

9th March 2010

Mr David O'Shea
Policy and Customer Strategy
Office of the Public Guardian
PO Box 15118
Birmingham B16 6GX

Dear Mr O'Shea

Office of the Public Guardian: amendments to secondary legislation

I am writing in response to your consultation on the areas of the Mental Capacity Act 2005 that in practice have not worked as well as otherwise intended.

Drawing on the recently published report of the Nuffield Council on Bioethics, *Dementia: ethical issues*, I would like to raise a number of points in relation to Personal Welfare Lasting Powers of Attorney. Paragraph and chapter numbers in brackets refer to the Council's report.

In summary, we welcome the proposals that aim to make welfare powers of attorney more accessible. However, more could be done to support people in appointing a welfare power of attorney at the point of diagnosis and to actively monitor whether the current arrangements are hindering anyone who might wish to appoint a welfare attorney from doing so.

We would like to note that we are disappointed that the Mental Capacity Act Code of Practice itself is not open for consultation and review. In general, the Act has been welcomed by those working in the field of dementia. There are a number of areas, however, where extra guidance on how the Act should work in practice would be helpful [see Chapter 5].

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Access and support in appointing welfare powers of attorney

Welfare powers of attorney are a very good way of promoting a person's autonomy interests. They have many advantages over an advance decision as they permit decisions to be made in the light of up-to-date knowledge both of the person's clinical needs and the care options available. We therefore welcome all attempts by the Offices of the Public Guardian to make welfare powers of attorney as accessible as possible to anyone who wishes to make one, in terms of ease of completion, level of bureaucracy and cost.

Therefore, we support the OPG's proposals to expand the list of benefits that would qualify a customer for exemption from payment of OPG fees and a more flexible charging system for LPA registration fees. The proposals to give donors the option to have their attorneys supervised when they register their LPAs and an optional checking service for LPA applications may benefit some potential users, although these services do incur a fee.

However, the proposals could go further. We believe that, in supporting and facilitating decision making on behalf of people who are inherently vulnerable as a result of their declining capacity, welfare powers of attorney represent a 'social good' and that, as such, they should, in principle, be available free of charge for everyone. At the very least, a funding mechanism should be found in order to ensure that when a person is first diagnosed with dementia, they are actively supported in nominating a welfare attorney if they so wish. We recommend that the OPG works with the Department of Health to explore this further [paragraphs 5.55-5.56].

Monitoring barriers to appointing welfare powers of attorney

We recommend that the Office of the Public Guardian actively monitors whether the current arrangements are in practice hindering anyone who might wish to benefit from appointing a welfare attorney from doing so, whether because of the cost or because of the complexity of the process [paragraph 5.56]. This would provide evidence for any barriers that exist and help the OPG to improve the system in future.

The Council's report *Dementia: ethical issues* is available to download at www.nuffieldbioethics.org/dementia. A copy will also be posted to you, along with a hard copy of this response.

Please do not hesitate to contact me if you would like further information or assistance.

Yours sincerely

A handwritten signature in black ink that reads "Hugh Whittall". The signature is written in a cursive style with a large, sweeping 'H' and a long, trailing tail on the 'l'.

Hugh Whittall
Director