

**In The “Best Interests” Of Us All**

The Public Guardian Board’s Annual Report 2010



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## Executive Summary

It is now three years since the Mental Capacity Act (MCA) came into operation and the Public Guardian Board started work formally. To mark that point and the fact that this may well be our final report, we have taken the opportunity to reflect on the progress that has been made in that initial period and on what we believe needs to be done in the future to develop the vision of the Act and the work of the Office of the Public Guardian (OPG).

That reflection has forced us to the conclusion that to achieve real progress a radical shift is needed in the way the OPG operates. The Office should be enabled to take a more commercial and businesslike approach, to develop a pro-active marketing strategy focusing on getting more people to take out Lasting Powers of Attorney, and to meet the inevitable troughs and peaks of demand.

At the same time Championing the Act through collaboration across government and the wider community is vital to ensure both the spirit and the letter of the MCA.

It is with all these points in mind, that we are making the following recommendations aimed at meeting these aspirations.

## Recommendations

1. The OPG should be given the freedom to explore a range of business options, including outsourcing and commercial partnerships. Allied to this should be the flexibility to manage the Office's budget and invest over a three or, preferably, five year period. These changes are essential to provide improvements to services.
2. The OPG should implement pro-actively the Communications and Marketing Strategy, which is focused on increasing the take up of LPAs, initially targeting those with variable capacity, those at risk of losing capacity over the next 10 years and those in high risk occupations. At the same time the Office should ensure it has both the capacity and capability to meet the additional demand.
3. The OPG should develop pro-actively communications with a wide range of stakeholders, through the launch and implementation of the Stakeholder Strategy. Joint working with organisations that are in direct contact with people who use the OPG's services is essential.
4. The OPG having completed and tested the IT strategy, identifying the requirements needed, in-house, to deliver an efficient, effective and responsive service, that is fit for purpose, should proceed to develop that strategy as a matter of urgency.
5. Regulatory and professional bodies are urged to ensure that the Mental Capacity Act and the way it operates, particularly making "best interests" decisions, is a core element in the foundation training of all doctors, nurses, social workers and other health professionals and integral to ongoing development and professional education.
6. The Government is urged to recognise the need for a powerful and independent Champion for the Mental Capacity Act to ensure the Act's potential is realised. The MCA enshrines the rights of every citizen to exercise choice and to receive assistance to do so when their ability is limited. To achieve this, many different players, from across government, health, social care and the third sectors, need to work together.
7. The Government is urged, when the PGB is abolished and new governance arrangements are introduced, to mandate an OPG Management Board with a strong Non-Executive presence. Extending this approach to include a Non-Executive Chair who can support the Public Guardian and Ministers in influencing the MCA landscape and championing the Act, is key to the OPG's development.

## Foreword from the Chair

This is the third, and, in all probability, the final report of the Public Guardian Board (PGB). The PGB was set up under the Mental Capacity Act (MCA) 2005 and came into operation in 2007. For three years we have advised the Lord Chancellor about the implementation of the MCA and the performance of the new Office of the Public Guardian (OPG), provided support, scrutiny and challenge to the Public Guardian, and maintained a lively dialogue with those who use or provide services under the Act. In these ways we have discharged our duty to keep a highly significant piece of legislation under active and independent review during its formative years.

We are encouraged by the early steps that the OPG has taken towards becoming a customer-focused organisation, by seeds of change in the attitude of professionals towards those they care for, and by the way in which our advice and formal recommendations have been received and acted upon.

Given the current financial constraints and the Government's obligation to concentrate public expenditure on essential functions, we agree that an advisory board such as ours cannot continue into the future, and we support the proposal in the Public Bodies Bill, currently before Parliament, that we should be one of the bodies that ceases to exist. We hope that robust alternative arrangements for the OPG's governance will be put in place.

I have played an active part in discussions about more streamlined governance arrangements for the OPG. I am very clear about the need for effective accountability and challenge within an arm of government with such an impact on the lives of our most vulnerable citizens. In this report we argue for the OPG to adopt a more

businesslike model, and to be freed from the traditional constraints of a central government agency. Such a transition in my view adds to the case for a strong and integrated governance structure to succeed the Public Guardian Board, which has operated up until now alongside the internal management processes of the OPG.

The Mental Capacity Act is ground breaking and on a par in significance with the Human Rights Act. After fifteen years in gestation it passed through Parliament and entered the statute book with cross-party support. It is a credit to our democracy that we now have enshrined in law the principle that all citizens should be encouraged and empowered to make decisions for themselves, within a framework of safeguards to support those who lack capacity, and to ensure that their interests underpin decisions taken by Attorneys and Deputies. I can think of no better strap line for the Act than the Coalition mantra 'No decision about me without me'.

The Public Guardian Board, which was set up as a result of a Lords' amendment, has meant that Ministers have been kept informed by an independent 'watch dog' about the roll out and effect of legislative change. After our demise it will be even more important that the Government is alive to the provisions of the Act and its role in promoting active citizenship and protecting the vulnerable. The MCA is a highly complex piece of legislation with far reaching implications, many of which are still to be generally realised. We are a long way from a situation in which all those providing health and social care understand and reflect the principles of 'best interests decision making' in their practice, an issue we emphasise in this and previous reports. The balance between empowering citizens whilst safeguarding them from abuse

pervades all areas of public policy, and it is critical to realising the principles embodied in the MCA. Perhaps understandably, attention to date has focused on having effective safeguards. It must now shift to the provisions that allow people to record their preferences, in advance of dwindling capacity, and to those that require support and who need assistance in expressing their preferences.

As I write, the Department of Health is closing its MCA Implementation team, Local Authorities are trimming all but essential services, and Primary Care Trusts are being abolished. The challenge to the Government, in maintaining the momentum and reaping the potential of the MCA in the face of such financial constraint and organisational upheaval, is enormous.

My fellow Board members and I have found our work on the Public Guardian Board to be productive, worthwhile, and enjoyable. It has been exciting to play a part in realising reform across justice, health, social care, and the voluntary sector. In the course of our enquiries we have come into contact with a wide range of individuals and representatives of interest groups, all of whom have shown real commitment and spoken openly and constructively about the issues to be tackled.

We pay tribute to Martin John, the Public Guardian, for the spirit with which he has actively engaged with us and positively encouraged our scrutiny. We thank Martin and all of those who work at the OPG and we wish them well in the future. We are indebted to Senior Judge Denzil Lush, David Thompson in Her Majesty's Court Service, and Paul Gantley in the Department of Health, for collaborating with us and for their individual roles in implementing our recommendations to

date. We wish to record the enormous good will we have encountered from all parties.

As Chair, I have been very fortunate to work with a Board of talented, principled, and supportive members. This report is the product of many forthright Board meetings and of the extensive conversations which each of us had with different stakeholders.

**Rosie Varley OBE,  
Chair of the Public Guardian Board.**

## The Role of the Public Guardian Board

The Board's statutory duty, as set out in the Mental Capacity Act 2005, is to scrutinise and review the way the Public Guardian discharges his functions (**Annex A**).

We provide an independent means of overseeing the work of the Public Guardian and the OPG to improve the services delivered to some of the most vulnerable members of society. The establishment of the OPG and its separation from the Court of Protection was an important feature of the Mental Capacity Act, the significance of which can only be understood in relation to the Act's other provisions and the principles that underpin them. From the beginning, with the support of Ministers, the Board took the view that it could only comment meaningfully on the performance of the OPG with reference to the wider MCA context, and so it has taken an interest in the role and performance of the Court, the Department of Health, Local Authorities, Regulatory Bodies, and the Third Sector. By our reading of Hansard, those who moved the Lords' amendment that created the PGB saw it as a means of keeping the delivery of the Act, not just the performance of the OPG, under the spotlight. In adopting this approach the Board has sought to comply with the spirit as well as the letter of the law.

The Board (**Annex B**) works in a number of different and complimentary ways. It holds quarterly Board meetings, attended by the Public Guardian and his Executive Team, to consider performance reports, advise on strategy, and discuss customer and stakeholder feedback. These allow us to hear directly from the Public Guardian, and to provide the Office with ongoing challenge, advice, feedback and support.

Running alongside these formal meetings there is an ongoing programme of external meetings with individuals and organisations that have a stake in the OPG's performance, and in the successful implementation of the MCA. This outside perspective is essential for the Board to understand the experience of those who use or provide the OPG's services, and to gain insight into a complex landscape made up of a number of different but interdependent players.

Whilst the Mental Capacity Act covers England and Wales, the health and social policy context within which it operates differs markedly in the two countries. If anything these differences are becoming more pronounced. The Board is very conscious of the need to understand and refer to the Welsh context. Each year we have held one of our four Board meetings in Wales, which we have combined with a private meeting with Welsh Assembly Officials, and a large open stakeholder event. Individual members of the Board have attended conferences and other events in Wales. It is important to note the consistency between the messages we have heard in Wales and England. The major themes highlighted in this report emerged equally from both.

Besides providing an Annual Report to the Lord Chancellor, the Chair has met personally with Ministers on a regular basis to share the Board's advice. These discussions, together with the Minister's attendance each year at the Annual Public Meeting, have provided an effective vehicle for the Board to report as required to the Lord Chancellor, and a channel of communication as envisaged by legislators from stakeholders to government.



## At the Office of the Public Guardian

Since the OPG came into operation in 2007 demand for its services has been high, with intermittent peaks that have stretched its capacity to deliver, and revealed limitations in its infrastructure and processes.

The first year was particularly difficult. The numbers of applications for Lasting Powers of Attorney were far in excess of those that had been predicted, resulting in a long backlog, unacceptable delays, and poor customer service. Unsurprisingly these difficulties generated an exceptionally large number of complaints, widespread dissatisfaction amongst the legal and advocacy community, and negative media coverage. In its first Annual Report the Board documented this position, but noted the plans, that by then, had been put in place to address the issues, and the early signs of turn around. In the event the interventions proved to be robust, and by the end of that year targets were being met, and more importantly there was a noticeable reduction in the number of complaints, together with outside recognition that services had improved.

During the following year the Office made real progress. Constraints and weaknesses were identified and addressed, and important but difficult decisions were taken. Plans were made to become a multi-site operation and offices were opened in Birmingham and then more recently the Contact Centre moved to Nottingham. Besides addressing long standing difficulties with staff recruitment and retention in London, this increased capacity, facilitated the introduction of new systems and working practices, and made it easier for the OPG to respond to varying workloads. The move to Nottingham was not without its problems and it has taken some time for the operation to deliver the service to the required standard. However

with additional training and support the situation has now improved.

There was a marked improvement in overall performance until late in 2009 when national newspaper and television coverage generated another sudden and sustained surge in applications for LPAs. Unprepared for this, backlogs again built up and performance targets were missed, although this time the OPG identified the situation earlier, communicated better with its customers, and avoided the general failure that was perceived before.

Despite significant and commendable management effort, experience to date leads the Board to observe that the current operating model of the OPG is inadequate to meet potential demand. If the Office is to become proactive, rather than reactive, major transformation and not incremental improvement is necessary. The Office must have the freedom and independence to build capacity and take control of its market. This is the thrust of this report.

Soon after the introduction of the MCA it became clear that many of the difficulties experienced stemmed not from the Act itself but from the administrative procedures that had been designed to support it. It is to the credit of the Public Guardian and of the MoJ that an early Review led to prompt action including a reduction in the registration fee, simplification of the forms, and a more sophisticated and supportive supervision regime. As a result more people now complete an LPA without incurring the cost of legal advice, and there has been a reduction in the number of errors and rejected forms. The Board welcomes these changes and the responsive attitude they evidence.

## At the Court of Protection

One of the fundamental reforms of the Mental Capacity Act was the separation of the Court of Protection from the Public Guardian. To begin with, the Court's remit was judicial decision-making, with the OPG providing administrative support including the supervision of Deputies. In its first report the Board recommended that the COP should be transferred to HMCS, thereby underlining its independence and allowing the OPG to concentrate on its own business, and the COP to benefit from the expertise available in an organisation dedicated to court management. This recommendation was implemented and the transfer took place in 2009.

Despite this proper separation the public do not, and cannot be expected to, differentiate between their interactions with the Court and the OPG – if the public is to have a good experience and the MCA to work effectively the COP and the OPG need

to communicate and perform in support of each other. For this reason the Board has maintained a keen interest in the COP, with our judicial member providing an invaluable link through the Court User Group. HMCS has introduced a number of initiatives which improve efficiency and reduce cost, including a fast track system for urgent applications.

The Board welcomes these and encourages further measures to make access to the Court easier, quicker, and more transparent. It is clear from our conversations and from our postbag that many complaints relate to the Court rather than (or as well as) the OPG. HMCS has made a good start but continuous improvement and modernisation is essential. Accordingly, the Board welcomes and supports the Court Rules Committee report and its recommendations.

## Looking to the Future

As this will almost certainly be the Board's final report we bring together our findings to date, identify and summarise the core themes that have emerged, and leave the Government with a number of strategic recommendations.

### **Awareness and Capacity**

An ultimate measure of success for the MCA would be for every adult to have a Lasting Power of Attorney recording their wishes for the future and choosing who will make decisions if they are unable to do so themselves. There are approximately 51,446,000 adults in England and Wales. According to The Office for National

Statistics 1 in 4 adults suffer from a mental illness at some stage in their lives. From implementation, October 2007 to the end of the financial year 2010, 212,253 people have registered powers of attorney. Bearing in mind the difficulties encountered by the OPG in dealing with demand to date, the scale of the challenge is clearly enormous.

The OPG has committed itself to increasing awareness of its services. We note its stated vision 'To encourage everyone to prepare for a possible lack of capacity and to safeguard those who lack capacity now.' Over the past twelve months we have supported the Office in developing a Communication and Marketing Strategy

focused on increasing the take up of LPA's. We suggest that this should be targeted on those with variable capacity, those who are at risk of losing capacity in the next ten years, and those in high risk occupations. Given the importance of citizens taking an active role in planning their future, and the Government's commitment to this principle, the Board hopes that the delivery of the strategy will not be a casualty of financial restraints.

There is a tension within the OPG between its duty to raise awareness and its capacity to meet the demand so generated. We have repeatedly witnessed the Office struggle to cope with surges in demand following unplanned publicity, and the way this has put a brake on marketing activity. We do not question the Office's intention to actively promote its services, but we are highly sceptical about the likelihood of this being successful within the restraints of its current operating arrangements.

The Board has come to the view that a radical transformation of the OPG's operating model is necessary for it to reach out and provide sustained high quality services to a significant proportion of citizens. As a Government Agency the OPG is required to manage its budget and meets its financial targets on an annual basis. This is a severe restraint that has resulted in a short term reactive approach. It prevents the Office from building capacity in tandem with planned increases in volume, and from managing demand and market expansion in the way a commercial operation would. In the first instance we regard it as essential for the Office to be given the flexibility to manage its budget and invest over a three, or preferably five, year period. In the longer term the Government should consider other models more conducive to commercially driven customer awareness.

## Cost and Access

Together the Court of Protection and OPG safeguard the interests of some of the most vulnerable and least powerful groups in our society. According to Alzheimer's Research trust there are over 820,000 people living with Dementia in the UK today. This figure is forecast to rise rapidly as the population ages, so that by 2025 we can expect there to be over a million people with Dementia. We know that one in four people will suffer a mental illness in the course of their life, and that there is a growing number of people with Acquired Brain Injury. Access to the rights and protection afforded by the MCA should be easy, simple and affordable to all. Most importantly cost should not be a deterrent to those most at risk. There is a widespread view that the costs associated with a Court application and Order are unacceptably high, and that when legal fees are included the option of taking out an LPA is restricted to the comfortably off. Whatever the reality behind these perceptions, the Board has no doubt that that they act as a significant disincentive, and we believe there should be a continuous effort to drive down costs and reduce customer charges.

We welcomed the reduction in the LPA registration fee in April 2009. Although the next fee review did not lead to a further reduction, we note there was not an increase. The Public Guardian is currently looking again at the fee framework with a view to making it more sensitive and flexible, and easier to operate. Consideration is being given to the system and levels for exemptions and remissions, the possibility of a reduction for taking out Property and Finance and Health and Welfare LPAs at the same time, and the introduction of a lower fee for those applications that are resubmitted because of a previous error. Whilst the Board wholeheartedly welcomes

this initiative, it is concerned that any proposals are thoroughly tested to ensure that they do not impact negatively on those with low incomes.

An early review of the MCA implementation led in 2009 to the introduction of an LPA form that was simpler, and more user friendly with clearer instructions. This was welcomed by customers and stakeholders, and has had the positive effect of increasing the number of applicants who submit an application without incurring the significant additional expense of legal advice. It has also led to a marked reduction in the number of forms rejected because of errors. The recent expansion of MCA related material within Direct.gov has opened up a new electronic channel and source of information. These are all steps in the right direction, which must be towards the fully automated on-line service that most people today expect and that is necessary to deliver significant cost savings.

The OPG's Information Technology infrastructure is inadequate and out of date. This gave rise to problems from the start. In previous reports the Board has highlighted the risks and the need for investment. In the past year operating across multiple sites and an increasing workload have put the IT systems under even greater pressure; consequently resulting in ever increasing backlogs. This is an urgent issue that must be addressed if efficient cost effective services are to be delivered.

As a matter of high priority consideration must be given to replacing the current bespoke IT system, and all its limitations, with systems that can support partnerships across sectors as well as empower individuals through e-enabling technologies.

## Stakeholders and Partners

In each of its previous reports the Board has highlighted the importance of the OPG maintaining an active dialogue with its stakeholders. Stakeholder engagement has been a major strand of our own activity, and Board members have used their individual networks to broker contact between the OPG and outside organisations that either provide services to, or represent the interests of, service users.

The Office's Stakeholder Forum has met intermittently, and there has been a gradual improvement in relationships since the early days when these tended to be limited and one sided. Key stakeholders have been consulted on policy changes and their views reflected in the improvements documented elsewhere in this report. However the Board has been disappointed by what it regards as slow progress in this area, and frustrated that opportunities have not been systematically exploited. Whilst communication within a close circle in the legal, health, and local authority sectors has been maintained, there has been relatively little contact with voluntary, third sector, and advocacy organisations. Joint working with organisations that are in direct contact with the people who most use the OPG's services are essential, and of enormous potential in terms of raising awareness and facilitating access. Over the past year the Office has developed a comprehensive and more sophisticated stakeholder strategy. We hope this will have been launched by the time that this report is published, and that it does not fall victim to financial restraint.

As part of adopting a more commercial model the OPG should consider entering into business partnerships to assist in marketing its services. We have in mind the partnership between the Passport

Office and the Post Office through which the customer pays a small fee for an application form to be checked and submitted. Professional financial advisors, companies marketing to the older age groups, and condition specific support groups might all have a role to play in disseminating information or assisting with applications. A joined up approach across government could lead to information about LPAs being distributed at key points in a citizen's lifespan, say on marriage or civil partnership, or on reaching the pension age, or on the diagnosis of a chronic illness.

### **Empowerment and Safeguarding**

The fundamental challenge posed by the Mental Capacity Act is to achieve the right balance between the principle of empowerment that drives it, and the effective operation of its protective framework. This is a tension facing all public services in a society that values active citizenship but recognises its duty to protect the young, frail, and vulnerable. In his foreword to the Council for Healthcare Regulatory Excellence recent paper on 'Right Touch Regulation' Harry Cayton observes that 'we want to be free and we want to be safe', and argues that regulation exists to protect people, not to control unduly how they live their lives.

In its last report the Board flagged up the role of professional regulation in ensuring that all registered health and social care professionals are competent to assess an individual's ability to make decisions, and to assist and support everyone in exercising meaningful choices. The Mental Capacity Act signifies a fundamental shift in the relationship between those giving and receiving care, and has far reaching implications for professional practice. We believe the Mental Capacity Act to be as fundamental as the Human Rights Act. It

should be a core element in the foundation training of all doctors, nurses, social workers and other health professionals, and integral to ongoing development and professional education. The feedback we continue to receive is that, whereas in general, knowledge of the law might be good, an understanding of what this implies in terms of professional conduct and practice is at best patchy. We are repeatedly told that mental capacity still tends to be seen as an issue for those practicing in mental health and learning disability, not as mainstream to all services, and of poor uptake of training provided by hospitals and care providers. We have held positive discussions with the Council for Healthcare Regulatory Excellence, the General Medical Council, the Nursing and Midwifery Council, and the Health Professions Council. All of these bodies acknowledge the relevance of the Mental Capacity Act to professional practice, and some are moving towards explicit recognition through the standards underpinning education and codes of practice. We particularly commend the General Medical Council for its publication 'Good Practice in Decision Making' which provides guidance to those providing care and treatment to people reaching the end of their life, and the Social Care Institute for Excellence for the training material and tools it has developed and disseminated. The CHRE has an influential role in reviewing the performance and promoting excellence amongst the healthcare professional regulators. We would like to see CHRE positively endorse the Mental Capacity Act through its framework for reviewing the performance of the regulators.

In 2007 the Lord Chancellor issued the Mental Capacity Act Code of Practice. This is an impressive document, comprehensive and written in an accessible style. However



the Board is concerned that the Code has not been widely distributed and that its price (£15) is seen as an obstacle. Although it is available to download from the OPG website (and has been accessed 51,798 times since 1 April 2010) we believe that a copy should be available to every Deputy, Attorney, health and social care practitioner and advocate. We welcome the proposal to review and update the Code in the coming period, and we recommend that every effort should be made to ensure its wide availability.

During the course of the year we have met with the Care Quality Commission in England, and the Healthcare Inspectorate and Care and Social Services Inspectorate, Wales.

These are the bodies responsible for inspecting and regulating the providers of services in the two countries. Managers of hospitals and care homes have a key responsibility in making sure that all those they employ have the attitude and skill necessary to assist vulnerable people in making decisions, and in maintaining the necessary records and procedures. We are pleased to note that these inspectorates now include compliance with the Act amongst their indicators. The CQC has issued useful guidance which assists care and treatment providers in understanding the duties and responsibilities placed on them by the MCA, and its own fieldworkers in judging whether these are being complied with. This year the CQC sent out a clear and welcome message by requiring six hospitals to demonstrate compliance with the MCA before registration. We were impressed by the close engagement in Wales between Inspectorates, Professional Regulators, and Practitioners, as demonstrated by the regular attendance of inspectors at local MCA Network Events.

Over the past year the OPG has taken forward a number of initiatives aimed at improving the skill and understanding of those responsible for taking decisions on behalf of others.

There has been a review of the Panel of Deputies from which the Court of Protection appoints in cases where nobody close to the client is able to act. This will produce a smaller panel of approved Deputies, all of whom must have demonstrated the competence to act in the best interests of someone who has limited ability to manage their own affairs. In supporting this exercise the Board commented on the need for cultural diversity and geographical spread, and on the relevance of advocacy skills as well as legal and financial acumen.

In 2009 the Office adopted a more sensitive approach to supervision. It introduced another level (2A) that provides more oversight and support to new Deputies, and affords a greater degree of protection to the customer as the Deputyship is established.

The Office is now developing a more sophisticated approach to its Court applications, making it possible for less contentious matters to be resolved through negotiation and consent. It is also seeking more specific Orders that address a particular aspect of the powers granted to a Deputy. These will give the Court the option to leave a Deputy in place whilst placing tighter restrictions on their discretion and access to funds.

The Board is pleased that the OPG is engaging with Local Government across England and Wales to promote best practice and information sharing amongst the Local Authority Deputy community. There is a wide variation in approach between Authorities. Some take their responsibility very seriously and provide

a dedicated service. Others enter into arrangements with neighbouring areas. Some do not provide any service. As Local Authorities are not statutorily required to provide Deputies this important service is at particular risk from cuts in public expenditure. In order to bring about consistent standards across England and Wales the Board suggests that consideration must be given to the development and enforcement of a national model.

The DH and OPG are jointly undertaking research into decision making in particularly complex cases, with a view to designing guidance and training materials for practitioners, and a tool with which to review applications to the Court. These

should lead to a more informed and evidence based approach.

An Independent Mental Capacity Advocacy (IMCA) service, commissioned by local authorities jointly on their own behalf and on behalf of primary care trusts, to date has represented and supported more than 20,000 people lacking the capacity to take part in major decisions about their lives. The Board has attended IMCA network meetings across England and Wales and has been impressed by the skilled and independent service they offer. We regard this as a resource that is under-recognised and utilised and suggest that consideration is given to extending the use and role of IMCAs.

## After the Public Guardian Board: A Champion for the Act

The Public Guardian Board came about through the efforts of a group of far sighted legislators determined to make sure that long awaited legal reform remained under active scrutiny. The Board was set up within the Ministry of Justice and given formal responsibility to monitor and report on the OPG, an MoJ agency. However, the provisions of the Act extend far beyond justice. For the vision it embodies to become a reality many different players across government, health, social care, and the third sectors need to work together to promote the rights of every citizen to exercise choice and to provide assistance to those whose ability is limited. From the beginning the Board has argued for a high profile cross government champion for the Act. In this our final report we conclude that

the Act's potential is still a long way from being realised, and we record our concern about the possible impact of current financial restraints. In this climate the argument for a powerful and independent champion is even stronger.

When the Board ceases to exist, new governance arrangements for the OPG will be introduced. We are firmly of the view that the OPG should be governed by a Board, led by a Chair of the standing and experience to influence across the MCA landscape and to champion the rights embodied in the Act. Such independent leadership is, in our view, critical to accountability and supporting the continued transformation of the Office.

## Recommendations

1. The OPG should be given the freedom to explore a range of business options, including outsourcing and commercial partnerships. Allied to this should be the flexibility to manage the Office's budget and invest over a three or, preferably, five year period. These changes are essential to provide improvements to services.
2. The OPG should implement pro-actively the Communications and Marketing Strategy, which is focused on increasing the take up of LPAs, initially targeting those with variable capacity, those at risk of losing capacity over the next 10 years and those in high risk occupations. At the same time the Office should ensure it has both the capacity and capability to meet the additional demand.
3. The OPG should develop pro-actively communications with a wide range of stakeholders, through the launch and implementation of the Stakeholder Strategy. Joint working with organisations that are in direct contact with the person, who use the OPG's services, is essential.
4. The OPG having completed and tested the IT strategy, identifying the requirements needed, in-house, to deliver an efficient, effective and responsive service, that is fit for purpose, should proceed to develop that strategy as a matter of urgency.
5. Regulatory and professional bodies are urged to ensure that the Mental Capacity Act and the way it operates, particularly making "best interests" decisions, is a core element in the foundation training of all doctors, nurses, social workers and other health professionals and integral to ongoing development and professional education.
6. The Government is urged to recognise the need for a powerful and independent Champion for the Mental Capacity Act to ensure the Act's potential is realised. The MCA enshrines the rights of every citizen to exercise choice and to receive assistance to do so when their ability is limited. To achieve this, many different players, from across government, health, social care and the third sectors, need to work together.
7. The Government is urged, when the PGB is abolished and new governance arrangements are introduced, to mandate an OPG Management Board with a strong Non-Executive presence. Extending this approach to include a Non-Executive Chair who can support the Public Guardian and Ministers in influencing the MCA landscape and championing the Act, is key to the OPG's development.



## Annex A – Role and Responsibilities of the PG Board

The Public Guardian Board (the board) is a body created under section 59 of the Mental Capacity Act 2005. The legislation reads:

‘There is to be a body, to be known as The Public Guardian Board.’

‘The Board’s duty is to scrutinise and review the way in which the Public Guardian discharges his functions and to make such recommendations to the Lord Chancellor about that matter as it thinks appropriate.’

The Board provides an independent means of overseeing the work of the Public Guardian and the OPG and so assists in helping to improve the service delivered to some of the most vulnerable members of society.

It was established following an amendment, proposed in the House of Lords, to the Mental Capacity Bill; which later became the Mental Capacity Act 2005.

A constructive relationship between the Board and the Public Guardian is critical to the success of our work.

To undertake our role of review and scrutiny, the Board has a programme of meetings to examine the OPG’s performance and to discuss customer and stakeholder feedback. The OPG provides us with reports on its performance, and the Public Guardian and OPG Executive Team attend our meetings. This opportunity allows us to raise any issues directly with the Public Guardian and discuss any concerns.

The effective operation of the OPG depends fundamentally on its partnerships with stakeholders. The Board engages both formally and informally with a range of stakeholders throughout the year. This interaction helps us to build a fuller picture of the way the OPG is performing and the direct impact the work is having on the public. We also have direct access to Ministers, providing reports and on going advice to them.

The Board does not have any executive powers; these are held by the Public Guardian, advised by the Executive Team.

## Annex B – The Public Guardian Board Members

The PGB is made up of seven independent members (including the Chair) appointed by the Lord Chancellor. One of the members is a judge, and between them the others bring a range of skills and experience, professional and personal, relevant to the OPG and its customers. Individual Board members also provide non-executive input to OPG sub boards.

Rosie Varley OBE Chair

Lionel Joyce OBE

Her Honour Judge Hazel Marshall QC

Suzanne McCarthy

Maurice Rumbold

Deep Sagar

Sue Whittaker

Sarah Wood OPG's Audit Committee Chair



For further information on any of the issues that appear in this report; please contact the Public Guardian Board at the following address: [PublicGuardianBoard@justice.gsi.gov.uk](mailto:PublicGuardianBoard@justice.gsi.gov.uk)

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