



Ministry  
of Justice

# **Mental Capacity Small Payments Scheme**

November 2021

CP 559



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of Justice

## **Mental Capacity Small Payments Scheme**

Presented to Parliament

by the Lord Chancellor and Secretary of State for Justice

by Command of Her Majesty

November 2021



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# About this consultation

- To:** This consultation is aimed at the public and those who may need to access limited funds belonging to someone without mental capacity. We also welcome views from professionals from the legal, financial services and charitable sectors.
- Duration:** From 16/11/21 to 12/01/22
- Enquiries (including requests for the paper in an alternative format) to:** **Vulnerability Policy Unit – Mental Capacity Policy**  
Ministry of Justice  
Family and Criminal Justice Policy Directorate  
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London SW1H 9AJ  
Email: [MCAsmallpaymentsconsultation@justice.gov.uk](mailto:MCAsmallpaymentsconsultation@justice.gov.uk)
- How to respond:** Please send your response by 12 January 2022 to:  
**Vulnerability Policy Unit – Mental Capacity Policy**  
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102 Petty France  
London SW1H 9AJ  
Email: [MCAsmallpaymentsconsultation@justice.gov.uk](mailto:MCAsmallpaymentsconsultation@justice.gov.uk)
- Additional ways to feed in your views:** A series of stakeholder meetings is also taking place. For further information please use the “Enquiries” contact details above.
- Response paper:** A response to this consultation exercise is due to be published April 2022 at: <https://consult.justice.gov.uk/>

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# Foreword

It is a long-held legal principle that an adult must have proper legal authority to access or deal with property belonging to another adult. Where an adult has mental capacity, this legal authority can be provided by an ordinary power of attorney.<sup>1</sup> In cases where the adult lacks mental capacity, the Mental Capacity Act 2005 (MCA) provides the framework for them to grant legal authority by appointing a lasting power of attorney (LPA) while they still have mental capacity, or for third parties to obtain legal authority through applications to the Court of Protection (CoP).

Since coming into force in 2007, the Mental Capacity Act has been a vital piece of legislation, protecting individuals without mental capacity and supporting families in preparing for the future.

We are aware of concerns regarding the Court of Protection process for obtaining a property and affairs order, including the length of the forms, and the time taken between completing the application to the final order being made. Where relatively small sums of money are involved, some families have said that the Court of Protection process is disproportionate and could have a detrimental effect in delaying the ability of the account holder to benefit from their funds. This adds to the stress of looking after a disabled adult or child.

This issue was initially brought to our attention by the families of children and young adults who lack the mental capacity to access their matured Child Trust Funds (CTFs) when they turn 18. However, these issues will not just be faced by parents and carers of young adults, but by anyone who cares for someone who lacks mental capacity. There will be individuals who may require access to small amounts of money to support the specific needs of a person without mental capacity, but may not feel a full deputyship order is appropriate for them, or they find the application process for a one-off order off-putting.

It is for this reason that the Ministry of Justice has been examining the case for legislation to enable third-party access to smaller balances without the need to obtain the form of legal authority currently required under the Mental Capacity Act 2005.

We want the scheme to be simple and quick, but it must also contain protections and safeguards for vulnerable individuals. It must not be seen as a replacement for obtaining the recognised legal authority as provided by either an LPA or an order of the Court of

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<sup>1</sup> An ordinary power of attorney (OPA) is a legal document in which someone (the donor) gives another person (the attorney) the right to help them make decisions or take decisions on their behalf. It can also be called a general power of attorney.

Protection, but rather an interim measure while longer-term arrangements are put in place where appropriate. Nor should it undermine the protections and support offered by the Mental Capacity Act.

Achieving these aims necessitates finding a careful balance between ease of access and protections against fraud, abuse and coercion. Whilst we know the majority of parents, relatives and carers will always act in the best interest of their loved ones, sadly we know this is not always going to be the case. Therefore, careful consideration is required.

Creating a small payments scheme will require changes to the Mental Capacity Act 2005 and supporting secondary legislation. I've launched this consultation as we want your views on the feasibility and desirability of such a scheme, and the potential changes to legislation. Your input will help to build a robust evidence base to inform the development of the scheme.

Over the summer, we've engaged organisations across the charitable, legal and finance sectors, as well as campaigners and groups representing the elderly and those with disabilities and relevant departments across government. I'd like to thank them for their contributions so far.

Their input has helped us to shape the proposals in this consultation.

In parallel with the formal consultation, my officials will continue to carry out engagement through roundtables and one-to-one meetings. It's important that we gather evidence from, and hear the experiences of, a diverse range of people and organisations, and I would ask you to get in touch if you can help. You'll find contact details at the start of this document.

We will continue to raise awareness on the requirements of the Mental Capacity Act, in particular the actions that parents should take in advance of their child turning 18 to support transition to adulthood. We also want to gather further evidence on what the barriers are to engaging with existing processes, so we can minimise these as far as possible.

The issues in play are complex and not simple to resolve. I must be clear though, that it remains the individual without mental capacity who must take priority, and not lose the empowerment and protections that the MCA gives them. Their needs are paramount and must come before those of any other party.



Tom Pursglove MP  
Parliamentary Under Secretary of State

# Executive summary

1. If a person 'lacks mental capacity', they are unable to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken due to an impairment of the mind or brain. This is both time and decision specific. This means that people may lack capacity to make some decisions for themselves but have the capacity to make others.
2. The Mental Capacity Act 2005 (MCA) provides a statutory framework in England and Wales, for supporting people aged 16 and over to make their own decisions, alongside setting out the legal framework for people who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a time when they may lack capacity in the future. The Act also upholds the essential principle in property law that an adult must have the proper legal authority in order to deal with the property and finances of another adult. These are vital safeguards for the protection of vulnerable people and their assets.
3. The MCA enables individuals who have capacity to plan for the future, by making a Lasting Power of Attorney (LPA). An LPA allows a person (the 'donor') who has capacity to grant decision-making powers to one or more persons of their choosing (attorneys) relating to either their property and affairs or personal welfare where they to lack capacity to make those decisions in the future.
4. In cases where a person has lost mental capacity without having made an LPA, the Court of Protection (CoP) can make a 'one-off order' authorising a particular decision to be made on that person's behalf, or appoint a deputy to make decisions relating to either property and affairs or personal welfare on an ongoing basis.
5. The CoP is the specialist court that deals with all issues relating to a lack of mental capacity. An application to the CoP for a Property and Affairs Order requires the completion and submission of three forms and the provision of a capacity assessment by a medical practitioner. The court application fee is £371, but it is possible to apply to have fees waived depending on financial circumstances. This process takes an average of 21 weeks.

## The case for change

6. We have been made aware that the existing processes for obtaining legal authority may not be suitable for all circumstances. This has particularly been highlighted in the case of accessing matured Child Trusts Funds, but we do not have a robust evidence base to understand the extent and nature of the difficulties and barriers individuals may face navigating the existing processes.
7. 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. From stakeholder engagement with financial services providers and disability groups it is clear that the issue extends beyond matured Child Trust Funds (CTFs) to many other circumstances and types of accounts where the ability of third parties to make payments on their behalf would benefit the account holder. As a result, we believe that there may be a case for an alternative process to the CoP for authorising the release of small payments to suitable recipients.
8. While it is vital that the principles of the MCA are upheld to protect the interests of those without mental capacity, it may also be in those people's interests to allow an administrative process that makes it easier for their families, friends or carers to use their funds on their behalf. Some financial services firms are already doing this on an informal basis, but this is not underpinned by legislation, circumvents the MCA and has no formal safeguards for the vulnerable individuals.

## Our approach

9. The aims of this consultation are twofold: to gather specific feedback on elements of the proposed process, such as the purpose of the scheme, value and duration of payments, products in scope and administrative arrangements; and to gather more evidence and broader views on areas such as current barriers in the system, security measures and liability, in order to support the further development of a small payments scheme and its possible implementation.
10. In considering the issues arising in relation to accessing matured CTFs, government has decided that the time is right to consult on the idea of a small payments scheme for accessing funds on behalf of those who lack capacity.
11. Any scheme must enable third parties to make payments on behalf of an individual who lacks capacity in a simpler and faster way than applying for a one-off order or deputyship, while maintaining sufficient safeguards.

12. From this challenge we have identified three themes for investigation, which have been used to structure this consultation. These themes are:
  - **scope** – any scheme must be broad enough in scope to be useful to applicants while avoiding inadvertent discrimination, or replacing the CoP process
  - **security** – the scheme must be secure enough that it does not create undue risk to the assets of those without mental capacity or create a risk to the security of all accounts
  - **simplicity** – a proposed scheme must be simpler than what exists and be faster and more straightforward to navigate, while not being too costly or difficult for financial services firms to implement, ensuring consistency across the industry
13. We are applying the following principles to assess the suitability of any new process:
  - Does it uphold the principles of the MCA to put the vulnerable person's rights first?
  - Will it contribute to achieving simpler access to funds?
  - Does it mitigate potential risk to people's assets and to financial services firms?
  - Does it reflect the principle that the scheme is to act as a simpler alternative to a one-off property and affairs order rather than a replacement for a deputyship?
  - Is it capable of being applied without disproportionate impact on any one group? e.g. does it avoid negative equalities implications?
  - Is it deliverable?
14. In developing our proposals, we have engaged with the legal sector, the financial industry and organisations representing individuals with learning disabilities and dementia. This has revealed concerns about the complexity and duration of current CoP processes, a desire for a simplified process and a lack of awareness of the MCA.
15. The consultation is structured by the themes set out in paragraph 12. The introduction gives the background to the MCA and how third-party payments are currently authorised and describes the case for change and some past proposals. The 'scope' section sets out the general outline of the proposed scheme, asking for comment on the specifics of its parameters. The 'security' section then follows, seeking views on application elements, evidence on preventing fraud and options for redress. The 'simplicity' section summarises the process and sets out the trade-offs involved in the proposals, looking for evidence relating to their feasibility. A final section seeks evidence on the CoP process to understand existing barriers better.

## Summary of proposals

16. Having considered prior proposals and the needs of stakeholders, we propose a scheme that allows payments to be made for a fixed period, enabling the specific needs of a person without mental capacity to be met while more permanent arrangements are put in place, if necessary:
  - payments would be permitted for a six-month period from one account
  - payments would be allowed up to a value of £2,500 – an amount which is of sufficiently high value to include the majority of matured CTFs and is in-line with previous proposals (see paras 54-58)
  - a single extension to the access period, of a further six months, would be permitted only if the value of £2,500 had not been reached
  - the same account or other accounts belonging to the individual could not be accessed again by the same or a different applicant
  - the scheme would be run by financial services firms (e.g. banks, building societies and e-money institutions), allowing payments or withdrawals primarily from cash-based accounts
  - by someone who could prove their suitability, rather than just family members
  - 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
17. The proposal builds on informal processes already operated by many providers, potentially allowing for faster and easier implementation for financial services firms and at lower cost to the taxpayer.
18. Although the scheme is referred to as a small payments scheme, this could refer to both cash withdrawals and direct payments for goods and services, with views sought on the preferred approach. The scheme would apply to all people without the mental capacity to manage their financial affairs, although the consultation does consider whether this should extend to individuals with temporary or fluctuating loss of capacity.
19. While the goal of the proposal is to make it easier for family, friends and carers to access a vulnerable person's money to help improve their quality of life, removing too many barriers to access puts those same vulnerable people at increased risk of fraud. The proposal therefore aims to replicate some of the proven protections found in the CoP process and systems already used by financial services firms to release funds to third parties. These include the information requested in the application. Other elements of security include fraud prevention, such as the mechanisms of payment, notification of referees and use of a register of applicants and account holders, as well as a means of providing redress to account holders in the event of fraud.

20. 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. For the same reason, the proposal does not attempt to capture every situation in which financial services firms might be approached to release funds to a third party on behalf of someone who lacks capacity. Nor is the scheme intended to replace the one-off order and deputyship process which will still be required if access to larger amounts or multiple funds is required. For this reason, it is deliberately restricted in value and the type of assets in scope.

## **Equalities statement**

21. An equalities statement can be found at Annex A.

# Introduction

22. This paper sets out for consultation a proposal for a small payments scheme within the Mental Capacity Act 2005, which would allow for the release of funds to third parties where an account holder lacked the mental capacity to manage their finances. These proposals will require changes to primary legislation. The consultation is aimed at the public and those in the financial services, disability advocacy and legal services sectors in England and Wales.
23. A Welsh language consultation paper will be available shortly at <https://consult.justice.gov.uk/>
24. An Impact Assessment indicates that financial services customers who lack mental capacity, the NHS, voluntary sector and charity organisations who advise and support people who lack capacity and their families/carers, Welsh language speakers and people with protected characteristics are likely to be affected. The proposals are likely to lead to additional costs or savings for businesses, charities or the voluntary sector, or for the public sector. An Impact Assessment is attached.
25. Comments on the Impact Assessment are welcome.
26. Copies of the consultation paper are being sent to:
  - Alzheimer's Society
  - Age UK
  - Association of British Credit Unions Limited
  - Association of Public Authority Deputies
  - Building Societies Association
  - CARE UK
  - CARERS WALES
  - CIFAS
  - Council and Care for the Elderly
  - Court of Protection judiciary
  - Department of Health and Social Care
  - Department for Work and Pensions
  - Financial Conduct Authority
  - Foundation for People with Learning Disabilities
  - HM Treasury
  - HM Revenue and Customs
  - Law Society
  - Learning Disability England

- MENCAP
- Mental Health Foundation
- MIND
- Money and Mental Health Institute
- Money and Pensions Service
- National Association of Citizens Advice Bureaux
- National Autistic Society
- People First
- Society for Trust and Estate Practitioners
- Solicitors for the Elderly
- The Investing and Saving Alliance
- UK Finance

27. 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 subjects covered by this paper.

# The proposals

## Background

### The Mental Capacity Act

#### *Overview*

28. Prior to the implementation of the Mental Capacity Act 2005 (MCA) in 2007, there was no clear legislation on mental capacity in England and Wales. It was therefore dependent on pockets of good practice or common law. The rights of people with a learning disability, dementia, or brain injury to make their own decisions has not always been respected. Many people have been viewed as incapable because of their label or diagnosis, or were 'allowed' to make decisions by those around them as long as they were seen by others as making the 'right' decision. For instance, if someone with a learning disability made a decision that was considered to be unwise by their family or people who support them, they were often seen as lacking capacity. Some professionals made decisions on behalf of a person with a learning disability or dementia who lacked capacity without considering their wishes and feelings. They have made assumptions about their level of capacity and taken decisions on their behalf without including them in the process.
29. The MCA provides a statutory framework for supporting people aged 16 and over to make their own decisions, alongside setting out the legal framework for people to make decisions on behalf of those who lack mental capacity to make decisions for themselves. It sets out who can take decisions, in which situations, and how they should go about this. The Act also makes provision for those who have capacity and want to make preparations for a time when they may lack mental capacity in the future by way of appointing an attorney under a Lasting Power of Attorney. The Act came into force in 2007 and applies to England and Wales.
30. The Act's starting point is that it should be assumed that a person has legal capacity to make a decision for themselves (the right to autonomy) unless it is established that they do not have capacity. A person will lack capacity if an assessment shows that they do not have capacity to make a decision at the time it needs to be made. The Act also states that people must be given all practicable help and support to enable them to make their own decision, or to maximise their participation in any decision-making process.
31. The underlying philosophy of the Act is to empower people to make their own decisions where possible and to ensure that any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves is made in their best interests.

32. The Act is intended to assist and support people aged 16 and over by maximising their ability to make decisions and participate in decision-making as far as they are able to, and to discourage anyone who is involved in caring for them from being overly restrictive or controlling. But the Act also aims to balance an individual's right to make a decision for themselves with their right to be safeguarded from harm if they lack mental capacity to make a decision to protect themselves.
33. Section 1 of the Act sets out the five 'statutory principles' – the values that underpin the legal requirements in the Act. They are:
- i. A person must be assumed to have capacity unless it is established that they lack capacity.
  - ii. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
  - iii. A person is not to be treated as unable to make a decision merely because they make an unwise decision.
  - iv. An act done, or decision made, under this Act for, or on behalf of a person who lacks capacity must be done, or made, in their best interests.
  - v. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
34. The principles aim to assist and support people who may lack mental capacity to make a particular decision, and not to restrict or control their lives. They aim to empower people and encourage supported decision-making, as well as ensure that decisions made about a person accord, as much as possible within the law, with that person's wishes, values, beliefs and feelings.

*What does it mean to 'lack mental capacity'?*

35. 'Lacking mental capacity' means a person is unable to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken due to an impairment of the mind. It is both time and decision specific. This means that people may lack capacity to make some decisions for themselves but have capacity to make other decisions. For example, they may have capacity to make small decisions about everyday issues such as what to wear or what to eat, but lack capacity to make more complex decisions about financial matters without support; or they may be better able to make decisions at particular times of day, or in particular settings.
36. It also means that while some people may always lack capacity to make some types of decisions – for example, due to a condition or severe learning disability that has affected them from birth – others may learn new skills that enable them to gain capacity to make decisions for themselves, and yet others regain capacity, as part of recovery from a brain injury for example.

37. As well as concerning issues relating to care and treatment, the Act also upholds the essential principle in property law that an adult must have the proper legal authority in order to deal with the property and finances of another adult. Where an adult has capacity, the legal authority is granted by using an ordinary power of attorney. In cases where an adult lacks mental capacity, the Act requires an LPA or a property and affairs order from the CoP. These are vital safeguards for the protection of vulnerable people and their assets.

*Planning ahead - Lasting Power of Attorney*

38. As well as empowering and protecting people who may lack capacity, the MCA enables individuals who have capacity to plan for the future, by making a Lasting Power of Attorney. An LPA allows a person (the 'donor') to grant decision-making powers to one or more others (attorneys) relating to either their property and affairs or personal welfare were they to lack capacity to make those decisions in the future. A person may lack capacity to manage their property and affairs in the general sense but be aware that they need support to manage their affairs and know who could provide them with that support. In these instances, it would be possible for the person to make an LPA.

*Enduring Powers of Attorney*

39. Prior to 1 October 2007, some people may have planned for a time in the future when they might lack capacity by making an Enduring Power of Attorney (EPA). Any EPA made before 1 October 2007 can still be used but must first be registered with the Office of the Public Guardian (OPG).

*Court of Protection orders, including deputyship*

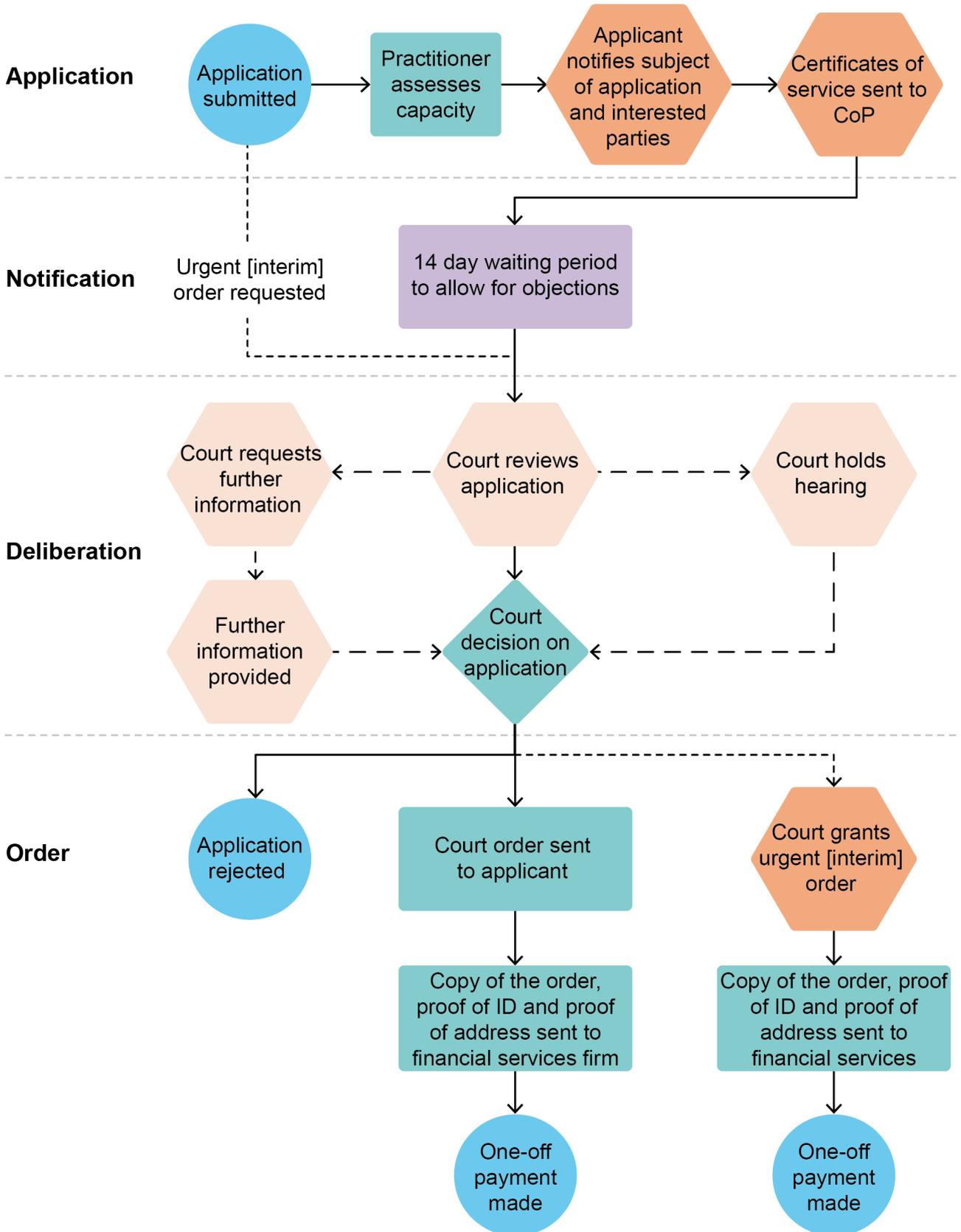
40. In cases where a person has lost mental capacity without having made an LPA or an EPA, or has never had capacity to do so, the CoP can make a one-off order authorising a particular decision to be made on that person's behalf, or appoint a deputy to make decisions relating to either property and affairs or personal welfare on an ongoing basis. The deputy could then access the person's assets (for example cash held in a bank account) to meet the needs of the individual, or manage other assets/investments, for example by selling a property belonging to the individual. In 2020, the CoP made 12,846 deputyship orders and 2,031 one-off property and affairs orders.
41. The CoP is the specialist court that deals with all issues relating to a lack of mental capacity. Most of the work of the court is non-contentious. It aims to put in place a protective legal framework, as provided in the MCA, for the person lacking mental capacity who is unable to protect and promote their own interests.

### **Deputyship application process**

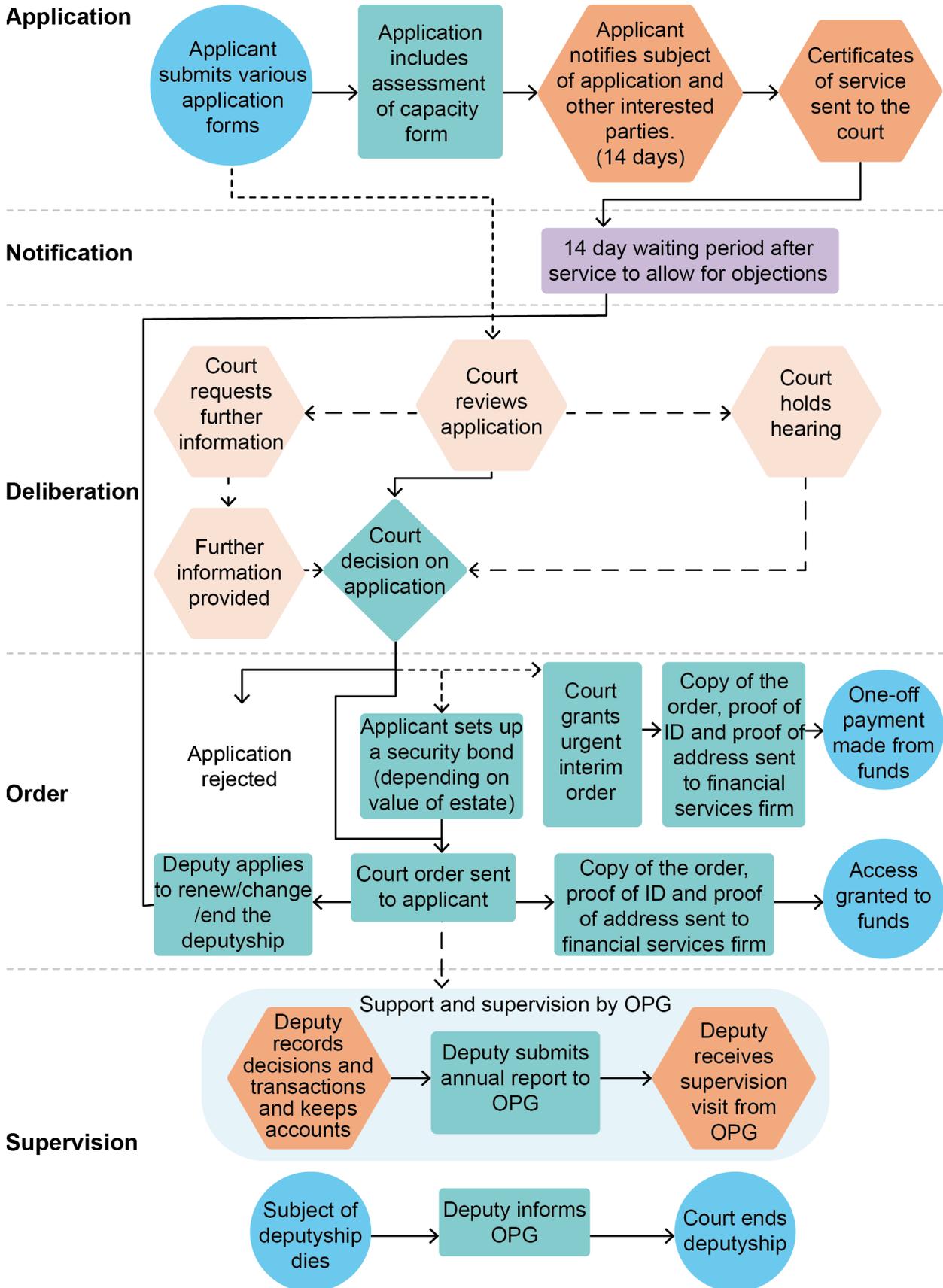
42. The CoP process prioritises empowerment and security and is designed primarily to uphold the principles of the MCA, by presuming capacity and ensuring that any decisions are taken in the person's best interests. This accounts for the number of steps involved in the process of applying for a deputyship, receiving a property and affairs order, making payments on behalf of an individual without mental capacity to manage their financial affairs, and then accounting for use of the money.
43. An application to the CoP for a Property and Affairs Order requires the completion and submission of an application form (COP1), a supporting information form (COP1A), an assessment of capacity form completed by a practitioner (COP3) and a deputy's declaration (COP4). The court application fee is £371, but it is possible to apply to have fees reduced or waived depending on financial circumstances. While the process can be completed without the assistance of a solicitor, some applicants do choose to use them, adding to this cost.
44. Figures 1 and 2 show the process that must be followed from submission of the application form, before funds are released. This takes, on average, 21 weeks from application to the granting of a property and affairs order – although where there is genuine urgency the CoP can expedite this process in a matter of hours in exceptional cases. Two weeks of this consist of a 'notification period', in which the subject of the application and any interested parties must be notified and can raise their objections should they disagree with the application. In contentious cases, the CoP can require a hearing – which costs £494 – to help come to a decision on an order. Hearings are only used where there is such contention, with many other orders being made after an administrative process of review by the court without any need for a hearing.
45. If a full financial deputyship order is granted (Figure 2), a further layer of security may come from the applicant being asked to set up a security bond, to insure against misappropriation of the funds. Lastly, the property and affairs order must be presented to the relevant financial services firms along with proof of ID and address, and, once accepted, they grant access to funds in accordance with the order.
46. Oversight of appointed deputies is provided by the OPG, something that does not apply if only a one-off order is granted. Deputies must keep accounts and records of decisions and submit an annual report to the OPG. New deputies also receive a supervision visit. The costs of supervision are covered through an annual supervision fee of £320 and new deputies also pay a £100 assessment fee. If concerns emerge about a deputy, the OPG can investigate and apply to the court to have the deputy removed. Where a deputy wishes to end their deputyship, this typically requires a further application, and its associated fee.

47. This process provides the highest level of protection to the person lacking mental capacity, from application to the conclusion of the deputyship. It is also somewhat flexible to the needs of individual cases, with form completion, fees and security bonds adjusted based on asset sizes.

**Figure 1: Court of Protection: One-off property and affairs order process**



**Figure 2: Court of Protection: Deputyship order process**



### **DWP appointee process**

48. The Department for Work and Pensions' (DWP) appointeeship process is another means through which funds – in this case benefits payments – can be received by one adult on behalf of another, if they lack mental capacity or are severely disabled. Some families, friends and carers seeking to access assets of people without mental capacity already receive funds on that person's behalf in this way and see it as a model which could be followed for a small payments scheme.
49. An appointee manages a person's welfare benefits in order to ensure that everyday bills are paid and to report any changes in circumstances to the DWP. An appointee has a much smaller level of authority over someone's finances as the appointment is restricted to their welfare benefit payments and does not extend to financial assets belonging to the individual.
50. The proposed appointee completes a form with their details, details of the benefit claimant and details of the account into which the benefit should be paid. A DWP Visiting Officer will interview, preferably separately, the benefit claimant and the proposed appointee to assess the need for an appointee. The Visiting Officer is required to make an independent assessment of the benefit claimant's ability to manage their financial affairs and, more specifically, their ability to understand how to make and manage a claim to benefit. During the interview with the proposed appointee, the Visiting Officer will:
  - establish the relationship, if any, to the benefit recipient
  - seek confirmation that the benefit recipient lacks mental capacity
  - ask the prospective appointee if they know of any next-of-kin or family members
  - confirm that no LPA or deputyship is in existence
  - ascertain what dealings they may already have with the customer's finances – what arrangements, if any, have they made to pay the customer's bills for example, utilities, rent, mortgage etc.
51. The process can take up to six weeks before the formal authorisation is issued.
52. The process is simpler than applying to the court as the DWP is only interested in the benefits aspects of the claimant's affairs whereas the CoP requires details of all financial aspects of an individual's affairs to ensure that the correct order is issued and prevent the need for additional applications. However, there are similarities in the processes in that both require details of family, evidence of mental incapacity and confirmation of LPA or deputyship. This information is supplied verbally during the DWP interview whereas the court requires this on its application forms.
53. While not formally required by the DWP, it is now possible to obtain a security bond as a safeguard against the appointee misappropriating benefits in a similar way that a financial deputy is required by the court to obtain a security bond.

### **Past proposals for a simplified small payments scheme**

54. Proposals for a simpler scheme to authorise small payments on behalf of those without mental capacity and without applying to the CoP predate the MCA 2005. In 1992 in a report titled *Mentally Incapacitated Adults and Decision Making*, the Law Commission acknowledged that there were already a number of informal mechanisms whereby a person could obtain a payment, provided that those in the position to make the payment were satisfied both as to the suitability of the proposed recipient and the incapacity of the person with whom they would normally deal. The Commission suggested that there should be a more formal arrangement and invited views on the merits of a release of payments scheme which would allow financial services firms to release sums of money to a named individual without that person having either a Power of Attorney or an order from the CoP.
55. The scheme proposed that firms such as banks, building societies, and insurance companies, should be able, at their own discretion, to permit a named individual to withdraw money or receive payment from an account or under an insurance policy belonging to a person lacking mental capacity. Many consultees agreed that there was a need for such a scheme. In 1995 the Commission refined its proposals and suggested the scheme would require the paying institution to enter into an agreement with the proposed recipient of the funds. The recipient would need to:
- provide the financial services firm with medical evidence of the account holder's lack of capacity to manage their financial affairs
  - confirm their understanding that the funds received must be used in the best interests of the account holder
  - be aware that they could be liable for civil or criminal proceedings if the funds are misused; and
  - confirm that they were not aware of any person who may already be authorised to receive the funds by virtue of acting under a Power of Attorney or by order of the CoP
56. The Law Commission proposed that the scheme should operate on an opt-out basis both for the account holder and the financial institution, have a statutory limit of £2,000 per annum or a capital limit of £2,000 if the withdrawal related to a one-off payment, with further payments allowed through invoices and direct debits and finally that agreements relating to the scheme should be for a statutory two-year period, at which point a further application would be needed in order to renew.
57. In the 1997 green paper *Who Decides*, government accepted the Commission's proposals in principle but advised that there were "a number of practical problems, including ensuring that there are adequate safeguards against abuse". In 1999, government consulted on the issue but concluded on consideration of the evidence and responses put forward by consultees that "the extent of the problems that the

scheme was intended to solve should be clarified, and that further consultation should take place on this issue, and on the appropriate safeguards for any scheme”.

58. Consequently, the Law Commission’s proposals for a release of payments scheme were not included in the Bill that eventually became the MCA 2005.

### **The case for change**

59. Through the efforts of campaigners, as well as extensive engagement with age and disability charities and financial services firms, we have been made aware that the existing processes for obtaining legal authority may not be suitable for all circumstances. Some feel that the process of obtaining a deputyship is too complex, time-consuming and burdensome where limited funds are involved. This has particularly been highlighted in the case of accessing matured CTFs.

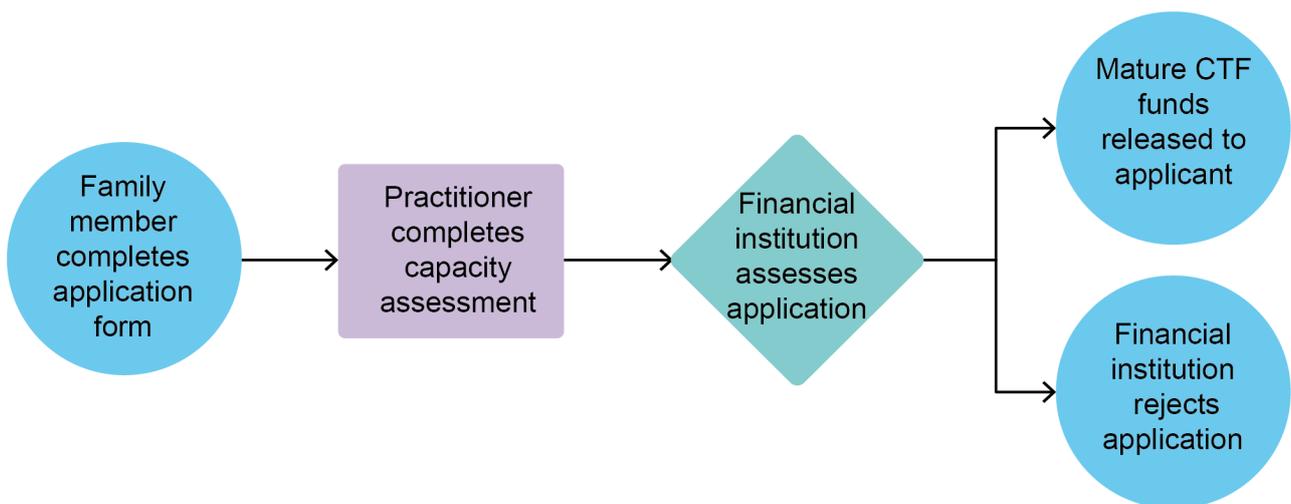
### *Accessing Child Trust Funds*

60. CTFs are long-term tax-free children’s saving accounts set up by the government in 2002. They were designed to help make sure children arrived at adulthood with a savings account, were encouraged to save and understood why it is important to save. The accounts were available to all children in the UK, whose parents received Child Benefit between 1 September 2002 and 2 January 2011. The first CTFs matured in September 2020, when the oldest account holders turned 18. The last CTF will mature in 2029.
61. There are 6.3 million CTFs with an average account balance of £1,500. There is no reliable estimate for how many young people lack mental capacity to manage their financial affairs and may therefore be unable to access their accounts upon reaching adulthood. Although it is estimated that 2.5% of children may have learning difficulties in the UK, the number of those that lack mental capacity to make this specific decision is difficult to quantify as individuals may be able to make some decisions relating to finances, but not others (see paragraphs 35-37). So far only 28 applications have been made to the CoP to access CTFs. This could be due to the general lack of awareness of the existence of the CTF, lack of awareness of the court or the process, the misapprehension that a solicitor is required to make the application and the legal costs that will be incurred or, in a few cases an application to the court is not necessary as the young person is able to make an LPA.
62. Campaigners maintain that there should be a simpler means of accessing these funds and that it should not be necessary to apply to the CoP for a young person with one modest savings account. The need to obtain legal authority is seen by some as onerous and disproportionate to the small balances of the mature Child Trust Fund, and more suited to those who manage the complex and substantial financial affairs of an adult who has lost mental capacity. Some campaigners also contrast unfavourably

the need for careful justification of the use of CTFs with the freedom with which young adults with capacity can spend the matured funds on anything they like.

63. In response to these concerns, some CTF providers have devised arrangements which allow a person other than the account holder access to funds in a CTF without the need to obtain legal authority in any of the ways provided by the MCA or any other legislation. These are largely based on formats and questions that can be found within the existing CoP process, the CTF Terminal Illness process as operated by HM Revenue and Customs, and the Appointee scheme application process used by the Department for Work and Pensions. The providers' stated purpose for their process is to focus on essential questions and declarations specific to the circumstances of a matured CTF and deliver a short and easy process, without significantly compromising the protection necessary for one savings account. Firms estimate that around 500 applications have been made using this process.
64. The process, summarised at Figure 3, can be used for CTFs with balances up to £5,000 and involves the completion of a single form, with a capacity assessment from a practitioner attached. Requirements as to who may provide a practitioner assessment are set out in paragraphs 115-116 below. This is then sent to the financial institution for assessment, which does not involve contacting the account holder or any external referees. Once the provider is satisfied, the entire CTF is transferred directly to the applicant to spend on behalf of the young person. Such an approach circumvents the MCA and does not have consistent or formal safeguards for vulnerable individuals.

**Figure 3: Providers' 'exceptional process' for access to Child Trust Funds**



*Other releases of funds*

65. We understand that mature CTFs are not the only instance in which financial services firms may release funds to third parties in cases where the account holder

lacks capacity, without authority having been obtained in any of the ways provided by the MCA. Firms take decisions on a case-by-case basis, based on their assessment of the risk, their knowledge of the circumstances of the account holder, and any other information they choose to request from the applicant, with processes varying by firm. It is completely at a firm's discretion as to whether they are prepared to enter such an arrangement to release a payment or not. Again, such an approach circumvents the MCA and does not have consistent or formal safeguards for vulnerable individuals.

*Developing an alternative process*

66. The increasing frequency with which concerns about existing CoP processes are being voiced and the alternative mechanisms that have been developed by financial services firms point to the need to consult on an alternative process.
67. We believe consideration of an alternative process to the CoP for authorising small payments may be needed due to the number of people whose families, friends and carers we believe are not applying to the CoP because they consider the process too complex or disproportionate to the amount of funds involved. Stakeholder engagement with financial services providers and disability groups confirms that the issue extends beyond matured CTFs to many other circumstances and types of accounts where the ability of third parties to make payments on their behalf would benefit the account holder. As a result, we believe that there may be a case for an alternative process to the CoP for authorising the release of small payments to suitable recipients.
68. While it is vital that the principles of the MCA are upheld to protect the interests of those without mental capacity, it may also be in those people's interests to allow an administrative process that makes it easier for their families, friends or carers to use their funds on their behalf. As outlined in paragraphs 63-65 some financial services firms are already doing this on an informal basis, but this is not underpinned by legislation and does not ensure safeguards for the vulnerable individuals. Additionally, informal decisions made by firms will be driven by their own risk appetite and so may not always lead to consistent outcomes for all consumers.
69. We are applying the following principles to assess the suitability of any new process:
  - Does it uphold the principles of the MCA 2005 to put the rights of the vulnerable person first?
  - Will it contribute to achieving simpler access to small funds?
  - Does it mitigate financial risk and address liability concerns?
  - Does it reflect the principle that the scheme is to act as a simpler alternative to a one-off property and affairs order rather than a replacement for a deputyship?
  - Is it capable of being applied without disproportionate impact on any one group? e.g. does it avoid negative equalities implications?
  - Is it deliverable?

*A small payments scheme*

70. In considering the issues arising in relation to accessing CTFs, government has decided that the time is right to revisit and consult on the idea of a small payments scheme for accessing funds on behalf of those who lack capacity.
71. Any scheme must enable third parties to make payments on behalf of an individual who lacks capacity in a simpler and faster way than applying for a one-off order or deputyship, while maintaining sufficient safeguards
72. From this challenge we have identified three themes for investigation, which have been used to structure this consultation. These themes are:
- **scope** – any scheme must be broad enough in scope to be useful to applicants and avoid inadvertent discrimination, while not replacing the CoP process
  - **security** – the scheme must be secure enough that it does not create undue risk to the assets of those without mental capacity or create a risk to the security of all accounts
  - **simplicity** – a proposed scheme must be meaningfully simpler than what already exists and be faster and more straightforward to navigate, while not being too costly or difficult for financial services firms to implement, ensuring consistency across the industry
73. Having considered prior proposals and the needs of stakeholders, we propose a scheme for small payments where the recipient enters into an agreement directly with the financial services firm to receive funds. 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. The scheme would apply to a range of accounts. More detailed information on our proposals for the scheme is contained with this consultation. The proposals build on the scheme put forward by the Law Commission, with additional elements to address some of the concerns raised at the time in relation to safeguards.
74. The aims of this consultation are twofold: to gather specific feedback on elements of the proposed process, such as the purpose of the scheme, value and duration of payments, products in scope and administrative arrangements; and to gather more evidence and broader views on areas such as current barriers in the system, security measures and liability, in order to assess whether the proposed scheme is a proportionate and workable solution.

**Engagement**

75. In developing our proposals, we have engaged with the legal sector, the financial industry and organisations representing individuals with learning disabilities and dementia.

## Scope

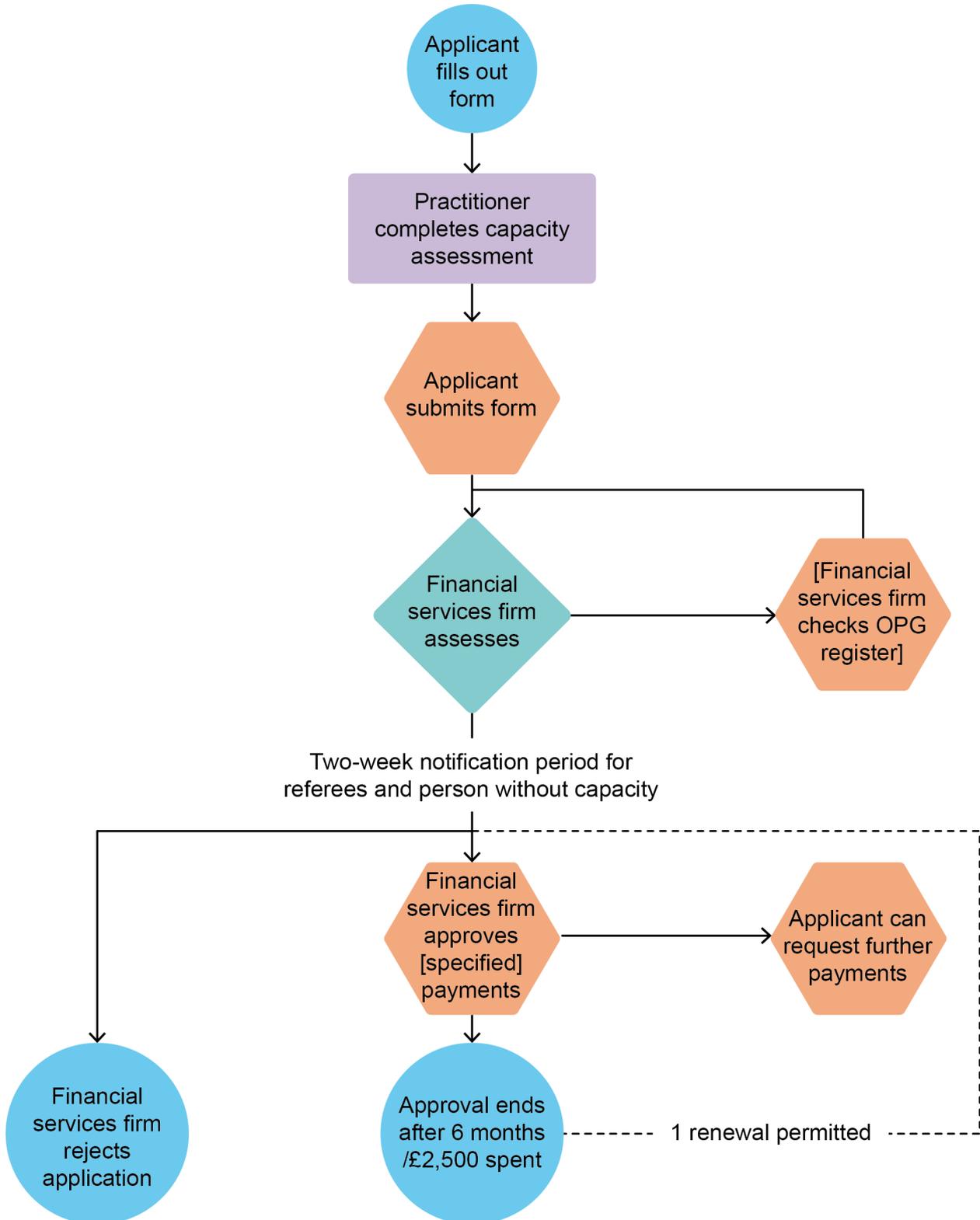
### Overview

76. We propose a scheme that allows payments to be made for a fixed period enabling the specific needs of a person without mental capacity to be met while more permanent arrangements are put in place, if necessary:
- payments would be permitted for a six-month period from one account, up to a total value of £2,500
  - access would only be granted for one six-month period, with a single extension of six months permitted only if the £2,500 limit had not been reached
  - the same account or other accounts belonging to the individual could not be accessed again by the same or a different applicant
  - the scheme would be run by financial services firms (e.g. banks and building societies) allowing payments or withdrawals primarily from cash-based accounts
  - by someone who could prove their suitability (see paragraphs 112-114)
  - the scheme would not allow access to CTFs or Junior ISAs before maturity, when the account holder turns 18
77. This proposal aims to meet the challenge set out in paragraph 71. It builds on informal processes already operated by many financial services providers, and we therefore hope that most firms will find it straightforward to implement the scheme and administer the security checks. This will allow payments to be made to a third party on behalf of an individual who lacks capacity in a simpler and faster way, while maintaining sufficient safeguards.
78. Although the scheme is referred to as a small *payments* scheme, this could refer to both cash withdrawals and direct payments for goods and services. Views are sought on whether one approach should be favoured over the other in paragraph 121.
79. The scheme would apply to all people without the mental capacity to manage their financial affairs, although the consultation does consider whether this should extend to individuals with temporary or fluctuating loss of capacity (see paragraph 87). While work on these proposals was occasioned by the campaign for simpler access to mature CTFs for the families of young people without mental capacity, we know this is a wider issue. From early engagement with the disability sector, we understand that there are a range of scenarios where current processes might not be suitable for an individual and a more streamlined approach could be useful. It is therefore important that the scheme should be accessible to anyone who lacks the capacity to manage their finances. Similarly, the scheme should avoid creating discriminatory effects by reducing the protection of any particular group's assets or through unjustifiable denial of access to the scheme. For example, it would not be appropriate to only apply the scheme to assets belonging to young adults without mental

capacity, as all individuals without mental capacity should be afforded the same property rights regardless of age.

80. As any small payments scheme needs to be simple, this proposal does not attempt to capture every situation in which financial services firms might be approached to release funds to a third party on behalf of someone who lacks capacity. Nor is the scheme intended to replace the one-off order and deputyship process which is more appropriate where there are larger sums of money or more complex finances involved. For this reason, it is deliberately restricted in value and the type of assets in scope.
81. Figure 4 gives an overview of the process for the proposed scheme, from application through the checks conducted by financial services funds to the release of funds. The process is detailed in more depth in paragraphs 146-156.

Figure 4: Summary of proposed small payments scheme



## **Purpose**

82. The scheme would allow applicants to make payments or withdrawals for a fixed period of time (six months), to meet the specific needs of a person without the mental capacity to manage their finances. For example, it could be used for the family of a young adult without mental capacity to use money from a matured CTF to pay for something that the young person wanted, such as a bike, a piece of technology, or even a holiday. Similarly, the scheme might be used to pay for adaptations to the home of a person with dementia such as fitting grab rails or buying specialist equipment, while a deputyship was sought.
83. While there are instances where funds accessed through the scheme might be used to meet day-to-day and ongoing care needs, it would not be primarily intended for this purpose. The DWP Appointeeship scheme already allows for access to benefits for this purpose, while more enduring arrangements provided by the CoP are more appropriate where spending decisions need to be made on an ongoing basis.
84. 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. Here, an urgent application to the CoP would be the more appropriate and secure course of action, as an order can be granted in a matter of hours in an emergency.
85. It should be reiterated that the MCA already provides robust processes for releasing funds in all the circumstances noted above. These can be expedited in true emergency cases, and fee waivers are available. Moreover, whatever approach is taken in response to this consultation, financial services firms might choose to continue to operate as they do now in relation to such accounts, at their own financial risk.

## **Questions**

1. In your view, is a small payments scheme needed? Please give your reasons.  
Yes/No/Don't know

2. What effect do you think the proposed small payments scheme would have for those without mental capacity? Please give your reasons.
  - Positive
  - Mostly positive
  - Neutral
  - Mostly Negative
  - Negative
  - Don't know
3. In your view, what effect would the proposed scheme have for the *parents, carers or guardians* of those without mental capacity? Please give your reasons.
  - Positive
  - Mostly positive
  - Neutral
  - Mostly negative
  - Negative
  - Don't know
4. What categories would funds acquired through a small payments scheme by a third party most likely be used for?
  - Food and drink
  - Clothing and footwear
  - Housing, maintenance and furnishings
  - Health
  - Recreation and entertainment
  - Travel
  - Electronics
  - Other (please specify)
  - Don't know
  - I wouldn't use the scheme

### **People covered by the scheme**

86. The proposed scheme is designed to enable third parties to make payments on behalf of those who 'lack mental capacity to manage their own funds'. It is possible for someone to lack mental capacity to take some decisions, but have sufficient mental capacity to take others, particularly when properly supported and given the right explanation, as laid out in principle two of the MCA. For this reason, it should not be assumed that someone lacks capacity to manage their funds just because they lack capacity to make decisions in other areas of their lives, nor that they are incapable of making an LPA with appropriate support. For this reason, practitioners

would be asked to assess the account holder's capacity specifically in relation to managing these finances (see paragraphs 115-116).

87. Loss of capacity can be temporary as well as permanent, so there is a chance that some account holders who lack mental capacity at the time that the application is made could regain it in the future. While these people may benefit from a third party being able to make payments on their behalf while they lack capacity, there is a chance that, once their capacity returned, they could object to how their money had been spent.

### Questions

5. Should the scheme apply to individuals who have fluctuating or temporary loss of capacity? Please give your reasons  
Yes/No/Don't know
6. If yes, should there be a minimum period of time for which capacity must be lost?  
If no, why?

### Value of payments

88. Payments up to a total value of £2,500 would be permitted. This amount would be sufficient to enable access to funds held in the majority of mature CTFs, and is in line with past proposals, such as that from the Law Commission. Our view is that £2,500 is an appropriate sum for discretionary expenditure to meet the kind of examples of specific needs which the scheme is designed to meet (see paragraph 82). This figure could be amended through secondary legislation to allow it to be revised in line with inflation or based on evidence from the operation of the scheme. There would be no sub-limits on the value of individual payments or withdrawals, as it would be for the applicant, rather than the financial institution, to determine whether these were in an individual's best interests.
89. Setting a limit on the amount of funds accessible through the scheme lessens the potential risk to the account holders' funds. This enables us to simplify the security checks and oversight required when compared to a full deputyship application. Increasing the withdrawal limit will increase financial risk for account holders and financial services firms, making more significant forms of security checks and oversight necessary. This could mean replicating the CoP application process and oversight measures, which would not meet the objectives of the small payments scheme (simplicity, speed and security).
90. This maximum limit of £2,500 would apply irrespective of the total value of the account holder's assets, as people should be able to benefit from the scheme regardless of their overall wealth. Applicants would not be allowed to access more

than the total value of an account, to avoid incurring debt for the person without mental capacity. For simplicity's sake, we anticipate that access will need to be restricted to a single account, per person, and we are seeking views on the ways this could best be achieved (see paragraphs 125-129).

### Question

7. In your view, is £2,500 an appropriate limit for the value of payments made through a small payment scheme? Please give your reasons.

Yes/No/Don't know

If no, please specify a value that you think would be more appropriate, and why.

### Duration of payments

#### *Access for a fixed period of six-months*

91. A successful application would allow payments or withdrawals from one account up to a total value of £2,500 to be made within one six-month period. This aligns with the average time taken to obtain a property and affairs order from the CoP and would also allow for interim access while the applicant sought a deputyship, where needed.
92. Setting a six-month limit would also avoid the scheme replacing the CoP's checks and balances where longer-term arrangements to manage the subject's assets were needed.

#### *Application renewal*

93. We also recognise that more permanent arrangements will not be necessary or appropriate in all cases. There will be instances where the person's funds are so limited that their ongoing management is not needed, following an initial access period. Moreover, depending on their relationship with the person without capacity, not all applicants will want the ongoing obligations of a deputyship and the reporting requirements that one entails. For this reason, we propose to allow one renewal of the six-month access period. This would not allow for access to further funds beyond the initial £2,500 limit, so if this had all already been spent within the first six months, no renewal would be permitted. At each stage the applicant will be asked to consider whether a deputyship is more appropriate for the management of these funds, particularly if they re-apply to use the scheme.
94. Applications to the scheme would not be linked to, or be contingent on, a CoP application being submitted. As stated above, in some cases a deputyship will not be necessary or appropriate for all individuals who use the scheme. Making this scheme contingent on a CoP application could therefore disincentivise use of the scheme. There would also be significant technical and operational challenges in connecting the two processes, and it would offer little additional protection, as the money will

have been released to the applicant by the time a decision was taken on the property and affairs order.

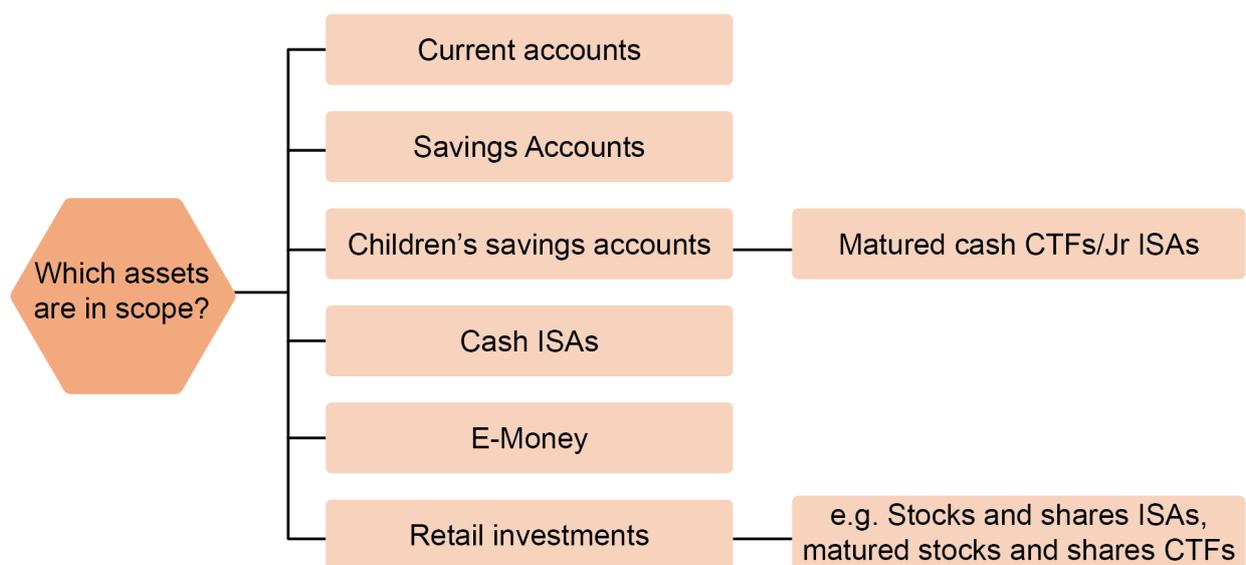
**Questions**

- 8. Is six months a suitable time limit for access to the small payments scheme? Please give your reasons.  
Yes/No/Don't know
- 9. Do you think the scheme should allow for a single renewal (with no extension to the original £2,500 limit)? Please give your reasons.  
Yes/No/Don't know

**Products in scope**

- 95. As the proposal is for a *small payments* scheme, its scope is focused on those financial products that most easily enable this. This rules out income streams and assets requiring more complex management, investment or credit decisions like mortgages, annuities, loans and pensions, as well as non-financial assets like property.
- 96. Figure 5 presents the products we propose to be in scope. These are primarily 'cash accounts', such as current and savings accounts, as well as cash ISAs and e-money. Payments can typically be easily authorised and made directly from such accounts.

**Figure 5: Products in scope of the proposed small payments scheme**



97. In recognition of the fact that retail investments can be readily accessible, and to capture those CTFs held in stocks and shares, retail investments will also be in scope of the scheme, with finance sector feedback suggesting that release of these funds can be achieved relatively easily.
98. The CTF Regulations require that the instructions for a maturing CTF must cover the entire value of the account. It is therefore not possible to make more than one withdrawal from a mature CTF. This means that matured CTF accounts containing more than £2,500 would not be accessible via the proposed scheme. However, it is possible, prior to account maturity at 18, for the funds in the account to be transferred to a Junior ISA, which will automatically become a protected ISA at maturity. It is also possible, where the CTF provider also provides ISAs, for the provider to transfer the funds to a protected ISA once mature. The proposed scheme would provide for small withdrawals from a protected ISA, thereby allowing access to the matured funds.
99. Accounts with penalties for withdrawal would also be in scope, should the applicant judge that the benefit to the subject of accessing the money outweighed the cost of the penalty, and should a situation be avoided in which the subject was placed in debt.
100. Accounts where access to funds is prohibited due to specific terms or regulatory requirements, such as non-mature CTFs and Junior ISAs (where, by definition, the account holder is under 18) are out of scope.

### Questions

10. Do you agree with the proposed list of financial products in scope of a small payments scheme?

Yes/No/Don't know

11. If any, which products do you think should be added or removed from this list?

[Free text]

### Administration

101. We propose that financial services firms, rather than government, would administer a small payments scheme. Firms already regularly release funds on an informal basis to meet customer needs, based on their own ad hoc assessment of need and risk. Some already have a more developed 'exceptional process' for parents to access matured CTFs where a young adult lacks capacity, and we understand that over 500 applications have been received for this process. Therefore, a formal small payments scheme administered by financial services firms should be feasible, will allow quicker release of funds and will help make the process more accessible. The end-to-end process for the scheme is discussed at paragraphs 146-156.

102. A formal scheme would build on existing processes within many financial services firms potentially allowing for faster implementation and lower cost to the taxpayer. The potential for government oversight is discussed at paragraphs 125-129 below. Formalising the means by which firms grant permission for small payments on behalf of someone without mental capacity could also produce a more consistent process for applicants and fairer consumer outcomes than current informal arrangements.

### Question

12. Should financial services firms be responsible for administering a small payments scheme? Please give your reasons.  
Yes/No/Don't know

### Applicants

103. The nature of an applicant's relationship to the subject is not in itself a guarantee that the applicant would act in that individual's best interests. Given the variety of relationships through which people without mental capacity are supported and cared for, it is important that the most appropriate person should be able to apply to the scheme for them, rather than restricting applications to particular groups. Our priority is therefore to ensure that the process checks the suitability of the applicant, regardless of the nature of their relationship with the subject of the application.

We wish to test two approaches to testing applicant suitability:

104. **Approach A** would restrict applications to those with an existing authorisation to access or manage the vulnerable person's funds – such as the established 'named contacts' for CTFs, or DWP appointees – to apply to the scheme. This would draw on the prior suitability checks conducted by other organisations to strengthen the security of the scheme and avoid burdening firms with the administration of checks.
105. **Approach B** would be more open, asking applicants to demonstrate their suitability through the application process, setting out their relationship to the person, why they were applying, their trustworthiness (based on their exercise of responsibility elsewhere). Financial services firms would have to take a decision based on this, and the views of the referees, directing anybody rejected to the CoP if they still want to obtain access to funds.

## Questions

13. Which approach do you consider most appropriate for determining applicant suitability:  
Approach A or Approach B?  
Why?
14. How do you think applicants should demonstrate their suitability when applying to the scheme?  
[free text]

## Security

### Overview

106. The vast majority of parents, guardians and others involved in the care of an individual who lacks mental capacity will act in their best interests and only use money obtained through the scheme for its intended purpose – to meet the needs of the person who lacks capacity. However, we know this will not always be the case, and there is a risk that money could be misappropriated from vulnerable individuals if the scheme lacks sufficient safeguards and security measures. UK Finance report that 2.8 million instances of fraud were detected in 2020 and estimates from the Crime Survey for England and Wales (TCSEW) point to 4.5 million fraud offences in the 12 months to December 2020.<sup>2,3</sup>
107. The prevalence of fraud, and the vulnerable nature of account holders, means that any new scheme should replicate some of the proven protections found in the CoP process and systems already used by financial services firms to release funds to third parties.
108. However, we also recognise the need for the information requested and checks conducted to be proportionate to the sums of money involved, and the need to avoid replicating the barriers faced in the CoP process. The objective of devising a simpler and faster process remains, so security considerations must be balanced against the other objectives of the scheme. Below, we present the security features we propose for the application process, and seek views on the payment/withdrawal mechanisms, degree of oversight required, notification of referees and wider fraud prevention.

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<sup>2</sup> <https://www.ukfinance.org.uk/system/files/Fraud%20The%20Facts%202021-%20FINAL.pdf>

<sup>3</sup> <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingdecember2020>

109. The proposed security measures represent a standardised minimum for a small payments scheme and financial services firms will have the freedom add further layers of protection, such as credit checks, if they see fit.

### **Application elements**

#### *Reasons for application*

110. Applicants would be asked to confirm why they were using the small payments scheme to access this sum of money, as opposed to applying for a one-off order from the CoP or a full deputyship order. We think it is important to remind applicants of the formal means of obtaining legal authority under the MCA, as these may be more appropriate for those who intend to manage funds longer term, or where larger sums of money may be required. This question would encourage and prompt the applicant to actively consider all their options before proceeding.

#### **Question**

15. Do you think applicants should have to state their reasons for using this process as opposed to applying for one-off or deputyship order from the CoP? Please give your reasons.

Yes/No/Don't know

#### *Declaring spend*

111. Applicants would be asked to declare what the money would be spent on, to show the application was trying to meet specific needs, rather than passing general management of the subject's funds to a third party. Financial services firms would not undertake a value judgement of this spend but would confirm that the money is intended to be used to meet the needs of the individual who lacks capacity. The information would also be retained for future audit purposes in the event of allegations of fraud (see paras 122-123).

#### **Question**

16. Should applicants have to declare in their application what the funds will be spent on? Please give your reasons.

Yes/No/Don't know

#### *Account holder information and applicant suitability*

112. Aspects of the application form would request information about the account holder – including the type of account they held with the financial services firm, and confirmation that an LPA or deputyship order didn't already exist (see paragraph 124 for more information). Financial services firms would need to verify with the OPG that

an LPA/deputyship did not already exist by conducting a register search, before approving the application. On average, the OPG receives 140,000 requests for register searches per year, and from August 2019-20 4.6% were from banks and financial services firms.

113. There would also be questions aimed at exploring applicant suitability and verifying their identity in line with usual financial services firm processes. This would seek to confirm the identity of the applicant (via firms' standard procedures involving photographic confirmation of identity and proof of address) and record the nature of the relationship between the applicant and account holder.
114. We do not propose that firms request the applicant's financial history (including bankruptcy, or other debts), or use this to inform their decision on whether to release funds to the applicant. Credit checks or other financial checks would increase the administrative burden on financial services firms and could disincentivise some individuals from using the scheme. Personal debt or financial hardship does not necessarily mean that someone is not suitable to support the account holder with spending through the small payments scheme.

### Questions

17. Should financial services firms be requesting information on the applicant's financial history (e.g. bankruptcy, insolvency, debt)? Please give your reasons.  
Yes/No/Don't know
18. Are there any instances in which you think money should not be released to individuals?  
Yes/No/Don't know  
If yes, please give an example.

### *Practitioner certification*

115. Financial services firms would need to be able to verify that the account holder lacks mental capacity to ensure proper use of the scheme. The applicant would therefore need to present certification from a practitioner that the account holder lacks mental capacity to make decisions about their finances. As with the CoP application form, the practitioner may be a registered medical practitioner, for example the GP of the person to whom the application relates; or psychiatrist, approved mental health professional, social worker, psychologist, nurse, or occupational therapist who has examined and assessed the capacity of the person to whom the application relates.
116. The practitioner assessment should also state whether the account holder was likely to regain capacity and would therefore be able to manage their finances at some point in the future.

## Preventing fraud

### *Notification and referees*

117. Financial providers would need to notify the account holder that an application to access their account had been made and allow two weeks for a response to this message. This step would help mitigate the risk that an account belonging to someone who *did* have capacity to manage their finances could be accessed through the scheme, or that someone the subject was known not to trust could access their funds.
118. We also propose that the applicant would need to provide details of a referee who the financial services firm would notify of the application. This referee should be an individual known to the account holder. The firm should notify the referee at the same time as the account holder, starting the two-week response window. This step would allow the referee to raise any concerns or objections at the time of making the application but would also ensure additional oversight of the process by a third party known to the account holder.
119. On its own, the requirement to notify a referee cannot entirely prevent fraud. Indeed, there is a risk that a determined fraudster could collude with the supplied referee to create a false representation. However, when combined with the other security measures it does add an important check to the process. The need to inform and involve others forces applicants to consider the merits of their case and may help put off the most opportunistic fraudsters. Its use in the deputyship and LPA application process shows it is considered an effective security measure, even if adds to the length of the process
120. We do recognise that an *obligation* to contact referees may prove burdensome on financial services firms, particularly where they are already very familiar with the applicant and the circumstances of the account holder. For this reason, we are keen to explore and understand whether firms should have the option but not an obligation to follow up with referees, based on their own assessment of the risk.

## Questions

19. Do you think that applicants should have to provide contact details of a referee known to the account holder when applying to a small payments scheme? Please give your reasons.  
Yes/No/Don't know
20. Should financial services firms be required to contact named referees in all cases before making payment? Please give your reasons.  
Yes/No/Don't know
21. Should the named referee be required to sign a declaration in the application process to confirm they know both the account holder and applicant, and understand the purpose of the scheme? Please give your reasons.  
Yes/No/Don't know
22. Is a two-week notification period appropriate/long enough for the account holder or referee to raise an objection?  
Yes/No/Don't know  
If no, please specify a period of time that you think would be more appropriate, and why.
23. What risks, if any, might this approach to notification of referees and account holders have?

### *Mechanism of payment/withdrawal*

121. We have identified three mechanisms by which money could be released through the scheme, each with their own merits and risks. We currently favour option 3, as it offers the most flexibility for the different account types in scope of the proposed scheme.

**Option 1: Money is paid directly to the applicant.** This would give the applicant full control of both the amount withdrawn in one transaction (up to £2,500 under current proposals) and control over spending. This would remove a degree of oversight from the process and could make it more difficult to detect instances where money is mis-spent or not used to meet the needs of the account holder.

**Option 2: Payments are made directly to the provider of goods and services.** Under this option the applicant would submit an invoice to the financial services firm, and the firm would pay this invoice directly to the provider. The applicant would not be in direct receipt of any cash under this option. This would introduce a layer of oversight into the process as firms would be able to monitor what the money is being spent on and could check this against declarations made during the application

process (see paragraph 111). There may be some products in scope where this option would not be feasible – therefore some exceptions may need to apply.

**Option 3: Money is paid directly to the applicant AND payments can be made directly to the providers of goods and services.** This combines options 1 and 2, giving the widest scope and flexibility to the scheme. If direct payment is considered to offer sufficient protection, it may be possible to increase the overall limit on the amount accessible through the scheme, so the £2,500 limit would apply only to cash payments directly to the applicant, with higher value payments permitted directly to providers of goods and services.

### Questions

24. Which mechanism for payment/withdrawal do you think the scheme should adopt and why?

25. What risks, if any, might the proposed approaches to payment/withdrawal have?

26. In relation to option 2 (payments made directly to the provider) and option 3 (money paid to the applicant and to the provider):

Should there be a higher spending limit on payments (greater than £2,500) made directly to providers of goods and services?

Yes/No/Don't know

If yes, please specify a value you think would be more appropriate, and why.

### *Recording and audit of spending*

122. Depending on the mechanism of payment/withdrawal selected, it may be necessary to consider other methods of recording and monitoring how the money is spent. This is to ensure that any money withdrawn through the scheme is used entirely for the benefit of the account holder, and not to cover other expenses. Additionally, a record of spending may be needed if an objection is raised by a third party or the account holder about the management of funds, so that the applicant can show they have met their fiduciary duties.

123. Deputies must submit accounts and an annual report to the Office of the Public Guardian. This provides additional safeguards, but increases the burden on the applicant, particularly in cases where only small sums of money are involved. While this is likely to be disproportionate in a small payments scheme, consideration will need to be given to the level of oversight needed, given the sums of money involved and other potential checks in the process. Indeed, any audit process might be avoided if payments were made directly to the provider of goods and services

(option 2), as this would give a surer indication that the funds were being spent for the stated purpose, on the items declared in the application.

### Questions

27. Should applicants be required to keep receipts of all spending in the event of future objections? Please give your reasons.

Yes/No/Don't know

28. If money is paid directly to the applicants, should there be a requirement to report back to the financial services firm how the money was spent, using receipts to evidence this? Please give your reasons

Yes /No/Don't know

#### *OPG register search for existing LPA or deputyship orders*

124. The OPG maintains a register of everyone who has an LPA or EPA, their attorney, and details pertaining to deputyships. This is a public register and any person or business is able to contact the OPG to conduct a register search to check whether an LPA or deputyship is in place for an individual. Financial services firms will need to request a register search from the OPG when processing the application for a small payments scheme to confirm that that the account holder does not have mechanisms in place already for funds to be managed. Applications should be rejected if there is an LPA or deputyship order in existence.

#### *Register of applicants and account holders*

125. The elements outlined so far all offer some assurance that money would be paid to an appropriate person and be used to meet the needs of the account holder.

However, further oversight may be required to detect malpractice and prevent individuals from manipulating the system. Maintaining a central register of account holders and applicants who have used the scheme is proposed as an effective protective measure.

126. Without a register there is a wider vulnerability in the scheme, as there would be no way for firms to keep track of whether an individual was trying to access multiple accounts belonging to the same person with different providers, or applying to access several different people's accounts – whether speculatively or because they had direct access to the vulnerable individuals.

127. The existence of a register would help to reduce financial risk to individuals without mental capacity, as providers would check it to ensure that only one of their accounts was ever accessed via the scheme. The small payments scheme should not be used to access several accounts belonging to an individual. In such instances, a deputyship order would need to be requested through the CoP.

128. Such a register would need a central owner; the Office of the Public Guardian would be an appropriate owner for the register as they already store information on existing attorneys and deputies. However, there would be costs associated with expanding the register, continuously updating the register with new entries, and conducting searches every time a firm receives a new application. The OPG is a self-funded organisation, with operational costs primarily recovered by LPA and supervision fees. If a central register was used in this process, the costs of maintaining this may need to be subsidised by introducing application fees to this process, which could disincentivise applications. Additionally, the volume of applications that would be received is currently unknown, so we cannot predict what operational turnaround times for checks would be. Whilst the end-to-end process takes around 30 minutes (to update the register and conduct a search), initial estimates suggest that the OPG could require at least one week to do this, subject to volume of requests received, at a cost of £17 per application. This cost would need to be borne in some way, conceivably through a fee.
129. Therefore, whilst a register would improve oversight, there would be trade-offs in relation to cost of the process, resources involved and speed of service. Consideration needs to be made as to whether this level of oversight is proportionate given the sums of money involved. The proposed scheme has other security measures, and so this additional oversight may not seem proportionate in light of the sums of money involved and other trade-offs that might need to be made.

### Questions

29. Should account holder and applicant details be stored on a central register?  
Yes/No/Don't know
30. If yes, it is likely a cost would apply. Is it proportionate to charge an application fee in order to cover oversight costs related to maintaining the central register and conducting checks, which financial services providers might choose to pass on to applicants?  
Yes /No/Don't know

### *Restrictions on applicants*

130. Lastly, there may be merit in restricting an applicant from applying to this scheme for several different people's accounts. This could be a particular risk where someone is responsible for a group of individuals that lack mental capacity. However, we do recognise that there may be cases where individuals have a legitimate reason for making multiple different applications – for example parents who may have more than one child who lacks mental capacity, or an individual wishing to use this scheme to benefit both their parents. A decision would need to be taken on the restrictions we

place on individual applicants in order to minimise the risk of fraud, and enforcement would likely be contingent on the creation of a register.

### Question

31. Should there be a limit on how many different people's accounts one individual can have access to at any given time? Please give your reasons  
Yes/No/Don't know

131. When developing and considering further fraud prevention measures, we do not want to inadvertently introduce processes which slow down the release of payments, disincentivise applicants or financial services firms, or create a process that is viewed as burdensome. However, we do need to be assured that any proposed scheme does offer sufficient protections and mitigates financial risk to the account holder.

### Question

32. If any, what further fraud prevention measures that are not already listed here do you think are needed?

### Redress and refund in the event of fraud

#### *OPG powers*

132. We do not propose giving the OPG investigative powers in relation to complaints raised by third parties where fraud or abuse of funds is suspected. Investigations are a costly process – the costs associated with establishing the capacity of an individual can range from £150–£800 alone. On average, an investigation of this nature could cost the OPG £3,500 per case and would be resource intensive. This would need to be recovered either through application fees or by charging a third party when they want to raise the objection. This latter option could however disincentivise people from reporting suspected cases of fraud.

133. We do not think it is proportionate to introduce this process to the small payments scheme due to the sums of money involved and the fact that it would inevitably mean we would have to impose larger application fees to subsidise investigative costs. Instead, we expect financial services firms to remove access for individuals where legitimate concerns are raised, and for complaints of fraud or malpractice to be handled by the police or via the small claims track in the civil courts.

## Questions

33. Should the OPG be given powers to investigate fraudulent access to the scheme?  
Yes/No/Don't know
34. If yes, there is likely to be a cost implication. How should this be covered?  
Application fee; charging a third party each time they want to raise an objection;  
other.

## *Refund*

134. Financial services firms and third parties both have duties when it comes to the release of funds. Firms must follow the correct process for releasing funds, and third parties must uphold their fiduciary duties to the account holder to use the money in the account holder's best interests.
135. At present, as there is no legislative provision for the release of small payments from the account of someone who lacks capacity, firms remain liable to the account holder in respect of the funds and carry the risk when choosing to release funds to a third party. They take a decision based on their assessment of this risk. In the event of misappropriation or fraud by that third party, the financial institution would refund the account holder, having released the funds to someone other than the account holder at their own risk.
136. However, a small payments scheme would create a legislative basis for firms to release funds. If it were implemented firms, would expressly not be liable for misuse of the funds by the recipient provided that the firm had followed all statutory processes and demonstrated the appropriate duty of care in the process. The firms would therefore not need to refund account holders in the event of fraud.
137. The liability of the third-party recipient of another person's funds remains in place, regardless of the liability of the financial services firm, any small payments scheme or other legal process. Any person who takes control of the property of another will owe a fiduciary duty in respect of their actions. This applies to attorneys and deputies and therefore, in the event of fraud by the person to whom funds were released through a small payments scheme, liability would sit solely with that third party who breached their fiduciary duty to the account holder. However, seeking redress through refunds and compensation from the third party would be difficult to achieve in practice. The victim would lack capacity to seek redress without assistance and the cost of doing so through the small claims route would likely be greater than the amount of money misappropriated – making this an ineffective means of redress.
138. The interests of the account holder might therefore best be served by financial services firms continuing to refund them in the event that funds are misappropriated,

on the basis that this offers them greater certainty of redress. However, firms may wish to protect themselves to avoid the scheme causing them material losses.

139. Two methods for managing liability found in comparable processes are the use of a signed indemnity or a financial bond. When obtaining a property and affairs order, applicants are sometimes asked to set up a security bond before being appointed as a property and affairs deputy. This serves as a type of insurance protecting the finances of the person without mental capacity. However, this is not always used with lower value estates.
140. In the Small Estates Process, which is used as an alternative to probate when the value of an estate is lower, applicants are asked to sign an indemnity as part of the application. This agrees to indemnify the financial institution from and against all claims, demands, losses, damages, costs and expenses, which they might suffer, incur or be liable for as a result of acting on the applicant's instructions, and agrees to provide the resources to defend any claims and gives the firm the legal right to demand compensation from the applicant. Again, this may only be appropriate where liability would otherwise reside with the financial institution, and may also be disproportionate to this scheme, given that 'small' estates range in value from £5,000–£50,000, depending on the provider.
141. We are seeking views on the suitability of both approaches, as well as more information on any other methods that might be appropriate for managing liability.

### Questions

35. From whom do you think redress should be sought in the event of fraud?
36. If any, what are your views on how liability in the scheme could be managed?

## Simplicity

### Overview

142. For the purposes of this consultation, 'simplicity' refers to both how straightforward a process is and how *quickly* it can be navigated and completed, as well as how easy it is for firms to implement
143. When granting access to the funds of another person, there is an inevitable tension between security and simplicity. The information and decisions required are fundamentally complex and can be difficult to understand. Gathering this information, informing the relevant people and giving them time to respond is time consuming.

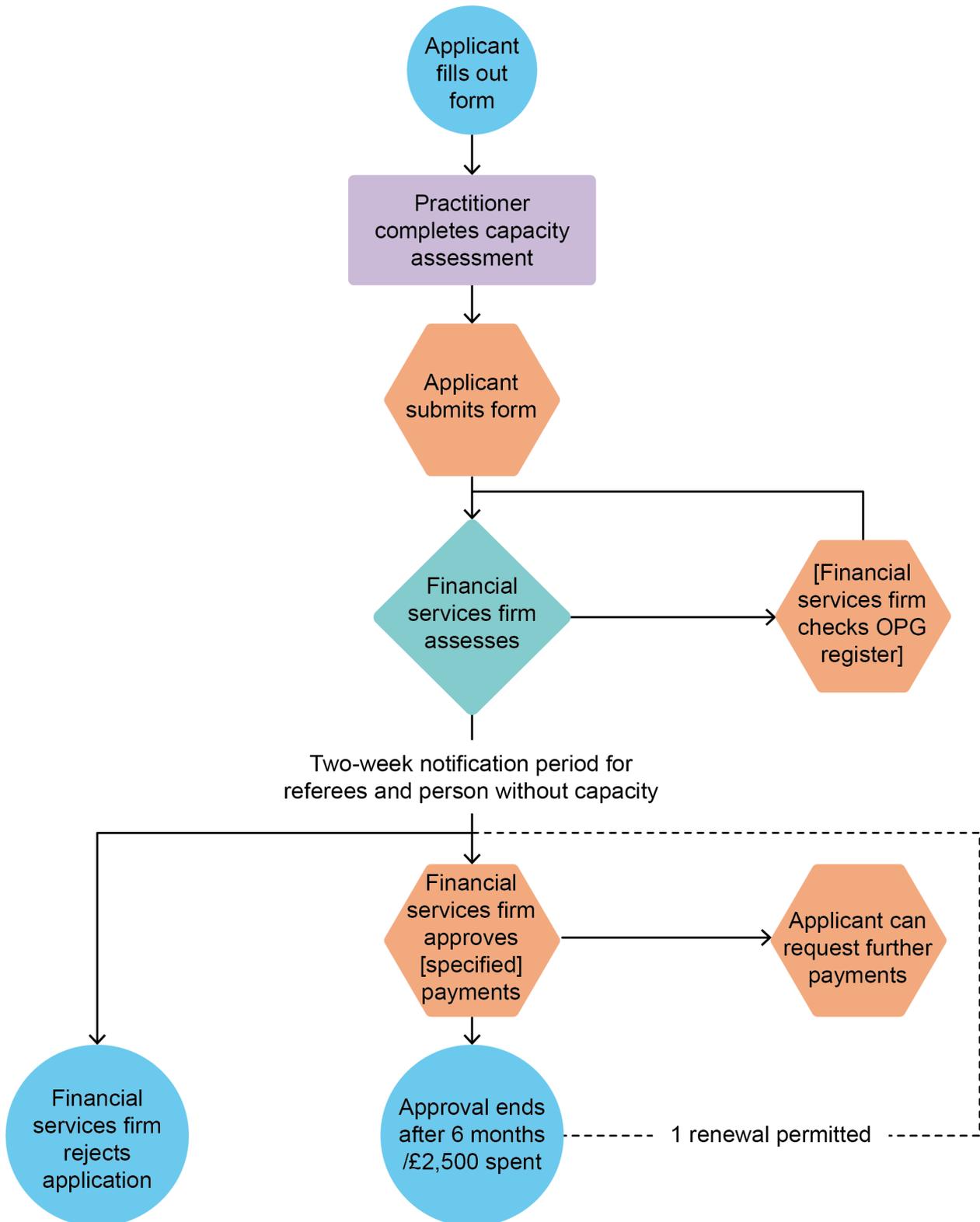
While there is real merit in making it easier for family, friends and carers to access a vulnerable person's money to help improve that person's quality of life, removing too many barriers to access puts those same vulnerable people at increased risk of fraud. Responsible trade-offs must therefore be considered.

144. As financial services firms would be responsible for implementing a small payments scheme, the same need for simplicity applies, as the systems required to prevent fraud and exploitation can be costly, and a lengthy process may demand more of staff's time. Here too a trade-off must be made, as it is also in firms' interest to prevent fraud and risk to their customers.
145. This section sets out how the elements laid out in the previous sections fit together into a simplified process. It draws comparisons with the CoP process to show how it attempts to achieve a meaningful simplification for small payments, while maintaining essential security measures. It seeks views on how well the proposals balance the tension between security and simplicity.

#### **Proposed small payments scheme process**

146. Figure 6 sets out the process to be followed in the proposal for a small payments scheme outlined in the previous two sections. This attempts to balance the need for greater simplicity with the need for essential protections, in a process that is deliverable by firms in a reasonable timescale without the need for significant new technology and processes. Such a simplification would only be possible because the proposal is deliberately restricted in scope to small payments, where lower levels of checks can be proportionate.

Figure 6: Proposed small payments scheme process map



147. Relative to an application to the CoP for a property and affairs order, a bespoke small payments scheme allows for a process which can be easier to navigate with fewer steps than the court process. A summary of the most basic form of the process is set out in the following paragraphs.
148. In the small payments scheme proposed, an applicant would complete one application form, containing only fields relevant to the scheme. Banks will have discretion to amend the form should they wish to request further information. This would be quicker for applicants to fill out, and shorter than the multiple forms used by the CoP.
149. An independent assessment of the subject's capacity by a practitioner would still be required on application to show that the account holder did not have the capacity to make decisions about their finances. As in the CoP, a range of practitioners (see paragraph 115) could complete this, so someone with appropriate knowledge of the application's subject could complete it, and the applicant would not necessarily need to pay a GP to conduct an assessment.
150. The form would then be submitted directly to the financial services firm for assessment. The gateway to this process could build on existing work to seek to raise awareness of the need to use the CoP to make longer-term arrangements through the documentation itself, and through financial services firms providing information about the CoP to customers when they make contact. The financial services firm would contact the referees and person without mental capacity, starting the two-week notification period. While this was ongoing, the firm could complete the rest of its assessment of the application form and check with the OPG whether an existing LPA or deputyship exists. It would also check the OPG's register of applicants and account holders, if this security option is selected.
151. If the financial institution was not satisfied at any stage of the assessment, it could reject the application and direct the applicant to apply to the CoP, which is able to deliberate on any contentious issues.
152. Once the financial institution had completed the assessment and the notification period had ended, it could immediately begin to release the funds, removing the intermediate stage found in the CoP process of presenting a copy of the property and affairs order to the financial institution. Combined, the above process could significantly shorten the length of time from application to release of funds compared to applying to the CoP, even with the two-week notification period.
153. Once the six-month period or £2,500 limit had been reached, access would cease. Any accounting requirements for the applicant would be light touch, particularly if the applicant had to state in advance what each payment was for, and if the option for firms to make payments directly to providers of goods and services was selected.

154. If there is consensus that further oversight is required, then additional steps would be introduced into the process. These are detailed in the 'security' section, and it is envisaged that even if all were implemented, the process would still be relatively quick and easy to navigate for applicants.

155. A comparison to the CoP process is set out in Table 1 below.

**Table 1 Comparison of small payments scheme with CoP process**

	<b>Proposed small payments scheme</b>	<b>Court of Protection process</b>
<b>Number of forms</b>	1	4
<b>Practitioner certification required?</b>	Yes	Yes
<b>Application fee</b>	TBC, likely lower than court fee/zero	£371 (fee waiver/help with fees available)
<b>Notification of referees</b>	Yes 14-day notification period	Yes 14-day notification period
<b>Time from application to release of funds</b>	Likely < 1 month	Average of 21 weeks for property and affairs order, plus bank processing time
<b>Supervision fee (full deputyship only)</b>	No	£100 assessment fee £35 per year minimal supervision £320 per year general supervision

156. We are seeking views on how effective the proposed process is at offering a simpler route than the CoP for a third party to make payments on behalf of a person without mental capacity, while balancing the need to maintain sufficient security measures and safeguards. We also want to consider its implications for financial services firms in terms of costs, complexity and feasibility of implementation, as managing these will be vital to any successful implementation.

## Questions

37. In your view, how effectively does the proposed process balance the trade-off between simplicity and security?

- Imbalanced towards security
- Somewhat imbalanced towards security
- Balances effectively
- Somewhat imbalanced towards simplicity
- Imbalanced towards simplicity
- Not sure

38. How simple do you consider this process for applicants?

- Not simple enough
- Not that simple
- Neutral
- Quite simple
- Very simple
- Not sure

39. How simple do you consider this process for financial services firms?

- Very simple
- Fairly simple
- Neutral
- Fairly difficult
- Very difficult
- Not sure

40. Would this process be feasible for financial services firms to introduce? Please give your reasons.

Yes/No/Don't know

41. If any, what elements would you add to or remove from the process?

42. How long do you think it should take to gain approval to make small payments/withdrawals on behalf of a person without mental capacity?

- One week or less
- Two weeks
- Less than one month
- Less than two months
- Less than six months
- Other [please specify]
- Don't know

**The following questions are only for response by Financial Services Firms:**

43. What new costs would you envisage from overseeing a formal small payments scheme as opposed to maintaining existing informal arrangements? If possible, please provide a quantified unit cost per applicant.
44. What proportion of unique account/financial product holders make use of informal arrangements related to mental incapacity at present?
45. What are the average product values for the following held by your organisation?
- Current accounts
  - Savings accounts
  - Children's savings accounts
  - Investment accounts
  - Children's investment accounts
  - E-money

**Devolution and territorial extent**

157. The MCA legislation only applies to England and Wales, and therefore the proposed small payments scheme would apply only to England and Wales. The Office of the Public Guardian in Scotland administers an 'Access to Funds' scheme, which allows an individual, a local authority or another organisation to apply for authority to access and manage the funds belonging to an incapable adult, when that adult's financial affairs are simple. In Northern Ireland, the Court can make a short procedure order where the value of someone's assets or income is relatively low. This may authorise someone to operate bank accounts on behalf of the person without mental capacity, without needing to be appointed as a 'Controller' – Northern Ireland's equivalent of a Deputy.
158. While we have considered the merits of both devolved approaches, we believe that neither offers the degree of simplicity desired for *this* small payments scheme. Any OPG (England and Wales)-based model would have costs attached, as the OPG is a self-funding organisation, would take time to set up, and would still need to interface with financial services firms' systems. The CoP in England and Wales already has the ability to make one-off orders, but it appears that the process is still considered too off-putting for people to apply in cases where the subject has limited assets.

## The Court of Protection (CoP) process

159. Regardless of the creation of a small payments scheme, the CoP will remain of paramount importance in upholding the principles of the MCA 2005 and protecting those without mental capacity. It will continue to play a vital role in ensuring that proper consideration is given when making short- and long-term decisions on both financial and welfare matters, and that enduring arrangements are subject to proper oversight.
160. For this reason, we are keen to understand the reasons why people may choose not to apply to the CoP, and what scope there is for future refinement of its processes.
161. Campaigners and stakeholders have given a number of different reasons why the CoP process may not be understood by or be suitable for everyone. From our initial engagement we understand that existing processes may present barriers for some individuals, but we do not have a robust evidence base to determine which of the issues are most significant or prevalent.
162. It is important that we understand these barriers better to:
- Ensure that we do not inadvertently introduce similar obstacles into the proposed small payments scheme
  - Develop a scheme that is actively resolving the most prevalent concerns
  - Inform the CoP Rule Committee and MoJ, where changes to CoP forms and processes might be appropriate or necessary
163. From initial discussions we believe the following might be the most prevalent barriers:

### Low Awareness

164. During our engagement with campaigners and stakeholders it became clear that many people are not aware of the MCA, the role of the CoP or the circumstances where legal authority in the form of a 'one-off' order or a full deputyship is needed. For example, we understand that some parents are not aware that, even if a young adult lacks capacity, parental responsibility ends once an individual turns 18, and therefore a deputyship order via the CoP is necessary to make significant finance or care decisions. Early engagement with the CoP process could make things much easier for these parents, particularly in the context of accessing matured CTFs.
165. MoJ has been working with the National Mental Capacity Forum (NMCF), financial services trade bodies and disability stakeholders to raise awareness in this space.

### **Complexity and costs**

166. Some individuals report finding the number of forms involved quite overwhelming and complicated to navigate. Whilst solicitors can help in those instances, this can be costly for individuals. Additionally, charges made by GP's for providing medical evidence of mental incapacity and the court application fees involved can further disincentivise individuals where they are only seeking to manage small amounts of money or make a one-off decision. Finally, some individuals find the idea of applying to the court intimidating or unnecessary, considering the amount of funds in an account, or the nature of the relationship they have with the person that lacks capacity. This may result in some people disengaging further with the process.
167. MoJ has been working with the National Mental Capacity Forum (NMCF) to breakdown the process for applicants by publishing sample completed forms<sup>4</sup> where there is only a single asset being accessed as in the case of CTFs for example. Additionally, in the case of matured CTFs, a fee waiver can apply where this is the sole asset of the account holder.

### **Processing time**

168. Due to the paper-based nature of many of the systems within the CoP, and the volume of applications received, a one-off order or deputyship order can take up to six-months to be issued. There are processes in place for urgent orders where needed. However, some individuals have reported frustration at the time taken to access funds in order to support the needs of the person who lacks capacity.

### **Questions**

46. What more could be done to raise awareness of the Mental Capacity Act 2005 and the legal arrangements for managing the care and affairs of people without mental capacity?
47. What more could be done to improve understanding of and engagement with the CoP?
48. If any, what do you think are the barriers in the CoP process?

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<sup>4</sup> <https://www.gov.uk/government/publications/apply-to-make-decisions-on-someones-behalf-form-cop1>  
<https://www.gov.uk/government/publications/apply-to-make-decisions-on-someones-behalf-property-and-finance-form-cop1a>  
<https://www.gov.uk/government/publications/make-a-report-on-someones-capacity-to-make-decisions-form-cop3>  
<https://www.gov.uk/government/publications/apply-to-become-someones-deputy-make-a-declaration-form-cop4>

## Equality Impact

169. We believe that among individuals lacking mental capacity, the following protected characteristics – older people and women – are over-represented. It is anticipated that individuals lacking mental capacity will be better protected by these proposed changes. See the Equality Statement in Annex A on page 65.
170. We are seeking to gather further evidence on the impacts of our proposals on those with protected characteristics through the consultation. Therefore, we would ask all respondents to consider and provide evidence, where it is available, on the following questions:

### Questions

49. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform set out in this consultation document? Please give reasons.
50. Do you agree that we have correctly identified the range and extent of the equalities impacts under each of the proposals set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

# Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

This consultation seeks to gather evidence from all interested stakeholders on the need and proposal for a small payments scheme. Not all questions will be relevant to all respondents, so please feel free to ignore any questions which do not apply to you.

## Scope

**Question 1:** In your view, is a small payments scheme needed? Please give your reasons.  
Yes/No/Don't know

**Question 2:** What effect do you think the proposed small payments scheme would have for those without mental capacity? Please give your reasons.

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

**Question 3:** In your view, what effect would the proposed scheme have for the parents, *carers* or guardians of those without mental capacity? Please give your reasons.

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

**Question 4:** What categories would funds acquired through a small payments scheme by a third party most likely be used for?

- Food and drink
- Clothing and footwear
- Housing, maintenance and furnishings
- Health
- Recreation and entertainment
- Travel

- Electronics
- Other (please specify)
- Don't know
- I wouldn't use the scheme

**Question 5:** Should the scheme apply to individuals who have fluctuating or temporary loss of capacity? Please give your reasons

Yes/No/Don't know

**Question 6:** If yes, should there be a minimum period of time for which capacity must be lost? If no, why?

**Question 7:** In your view, is £2,500 an appropriate limit for the value of payments made through a small payment scheme? Please give your reasons.

Yes/No/Don't know

If no, please specify a value that you think would be more appropriate, and why.

**Question 8:** Is six months a suitable time limit for access to the small payments scheme?

Please give your reasons.

Yes/No/Don't know

**Question 9:** Do you think the scheme should allow for a single renewal (with no extension to the original £2,500 limit)? Please give your reasons.

Yes/No/Don't know

**Question 10:** Do you agree with the proposed list of financial products in scope of a small payments scheme?

Yes/No/Don't know

**Question 11:** If any, which products do you think should be added or removed from this list?

Free text

**Question 12:** Should financial services firms be responsible for administering a small payments scheme? Please give your reasons.

Yes/No/Don't know

**Question 13:** Which approach do you consider most appropriate for determining applicant suitability?

Approach A or Approach B?

Why?

**Question 14:** How do you think applicants should demonstrate their suitability when applying to the scheme?

Free text

## Security

**Question 15:** Do you think applicants should have to state their reasons for using this process as opposed to applying for a one-off or deputyship order from the CoP? Please give your reasons.

Yes/No/Don't know

**Question 16:** Should applicants have to declare in their application what the funds will be spent on? Please give your reasons.

Yes/No/Don't know

**Question 17:** Should financial services firms be requesting information on the applicant's financial history (e.g. bankruptcy, insolvency, debt)? Please give your reasons.

Yes/No/Don't know

**Question 18:** Are there any instances in which you think money should not be released to individuals? Yes/No/Don't know

If yes, please give an example.

**Question 19:** Do you think that applicants should have to provide contact details of a referee known to the account holder when applying to a small payments scheme? Please give your reasons.

Yes/No/Don't know

**Question 20:** Should financial services firms be required to contact named referees in all cases before making payment? Please give your reasons.

Yes/No/Don't know

**Question 21:** Should the named referee be required to sign a declaration in the application process to confirm they know both the account holder and applicant, and understand the purpose of the scheme? Please give your reasons.

Yes/No/Don't know

**Question 22:** Is a two-week notification period appropriate/long enough for the account holder or referee to raise an objection?

Yes/No/Don't know

If no, please specify a period of time that you think would be more appropriate, and why.

**Question 23:** What risks, if any, might this approach to notification of referees and account holders have?

**Question 24:** Which mechanism for payment/withdrawal do you think the scheme should adopt and why?

**Question 25:** What risks, if any, might the proposed approaches to payment/withdrawal have?

**Question 26:** In relation to option 2 (payments made directly to the provider) and option 3 (money paid to the applicant and to the provider):

Should there be a higher spending limit on payments (greater than £2,500) made directly to providers of goods and services?

Yes/No/Don't know

If yes, please specify a value you think would be more appropriate, and why

**Question 27:** Should applicants be required to keep receipts of all spending in the event of future objections? Please give your reasons.

Yes/No/Don't know

**Question 28:** If money is paid directly to the applicants, should there be a requirement to report back to the financial services firm how the money was spent, using receipts to evidence this? Please give your reasons.

Yes/No/Don't know

**Question 29:** Should account holder and applicant details be stored on a central register?

Yes /No/Don't know

**Question 30:** If yes, it is likely a cost would apply. Is it proportionate to charge an application fee in order to cover oversight costs related to maintaining the central register and conducting checks, which financial services providers might choose to pass on to applicants? Yes/No/Don't know

**Question 31:** Should there be a limit on how many different people's accounts one individual can have access to at any given time? Please give your reasons

Yes /No/Don't know

**Question 32:** If any, what further fraud prevention measures that are not already listed here do you think are needed?

**Question 33:** Should the OPG be given powers to investigate fraudulent access to the scheme?

Yes/No/Don't know

**Question 34:** If yes, there is likely to be a cost implication. How should this be covered? Application fee; charging a third party each time they want to raise an objection; other.

**Question 35:** From whom do you think redress should be sought in the event of fraud?

**Question 36:** If any, what are your views on how liability in the scheme could be managed?

## Simplicity

**Question 37:** In your view, how effectively does the proposed process balance the trade-off between simplicity and security?

- Imbalanced towards security
- Somewhat imbalanced towards security
- Balances effectively
- Somewhat imbalanced towards simplicity
- Imbalanced towards simplicity
- Not sure

**Question 38:** How simple do you consider this process for applicants?

- Not simple enough
- Not that simple
- Neutral
- Quite simple
- Very simple
- Not sure

**Question 39:** How simple do you consider this process for financial services firms?

- Very simple
- Fairly simple
- Neutral
- Fairly difficult
- Very difficult
- Not sure

**Question 40:** Would this process be feasible for financial services firms to introduce?

Please give your reasons.

Yes/No/Don't know

**Question 41:** If any, what elements would you add to or remove from the process?

**Question 42:** How long do you think it should take to gain approval to make small payments/withdrawals on behalf of a person without mental capacity?

- One week or less
- Two weeks
- Less than one month
- Less than two months
- Less than six months
- Other [please specify]
- Don't know

**The following questions are only for response by Financial Services Firms:**

**Question 43:** What new costs would you envisage from overseeing a formal small payments scheme as opposed to maintaining existing informal arrangements? If possible, please provide a quantified unit cost per applicant.

**Question 44:** What proportion of unique account/financial product holders make use of informal arrangements related to mental incapacity at present?

**Question 45:** What are the average product values for the following held by your organisation:

- Current accounts
- Savings accounts
- Children's savings accounts
- Investment accounts
- Children's investment accounts
- E-money

## **The Court of Protection process**

**Question 46:** What more could be done to raise awareness of the Mental Capacity Act 2005 and the legal arrangements for managing the care and affairs of people without mental capacity?

**Question 47:** What more could be done to improve understanding of and engagement with the CoP?

**Question 48:** If any, what do you think are the barriers in the CoP process?

## **Equalities**

**Question 49:** What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform set out in this consultation document? Please give your reasons.

**Question 50:** Do you agree that we have correctly identified the range and extent of the equalities impacts under each of the proposals set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

**Thank you for participating in this consultation exercise.**

# About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
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.

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## Contact details/How to respond

Please send your response by 12 January 2022 to:

**Vulnerability Policy Unit- Mental Capacity Policy**

Ministry of Justice

Family and Criminal Justice Policy Directorate

Post point 7.25

7<sup>th</sup> Floor

102 Petty France

London SW1H 9AJ

**Email:** MCAsmallpaymentsconsultation@justice.gov.uk

### Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

### Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

Alternative format versions of this publication can be requested from MCAsmallpaymentsconsultation@justice.gov.uk.

### Publication of response

A paper summarising the responses to this consultation will be published in April 2022. The response paper will be available on-line at <https://consult.justice.gov.uk/>

### Representative groups

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

## Confidentiality

By responding to this consultation, you acknowledge that your response, along with your name/corporate identity will be made public when the department publishes a response to the consultation in accordance with the access to information regimes (these are primarily the Freedom of information Act 2000(FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

Government considers it important in the interests of transparency that the public can see who has responded to government consultations and what their views are. Further, the department may choose not to remove your name/details from your response at a later date, for example, if you change your mind or seek to be 'forgotten' under data protection legislation, if department considers that it remains in the public interest for those details to be publicly available. If you do not wish your name/corporate identity to be made public in this way then you are advised to provide a response in an anonymous fashion (for example 'local business owner', 'member of public'). Alternatively, you may choose not to respond.

For more information see the Ministry of Justice [Personal Information Charter](#).

# Consultation principles

The principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691383/Consultation\\_Principles\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf)

# Annex A: Equalities Statement

## Introduction

1. This analysis examines the potential equality impact of the proposals contained in the consultation outlining proposals for a Small Payments Scheme (SPS) and should be read in conjunction with the relevant Impact Assessment.
2. The proposals concern a new process in England and Wales for authorising the release of small payments from an account belonging to an individual lacking mental capacity without the need to obtain formal legal authority, through either a Lasting Power of Attorney or an order from the Court of Protection as provided for in the Mental Capacity Act 2005.

## Policy proposals summary

3. We propose a scheme for small payments where the recipient enters into an agreement directly with the financial services firm to receive funds. 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. The scheme would apply to a range of accounts and will permit payments to be made for a fixed period enabling the specific needs of a person without capacity to be met while more permanent arrangements are put in place, if necessary.
  - Payments would be permitted for a six-month period from one account, up to a value of £2,500
  - access would only be granted for one six-month period, with a single extension permitted only if the £2,500 value had not been reached.
  - The same account or other accounts belonging to the individual could not be accessed again by the same or a different applicant.
  - The scheme would be run by financial services firms (e.g. banks and building societies) allowing payments or withdrawals primarily from cash-based accounts;
  - by someone who could prove their suitability, rather than restricted to family members.
  - 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.

## Equality Duties

4. Section 149 of the Equality Act 2010 (EA Act) places a duty on Ministers and the department, when exercising their functions, to have 'due regard' to the need to:
  - Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
  - Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
  - Foster good relations between different groups (those who share a relevant protected characteristic and those who do not)
5. In line with our responsibilities under the Equality Act we have paid early consideration to the nine protected characteristics:
  - race
  - sex
  - age
  - disability
  - sexual orientation
  - religion or belief
  - pregnancy and maternity
  - gender reassignment
  - marriage/civil partnership
6. This equality analysis assesses the expected impacts of the proposals on those individuals with protected characteristics, in England and Wales. The analysis also assesses the expected impacts on other affected or disadvantaged groups, in England and Wales.

## Engagement and involvement

7. We have subsequently worked with a diverse range of people and groups, across England and Wales as we have developed the policy proposals. Furthermore, a public consultation in 2021 will gather more views on the proposed scheme. Pre-consultation, we have worked with:
  - Representatives for the Financial Services sector
  - Financial services regulators
  - Parents with young adults lacking capacity
  - Voluntary sector organisations
  - The Welsh Government

8. The consultation will last for eight weeks. As part of this consultation, we will carry out events with a range of stakeholders, including people with protected characteristics. This will enable and encourage people to engage with the consultation and feed back to the department. We will update our equality considerations in the Consultation Response.

## Evidence and analysis

### Limits of the evidence base

9. The application process for any type of bank account or financial investment collects very limited information on the demographic characteristics of customers. Information is currently limited to:
  - the age of the customer, based on their date of birth
  - the sex of the customer. This is, however, based on their given titles – for example, Mrs or Mr, but is ambiguous in some cases – for example, Doctor or Reverend
10. Information is not currently collected on:
  - race/ethnicity
  - disability
  - sexual orientation
  - religion or belief
  - pregnancy/maternity
  - gender reassignment
  - marriage/civil partnership
11. Although we lack the evidence to specify the impacts themselves, we do have evidence that leads us to believe that we will need to give special consideration to the needs of some people with certain protected characteristics to ensure the proposed scheme is accessible to all. These are:

### Age

Court of Protection data for 01/04/2011 to 31/03/2021 shows that the average age for property and finance applications is > 69 with the majority of deputyships being granted where the person lacking capacity is over 65. This is attributed by the fact that age-related conditions such as dementia can significantly affect mental capacity.

Awareness of the Mental Capacity Act remains low amongst this group and we continue to explore ways to raise awareness to ensure that people make preparation for the future, e.g. make an LPA.

### *16-18-year-olds*

Over the ten-year period 01/04/2011 to 31/03/2021, 2,262 property and finance deputyships were granted in cases where the person lacking mental capacity was under the age of 18.

The government is concerned about low levels of awareness of the Mental Capacity Act, the Court of Protection and Lasting Powers of Attorney amongst parents and carers of 16-18year olds with a learning disability. This is evidenced by the concerns raised with government by campaigners and parents in relation to Child Trust Funds and the inability of parents etc to access the matured funds on behalf of the young account holder. We will engage with expert stakeholders and disability organisations to explore how the proposals would safeguard and support this group of young people and their particular needs. We will also continue to work with the National Mental Capacity Forum, CTF providers and others to raise awareness amongst parents of the actions they can take in advance of their child turning 18 to obtain legal authority.

### **Sex**

Over the same ten-year period, Court of Protection data estimates that 57,384 applications for property and finance deputyship related to women whilst 42,853 related to men. This may be because women have a longer life expectancy so are therefore more likely to lose capacity to make certain decisions because of age related conditions, including dementia.<sup>5</sup> This means that women will be affected and more likely to benefit from the small payments proposals.

### **Race**

We are aware that ethnic minorities have low awareness of the Mental Capacity Act, and therefore may benefit from a small payments scheme that does not require an application to the Court. We are also aware that ethnicity plays a role in people's financial lives and that there are differences in the use of some retail products and services by ethnicity.<sup>6</sup> We expect that people from ethnic minority backgrounds are more likely to have savings accounts, particularly those who are retired or semi-retired, than investments and would benefit from the small payments proposals.

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<sup>5</sup> Office for National Statistics (2020). National life tables – life expectancy in the UK. Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/datasets/nationallifetablesunitedkingdomreferencetables>

<sup>6</sup> FCA Insight Report. / FCA Financial Lives 2020.

### **Disability**

Disability can either be physical or mental impairment that has a 'substantial' and 'long-term' negative effect on your ability to do normal daily activities. The financial sector does not collect data on disability and so we do not know the number of account holders with this characteristic. However, given the scheme is intended to support account holders who lack mental capacity, the proposals will be relevant to this group.

### **Religion / belief**

All people will be subject to the same process for the small payments scheme, regardless of religion or belief. We do not hold any data on religion or belief so are unable to analyse whether the current system applies to anyone disproportionately based on this characteristic, and accordingly whether they would experience an adverse impact.

### **Equality considerations**

#### *Direct discrimination*

12. We believe that the SPS proposals are not directly discriminatory within the meaning of the EA Act as they apply to all individuals lacking mental capacity; we do not consider that the proposals would result in people being treated less favourably because of the protected characteristic.

#### *Indirect discrimination*

13. We believe that among individuals lacking mental capacity with the following protected characteristics – older people and women are over-represented.
14. It is anticipated that individuals lacking mental capacity will be benefited by these proposed changes, however even if it were established that in some cases these effects constituted a particular disadvantage, implementation of the reforms represents a proportionate response to ensuring better protection of individuals lacking mental capacity.

#### *Discrimination arising from disability and duty to make reasonable adjustments*

15. In so far as the SPS proposals extend to disabled individuals lacking mental capacity, we believe that the policy is proportionate, having regard to its aim. As stated above, disability can either be physical or mental impairment that has a 'substantial' and 'long-term' negative effect on your ability to do normal daily activities therefore we expect the proposals will be relevant to this group. It remains important to make reasonable adjustments for individuals lacking mental capacity to ensure appropriate support is given.

#### *Harassment and victimisation*

16. We do not consider there to be a risk of harassment or victimisation as a result of these proposals.

*Advancing equality of opportunity*

17. Consideration has been given to how the SPS proposals impact on the duty to advance equality of opportunity by meeting the needs of individuals lacking mental capacity who share a particular characteristic, where those needs are different from the need of those who do not share that particular characteristic. The SPS proposals are aimed at better protecting people lacking mental capacity.

*Fostering good relations*

18. Consideration has been given to this objective that indicates it is unlikely to be of particular relevance to the proposals
19. In developing the scheme, it will be important to consider the particular impact on individuals with the characteristics discussed to ensure they're able to access the scheme, and that their funds are not misappropriated. We are keen to gather further information through the consultation on this.

**Questions**

What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed option for reform set out in this consultation document? Please give your reasons.

Do you agree that we have correctly identified the range and extent of the equalities impacts under each of these proposals set out in this consultation? Please give your reasons and supply evidence of further equalities impacts as appropriate

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