

East Sussex Health Overview and Scrutiny Committee



Review of support for patients and carers applying for power of attorney under the Mental Capacity Act 2005

Report by the Task Group

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The report of a short review of support for patients and carers applying for power of attorney under the Mental Capacity Act 2005

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1. Background

1. The Mental Capacity Act 2005 for England and Wales provides a framework to empower and protect people who may lack capacity to make some decisions for themselves. It makes it clear who can take decisions in which situations, and how they should go about this. It also allows people to plan ahead for a time when they may lack capacity.

2. It covers major decisions about someone's property and affairs, healthcare treatment and where the person lives, as well as everyday decisions about personal care (such as what the person eats), where the person lacks capacity to make those decisions themselves.

3. The Act may need to be used in situations where a person is unable to make any or certain decisions for themselves, for example as the result of a physical or learning disability, mental health problem or serious illness. It can be a long-term situation or short-term until the person recovers mental capacity. The Act therefore concerns patients, carers and families, health and social care staff and other people who may come into contact with people who lack mental capacity.

4. The Public Guardian exists to protect people who lack capacity from abuse. The Office of the Public Guardian supports the Public Guardian's role and oversees the system of applying for a nominated person to be able to take decisions on behalf of someone who lacks mental capacity. The Office works with the Court of Protection to safeguard the interests of people who lack mental capacity.

Power of attorney

5. The Mental Capacity Act replaced the old system of Enduring Powers of Attorney (EPA) with a new and different type of power of attorney called a Lasting Power of Attorney (LPA). EPAs which were applied for before the change are still valid, but anyone applying now would apply under the new LPA system. The change was made for a number of reasons, including concerns that there were insufficient safeguards in place under EPA and the system could be open to abuse.

6. EPAs only covered people's property and financial affairs, but under the new system there are two types of LPA:

- A personal welfare LPA – this allows a designated attorney(s) to take decisions about a person's healthcare and welfare and can only be used once the person in question has lost mental capacity and cannot make the decision for themselves.
- A property and affairs LPA – this allows a designated attorney(s) to take decisions about a person's property or affairs. A person can appoint an attorney to do this even while they still have mental capacity.

7. The person wishing to appoint an attorney (the 'donor') must make the application whilst they have mental capacity, as they must show that they understand the powers they are giving their attorney. If a person has already lost capacity and decisions need to be made for them, different processes apply.

2. Aims and scope of the review

8. The Health Overview and Scrutiny Committee (HOSC) included in its work programme for 2008/9 a piece of work to examine aspects of the implementation of the Mental Capacity Act. Concerns had been raised that the process of applying for power of attorney was complex and may be difficult for individuals, families and carers to manage, particularly if in a traumatic situation. HOSC was interested to examine the support available to local families and carers, or individuals who wish to make arrangements for someone to take over their own decisions in the event they lose mental capacity.

9. HOSC established a Task Group to examine this issue, with the original terms of reference:

“To examine the support and advice available to individuals, families and carers in East Sussex when applying for power of attorney for someone lacking mental capacity and to make recommendations as appropriate.”

10. During the review it became apparent that a power of attorney application must be made before a person loses mental capacity and that a different procedure applies once a person lacks capacity. The terms of reference were therefore amended to refer to ‘...someone who may lack mental capacity in the future...’.

11. The project’s scope included only the process of applying for power of attorney and not other aspects of the Mental Capacity Act or the work of the Office of the Public Guardian. Although the scope of the review did not include the processes used when someone has already lost capacity, some of the issues highlighted in the review are likely to also apply here.

12. It was recognised that the legal framework and process is set nationally and is not within HOSC’s sphere of influence. This was therefore also outside the scope of the review. The nature of the review as a short, desk research based type of review also meant that it would not be possible to conduct detailed research or consultation with patients and carers or a large number of health professionals.

13. The review focussed on the support available to East Sussex residents, and in particular whether available support is signposted through health services.

3. Review findings

Finding out about power of attorney

14. The Task Group was concerned that some people may not be aware that the option of power of attorney exists, or that they can apply for power of attorney at any time, to come into effect in the event that they lose mental capacity, or if they choose to action it (for property and affairs LPA). The fact that a new system has recently been introduced may also mean that there is less awareness of the newer ‘personal welfare’ provisions than the ‘property and affairs’ provisions which are similar to the previous system.

15. Whilst there is an obvious reason for people with certain health conditions such as dementia or a terminal illness to consider setting up a lasting power of attorney, the Task Group’s view is that healthy and/or younger people could also consider making the provision, in a similar way as these people would consider making a will.

16. There are two main routes to finding out about power of attorney, in the Task Group’s view:

- Seeing or seeking out general information via internet, leaflets, posters, publications etc. This could apply to someone with an immediate potential need for LPA or someone interested in planning for a possible need in the future.

- Being made aware of LPA by a health, social care, voluntary sector or other professional due to particular circumstances – this is more likely to be in the case of someone with an immediate potential need for LPA.

17. With access to the internet and knowledge of the term ‘power of attorney’ it is easy to obtain information. For example, the Office of the Public Guardian has a clear website with downloadable leaflets (www.publicguardian.gov.uk) and information is available via www.direct.gov.uk and www.nhs.uk. Locally, there is a page on the East Sussex County Council website called ‘Managing Financial Affairs’ which provides information on LPA. Even without knowledge of the term ‘power of attorney’ it is relatively straightforward to find details. For example, entering ‘accessing someone’s finances’ into Google offers up a Community Legal Services leaflet ‘Dealing with Someone Else’s Affairs’.

18. Of course, not everyone has access to, or is able to use, the internet and usage tends to be lower amongst older age groups who may be most affected by LPA. The Office of the Public Guardian provides useful information leaflets but these do not appear to be widely available to pick up in hard copy (although copies can be requested). Voluntary organisations do provide information leaflets, such as the Alzheimer’s Society and Age Concern factsheets available through local branches or their national offices. These voluntary sector routes are likely to help people who are completely unaware of term ‘power of attorney’ or the existence of the provisions, as they may come across the information whilst generally seeking information from these organisations.

19. Carol Wilkinson, Project Manager, Mental Health Commissioning, East Sussex County Council, advised the Task Group that a local leaflet on LPA had been considered but that statutory bodies were wary of duplicating leaflets and information already in existence. It was felt that a simple flyer or poster which would raise awareness of LPA and signpost to existing sources of information may be more appropriate.

20. For the second group mentioned above (see paragraph 15) with an immediate potential need for LPA, health, social care and other professionals are key. These workers are likely to be in contact with, and able to identify, patients/service users and carers who may be in need of LPA in the future due to a particular health condition. They would be able to bring the option to the attention of the person (and carer if appropriate) and signpost them to sources of information and advice.

21. Locally, significant efforts have been made by statutory agencies to prepare for the implementation of the various aspects of the Mental Capacity Act. The local NHS and the County Council’s Adult Social Care department have established good partnership arrangements to jointly organise training for health and social care staff on the Act’s provisions. The lead officers for the training programme explained to the Task Group that this training had been comprehensive. It has been more difficult to access GPs and their staff, but further funding has been obtained to undertake additional sessions aimed at these groups, and to develop an on-line summary training course. The training ensures staff are aware of LPA, as well as other provisions in the Act, and should put them in a position to draw the attention of patients/service users and carers to the LPA option if appropriate.

22. The Task Group noted that LPA applies to people aged over 18 and identified that there may be young people with certain disabilities who are approaching the age of 18 and who may need or want to put LPA in place. Staff in these environments may be well placed to make young people and their families aware of the provisions.

23. The Task Group has concluded that there is a good amount of information available on LPA, particularly for anyone seeking it out, and especially if they have internet access. There is perhaps less information aimed at making people aware of the provision if they had not heard about it and were not seeking information. The Task Group believes any additional work on information should therefore focus on this area.

Recommendation 1

Local Mental Capacity Act managers, working with the health and social care 'access to information' project, should consider:

- e) **The production of a simple poster and flyer which would make people aware that LPA is available and sources of further information, to be placed in key locations such as GP surgeries, libraries, day centres, special schools etc.**
- f) **Opportunities to place information about LPA into suitable existing publications, for example the 'Forward from 50' brochure.**
- g) **Opportunities to link with information or services related to wills and life insurance in East Sussex.**
- h) **Whether the Office of the Public Guardian leaflets could be made more widely available in public places in East Sussex.**

Finding support

24. Once someone has found out about LPA, the next step is to look into making an application. The relevant forms are freely available to download from the Office of the Public Guardian website, or application packs can be requested by phone and sent by post. In theory, the forms can be completed by a lay person without support, using the guidance notes provided. However, anecdotal evidence suggests that most people would find the forms difficult to complete without assistance and will need to seek some kind of support. Individuals are likely to need 'signposting' to sources of support through organisations and services they are in contact with.

25. Calls to the Office of the Public Guardian appeared to offer mixed advice on where to go for practical support in making an LPA application but solicitors and Citizens' Advice Bureaux were mentioned. These options are discussed further below.

26. Research conducted by the Task Group confirmed that the most common source of support is a solicitor. Many statutory and voluntary sector groups advise people wishing to apply for power of attorney to seek advice from a solicitor if possible, in order to ensure the correct procedures are followed and the forms completed accurately. Internet searches revealed that many local solicitors offer a power of attorney application service at a cost.

27. Organisations are understandably reluctant to recommend specific solicitors but some will supply lists of local firms who offer the service (for example, Sussex Partnership NHS Foundation Trust offers a list of local solicitors and can put people in touch with their chosen firm and Care for the Carers' Hospital Liaison Worker offers a list). These lists, coupled with details easily available from the internet or telephone directories, lead the Task Group to conclude that it is relatively easy to find a solicitor to handle the process, provided one can afford the fees.

28. However, the Group identified two possible areas for improvement. Firstly, although it is straightforward to find a solicitor, it may be more difficult to know whether firms are knowledgeable in this area and suitably experienced. Secondly, it should be possible to obtain a free 30 minute initial consultation with a solicitor before deciding whether to engage their services to pursue the matter in question. The Task Group believes awareness of this option could be heightened. It may be possible to use national or local accreditation schemes, such as the County Council's 'Buy with Confidence' scheme operated by Trading Standards to provide some indication to consumers as to whether a firm is suitable or not, and whether it has experience of LPA.

29. Given that support is relatively easily available to people who can afford and are able to engage a solicitor, the Task Group were particularly concerned to examine the support available to those unable or unwilling to obtain legal advice (for financial or other reasons). NHS organisations and local authorities are generally unable to provide significant support directly to people on the process of applying for LPA, unless perhaps the person has no family and their finances need to be managed to pay for their care. These organisations will, however, signpost individuals who are unable to engage a solicitor to other potential sources of advice and support in the voluntary sector. The Task Group's research with voluntary organisations suggested that many offer general advice and information over the phone or in the form of leaflets or internet pages. However, the main source of practical support with form completion appears to be via Citizens' Advice Bureaux (CAB).

30. The support provided through these routes in relation to the application process is discussed further in the next section.

Recommendation 2

Local Mental Capacity Act managers should liaise with Trading Standards to investigate the feasibility of promoting the Buy With Confidence scheme to local solicitors offering family legal services such as LPA applications.

Recommendation 3

HOSC should write to the Office of the Public Guardian to request that they consider an accreditation scheme for solicitors to help consumers identify those with relevant training and/or experience in LPA matters

Applying for power of attorney

31. As highlighted above, there are three main places individuals tend to be signposted to for practical support in making an application:

- Office of the Public Guardian helpline
- Solicitor
- Citizens Advice Bureaux

32. Having identified, or been signposted to, sources of support, the next step is to make the application. The Task Group took a limited look at the type of support available through these routes.

33. Calls to the Office of the Public Guardian's telephone helpline ascertained that staff are able to answer specific queries about forms and procedures, but cannot support people through the completion of the entire process. Calls to the helpline were promptly answered, staff were generally friendly, helpful and knowledgeable but confirmed that they are not able to talk people through the completion of the whole form. The Task Group concluded that the helpline service, whilst valuable, did not offer a comprehensive support service.

34. The Task Group did not look in detail at services offered by solicitors but feedback from health and social care staff and voluntary organisations suggested that solicitors offer a comprehensive service, effectively taking on the whole task of form filling and obtaining necessary input from the various parties. The main barrier to accessing this support is cost, although some people may not wish to engage a solicitor for other reasons. Legal aid may be an option for some people. The Task Group heard anecdotal evidence that it may be more difficult to obtain legal support in relation to a personal welfare LPA compared to a property and affairs LPA as the former is a newer and perhaps more sensitive area. However, it was not possible to investigate this further.

35. The main source of free, practical support is Citizens Advice Bureaux (CAB). Local CAB staff told the Task Group that they do receive a number of requests for help with LPA applications (for example, Hastings and Rother CAB had received 17 enquiries in 3 months) and that they provide support with form filling where possible, although they may recommend getting forms checked by a solicitor. They are also able to advise on which solicitors offer a legal aid service where this may be appropriate. CABs also suggested that an ageing population means that LPA issues may become more common.

36. Inevitably the resources available to CABs, as voluntary sector organisations, are limited and this is reflected in their restricted opening hours and staffing levels. It was clear to the Task Group that although they offer a valuable service in relation to LPA, it may not be possible for everyone who needs it to be able to access the service. The Task Group concluded that sources of funding could be investigated with a view to supporting the service offered in some way and potentially to evaluate the benefit of such a support service to local individuals and organisations.

37. The Task Group did not look in detail at the LPA forms and application procedure but noted that the Office of the Public Guardian had recently consulted on simplifying the forms and reducing the fees charged from £150 to £120. The Group also noted that fees could be waived altogether in certain circumstances, although another form has to be completed to apply for the exemption. It is possible that an additional fee will be charged if an incorrectly completed form is submitted and has to be returned for amending. The proposed improvements to the form are welcome, but the Task Group's view is that they will not fundamentally lower the complexity level of the form and therefore most people will still require support.

38. It is important to note that the Office of the Public Guardian is charged with ensuring that LPA powers are not abused and that safeguards are in place. There will therefore need to be a certain level of complexity in the process for the protection of individuals who are giving the power of decision making to others. The Task Group fully appreciates this, and welcomes the safeguards, but believes it must also be an accessible process to encourage proper decision making arrangements to be put in place in a planned way.

39. In summary, an LPA application is a relatively complex process, there are three main places individuals tend to be signposted to for practical support in making an application, and each of these has limitations:

- Office of the Public Guardian helpline – can only answer specific queries, cannot help with entire application process.
- Solicitor – can manage the entire process but is costly and some people will not be able to afford the fees. Legal aid may be an option for some.
- Citizens Advice Bureaux – offers free practical support, but has limited resources which restrict accessibility of support.

Recommendation 4

HOSC should write to the Office of the Public Guardian to:

- c) welcome the recent consultation on simplifying forms and reducing charges for LPA applications, but highlighting the fact that it remains difficult for individuals to complete the forms without assistance, and that most of the available support is costly.**
- d) request that they consider funding Citizens' Advice Bureaux nationally to provide a support service to people needing support with a power of attorney application who cannot afford a solicitor.**

Recommendation 5

Local Mental Capacity Act managers should investigate any potential funding sources to pilot and evaluate a 'surgery' type service which could support local people needing to apply for power of attorney.

Appendix: Methodology

Scope of the review

This short review was initially established to consider and make recommendations on the following:

“the support and advice available to individuals, families and carers in East Sussex when applying for power of attorney for someone lacking mental capacity”

As the review got underway it was sensible to amend this to refer to ‘..someone who may lack mental capacity in the future’ for the reasons described in section 2.

Board Membership and project support

Review Board Members: Councillor Ruth O’Keeffe and Councillor Sylvia Tidy. The Councillors jointly chaired the review and made decisions in relation to the objectives, activities and recommendations.

The Project Manager was Claire Lee, Scrutiny Lead Officer and project support was provided by Sam White, Scrutiny Support Officer.

Methodology

As this was a short review with limited time and resources, the methodology was based around desk research. The Task Group identified a range of local health, social care and voluntary sector organisations likely to be involved in power of attorney issues who were contacted by telephone or email regarding power of attorney enquiries and support. Key individuals were asked to attend Task Group meetings for a more detailed discussion. A standard set of questions was used as a basis for conversations, as follows:

Q1. Do you receive enquiries from people about applying for power of attorney? If so, what sort of issues do people ask you about? *(Possible prompts – cost, complexity of process, implications of taking on the role)*

Q2. What sort of support can your organisation provide to people needing to apply for power of attorney? For example:

- a) not able to offer any support/don’t know anything about it
- b) can signpost them to other sources of information *(if so, find out where)*
- c) can offer general advice and information but can’t directly support them in the process
- d) offer direct support to people through the process *(e.g. help finding solicitor, obtaining/filling forms, applying for cost reduction)*

Q3. What, if anything, could be put in place locally to help people who are in the position of needing to apply? *(note that we are having to bear in mind the context of a set national legal framework and limited resources)*

Q4. Are there any other comments you’d like to make about the process of applying for power of attorney?

In addition, the Office of the Public Guardian’s national helpline was telephoned on three occasions to ask questions about the support and advice available and internet searches were carried out using the search terms ‘power of attorney’ and ‘power of attorney + East Sussex’.

Project Board meeting dates

7th January 2009

9th February 2009

23rd March 2009

28th April 2009

Witnesses providing evidence

The Board would like to thank all the witnesses who provided evidence:

Witnesses providing evidence in person

Carol Wilkinson, Project Manager, Mental Health Commissioning, East Sussex County Council

Bob Skinner, Lead Consultant, Social Care Training, East Sussex County Council

Witnesses providing evidence through telephone interviews or in writing

Amy Ball, Participation Project Worker, Sussex Partnership NHS Foundation Trust

Su Barnicoat, Development and Fundraising Manager, Activ8 & Focus on Mental Health

Jane Bonds, Senior Practitioner, Older People's Mental Health Team, Adult Social Care, East Sussex County Council

Marcia Carter, Mental Health Act Services Manager, Sussex Partnership NHS Foundation Trust

Dave Eastwood, South of England Advocacy Projects (SEAP) Mental Health Advocacy Project

Vicky Grimes, Southdowns Housing Association

Janie Hooper, Crowborough Citizens Advice Bureau

Rachel Kenny, PALS, Sussex Partnership NHS Foundation Trust

Maurice Lawlor, Mental Capacity Act Lead, NHS East Sussex Downs and Weald and NHS Hastings and Rother

Jane Lawrence, Service Manager, Rethink East Sussex Carers' Support Service Hastings

Amanda Morton-King, Advice Services Manager, Citizens Advice 1066 (Hastings and Rother)

Karen Park, Practice Manager Assessment and Care Management, Adult Social Care, East Sussex County Council

Andy Porter, PALS, Sussex Partnership NHS Foundation Trust

Office of the Public Guardian call centre staff (Three members gave telephone interviews – Mike, Minesh and Paula)

Angela Reid, Head of Adult Social Care Legal Services, East Sussex County Council

Sue Reilly, Team Manager Older People's Mental Health, Adult Social Care, East Sussex County Council

Laura Rickaby, Carers Hospital Liaison Worker, Care for the Carers

Rita Stebbings, Assistant Director (Resources), Adult Social Care, East Sussex County Council

Angie Turner, Interim Safeguarding Manager, Adult Social Care, East Sussex County Council

Marian Trendell, Professional Head of Social Care, Sussex Partnership NHS Foundation Trust

Evidence papers

Item	Date
The Mental Capacity Act 2005 – easy read summary – Department of Health	2009
Overview of Mental Capacity Act 2005 – Office of the Public Guardian	2009
The Public Guardian, Office of the Public Guardian The Court of Protection – their roles	2009
Making a lasting power of attorney (LPA) – creation pack – Office of the Public Guardian	2009
Managing financial affairs – East Sussex County Council web pages	January 2009
Trust wins award for work in mental capacity – East Sussex Hospitals NHS Trust press release	January 2009
Enduring power of attorney and lasting power of attorney – Alzheimer’s Society Factsheet	July 2008
Fees, exemptions and remissions – Court of Protection and Office of the Public Guardian	November 2008
Mental Capacity Act – Salford City Council web pages	October 2008
Arranging for others to make decisions about your finances or welfare – Age Concern Fact Sheet 22	September 2008
Reviewing the Mental Capacity Act 2005: forms and supervision and fees – response to consultation – Ministry of Justice	March 2008
Financial decisions under the Mental Capacity Act 2005 – MIND briefing	January 2008
A guide to enduring powers of attorney – Office of the Public Guardian	2008
Making decisions – The Independent Mental Capacity Advocate (IMCA) Service	2007

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