

What does the Powers of Attorney Bill mean for those creating and registering Lasting Powers of Attorney?

Private Client analysis: The Powers of Attorney Bill received its second reading in the House of Commons on 9 December 2022 and forms part of the Ministry of Justice and the Office of the Public Guardian's (OPG) project to modernise Lasting Powers of Attorney (LPAs). Victoria Mahon de Palacios, partner at Wedlake Bell, explains what this means for practitioners involved in creating and registering lasting powers of attorney.

This analysis was first published on Lexis®PSL on 14 December 2022 and can be found [here](#) (subscription required).

The Powers of Attorney Bill follows hot on the heels of the Government's response to the consultation on Modernising LPAs (the Consultation Response) (see News Analysis: [Safer, simpler and fit for the future—government's response to modernising LPA](#)) and, once enacted, will introduce changes to the [Mental Capacity Act 2005 \(MCA 2005\)](#) to create a more modern LPA service. These changes include:

- so far as LPA registrations are concerned, only the donor will be permitted to apply to register an LPA, removing the ability for attorneys to register.

The Bill also makes provision for regulations to be introduced to allow those involved in making an LPA (the donor, attorney or certificate provider) to select whether to sign the LPA digitally or on paper.

It will be interesting to read the detail of the regulations in due course to understand how the modernised digital LPA service will work and if it will, for example, incorporate document and case management systems which the government indicated in the Consultation Response that it would explore in order to support legal professionals. Further, will the role of the certificate provider and witness be combined in relation to the execution of an LPA? Will registration be required immediately upon execution or will the current option of delaying registration remain? These are just a couple of examples that the government flagged in its Consultation Response that it would be exploring as part of a more modernised service.

The Bill confirms that, in terms of evidencing LPAs registered in electronic form, the electronic form will be evidence of registration rather than a paper 'office copy' as currently

- with a view to simplifying the LPA registration process for donors and ensuring that notifications have been sent, notifying named persons that an LPA is being registered will become the responsibility of the OPG and no longer that of the donor. The donor can request that the OPG dispenses with notifying a named person if there are special circumstances that justify this rather than a Court of Protection application being required for this, as currently.
- as promised in the government's Consultation response, the Bill makes provision for regulations to be made governing identification verification requirements in relation to registration applications. The regulations will set out how this will be achieved and

who involved in the registration process (the donor, certificate provider, attorneys and replacement attorneys) will have their identity checked. This is with a view to strengthening safeguards in the process particularly bearing in mind the increase in identity fraud and victims being targeted with ever more sophisticated methods.

- with a view to simplifying the registration objection process, all objections (which under the Bill can be made by anyone not only by the donor, attorney or named person, as currently) are to be made to the OPG. Currently, only objections on factual grounds (eg due to the donor's or attorney's bankruptcy or death) can be made to the OPG whilst objections on 'prescribed grounds' (eg on grounds that the donor lacked mental capacity to make the LPA, was under undue pressure to do so or where an attorney is acting against the donor's best interests) must be made to the Court of Protection. This single route for objections was confirmed by the government as a step it would take in its Consultation Response.

The detail in the Bill provides that in the absence of evidence to reasonably support the objection, the OPG will be required to register the LPA. However, if there is such evidence then the LPA can only be registered if an application is made to the Court of Protection and the Court directs the OPG to register the LPA.

- in terms of timing of objections, these can be raised at any point after the OPG is aware that the donor intends to create an LPA. The events that establish the donor's intention with the OPG will be set out in regulations but are likely to be linked to the stage when donors start the digital process of making LPAs (for example, by creating an online account in order to do so or requesting a paper LPA form from the OPG). This follows on from the government's mention in the Consultation Response of its plan to investigate methods that permit objections being made earlier – before and during the creation of LPAs - rather than only during the statutory waiting period, as currently. The Government had also flagged in the response to the Consultation that it will continue to investigate the appropriate length of the statutory waiting period; we are yet to see if regulations to be issued following on from the enactment of the Bill will make any changes to this.

Outside the changes to the [MCA 2005](#), the Bill also widens the categories of persons who can certify copy LPAs to Chartered Legal Executives by amending the [Powers of Attorney Act 1971](#). This change will be brought in within two months of the Bill (to be cited as the Power of Attorney Act 2022) receiving Royal Assent. The changes being made to the [MCA 2005](#) listed above, however, will be brought into force by regulations, for which we do not currently have a timescale. What is clear, however, is that a more modernised LPA system is moving ever closer.

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