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AFM Response to consultation on Mental Capacity Act: small payments scheme

1. I am writing in response to this consultation paper, on behalf of the Association of Financial Mutuals. The objectives we seek from our response are to:

- Comment on the proposals, and their consequences for AFM members and their customers.
- Express concerns about the way the proposals might apply to Child Trust Funds.

About AFM and its members

2. The Association of Financial Mutuals (AFM) represents insurance and healthcare providers that are owned by their customers, or which are established to serve a defined community (on a not for profit basis). Between them, mutual insurers manage the savings, pensions, protection and healthcare needs of over 30 million people in the UK and Ireland, collect annual premium income of £19.6 billion, and employ nearly 30,000 staff[1].

3. The nature of their ownership and the consequently lower prices, higher returns or better service that typically results, make mutuals accessible and attractive to consumers, and have been recognised by Parliament as worthy of continued support and promotion. In particular, FCA and PRA are required to analyse whether new rules impose any significantly different consequences for mutual businesses[2] and to take account of corporate diversity[3].

[1] ICMIF, https://www.icmif.org/publications/market-insights/market-insights-uk-2016
[2] Financial Services Act 2012, section 138 K: http://www.legislation.gov.uk/ukpga/2012/21/section/24/enacted
[3] http://www.legislation.gov.uk/ukpga/2016/14/section/20/enacted

AFM comments on the proposals

4. We welcome the consultation by the Ministry of Justice, and are pleased to respond on behalf of our members, and the many customers they have who have been or will be affected by the issues discussed in the paper. Much has been written and debated about the problems faced by families with a maturing Child Trust Fund, in adopting the Court of Protection process. In a Lords debate in October 2021, Lord Young of Cookham estimated that of 10,000 children with learning disabilities that have been entitled to receive the proceeds of a CTF once accounts began to mature last autumn, “only a handful have negotiated the tortuous Court of Protection process”.

5. The hurdles required in the current process have caused extra cost and inconvenience to families, and no small amount of distress, so we are grateful that the Government has explored an alternative route, whilst still asserting the primary importance and role of the Court of Protection process, particularly for larger claims.

6. AFM members account for over a third of all Child Trust Funds. The majority of the accounts held by AFM members were revenue allocated, and are therefore held in equity-based, stakeholder accounts. In October, in recognition of the problems experienced by their customers, all AFM members with a book of CTF accounts pledged to adopt a protocol to permit families to withdraw matured CTFs of up to £5,000 in value, where the child is without mental capacity. This was driven by our desire to remove barriers and unfairness to a particularly vulnerable audience, and because as mutual organisations, our primary responsibility is to work in the best interests of customers. Our statement announcing the commitment is attached.

7. We communicated this initiative at the time to MoJ, though this was not acknowledged, and based on the script in the consultation, well-intentioned though our exercise is, the industry-based appears to have caused concern to officials. Whilst the ‘fair access protocol’ is not consistent with the legislation, we might have hoped for a more positive response. Instead, in seeking to rectify the anomaly in the Mental Capacity Act, the Government’s proposal is to adopt a formal small payments scheme.

8. This is intended to make the industry protocol unnecessary, and is intended to have much wider effect than CTF accounts. However, we are concerned that the proposed small payments scheme will be difficult for many CTF account holders to take advantage of. This is because of the limit proposed, and the presumed primacy of cash-based accounts.

9. We consider the small payments scheme should have a higher limit, of £5,000. As the consultation points out, the financial risk of the higher limit is likely to be borne by the providers, and as per our statement below, we confirm our previous commitment to working to that higher limit. We also consider that the current proposed scheme adds significant complexity to the process, beyond that which is required by CTF providers to satisfy identify checks and to make payments speedily and fairly.

10. We recognise that the proposed small payment scheme is intended to apply much more widely than CTFs, and that the lower limits and complexity are in part a result of seeking to widen the application of the arrangements. Whilst we understand that, we would prefer a separate approach is adopted for CTFs, as this would avoid some of the problems we predict with the proposed scheme. Failing this, the alternative of maintaining the fair access protocol separately for CTF providers, and with proper endorsement by MoJ, would be welcome.

11. The FCA's latest financial lives survey, from October 2020, indicated that 27.7 million people in the UK display one or more indicators of financially vulnerability. The survey also reported that 18% of UK adults had a mental health condition or illness, up from 12% immediately before the pandemic. This emphasises the scale of vulnerability that the financial system is working with now, and that the proposed small payment scheme might apply to millions of consumers. Because of that as well, we consider that a separate solution to the issues surrounding CTFs would be preferable.

12. In summary, we think the consultation is a significant step forward in removing an unfair barrier to some of our most vulnerable consumers. The creation of a legislative solution will make a material difference to a very large number of people, and as member-owned businesses, we remain committed to working with the government to help people lead a full and fair financial life, regardless of their circumstances.

13. We have provided responses to some of the questions raised in the consultation below, and would welcome the opportunity to discuss further the issues raised by our response.

Yours sincerely,

Martin Shaw
Chief Executive
Association of Financial Mutuals

Responses to selected questions in the consultation

Scope

Question 1: *In your view, is a small payments scheme needed? Please give your reasons.*

Yes, a formally constructed solution is essential.

As has been well-illustrated by case studies in the media, the situation for young people with a maturing Child Trust Fund (CTF) who have no mental capacity, has been very problematic. The current Court of Protection process may not be appropriate in every case.

The preference by the Government to enable payments via a change to the Mental Capacity Act 2005 means that inevitably the scope of these proposals is significantly greater than CTFs, for which the campaign to act was originally focused.

Whilst from a fairness perspective this opens the scheme to a wider group of individuals without mental capacity, it has made the process proposed much more complicated and caveated. We would have preferred that government approached CTFs as an exception and, as our response explains, the value of the approach to families with a maturing CTF will be potentially diminished from the wider approach.

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

- Positive

The scheme would help to address a significant need, including the range of cases reported for young people with a maturing CTF.

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

- Positive

There has been a range of examples in the media, relating to young people with severe learning difficulties and a short life expectancy, for whom the release of funds without the lengthy Court of Protection process would make a material difference to their lives, and where relying on the CoP process to enable the release of funds might mean the money arrives too late.

Whilst the focus has been on the maturity of CTFs, there will be numerous similar products and customer situations, for both young people and adults. The limit of the amount accessible, and the presumption that payments will be mainly from a single, cash account will no doubt lead to problems for some families, for example, where parents or carers are aware of a number of small pots held on behalf of the person without mental capacity. In such cases, the MoJ appears to be favouring withdrawal from a bank account; however, this will make it more difficult for AFM members to act in support of the family, as they tend not to offer cash accounts, but who provide savings for many millions of people, including a third of CTF accounts.

The current proposals therefore provide an obstacle for CTF providers in using the scheme. We think the most effective way of overcoming this would be to raise the limit to a more realistic £5,000, as covered in more detail below.

In any event, the education process for the parent or carer is important, to ensure they've taken account of all the funds available, before determining a particular course of action. For example, to resist withdrawing a small amount from a bank account, if that disqualifies the withdrawal of other funding, such as a CTF, which may have been specifically earmarked for vital, life-enhancing, spend. The process appears to provide for a cooling-off period, which the family and providers might use for contemplation, and to ensure the option pursued is best.

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

- Other (please specify)

We do not have detailed information on this, since the intention is to capture a wider range of products than just CTFs. It may depend on the amount involved and the source of funds: for example, cash withdrawals from a bank may be used for immediate cash needs, whilst funds from a long-term investment, such as a CTF, may have a specific target, including those listed in paragraph 82.

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

Yes. For children with a CTF, and with long-term arrangements similar to the proposed deputyship, we think it would be discriminatory to exclude those individuals, and produce an unreasonable expectation on a provider to assess how long the loss of capacity might be for.

The situation might be more problematic for products that do not have a fixed maturity horizon, since there is then a risk that the person applying for the funds might elect a period that is unrepresentative of the individual's long-term health, to withdraw funds.

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

As above.

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

No. We consider a high figure, of £5,000 would be more appropriate. This is because for CTFs, for example, with an average balance in equity-based investments of over £2,000 at maturity (based on data across AFM members), the proposed limit is likely to penalise families who have saved diligently for a specific target purchase, and where the benefits received would be life-enhancing.

AFM member OneFamily estimates that a cap of £2,500 will mean that 30% of CTF balances are too high. For equity investments, given the rapid increase in stock markets in recent months, the 30% estimate may have increased further.

The average balance of £1,500 quoted in paragraph 61 may be for cash-based savings, which have not generated the same returns, or which may be less likely to include top-ups.

In addition, as CTF regulations do not permit partial withdrawal, it would not be possible for the deputy to withdrawal up to £2,500 where the balance was higher. Whilst this could be achieved by transferring to a Junior ISA, this would create extra paperwork, and in any event, not all CTF providers have permissions to offer a Junior ISA. Whilst a £5,000 limit does not eradicate this issue, it removes the frequency substantially.

For AFM members who provide CTFs, who have already acted to support families in these circumstances, we have already accepted the potential risk of misuse or misdirection of funds, and do not consider this to be material. As mutually-owned organisations, we prioritise the release of funds to the consumer wherever we can.

We accept however that some providers, such as banks, may have to weigh up competing priorities, and that the potential exposure to misuse or subjective judgments, is greater where the scheme is extended to a wider customer set. We think this may be a limitation of extending the arrangements to a wider range of circumstances and product sets, though we do not have any information to substantiate it.

Question 8: *Is six months a suitable time limit for access to the small payments scheme? Please give your reasons.*

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

- Don't know.

The rationale provided does not give us sufficient information on which to form a view, however we sense that in some circumstances, and considering the vulnerability of many customers affected, a six-month window only may not be sufficient.

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

Question 11: *If any, which products do you think should be added or removed from this list?*
None.

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

Yes, though where the process generates significant savings to government, and extra costs to financial providers, we are concerned that the extra paperwork produces an excessive burden on providers, compared to the simpler process used by many firms for handling CTF maturities.

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

- Approach A.

The alternative is much more complicated and appears to put extra burden on financial providers and to replace the role of the court in potentially more problematic cases. It would also add much more complication to the process and therefore cause unnecessary delays to CTFs where there is a pre-existing named contact.

Question 14: *How do you think applicants should demonstrate their suitability when applying to the scheme?*
For approach A, the suitability process should be limited in nature, and is broadly consistent with the identity checks necessary for all CTF maturities.

Security

Question 15: *Do you think applicants should have to state their reasons for using this process as opposed to applying for a one-off or deputyship order from the CoP? Please give your reasons.*
Yes. Applications should demonstrate that they are aware of the options available and how they have weighed up a decision that is in the best interest of the individual.

Question 16: *Should applicants have to declare in their application what the funds will be spent on? Please give your reasons.*
Yes: though we think this might be a written declaration only that the funds are being spent to the benefit solely of the individual accountholder.

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

Possibly: for bank accounts this may be necessary, where there is no current deputyship. For CTFs, this would place a significant burden on the provider, and would be inconsistent with the long-term guardianship role of the applicant.

Question 18: *Are there any instances in which you think money should not be released to individuals?*

Yes
Where they have not be able to satisfy all the procedure requirements.

Question 19: *Do you think that applicants should have to provide contact details of a referee known to the account holder when applying to a small payments scheme? Please give your reasons.*
Yes/No/Don't know

Question 20: *Should financial services firms be required to contact named referees in all cases before making payment? Please give your reasons.*
Yes/No/Don't know

Question 21: *Should the named referee be required to sign a declaration in the application process to confirm they know both the account holder and applicant, and understand the purpose of the scheme? Please give your reasons.*
Yes/No/Don't know

Question 22: *Is a two-week notification period appropriate/long enough for the account holder or referee to raise an objection?*
Yes/No/Don't know
If no, please specify a period of time that you think would be more appropriate, and why.

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

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

We prefer Option 1, as it is a consistent and fair approach, and removes delays in releasing funds to the individual.

CTF legislation does not permit release of funds to a third party, so the option to pay funds direct to someone other than the accountholder would not be open for CTF products.

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

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

Should there be a higher spending limit on payments (greater than £2,500) made directly to providers of goods and services?
No: we consider there should be a single approach, and this added complication increases the risk of mis-application. In any event, CTF legislation would not permit payment to a third party.

Question 27: *Should applicants be required to keep receipts of all spending in the event of future objections? Please give your reasons.*
Yes/No/Don't know

Question 28: *If money is paid directly to the applicants, should there be a requirement to report back to the financial services firm how the money was spent, using receipts to evidence this? Please give your reasons.*
Yes/No/Don't know

Question 29: *Should account holder and applicant details be stored on a central register? Yes /No/Don't know*

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

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

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

Question 33: *Should the OPG be given powers to investigate fraudulent access to the scheme?*
Yes/No/Don't know

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

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

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

Simplicity

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

- Somewhat imbalanced towards security

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

- Not simple enough

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

- Fairly difficult

Question 40: *Would this process be feasible for financial services firms to introduce? Please give your reasons.*
Yes: though it would be at significant handling cost to the provider, and for a low value product like a CTF, the cost is disproportionate to the low management fees received, and the degree of risk to the consumer.

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

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

- Two weeks

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

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

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

AFM member OneFamily provided an estimate that 20,000 CTFs account holders may have been impacted so far. We note MoJ estimated of around 125,000 CTFs where the account holder may lack capacity.

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

- Children's investment accounts

Across AFM members, the average reported maturity value of CTFs in 2020/21 was £2,180 (as at 1 September 2021).

The Court of Protection process

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

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

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

Equalities

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

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

Mutual providers of Child Trust Funds confirm commitment to support young people with a learning difficulty

20 October, 2021

The government has announced it will shortly be issuing a consultation designed to streamline the process by which children with learning difficulties can access their Child Trust Fund (CTF) when it matures. On 11 October the House of Lords held a debate on the issue, during which it was suggested around 10,000 young people with learning difficulties have had a CTF mature over the last 12 months, of whom many have faced extra costs or long delays to access their funds. In fact only 4 families in this situation have successfully navigated the current Court of Protection process which is in place, to gain access to their CTF.

As a result, all 8 member organisations of the Association of Financial Mutuals (AFM) with a book of Child Trust Funds*, who between them manage a third of all CTFs, have agreed to a protocol which allows for balances of up to £5,000 to be released, without the need for their parent or guardian to adopt the usual Court of Protection process, and with proportionate safeguarding of the interests of the CTF holder. The protocol is a process that is similar to the fair access protocol used by The Department for Education to enable vulnerable people to obtain a school place, and allows the release of funds against documentation that the parents or carers may already have.

We support a formal legal solution in development by the Ministry of Justice. Until a formal solution to this problem is achieved, the recognition of the Fair Access Protocol by the Government would enable providers and disability charities to support more families as their child's account reaches maturity, by allowing clear signposting of the protocol as an alternative to the Courts Process for smaller balances.

Martin Shaw, Chief Executive of AFM said:

"As a sector, mutuals are keen to support the vulnerable and those least able to access financial services. All AFM members with a CTF book have agreed to simplify the maturity process, to reduce costs to parents and carers, and to ensure young people receive the money due to them without delay. We are doing this ahead of the government consultation and planned changes to the law, because it is very much the mutual way of doing business".

*AFM members with a CTF book are:

- Foresters Friendly Society
- Healthy Investment
- OneFamily
- Scottish Friendly
- Sheffield Mutual
- Shepherds Friendly
- Transport Friendly
- Unity Mutual (The Oddfellows)