

Ministry of Justice
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Dear Vulnerability Policy Unit,

Ministry of Justice - Mental Capacity Small Payments Scheme

We welcome the opportunity to respond to this consultation. ABCUL is the primary trade association representing credit unions in England, Scotland and Wales with around two thirds of credit unions in mainland Great Britain affiliated to the Association.

Credit unions are co-operative societies who provide financial services – primarily savings and loans facilities – to their member-owners. They are registered as Co-operative Societies under the Co-operatives and Community Benefit Societies Act 2014 and the Credit Unions Act 1979. As deposit-takers they are dual-regulated by the Prudential Regulation Authority and the Financial Conduct Authority.

Credit unions have since their inception in Britain in 1964 been closely associated with anti-poverty and financial inclusion. They tend to provide savings and loans facilities to those with limited or no access to financial services from mainstream providers, generally due to their low income and / or lack of a developed credit profile. They have been a central element of numerous government and philanthropic initiatives to extend financial inclusion and address the lack of adequate provision of affordable credit and secure savings facilities for large sections of the population. They are capped in the interest that they can charge at 42.6% APR under the Credit Union Act 1979 and provide credit in competition with high-cost lenders.

They are numerous, with 250 credit unions active in mainland Great Britain today and have 1.4 million members and £1.95 billion in assets under management. They range from mid-sized businesses of up to 50 staff to small voluntary organisations.

Response to Consultation

We respond to this consultation with an understanding that there is a need for individuals to access funds on behalf of those with limited mental capacity to manage their financial affairs in a shorter timeframe than the current CoP process allows. However, we also believe that if public needs are not being completely met by the current CoP process, that the CoP should take primary responsibility for resolving these gaps.

We recommend that a small payments scheme should be administered by both firms and the CoP. We believe financial services firms do not have the expertise nor - for credit unions in particular – the resources to handle complex applications to the scheme in an efficient and consistent manner and should be able to refer cases deemed higher-risk on to the CoP.

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We also think it is important to recognise that allowing access to £2500 does not have an inherently lower risk of fraud than with accessing larger sums, and that the acute impact can be just as serious depending on the circumstances of the victim. We accept that there will always be a baseline level of security checks required to minimise risk of fraud for a scheme of this nature. As a result, the extent a scheme of this nature can be simplified whilst minimising the risk of exploitation of vulnerable individuals is limited.

Further, we view the adoption of Option A for assessing applicant suitability as essential for ensuring that the scheme is feasible for firms to carry out and not overly burdensome.

Question 1: In your view, is a small payments scheme needed?

We trust that a quicker and simpler process for accessing funds on behalf of individuals with limited mental capacity to manage their financial affairs is needed based on the MoJ's consultation with the disability sector. We understand why it would be useful for there to be access to the funds of an individual lacking mental capacity whilst a more permanent arrangement is put in place. If firms are already making informal arrangements to help individuals avoid the complex and timely process of applying to the CoP, it seems appropriate to consider a formal scheme to make outcomes more consistent. However, the main contention is how responsibility for the scheme should be shared between financial services firms and the CoP.

Question 5: Should the scheme apply to individuals who have fluctuating or temporary loss of capacity?

We do not think that the small payments scheme should apply to cases where the account holder has a fluctuating or temporary loss of capacity. There would be significant risk of the individual disagreeing with the use of funds once they regain capacity, as the consultation paper states. As the scheme includes non-essential spending, we see there being heightened risk of disagreement following a return of the individual's capacity. We believe that firms should not be liable for the risk in such a situation. We also believe the CoP has the necessary expertise to determine the best course of action where individuals have fluctuating or temporary loss of capacity, and so would be better placed to handle these complex cases than frontline financial services staff.

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

We view the £2500 as a significant enough value to require stringent protections against fraud. If financial firms are given the responsibility of full suitability checks and evaluations, and applications are not restricted to those already named as a suitable contact (i.e., approach B to assessing applicant suitability is taken), the limit for payments should be reduced to reflect the risk of fraud created by an easy-access payments scheme. However, we feel that the £2500 limit may be suitable if the risk burden on firms is reduced by taking Approach A for the scheme, and if applications can be escalated to the CoP process where this would be more appropriate.

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

We agree that cash products would be appropriate for the small payments scheme. We also agree that assets with more complex management requirements, such as loans, and non-financial assets are beyond the scope of the scheme.

Question 12: Should financial services firms be responsible for administering a small payments scheme?

We would suggest that responsibility for the scheme is shared between the CoP and financial services firms. Such an arrangement would support firms in managing cases that would be relatively straightforward to process, but also allow firms to refer more complex applications to the CoP to process.

We think that financial services firms should only be responsible for processing applications they feel are simple enough to be appropriate and proportionate for a small payments scheme. We view it as essential for firms to be able to refer any cases they deem too risky or complicated onto the CoP to process. This is both to reduce the administrative burden on firms and to ensure the release of the account holders funds is appropriately considered. The CoP has the expertise to manage more complex cases with consistency, efficiency, and skill. The £2500 value limit for the scheme is still significant to individuals, so it is important that the right decision is always made on behalf the account holder.

It would also be useful for the CoP to be able to receive and directly handle applications for the small payments scheme as well as firms. In particular, it could be beneficial for the CoP to process small payment scheme applications for individuals already applying to the CoP for more permanent arrangements who face the average 21 week wait to receive access to funds, as there will likely be some crossover in the assessments required for both applications. In these cases, the CoP could send approved applications on to firms to grant access to payment swiftly.

If financial services firms are even to have a shared responsibility for the scheme, they should retain the flexibility to adjust the complexity of the process for handling applications according to their own risk assessments. Further, firms should not be expected to make complicated assessments of suitability of the applicant when the scheme is intended to be simple and straightforward. We will reiterate both of these points in our response to further questions.

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

We strongly believe Approach A would be the appropriate choice for determining applicant suitability given the intended simplicity of the scheme, and that approach B would be disproportionate to the scope of the scheme. If the scheme's purpose is to provide simple and quick access to funds, then the administration process itself must be proportionately simple for

firms to carry out. The level of risk presented to firms and account holders by the scheme must also be proportionate to the simplicity of the application handling process.

To prevent exploitation of the account holder, it is necessary for a full investigation of suitability to have been carried out at some point along the line when an applicant is trying to access funds on behalf of a vulnerable individual. However, the time and cost implication for firms of carrying out a full suitability check is significant. Many front-line credit union staff will not have the necessary expertise to carry out such a check consistently and efficiently. Firms should not be expected to carry out full suitability checks for a scheme that is intended to be simple and offered to applicants for free. Option A, however, may be feasible for firms to carry out for the scheme by building on authorisation already granted by other organisations.

Option B would require front line staff in firms to be prepared to implement a complicated process that they will rarely need to use, whilst the CoP already has the knowledge base to handle these cases appropriately. We believe that the MoJ should provide for situations where access is needed but no checks have been carried out on the applicants, as firms are poorly positioned to assess the trustworthiness of applicants they may have no relationship with. Firms would be able to signpost or refer individuals to the CoP in such cases.

Question 14: How do you think applicants should demonstrate their suitability when applying to the scheme?

In accordance with our answer to question 13, existing authorisation should be a key aspect of demonstrating applicant suitability. We also think that the applicant should clearly identify their relationship with the account holder and their reason for applying to the small payments scheme. Given the intended simplicity of the scheme, it would be too burdensome and complicated for firms to assess the applicant's trustworthiness to a meaningful level, as suggested with Approach B. We would hope that the use of existing authorisation of some form, as required with Approach A, would be sufficient in verifying the applicant's trustworthiness.

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?

We think that applicants should have to state their reasoning for using this process to ensure that they have a strong basis for using the small payments as opposed to applying to the CoP. The addition of this question to the application form would not overcomplicate the process for applicants. We believe that the request to declare reasons for using the scheme is necessary part of the application process, given the risk of exploitation of the account holder.

Question 16: Should applicants have to declare in their application what the funds will be spent on?

It would be appropriate for applicants to declare what the funds will be spent on to add another simple security measure and set an expectation that the funds should be used specifically to meet the needs of the account holder.

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

We agree that financial history of the applicant should not be routinely assessed by financial firms, as it would add to the administrative burden of processing applications. We also agree that financial history checks could discourage individuals from using the scheme. The risk of the applicant misusing the funds could otherwise be reduced by taking approach A to suitability, asking the applicant for how they intend to spend the funds, and by requiring the applicant to retain receipts confirming how the funds have been spent.

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?

We think it should be a requirement for the applicant to provide contact details of a referee as part of the application form, in case the firm deems it necessary to carry out a referencing process for the application. The addition of this requirement should not make the process too complicated for the applicant and may be a necessary security measure.

Question 20: Should financial services firms be required to contact named referees in all cases before making payment?

We agree with the consultation paper that firms should not be required to contact named referees for each case, and that the decision to carry out referencing should be down to the firm and their risk assessment each application. As acknowledged in the consultation paper, the firm may be familiar the account holder, application or referee. This is particularly the case for credit unions that often maintain a close relationship with their members, so an added obligation to carry out references in each case could add unnecessary burden. It is likely that credit unions would at least notify referees in the majority of cases, but it should be down to each firm to determine whether a reference is needed.

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?

We believe that firms should be able to make the decision of whether to require the referee to sign a declaration form, in accordance with its risk appetite, to allow simplification of the process in low-risk cases.

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

We support the adoption of option 3 for the scheme, in which the choice of mechanism of payment would be left to open to the firm to choose. There is a tradeoff between security and simplicity between the two mechanisms for payment, as direct payment for goods or services could work to

minimise risk of fraudulent activity but could also create more administrative burden. Credit unions would benefit from the freedom to consider which payment mechanism to use for the scheme based on their risk appetite and their operational capacity to accommodate for direct payment for goods and services.

Question 27: Should applicants be required to keep receipts of all spending in the event of future objections?

We believe it would be appropriate for the applicants to retain receipts of the spending as a condition of using the small payments scheme. We do not anticipate that this requirement will make the scheme overly burdensome or complicated for applicants. Rather, we assess that it is necessary for applicants to retain proof of spending, both to protect themselves and to allow the firm to request evidence of the use of funds.

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?

It would be appropriate to allow firms to set the requirement for applicants to report on their spending as and when, based on their own risk appetite and operational capacity to review this evidence. Mandatory reporting of applicant spending to firms may create an unnecessary administrative burden in cases where the applicant is known to the credit union or where other sufficient security checks have been carried out.

Question 29: Should account holder and applicant details be stored on a central register?

We think that it is necessary to have a central register to maintain a record of users of the small payments to scheme to adequately prevent fraudulent activity and exploitation of the account holders. Maintaining a central register with the details of account holders and applicants on a central register would make it significantly easier for firms to verify that neither party has already used the small payments scheme. If a central record is not kept for the scheme, there would be no way to verify that the account holder has not already had funds accessed through the scheme for an account with another firm. As a result, there would be a clear gap in the process for checking suitability that could allow a vulnerable individual to be more easily exploited.

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?

We would view the charging of an application fee for the central register as disproportionate and agree that it could disincentivise the use of the scheme. We believe that the central register should be funded by Government if necessary. This is on the basis that firms are already being expected to absorb the additional cost of administering the small payments scheme and that the scheme

provides a public good. We would view it as excessive and overly bureaucratic to pass the cost of the register onto individual applicants.

Question 33: Should the OPG be given powers to investigate fraudulent access to the scheme?

We do not necessarily see a need for the OPG to be given powers to investigate fraudulent access to the scheme, as there are other channels available to investigate reports of fraud, such as Action Fraud. Consumers can also take a complaint to the Financial Ombudsman Service if they feel a firm has acted negligently when processing an application under the scheme.

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

We think redress should usually be sought from the fraudulent individual(s) wherever possible. We also expect that redress may be sought from firms in cases where they have acted with negligence.

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

We suggest that the liability of firms using the scheme is limited by requiring the applicant to sign a waiver in order to access the account holder's funds. A waiver should state that it is the applicant's responsibility to act in the interest of the account holder, and that the firm is not responsible for any disagreement that arises as a result of the spending of the funds.

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

If firms are to administer the small payments scheme, we would view approach A to suitability as a relatively balanced between simplicity and security. This is because approach A utilises pre-existing authorisations to both simplify the security checks required and ensure a base level of security with applications. If approach B is taken, we anticipate that credit unions would have to make a hard choice between simplicity and security. Firms would need to find some balance between a short, simple but highly risky evaluation of applicant's suitability on the one hand, or a lengthy process of security checks to minimise the risk of fraud on the other.

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

We would not consider the small payments scheme process simple for credit unions to implement, as there will be a number of security checks and risk assessments involved with each application. Credit unions serve a relatively low number of consumers compared to other financial firms and are likely to receive a limited number of applications for the scheme. The resulting lack of familiarity with the small payments scheme process will exacerbate the complexity and costs of the scheme on a per case basis. A small payments scheme can be made simpler for firms by escalating more complicated cases to the CoP, as well as by limiting applications to individuals who would fall under Approach A of assessing suitability.

Question 40: Would this process be feasible for financial services firms to introduce?

We are concerned about the feasibility of credit unions being able to carry the full burden of the small payments scheme proposed. Credit unions are likely to receive a low number of applications to the scheme, meaning that there is likely to be inefficiency in going through the various steps and risk assessments involved with processing each case. £2500 remains a significant value, and the scheme will necessarily involve a number of security checks to reduce risk of exploitation of the account holder. As a result, there is an associated cost implication of the staff/volunteer time required to manage each case.

Nevertheless, the cost of a low number of applications for the scheme may be manageable to credit unions if the complexity of suitability checks are reduced via taking option A. We foresee that the scheme may be feasible for credit unions to introduce if the MoJ takes the steps to ensure that firms' responsibility is minimised, and that firms are able to pass on more complicated or risky cases to the CoP. To increase feasibility of the scheme, we would strongly recommend that the CoP is also able to assess applications for the small payments scheme.

Please let me know if you wish to further discuss the proposal for a small payments scheme.

Yours sincerely,

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