form, its annexes and any supporting evidence *[such papers may be redacted as required by the court]*;

(b) any health record;

(c) any record of, or held by, a local authority and compiled in connection with a social services function, and

(d) any record held by a person registered under Part 2 of the Care Standards Act 2000 or Chapter 2 of Part 1 of the Health and Social Care Act 2008.]

Where a report is made under arrangements by a local authority or NHS Body

16. [The party who made the application for a section 49 report] [the party the court decides is the most appropriate] shall serve a copy of the order on [the senior officer who will accept this order on behalf of the *[insert name of public body]* and who will inform the court of the name of the person who will prepare the report] [XX being the person identified as having the appropriate expertise/knowledge to provide the report] within 7 days of service of this order, notwithstanding that in the event the order has not been sealed by the court, it shall be binding.

Record of lack of representation

17. Pursuant to rule 1.2(5) of the Court of Protection Rules 2017, the Court records that *[insert name of P]* has been directed to be joined as a party but such joinder has not occurred because no litigation friend or accredited legal representative has been appointed because *[insert reasons]*.

Other directions

18. [(a) This order having been made without a hearing or without notice to any person affected by it; P, any party to the proceedings and any person affected by this order may apply to the court within 21 days of the order being served for reconsideration of this order pursuant to rule 13.4 of the Court of Protection Rules 2017 by filing an application notice (Form COP9) in accordance with Part 10 of those Rules]

[or]

[(a) This order having been made [at an attended hearing] (*or if urgent*) [at an urgent hearing] leave to any person adversely affected by this order to apply to the court within 7 days of the order being served, to set aside, vary or stay the relevant disputed provision of this order by filing an application notice (Form COP9) in accordance with Part 10 of the Court of Protection Rules 2017];

[(b)].

16th December 2022