



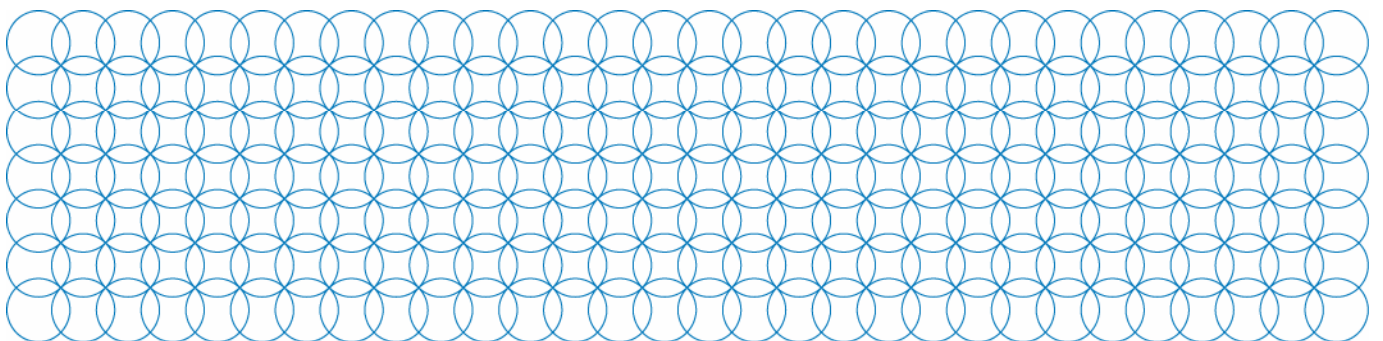
Ministry of
JUSTICE

Reviewing the Mental Capacity Act 2005: forms, supervision and fees

Consultation Paper CP26/08

Published on 23 October 2008

This consultation will end on 15 January 2009





Reviewing the Mental Capacity Act 2005: forms, supervision and fees

- **Lasting Powers of Attorney forms**
- **Supervision of Deputies by the Public Guardian**
- **Office of the Public Guardian and Court of Protection fees**

A consultation produced by the Office of the Public Guardian, an executive agency of the Ministry of Justice.

This information is also available on the Office of the Public Guardian website: www.publicguardian.gov.uk

Contents

Executive summary	3
Introduction	5
Consultation Process	7
Section 1 – Lasting Powers of Attorney forms	8
Section 2 – Supervision by the Public Guardian	14
Section 3 – Office of the Public Guardian and Court of Protection fees	20
Next Steps	27
Questionnaire	29
Contact details / How to respond	33
Annex A – List of people this consultation paper has been sent to	37
Annex B – Lasting Power of Attorney Personal Welfare Form	41
Annex C – Lasting Power of Attorney Property and Affairs form	67

Executive summary

The Mental Capacity Act 2005 (the MCA) provides a statutory framework to empower and protect people who may lack capacity to make some decisions for themselves. The Act created the Public Guardian to ensure that those appointed to take decisions on behalf of those who lack capacity discharge their duties properly, without abuse, and act in the best interests of the person without capacity. The Public Guardian does this through the Office of the Public Guardian (OPG), by supervising Deputies appointed by the Court of Protection, and investigating the ways Attorneys and Deputies exercise their powers.

The Court of Protection and the Office of the Public Guardian started their new roles on 1 October 2007, bringing into practice the additional safeguards and protection afforded to vulnerable people by the Act. At that time we announced our intention to review the implementation of the MCA after one year to ensure the potential benefits of the MCA were being fully realised. This consultation process marks the first stage of that review.

The evaluation process is intended to cover a wide range of issues and is intended to determine how well the Act, in practice, is meeting its aims and objectives. This consultation paper represents the first steps being taken by the OPG to address a number of areas that have already been identified during the first year of operations as being in need of reconsideration. Namely, the Lasting Power of Attorney (LPA) forms, the Public Guardian's supervision regime and the fees currently charged by the OPG and Court of Protection.

- The OPG has received feedback from a wide range of sources throughout the first year regarding the LPA forms. The comments already received have been used as the basis for an initial redesign of the forms to meet the concerns raised with us and we are now seeking wider views in this area. We particularly welcome views on the new layout, the language or length of the forms. Upon the close of the consultation on 15 January 2009 this information will be considered and any necessary amendments will be made.
- The OPG's current supervision strategy was designed to deliver a level of supervision to Deputies appointed by the Court of Protection that ensured all decisions were being made in the best interests of the person who lacks capacity. At present the three-tier supervision structure is not sufficiently flexible to cover the wide needs of the whole range of cases we manage and as such this paper proposes the addition of an additional tier of supervision. This will allow the OPG to monitor appropriately those cases that require, in the short or the long term, a higher level of supervision and support than is offered by the light touch supervision level, without the resource commitment and expense entailed by a close supervision allocation. This alteration will not affect the fees charged for the existing three tiers but will introduce a fourth option with an associated fee.

- The OPG and COP fees policy was established to ensure a fair and equitable fee regime that was proportionate to the services being provided by the Court of Protection and by the Public Guardian. Following the first year of business a number of changes to the fee structure have been called for to ensure the fees more fairly and accurately represent the work being done by the organization for each individual customer. This will affect the CoP application fee and the LPA registration fee and introduce a new fee for the additional supervision tier.

In summary this consultation deals with the first phase of the review of the Mental Capacity Act 2005. Wider evaluation of the act will follow, and information on how you can contribute to this will be made available as the work develops.

Introduction

The Mental Capacity Act 2005 (MCA) came fully into force in October 2007 and marked an important step in reforming the law relating to decision-making for people who may lack capacity. For the first time, it enshrined in legislation that everyone has the right to make as many decisions for themselves as they can and to be supported to have as much input as possible into decisions made on their behalf. Importantly, the Act defines decision-making capacity as the capacity to make a particular decision at the time it needs to be made. No longer does the law define people as 'capable' and 'incapable'. Instead there is recognition that many people who may lack the capacity to make some decisions could well be able to make many other decisions for themselves. Where a decision does need to be taken on a person's behalf the law is clear that the decision must be in their best interests and be as least restrictive of their rights and freedom as possible.

As well as empowering and protecting people who may lack capacity, the MCA provides a number of options for people who wish to plan ahead for the future. It provides for people to be able to make a Lasting Power of Attorney (LPA) to give someone the authority to make decisions relating either to their property and affairs, or to their personal welfare, were they to lack capacity to make those decisions. It also places advance decisions to refuse medical treatment on a clear statutory footing with additional protections for certain types of decisions.

Finally the Act created a new Court of Protection with jurisdiction over the whole range of issues covered by the Act. It also created a new office of the Public Guardian to register LPAs and Deputies appointed by the Court of Protection, to supervise Deputies and to investigate any concerns raised relating to an Attorney or Deputy's conduct.

We are aware that a huge range of people and organisations had campaigned long and hard for the law in this area to be modernised and for good reason. Adults who may lack capacity can be extremely vulnerable to abuse, fraud or other mistreatment. They are also at risk of having their decisions frustrated or overruled, or of being denied the support necessary for them to participate in any decision-making processes put in place on their behalf.

As with all new legislation there has needed to be an element of 'bedding in' as people start to get to grips with the new law and develop practices and procedures to support it. Now, one year on, we want to take the opportunity to look at how well the new legislation is working in practice and what difference it is really making to people's lives.

There are some areas that we know from the feedback we have received over the last 12 months aren't working as well as they might. This consultation document offers some concrete suggestions for change in those areas now, so that we can move quickly to improve the areas that people are telling us need to change. In other areas we are still looking for evidence as to what is working well and what isn't. Now that this initial consultation has been launched we will be starting to have conversations with all those impacted by the MCA to understand

what is happening on the ground. We will be seeking to engage with as many people as possible as part of this process: with people who may lack capacity, with those making decisions for them (whether as a Deputy or Attorney or as a less formal carer), with representative groups and charities, with legal and health care professionals and with interested and concerned members of the public.

This consultation paper therefore marks only the first part of a much wider conversation over the next year and a half and we look forward to hearing as many of your views and thoughts as possible.

Consultation Process

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 36 have been followed.

An Impact Assessment was completed in relation to the implementation of the Mental Capacity Act 2005. We have not considered that the current proposals will lead to additional costs or savings for businesses, charities or the voluntary sector, or the public sector beyond those identified in that impact assessment. Consequently, this paper does not contain an Impact Assessment.

We intend to revisit the MCA impact assessment during the wider review of the Act in order to evaluate the impact of any changes that may be implemented as a result of the review in its entirety.

Copies of the consultation paper are being sent to a wide range of groups and individuals within whom we have worked in the last or who we know have an interest in Lasting Powers of Attorney. A list of a number of key stakeholders who we will be sending copies to is included at Annex A.

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper. We will be drawing the consultation to the attention of all those who have expressed a recent interest in MCA issues.

Section 1 – Lasting Powers of Attorney forms

1. Introduction

A Lasting Power of Attorney is an important legal document that potentially gives significant powers to other individuals to make decisions about a person's property and affairs, or their personal welfare. Unless it states otherwise, a property and affairs LPA can generally be used by the Attorney to make decisions even if the person still has the capacity to make those decisions. Personal welfare LPAs can **only** be used when the Donor lacks the capacity to make the decision themselves.

The forms include a number of safeguards against possible abuse or misuse. Both types of LPA can only be used once they have been registered by the Public Guardian. Either the Donor (the person who made the LPA), or the Attorney can apply for registration of the power. In addition, before making such an application, they must send notice of their intention to register to up to 5 people named by the Donor within the document to be notified. Those people then have a 5 week period during which they can object to the registration of the power. Finally, all LPAs must include a statement by an independent person certifying that the Donor had the capacity to make the LPA and were not subject to fraud or undue pressure to make it. If the Donor chose not to list anybody to be notified on registration, then the LPA must include 2 such independent statements.

Under the Mental Capacity Act 2005 (MCA), an LPA must be in a prescribed form. This means that the format and content of the form must be set down in regulations that are then laid before Parliament. The Public Guardian must reject any form that appears to him to be materially different from the prescribed form. Any changes to the design and content of the LPA forms must therefore be laid before Parliament before they can be used.

2. Current forms

The former Department of Constitutional Affairs ran a public consultation on draft versions of the LPA forms from 20 January 2006 to 14 April 2006. The consultation paper asked a number of questions concerning the forms' design and the information included within them. The forms then went through a lengthy process of amendment as a result of the responses to consultation. Final versions of the forms were laid before Parliament on 17 April 2007 and came into force on 1 October 2007 along with the majority of the other provisions contained within the MCA.

As the forms were designed, a balance was sought between keeping their length to a minimum whilst still containing all the information considered essential. Many consultation responses pointed out additional content or information that always recognised that many people making an

LPA may wish to take professional advice as part of the process. Nonetheless, it was also a conscious aim that the forms should be as simple and accessible as possible and that people should be able to fill them in without the need for professional input.

3. Problems with the current forms

The existing forms have now been in operation for a full year and we wish to seek wider views on how well they are operating in practice and to what extent they are, or are not, meeting the needs of those making them.

It has been well documented that the number of people seeking to register an LPA over the last 12 months has been significantly in excess of predictions made before the Act came into force. Nonetheless, it is also apparent that in spite of this take-up, there are a number of major issues with the current forms. We have received many representations throughout the year highlighting elements of the forms which users have found unhelpful or unclear. These have ranged from comments from private individuals or professionals sharing their personal experiences of the forms, through to comments based on wider experience from Solicitors for the Elderly and the Law Society, for example, based on comments and experiences received from their members.

The feedback indicates that the current forms are in need of careful review in order to ensure that they adequately meet people's needs. Chief amongst the complaints have been that the current forms are too lengthy and too complicated to fill in. There have also been criticisms that the design of the form can too easily lead to critical boxes or sections being overlooked, sometimes invalidating the power. It has also been suggested that in some places the current forms include overly burdensome conditions or requirements that are not required by the legislation.

The experience of the OPG itself over the last year has reinforced this external evidence. Frequently the Office has been in the position of having to reject a form on the grounds that essential sections have not been completed, or has had to delay registration whilst corrections have been made.

4. Redesigned forms for consultation

We are grateful to all those who took the time over the last year to share their views and concerns with us – they have been invaluable in forming an initial view of what changes need to be made. We now want to seek views more widely and more formally on the forms and possible changes to them. Given there were a number of aspects where the need for change was clearly apparent, we felt it would be more helpful to try and address those points in a redesigned version of the current form and then consult on new drafts. We hope this approach will help respondents focus on areas where their views can have most value respondents felt needed to be included.

The revised forms have been produced by professional forms designers with input from Solicitors for the Elderly, to represent the practical experiences of professionals working in this area, as well as staff and legal advisers from the OPG. We hope that the new versions will address many of the problems people identified with the current forms. However, even with the weight of a year's-worth of experience, there were a number of difficult choices to be made to balance legal accuracy with accessible language and the need for conciseness with the inclusion of critical information. We are therefore very interested to hear as many of your views as possible on the redesigned forms. We accept that the revised forms may need to change again as a result of your input but we think it's important that we do all we can to get them right.

5. Questions

The redesigned personal welfare form is found at Annex B and the property and affairs form at Annex C.

We would welcome responses to the following questions.

Language

We have tried to use plain English as much as possible and to avoid legal jargon and complex language. Nonetheless, there have been some areas of the form where we have felt it necessary to retain more precise legal wording.

For example, in the prescribed information, we have not directly replicated the principles as they are outlined in the Act but have tried to express them in simpler language. We have also preferred 'health and welfare' to 'personal welfare' and 'property and financial affairs' to 'property and affairs' as we feel this makes it clearer which decisions are covered by each type of LPA.

However, we have reverted to using 'jointly, or jointly and severally' rather than the current forms' use of 'together, or together and separately' as it was felt that the latter wording was legally imprecise as it failed to cover the issue of liability and the survivorship of the power. We were also mindful of the need for consistency with the Code of Practice as well as the Mental Capacity Act.

- Question 1. **Do you agree with adopting a clearer English version of the 5 principles of the MCA, or do you think it is better to retain the actual wording in the Act?**
- Question 2. **Do you agree with using 'health and welfare' and 'property and financial affairs' throughout, or do you think it is better to keep the Act's wording of 'personal welfare' and 'property and affairs'?**
- Question 3. **Do you agree that we should change the wording of 'together or together and independently' to 'jointly or jointly and severally' or is the former wording acceptable?**
- Question 4. **Are there any other areas where you feel the wording needs to be more legally precise or reflect the wording of the Act?**
- Question 5. **Are there any other areas where you feel the wording tends too much towards jargon and needs to be simpler or clearer?**

Length

We have tried as much as possible to reduce the combined length of the current forms and guidance notes. We have combined the notes for completion with the forms themselves so that the guidance is available alongside the sections to which it refers at the point where it is needed. However, we are aware that even though the forms now include the guidance notes for completion that the length of the forms has not reduced. We seek your views as to the length of the forms and whether there is any content that can be removed, or whether the design and structure means that the forms meet usability requirements in spite of their length.

We have also tried to reduce the number of boxes in the main section of the form. So, for example, it is relatively rare for people to name more than two people to be notified when an application is made to register the LPA. We have therefore included space in the revised form for only two notifiable persons with a note that any further people should be listed on a continuation sheet. We have also included provision for additional Attorneys and substitutes to avoid the need for continuation sheets and the risk of being detached from the main document. We have pointed people to continuation sheets where necessary.

Question 6. **Do you think there are any things that can be removed from the current forms? Do you think that it is important to reduce the length even if that means losing some of the current content?**

Question 7. **Do you think it is helpful to have the guidance notes alongside the sections of the form to which they refer?**

Question 8. **Do you think the amount of guidance is sufficient? Should there be more or less guidance?**

Question 9. **Do you agree with the approach taken with the continuation sheets or should there be more space to add additional notifiable people / attorneys / substitute attorneys in the main body of the form?**

We have also reduced the 'Prescribed Information' section. Much of the information here was beyond the scope of what was required by the Act.

Question 10. **Do you think the 'Prescribed Information' covers all the areas that it needs to cover? Do you think there needs to be more / less information in this section?**

Life-sustaining treatment section of personal welfare forms

We have not heard of any specific concerns relating to this area of the forms and have therefore made little amendment to this aspect of the personal welfare forms. What changes have been made have been limited to the inclusion of the relevant notes for completion alongside the sections of the form to be completed in line with the approach taken for the rest of both forms.

Question 11. **Are there any changes that you feel are necessary in relation to the section dealing with life-sustaining treatment?**

Question 12. **In particular, do you think it is necessary and appropriate to require the Donor's choice to be both signed and witnessed?**

General questions

Question 13. **Overall, do you feel the current forms offer the right balance between length and the inclusion of essential information?**

Question 14. **Overall, do you feel the forms meet the needs of those using them?**

Question 15. **In particular, do you feel the forms meet the needs of ordinary people who may be completing them without professional assistance?**

Question 16. **In particular, do you feel the forms meet the needs of professionals drawing up the instruments on behalf of clients?**

Question 17. **Do you have any other comments on the forms' design or content?**

Section 2 – Supervision by the Public Guardian

1. Introduction

This section sets out for consultation the proposed changes to the current approach to the supervision of Deputies undertaken by the Public Guardian. The changes could well affect a large number of people as well as require a change to the current fee regime. It is therefore important that we seek your views in relation to this area to help ensure our approach is proportionate and effective.

It is proposed that any changes would come into effect from April 2009 for new Deputies and that existing cases will be re-assessed during their annual or bi-annual reviews.

2. Current supervision policy

Upon the appointment of a Deputy the OPG carries out an assessment to determine which level of supervision and support is appropriate given the particular needs of the case.

Various risk factors are considered during the assessment, including:

- the complexity of the estate of the person who lacks capacity;
- the value of their estate;
- the relationship and amount of contact between the Deputy and the person who lack's capacity;
- the types of decisions the Deputy is being asked to make;
- the Deputy's level of experience or past record;
- the amount of support provided to the person lacking capacity by family, friends, or professionals and
- any particular requirements in the Court Order that require ongoing monitoring.

Following the assessment the Deputy is allocated to one of three supervision regimes:

Type 1 close supervision (current fee: £800 pa): These cases receive proactive case management, involving frequent OPG contact with the Deputy and some contact with other third parties if needed. This might include care homes, local authorities, or primary care trusts. Deputies are required to report to the OPG on the management of the case. This might be annually although, depending on the circumstances of the case, some may be asked to report more frequently. In all these cases a visit is made to the Deputy and sometimes to the client in every case at least annually, and sometimes more frequently. These cases are reviewed regularly, to check that the level of supervision is still appropriate.

Type 2 light touch supervision (current fee: £175 pa): These cases do not receive close case management. Rather, Deputies are required to provide annual reports to the OPG on the management of the cases, and a percentage of these reports are selected for checking. Deputies have access to the Customer Services helpline, and more complex casework issues may be referred to caseworkers to resolve. These activities, or contact from a third party, may prompt a review of the case and a re-assessment of the supervision level. We currently undertake to perform a review of all cases in this category within at least two years of the initial assessment.

Type 3 minimal supervision (current fee: none): Cases are allocated to this category if they have very limited resources – under £16,000 – and there are no other factors that indicate a higher level of supervision is required. Deputies in these cases have access to the Customer Services helpline but they are not required to provide an annual report and there is no annual fee payable.

3. Situation at present

As of May 2008 there were 24,205 active Deputyships, comprising 19,702 legacy cases dating from before October 2007 and 4,503 appointments made since that point. The table below outlines the percentage of cases allocated to each level of supervision against our original estimates

Level	No of cases at October 2008	Predicted before implementation	Activity	Annual Fee
Type 1 (close)	1159 (5%)	30%	Dedicated OPG casework team and a proactive case-specific management plan which usually involves a visit from a CoP visitor, checking Deputy reports and accounts, regular contact with the Deputy and third parties with an interest in the client's welfare, investigations and applications to Court to discharge unsuitable Deputies.	£800
Type 2 (light touch)	20972 (84%)	60%	Collection of Deputy reports, audit checks on a 10% random sample of cases, investigation of concerns where reported to the PG, advice and support available from the Contact Centre, 2-yearly review of supervision level.	£175
Type 3 (minimal)	2705 (11%)	10%	Advice and support available from the Contact Centre	Nil

Spot checks on the accuracy of allocation to a supervision category reveal a very low level of error. Additionally, 100 complex cases have been analysed to determine if the assessment criteria encompass all the relevant factors in the case, and no omissions were identified. This suggests that the case assessment criteria are being correctly applied and are capturing all the relevant factors in each case.

The following factors are most likely to result in a case being allocated to the closest level of supervision.

- A damages award recently made or pending
- A requirement in the Court Order for the Deputy to take specific action
- Known risks around decision-making
- Sensitivity around decision-making that may put pressure on the Deputy
- Issues raised in a report submitted to the OPG by a Court of Protection Visitor

Other than these, a combination of factors such as the status and previous experience of the Deputy, the size and nature of the assets being managed, the past provision of accounts and the isolation of the client are more likely to result in the case being allocated to close supervision.

4. Argument for change

As we now have a more complete picture of the volumes of Deputyships allocated to each supervision level we can see a departure from our earlier predictions. Only 5%, against a predicted 30%, are being allocated to close supervision, while 84%, against a predicted 60%, fall into the second tier.

For most new Deputies, there is little existing evidence on which to base a case assessment, particularly if the Deputy is a layperson with no previous experience of managing a case. Equally, some legacy cases allocated to the second category of supervision due to the low level of risk factors in the case nevertheless have a need for a higher level of short-term support or intervention than is provided by that regime.

A number of sample visits to Type 2 cases have been undertaken since October 2007. These have identified a number of issues of varying significance that were not evident at the original assessment but which have an impact of the level of supervision and support that is required in the short-term.

Of the 2,224 cases that have received a visit since October, short-term issues were identified by the visitor in 274 cases (12%) and significant issues were identified in 65 cases (3%). None of these could have been identified at the time of assessment. Whilst the need for interventions in legacy cases is likely to decrease in time as Deputies adjust to the new legislation, this may highlight an ongoing need for increased monitoring of cases currently receiving a light touch level of supervision. Assuming there will be 10,000 new appointments in 2008/09,

of which 8,000 will be allocated to Type 2 supervision, the small sample suggests that around 1,600 new cases may have short term needs not catered for in the existing supervision framework.

Additionally, there is an emerging trend by which court orders include a requirement for the Deputy to take a specific action, such as consult an independent financial advisor. Given that type 2 cases are not actively monitored once assessed, such cases are currently allocated to the highest tier of supervision until the required actions have been completed and are then reallocated as a type 2 case. However this is an administratively cumbersome process and a number of Deputies have expressed dissatisfaction at this approach.

Finally, there is the question of whether the present system of supervising type 2 cases by employing random checks on a limited number of cases is sufficiently robust to deter or detect fraud or mismanagement given the volume of cases currently allocated to this category. Such an approach also places a high emphasis on whistle blowing by third parties.

5. Proposed changes

It is proposed that the OPG amend the current three-tier system and introduce an additional level of supervision to capture those cases not adequately covered by the current regime. Should the proposed changes be adopted the revised system will apply to all new cases from April 2009 and the amended criteria will be used when all current cases are reviewed

New type 2A

Under this new system, cases would be assessed and appointed to any of the four levels of supervision. Cases could still move between levels at any point in their lifecycle should circumstances call for it. The new type 2A level would sit between current levels 1 and 2. Type 2A will afford a higher level of supervision than type 2 but will not require the close degree of contact received by type 1 cases.

This addition will inject a new flexibility into the system, allowing short-term interventions both at the commencement of a new Deputyship or when potential problems are highlighted during routine monitoring of existing cases.

The suggested activities for type 2A are as follows:

- telephone and letter contact will be used on appointment;
- a letter sent to relevant 3rd parties advising them of the number to call should they have any concerns;
- visits will occur where a client is considered to be more vulnerable, e.g. usually where the client lives alone or when there was an objection to the appointment;
- letters will be sent to the care providers to gain evidence that the client's needs are being met and wishes taken into account;
- Deputies will be required to complete and submit an annual report;
- investigations will be undertaken where appropriate and
- cases will receive at least an annual review of their supervision level.

A small sample of 450 current cases was assessed under the proposed criteria and it was possible to conclude that a significant number (50-60%) of cases would potentially meet the criteria for type 2A supervision.

6. Desired outcome

Introducing a new level of supervision would mean that more cases are monitored during the early months to ensure that any court order stipulations are met, that issues are addressed quickly, and that new Deputies can rely on increased support from the OPG.

Questions

We would welcome responses to the following questions.

Question 18. **Does the proposed supervisory regime give sufficient protection to those who need it?**

Question 19. **Is the level of activity in each category sufficiently robust / not robust enough / too robust?**

Question 20. **Are there other activities relevant for any of the supervision levels that you could suggest?**

Question 21. **Is the frequency of review sufficient?**

Question 22. **Does this approach reduce the reliance on third party whistle blowing or generally will it further deter fraud?**

Section 3 – Office of the Public Guardian and Court of Protection fees

1. Introduction

This section sets out for consultation the fees to be charged by the Court of Protection and the Office of the Public Guardian together with the policy for fee remissions and exemptions. The consultation is aimed at the legal profession, health and social care professionals and anyone with an interest in mental capacity issues in England and Wales.

2. Fee Policy

The OPG and COP fees policy is to establish a fair and equitable fee regime that is proportionate to the services being provided to the applicant by the Court of Protection and by the Public Guardian.

The Court of Protection and the Office of the Public Guardian are not part of HM Courts Service and although the fee policy is set under similar general principles to that of HMCS, it is separate and distinct.

For the first year the Court of Protection and the Office of the Public Guardian's fees were set at a level to recover approximately 63% of the Court of Protection costs and 100% of the Office of the Public Guardian costs, rather than passing on the full costs of operating the services to those applying to the new organisations. The Court of Protection will be looking to recover 80% for 2009/10.

In order to ensure adequate access to justice for all, a fee remission and exemption scheme was established at the same time as the fees came into force. We propose a similar remission and exemption scheme should continue.

3. Consultation

This consultation paper looks at 3 areas within the organisations where we propose to change the fees currently charged. These areas are:

- registration of Enduring Powers of Attorney (EPA) and Lasting Powers of Attorney and searches of the registers;
- fees in the Court of Protection;
- fee relating to Deputies and their supervision.

4. Court of Protection Fees

We propose that, for now, it is appropriate to keep most Court of Protection fees at current levels. It was originally envisaged that there would be a substantial number oral hearings both in London and at the regional courts but this has not been the case. Judges have been able to make many more decisions based on

papers submitted than originally forecast. This has resulted in the cost being spread more evenly although we are still waiting to see volumes settle down into a longer term pattern.

We therefore feel that it would be beneficial to continue to monitor the operation of the Court and volumes of business for a further 12 months before determining whether any change to the Court fees is appropriate.

Application fee

This fee of £400 is payable on application to the Court by the person making the application. If the person lacking capacity dies within five days of the application being lodged then fee is refunded. If the applicant dies the fee is not refundable however it can be transferred to a new application.

Applications relating to objections (by those entitled to object) to the registration of EPAs and LPAs do not incur a fee.

No change is proposed to the Application fee.

Oral hearing fee

This fee of £500 is payable when the Court needs to hold a hearing to decide an application and is due after the Court has made the final order, declaration or decision.

The fee is payable by the person making the application – however the Court may decide the applicant can recover the fee from the person the application is about or from another party. If the hearing relates to an appeal it is payable by the person making the appeal.

If the person lacking capacity dies the hearing will not be held therefore no fee is payable. If the applicant dies but the hearing still goes ahead, (i.e. a new applicant takes over), then the fee remains payable.

No fee is payable when if the hearing is adjourned and does not take place after a judicial direction.

No fee is payable where the Court gives only case management directions and does not make a decision at the hearing – the court order in such cases will usually be titled “directions”.

No change is proposed to the Hearing fee.

Appeal fee

The fee of £400 is payable on filing an appellant’s notice appealing a Court decision, or seeking permission to appeal a Court decision.

It is payable by the person making the appeal – however the Court may decide the applicant can recover the fee from the person the appeal is about, or from another party.

If the person lacking capacity dies within five days of the appeal being lodged the fee will be refunded. If the applicant dies the fee is not refundable however it can be transferred to a new appeal.

No change is proposed to the Appeal fee.

Copy of document fee

The fee of £5 is payable by the person requesting the document.

No change is proposed to the copy of document fee.

Copy of certified document

This fee is currently £25 and is payable by the person requesting the document.

This fee has not been raised since the OPG came into existence in October 2007. Furthermore within the Court rules or practice directions for the court there is no requirement for the Court to provide a certified copy.

No change is proposed to the Copy of certified document

Applications to the Court for which no fee is payable.

Existing Deputies will be able to make the following applications without attracting a fee:

- reconsideration (review) of a court order where the order was made without a hearing;
- applications for directions where the person lacking capacity ceases to lack capacity, this might be, for example, to discharge a Deputy or discharge a security bond;
- applications for directions when the person lacking capacity dies, this might be, for example, an order to assess solicitors' costs or discharge a security bond.

5. Office of the Public Guardian

Enduring Power of Attorney

This fee is payable on making an application to register the EPA. No refund is available if either the Donor or Attorney die before registration is complete, neither is any refund due on premature registration. This fee is payable by the person seeking to register the EPA and can be claimed back from the Donor's funds.

No change is proposed to the Enduring Power of Attorney fee.

Lasting Power of Attorney

This fee is payable on making an application to register the LPA. A separate registration fee is payable for a Property and Affairs LPA and a Personal Welfare LPA when each application for registration is made. No refund is available if either the Donor or Attorney die before registration is complete, nor is any refund available should the application be invalid or imperfect. This fee is payable by the person seeking to register the LPA and can be claimed back from the Donor's funds.

Given that numbers of applications for a Lasting Power of Attorney are far greater than originally expected, fee income in this area has increased beyond projections. We therefore propose that this fee to register an LPA be reduced from £150 to £120. This would also mean that applications to register both EPAs and LPAs would attract the same level of fee.

It is proposed that this fee be reduced to £120.00.

New fee relating to office copies

We also propose to create a new fee for additional Office Copies of a registered EPA or LPA. We propose to charge £25.00. Although the Office of the Public Guardian does not normally produce copies of EPA's or LPA's that are registered and certified copies of these forms can be obtained from solicitors, on occasions where there is no alternative to a copy being obtained from the Public Guardian, the Public Guardian will exceptionally make a copy. In those circumstances the fee will be payable to offset the cost of creating the copy.

Deputy Assessment fee

This is a one-off payment of £125 for carrying out a risk assessment to determine the appropriate Deputy supervision regime and for placing the Deputy's details on a register. In view of the changes to the supervision level, and the likelihood that a large number of cases will enter the new type of type 2A supervision for their first year of operation, we also propose that the Deputy Assessment fee be reduced from £125 to £100.

This fee payable by the person for whom the Deputy was appointed. No refund is available should either the Deputy or the person who lacks capacity dies.

It is proposed that this fee be reduced to £100.00.

Deputy supervision fees

At present there are three types of supervision and each attracts a different annual fee which is payable annually in arrears on 31st March.

- Type 1 £800 p.a.
- Type 2 £175 p.a.
- Type 3 £0 p.a.

Each case is reviewed regularly and the type of supervision allocated may change as circumstances change.

Supervision fees are be calculated on a pro-rata basis if:

- There has been more than one type of supervision applied in a one-year period; or
- Supervision has been in place for less than one year.

Details of pro-rata calculations are shown on the invoice sent to the Deputy.

If the person who lacks capacity dies, fees are payable up to their date of death. If the Deputy dies, supervision fees are payable up to their date of death and new fee arrangements will be made in relation to a replacement Deputy.

Section 1 of this consultation paper outlines the proposed changes to the OPG's supervision regime.

If the suggested changes are adopted, it is proposed that the fees from the 1st April 2009 will be:

- | | |
|-----------|------|
| • Type 1 | £800 |
| • Type 2A | £350 |
| • Type 2 | £175 |
| • Type 3 | nil |

Application to search the registers fee

The fee of £25 is payable on application, which covers a search of the three OPG registers: LPAs, EPAs and Court orders appointing Deputies.

It is payable by the person making the application. No refund is due on death of the person making the application or the person on whom the search is being carried out.

No change is proposed to the fee applying to search the registers.

6. Exemptions and Remissions

The current Exemption and Remission policy is set out below.

There have been a significant number of requests for exemptions and remissions since the launch of the new regime in October 2007 and 10% of all fees issued are currently granted an exemption or remission.

Current evidence suggests that the existing remissions and exemptions policy is reasonable and operating effectively. It is also broadly in line with the same policies within the family and civil courts. We have not therefore, considered that it is appropriate to revisit this area of fees policy at this time. However, this is an

area that will be considered in more detail during the wider review of the Act's operation.

Exemptions

Fee exemptions are granted, on any fee, if you are in receipt of any of the following means-tested benefits and you have not been awarded damages of more than £16,000 that were disregarded when determining your eligibility for the benefit:

- income Support;
- income-based Job-Seeker's Allowance;
- a combination of Working Tax Credit and either Child Tax Credit, Disability Element (within the working tax credit) or Severe Disability Element (within the working tax credit) this does not include severe disability living allowance of invalidity benefit;
- state Pension Guarantee Credit (you will not be eligible if this is calculated as nil);
- council tax benefit (not the 25% single person deduction).

Remissions

Eligibility for a remission is based on income as follows;

If your gross income* is within the bands shown in Table 1:

Income	Percentage of fee remitted
Up to £12,000	No fee to pay
£12,001 to £13,000	75% remission – you need to enclose 25% of the fee
£13,001 to £14,500	50% remission – you need to enclose 50% of the fee
£14,501 to £16,000	25% remission – You need to enclose 75% of the fee
Over £16000	You are not entitled to a fee remission

*Gross income is the amount received before you pay tax and national insurance and includes all state benefits. It may come from; employment; non-means-tested benefits; pensions; and/or Interest from capital investments.

No change is proposed to the current Exemption and Remission rules.

Questions

We would welcome responses to the following questions.

Question 23. **Having read the above proposals for Court of Protection fees, do you consider any of the fees to be inappropriate?**

Question 24. **Having read the above proposals for fees relating to registration of EPAs and LPAs, do you consider any of the fees to be inappropriate?**

Question 25. **Having read the proposals in section 1 as to how Deputies are to be supervised, do you consider any of the supervision fees to be inappropriate?**

Question 26. **Having read the above proposals for fees relating to searches of the register, do you consider any of the levels of fees proposed to be inappropriate?**

Question 27. **Having read the above proposals relating to the exemption and remission policy do you consider the current approach to be acceptable? Are there any further criteria that you feel ought to be considered?**

Are there any other fees you feel that should be charged and why?

Next Steps

Areas covered by this consultation

This consultation is due to end on the 15 January 2009 after which there will be a period of analysis before a formal response is issued and any necessary changes made to our practices and procedures.

Changes to the fees will require a change to the secondary legislation that governs fees chargeable by the OPG and Court. Because the LPA forms are statutory forms, any amendments will also require changes to the governing secondary legislation. Changes to the way the Public Guardian exercises his supervisory role do not themselves require a change to secondary legislation but are dependent on approval of the accompanying fee changes.

It is our intention to lay a new statutory instrument early in 2009 to amend the OPG and Court fees. This will enable any changes to the supervisory regime and the OPG and Court fees to be implemented by April 2009.

It is also our intention to lay a statutory instrument amending the LPA forms at around the same time and for the revised forms also to be implemented by April 2009. However, we are aware that the current forms may require considerable further work as a result of your responses to this consultation. We think it is important to get the forms right and if this means taking a little extra time over them we will do this. But we do not want the timetable to extend significantly beyond April as we think it is important that the forms are revised and in operation as soon as possible. Therefore, even if significant further work is required we would hope that the work would be complete by May 2009 and that a statutory instrument could be laid by the end of June in order that the new forms could be implemented prior to the 2009 summer Parliamentary recess.

Areas not covered by this consultation

This consultation only marks the first step in a range of work that we will be taking forward over the next 12-18 months to evaluate how well the Act is working and to what extent it is having the impact that was intended. This consultation paper only covers the three specific areas of LPA forms, supervision and fees that we wanted to address as soon as we were able.

Over the next few months we will be commissioning formal research and carrying out further consultation on a number of additional areas. This will include:

- Impact of the Act – how much of a difference is the Act having in practice, are people approaching best interests decision-making and making assessments of capacity differently now compared to before the Act came into force

- Information and guidance – is the range of information produced by the OPG and Court of Protection sufficient and how could it be amended improved;
- Code of Practice – to what extent is the Code of Practice meeting people’s needs and how relevant / current is the information it provides;
- Are the Court of Protection’s rules, practice directions and processes working effectively or are their amendments or modifications that are required;
- Are the OPG’s processes for registration of LPAs and searching of the register working effectively or do they require amendment;
- How effective are the OPG’s processes for investigating concerns raised in relation to Deputies and Attorneys, do the processes need to change, how should the OPG engage with other agencies involved with protecting vulnerable adults?

Information about the work in these areas and how it is taking forward will be provided regularly on our website www.publicguardian.gov.uk and in our regular update newsletter.

Questionnaire

We seek your views on the following questions:

1. **Do you agree with adopting a clearer English version of the 5 principles of the MCA, or do you think it is better to retain the actual wording in the Act?**
2. **Do you agree with using 'health and welfare' and 'property and financial affairs' throughout, or do you think it is better to keep the Act's wording of 'personal welfare' and 'property and affairs'?**
3. **Do you agree that we should change the wording of 'together or together and independently' to 'jointly or jointly and severally' or is the former wording acceptable?**
4. **Are there any other areas where you feel the wording needs to be more legally precise or reflect the wording of the Act?**
5. **Are there any other areas where you feel the wording tends too much towards jargon and needs to be simpler or clearer?**
6. **Do you think there are any things that can be removed from the current forms? Do you think that it is important to reduce the length even if that means losing some of the current content?**
7. **Do you think it is helpful to have the guidance notes alongside the sections of the form to which they refer?**
8. **Do you think the amount of guidance is sufficient? Should there be more or less guidance?**
9. **Do you agree with the approach taken with the continuation sheets or should there be more space to add additional notifiable people / attorneys / substitute attorneys in the main body of the form?**

10. **Do you think the 'Prescribed Information' covers all the areas that it needs to cover? Do you think there needs to be more / less information in this section?**
11. **Are there any changes that you feel are necessary in relation to the section dealing with life-sustaining treatment?**
12. **In particular, do you think it is necessary and appropriate to require the Donor's choice to be both signed and witnessed?**
13. **Overall, do you feel the current forms offer the right balance between length and the inclusion of essential information?**
14. **Overall, do you feel the forms meet the needs of those using them?**
15. **In particular, do you feel the forms meet the needs of ordinary people who may be completing them without professional assistance?**
16. **In particular, do you feel the forms meet the needs of professionals drawing up the instruments on behalf of clients?**
17. **Do you have any other comments on the forms' design or content?**
18. **Does the proposed supervisory regime give sufficient protection to those who need it?**
19. **Is the level of activity in each category sufficiently robust / not robust enough / too robust?**
20. **Are there other activities relevant for any of the supervision levels that you could suggest?**
21. **Is the frequency of review sufficient?**
22. **Does this approach reduce the reliance on third party whistle blowing or generally will it further deter fraud?**
23. **Having read the above proposals for Court of Protection fees, do you consider any of the fees to be inappropriate?**

24. **Having read the above proposals for fees relating to registration of EPAs and LPAs, do you consider any of the fees to be inappropriate?**
25. **Having read the proposals in section 1 as to how Deputies are to be supervised, do you consider any of the supervision fees to be inappropriate?**
26. **Having read the above proposals for fees relating to searches of the register, do you consider any of the levels of fees proposed to be inappropriate?**
27. **Having read the above proposals relating to the exemption and remission policy do you consider the current approach to be acceptable? Are there any further criteria that you feel ought to be considered?**
28. **Are there any other fees you feel that should be charged and why?**

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details / How to respond

Please send your response by 15 January 2009 to:

Fallon Horan-Swords

Mental Capacity Act Evaluation Team

Office of the Public Guardian

5th floor

81 Chancery Lane

London

WC2A 1DD

Tel: 020 – 7911 7062

Fax: 020 – 7911 7093

Email: MCARewiew@publicguardian.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at:

<http://www.justice.gov.uk/publications/consultations.htm>

Alternative format versions of this publication can be requested from the above contact details.

Publication of response

A paper summarising the responses to this consultation will be published three months after the close of the consultation. The response will be available on-line at <http://www.justice.gov.uk/index.htm>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which

public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 – 7210 1326, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 34.