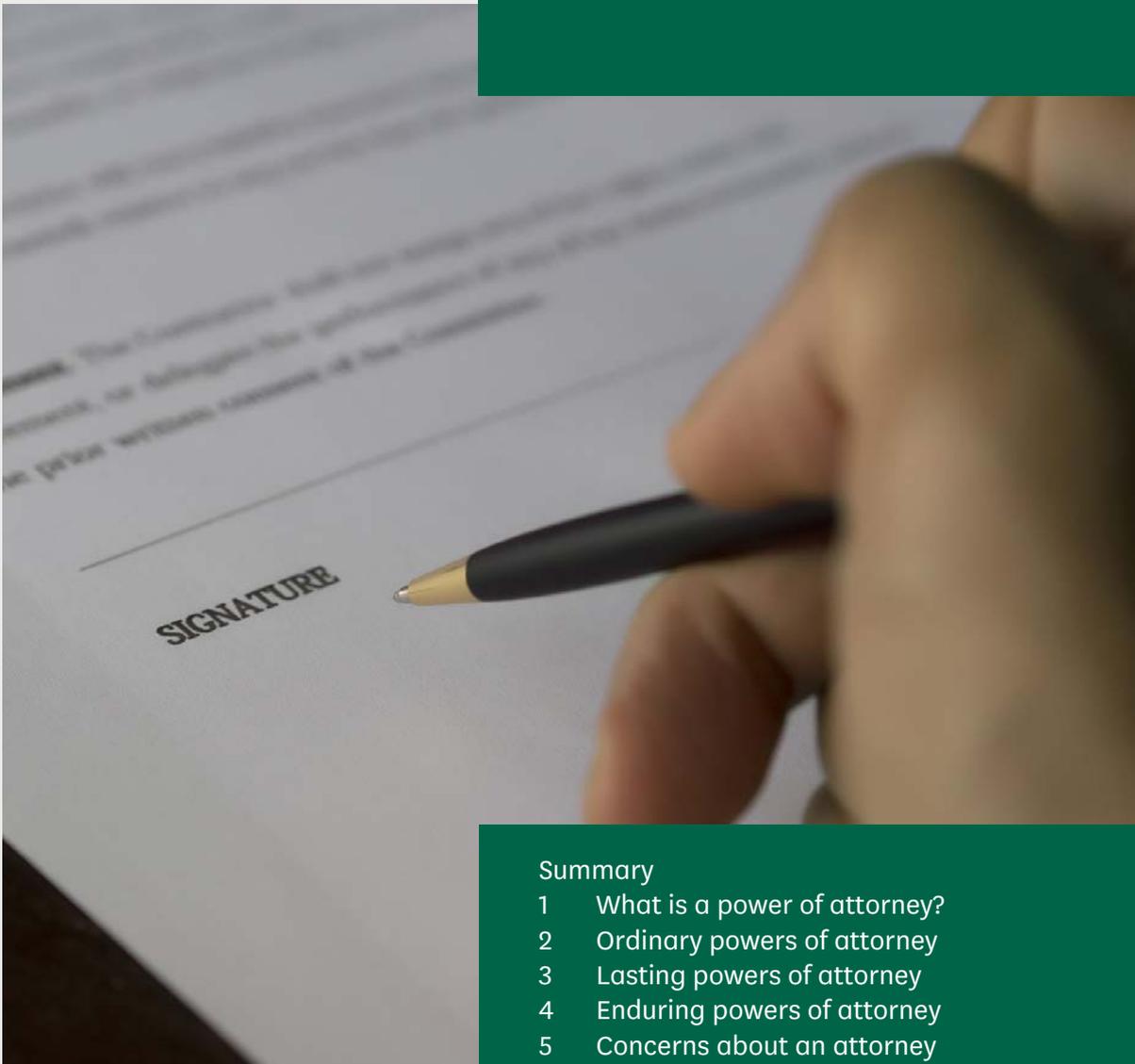


By Catherine Fairbairn

5 October 2021

Powers of attorney and other decision-making powers



Summary

- 1 What is a power of attorney?
- 2 Ordinary powers of attorney
- 3 Lasting powers of attorney
- 4 Enduring powers of attorney
- 5 Concerns about an attorney
- 6 Other decision-making powers
- 7 Code of Practice

Image Credits

Contract - [no copyright required](#)

Disclaimer

The Commons Library does not intend the information in our research publications and briefings to address the specific circumstances of any particular individual. We have published it to support the work of MPs. You should not rely upon it as legal or professional advice, or as a substitute for it. We do not accept any liability whatsoever for any errors, omissions or misstatements contained herein. You should consult a suitably qualified professional if you require specific advice or information. Read our briefing '[Legal help: where to go and how to pay](#)' for further information about sources of legal advice and help. This information is provided subject to the conditions of the Open Parliament Licence.

Feedback

Every effort is made to ensure that the information contained in these publicly available briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Please note that authors are not always able to engage in discussions with members of the public who express opinions about the content of our research, although we will carefully consider and correct any factual errors.

You can read our feedback and complaints policy and our editorial policy at commonslibrary.parliament.uk. If you have general questions about the work of the House of Commons email hcenquiries@parliament.uk.

Contents

Summary	4
1 What is a power of attorney?	6
2 Ordinary powers of attorney	7
3 Lasting powers of attorney	8
3.1 Two types of lasting power of attorney	8
3.2 Making a lasting power of attorney	9
3.3 Safeguards	9
3.4 Guiding principles	11
3.5 ‘Use a lasting power of attorney’ service	11
3.6 Government consultation: Modernising lasting powers of attorney	12
4 Enduring powers of attorney	16
5 Concerns about an attorney	17
6 Other decision-making powers	18
6.1 Court of Protection and court appointed deputies	18
6.2 Department for Work and Pensions appointees	19
7 Code of Practice	20
7.1 Call for evidence	20

Summary

This briefing paper deals with powers of attorney and other ways of authorising someone to make a decision for another person in England and Wales.

Powers of attorney

A power of attorney is a deed by which a person (the donor) authorises another person (the attorney, sometimes called the donee) to act on behalf of the donor. It is not a document which can be applied for by one individual on behalf of another. There are several different types of power of attorney.

An ordinary power of attorney automatically comes to an end as soon as the donor loses mental capacity.

The Mental Capacity Act 2005 created a new form of power of attorney, the lasting power of attorney (LPA). An LPA enables the donor to appoint one or more attorneys to make decisions on their behalf at a time when they no longer have the mental capacity to make those decisions themselves. There are two types of LPA dealing respectively with property and financial affairs and with health and welfare.

LPAs replaced enduring powers of attorney (EPAs) which could authorise an attorney to act in relation to the donor's property and financial affairs but not to make decisions on health and welfare matters. It is no longer possible to create a new EPA but properly executed EPAs made prior to 1 October 2007 continue to be valid.

Government consultation on modernising LPAs

On 20 July 2021, the Ministry of Justice, in collaboration with the Office of the Public Guardian, published a consultation: [Modernising Lasting Powers of Attorney](#). The consultation will close on 13 October 2021.

The [consultation considers](#) proposals to move to a predominantly digital service intended to be simpler and easy to use. Alternatives would remain for those unable to use the internet. New safeguards to protect against fraud and abuse are also proposed.

Other decision-making powers

If a person does not have the mental capacity to make an LPA, it may be necessary to apply to the Court of Protection. The Court of Protection makes decisions and appoints deputies to make decisions in the best interests of those who lack capacity to make those decisions themselves. There are two

types of deputy, one for property and financial affairs and one for health and welfare.

If the only income of the person without mental capacity is social security benefits, and they have no property or savings, it may not be necessary for a deputy to be appointed. Instead, the person's benefits may be managed by an appointee, appointed by the Department for Work and Pensions.

“Best interests” decisions

Anyone making a decision for a person who does not have the mental capacity to make their own decision, must act in the best interests of that person. Attorneys and deputies must have regard to the Mental Capacity Act Code of Practice when making decisions.

1

What is a power of attorney?

A power of attorney is a deed by which a person (the donor) authorises another person (the attorney, sometimes called the donee) to act on behalf of the donor. The donor may appoint more than one attorney and specify that they must act together (jointly) in making decisions, or that they can act separately or together (jointly and severally), which means attorneys can make decisions on their own or with other attorneys.

A power of attorney may be created only by someone who has sufficient mental capacity to do so. It is not a document which can be applied for by one individual on behalf of another. It is for the donor to decide whether to make a power of attorney, and if so, who the attorney(s) should be.

There a number of different types of power of attorney, including ordinary powers of attorney, lasting powers of attorney, and enduring powers of attorney.

2

Ordinary powers of attorney

An ordinary power of attorney authorises the attorney to act on behalf of the donor. The power can be general or limited:

- A general power of attorney authorises the attorney to do on behalf of the donor anything which the donor can lawfully do by an attorney.
- A limited power authorises the attorney to deal only with specified matters and/or to act for a specified time.

An ordinary power of attorney automatically comes to an end as soon as the donor loses mental capacity.

3 Lasting powers of attorney

The [Mental Capacity Act 2005](#) (the 2005 Act) created a new form of power of attorney, the lasting power of attorney (LPA). It was not possible to make an LPA until 1 October 2007.

The 2005 Act also created a new Public Guardian, supported by staff of the Office of the Public Guardian (OPG).¹ The OPG is an executive agency of the Ministry of Justice and is responsible for, among other things, registering LPAs. OPG guidance on the Gov.UK website, [LP9: What happens when I can no longer make decisions for myself?](#) sets out information about planning ahead by making an LPA.²

3.1 Two types of lasting power of attorney

There are two different types of LPA:

- **Property and Financial Affairs LPA:** this enables a donor to authorise one or more attorneys to make decisions on the donor's behalf in relation to property and financial matters. The donor may restrict the decisions an attorney can make. When it has been registered, it may be used at once, if this is what the donor specifies.
- **Health and Welfare LPA:** this enables a donor to authorise one or more attorneys to act in relation to all, or only specified, matters concerning their personal welfare. The type of decisions that health and welfare attorneys could be authorised to take might include, for example, decisions on where the donor should live, and giving or refusing consent to medical examination and/or treatment. These decisions can only be taken by the attorney if the donor lacks the capacity to make the necessary decision themselves.

A person can choose to have one type of LPA or both.

¹ [Mental Capacity Act Code of Practice](#), 2007, paragraph 14.8

² 28 February 2017. All links in this briefing paper accessed 5 October 2021 unless otherwise stated

3.2 Making a lasting power of attorney

The 2005 Act provides that an LPA must be in a prescribed form and must contain prescribed information. There are different forms for the two types of LPA. General information about LPAs, together with forms and guidance, and a number of [help sheets](#)³ are available on the [Gov.UK website](#).⁴

It is possible to [make an LPA online](#) or by using [paper forms](#). However, if the online option is chosen, it is necessary to print out the forms, when completed, to be signed and witnessed.

An OPG guide, [Make and register your lasting power of attorney \(LP12\)](#) states, “You don’t need a lawyer to make an LPA, unless you have unusual or specific requirements”.⁵ The LPA forms indicate particular matters on which a donor may wish to seek legal advice. The OPG has stated separately that they would always recommend that someone seeks legal advice if they have complicated finances or specific wishes as part of their application.⁶

3.3 Safeguards

Various safeguards are built into the procedure to make an LPA. These include requirements that:

- the donor’s signature is witnessed;
- the LPA is signed by a ‘certificate provider’;
- the LPA is registered with the OPG before it can be used.

Certificate providers

A certificate provider is an impartial person who confirms that in their opinion, when the donor executes the document:

- the donor understands the purpose of the LPA and the scope of the authority conferred under it;
- that no fraud or undue pressure is being used to induce the donor to create the LPA; and
- there is nothing else which would prevent the LPA being created.

A certificate provider may be someone who has known the donor personally for at least two years; or someone with relevant professional skills, such as

³ Gov.UK, [A guide to making your lasting power of attorney](#)

⁴ [Gov.UK, Make, register or end a lasting power of attorney](#)

⁵ Updated 24 September 2020

⁶ Office of the Public Guardian Blog, [Lasting powers of attorney – your voice, your decision](#), reply to a comment posted 10 April 2019

the donor's GP, a healthcare professional or a solicitor. [LPA guidance](#) sets out who may and may not be a certificate provider.⁷

Registration

An LPA cannot be used until it is registered with the OPG, even if the donor retains mental capacity. It costs £82 to register each LPA.⁸ Some people qualify for a fee exemption or remission (that is, to pay less or nothing at all) – Gov.UK provides information: [Lasting or enduring power of attorney fee: exemption or remission](#).

The donor may specify named persons who should be notified when an application is made to register the LPA. Named persons can object to the LPA being registered in certain circumstances. They cannot object to the LPA only because they do not like it. People who are notified have three weeks to raise any concerns with OPG. Another OPG help sheet, [People to notify](#), provides further information:

Why notify people?

Letting people know about the LPA when it's about to be registered provides extra security. It gives people who know the donor well a chance to raise concerns.

Having people to notify can be particularly important if there's a long time between making the LPA and registering it.

Choose people to notify

The donor can choose up to 5 people to notify. They cannot be the attorneys or replacement attorneys. Many donors choose family members or close friends...⁹

The Ministry of Justice has commented on the effect of registration:

This is a continuing misconception, that registering an LPA immediately transfers powers to the attorney(s) and prevents the donor from making their own decisions. This is not the case. An LPA only confers power on an attorney when the donor lacks mental capacity, and the donor remains able to take their own decisions as long as they have the mental capacity to do so. Where a donor chooses to allow a property and finance LPA to confer power as soon as the LPA is registered, while the donor has capacity, an attorney can only act on the donor's instructions.¹⁰

⁷ [Gov.UK, Certificate providers](#)

⁸ Gov.UK, [Make, register or end a lasting power of attorney, Register a lasting power of attorney](#)

⁹ [Gov.UK, People to notify](#)

¹⁰ [Modernising Lasting Powers of Attorney](#), CP 495, July 2021, paragraph 111

3.4 Guiding principles

Attorneys must follow the principles set out in the 2005 Act:

- A person must be assumed to have capacity unless it is established that they lack capacity.
- 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.
- A person is not to be treated as unable to make a decision merely because they make an unwise decision.
- 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.
- 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.¹¹

The OPG has published guidance for LPA attorneys:

- [Getting started as an attorney: property and financial affairs](#)
- [Getting started as an attorney: health and welfare](#).¹²

3.5 'Use a lasting power of attorney' service

On 17 July 2020, the OPG launched a new service, '[Use a lasting power of attorney](#)'. An [OPG blog post](#) provides information about how the service works:

Customers whose LPAs are registered by the OPG (this is the last thing we do before returning it to you) on or after the 17 July 2020 will receive an LPA reference number and activation key in their registration letter. Both attorneys and donors on the LPA will receive these details. They can then visit www.gov.uk/use-lpa to create an account and add the LPA by using the reference number and activation key, along with their date of birth. Once the LPA is added, the customer can choose to share the details by generating a secure access code to provide to third party organisations. The third party can then view the LPA details by going to www.gov.uk/view-lpa, adding the customer name and secure access code. This enables the

¹¹ [Mental Capacity Act 2005 section 1](#)

¹² Gov.UK Office of the Public Guardian, [Lasting power of attorney: getting started as an attorney](#), updated September 2018

organisation to check the LPA is valid and offers a downloadable version of the LPA summary to save for their records.¹³

The OPG has also set out how the service is intended to help users:

The Use an LPA service is intended to better assist donors and attorneys in sharing the details of the LPA with organisations. It provides peace of mind, particularly to those who may be experiencing reduced contact with others, that their wishes can still be actioned, and for attorneys to continue to support the donor.

While newly registered donors and attorneys have access to the Use an LPA service upon registration, there is a banner at the top of the page which, when accessed by anyone, shows whether the LPA is valid and whether the attorney can act while the donor has mental capacity (on property and finance LPAs). There is also confirmation that, in these instances, the attorney can only act with the donor's permission.

An LPA is an agreement between a donor and attorney(s) and is registered by the OPG on the understanding that the attorney is somebody that the donor trusts. This includes the understanding that, before creating and sending the LPA, the donor has spoken to the attorney about how and when they should act.¹⁴

3.6

Government consultation: Modernising lasting powers of attorney

On 20 July 2021, the Ministry of Justice, in collaboration with the OPG, launched a consultation, [Modernising Lasting Powers of Attorney](#) ('the consultation paper').¹⁵ The consultation will close on 13 October 2021.

The stated aims of the work by the Ministry of Justice and OPG to modernise LPAs are to:

- increase safeguards, especially for the donor
- improve the process of making and registering an LPA for donors, attorneys and third parties

¹³ Office of the Public Guardian blog, [Use a lasting power of attorney – your questions answered](#), posted by Caroline Hufton on 9 September 2020

¹⁴ Ibid

¹⁵ [Modernising Lasting Powers of Attorney](#), CP 495, July 2021

- achieve sustainability for OPG whilst keeping LPAs as affordable as possible for all people in society.¹⁶

In his Ministerial Foreword to the consultation, Alex Chalk, who was then junior Justice Minister, spoke of increased demand for access to digital services and of the need to consider new safeguards:

The protections that exist in the LPA are based on decades, if not centuries, of tradition and legal case law. They're based on known and trusted paper-based social conventions, such as signing and witnessing.

However, the world is changing and people increasingly want to access services digitally. The COVID-19 pandemic has accelerated this demand and transformed the way many people think and act.

Digital channels provide many opportunities to improve access and speed of service, but they also require us to think anew about the safeguards we put in place in such systems. The old paper practices are not appropriate for a new digital world. New ways of achieving the same, or better, levels of protection have to be identified before we can move forwards. At the same time, we must meet the needs of those who cannot or will not use digital channels.¹⁷

The consultation paper sets out the case for change:

In the 14 years since LPAs were introduced, technology has advanced and become more widely available. People increasingly expect to be able to access government services online. Many donors and attorneys have told us the paper-based LPA is cumbersome, bureaucratic and complex.

In 2019/20, OPG received 19 million sheets of paper in the form of hard copy LPAs and posted out a similar amount. Handling large amounts of paper is costly and inefficient, creating an ever-increasing need for staff, equipment and storage.

OPG's operating costs are funded entirely by the income from the fees it charges. If the LPA service is not made more efficient, either fees will have to increase or the way OPG is funded will become unsustainable in the longer term.

When the LPA was introduced in 2007, the safeguards put in place were appropriate for the time, but technology and society have moved on. Technology now offers new ways for OPG to protect its users through identity and information verification. Society's

¹⁶ Ibid paragraph 13

¹⁷ Ibid, p3

attitudes to fraud and abuse, and the expected protections against them, have also changed.

We need to respond to these challenges and look at how technology can make it easier for people to make and register an LPA. We must also fully consider concerns about security – finding the right balance between ease of use and protection against abuse. Ease of access and protections must also be ensured for those who cannot use the digital service or do not want to.

We believe that a move towards automating OPG's services will improve efficiency and reduce costs. It would also allow resources to be moved to improving other OPG services that provide more benefits for users.¹⁸

The consultation seeks views and evidence on seven proposals for modernising LPAs that require changes to primary legislation:

Proposal 1 considers the role and value of witnessing on LPAs and how to keep that value. We examine how we can achieve this using technology to support remote witnessing or to replace the witness. If there's no value, we consider removing the need for a witness. Our preferred option is to replace the witness with new safeguards that perform the same function.

Proposal 2 considers the role of applying to register an LPA and who can apply. We look at how to reduce the chance of an LPA being rejected by OPG and the benefits of reducing or keeping the delay between execution and registration. Our preferred option is that LPAs are digitally checked as they are being made, and are sent for registration as soon as they are executed.

Proposal 3 considers OPG's remit. We examine how to widen OPG's remit so it can do things such as verify people's identity, and stop or delay an LPA's registration if it has concerns about it. Our preferred option is for OPG to be able to do this by expanding the types of checks it's allowed to carry out under the MCA and supporting regulations.

Proposal 4 considers how people can object to an LPA. We look at how to simplify the current process so people can more easily understand where to send objections and how to do so. Our preferred option is that anyone should be able to object to an LPA and that all objections are sent to OPG first.

Proposal 5 considers when people can object. We examine at what point and for how long objections can be made before an LPA is registered and if this remains a safeguard for the donor. Our preferred option is to allow people to object to an LPA from the time

¹⁸ Ibid paragraphs 7-12

the donor starts creating it to the point it is registered. We would also like to shorten the time between an LPA being sent for registration and it being placed onto the register.

Proposal 6 considers the speed of the LPA service and whether a dedicated faster service should be introduced for people who need an LPA urgently. We look at whether an urgent service would provide additional benefits over making the service faster for everyone. We also consider whether a dedicated service could be introduced without making the process more complex for users and OPG. Our preferred option is not to introduce a dedicated service, as we do not believe it's possible to create a faster service with a high enough level of safeguards that is not also overly complex.

Proposal 7 considers solicitors' access to the service. We look at whether this can be achieved through integrating our service with solicitor's case management systems or whether mandating part or all of the service would be necessary. Our preferred option is to provide solicitors with access to the service by integrating with their existing systems.¹⁹

The consultation paper acknowledges that not everybody is able or willing to use digital technology to access services and states that any future LPA service will allow for multi-channel access.²⁰

¹⁹ Ibid, paragraphs 19-25

²⁰ Ibid, paragraph 53

4

Enduring powers of attorney

Until 1 October 2007, it was possible to create an enduring power of attorney (EPA) to authorise an attorney either:

- to act with immediate effect and to continue to act after the donor had become mentally incapable; or
- to act as attorney only after the donor had lost mental capacity.

EPAs could authorise an attorney to make decisions only in relation to the donor's property and financial affairs and not on health and welfare matters.

It is no longer possible to create a new EPA or to make changes to an existing EPA. However, properly executed EPAs made prior to 1 October 2007 continue to be valid after that date.

An EPA can be used without registration as long as the donor still has mental capacity. The attorney has a duty to register the EPA with the OPG as soon as the donor has become, or is becoming, mentally incapable of managing their own affairs. The duty arises when the attorney has reason to believe that the donor is becoming mentally incapable and therefore this is a decision for the attorney to make.

Notice of the application to register the EPA must be given to the donor and to specified relatives and there are various grounds for objecting to the registration. The Gov.UK website provides further information about EPAs: [Enduring power of attorney: acting as an attorney.](#)

5

Concerns about an attorney

The OPG is responsible for investigating complaints, or allegations of abuse, made against attorneys acting under registered powers. Information about how to raise concerns is provided on the Gov.UK website, [Report a concern about an attorney, deputy or guardian](#).

The Court of Protection has power, in relevant circumstances, to remove attorneys who fail to carry out their duties. Other ways of dealing with a disagreement between family members may be more appropriate, depending on the circumstances.

The [Mental Capacity Act 2005 Code of Practice](#)²¹ provides further information:

- Chapter 14, “[What means of protection exist for people who lack capacity to make decisions for themselves?](#)”
- Chapter 15, “[What are the best ways to settle disagreements and disputes about issues covered in the Act?](#)”

²¹ See section 7 of this briefing paper below

6 Other decision-making powers

6.1 Court of Protection and court appointed deputies

If a person does not have the mental capacity to make a lasting power of attorney, it may be necessary to apply to the Court of Protection.

The Court of Protection has jurisdiction to make decisions and appoint deputies to make decisions in the best interests of those who lack capacity to make their own decisions.

There are two types of deputy, one for property and financial affairs and one for health and welfare.

General information about the appointment and supervision of deputies, their responsibilities, the fees payable, and exemptions and remissions, is provided on the Gov.UK website, [Deputies: make decisions for someone who lacks capacity](#).

Further general information is available online including:

- Gov.UK:
 - [Court of Protection](#);
 - [Apply for a one-off decision from the Court of Protection](#);
 - [Deputy guidance: how to carry out your duties](#);
- Citizens Advice Bureau Advice Guide, [Managing affairs for someone else](#);
- Mental Capacity Law and Policy, [Basic guide to the Court of Protection and glossary](#), 8 July 2020.

The Ministry of Justice intends to publish a consultation on the sustainability and structure of the deputyship supervision fees charged by the OPG later in 2021.²²

²² [Modernising Lasting Powers of Attorney](#), CP 495, July 2021, paragraph 51

6.2

Department for Work and Pensions appointees

If the only income of the person without mental capacity is social security benefits, and they have no property or savings, it may not be necessary for a deputy to be appointed. Instead, the person's benefits may be managed by an appointee, appointed by the Department for Work and Pensions.²³

Information about becoming an appointee is provided on the Gov.UK website: [Become an appointee for someone claiming benefits.](#)

²³ [Mental Capacity Act Code of Practice](#), 2007, paragraph 8.36

7 Code of Practice

The underlying philosophy of the [Mental Capacity Act 2005](#) is 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.

The [Mental Capacity Act Code of Practice](#) provides guidance and information on how the Mental Capacity Act 2005 works in practice. Chapter 7 deals with LPAs and Chapter 8 with the role of the Court of Protection and court-appointed deputies.

LPA attorneys and deputies appointed by the Court of Protection are among the categories of people who are legally required to ‘have regard to’ relevant guidance in the Code of Practice.

7.1 Call for evidence

On 24 January 2019, the Ministry of Justice launched a call for evidence, which ran until 7 March 2019, in respect of the Mental Capacity Act Code of Practice:

Since the Act came into force in 2007, the Code of Practice has provided practical guidance regarding its implementation. The Code offers examples of best practice to both carers and practitioners, who have a formal duty to adhere to the Code. It also serves as a fundamental piece of guidance to the friends and family of the individual, to enable them to better understand the practical insight the Act offers to those who lack capacity.

The Call for Evidence will seek to establish the extent to which the current Code of Practice reflects changes in case law and lessons learned through practical use of the Code of Practice over the last 11 years. It is important that we ensure that the Code remains relevant and places individuals at the very heart of the decision-making process. The questions in the call for evidence are designed to inform the Government’s decision-making on which aspects of the Code require revision.²⁴

²⁴ Gov.UK from the Ministry of Justice, [Revising the Mental Capacity Act 2005 Code of Practice: Call for evidence](#), 24 January 2019

The Government is still analysing feedback.²⁵

²⁵ Ibid

The House of Commons Library is a research and information service based in the UK Parliament. Our impartial analysis, statistical research and resources help MPs and their staff scrutinise legislation, develop policy, and support constituents.

Our published material is available to everyone on commonslibrary.parliament.uk.

Get our latest research delivered straight to your inbox. Subscribe at commonslibrary.parliament.uk/subscribe or scan the code below:



 commonslibrary.parliament.uk

 [@commonslibrary](https://twitter.com/commonslibrary)