

**Ministry of Justice**  
**Modernising Lasting Powers of Attorney**  
**Consultation Response: Wedlake Bell LLP**

Wedlake Bell LLP is a central London law firm whose history goes back over 230 years. It has 71 partners and is one of the top 100 firms in the UK on turnover.

The firm welcomes the opportunity to respond to The Ministry of Justice's ('**MoJ**') Modernising Lasting Powers of Attorney ('**LPAs**') Consultation dated 20 July 2021 ('**the Consultation Document**').

Wedlake Bell's response has been prepared by its Private Client team who have extensive experience of advising clients on the preparation, registration and use of LPAs. The team is ranked in the Legal 500 (Tier 3) and Chambers High Net Worth guide (Band 3) and is listed in Tier 1 as one of the 2021 eprivateclient Top Law Firms.

Any text in italics below is text lifted from the Consultation Document.

**Scope of Consultation**

*This consultation is aimed at the public and those who have been involved in the creation and/or use of LPAs. In the fourteen years since LPAs were introduced, technology has advanced and become more widely available. Many donors and attorneys find the current paper-based LPA cumbersome, bureaucratic and complex. In 2019/20 the Office of the Public Guardian ('**OPG**') received 19 million sheets of papers in the form of hard copy LPAs and posted out a similar amount. Handling large amounts of paper is costly and inefficient. The OPG's operating costs are funded entirely by the income from the fees it charges. If the LPA service is not made more efficient, either fees will have to increase or the way the OPG is funded will become unsustainable in the longer term. When LPAs were introduced in 2007 the safeguards put in place were appropriate for the time, but technology and society have moved on. It is necessary to look at how technology can make it easier to make and register an LPA at the same time as providing sufficient protection against abuse. Ease of access and protections must also be ensured for those who cannot use the digital service or choose not to. The MoJ believes that automating OPG's services will improve efficiency and reduce costs, as well as allow resources to be moved to improving other OPG services. It is for these reasons that the MoJ and OPG are working to modernise LPAs. The aims of the consultation are to:*

- *increase safeguards, especially for the donor;*
- *improve the process of making and registering an LPA for donors, attorneys and third parties;*
- *achieve sustainability for OPG whilst keeping LPAs as affordable as possible for all people in society.*

*The consultation document sets out seven proposals that have been developed to modernise LPAs, and considers what changes to the law may be needed.*

**Proposal 1: Role of witness**

*This proposal considers whether there is still value to the role of the witness (aside from the role of the certificate provider), and if there is, how to retain this value within a future service where digital methods of creating and executing an LPA will be possible.*

*The consultation document identifies three possible approaches:*

*Approach 1a – Remove witnessing - amend legislation to remove the need for signatures to be witnessed and do not replace the function of the witness with an alternative.*

*Approach 1b – Remote witnessing - a digital channel could allow someone to remotely witness an LPA being signed or executed, without needing to be in the same physical location as the donor or attorney.*

*Approach 1c – Replace witnessing with a similar function - the existing requirement for someone to be physically present to witness the donor and attorney(s) sign and execute an LPA could be removed and replaced with new safeguards within the process that fulfil the same function.*

## Response

1. We accept that there is confusion as to the role of the witness and their signing requirements. This often leads to mistakes and many LPAs being rejected for registration due to incorrect witnessing. We believe, however, that removal of the witness would diminish the legal significance of the LPA. The requirement for a face-to-face witness should remain.
2. The objectives to address the current issues with the witness requirement should be to make signing easier, increase safeguards and simplify the forms. The OPG should have at the forefront of its goals maintaining safeguards established in the Mental Capacity Act 2005. To suggest that witnesses are superfluous and their role could be replaced by digital signatures is alarming. The consultation document states that the "*preferred option is to replace the witness with new safeguards that perform the same function*". We fail to see what possible safeguards would act in the same way as an independent witness. A witness will be physically present at the time that the donor signs and can potentially provide evidence that there is no one else asserting influence, telling the donor to sign, or even signing in their place: it is difficult to see how a digital safeguard can do the same job.
3. The proposed digital safeguard to replace witnessing (paragraph 93 of the Consultation Document) will not work for all. The majority of individuals making LPAs are aged 70 and above, and/or vulnerable, and clearly less able to deal with an online signature process than younger people. The reason that many clients suddenly want LPAs is because they are aware of their declining faculties and recognise that they will shortly need help.
4. We agree that it is not the witness's role to verify the identification ('ID') of the donor or attorney and this verification is important. There does not need to be an ID verification system as part of the LPA process. These ID checks could be carried out as part of an online portal system (as proposed in connection with proposal 7) so that verification must be provided for the donor and attorney at the point of registration. Built in to the ID check system should be a check on previous criminal convictions and also bankruptcy. It is vital (for obvious reasons) that bankrupt attorneys should be prevented from acting under an LPA for financial decisions.
5. Aside from the well-recognised risks of fraud and undue influence, remote witnessing would be overly complex and may discourage people from making LPAs. It also discriminates against elderly donors generally less familiar with technology. We would not favour remote witnessing as an alternative. The limitations of remote witnessing in the context of Wills have been well discussed by legal professionals and professional bodies<sup>1</sup>.
6. It is interesting to note that the Consultation Document mentions that the role of the certificate provider is poorly understood amongst all groups, including the public, solicitors and the third sector; and, furthermore, that people often conflate the roles of certificate provider and witness, meaning the perceived safeguard may actually be in the role of certificate provider, rather than

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<sup>1</sup> [Our position on the use of virtual execution and e-signature during the coronavirus \(COVID-19\) pandemic | The Law Society](#) 6 January 2021; [Law Commission Electronic execution of documents](#) 3 September 2019; [Briefing note on execution of wills \(E&W\).pdf \(step.org\)](#) 25 July 2020

the witness. We would suggest that this issue was exacerbated by the changes made in 2015 when a certificate provider did not have to be a specified professional but could be someone who has known the donor personally for at least two years. Since 2015, there has been no requirement for the certificate provider to state in what capacity they are acting; they simply have to give their title, name, and address. It is therefore difficult to see how the OPG can verify whether the certificate provider is acting in the correct capacity, and perhaps not surprising that lay certificate providers find it difficult to understand their role. By way of comparison, Scottish Powers of Attorney ('PoA') include a 'certificate of capacity' (also known as schedule 1) which must be completed by a solicitor who is registered to practise law in Scotland, or a practising member of the Faculty of Advocates, or a registered UK medical doctor who holds a licence to practise.<sup>2</sup> This not only resolves many safeguarding issues but also clarifies the role a certificate provider must play, as well as differentiating it from that of a witness. Bearing in mind that the requirement for notice to be given to family members and the need for a second certificate provider have both been removed in the English system, the Scottish example shows how the system can operate and provide greater protection for vulnerable adults. We would therefore suggest that consideration could valuably be given to analysing the effectiveness of the Scottish model with a view to potentially adopting it (in whole or part) for the English LPA process.

## **Proposal 2: Role of application**

*This proposal looks at the purpose application serves within the process of creating and registering an LPA and who can apply to register one with the objective of reducing and limiting the number of errors made in an LPA before it is sent for registration.*

*The consultation document identifies two different approaches:*

*Approach 2a – Execution starts registration - the application process needed to register an LPA could be removed, with a new requirement that an LPA is sent for registration as soon as it is executed. This would remove additional complexity. To facilitate this, checks on the content of the LPA would be automated as far as possible and carried out upfront, identifying any errors at a point when they can be easily corrected by the parties, and removing the risk of errors being found later, when the donor may have lost capacity.*

*Approach 2b – Execution allows delayed registration. This approach would retain the current ability for people to delay registering their LPA and require OPG to store LPAs created digitally until they were submitted for registration. Donors would be able to execute an LPA and withhold it from immediate use, but they would still be required to register it within a clearly defined and published time frame, after which their executed LPA would be deleted in accordance with record and retention schedules.*

## **Response**

7. We strongly believe it is important that there remains an option for donors to sign their LPA on paper, in wet ink. We therefore accept that there will inevitably be a delay between execution and the OPG receiving the LPA for registration. It is just not possible to safeguard vulnerable donors by attempting to reduce this waiting time by introducing a fully digital system for all donors. Reductions in timescales could be better and more safely achieved by increasing OPG resourcing.
8. Our experience suggests that LPAs that contain preferences and/or instructions are taking longer to register than those that do not. This should not be the case. Preferences and instructions are

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<sup>2</sup> [gp's solicitors \(publicguardian-scotland.gov.uk\)](http://gpsolicitors(publicguardian-scotland.gov.uk))

an integral part of the LPA and help make it operate as much as possible in the donor's best interests; they should be encouraged as a necessary feature of the LPA, not discouraged by causing the LPA application process to be held up.

9. Currently, donors can delay sending their LPA for registration for as long as they wish. Under the government's preferred proposal 2a, only the donor could apply for registration and could only delay registration for a certain period. We always advise clients to register their LPAs as soon as they are completed and, given that statistics from the OPG indicate that few people delay registering an executed LPA (only 4.24% of LPA applications are received by OPG more than 200 days after the donor signed the forms), we do not support removing the ability to delay registration.

### **Proposal 3: OPG remit**

*This proposal looks at ways to widen the powers of OPG in legislation to provide clarity on the checks it can carry out on an LPA and the actions it can take to halt or delay registration outside the direction of the Court of Protection where those checks are failed or inconclusive. In particular, clarifying its ability to check the LPA for more than just administrative purposes to aid in the prevention of fraud, abuse and undue pressure, including the introduction of identity verification on the parties to the LPA.*

*There are two different approaches that could be taken to modify OPG's functions as part of the new digital channel:*

*Approach 3a – Conditional registration - OPG's remit would be widened so that an LPA could be registered, or rejected, depending upon the outcome of a new set of prescribed checks during the creation and registration process, including ID checks and potentially the ability to limit who can be an attorney on the basis of prior relevant convictions. In practice a donor could use a created or existing identity provider, such as HMRC Government Gateway, to access the LPA service. If they cannot pass the identity checks required for the online process with a suitable level of confidence, they may need to prove their identity through a physical interview with a 3rd party that could 'vouch' for their identity, similar to the service offered by the Post Office for passports. Without these checks, they would not be able to submit their application to OPG. Only LPAs where the donor has passed the required automated or in-person checks could be registered*

*Approach 3b – Discretionary registration - OPG's remit would be widened so that an LPA could be registered, or rejected, depending on whether OPG judged that the LPA was within a safe risk threshold. This would include ID verification. New checks on LPAs by OPG would add together to determine a risk score for the LPA. Legislation would set a risk threshold below which an LPA could not be registered. Applications within a defined tolerance level would be reviewed by caseworkers and approved or rejected at their discretion.*

### **Response**

10. We are not aware of there being an issue with identifying other actors in the LPA process and the connection, if any, between this and abuse or undue pressure.
11. Discretionary registration would give too much power to those exercising that discretion and so we agree that the preferred approach should be 3a.

### **Proposal 4: How to object**

*This proposal considers how to clarify and streamline the current processes for objecting to the registration of an LPA.. Currently, the legislation sets out different processes for different types of objection. The*

question is how to make it easier for those wanting to raise an objection to do so and ensure that the donor is protected against fraud and abuse by providing a clearer and more streamlined process to allow all those with legitimate concerns to raise an objection to the registration of an LPA. The consultation document identifies two possible approaches:

*Approach 4a – OPG receives all objections – OPG would be able to review and investigate objections raised by anyone to establish whether they had a legitimate concern about the registration of an LPA. Changing the primary legislation so that OPG is the sole organisation for anyone to raise an objection with, and promoting itself as such, makes it easier for those with a concern to know where to go and what to do next. Widening the group that can object ensures that all legitimate concerns can be raised. Additionally, this would mean that the process of investigating the complaint could be dealt with earlier in the process and be ready at the point the Court needs to make a determination, if it needs to do so, rather than causing further delay.*

*Approach 4b – OPG receives only factual objections - anyone with a concern would be able to raise an objection, however they would need to refer their objection directly to OPG or the Court of Protection, depending upon the nature of their objection. Factual objections would go to OPG, prescribed objections would go to the Court of Protection. OPG would not review or investigate prescribed objections, unless directed to do so by the Court. If OPG was sent a prescribed objection by mistake, they would signpost the objector to make an application to the Court instead.*

## **Response**

12. The government's preferred approach is 4a, however, we would highlight that OPG staff would need to be legally trained to be able to identify whether the objection has a legal grounding.
13. LPAs initially had to include a provision for the notification of a third party when activated. This requirement was abandoned when the process was simplified in July 2015 as part of a drive to encourage greater take-up of LPAs. We note from the Consultation Document that since the notification process was changed, 83% of applicants are choosing not to name someone to notify. The notification system is an important safeguard and we would support consideration of a return to the Enduring Power of Attorney registration process when notifications were mandatory and in a set order.
14. We suspect that more objections were raised before this change in notification process, indicating that the current process is not doing what it is designed to do because potential objectors are simply not finding out about the LPA.
15. We note from the Consultation Document that the Court of Protection received only 47 applications regarding an objection to the registration of an LPA in calendar year 2020, compared to the 227 received (just from third parties) in 2019/20. Furthermore, it is often the case that even where the Court does receive an application to object, it will then direct OPG to investigate the allegation. It is imperative that whatever approach is adopted, the process needs to be sufficiently clear so as not to dissuade genuine objections, and allows anyone, including certificate providers and third parties, to easily raise legitimate concerns.

## **Proposal 5: When to object**

*Proposal 5 looks at what point and for how long objections to the registration of an LPA should be permitted, and if a distinct pre-registration objection process is still a relevant safeguard for the donor. In particular, whether the current four week statutory waiting period is appropriate, and where it sits in the LPA creation and registration process. In addition, what value the ability to object during certain parts of the process may bring, and whether prevention is a better safeguard than intervention. Objections could be raised at different times within the process or within a statutory waiting period of a different length which will impact upon the time taken to register an LPA. A digital channel could provide quicker routes for contact and response regarding objections, which would allow the time taken to register an LPA to be shortened.*

*Other than the current system of delaying registration to allow the consideration of objections for a 4-week period, the consultation document identifies three ways to make changes:*

*Approach 5a – Objection during creation - objections could be raised from the point the donor starts creating their LPA until it is sent for registration which moves the time for objection earlier within the process and means they could be investigated, resolved or upheld as soon as possible after the LPA is received by OPG. If an objection is raised and the investigation resolved as early as possible, the donor can be assured of an expedient registration, assuming other checks in the process are satisfactory. Conversely, if someone has proceeded with a coerced or fraudulent LPA, OPG may have evidence available immediately upon receipt of the application and could act swiftly.*

*Approach 5b – Reduce the statutory waiting period – a revised statutory waiting period of two weeks is built into the registration process, beginning at the point of receipt of the LPA, and once the payment has been submitted. Notices would be sent to all required parties automatically and there would be a clearly signposted route for them to respond directly through the digital channel, improving awareness and response times to any concerns raised.*

*Approach 5c – Remove the statutory waiting period – other new safeguards and checks in the process could create a high level of protection from abuse. This would speed up the time taken to register an LPA. Objections from concerned individuals could be received at any time and would be investigated by the OPG after an LPA has been registered. There could also be a set timeframe for donors to easily withdraw their LPA after it has been sent for registration should they change their mind about any decisions made in the LPA.*

*Based on the current evidence available, the Government's preferred approach is a combination of the above approaches.*

## **Response**

16. Our view is that reducing the four-week waiting time for objections is not going to make a significant difference to the current timescale for registering an LPA. LPA waiting times are currently approximately six months and so cutting out two or four weeks from this at a cost to safeguarding, is not beneficial. Equivalent or even better time savings could be made by improving OPG resources and taking on more staff to process applications.
17. If it is decided that the four-week period needs to be removed, a 'cooling off' period could work as an alternative, whereby the LPA is registered straightaway but there is a two-four week period when objections can be raised afterwards. It would only save time, however, if the LPA can be used in the meantime, which would come at a risk of abuse, but perhaps it is worth accepting this risk in a small minority of cases, so as to bring a time saving for every user.
18. It should be easier for certificate providers to raise concerns as they have a key role to play in determining that the donor understands the meaning of the LPA and that no fraud or undue pressure has been applied in the creation of the LPA.

## **Proposal 6: Speed of service**

*The MoJ aims to create a smoother service for all users by making the process of creating and registering an LPA more straightforward. Proposal 6 questions whether there is a need for an even quicker service for those people who have an urgent need for an LPA, how to balance this against the safeguards needed and the ease of access for those same users.*

*Based on the current evidence available, the Government's preferred approach is not to proceed with a dedicated urgent service. As outlined in the consultation document, moving the ability to object earlier in the process, requiring the immediate submission of an LPA for registration and the introduction of*

*automated checks would speed up the registration of LPAs for everyone, potentially to as little as two weeks. The government does not believe it is possible to offer an urgent service with the necessary safeguards to protect donors and therefore the best way to proceed is to provide an optimal speed of service to all donors.*

## **Response**

19. In order to reduce the timescale for registering an LPA, the OPG needs to write to the donor and attorney(s) to acknowledge receipt of the application more quickly so that the four-week statutory waiting period can start as soon possible. Again, we assume that this is a resourcing issue for the OPG.
20. In Scotland, the OPG's target is to process PoAs within 30 working days of receiving the document. They are able to process electronically submitted documents more quickly; however, if documents are submitted by post and there is a genuine urgency, a request can be made to expedite the service. If the request is granted, the PoA will be processed within five working days.<sup>3</sup> This again highlights how analysis could usefully be undertaken of the Scottish system particularly in respect of their processing and resourcing strategies.

## **Proposal 7: Solicitor access to the service**

*The final proposal considers ways to support solicitors to use a new modernised service through the use of integrated digital systems and legislative requirements. Given the large number of LPAs which solicitors help create and register, solicitors should use the most efficient, largely digital, channels to submit LPAs to the OPG for registration. This will ensure that OPG can provide ease of access for both solicitors and their clients through reduced reliance on the postal system (and its associated cost), reduce the need for error correction and therefore reduce OPG processing time and achieve sustainability for the OPG through a reduction in paper handling and storage as well as reduced error rates due to front loaded checks within the service.*

*There are three different approaches to consider for achieving sustainability for OPG while ensuring solicitors have access to the most efficient service:*

*Approach 7a – Integration only – providing a service that effectively meets the needs of solicitors and is integrated into their existing document management systems could be enough to reach the position that most solicitors use the digital channel without any more formal requirements. This could work by the OPG releasing an application programming interface (API) which securely, and reliably, connects existing solicitor software used to create an LPA with OPG back office systems. This link would allow solicitors to prepare an LPA form from their existing client data, and – once prepared and executed to standard – to pay, submit and manage applications digitally through their legal stationer software. There would be no need to retype application data, print or export forms for posting to the OPG manually. By submitting applications electronically through this integration (API), OPG would receive clean, processed data which it can use to automate a larger proportion of back-office checks, this should allow for immediate error checking and noticeably reduce processing times often associated with scanning and cleaning data submitted to the OPG for casework. Donors' would benefit from a faster, smoother registration, while still receiving the benefits a solicitor can provide.*

*Approach 7b – Mandate solicitors to use part of the service - an alternative approach would be to legislate to require solicitors to use the digital channel for certain aspects of the registration process. The most obvious one would be to require digital submission of the LPA in line with the new requirements of the process.*

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<sup>3</sup> [How long will it take \(publicguardian-scotland.gov.uk\)](https://www.publicguardian-scotland.gov.uk)

*Approach 7c – Mandate solicitors to use the whole service - Solicitors would be required to use all the elements of the digital channel for all LPA applications after a certain date. This would help OPG to become sustainable and create consistency in how the service is provided but would be extremely restrictive on how solicitors provide service to their clients.*

*Based on the current evidence available, the Government's preferred approach is 7a.*

## **Response**

21. We are in favour of there being some form of portal (similar to the one for online probate applications) whereby solicitors can upload documents, provide verification of ID and track the progress of the application. This online system should not mean that the only way of executing an LPA is online. As per paragraph 6 above, there needs to be a hybrid system so that those donors who want to (or can/ should only) sign in wet ink, can do so, with those wet ink versions being posted to the OPG in support of the online application.

## **Additional questions**

**12. Are there any other costs (in hours/days or in monetary terms) that you could see as a result of modernising LPAs for yourself or other people involved? Please provide evidence for your answer.**

**13. Are there any other benefits (monetised or non-monetised) that you could see as a result of modernising LPAs? Please give evidence for your answer.**

**14. Do you have any further comments on modernising lasting power of attorney?**

22. Generally, we believe the LPA service can be most quickly and efficiently improved by increasing the LPA registration fee and recruiting and training more OPG staff, with the objective of bringing down the processing times for LPAs from its current six-month level to the target of 40 days.
23. The registration fee was £150 when LPAs were first introduced in October 2007. After several reductions, it has been at the current level of £82 since April 2017. We did not see many objections to this higher fee in practice, and, in our experience, people are willing to pay slightly more in return for a better service.
24. The Consultation Document continues the theme of 'digitisation by default' when it should be focussed on the safeguards for older and vulnerable people. At the very least we should be considering reintroducing those that have been removed since 2007, such as the compulsory notification requirements and identifying the capacity in which the certificate provider acts.
25. While the online world may be appropriate for the younger generation, and agencies such as the Probate Registry and the Land Registry, surely we should be concerned about how the older and vulnerable in society access services that directly affect them? We need to recognise that many clients who want LPAs do not fit neatly into a digital world and do all we can to restore and keep legal protections for them in place.

**Wedlake Bell LLP**

13 October 2021

AS/QJC/BARH/ATKE/SAB