



BACKGROUND

On 16th November 2021, The Ministry of Justice opened its consultation for the Small Payments Scheme. The consultation put forward the case for changes to be made to the Mental Capacity Act 2005.

The proposed change to the legislation would have set up a scheme, designed to be run by financial service providers (e.g. banks, building societies and e-money institutions), providing the ability for a nominated individual to access a small amount of money (less than £2,500) on behalf of somebody who lacks capacity ("P") but does not otherwise have a lasting power of attorney or deputyship order.

The intention of this proposed change in legislation appeared largely to be a response to the issues with the current Court of Protection ("CoP") process for a deputy to be appointed.

That being said, the proposed Small Payments Scheme was not put forward as a proposed replacement or alternative means to applying to the CoP but merely as an interim measure to allow some funds to be accessed whilst an application to the CoP is ongoing.

In an article from February 2022 [The Mental Capacity Act 2005 - Small Payment Scheme Consultation - Pathfinder Legal Services](#), we set out the issues with the current CoP process, what the proposed scheme would look like and identified several real problems that the proposed scheme presented, namely:

Safeguarding issues – primarily, how P would be protected under the scheme, for example, what level of supervision would be in place for those accessing P's funds.

Financial Issues – the amount of money that can be accessed and what it can be spent on. The sum of £2,500, speaking from a public sector perspective seemed fairly small and therefore we were unsure as to how this would meaningfully contribute towards the cost of P's care and support or treatment, for example.

Management of the scheme – this was proposed to be managed by financial service providers who, whilst have a wealth of experience in dealing with finances – they are unlikely to be experienced in issues of mental capacity and which raises the question of whether or not they are best placed to manage such schemes.



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The consultation response was published in February 2023 and the outcome of this is discussed in further detail below.

CONSULTATION RESPONSES

Over 200 people responded to the consultation including general lay members of the public, lawyers, other financial professionals such as those from financial institutions and also organisations such as the Law Society.

The majority of respondents (87%) thought a small payments scheme was necessary to address problems in the current system of making applications to the CoP, namely complex application forms, costs and lengthy court processes.

However, despite their being a clear consensus on the fact there was a “gap in the market” for a scheme such as that proposed – there was a difference of opinion on the precise mechanics of how the scheme should be run and how P could best be safeguarded all whilst trying to stay true to the purpose of the scheme which was to create an interim and simpler approach than that of the CoP.

The main feedback from the consultation appears to fall into three categories: safeguarding issues, financial issues and management of the scheme.

SAFEGUARDING ISSUES

There was a lack of consensus on the safeguards needed to prevent abuse, including the use of referees, background checks and central oversight of the scheme by the Office of the Public Guardian

FINANCIAL ISSUES

They also thought a limit of £2,500 was too low to offer genuine value and suggested this should be raised to £5,000. Additionally, some of the financial service firms who responded advised that the scheme would not necessarily be appropriate for the majority of urgent requests for the release of money that they receive, which although not high in volume, are often for releasing larger sums of money.

MANAGEMENT OF THE SCHEME

Many financial services firms who responded highlighted the difficulty they foresaw in administering the scheme and that the efforts on this would likely be disproportionate given the low volume (an estimated 1%) of customers who they foresaw utilising the scheme. Furthermore, many firms are of the opinion that banks should be able to continue to make their own risk-based judgements to release small sums of money where there is an urgent need, without a central process.

OVERALL OUTCOME

The outcome of the consultation demonstrates that in practice it would be extremely difficult to implement a scheme which offers ample protection and safeguards to P but also serves as useful and effective in terms of accessing and utilising funds in P’s best interests.

“The consultation has provided us with detailed evidence showing there is no simple, safe and speedy way of resolving this issue. Satisfying all and building in the relevant safeguards quickly leads to a process that looks like the existing CoP one.”

Therefore, it appears to highlight that in practice, an order of the CoP is the best form of protection for P and in which case focus and attention should be turned to improving the overall CoP process, rather than implementing a new scheme and this is the decision that has been made.

“As a result, the government will not seek to legislate for the introduction of a small payments scheme.”

AWARENESS OF THE MCA 2005

Interestingly, the consultation response details that additional engagement from discussions relating to the scheme has brought to light, a lack of awareness of the MCA 2005 and further, where there is some awareness of this, there are mistaken views on what individuals can do on behalf of P or that it only applies to the elderly.

“There is a widespread but misplaced belief that certain family relationships, such as being the ‘next of kin’ to someone, gives you the right to make decisions on their behalf should they lose or lack mental capacity.”

The consultation response highlights that difficulties in navigating the MCA 2005 are often experienced by the parents of young people who lack mental capacity and are reaching adulthood – particularly as the powers under parental responsibility come to an end.

From a public sector perspective, we would be inclined to agree that there is a lack of awareness of the MCA 2005 and in particular the powers that family members do and don’t have – for example the ability to sign or enter into tenancy agreements or being able to access funds on P’s behalf. We see this in both the transitional situations (from childhood to adulthood) but also generally across the board.

The consultation response confirms that the Government will work across its internal departments, with charities and also with the public to develop guidance and information to raise awareness of the MCA. However, no specific details are given on exactly how this will be achieved.

IMPLEMENTING CHANGE

Those with knowledge or experience of the current CoP process are in unanimous agreement that changes needed to be made in order to make it more effective and fit for purpose.

In line with this, from February 2023, the CoP has created a digital online process for applying for property and affairs deputyship orders following the implementation of a successful pilot scheme for the same. However, it is important to note that the CoP is also retaining its paper application process to ensure that those who cannot access the online process are not excluded from applying.

Additionally, the forms required to make such an application have changed slightly in that notice of the application to others is now made in advance, rather than notice being given after the application is issued.

It is stated within the consultation response that the CoP’s aim is to continually improve the digital application process by reducing the number of forms and repetition across them. The digital service is under continual development, with the overall aim of people being able to directly feed relevant information into an online portal rather than completing and uploading forms.

Therefore, what we see being rolled out is a small step but one that we hope is effective. It will be interesting to see how the change in forms and digital process improves the issues identified with the CoP process, particularly the time it takes from the date the application is made, until the date the final order is received, which in our experience can be over twelve months presently which can create a plethora of issues for those trying to deal with urgent situations such as paying for care fees or treatment.

We anticipate that there is still a long way to go before the issues are fully resolved, but if nothing else, it is positive that these issues have been highlighted further as a result of this consultation and that changes are being slowly rolled out to try and address the same.

The link to the consultation response document can be found here: [Mental Capacity Act: Small Payments Scheme - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/mental-capacity-act-small-payments-scheme)

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, Integrated Care Boards, hospices and charities on relevant areas.

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

- NHS Trust or local authority disputes
- Assessments and appeals
- Cases relating to end of life
- Closure of healthcare facilities – such as hospitals, clinics, care homes and day care services
- 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

As a 'social enterprise law firm', Pathfinder Legal Services Ltd is one of the first of its kind to be established in the UK and is wholly owned by Cambridgeshire County Council and Central Bedfordshire Council. We are experts in our field and provide a tailored legal service exclusively to the public and not-for-profit sectors, our clients are key, and our fees reflect this: our charging rates are substantially reduced and our billing system transparent. Our credibility, values and focus remain paramount to all that we do as a publicly owned legal service provider, with clients including Local Authorities, Integrated Care Boards, Foundation Trusts, Charities and Fire Services. In 2021 the firm was awarded 'Law Firm of the Year' (under its previous trading name of LGSS Law Ltd) at the prestigious Cambridgeshire Law Society's legal awards.

If you are keen to find out more about Pathfinder Legal Services including how our services work, our billing process and how to instruct us, please contact us at operations@pathfinderlegal.co.uk

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