Making Decisions

The Government's proposals for making decisions on behalf of mentally incapacitated adults

A REPORT ISSUED IN THE LIGHT OF RESPONSES TO THE CONSULTATION PAPER WHO DECIDES?

October 1999

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Presented to Parliament by the Lord High Chancellor by Command of Her Majesty

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Contents

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Introduction

1. This policy statement sets out the Government's proposals to reform the law in order to improve and clarify the decision-making process for those who are unable to make decisions for themselves, or who cannot communicate their decisions. The policy statement flows from the Consultation Paper *Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults* which was published in December 1997 (Cm 3803), and the Law Commission's 1995 report *Mental Incapacity*.

2. The Government was delighted with the response received to *Who Decides?* Respondents included charities working on behalf of people without capacity; local authorities; doctors; professional organisations; and those working with the law. We also received a large number of contributions from members of the public, many of whom had personal experience of caring for a person without capacity.

3. The extent of the response to *Who Decides?* confirmed that this is an important area of social policy which has a significant effect on the daily lives of many people.

4. The initiatives set out in this policy statement apply only to England and Wales. In relation to Scotland, the Scottish Executive published a policy statement *Making the Right Moves* on 23 August 1999. A Bill to implement the proposals in the Scottish Executive policy statement has already been introduced in the Scottish Parliament this autumn. The approaches being proposed in the two jurisdictions are broadly similar, although the existing framework of law is different in a number of respects, and thus the detailed proposals will also differ in some ways. Similar reforms are also under consideration for Northern Ireland.

5. Since the consultation on *Who Decides?* took place, the Government has received a Report from the Committee of Public Accounts on the mental health functions of the Public Trust Office (PTO). The Committee has made a number of recommendations about the work of the PTO's Mental Health Sector. The response to that Report will be published on 18 November 1999. In addition, the Quinquennial Review of the PTO's status as an Executive Agency is also due to be published in November 1999. This Review involves a fundamental consideration of a range of options for the future delivery of the PTO's functions, including abolition, contracting-out, and partnerships with public, private and voluntary bodies. In the

light of the Review's recommendations, the Government will consider the appropriate role of the PTO or other bodies in meeting the needs of mentally incapacitated adults and their carers.

6. The policy statement should also be seen against the background of the review of the Mental Health Act 1983 being conducted by the Department of Health. That review is primarily concerned with the care and treatment of those with mental illness. The Government will consider carefully the implications of the review of the Mental Health Act for the proposals set out in this policy statement.

THE GOVERNMENT'S PROPOSALS

7. As a result of the response to consultation, the Government has decided to take forward a number of the issues raised in *Who Decides?* The Government's proposals are set out in bold italics in the following chapters. These proposals would apply to people without capacity aged 16 or over, except where otherwise indicated. Clearly, legislative changes can only be made when Parliamentary time allows.

Chapter 1: The Key Principles

8. The first part of Who Decides? concentrated on three 'key principles': capacity; best interests; and general authority to act reasonably. These concepts, which are discussed further in Chapter 1, are aimed at giving carers and professionals clear guidelines when day-to-day decisions have to be made about the care and welfare of a person without capacity.

CAPACITY

The definition of capacity sets out how to decide whether a person has lost capacity. It deals with both a person's inability to make a decision, and their inability to communicate any decision made.

BEST INTERESTS

The guidance on assessing a person's best interests sets out a number of factors that should be taken into account when making a decision on behalf of a person without capacity.

GENERAL AUTHORITY TO ACT REASONABLY

The general authority will regulate day to day decisions. It states that anyone who needs to take decisions for a person without capacity must act reasonably in the best interests of that person.

Chapter 2: Continuing Powers of Attorney

9. *Who Decides?* suggested that the current system of Enduring Powers of Attorney (EPA) should be replaced by a new Continuing Power of Attorney (CPA). There was wide-ranging support in consultation for the creation of CPAs.

Chapter 3: Decision-making by the court, and the appointment of managers

10. The court's powers will include the appointment of a manager where ongoing decisions are necessary, and where a person is incapable of managing his or her own financial affairs, the manager will also be able to deal with personal welfare or healthcare issues.

Chapter 4: Modernising the Judicial Forum

11. *Who Decides?* set out a framework for a modern Court of Protection replacing the existing Court of Protection. The court would be able to resolve disputes where there were doubts about a person's capacity. It could also resolve disputes about CPAs, the best interests of a person without capacity or whether a general authority was being used inappropriately.

12. **The Government has decided, in the light of the responses to the consultation, that a number of issues raised in *Who Decides?* should not be taken forward at this time. These issues are:**

- **Advance Statements about Healthcare**
- **Independent Supervision of Medical and Research Procedures**
- **Public Law Protection for People at Risk**

ADVANCE STATEMENTS

13. In *Who Decides?*, the Government sought views on whether there should be legislation on the subject of advance statements about healthcare and, if so, what its objective should be. Advance statements (sometimes known as advance directives or living wills) are anticipatory decisions made while a person is capable, which are intended to give effect to that person's wishes as to how he or she shall be treated or cared for after the loss of capacity.

14. The responses to consultation showed a wide range of views on this complex and sensitive subject. Some respondents believed that legislation was needed to clarify the law, and that the existing case law was not adequately understood by doctors and lawyers. Some believed that the existing case law provided sufficient guidance, and that the development of the common law would provide greater flexibility than rigid statutory provisions. Others believed that advance statements were morally wrong, and that giving them legislative force would compel doctors to withdraw or withhold treatment that could save the patient's life. Concerns were also expressed that doctors would be prevented from providing the best treatment available or using new treatments that may have developed since the patient had made the advance statement.

15. The Government recognises the strength of feeling on this subject and the fact that widely differing views are held with sincerity and conviction.

16. The Government believes that a clear statement of the present legal position concerning advance statements would be helpful to lawyers, doctors and patients. The current law and medical practice is as follows. It is a general principle of law and medical practice that all adults have the right to consent to or refuse medical treatment. Advance statements are a means for patients to exercise that right by anticipating a time when they may lose the capacity to make or communicate a decision.

17. An advance statement contains a person's instructions as to which medical treatment that person would or would not be prepared to accept if he or she should subsequently lose the capacity to decide for himself or herself. An advance statement can request specific treatments. It is an important principle that health professionals are not legally bound to provide that treatment if it conflicts with their professional judgment about the most appropriate treatment to give to a patient just as they would not be bound to give a treatment requested by a patient with capacity. However, the health professional may take the person's wishes into account when deciding the course of action.

18. Advance statements are sometimes concerned with the refusal of life sustaining procedures in the event of terminal illness. They have nothing to do with euthanasia or suicide. They cannot authorise a doctor to do anything which is illegal or which a person with capacity could not request a doctor to do. Nor can they ask for treatment which is clinically inappropriate. Advance statements are simply a method whereby a person can exercise his or her right to accept or reject medical treatment. The Government wishes to make absolutely clear its complete opposition to euthanasia, which is and will remain illegal.

19. Adults with capacity have the right to refuse or withdraw their consent to medical treatment. We do not accept that the decision has either to be reasonable or has to be justified to anyone apart from the individual who is making the decision. It follows that the Government respects the right of people with capacity to be able to define, in advance, which medical procedures they will and will not consent to at a time when that individual has become incapable of making or communicating that decision. The courts have approved this principle and have determined that certain forms of advance statement already have full effect at common law. The judgments in *Re T*[1], together with those in *Airedale NHS Trust v Bland*[2] in both the Court of Appeal and the House of Lords, indicate that an advance refusal of treatment which is 'clearly established' and 'applicable in all the circumstances' is as effective as the decision of a capable adult. The case of *Re C*[3] provided further clarification. In that case, the High Court held that a refusal of treatment by a patient who had capacity to make that refusal was binding on his doctors for the present and the future until it was revoked. The Government accepts those decisions.

20. Given the division of opinion which exists on this complex subject and given the flexibility inherent in developing case law, the Government believes that it would not be appropriate to legislate at the present time, and thus fix the statutory position once and for all. The Government is satisfied that the guidance contained in case law, together with the Code of Practice *Advance Statements about Medical Treatment* published by the British Medical Association, provides sufficient clarity and flexibility to enable the validity and applicability of advance statements to be decided on a case by case basis. However, the Government intends to continue to keep the subject under consideration in the light of future medical and legal developments.

1 *Re T (Adult: Refusal of Treatment) [1992] WLR 782*

2 *Airedale NHS Trust v Bland [1993] AC 789*

3 *Re C (Adult Refusal of Treatment) [1994] 1 WLR 290*

Other issues raised by respondents to Who Decides?

ADVOCACY

21. Many respondents to *Who Decides?* raised the issue of the role of advocates in supporting the rights of a person without capacity and assisting them in making decisions. This is an issue the Government intends to consider further and is also something that may be considered in the context of the review of the Mental Health Act.

CODE OF PRACTICE

22. Responses to *Who Decides?* demonstrated that there was much support for a Code of Practice to provide guidance to carers and professionals. The Government fully recognises the importance of giving as much guidance as possible to those involved in the care of people without capacity. It is therefore anticipated that any future legislation would be accompanied by a Code of Practice, which would be quite separate from the Mental Health Act Code of Practice.

chapter

1

The Key Principles

Capacity, Best Interests, and The General Authority to Act Reasonably

1.1. The key principles were suggested by the Law Commission in 1995, and provide an understandable framework within which carers and others who need to make decisions for, or act on behalf of, a person without capacity, can act with confidence. The issues were discussed in Chapter 3 of *Who Decides?*

THE TEST OF CAPACITY

The Government has decided that there will be a new test of capacity.

1.2. Respondents to the Consultation Paper Who Decides? strongly supported the new test (see 1.6. below).

There will be a presumption against lack of capacity.

1.3. There will be a statutory presumption against lack of capacity. In other words, it will be assumed that a person can make their own decisions unless it is proved that they are unable to do so. This reflects the current common law position. It also follows the principle that intervention in the affairs of individuals should be kept to the minimum necessary.

There will be a functional approach to determining whether or not a person has capacity to make a particular decision.

1.4. The Law Commission recommended a 'functional approach' to determining capacity. This would focus on whether the individual is able, at the time when a particular decision has to be made, to understand the nature and effect of the decision. This is a very specific approach which will avoid unnecessary intrusion into the individual's managing of his or her own affairs. It will allow for cases where the individual is able to make some decisions, but is unable to understand the implications of others. In cases of fluctuating capacity the functional approach, together with the best interests factors set out below, will ensure that, wherever possible, decisions are made when the individual is able to exercise the maximum decision-making powers possible.

1.5. This would ensure that people would not be excluded from making the decisions that they are

capable of making. The Government accepted this recommendation in *Who Decides?* and there was general support in the responses received.

There will be a new statutory definition of incapacity.

1.6. The Law Commission proposed three definitions to ascertain whether a person lacks capacity.

The Government agrees that the definitions set out below are helpful, and they will be incorporated in legislation.

- A person is without capacity if, at the time that a decision needs to be taken, he or she is '**unable** by reason of **mental disability to make a decision** on the matter in question; or unable to communicate a decision on that matter because he or she is unconscious or for any other reason'.
- **Mental disability** is 'any disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning'.
- A person is to be regarded as **unable to make a decision** by reason of mental disability if the disability is such that, at the time when the decision needs to be made, the person is 'unable to understand or retain the information relevant to the decision, or unable to make a decision based on that information'.

All practicable steps must be taken to enable a person without capacity to communicate their decisions.

1.7. The Law Commission recommended that a person should not be regarded as incapable of communicating their decisions unless 'all practicable steps to enable him or her to do so have been taken without success'.

1.8. The majority of respondents to *Who Decides?* supported the proposed approach, and many respondents suggested possible methods to aid communication. The majority also supported the provision in statute for 'all practicable steps' to be taken, and provided suggestions for guidance which the Government has noted.

1.9. The Law Commission recommended that a decision should not be regarded as invalid merely because it would not be made by a 'person with ordinary prudence'. This supports the right of the individual to make his own decisions, and clarifies that he should not be regarded as incapable of doing so merely because the decisions he reaches appear to others to be unwise or irrational. The Government accepts this recommendation.

BEST INTERESTS

1.10. The Law Commission recommended that statutory provision should be made to the effect that decisions made by others on behalf of people without capacity must be made in the best interests of the people without capacity. *Who Decides?* indicated that the Government shared this view, but asked respondents for comments. A large majority of responses from all areas of opinion supported this approach.

There will be statutory guidance on how the best interests of a person without capacity should be determined.

1.11. The Law Commission proposed the following list of factors to be considered in making an assessment of a person without capacity's best interests:

- the ascertainable past and present wishes and feelings of the person concerned and the factors the person would consider if able to do so
- the need to permit and encourage the person to participate or improve his or her ability to participate as fully as possible in anything done for and any decision affecting him or her
- the views of other people whom it is appropriate and practical to consult about the person's wishes and feelings and what would be in his or her best interests
- whether the purpose for which any action or decision is required can be as effectively achieved in a manner less restrictive of the person's freedom of action.

The majority of responses supported the factors identified by the Law Commission, and the Government agrees that these factors should be included in legislation.

1.12. Following comments received on consultation, the Government proposes to make provision in legislation for the following additional factors to be taken into account in determining best interests:

- whether there is a reasonable expectation of the person recovering capacity to make the decision in the reasonably foreseeable future
- the need to be satisfied that the wishes of the person without capacity were not the result of undue influence.

1.13. The list of factors should not be applied too rigidly and should not exclude consideration of any relevant factor in a particular case.

THE GENERAL AUTHORITY TO ACT REASONABLY

Future legislation will provide for a general authority to act reasonably, in accordance with that proposed by the Law Commission.

1.14. The Law Commission drew attention to the fact that authority for day to day decision-making on behalf of people without capacity often develops informally and in a piecemeal way. The present law protects neither the person without capacity nor the carer (whose actions would have little or no legal basis).

1.15. The Law Commission recommended that this informality of decision-making should remain, but that a legal context should be provided to give clarity to carers and adequate protection for those without capacity. It therefore proposed that there should be a general authority 'to do anything for the personal welfare or healthcare of a person who is, or is reasonably believed to be, without capacity in relation to the matter in question if it is in all the circumstances reasonable for it to be done by the person who does it'.

1.16. Almost all respondents were satisfied with the definition. A number, however, including the Bar Council, believed that the link between the general authority and the best interests factors to be considered in decision-making should be more clearly defined. The definition will therefore make reference to the concept that any action under the general authority should be reasonably believed by the decision-maker to be in the person without capacity's best interests.

1.17. The general authority will provide a legal context for the many day to day decisions that have to be made about the care and welfare of people without capacity. For example, these could include decisions about the paying of bills; giving medication; and providing help with dressing or feeding. Where people act in accordance with the general authority they will be protected from civil liability, for example for trespass to the person or assault.

1.18. The general authority will not enable access to financial assets held by the person without capacity in a bank or other financial institution. Where the person without capacity has substantial sums of capital or other property that need to be administered, recourse will be needed to the court for the appointment of a manager to handle the person's affairs (see Chapter 3). Where disputes arise about healthcare or welfare issues which cannot be resolved, the court may be asked to make an order or appoint a manager to do so.

1.19. The general authority will not be able to authorise an action which is contrary to a decision made by:

- a court appointed manager
- the donee of a Continuing Power of Attorney acting within the scope of his or her authority.

1.20. However, this does not preclude a challenge to such a decision in court. Nor does it preclude taking action to prevent the death or serious deterioration in the condition of the person without capacity while an order relating to the matter is sought from the court.

1.21. There will be a need for guidance for carers as to their responsibilities under the general authority. Such guidance will be produced as a Code of Practice in association with the legislation.

1.22. The Law Commission recommended that the general authority should not include authorising 'the use or threat of force to enforce the doing of anything to which that person objects, nor should it authorise the detention on confinement of that person, whether or not he or she objects. This provision is not to preclude the taking of steps which are necessary to avert a substantial risk of harm to the person concerned'.

The Government will restrict the general authority in accordance with the Law Commission recommendations.

1.23. In addition, as recommended by the Law Commission, there will be a number of decisions which no one may take on behalf of the person without capacity, including when acting under a general authority. These are:

- consent to marriage

- consent to sexual relations
- consent to divorce on the basis of 2 years separation
- consent to adoption or to the freeing of a child for adoption
- voting at an election for any public office
- discharging parental responsibilities, except in relation to a child's property (the view of the majority of responses to *Who Decides?* was that in any decision about a child's property, the child's interests should take precedence over those of the person without capacity. The Government shares that view).

These apply equally to CPAs (see paragraph 2.8., below) and managers (see paragraph 3.21., below).

EXPENDITURE INCURRED UNDER THE GENERAL AUTHORITY

1.24. The Law Commission recommended that, where expenditure is incurred under the general authority, payment might be made in a number of ways. These recommendations were made because the legal position of a person who has arranged for goods or services for a person without capacity is unclear in relation to liability for payment of the bill.

1.25. Provision is needed for it to be lawful, where action taken under the general authority involves expenditure, for payment to be made in a number of ways:

- a carer might pay using the person without capacity's money
- the carer might use his or her own money and then claim from the person without capacity
- a promise might be made on behalf of the person without capacity to pay at a later date.

1.26. The Government accepted this recommendation in *Who Decides?*

1.27. *Who Decides?* asked respondents about the safeguards that would be needed to prevent abuse but there were no specific practical suggestions made.

The Government accepts the Law Commission's recommendations about payment for goods and services incurred on behalf of a person without capacity and these will be included either in legislation or a Code of Practice.

THE 'NECESSARIES' RULE

1.28. At common law, where goods and services which are "necessaries" are supplied to a person with a mental disability, even if the supplier knew or ought to have known of the person's disability – and therefore that the supplier cannot enforce the contract – the supplier has the right to recover a reasonable price.

1.29. The Law Commission recommended that this principle should be included in legislation, to

enable people without capacity to be provided with basic goods and services with the safeguard that the price charged must be reasonable.

1.30. *Who Decides?* indicated the Government's acceptance of this recommendation and there was no opposition in the responses.

The 'necessaries' rule will be included in legislation

1.31. It is proposed that the definition of 'necessaries' used in the Sale of Goods Act 1979 will be used in this legislation. This defines necessaries as goods which are 'suitable to the condition in life of the person concerned, and to his actual requirements at the time when the goods are supplied or the services provided'.

THE RELEASE OF PAYMENTS SCHEME

1.32. The Law Commission proposed that there should be a Release of Payments Scheme operating alongside the general authority.

1.33. Under this scheme, carers could enter into arrangements with banks, building societies and other financial institutions to obtain access to the person without capacity's funds to deal with day to day expenditure.

1.34. As a result of consultation, the Government is not convinced of the need for such a scheme. It considers 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.

1.35. Details of the Law Commission's original proposals are set out in **Annex A**. We would welcome views on the questions set out in the annex, particularly from voluntary groups and financial institutions.

A NEW OFFENCE TO ILL TREAT OR WILFULLY NEGLECT A PERSON WITHOUT CAPACITY

1.36. The Law Commission recommended that it should be an offence for a person to ill treat or wilfully neglect a person in relation to whom he or she has responsibility under the new legislation. This would relate to people appointed as managers by the court; donees of CPAs; and those having care of, or in lawful control of, the property of the person without capacity.

1.37. Many respondents were keen to support sanctions for ill treatment and supported the idea of a new offence. The Government recognises that ill treatment of a person without capacity is a very serious matter. However, while the Government has not ruled out the need for such legislation, it is not persuaded that the creation of a new offence would be the best way of tackling abuse.

chapter 2

Continuing Powers of Attorney

2.1. The issues relating to Powers of Attorney were covered in Chapter 6 of *Who Decides?*

BACKGROUND

2.2. There are currently two types of power of attorney:

- the first is the ordinary power, by which a person ('the donor') may delegate to another, decision-making on financial issues to be exercised on the donor's behalf. The donor may limit the power in time and make it subject to other conditions. This is used, for example, where a person goes abroad for a few years, and wants their property or financial affairs looked after by somebody in their absence, on the understanding that control will return to the donor on the donor's return. This ordinary power of attorney only lasts for as long as the donor retains mental capacity. If the donor becomes incapable, the attorney loses his or her authority to act. Often a delegated decision-making power would be of most use at the point where the donor loses mental capacity;

- to overcome this difficulty the second type of power of attorney – the Enduring Power of Attorney (EPA) – was created, in the Enduring Powers of Attorney Act 1985. The Act specifically enables a person to delegate decision-making powers on financial matters, anticipating a time when the person will be mentally incapacitated and unable to make decisions for himself or herself. The 1985 Act requires an EPA to be made using a prescribed form, and to be drawn up at a time when the donor still has capacity. The attorney under the power is obliged to register the EPA when he has reason to believe that the donor is, or is becoming, mentally incapable. Before doing so, he is required by the statute to notify relatives of the donor.

PROBLEMS WITH THE PRESENT SYSTEM

2.3. The Government recognises that there are a number of problems with this system, and this view was reinforced in the consultation process. A number of concerns were raised, including the following:

The drafting or creation of the power:

- powers were used prior to the donor becoming incapacitated
- family members did not know about the existence of the EPA – some felt that it would be a safeguard if other people had to be alerted that the power had been created
- donors of EPAs were already without capacity by the time they signed their EPA.

The registration process:

- notification of others in the statutory list is inadequate, since the donor and relative may not see, or care anything for, one another
- there is no adequate system to compel the attorney to register the EPA when the donor becomes incapable.

The powers of the attorney:

- the court will not usually know about unregistered powers which are being exercised, where instances of financial abuse might occur.

The lack of a regional office:

- there is a lack of access for members of the public to speak to someone about EPAs.

2.4. The Law Commission recommended that EPAs, which are limited to financial affairs, should be replaced by Continuing Powers of Attorney (CPAs). CPAs would allow individuals to delegate decision-making powers on finance, healthcare, and personal welfare to a person of their choice. CPAs received very strong support on consultation from a wide range of individuals and organisations.

The Government intends to put in place a system of CPAs that would enable a person to delegate decision-making powers on finance, healthcare and personal welfare, where both the donor and donee are over 18.

2.5. A CPA may give general authority to take financial or welfare decisions but this principle is subject to reservations where the CPA relates to healthcare matters. A CPA should never be able to authorise the attorney to:

- consent or refuse consent to any treatment or procedure unless the donor is or is reasonably believed to be without capacity; or
- consent to the donor's compulsory treatment under the Mental Health Act 1983.

2.6. An attorney will not be able to make decisions on behalf of the person without capacity about the withdrawal of artificial nutrition and hydration unless the person has specifically given the authority to do this in the CPA. A general authority in the CPA to make health care decisions will be insufficient for this purpose.

2.7. An attorney will not be able to use the healthcare powers until the donor becomes incapacitated.

2.8. As is the case with the general authority to act reasonably (see paragraph 1.23., above) and managers (see paragraph 3.21., below), there are a number of decisions which no one can take on behalf of the person without capacity. These are listed in paragraph 1.23.

SAFEGUARDS

There will be safeguards for those making CPAs.

2.9. As a result of the response to *Who Decides?*, the Government has decided that certain safeguards would be appropriate. These are intended to provide sufficient safeguards for people without capacity, while recognising that there should be minimal interference where things are working well.

2.10. Accordingly, the legislation will contain provisions about the form and manner of execution of the CPA, procedural requirements, and restrictions on who may be an attorney.

MAKING A CPA

- The form for making a CPA will be prescribed; and the terms of the CPA must be set out in writing. The document must be signed, witnessed and dated.
- The form must be accompanied by evidence that the donor was mentally capable at the time that it was created. That evidence could be provided by either a separate medical certificate or a signed statement by a doctor in the CPA form itself.
- Donors will be able to make more than one CPA and have more than one attorney. They may want to appoint different people to deal with different aspects, or they may wish to appoint joint attorneys for all decisions.
- Donors will be able to appoint substitute attorneys in case their first choice of attorney loses mental capacity or dies.
- It will not be possible to appoint the holder for the time being of a specified office to act as attorney.
- The donor must indicate whether he wishes to give to the attorney either general or specific powers in relation to finance, welfare and healthcare issues. As indicated at paragraph 2.6. above, certain healthcare powers can only be granted specifically.

TRANSITIONAL ARRANGEMENTS

2.11. It will not be possible to convert an existing financial EPA into a CPA dealing with broader issues. Legislation will contain appropriate transitional arrangements in respect of EPAs to ensure a smooth transition.

REVOCATION AND AMENDMENT OF CPAS

2.12. Donors of CPAs will be able to revoke or amend them at any time while they have capacity, and to change their attorney. An attorney will be able to withdraw their consent to act under a CPA.

POWERS OF THE COURT

The Government has decided that the Court of Protection will not be able to appoint a substitute attorney.

2.13. The aim of a CPA is to allow someone to choose another person to make decisions on their behalf. This process of selection will inevitably be highly personal. The nature of the relationship, and the level of trust that the donor has in the attorney, is crucial, given the wide range of powers that the attorney will have. But the original attorney may become unable, or unwilling, to perform his or her duties on behalf of the donor. If the donor has not nominated a substitute attorney, then the court will not be able to appoint a substitute itself. However, it will be able to appoint a manager, who will be subject to stricter controls than an attorney.

COMPULSORY REGISTRATION OF CPAS

There will be a compulsory Registration system and a Registering Authority. All CPAs must be registered before the attorney can use them.

2.14. Respondents strongly supported this on consultation. The authority will check whether the donor has already donated the same powers to another person under a valid, registered CPA, and, if necessary, refer the matter to the court for a ruling on validity. The legislation will set out the registration procedure.

2.15. Registration will be possible at any point following execution of the CPA until the time when the donor has become incapable. It will be possible for the attorney to exercise powers in relation to financial and welfare issues while the donor is still capable if that is the donor's wish. However, as noted at paragraph 2.7., above, it will only be possible for powers in relation to healthcare issues to be exercised when the donor has become incapable. This will ensure that the donor continues to make decisions about healthcare while capable of doing so, but would enable an attorney to make immediate decisions in the event of the donor becoming instantly incapable, for example as a result of receiving a head injury in a car accident.

SAFEGUARDS AGAINST ABUSE

2.16. As a safeguard against fraudulent registration and abuse, the Law Commission recommended that the attorney should be required to notify others of the application for registration **after** the CPA had been registered.

2.17. As a result of the response to consultation the Government has decided that notification should take place **before** registration. This would enable disputes and challenges to be settled by the court before the CPA has become effective. The attorney will have to provide evidence that notification had taken place or that best endeavours to contact those to be notified had failed.

2.18. The CPA form will allow donors to name specific people to be notified at the time of registration. This will replace the relationship provisions in relation to EPAs (see paragraphs 2.2.-2.3., above). The donor may specify on the CPA form that no one should be notified.

2.19. Except in unusual circumstances, a period of 28 days should elapse between notification and registration to allow time for objections to be lodged with the Registering Authority.

EMERGENCY SITUATIONS

2.20. The Government will make appropriate provision for emergency situations.

RECOGNITION OF CPAS

2.21. One current problem with the EPA system is that attorneys sometimes have problems with organisations or individuals who are unfamiliar with the EPA document, and are therefore suspicious of the attorney's claims to have authority to make decisions on the donor's behalf. It would be particularly problematic if this continued into the CPA system, when the attorney needed to make urgent medical decisions about a person's healthcare. The Government is looking at the most appropriate way of meeting the needs of the attorney in gaining recognition.

ROLE OF THE COURT OF PROTECTION

2.22. The powers of the Court of Protection ("the court") in relation to CPAs will be similar to those held by the current court in relation to EPAs. These will include the power to determine questions about the meaning and effect of a CPA. The court will also have the power to revoke a CPA on the grounds of the unsuitability of an attorney, including where the attorney is not acting in the best interests of the donor.

PROTECTION FOR ATTORNEYS AND THIRD PARTIES

2.23. The Law Commission recommended protection for an attorney or third party who has acted in good faith using the powers contained in a CPA which had been revoked.

2.24. The Government agrees that an attorney or third party who acts in the belief that a revoked CPA is valid should be protected from liability, provided that their actions would otherwise be lawful.

CONSENT TO TREATMENT AND CIVIL LIABILITY

2.25. On healthcare matters, the Law Commission recommended that, as far as civil liability is concerned, consent to treatment given by the attorney in respect of an incapable adult should be regarded as if it was consent to treatment given by the individual patient. This recommendation was broadly supported in consultation and will be taken forward.

Decision-Making by the Court

3.1. These issues were addressed in Chapter 7 of *Who Decides?*.

STRUCTURE AND ROLE OF THE COURT; COURT APPOINTED MANAGERS

Background

3.2. The Law Commission recommended that, in support of their proposals for a unified system of decision-making to cover financial, personal welfare and healthcare matters, there should be a single court jurisdiction, which would deal with all these issues together. It envisaged the court as being principally the option of last resort in cases of dispute.

3.3. *Who Decides?* supported the recommendation in principle, but identified the potential resource implications and sought views on whether the Court of Protection offered the most appropriate base for this jurisdiction.

3.4. Most respondents favoured a single court jurisdiction for all areas of decision-making. Although there were some concerns about the Court of Protection's perceived lack of accessibility and unsuitability for dealing with emergencies, no realistic alternatives were proposed, and a clear majority of respondents supported the Court of Protection exercising this jurisdiction.

The Government has decided that there will be a new single court jurisdiction, which will deal with all areas of decision-making for adults without capacity.

The new jurisdiction will be based at the Court of Protection, and concerns about accessibility will be met by a regionalised structure (see Chapter 4).

POWERS OF THE COURT

3.5. The Law Commission recommended that decision-making by the court should operate in the context of its key principles:

- decisions should be taken in the best interests of the person without capacity

- there should be minimal intervention in his or her affairs unless there is a demonstrable need to do so
- the option least restrictive of the person's freedom of action should be chosen.

3.6. The court would need to consider the nature and extent of the person's decision-making capacity in reaching a decision.

The Government has decided that the court will be able to make decisions on behalf of a person without capacity, or appoint a manager to make decisions.

The Government intends that the court should have the power to make declarations about capacity.

In exercising its powers, the court will follow two principles that support the aim of making the jurisdiction aimed at limiting intervention to the minimum possible:

- ***the decision of the court is preferable to the appointment of a manager***
- ***the appointment of a manager should be as limited in scope and duration as possible.***

POWERS OF THE COURT IN HEALTHCARE MATTERS

3.7. The Law Commission recommended that the court's powers in this area should extend to:

- approving or refusing approval to particular forms of healthcare
- appointing a manager to consent, or refuse consent, to particular forms of healthcare
- requiring a person responsible for the healthcare of a patient to allow a different person to take over the healthcare of that patient
- obtaining access to healthcare records.

The Government agrees that the court should have these powers

3.8. The Government believes that certain serious healthcare decisions which can currently be made by a court, such as the withdrawal of artificial nutrition and hydration from a patient in a permanent vegetative state or similar condition, and questions of treatment where the patient has made an advance statement should remain a matter for the court, and should not be able to be delegated to a manager.

POWERS OF THE COURT IN WELFARE MATTERS

3.9. The Law Commission recommended that the court's powers should extend in particular to matters relating to:

- where the person without capacity is to live
- what contact, if any, the person without capacity is to have with any specified persons (including the power to restrain a named person from having contact with or molesting the person without capacity)
- the exercise of the rights conferred on him or her by or under any enactment to obtain information
- obtaining the benefits and services to which the person without capacity is entitled or which are available to him or her.

The powers in relation to where the person is to live would not, however, extend to requiring or authorising admission against his or her will for assessment or treatment for mental disorder under the Mental Health Act 1983.

3.10. The Government indicated in *Who Decides?* that it accepted these recommendations in principle. It raised the question of whether explicit provision should also be made for the court to make other welfare-related orders in addition to residence and contact orders.

On the basis of the responses received, the Government's view is that as the list proposed by the Law Commission is not exhaustive, and gives the court flexibility to make orders relating to other welfare needs, an explicit list of those orders is not necessary.

ACCESS TO HEALTHCARE RECORDS

3.11. The Law Commission recommended that the powers of the court should extend to obtaining access to healthcare records. A manager may need access to healthcare records in order to exercise their function as proxy decision-maker.

3.12. The Government recognises that a manager who is empowered to take healthcare decisions could require access to healthcare records, and proposes that the court should have the power to authorise a manager to do so.

3.13. The Law Commission also proposed a new power for the court to order admission of people without capacity to hospital for assessment and treatment on similar criteria to those contained in the Mental Health Act 1983.

3.14. Responses did not support such a provision. The Law Commission proposal will therefore not be taken forward.

THE 'NO ORDER' PRINCIPLE

3.15. The Law Commission did not believe that there was a need for a 'no order' principle such as that in the Children Act 1989, where the court may not make an order unless it is satisfied that doing

so would be better for the child than not doing so.

3.16. The Government sought views on whether a 'no order' principle was appropriate. The majority of responses supported a 'no order' principle. However, authoritative opposition came from the Senior District Judge and the Official Solicitor. Their view was that the requirement that the court adopt the least restrictive option was sufficient and that the situation was not equivalent to that under the Children Act. Under that Act, the basis for the principle is that those with parental responsibility for the child should be left to exercise it without the intervention of the court unless necessary. However, there is no equivalent to parental responsibility for adults without capacity.

There will not be a 'No Order' principle in relation to court orders made for adults without capacity.

APPOINTING A MANAGER

3.17. *Who Decides?* asked whether the court should be able to appoint a manager; what the scope of the manager's responsibilities should be; and what criteria should be used to decide who should be a manager. The great majority of responses supported the court appointment of managers to deal with welfare, healthcare and property and financial decisions.

3.18. The Government's proposals are an extension of, and replacement for, the current receivership system. The court will be able to appoint a manager to make decisions on matters relating to the personal welfare, healthcare, property or financial affairs of a person without capacity.

Transitional Arrangements

3.19. Appropriate arrangements will be put in place in respect of existing receiverships.

The manager's responsibilities

3.20. The court will be able to appoint a suitable manager and set the scope of his or her responsibilities. The court will be able to appoint different managers for different areas of decision-making if appropriate.

POWERS OF A MANAGER

Decisions that cannot be made by a manager

3.21. As is the case with the general authority to act reasonably, and with CPAs (see paragraphs 1.23. and 2.8., above), a manager will not be able to take certain decisions on behalf of people without capacity. In addition, neither the court nor a manager should have power to make decisions which the person without capacity could not lawfully have made, if that person had retained capacity.

Powers of a manager to refuse consent to healthcare

3.22. *Who Decides?* expressed concern about the provision that would allow a court appointed manager to refuse consent to healthcare and asked the views of respondents on this point. The

majority of responses opposed a manager having this power, although there was a substantial minority in favour, including the Law Society and Age Concern.

3.23. The Government takes the view that in most healthcare cases, a one-off decision about treatment will be needed. This could be made by the court without the need to appoint a manager. If a dispute then arose, the matter could be returned to court.

3.24. In cases where the court considered that the appointment of a manager was needed, it would take all relevant factors into account when making the appointment.

In making property and finance decisions managers appointed by the court will be able to deal with:

- ***the control and management of any property, and its disposal or acquisition***
- ***the carrying on of any business, trade or profession***
- ***dissolution of any partnership***
- ***carrying out of any contract***
- ***discharge of any debt or obligation.***

3.25. The Law Commission recommended these powers, and *Who Decides?* indicated the Government's acceptance of these recommendations.

The Government will ensure that the following decisions, as recommended by the Law Commission, must be made by the court, and not delegated to a manager:

- ***setting up a trust for the person concerned***
- ***making a settlement of any property; whether with the person concerned or with others as beneficiaries***
- ***making a will***
- ***exercising powers vested in the person concerned, such as under a trust.***

The Government believes that, with the exception of these issues, the court should be able to decide the specific powers that a manager should have in each individual case.

WHO CAN ACT AS FINANCIAL MANAGER?

3.26. The Law Commission also suggested that in cases where the Public Trustee was currently appointed as Receiver, there might be scope for a wider range of bodies to be appointed as manager, such as solicitors, accountants and investment managers. It also suggested that a similar approach might be valuable in the case of private receivers. It indicated that this would be a matter of practice rather than legislative change. Although such managers would have

greater autonomy and access to capital, the Law Commission still envisaged a role for an administrative body in taking security and reviewing annual accounts.

3.27. *Who Decides?* raised a number of potential difficulties with this proposal. First, although the Law Commission had recommended that security should always be taken from financial managers, affordable security would not necessarily be readily available to individuals managing substantial amounts of capital. The additional risk of releasing large sums of capital without security or with expensive security could present an obstacle.

3.28. Secondly, this could result in professional managers who could give adequate security being preferred as managers to family members. This would go against the Law Commission's intentions and the existing Court of Protection practice.

3.29. Thirdly, although the Law Commission intended that their proposal would reduce the costs of administrative fees to people without capacity, professional managers would also charge fees which could easily exceed those of any administrative body, which would in any event still need to finance its supervisory role.

3.30. No specific question was asked in *Who Decides?* on this issue and few comments were received, although the Law Society shared the concerns about the provision of adequate security and the consequent expense. At present, the Court of Protection appoints solicitors as Receivers in appropriate cases, and it would be open to the new court similarly to appoint solicitors or other professionals as manager where appropriate.

The Government has decided that, when deciding who should be appointed as manager, and the need for security to protect the money of the person without capacity, the court should retain a wide discretion to deal with each case on its particular facts.

The following requirements will apply to all managers:

- ***a manager will be obliged to act in the best interests of the person without capacity***
- ***a manager must be an individual aged at least 18 or may, in relation to property and financial affairs (but not healthcare and welfare issues), be a trust corporation***
- ***the holder of a specified office can be appointed provided there is no conflict of interest, except in relation to healthcare issues***
- ***more than one manager can be appointed to act***
- ***the court would be able to remove a manager on grounds of unsuitability or not acting in the best interests of the person without capacity***

- ***a manager, acting in his or her capacity as such, will be regarded in law as a statutory agent of the person without capacity***
- ***no manager will be able to do anything which is inconsistent with the decision of the attorney under a CPA acting within his or her authority.***

TIME LIMITS AND REVIEW

3.31. The Law Commission proposed that the appointment of a manager should be for the shortest duration that the court deemed necessary, and that a maximum time limit of 5 years for an appointment should be fixed by statute. This would necessitate the automatic review of all cases at least every 5 years.

3.32. *Who Decides?* identified a number of practical drawbacks to this proposal. The majority of longer-term appointments would be likely to concern financial matters. At present, the vast majority of the Court of Protection's patients have no prospect of recovering capacity. A requirement for an appointment to expire, be reviewed and renewed every 5 years would thus involve a substantial waste of resources, which would have serious implications for the workload of the court and would be of consequent additional cost to the patient.

3.33. It could also cause problems if the date of expiry was overlooked and resulted in the manager authorising transactions without authority, or co-incided with an important decision which could not be delayed – for example selling property.

3.34. Responses to *Who Decides?* were divided on whether time limited appointments would be useful. The Master of the Court of Protection suggested that, rather than time limit all appointments, the court should have the power to fix a time limit or order a review where appropriate. This view received wide support.

The Government has decided, as a result of the responses, that the court should have the power to fix a time limit or order a periodical review where appropriate in cases where managers are appointed to deal with decisions on financial and welfare issues.

Healthcare managers are likely to be needed for a much shorter duration, and the court should always place a time limit on these appointments. Such appointments will be for a fixed period of no more than 5 years, but they will be renewable by the court.

MONITORING OF MANAGERS

3.35. The Law Commission recommended that:

- managers should continue to be asked for security and annual accounts as is currently the case for receivers under the Court of Protection, and that annual reports would still be

appropriate even where the appointment related only to welfare or healthcare matters. It envisaged the Public Trust Office taking on responsibility for monitoring welfare and healthcare managers as well as financial ones; and

- the Public Trustee could continue to be appointed as financial manager of last resort as at present. The Public Trustee would have the power to raise questions on managers' reports, to direct a Lord Chancellor's Visitor to visit and report, and to inspect the person without capacity's property or direct an appropriate person to do so.

3.36. *Who Decides?* asked how practical these proposals would be. It highlighted the workload and training implications for the current Public Trust Office taking on the monitoring of welfare and healthcare matters, and the fact that many people requiring a welfare or healthcare manager would not have the resources to pay Public Trust Office fees. Most respondents agreed that the proposals were practical, subject to adequate staffing and resources being made available either to the PTO or to other bodies carrying out these functions.

The Government will ensure that appropriate arrangements are put in place to provide a practical and effective system to monitor healthcare, welfare and financial managers.

THE VISITING SERVICE

3.37. There will be an expansion in the role and numbers of the visiting service, a task currently performed by Lord Chancellor's Visitors and Lord Chancellor's Medical Visitors, to enable reports to be provided on cases involving welfare and healthcare managers.

REMUNERATION FOR MANAGERS

3.38. The Law Commission recommended no changes to the current position where the court can direct whether remuneration or expenses should be paid from the estate of the person without capacity. It also recommended that the Public Trustee should be able (as now) to charge a fee for acting as manager and for the monitoring functions proposed above.

3.39. The Government accepted this recommendation in principle in *Who Decides?*, although it was concerned about how these arrangements would work where the person without capacity had no finances – particularly where a person without capacity had only a healthcare and welfare manager.

3.40. The respondents to *Who Decides?* took the view that family members and carers acting as managers should only be able to receive out of pocket expenses. Professional managers should be able to be remunerated at a rate approved by the court. The Government agrees with this approach.

Family members and carers may receive out of pocket expenses for acting as managers, and professional managers (including the Public Trustee) may be paid at a rate approved by the court.

MANAGEMENT OF RESIDENTS' FUNDS BY CARE ESTABLISHMENTS

3.41. The question of care establishments managing the funds of incapable residents was raised in the report of the Scottish Law Commission. The Law Commission (of England and Wales) did not specifically address this issue.

3.42. *Who Decides?* asked whether there should be a general presumption that care home managers should not be appointed as managers of the financial affairs of a person without capacity because of the possibility of conflicts of interest arising.

3.43. The great majority of respondents supported this presumption, although it was recognised that there may be circumstances where a care home manager might need to be appointed. The Government agrees with this approach. The approach suggested in Scotland is set out in *Making the Right Moves* (see paragraph 4 of the Introduction).

There will be a presumption against the appointment of the manager of a care home in which the person without capacity resides, as the manager of the person's financial affairs.

chapter

4

Modernising the Judicial Forum

4.1. The issues were covered in Chapter 9 of *Who Decides?*

4.2. The Law Commission recommended that the new jurisdiction should be operated by the courts, which would provide an integrated forum and enable existing resources and expertise to be used.

THE NAME OF THE COURT

4.3. The Law Commission recommended the establishment of a new superior court of record called the Court of Protection in place of the current Court of Protection, which would be an office of the Supreme Court, with a designated Senior Judge, and, if the future volume of work justified it, a President.

4.4. *Who Decides?* accepted this in principle, but sought views on whether the new forum should continue to be called the Court of Protection.

4.5. The majority of responses favoured the name remaining the same, although some, including the Bar Council, believed that a new name was needed to reflect the court's extended role. The Government will give further consideration to a possible new name for the court.

REGIONAL PRESENCE FOR THE COURT

4.6. The Law Commission noted that many respondents to their papers had criticised the Court of Protection's lack of regional presence and suggested that the new court should be based in London, with at least one other designated venue for each of the six other court circuits.

4.7. *Who Decides?* indicated that the Government was minded to adopt the approach taken with other specialist areas of the court system, centralising resources until the workload in a particular area justified a new centre.

4.8. Although some respondents found this acceptable, others including the Law Society and MIND felt strongly that a regional presence was essential from the outset.

The Government now takes the view that there should be scope for healthcare, welfare and disputed financial cases to be dealt with locally rather than in London, where this is more convenient for the parties involved. A central administration will carry out support and administrative functions. High Court Judges, Circuit Judges and District Judges will be assigned to the Court of Protection.

4.9. The High Court will retain its inherent jurisdiction to make declarations on the lawfulness of certain medical actions.

PROCEDURAL MATTERS

4.10. The usual civil appeals system will apply to the new jurisdiction.

4.11. The Court of Protection will be able to make an order or give directions pending a decision on whether the person concerned lacks capacity, and will be able to require an assessment of capacity to take place.

4.12. The Lord Chancellor will have the power to make Rules of Court governing proceedings under the new jurisdiction.

4.13. There will be provision for the transfer of proceedings in respect of 16-18 year olds between a court exercising the new jurisdiction, and a court exercising jurisdiction under the Children Act 1989.

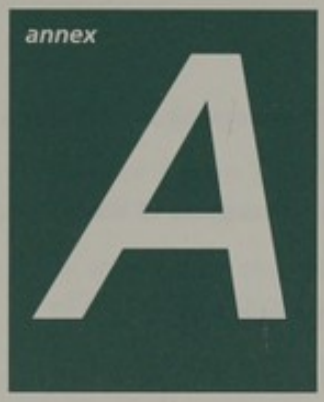
4.14. The power of the Master of the Court of Protection to visit any patient, and to interview them in private, will be preserved and extended to the other nominated judges.

There will be no restrictions on the automatic right to apply to the court for orders under the new jurisdiction

4.15. The Law Commission recommended that there should be a leave requirement for certain categories of applicant. The majority of responses to consultation disagreed with this approach. The Government does not see a need to introduce restrictions initially, and will do so in future only if circumstances justify it.

The court will have the power to call for reports as necessary. The provider of the report could vary according to the issues involved.

4.16. Respondents to consultation suggested that a wide range of organisations could be appropriate to provide reports to the court in individual cases. The Government has decided that it would be sensible to allow the court discretion to decide who would be the most suitable agency in each case.



The Release of Payments Scheme

This Annex sets out the Law Commission's recommendations and the Scottish scheme. It then sets out the Government's position in the light of the responses to *Who Decides?*

THE LAW COMMISSION'S RECOMMENDATIONS

1. In its 1995 Report, *Mental Incapacity*, the Law Commission set out details of a proposed Release of Payments scheme.

2. The aims of the scheme were:

   - to allow carers access to funds to deal with the day to day necessities required by the person without capacity they cared for, without continual recourse to the courts
   - to enable banks and building societies, insurance companies or other institutions to make arrangements with carers, once carers had demonstrated that the person in their care did not have capacity.

3. Under the scheme, banks, building societies, insurance companies and other fund holding institutions would be able to make limited contractual arrangements with a third party for withdrawals on behalf of the person without capacity. However, they would be obliged to check that the third party had provided certification from a medical practitioner that the person concerned did lack capacity before operating under the scheme.

SAFEGUARDS FOR THE FINANCIAL INSTITUTIONS

- there would be no compulsion on companies or their depositors to participate in the scheme
- where an institution released payments in accordance with the terms of the Scheme, then the institution would be protected from liability to its incapacitated customer for having done so.

The protection would not apply where:

- the person without capacity had previously instructed the company not to enter into the scheme

the person without capacity had instructed the company not to make a particular payment once the scheme was in operation

- there was reasonable cause to believe that the recipient of money under the scheme was likely to misapply it.

SAFEGUARDS FOR THE PERSON WITHOUT CAPACITY

4. When making a Release of Payments arrangement, the third party, often a carer, would have to:

- provide a statement acknowledging their obligation to apply the money in the best interests of the person without capacity
- confirm that they were aware that he or she would be subject to civil/criminal liability if money is misapplied
- confirm that they were not aware of any other person with authority to receive the money.

5. In addition, such agreements

- would be limited to £2000 per year for each recipient or each account
- would not protect the company if the maximum amount was breached
- would have a time limit of two years
- could be overridden by a person acting under a Power of Attorney or similar.

Who Decides? accepted these recommendations in principle, but raised concerns about the effectiveness of the proposed safeguards against abuse of the scheme. Because of these concerns, views were also sought on the merits of an alternative scheme, which is a modified version of that put forward by the Scottish Law Commission. It is described more fully in *Making the Right Moves*.

THE SCOTTISH SCHEME

6. Under the Scottish scheme:

Carers would be able to:

- apply to the Public Guardian (an officer of the Supreme Court) for authority for single payments, or a series of regular payments, from the bank account of the person without capacity, to be made to a specially designated account at the same bank
- operate the designated account in the normal way, and could use it to withdraw cash or to make direct debit or standing order arrangements to meet daily living expenses.

The Public Guardian would:

- authorise the amount and frequency of payments
- monitor through spot checks and by investigating complaints that funds were used for the benefit of the person without capacity
- be able to make enquiries about transactions on the designated account and on the account of the person without capacity
- review the authority to withdraw regularly
- investigate any problems or suspicious circumstances
- be able to charge a fee.

The bank would:

- be liable to the person without capacity for allowing payments over the limits set out in the Public Guardian's authority.

RESPONSE TO CONSULTATION IN WHO DECIDES?

7. *Who Decides?* sought views on the respective merits of these two schemes, and acknowledged the desirability of adopting a common approach in both jurisdictions. Those who responded to consultation on this issue generally supported a Release of Payments scheme.

8. However, the responses failed to clarify whether the scheme was really needed, or whether it would solve a major current problem for people without capacity and their carers. Respondents expressed concern about the lack of safeguards in the Law Commission's proposals, but did not offer practical suggestions for safeguards that would be appropriate. There was some support for the alternative scheme proposed by the Scottish Law Commission.

9. The Government is concerned that if a scheme similar to the Scottish scheme were set up, it would need a central organisation to administer and monitor the scheme. This would be cumbersome and bureaucratic for carers and financial institutions in England and Wales, and would go directly against the Law Commission's intentions in proposing a Release of Payments Scheme which was intended to enable simple, informal arrangements to deal with day to day expenditure. There would also be substantial resource implications.

The Government needs to consider if the new system would justify the additional resources necessary. Do we need such a system, and would it really address the problems faced by people without capacity and their carers?

10. Following consultation in *Who Decides?*, the Government met with major voluntary groups, including Mencap, Age Concern, the Alzheimer's Disease Society, and the Carers Association, and also with the Building Societies Association, in order to discuss the need for the Law Commission's scheme. However, these meetings did not adequately clarify:

- the extent of the difficulties that the Release of Payments scheme is intended to address

- the extent to which these difficulties would be resolved by other elements in the Law Commission's package, such as CPAs
- how workable and unbureaucratic additional safeguards could be provided.

11. The groups we consulted expressed support for a statutory scheme which would have effective safeguards with no additional costs and no bureaucracy. It is not clear how this might be achieved.

12. As noted at paragraph 3 above, the safeguards proposed by the Law Commission included the need to provide a medical certificate confirming incapacity and a statement by the carer, which the financial institution could scrutinise and then monitor the carer's actions under the scheme. In their responses to *Who Decides?*, banks and building societies have made clear that they would not be willing to undertake any such investigative or monitoring role, substantially reducing the effectiveness of these safeguards.

The Government is not at present convinced of the need for the Release of Payments scheme. We therefore invite further views on this issue, particularly from voluntary groups working on behalf of carers and people without capacity.

We would welcome views on:

- ***the extent of current problems***
- ***the type of workable safeguards that should be put in place, given the potential problems inherent in the Law Commission safeguards and the creation of a central authority on the Scottish model.***

Comments on the Release of Payments Scheme should be sent to :

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SW1E 6QW
Tel: 0171 210 0668

Comments can also be e-mailed to the following address: svinogradoff@lcdhq.gsi.gov.uk

Responses on the Release of Payments Scheme should be received by 25 February 2000.

Any request to treat all, or part, of a reply in confidence will of course be respected. If no such request is made it will be assumed that the reply is not intended to be confidential.

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