THE MENTAL CAPACITY ACT 2005: SMALL PAYMENTS SCHEME CONSULTATION

BACKGROUND

Currently, when an individual loses mental capacity ("P") and does not already have a Lasting Power of Attorney (or in some older cases, an Enduring Power of Attorney) in place to enable a nominated person(s) to manage their finances, it can be difficult in practice to help them, for example by assisting them to pay bills or arranging services/care.

Often, the only way forward is to apply to the Court of Protection ("CoP") for an order appointing a deputy who is given a range of powers to deal with the P's property and affairs. In some situations, however, the CoP may simply give authority to carry out a specific task for the person for example to enter into a tenancy agreement on behalf of P or to sell their property. For context, it is recorded that in 2020, the CoP made 12,846 deputyship orders and 2,031 one-off property and affairs orders. [1]

Unfortunately, for many, applications to the CoP can be complex and confusing. There are several application forms to complete which are lengthy and, at times, difficult to navigate. There is also an application fee to pay, although this can sometimes be waived or reduced dependent on the circumstances.

Notwithstanding this, the current waiting time for an application to the CoP to be processed is extremely lengthy. Official documentation currently states that it is taking, on average, 21 weeks from the time the application is made, up until the time the final order is made. However, in practice, we are currently seeing that it is far longer than this, with some applications taking between 12-18 months to conclude.

It can therefore be a stressful time for those applying for such orders, especially as it can leave P vulnerable and without access to their finances in the meantime. It is not hard to see why making an application to the CoP is considered burdensome.

In fact, it is often considered that an application to the CoP is not always necessary, especially if P's finances are relatively simple or low in value. For example, becoming an appointee for benefits via the Department of Work and Pensions may be sufficient in P's particular circumstances. However, this may not always be in P's best interests as they may need better protection than an appointee can afford. As aforementioned, this therefore means there is no option but to make an application to the CoP.

CALL FOR CHANGE

Unsurprisingly, the issues with the current CoP process have only been exacerbated by the COVID-19 pandemic and it is becoming increasingly recognised that whilst the CoP

[1] Paragraph 40 Consultation Document – Mental Capacity Act: Small Payments Scheme - GOV.UK (www.gov.uk)

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can offer individuals who lack capacity to manage their own finances important safeguards and protections, the system in place is not currently fit for purpose.

On 16th November 2021, The Ministry of Justice opened its consultation for the Small Payments Scheme. The consultation puts forward the case for changes to be made to the Mental Capacity Act 2005 which, in short, would enable third-party access to limited funds on behalf of P, without the need to obtain the form of legal authority currently required (an application to the CoP for a deputy to be appointed).

The intention of this proposed change in legislation appears largely to be a response to the issues with the current CoP process for a deputy to be appointed and delays in P accessing financial resources pending a final order.

> *"We believe an alternative process to the CoP for authorising small payments may be appropriate in some circumstances, due to of the potential number of people whose families, friends and carers may not be applying to the CoP because they consider the process too complex or disproportionate to the amount of funds involved."*
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> Mental Capacity Small Payments Scheme Consultation (justice.gov.uk)

A large chunk of the consultation document (which is 75 pages long) talks at length about the current processes in place and the issues. It notes the following issues as main causes for concern:

- The delays
- The length of the forms that need to be completed
- The process being disproportionate in the event that P's funds aren't large

However, interestingly, despite noting the obvious issues that the CoP process has, the proposed scheme is not to be seen as a replacement or alternative means to applying to the CoP. Rather it appears to be an interim measure, allowing for some funds to be accessed, whilst at the same time progressing an application to the CoP.

> *"The proposal attempts to strike a balance between the need for security and the need for simplicity, seeking to be proportionate to the sums of money involved, and avoid replicating the perceived barriers found in the CoP process or creating expense and complexity for the financial services firms implementing the scheme."*

WHAT WOULD THE SCHEME LOOK LIKE?

Designed to be run by financial service providers (e.g. banks, building societies and e-money institutions), allowing payments or withdrawals primarily from cash-based accounts, the consultation sets out that the scheme would run as follows:

- An individual who could prove their suitability to the financial service provider, could make an application for the 'small payment scheme'.
- The applicant would need to apply for the scheme including a capacity assessment to prove the account holder lacks the mental capacity to make decisions about their finances.
- The financial provider would review the application and notify the account holder that an application has been received and give them a two-week window in which to respond should they wish to.
- During this two-week period, the financial provider would complete all other necessary checks which include checks with the Office of the Public Guardian ("OPG") that a deputyship, LPA or EPA is not already in existence.

- If the application is successful, payments to the applicant would be permitted for a six-month period, from one account and up to a value of £2,500. A single extension to the access period, of a further six months, would be permitted only if the value of £2,500 is not reached in the first six months.
- The same account or other accounts belonging to the individual could not be accessed again by the same or a different applicant.
- Applicants will be asked to consider whether a deputyship is necessary or appropriate for longer-term management of accounts and encouraged to apply to the CoP where necessary.

In short, the purpose of the scheme is to make it "quick and simple" to access small funds belonging to P when P does not have a LPA or a court appointed deputy. However, there are several real problems that the scheme presents, and these are discussed below.

SAFEGUARDING ISSUES

In relation to safeguarding P, the consultation talks at length about how they would be safeguarded at the time the application is made. Such safeguards include the need to notify P that the application has been made (akin to the current process under the CoP) and the need for those applying to have an appropriate referee. Of course, there is also the right of the financial service provider to reject an application if for any reason they were concerned or dissatisfied with it. However, the scheme appears to have no regard for safeguarding P *after* the application is granted. This could leave individuals vulnerable to exploitation depending on the financial service provider's approach.

The current safeguards provided by the CoP process means that there is a level of supervision of the activity undertaken, afforded by the OPG. Deputies must keep accounts and records of decisions and submit an annual report to the OPG and therefore anything unusual, suspicious or otherwise would be picked up. New deputies also receive a supervision visit adding another layer of protection for P. Additionally, if concerns emerge about a deputy, the OPG can investigate and if they are concerned, they can apply to the court to have the deputy removed. It is not clear whether a similar approach will be applied under this scheme and whether the applicant who will ultimately be accessing the funds of P, would need to account for the money used and if so, who to and when. The financial service provider may well be expected to govern this on their own terms.

Also, there appears to be no consideration given to the potential for disagreements between P's relatives regarding how the money is spent and preventing any potential overspend. The financial service provider would again likely be required to set its own procedures on how to protect P's best interests in these types of situations which does not appear to be an appropriate way of safeguarding P.

FINANCIAL ISSUES

Another issue we have identified with the scheme, is the amount of money being accessed and how this can be spent. Whilst only being able to access funds of up to £2,500 protects the individual to some extent, this small sum is unlikely to be sufficient to pay for or meaningfully contribute to payments towards P's care and support, be that paying care fees, treatment fees or otherwise.

From a public sector perspective, an application to the CoP is often made when an individual needs assistance to pay for the care and support they are receiving. The consultation, however, states that this scheme *"is not primarily intended as a means of meeting the day to day needs of someone."* It goes on to say that *"Nor would it be designed for emergency access to funds when someone loses capacity unexpectedly, such as to pay care or hospital bills, as this would involve larger sums of money."*

It is not clear whether there will be any rules on what the money can be used for and it does not address the issue of being able to access P's funds to utilise it in their best interests and ultimately for their benefit.

MANAGEMENT OF THE SCHEME

The scheme, if implemented, would be run by financial service providers, as opposed to the CoP. As the consultation document notes, this builds on informal processes already operated by many financial services providers, whereby the providers release funds on an informal basis to meet their customer needs based on their own assessment of need and risk.

Whilst we do not dispute that financial service providers are experienced in dealing with their customers finances and risk management to protect them, these are unlikely to be geared towards those who lack capacity.

The financial service providers will likely be expected to give information to applicants regarding how to make an application to the CoP. Whilst financial service providers may have a basic understanding of the CoP process, lay individuals and applicants may look to them for more in-depth guidance which the financial service provider will be unable to provide. This could leave a gap in understanding about the COP process, which places P at risk.

The consultation hints at the fact that each individual provider will have a certain amount of freedom when it comes to setting rules about application forms and internal procedure. This could lead to a disparity in procedure across the providers involved in the scheme resulting in some individuals receiving "better" protection than others.

A PARALLEL PROCESS

The intention of this scheme, as set out in the consultation, was never to replace the need to make an application to the CoP. However, it only provides an interim measure to access funds whilst a CoP application is progressed in parallel. This does not address the root cause of the problem of individuals having to navigate a lengthy, complex and potentially excessive process.

The scheme would only be of benefit to those who have funds so small that an application to the CoP would not be needed in any event.

The number of applications to the CoP will not greatly reduce and certainly not enough to make any meaningful difference to the delays with the COP application process. The lengthy application forms still need to be completed and the fee paid.

THE LAW SOCIETY'S RESPONSE

The Law Society has responded to the consultation and set out their views in the following terms:

- They broadly agree with the need for a scheme such as the one proposed.
- They recognise that the current court process is complicated and time consuming.
- They do not believe that the scheme should be run by financial service providers and instead believe that the Court of Protection would be best placed to do so due to their expertise in this area.
- They are keen to make sure that just because there is a limit of £2,500 on the amount of money that can be accessed, this does not mean that security measure and safeguards should be reduced.

> *"Important safeguards must be in place so that the scheme cannot be taken advantage of by someone who does not have the vulnerable person's best interests at heart."*

The Law Society make a good point that the CoP has more than ample expertise in this area and would be an appropriate body to manage and govern the scheme. However, given the issues and concerns that have been noted about their current practice and procedure, it is difficult to envisage how the COP could agree to run this scheme on top of the other work that they do.

WHERE DO WE GO FROM HERE?

This consultation and the call for a "simple and quick" process is something that I am sure we can all see the benefit of. However, on close review, the consultation, whilst undoubtedly published with good intentions, did nothing if not really re-emphasise the issues that are being faced within the CoP arena (of which we are all too familiar with.) However, it also highlights that despite the issues, an order of the CoP is often the best form of protection for an individual.

The scheme glazes over the fundamental issues that are being faced within the CoP arena. Whilst it goes some way towards doing so, unfortunately it does not appear to be able to appropriately safeguard the vulnerable adults it would be open to. Additionally, in most cases, an application to the CoP will still need to be made in any event. As no changes are being proposed to the CoP process meaning that demand will remain high whilst the service being provided remains inefficient.

I appreciate that this is by no means a quick and easy fix, it would perhaps seem more sensible to improve and address the concerns that the current system faces to facilitate an efficient CoP process.

The consultation closed on 12th January 2022 and a response is due to be published in April of this year. A follow up article will be provided about the developments.

The link to the consultation document can be found here Mental Capacity Act: Small Payments Scheme - GOV.UK (www.gov.uk)

About Pathfinder Legal Services Ltd's Health & Adult Social Care Team

The need to provide support and assistance to members of the community who have physical or mental health problems is a key focus for local authorities and other public sector organisations. We recognise the safeguarding duties placed on our clients and provide specialist advice on all aspects of work connected to duties under the Mental Health Act 1983, the Mental Capacity Act 2005 and the Care Act 2014. We are experienced in advising local authorities, Clinical Commissioning Groups, hospices and charities on relevant areas.

Our experienced team of 10 fee earners can provide advice on the following:-

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- Court of Protection Health and welfare disputes
- Deprivation of Liberty challenges
- Mental Health Act Matters
- Coroners Investigations
- Health and Social Care Integration
- Healthcare funding disputes

About Pathfinder Legal Services Ltd

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