



Ministry  
of Justice

# Modernising Lasting Powers of Attorney

July 2021

CP 495



Ministry  
of Justice

## **Modernising Lasting Powers of Attorney**

Presented to Parliament  
by the Lord Chancellor and Secretary of State for Justice  
by Command of Her Majesty

July 2021



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# About this consultation

- To:** This consultation is aimed at the public and those who have been involved in the creation and/or use of lasting powers of attorney. We also welcome views from professionals across the social service, local authority, legal, health and charitable sectors.
- Duration:** 20/07/21 to 13/10/21
- Enquiries (including requests for the paper in an alternative format) to:** Vulnerability Policy Unit  
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Email: [mlpaconsultation@justice.gov.uk](mailto:mlpaconsultation@justice.gov.uk)
- How to respond:** Please send your response by 13 October 2021 to:  
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Email: [mlpaconsultation@justice.gov.uk](mailto:mlpaconsultation@justice.gov.uk)
- Response paper:** A response to this consultation exercise is due to be published in January 2022 at:  
<https://consult.justice.gov.uk/>

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# Foreword

There are things we take for granted until we no longer have them – our ability to make decisions, our ability to express ourselves, our ability to choose. The Mental Capacity Act 2005 gives people the opportunity to appoint someone they trust to make decisions on their behalf, in the event those abilities are taken from them, whether through accident, disease or illness.

The lasting power of attorney (LPA) was introduced in 2007. It was designed to provide more flexibility and greater protections than its 1985 predecessor, the enduring power of attorney (EPA). However, it also retained many of the paper-based features and protections of the EPA. In its essence, the LPA is 36 years old.

But an LPA is not just a piece of paper. It is a legal agreement that allows a person to set out their wishes and preferences and have peace of mind that these will be followed. I believe that everyone in society should benefit from ensuring that, if the need arises, their property, finances, health and welfare can be looked after by someone they trust.

The protections that exist in the LPA are based on decades, if not centuries, of tradition and legal case law. They're based on known and trusted paper-based social conventions, such as signing and witnessing.

However, the world is changing and people increasingly want to access services digitally. The COVID-19 pandemic has accelerated this demand and transformed the way many people think and act.

Digital channels provide many opportunities to improve access and speed of service, but they also require us to think anew about the safeguards we put in place in such systems. The old paper practices are not appropriate for a new digital world. New ways of achieving the same, or better, levels of protection have to be identified before we can move forwards. At the same time, we must meet the needs of those who cannot or will not use digital channels.

Creating a modern LPA service will require changes to the Mental Capacity Act 2005 and the supporting secondary legislation. I've launched this consultation as we want your views on the potential changes to the legal framework for lasting powers of attorney. Your input will help to build a robust evidence base to inform the creation of the future LPA service.

Over the last few months, we've engaged with organisations from across the charitable, legal, social care, and finance sectors as well as groups representing those with disabilities and ethnic minority interests. I'd like to thank them for their contributions so far.

Their input, alongside our research with the public, has helped us to shape the proposals in this consultation.

In parallel with the formal consultation, my officials will continue to carry out engagement through workshops and user research. It's important that we gather evidence from, and hear the experiences of, a diverse range of people and organisations, and I would ask you to get in touch if you can help. You'll find contact details at the start of this document.

With policy consultation and user research working together, we can build a future LPA service that retains trust and safeguards, meets user needs and is fit for purpose.

However, I must be clear that while we will endeavour to meet the needs of all, there is one party that must always take priority. The LPA was created to empower and protect the individual who may lose capacity and it is that individual who must be our primary concern. Their needs are paramount and must come before those of any other party.

A handwritten signature in black ink, appearing to read "Alex Chalk". The signature is written in a cursive style with a large initial 'A'.

Alex Chalk MP

Parliamentary Under Secretary of State



## Executive summary

1. A lasting power of attorney (LPA) is a legal tool that helps people plan for their future. It lets someone (the 'donor') choose people they trust ('attorneys') to support them and make decisions for them if they lose the mental capacity to make their own decisions in the future. For example, due to an illness like dementia or an accident.
2. The LPA was introduced by the Mental Capacity Act 2005 (MCA), to replace the Enduring Power of Attorney. It aimed to balance the need to improve safeguards for the donor, with the need for it to be easy to make an LPA.
3. The MCA also created the Office of the Public Guardian (OPG), an executive agency of the Ministry of Justice. OPG is responsible for:
  - registering LPAs (an LPA must be registered before it can be used)
  - taking action where there are concerns about an attorney
4. The number of LPAs has increased significantly since their introduction. In 2014/15, just over 390,000 LPAs were sent to OPG for registration. By 2019/20 this more than doubled to just under 920,000.
5. The steps involved in making and registering an LPA are set out in the MCA. As an LPA is a deed, it must also meet the requirements of the Law of Property (Miscellaneous Provisions) Act 1989.
6. The LPA is filled in on paper, on a PDF, or using OPG's online tool, which then creates a PDF. Once filled in, the PDF must be printed out so it can be signed and witnessed on paper. The donor or an attorney then applies to OPG to register the LPA. They pay an application fee and post the LPA to OPG.

## The case for change

7. In the 14 years since LPAs were introduced, technology has advanced and become more widely available. People increasingly expect to be able to access government services online. Many donors and attorneys have told us the paper-based LPA is cumbersome, bureaucratic and complex.
8. In 2019/20, OPG received 19 million sheets of paper in the form of hard copy LPAs and posted out a similar amount. Handling large amounts of paper is costly and inefficient, creating an ever-increasing need for staff, equipment and storage.

9. 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 OPG is funded will become unsustainable in the longer term.
10. When the LPA was introduced in 2007, the safeguards put in place were appropriate for the time, but technology and society have moved on. Technology now offers new ways for OPG to protect its users through identity and information verification. Society's attitudes to fraud and abuse, and the expected protections against them, have also changed.
11. We need to respond to these challenges and look at how technology can make it easier for people to make and register an LPA. We must also fully consider concerns about security – finding the right balance between ease of use and protection against abuse. Ease of access and protections must also be ensured for those who cannot use the digital service or do not want to.
12. We believe that a move towards automating OPG's services will improve efficiency and reduce costs. It would also allow resources to be moved to improving other OPG services that provide more benefits for users.
13. It's for these reasons that the Ministry of Justice and OPG are working to modernise LPAs. The aims of this work 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
14. This consultation considers how best to achieve these aims, and what changes to the law may be needed.

## **Our approach**

15. We have used user research, interviews and surveys to gather the views of the public and professionals. We have also held a series of workshops with the MLPA working group. The group is made up of stakeholders from a range of sectors, including finance, legal, charity and social care.
16. COVID-19 has meant much of our engagement has had to be done online. We know this means we may not have heard from stakeholders or members of the public who do not have access to the internet, or do not want to use it. In this consultation, we're particularly keen to hear from people who fall into this group.

17. COVID-19 has also significantly affected LPA application numbers and OPG's processes. In this consultation, we've used data from the 2019 to 2020 financial year, as this best reflects normal service levels.

## Key findings and proposals

18. Our analysis, research and engagement has helped us to develop seven proposals for modernising LPAs that require change to primary legislation:
19. **Proposal 1** considers the role and value of witnessing on LPAs and how to keep that value. We examine how we can achieve this using technology to support remote witnessing or to replace the witness. If there's no value, we consider removing the need for a witness. Our preferred option is to replace the witness with new safeguards that perform the same function.
20. **Proposal 2** considers the role of applying to register an LPA and who can apply. We look at how to reduce the chance of an LPA being rejected by OPG and the benefits of reducing or keeping the delay between execution and registration. Our preferred option is that LPAs are digitally checked as they are being made, and are sent for registration as soon as they are executed.
21. **Proposal 3** considers OPG's remit. We examine how to widen OPG's remit so it can do things such as verify people's identity, and stop or delay an LPA's registration if it has concerns about it. Our preferred option is for OPG to be able to do this by expanding the types of checks it's allowed to carry out under the MCA and supporting regulations.
22. **Proposal 4** considers how people can object to an LPA. We look at how to simplify the current process so people can more easily understand where to send objections and how to do so. Our preferred option is that anyone should be able to object to an LPA and that all objections are sent to OPG first.
23. **Proposal 5** considers when people can object. We examine at what point and for how long objections can be made before an LPA is registered and if this remains a safeguard for the donor. Our preferred option is to allow people to object to an LPA from the time the donor starts creating it to the point it is registered. We would also like to shorten the time between an LPA being sent for registration and it being placed onto the register.
24. **Proposal 6** considers the speed of the LPA service and whether a dedicated faster service should be introduced for people who need an LPA urgently. We look at whether an urgent service would provide additional benefits over making the service faster for everyone. We also consider whether a dedicated service could be

introduced without making the process more complex for users and OPG. Our preferred option is not to introduce a dedicated service, as we do not believe it's possible to create a faster service with a high enough level of safeguards that is not also overly complex.

25. **Proposal 7** considers solicitors' access to the service. We look at whether this can be achieved through integrating our service with solicitor's case management systems or whether mandating part or all of the service would be necessary. Our preferred option is to provide solicitors with access to the service by integrating with their existing systems.
26. This consultation seeks to gather further views and evidence on these proposals. We ask specific questions on each proposal as well as asking for evidence on the equality impacts and some general questions about the proposals overall. Your responses will inform the approach we take to modernise LPAs.

## **Equalities statement**

27. An equalities statement can be found at Annex A.

# Introduction

28. This paper sets out for consultation a number of proposals that have been developed to modernise LPAs. These proposals will require changes to primary legislation. The consultation is aimed at the public and those who have been involved in the creation and/or use of lasting powers of attorney in England and Wales.
29. A Welsh language consultation paper will be available shortly at <https://consult.justice.gov.uk/>.
30. An Impact Assessment indicates that members of the public who make LPAs, others involved in the creation and registration of LPAs, those who provide legal assistance in relation to LPAs, charity groups who support people making LPAs and third parties who interact with LPAs, or have concerns about them, are likely to be particularly affected. This is in addition to the OPG, Ministry of Justice, Court of Protection, Department for Health and Social Care, NHS and Welsh Government who will be impacted.
31. It has not been possible to monetise the impacts of the proposals put forward as the key logistics of the proposed service are yet to be decided and some data is not held by the OPG or others. This consultation is part of our evidence-gathering that will help to fill the gaps in our knowledge. An Impact Assessment is attached and comments on it are very welcome.

# The proposals

## Background

32. The Lasting Power of Attorney (LPA) is an important tool that allows a person to plan ahead for a time when they may not be able to make decisions for themselves by choosing someone they trust to make decisions for them.
33. There are two types of LPA – property and affairs, and health and welfare. A property and affairs LPA covers decisions such as buying and selling property or managing bank or building society accounts or investments. A health and welfare LPA may cover decisions about medical treatment, or care arrangements such as where a person should live, who they contact and their day-to-day care.
34. An LPA allows a person (the ‘donor’) to grant decision-making powers to one or more others (the attorneys). The donor can choose how wide-ranging or limited their attorneys’ power will be. This includes whether an attorney can make decisions about life-sustaining treatment (for health and welfare) or whether an attorney may act before the donor has lost capacity (property and affairs). The donor can also set out preferences and instructions for how their attorneys should make decisions.
35. Although LPAs are private agreements between individuals, the Office of the Public Guardian (OPG) must register an LPA before it can be used.

## How and why the LPA was introduced

36. The LPA was created by the Mental Capacity Act 2005 (MCA) to replace the Enduring Power of Attorney (EPA). The EPA was introduced in 1986 to address concerns that a general Power of Attorney ends when a person lost mental capacity. The Law Commission’s view was that ‘at a time when the assistance of the attorney has become for the donor not merely desirable but essential, the attorney has no authority to act’. However, by the mid-1990s there were concerns about possible abuse of the EPA – with some estimates placing the rate of abuse as high as 20%. In 1995, the Law Commission published a report, which ultimately resulted in the MCA and the introduction of the LPA. The report proposed a new process to provide more robust safeguards, including the need for LPAs to be registered before use.
37. The introduction of the LPA was intended to balance the need for safeguards with ease of access. The aim was to encourage people to make an LPA and to be willing to act as an attorney.

38. The MCA set out a new approach to supporting and protecting those without mental capacity in England and Wales. It also set up OPG to oversee the registration of LPAs as a safeguard against the increasing abuse that had been present with EPAs.
39. OPG is an executive agency of the Ministry of Justice, which supports the Public Guardian in carrying out their statutory functions. These functions are contained in S. 58 of the MCA and, in relation to LPAs, include:
  - establishing and maintaining a register of LPA
  - dealing with representations, including complaints about how attorneys carry out their duties
40. Since OPG was established in 2007, the number of LPAs has increased considerably. In the five years to 2020, the number more than doubled, going from just over 390k in 2014/15 to just under 920k in 2019/20.

#### **How an LPA is made and registered**

41. An LPA must be executed (signed and witnessed) and registered on paper. This is so it meets the requirements of the MCA and because the LPA is a deed. For a deed to be valid under the Law of Property (Miscellaneous Provisions) Act 1989, it must be:
  - signed
  - witnessed
  - attested
  - delivered
42. Although OPG introduced a digital tool in 2013 to help people fill in the LPA form, the final stages of the process must still be completed on paper.
43. The filled in LPA must be printed so that the donor and attorneys can sign it in a specific order, and those signatures can be witnessed. The 'certificate provider' must then sign to confirm that the donor understands their LPA and that there's no undue pressure on the donor or fraud. The 'applicant' then posts the LPA form to OPG for registration.
44. When it receives the paper LPA, OPG scans it so it can be processed and checked. If it meets all the requirements of the MCA, the LPA is registered and posted back to the applicant. This process requires a huge amount of paper. In 2019/20, OPG received approximately 19m sheets of A4 paper in the form of hard copy LPAs and application forms, and sent out an equivalent amount, mostly in relation to the registration of LPAs. This is approximately 38m sheets of paper a year, not accounting for paper used in the creation and application process before LPAs reach OPG.

45. Many donors and attorneys have told us that this paper process is cumbersome, bureaucratic and complex. We want to address these concerns, while maintaining the right balance between ease of use and protection against abuse.

### **The case for change**

46. There have been huge changes in society in the 14 years since LPAs were introduced. Technology has advanced and become more widely available. As more and more services are delivered online, people have become more technically proficient and more confident in using technology to access services such as shopping, banking and communications. Government services – such as renewing a passport or TV licence, or submitting a tax return – are now routinely accessed online. This trend has accelerated during the coronavirus (COVID-19) pandemic, which saw many people previously unfamiliar with digital technology, embracing new ways of interacting with organisations and public services.
47. Increasingly, people expect to be able to access information and services quickly and easily online. Alongside this, there is also increased awareness of online privacy and security risks, and an expectation that organisations must take steps to protect people’s data and to prevent abuse.
48. We need to respond to these changes and explore how digital technology can improve the service for people who want to create and register an LPA. As part of this, we must take full account of concerns about security and provide safeguards to prevent abuse. We must also ensure access and protections for people who cannot use, or choose not to use, digital routes.
49. In 2019, the Law Commission published its paper: ‘Electronic Execution of Documents’. It was commissioned by the Government to consider the implications of the electronic execution of documents, especially in relation to electronic signatures and witnessing. Following extensive engagement, and concerns raised in relation to LPAs as a unique type of agreement, the report specifically highlighted that:
- “In the case of lasting powers of attorney, it is clear that the OPG and [Ministry of Justice] should consider what is sufficiently secure and reliable for donors before introducing any system using electronic signatures. We have drawn these issues to the attention of the OPG and [Ministry of Justice] officials.”*
50. It is for these reasons that that the Ministry of Justice and OPG are working to modernise LPAs. The aims of this work are to:
- i. increase safeguards, especially for the donor
  - ii. improve the process of making and registering an LPA for donors, attorneys and third parties
  - iii. achieve sustainability for OPG whilst keeping LPAs as affordable as possible for all people in society



51. At this point, and in line with the third aim above, we would like to make readers aware that the Ministry of Justice also intends to publish a consultation on the sustainability and structure of the deputyship supervision fees charged by the OPG. This relates to a different function of the OPG and will be published later in the year.
52. This consultation seeks a greater understanding of the issues involved in digitising the LPA as a deed. In particular the role of the witness in executing an LPA. It will also consider how technology can help us both increase safeguards and better meet users' needs. The consultation is focused on the changes to primary legislation needed to facilitate a digital channel for creating, executing and registering LPAs.
53. We know not everybody is able or willing to use digital technology to access services. Any future LPA service will allow for multi-channel access. Where the changes we propose have implications for analogue (including paper) channels, we highlight these in the consultation. Especially where they relate to new safeguards. We will continue to consider this in our design work and have considered the equalities impacts of these changes, as outlined in Annex A.
54. As part of our research we've spoken to people who've made LPAs. They've told us they find the process complex and confusing. In particular, we've heard that:
  - the form is overlong, with too many pieces of paper
  - the fact the LPA must be signed in a specific order creates logistical difficulties, particularly when the donor and attorneys are not in the same place
  - the forms are not accessible, for example to people with visual impairments
55. Users have told us that they would like to have clear safeguards in the process to prevent coercion or the fraudulent creation of LPAs. They would also like to see clearer guidance up front so that everyone understands their roles, rights and responsibilities. There was a common view that more time should be spent thinking about the important decisions involved in making an LPA – such as choosing an attorney – rather than dealing with the complexities and logistics of completing the LPA form. Not all of these ideas are considered in the consultation as they do not require changes to primary legislation. However, they are areas we will continue to look at as we work towards a modernised service.
56. In recent years, the substantial increase in the number of LPA applications has created challenges for OPG. Handling large amounts of paper is costly and inefficient, creating an ever-increasing need for staff, equipment and storage. As OPG's operating costs are funded entirely by fee income, rising costs will have an impact on the fees that they have to charge for their services. One of OPG's key aims is to continue to make LPAs accessible to all who need them, at a reasonable and fair price. Without action to increase the efficiency of the LPA service, either fees will

have to increase or OPG's funding mechanism will become unsustainable in the long term.

57. The impact of these issues has increased over the last year because of COVID-19. The reliance on paper-based processes, such as physical signatures and in-person witnessing, combined with social distancing, has further complicated the LPA creation process for some people. Social distancing has also had a significant impact on OPG's ability to process paper LPAs, as this must be done in the office by hand. A modern, more digital, service would build resilience into the system by ensuring multiple channels of access.
58. We believe that a move towards automating OPG's services will provide opportunities to improve efficiency and reduce costs. Crucially, this would allow resource to be reinvested in improving safeguards, for example by increasing OPG's investigations function.
59. Any new system for making and registering an LPA must address concerns about safeguards against fraud, undue pressure (including coercion) and abuse. The safeguards introduced with the LPA were appropriate for 2007, however, technology has moved on. Society's attitudes to fraud and abuse, and the expected protections against them, have also changed. Action is needed to ensure the system continues to protect the public in the way it was intended to. It must allow the registration of valid LPAs, while identifying and preventing registration of invalid ones, including those made through fraud or undue pressure where possible.
60. Digital systems offer new ways for OPG to protect its customers through the use of identity and information verification. We now need to consider how best to apply these processes, and any necessary changes to the law to allow OPG to operate these valuable safeguards.

### **Previous engagement**

61. We've consulted on allowing an LPA to be created online before. In 2013, the Government's 'Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default' sought views on this. Respondents had concerns about the potential loss of safeguards, increased risk of fraud, and the need to keep a paper option for those unable to access technology. The Government's response committed to consult further on any new proposals.
62. Since then, OPG has taken forward a programme of digital transformation, including the introduction of its digital tool for filling in an LPA. 28.4% of LPAs are made using this tool, which has a steady 90% satisfaction rate. In 2020, OPG launched the 'Use a lasting power of attorney' service that allows donors and attorneys to share the content of an LPA online with organisations. 125k LPAs were added to the service

between its launch in July 2020 and May 2021. It has a 90.9% satisfaction rate across the public and external organisations.

63. We continue to carry out research with users, solicitors, third sector organisations and others to better understand the issues around making and registering an LPA. This research has led to the proposals and questions set out in this document.

**A note on the impact of COVID-19 on our evidence base**

64. Because of COVID-19, we've had to make significant changes to the way we develop policy, to ensure we could engage with people safely. In this document, we refer to our research, workshops and stakeholder engagement. This has largely been carried out using remote technology, including online surveys, video conferencing and online collaboration tools.

65. While we have attempted to reach out to individuals and groups who can provide specific evidence on how to ensure a modernised LPA will work for those who are digitally excluded or digitally unengaged, we are also aware that our need to make use of digital tools to do this may have built a specific bias into our current evidence base. Therefore, in responding to this consultation, please know that we are especially interested in evidence related to those who may need analogue services such as in person document checking, whether this is because they do not have access to digital channels or choose not to use them.

66. The impact of COVID-19 on LPA application numbers and OPG processes mean that we have largely relied on OPG data from 2019/20, rather than 2020/21. 2019/20 is the last complete and robust comparator for normal service levels.

**A note on terminology**

67. An LPA is only legally created under the MCA when it is registered by the OPG. Until then the donor is only completing an 'instrument that is intended to create' an LPA. For the sake of simplicity, throughout this consultation we refer to:
- 'LPA' in both circumstances, except when contrasting the 'LPA instrument' with the 'application to register' within the LPA forms; and
  - 'creation' to mean the process the donor goes through to make decisions and draft their LPA as compared to registration which is the process by which the OPG checks and adds the LPA to the register for use
68. A glossary of terms is included at Annex B.

## Proposal 1: Role of witness

69. Under this proposal we are considering whether there is 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. We examine how we can achieve this by using technology to support remote witnessing, in replacing the need for a person with a similar safeguard or in removing witnesses entirely.

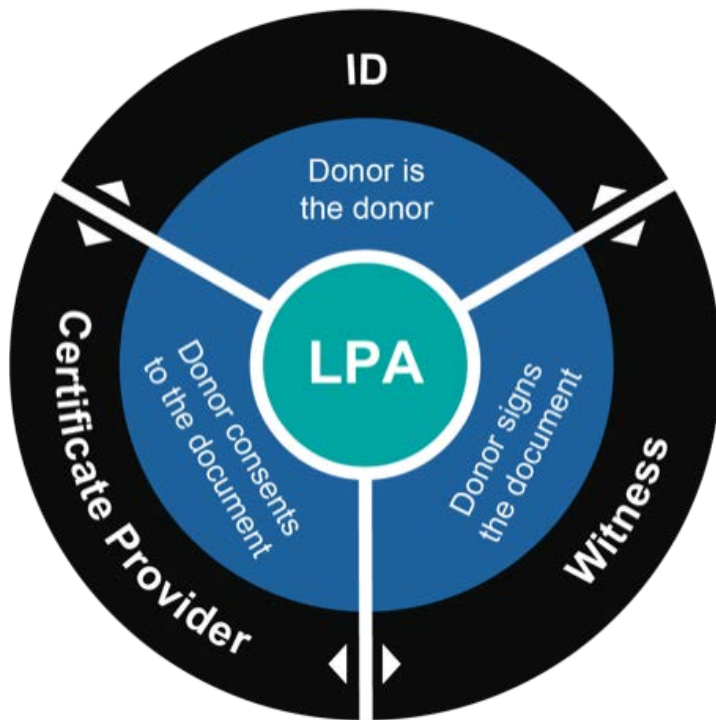
### **The current process**

70. An LPA is a deed which means the donor's and attorneys' signatures must be witnessed. The witness must sign the document and provide their full name and address. These requirements are set out in the Law of Property (Miscellaneous Provisions) Act 1989 and The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.

71. In the current process, the witness only has to verify that a person signed the document. They do not have to know the people involved or check that the person signing it is who they claim to be. They do not need to know what the document is, or what the person is agreeing to. This means that currently, witnessing provides limited safeguards.

72. Witnessing can only add value as a safeguard when combined with two other elements (see fig. 1). These are verification that the donor:

- i. is who they claim to be (provided by ID verification)
- ii. signed the document (provided by the witness)
- iii. understands and freely consents to the creation of the LPA (provided by the certificate provider)



**Fig.1** Witness Triangulation

73. The current process of making an LPA does not include ID verification (considered in proposal 3). There is also significant confusion between the roles of the witness and certificate provider, which undermines the safeguards they provide.

**Evidence**

74. Given the limited role of the witness as set out in legislation, we’ve sought to understand what people believe the witness’s role and value to be on an LPA. Research indicates that users don’t understand what the witness is there to do, with 49% of donors surveyed online incorrectly explaining the role of the witness.<sup>1</sup>

*The witness and the certificate provider*

75. In our user research, some users told us that the witness’s role is superfluous and redundant, but most said having a witness adds significance to the moment of signing the LPA. Some solicitors involved in our stakeholder engagement think that witnessing provides a safeguard for donors.

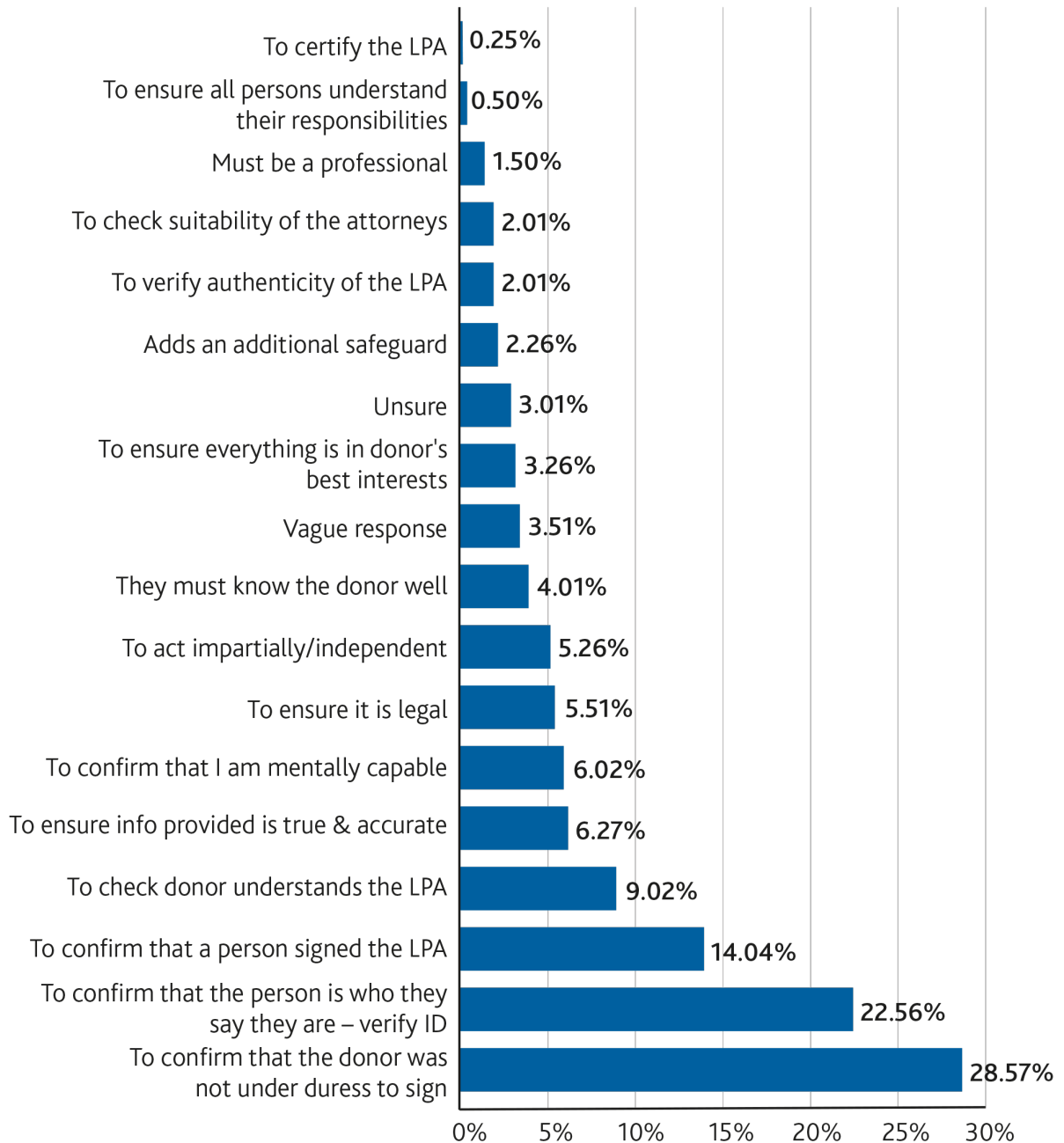
76. We’ve found people often conflate the roles of certificate provider and witness, meaning the perceived safeguard may actually be in the role of certificate provider, rather than witness.

77. Much of the significance attributed to the witness (ensuring understanding, checking there is no undue pressure or fraud, and confirming that the donor is the person who made the LPA, see fig. 2), is actually the role of the certificate provider. Although

<sup>1</sup> OPG (2021) Post Registration (Donor) Survey Responses. Unpublished.

many conscientious witnesses do take on these responsibilities, they are not required to under the legislation.

**Fig. 2 Donor’s understanding of the role of the witness**

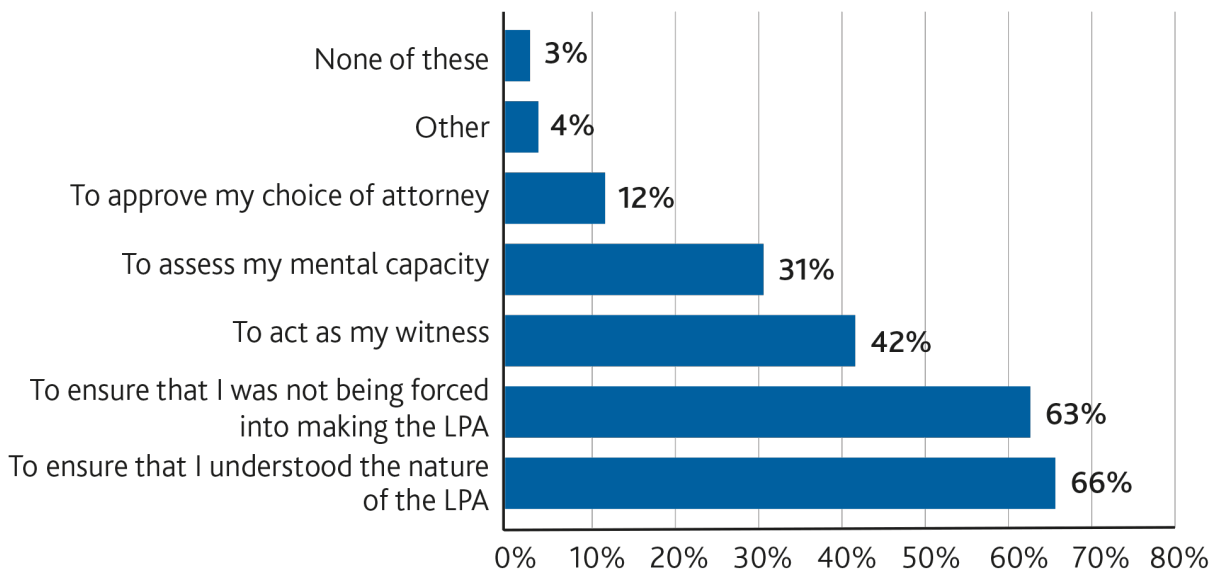


78. The role of the certificate provider is poorly understood amongst all groups we’ve spoken to, including the public, solicitors and the third sector (see fig. 3). In recent research, 42% of donors who completed our online survey, believed the role of the certificate provider was to act as a witness.<sup>2</sup>

<sup>2</sup> OPG (2021) Post Registration (Donor) Survey Responses. Unpublished.

79. We found many people incorrectly believe the certificate provider:
- is responsible for checking the donor has mental capacity (which under the Mental Capacity Act should be assumed, unless there is evidence to the contrary)
  - is responsible for confirming the donor has chosen appropriate attorneys
  - must be a member of a professional body (this is only true if the certificate provider has not known then donor for at least two years)

**Fig. 3 Donor’s understanding of the role of the Certificate Provider**



80. We suspect this confusion has arisen because the certificate provider can also act as a witness. For instance, when making an LPA for someone, solicitors often take on the role of certificate provider and witness. In our survey of solicitors, 90% told us they always act as certificate provider for their client.<sup>3</sup> Additionally, stakeholders from the charity sector told us that they recommend to their clients that the certificate provider also acts as witness to reduce the number of people involved.
81. Having one person act as both certificate provider and witness allows for an easier and more efficient process and is hugely helpful to those with smaller social networks. However, it’s likely this has also led people to conflate the two roles.

*Practical difficulties*

82. There are also practical difficulties with the witnessing process for some users. They can struggle to get the LPA signed and witnessed in the correct order required by regulations.

<sup>3</sup> Ministry of Justice Digital & Technology (2020) Modernising Lasting Power of Attorney Solicitor Survey. Unpublished.

83. Signing and witnessing errors can result in OPG deeming an LPA to be ‘imperfect’ (meaning sections of the LPA must be signed and witnessed again) or ‘invalid’ (the whole LPA must be made, signed and witnessed again, and another application fee paid).
84. Our research uncovered many examples of LPAs being witnessed incorrectly. In 2019/20, around 15% of LPAs (approximately 140k) had errors that made them either imperfect or invalid. Signing and witnessing errors made up a significant number of these errors. They’re responsible for 74% of imperfect LPAs and 59% of invalid LPAs.<sup>4</sup> 60% of all errors made in the life-sustaining treatment section of the LPA are due to incorrect witnessing. Fixing these errors requires extra effort, time and cost for the donor and attorneys.
85. Incorrect witnessing happens for many reasons. Sometimes it’s because the role is not correctly understood. Some don’t understand the witness has to watch the LPA being signed, rather than simply check it has been signed. This has been a particular issue during COVID-19 restrictions (e.g. leaving the signed document in a hallway so a neighbour could sign as witness but without the witness actually observing the signature through a door or window). In other cases, the physical presence of a witness has not been possible due to timings or plans changing. Some users also admit to deliberately not following signing and witnessing requirements. For example, by dating the signature boxes before sending the LPA to be signed by others involved in the process.
86. In Q1–3 of 2020/21, there was a 24% reduction in the number of LPAs sent for registration compared to the same period in 2019/20. We believe this was due to difficulties in getting an LPA signed and witnessed during lockdowns and while observing social distancing, as well as a lower interest in LPAs as people dealt with more pressing concerns.
87. There are several approaches that could be taken to address both the confusion around the role of the witness and the practical difficulties of getting an LPA witnessed. These would apply only to the role of witnessing and not the role of the certificate provider.

### **Approach 1a – Remove witnessing**

88. We amend legislation to remove the need for signatures to be witnessed and do not replace the function of the witness with an alternative.

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<sup>4</sup> OPG (2017) Understanding the LPA (datamining). Internal OPG report. Unpublished.



89. This would make creating and registering an LPA easier and quicker for users, and reduce the number of LPAs that cannot be registered because of signing and witnessing errors.
90. This approach is based upon:
- the finding that witnessing does not provide any additional value or safeguards that are not already covered by other parts of the process
  - the belief that no changes beyond those proposed elsewhere in this consultation are needed to cover the role and purpose of witnessing
91. Removing witnessing may put donors at risk if it does in fact provide a safeguard. It may also reduce the perceived legal weight of creating an LPA, making donors and attorneys less likely to fully consider its legal significance.

*In practice, this approach might work by:*

92. Changing legislation to either disapply the provisions for witnessing or remove the need for an LPA to be a deed.

### **Approach 1b – Remote witnessing**

93. 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. This would remove the unnecessary physical logistics for users and provide a continuous digital journey, whilst retaining the safeguards provided by a witness.
94. For this approach to be successful, users would need to be willing, or prefer, to witness an LPA digitally. This witnessing system would need to be safe, secure and easy to use. There's a risk that some users may find digital witnessing more complex and be discouraged from making an LPA. The digital process could be open to manipulation, conflict with other safeguards in the process and potentially compromise the security of those features, such as e-signatures.

*In practice, this approach might work as follows:*

- i. the witness is invited to a video call with the donor or attorney, in which they must have a 'clear line of sight' to them consenting to the execution of the LPA
- ii. the process ensures that the donor or attorney understands that they are witnessing and acknowledging consent to the LPA being executed
- iii. the witness is contacted via email or text by the OPG's service, and enters their details as verification that they witnessed the signing

### **Approach 1c – Replace witnessing with a similar function**

95. 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. A more appropriate method could be used to provide OPG with objective evidence that an LPA has been

legitimately created whilst reducing the number of LPA that cannot be registered due to witnessing errors. The level of safeguard provided by witnessing would be retained, or possibly improved, by making the safeguard more appropriate for digital channels.

96. This approach relies on the safeguard behind witnessing being possible to replicate through digital means, and that users will be confident using a system where technology fulfils this role instead.

*In practice, this approach might work as follows:*

97. When a donor or attorney marks their consent to the execution of the LPA, they might do so through an Advanced or Qualified Electronic Signature (AeS/QeS) equivalent. These technologies allow a donor or attorney to make a mark upon an electronic document within a one-time anti-tamper environment, and securely record additional evidence of the event such as internet address, device information, timestamp, location and identifiable information. These data points would be encrypted as part of the submitted LPA information, and serve as sufficient evidence to attest an agreement was made by the donor and attorney, without the need for an in-person witness.
98. **Based on the current evidence available, the Government's preferred approach is 1c.** Our research demonstrates that there is value to the role of the witness when combined with the role of the certificate provide and ID requirements. We are aware that simplification of the process of witnessing an LPA would be welcomed by users as it would reduce the, often complex, logistics required to complete the LPA. Members of the public acting in this role take their responsibility seriously and solicitors, charities and those supporting the creation view it as a key safeguard.
99. Removal of the witnessing requirement would reduce the number of LPA that cannot be registered due to witnessing errors, but would also remove an element of the three part safeguard process.
100. However, we also recognise that it is a safeguard that can be easily manipulated where coercion or fraud are the objectives of those involved as witness details can be falsified or the witness may be part of the coercion. Remote witnessing does not resolve these issues and additionally creates further difficulties in relation to the use of digital signatures, some of which can't be witnessed without compromising their security.
101. Robust evidence that an agreement has been legitimately made and the acknowledgement of the significant and serious moment of agreeing to an LPA will need to be retained in the new service without compromising the security of the LPA itself or other parts of the process. We therefore propose to look at the introduction of objective evidence-based approaches to verifying that the parties executed the LPA.

## Questions

1. What are your views on the proposals outlined? Please give your reasons for your responses:

### **Remove witnessing (approach 1a)**

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

### **Remote witnessing (approach 1b)**

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

### **Replace witnessing with a similar function (approach 1c)**

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

## Proposal 2: Role of application

102. In this proposal, we examine what purpose application serves within the process of creating and registering an LPA and who can apply to register one. We also consider how to reduce the chance of an LPA being rejected. We examine changes that would either require that an LPA is sent for registration as soon as it is completed by the donor or facilitate the digital storage of a completed LPA before it is sent for registration.

### The current process

103. At present, once an LPA has been created, donors and attorneys can delay sending the document to OPG for registration until it is required for use. There is no legal time limit on how long an executed LPA can be stored before being registered and any outdated forms will be accepted by OPG, as detailed in Schedule 1 of the Mental Capacity Act 2005.

104. To register an LPA, the donor or attorney(s) must complete an application form, combined with the LPA and a fee payable to OPG. They are then recognised as the applicant. The application form must be signed and submitted by the applicant. As set out at proposal 1, the LPA will then go through a series of checks to ensure it complies with the requirements of the MCA 2005 and regulations. If errors are found in the document that prevent its registration, depending on the nature of the error, OPG will either seek to correct these errors with the donor (imperfect) or a new LPA will need to be created and submitted for registration at an additional fee (invalid).

105. The fact that an LPA is only checked for its compliance with legislative requirements once it reaches OPG also creates a set of risks for the donor. If the donor has delayed registering the LPA, it will only be during the registration process that any errors will come to light. If these errors prevent registration and the donor has lost mental capacity to make the LPA in the meantime, then the donor will be unable to correct these or make a new LPA. In those circumstances, where an LPA is no longer a possibility, the intended attorney would need to make an application to the Court of Protection to be appointed as a deputy, at extra costs to the donor's estate.

106. Both of these circumstances lead to additional work, stress and potentially costs for the donor which we are seeking to reduce or remove through modernisation.

### Evidence

107. Statistics from 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). Internal OPG data shows that in 2019/20, OPG received 6,256 LPAs created on forms from before 2015 when the latest LPAs forms were launched (this represents 0.76% of OPGs 2019/20 caseload). OPG modelling suggests that at

any one time there are 80k LPAs that remain unregistered more than 200 days after they were created. Beyond this we have limited knowledge of how many LPAs have been executed but remain stored with donors, attorneys, solicitors or other parties but have not been registered.

108. Research by Ipsos Mori in 2013/14 indicated that 41% of their respondents who had an LPA had not registered it and 44% of potential LPA customers did not see the point in registering the LPA until it was needed.<sup>5</sup> However, since then OPG has put considerable effort in to promoting the reasons why LPAs should be sent for registration immediately. Registration fees also reduced in 2017 to £82 per LPA and the number of LPAs sent for registration has continued to rise year on year. We are therefore limited in our understanding of the scale of this issue at the present time and the reasons why people may still choose to delay registration.
109. During user research with donors and attorneys, we did not uncover any instances where a donor had made and executed an LPA but then decided not to send the LPA into OPG to be registered. This has made it difficult to determine what reasons a user may have for delaying the registration process. In our research survey with over 400 solicitors, 98% told us that they always recommended registering the LPA as soon as possible after completing the document.<sup>6</sup> In addition, in interviews with charity stakeholders, we could find no evidence of delays to registration. Here too the advice is always to register as soon as the document has been executed.
110. One potential reason for delay has been highlighted by user research conducted during the development of OPG's 'Use a Lasting Power of Attorney' service. Some solicitors have noted that their advice on registration has changed since the launch of this service as a protection against 'transferring' power to the attorney too soon.
111. This is a continuing misconception, that registering an LPA immediately transfers powers to the attorney(s) and prevents the donor from making their own decisions. This is not the case. An LPA only confers power on an attorney when the donor lacks mental capacity, and the donor remains able to take their own decisions as long as they have the mental capacity to do so. Where a donor chooses to allow a property and finance LPA to confer power as soon as the LPA is registered, while the donor has capacity, an attorney can only act on the donor's instructions.
112. This finding is backed up by wider OPG research as 48% of online respondents with a health and welfare LPA believed that the attorney could decide when to start to use

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<sup>5</sup> Ipsos Mori (2013) The Future of Lasting Power of Attorney: A research report for the OPG. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/358560/OPG\\_LPA\\_Ipsos-MORI\\_Nov\\_13.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358560/OPG_LPA_Ipsos-MORI_Nov_13.pdf)

<sup>6</sup> Ministry of Justice Digital & Technology (2020) Modernising Lasting Power of Attorney Solicitor Survey. Unpublished.

the LPA, even if the donor has mental capacity.<sup>7</sup> This is despite the fact that a health and welfare LPA can only be used after a loss of mental capacity and it is not possible to override this.

113. Where there are delays to registration, more people in our user research reported that these arise from neglecting to start or finish the process, rather than an intention to delay once the LPA is completed. Some of those who have already made an LPA report delaying registration to delay paying the registration fee, however, since LPA fees were reduced, only 2% of respondents cite cost as a reason for delay.<sup>8</sup>
114. The same research indicated that where registration was delayed due to cost, this was associated with concerns that the individual may need to change their LPA later in life, and that there would be a registration fee for each change made.<sup>9</sup> While this is a legitimate concern if you wish to completely change your LPA, there is flexibility already built into the system, for instance if your concern is that your chosen attorneys may be unable to take up their responsibilities, you can include replacement attorneys.
115. At this point, we need to note that changes to make LPAs amendable are out of scope for the current set of changes being made to modernise the LPA. This is to ensure that the benefits we are looking to realise through increased safeguards, improved access and sustainability can be achieved more quickly. However, we are considering how to lay the foundations to make this possible in the future.
116. While evidence on delayed registration is limited, it is worth noting that during user research we found that the public who are making LPAs without the support of solicitors saw no distinction between filling out the LPA Instrument (sections 1–11) and the application to register (section 12–15); they see the role of application as an integral part of the process of making an LPA rather than the first step in registering it.
117. One of the main reasons to send an LPA for registration immediately, is that it allows for errors in the document to be corrected as soon as possible before the donor loses the capacity to do so. According to internal OPG data for 2019/20, 7.24% of LPAs contained errors that made them imperfect while 8.24% were rejected on the basis that they were invalid. The first can be corrected and resent to the OPG, however the

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<sup>7</sup> OPG (2021) Post Registration (Donor) Survey Responses. Unpublished.

<sup>8</sup> Ipsos Mori (2013) The Future of Lasting Power of Attorney: A research report for the OPG. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/358560/OPG\\_LPA\\_Ipsos-MORI\\_Nov\\_13.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358560/OPG_LPA_Ipsos-MORI_Nov_13.pdf)

<sup>9</sup> Ipsos Mori (2013) The Future of Lasting Power of Attorney: A research report for the OPG. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/358560/OPG\\_LPA\\_Ipsos-MORI\\_Nov\\_13.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358560/OPG_LPA_Ipsos-MORI_Nov_13.pdf)

second must be remade and a new fee paid. This is where the risk that a donor may have lost capacity in the interim becomes an issue as they cannot then correct or recreate the LPA

118. Introducing ways to seamlessly reduce the error rate is therefore going to make the process more straight forward for users and reduce that risk. 19% of LPAs submitted by members of the public contain errors, whilst only 6% of LPAs submitted by solicitors contain errors.<sup>10</sup> This indicates that while the involvement of a solicitor could reduce the error rate it is not enough to guarantee that an LPA will be error free.
119. New digital channels of creation and registration will allow us to look at how checks on LPAs can be automated even while continuing to allow access for those who can't use a digital system. This would reduce the burden on the OPG while increasing the ability to safeguard donors when combined with the OPG remit proposals at proposal 3. If these can be done as early in the process as possible, potentially while the LPA is being created or as soon as possible after it is completed, we could also provide value for users by assuring them of the accuracy of the LPA before it is sent for registration. Work by the OPG in 2016 indicated that up to 97% of the errors in imperfects and invalid LPAs could be removed through a digital submission process.<sup>11</sup>
120. We are seeking to understand how best to reduce and limit the number of errors made in an LPA before it is sent for registration and implement these solutions in a new service that increases the speed and simplicity of registration for users. There are two different approaches we have identified.

#### **Approach 2a – Execution starts registration**

121. 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.
122. Sending the LPA for registration immediately would also be a benefit to OPG investigations where there is an objection to the registration on the grounds that the donor did not have capacity to execute the LPA. Investigation of these objections closer to the point at which the LPA is executed would make it easier to gather evidence to make a determination and therefore would better service the donor's interests. We consider the objection process, and the implications of a short period

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<sup>10</sup> OPG (2017) Understanding the LPA (datamining). Internal OPG report. Unpublished.

<sup>11</sup> OPG (2016) Future LPAs Discovery. Unpublished.

between the LPA being sent for registration and it actually being registered, at proposals 4 and 5 below.

123. This approach assumes that there is no need for donors to withhold registration. There is a risk that removing the option for people to delay registration could be negatively perceived as removing an element of choice, and that some users will delay completion of their LPA to prevent registration occurring before they are ready. This could be especially the case if they expect their family's arrangements to change or through a misunderstanding about the powers that an LPA confers. This would move the risk that that a donor could lose capacity before creating their LPA to earlier in the process. It would also require a time limit for completion of the LPA to limit the storage burden on the OPG, as exists in the current digital tool. Additionally, due to our lack of information on the reasons people delay registration, we could unintentionally remove a process that users have a need for.

*In practice, this approach might work as follows:*

124. Legislation would be amended to require that an LPA is sent for registration as soon as it is executed. Only the donor would be able to register the LPA, although they could be supported through the process by an attorney or third party. The registration itself, and consent for such, would come from the donor whilst they have capacity. The LPA is checked during the creation process and added to the register immediately after payment is received. As with the current digital tool, if the donor pauses creation of their LPA and it remains inactive for a certain period of time, e.g. six months, the OPG will contact the parties to ask if they intend to complete the document and if no response is received, it would be deleted, otherwise they could continue to create the LPA ready for registration.

### **Approach 2b – Execution allows delayed registration**

125. This approach would retain the current ability for people to delay registering their LPA and require OPG to store LPAs created digital 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. This would prevent OPG from having to pay unsustainable amounts to store ever increasing numbers of unregistered LPA which may never be used, registered or have fees paid upon them.
126. For this approach to be workable, some basic checks would still need to be built into the creation and execution process. These would be focused on ensuring the right information was included in the right boxes. More complex checks focused on verification of information would have to wait until the LPA was sent for registration and the OPG has permission to access the information within the LPA.



127. Payment would need to be made at point of execution (rather than registration as now) to cover storage costs, as some LPAs may never be submitted for registration. There would need to be robust identity verification at the point of retrieval and application to register to ensure the donor or attorney accessing the LPA is who they claim to be, and to confirm that they are authorised to apply to register the LPA. This could potentially be decades after its execution as evidenced by the number EPAs that the OPG still receives (currently 40–50 a day) even though they were discontinued in 2007. This also means that OPG would need to have the power to delete an LPA that had been executed but not registered within a certain timeframe e.g. 6 months.
128. Additionally, without permission from the registration process to access the data in the LPA, the OPG would have limited ability to do more than basic checks on the document. This approach may therefore still result in situations where an LPA is sent for registration after the donor has lost capacity and errors are found so it cannot be registered, a new LPA cannot be made, and an application would need to be made to the Court of Protection. This risk diminishes the smaller the gap between execution and registration can be made.

*In practice, this approach might work as follows:*

129. Upon completion, The Office of Public Guardian allows the donor and attorney to digitally store the LPA prior to registration. Payment must be taken in advance to cover storage costs incurred by OPG and could cover a proportion of any future fee on application to register. During the time an LPA is stored with OPG, checks would be performed to ensure errors would not be present at a much later point of registration. Upon the need to register, a donor or attorney would search for the LPA through GOV.UK and must complete a strong identity check to recall the data and confirm their role to proceed with registration. Until that point, the completed power of attorney would exist, but without a ‘registered’ status it could not be used.
130. **Based on the current evidence available, the Government’s preferred approach is 2a.** Given the number of LPAs that are found to be either imperfect or invalid, early checks and immediate submission for registration would allow OPG to vastly reduce the number of LPAs that have to be returned, reducing the burden on donors and attorneys and reducing the risk that the donor cannot make a replacement due to loss of capacity. The practical limitations of creating a system that allows long term digital storage of LPAs make this undesirable as we do not believe it is appropriate to delete an LPA that has, to all intents and purposes, been executed and is valid but has simply not been registered. This is especially the case in light of the fact that LPAs are private agreements between private individuals and OPG’s role is intended to be as an administrative registering body.

## Questions

2. Would you, or the people you support, delay the registration of an LPA?  
Please give the reasons for your answers.

### No

- Do not see a benefit to delaying registration.
- Was advised not to delay registration.
- Need an LPA as soon as possible due to a medical diagnosis
- Need an LPA as soon as possible due to a financial decision that needed to be made
- Other reason (please specify)

### Yes

- Don't want to pay the fee yet
- Can't pay the fee immediately
- Don't want to transfer power of attorney immediately
- May want to change my LPA
- Created an LPA after a medical diagnosis and I'm waiting until nearer the time
- Other reason (please specify)

3. What impact would removing the ability to delay registration have? Please give reasons for your answer

- Positive
- Negative
- Don't know

## Proposal 3: OPG remit

131. Under this proposal we are considering 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, we are interested in clarifying its ability to check the LPA for more than just administrative purposes. This would be to aid in the prevention of fraud, abuse and undue pressure, including the introduction of identity verification on the parties to the LPA. We consider approaches based on set conditional checks and discretionary powers. Both options include the introduction of identity verification.

### The current process

132. The statutory functions of the Public Guardian are set out in section 58 of the Mental Capacity Act 2005. For LPA, OPG operates as an administrative body and is responsible for “establishing and maintaining a register of the lasting powers of attorney”. Under the Mental Capacity Act 2005, it has limited powers to halt or stop their registration where an LPA does not comply with Schedule 1 of the MCA but is largely reliant on third parties to raise concerns about the contents or creation of an LPA. While OPG checks LPA to ensure that they comply with legislation, its ability to verify the accuracy of the information it receives is unclear in the current legislation.

### Evidence

133. There is limited understanding of OPG’s functions amongst the public and stakeholders, for example; 50% of the general public in England and Wales give an incorrect or vague answer when asked what they believe the function of OPG to be while only 3% had a full understanding.<sup>12</sup> Misconceptions are evident when discussing OPG’s role in LPA. For instance, research has shown that many stakeholders and users mistakenly assume that accuracy or identification checks are routinely conducted. Some users even ‘remember’ providing ID as part of the process of making their LPA, even though this has never been part of the creation or registration process.

134. Our research to date shows that introducing ID verification checks would be viewed positively by the public, legal and charity sectors. There are two caveats to this:

- i. that we provide an inclusive list of verification options and
- ii. allowed for the checks to take place either online or offline

135. Currently, all solicitors are mandated to verify the identity of their client under the requirements of the profession. As a result, those donors procuring the services of a

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<sup>12</sup> OPG (2020). Lasting Power of Attorney Public Awareness and Understanding in England and Wales. Internal OPG report. Unpublished.

solicitor are already having to provide documents to verify their identity, and proof of address in some instances.

136. The same is not the case for other actors in the LPA. In our survey with solicitors, only 11% check the attorneys' ID, and fewer check the ID of other actors on the LPA.<sup>13</sup> During user research, we did not experience disapproval from attorneys we spoke to on the matter of providing proof of their identity.
137. Both users and stakeholders have expressed their desire for checks to be conducted on actors involved in the LPA application process as a safeguard for the donor. For more checks to be conducted on LPAs, we would want to amend legislation governing OPG's functions to give it proportionate powers to ensure the accuracy of the information it registers. This would also be intended to provide clarity on the scope of OPGs powers, including the ability to carry out ID checks and halt registration where the results did not align with the requirements of the legislation.
138. Introducing ID checks only for new LPAs once a modernised service is introduced, could leave loopholes for fraudsters who could still access historical forms to create false LPAs. In order to close this loop, while still allowing historical LPAs to be registered, we would need to consider how we could provide an enhanced application process for old LPAs. This would allow an existing, executed LPA to be sent to the OPG for registration while applying new ID checks to the process of applying to register the LPA. Our intention would be for this process to dovetail into the new modernised system as far as possible so older LPA customers could also make use of the increased benefits of the new system.
139. Outside of identity, our stakeholders have suggested that powers could be expanded to further assess the suitability of the attorney's appointment. This could include restricting the ability to appoint a person who has previously misused a power of attorney or those convicted of abuse of a vulnerable person. Stakeholders have also highlighted the need to ensure that where an LPA's registration is rejected, there is an appropriate appeals process.
140. We are also aware that the number of living LPA holders is increasing as life expectancy increases. OPG modelling estimates there are currently 3 million living LPA holders, and predicts this will rise to 4.5m by 2025. This means that OPG's post-registration services, such as investigations, are likely to see increased demand over the next few years to reflect this change. If we can front load and automate checks (as set out in proposal 2) to see if the LPA is compliant with the requirements of the MCA, then this could ensure that the OPG can better focus its resources on

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<sup>13</sup> Ministry of Justice Digital & Technology (2020) Modernising Lasting Power of Attorney Solicitor Survey. Unpublished.

investigations that would require more in-depth consideration of the evidence, such as concerns about capacity or abuse, as the number of those concerns increase.

141. These powers and checks are intended to reduce the chance that a fraudulent LPA or one created through undue pressure will be registered and increase confidence in the safeguards provided by OPG. It is however important to recognise that it is not possible to reduce instances of fraud and abuse to zero, and determined perpetrators will still seek to find ways around the safeguards put in place. For those cases, OPG will continue to have a role investigating the misuse of registered LPAs and taking concerns to the Court of Protection as necessary. 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**

142. 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. The OPG would not register an LPA that could not pass these checks unless directed to do so by the Court of Protection. Many of these checks would be automated which would increase efficiency and consistency for OPG. Registration for users would be guaranteed once they have passed certain checks as set out in regulations, but OPG would have the ability to refuse registration where the information contained in an LPA could not be verified or did not meet the checks required. Where this was the case, a donor or attorney would still, as now, be able to apply to the Court of Protection to have their LPA recognised as valid and placed on the register.
143. This approach assumes that we can identify and prescribe in legislation a set of checks that when passed, either individually or in groups, will provide the necessary level of confidence that an LPA has been validly made by the parties involved. This would include ID verification checks which would need to align with current government guidance, known as "Good Practice Guide 45",<sup>14</sup> which is also incorporated into the draft UK digital identity and attributes trust framework.<sup>15</sup> The intention behind such checks would be to provide additional protection for donors by verifying that they were the ones who consented to the LPA, increased confidence in the validity of an LPA for third parties and to deter fraud, abuse and undue pressure.

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<sup>14</sup> Cabinet Office and Government Digital Service (2014) How to Prove and Verify Someone's Identity. Available at: <https://www.gov.uk/government/publications/identity-proofing-and-verification-of-an-individual>

<sup>15</sup> Department for Digital, Culture, Media & Sport and Matt Warman MP (2021) The UK Digital Identity and Attributes Trust Framework. Available at: <https://www.gov.uk/government/publications/the-uk-digital-identity-and-attributes-trust-framework>

144. Where an LPA was unable to pass any of the required checks, OPG would have the power to refuse registration. This creates a risk that if the checks are too stringent, legitimate LPAs may be rejected. However, if the checks are too weak, an unacceptable number of abusive or fraudulent LPAs may be registered, leaving vulnerable donors open to abuse and increasing the burden on OPG's investigations team and the Court of Protection.
145. The prescribed checks would also need some flexibility for future changes to the system to ensure that as best practice, especially on ID verification, changes, the checks carried out by OPG could be upgraded.

*In practice, this approach might work as follows:*

146. A donor uses 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 LPA where the donor has passed the required automated or in-person checks could be registered.

### **Approach 3b – Discretionary registration**

147. 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.
148. Taking a discretionary approach to registration would mean that OPG has more ability to consider the unique circumstances of each donor, their LPA and the information they have available to pass the required checks. It mitigates the risk of checks being too stringent or weak. This would allow OPG to register LPAs that may not meet the threshold for automatic registration but can still be demonstrated to be valid.
149. To take this approach, high-risk cases would need to be easily identifiable, something we would test through further evidence gathering and development. There are potentially significant risks with this approach however, as in any discretionary system, it would be liable to individual biases and inconsistencies, even with strict rules and guidance in place. This in turn could lead to an increase in applications and appeals to the Court of Protection while depriving people of the protection of an LPA. OPG would also potentially be exposed to increased liabilities, in relation to

discrimination or if was judged to have registered a fraudulent or abusive LPA in error. This could undermine its sustainability and ability to robustly carry out its duties. A system that protected against this risk would likely become a system of conditional checks as outlined at 3a, but potentially with a lot more complexity.

*In practice, this approach might work as follows:*

150. A series of proportional checks would be performed throughout the application process until, added together, they give a combined risk score for the donor which would determine whether their LPA could be registered.
151. To decrease their overall risk factor and build confidence, the donor could:
  - authenticate their account through multi-factor authentication, presenting two or more pieces of evidence (something they know, something they have, something they are) to protect them from others trying to access their data.
  - perform a liveness test, to analyse images or videos and decide whether they come from a real person or a fake one (similar to the current passport application process).
  - include people to notify in their application,
  - be supported through the process by an accredited intermediary or have more than one attorney, and
  - have their identity checked at point of payment by verifying their cardholder details through Open Banking
152. Where a donor feels that they have been refused registration on unfair grounds, they are able to submit an appeal to the Office of Public Guardian where their application would be reviewed by senior operational staff or an independent panel.
153. **Based on the current evidence available, the Government's preferred approach is 3a.** Conditional registration would provide clarity for all involved on the specific checks that OPG carried out and how these informed the registration of an LPA. This will help make sure all those applying know what they need to do and the information they need to provide before they register their LPA. All individuals would be required to pass the same checks to register their LPA. We are concerned that discretionary checks could lead to inconsistent outcomes for individuals. Our intention would be to create a proportionate, conditional system that allows for a wide range of checks and information that can be provided. In doing so, we would aim to include methods of verification for those who may not otherwise be able to provide e.g. a passport or driving license and ensure that costs remain affordable for those creating an LPA.

## Questions

4. Which actors in an LPA do you think should have their identity checked?

Please give reasons for your answers:

- Donor
- Attorney
- Certificate Provider
- Don't know
- Other (please specify)

5. What are your views on the proposals outlined? Please give your reasons for your responses:

### **Conditional checks (approach 3a)**

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

### **Discretionary checks (approach 3b)**

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know



## Proposal 4: How to object

154. Under this proposal we are considering how to clarify and streamline the current processes for objecting to the registration of an LPA. This process allows people to raise an objection to an LPA being registered if they have concerns about what is contained within it or how it was created. Currently, the legislation sets out different processes for different types of objection. We are seeking to understand how to make it easier for those wanting to raise an objection to do so.

### The current process

155. Objection processes are governed by the Mental Capacity Act 2005 and The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007. The legislation currently only deals expressly with objections made by donors, attorneys and other named persons. Named persons are those the donor has listed within the LPA as people to notify prior to the registration of the LPA. It also provides for different routes of objection depending upon the nature of the objection.

156. Objections can either be on the basis that:

- the LPA was never legally executed in the first place, for example, because the donor did not have capacity to create it or undue pressure was applied to them. This is called a prescribed objection, or
- while the LPA was legally executed, it has ceased to confer power, for example due to the death of the donor or bankruptcy of an attorney. This is called a factual objection

157. The role of the OPG varies slightly depending upon the identity of the objector and the nature of the objection, but the general scheme of the legislation is that where an objection from a donor, attorney or other named person meets the requirements set down, the OPG must not register the LPA unless directed to do so by the Court. This is because, while the OPG is responsible for maintaining the register of active LPAs, the Court of Protection has responsibility for resolving disputes regarding LPAs. Applications to the Court can be made either by the party making the objection, or the party wishing to register, depending upon the type of objection.

158. The OPG also receives objections to registration from other (third) parties – most frequently, family members who were not notified of the LPA and Local Authorities. Where such objections provide OPG with evidence that an LPA has not been made in accordance with the requirements of the legislation – for example, because the donor lacked capacity at the time of execution of the LPA – OPG is prohibited from registering unless directed by the court to do so. The legislation does not address who should make an application to the Court in these circumstances which results in a lack of clarity for both OPG and potential objectors.

159. The notification and objection process is designed to build in safeguards, including in relation to alleged fraudulent action, or undue pressure on the donor, and accordingly it is important that the process is sufficiently easy to understand so as not to discourage genuine objections from being raised. At present, the legislative framework is relatively complex and does not clearly set out the objection process for all potential objectors. Some potential objectors may be unclear on whether they can intervene, and, if so, how they should go about it. This could result in donors being at risk of abuse once an LPA is registered.

### **Evidence**

160. Allowing donors to include people to notify in their LPA was intended to provide an important safeguard as they would be people, chosen by the donor, who might be aware of any circumstances that may invalidate, or cause concern about, the creation of an LPA. Accordingly, they are specifically referenced in the legislation as being able to raise an objection. However, in 2017, 83% of LPA had no people to notify<sup>16</sup> and user research has demonstrated that some people are unclear on the role that including people to notify in an LPA serves.
161. In our survey with solicitors, an overwhelming majority told us that having people to notify serves little value and now that it is no longer mandatory, they do not recommend including them.<sup>17</sup> The same was the case with many charity stakeholders we spoke to; many told us that their clients choose not to notify any individuals and they are unlikely to recommend it. Some solicitors have shared with us that notifying people can act as a safeguard should the donor not wish to register their LPA immediately upon completion.
162. Stakeholder engagement has shown that limitations to a donor's social network and social isolation can reduce the likelihood of them having additional parties to notify upon registration. The difficulty some people have finding people to notify or act as a second certificate provider was the reason that the requirement for two certificate providers in the event there were no people to notify was removed.
163. User research and digital research methods show that people, including professionals, want a simpler and better signposted route to raise concerns. There is also recognition that the certificate provider is in a unique position to be aware of any legitimate grounds to object but does not have any specific statutory basis on which to raise a concern with OPG. The same could be said for organisations such as Local Authorities who are likely to have pertinent information about LPA applications due to their statutory safeguarding duty.

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<sup>16</sup> OPG (2017) Understanding the LPA (datamining). Internal OPG report. Unpublished.

<sup>17</sup> Ministry of Justice Digital & Technology (2020) Modernising Lasting Power of Attorney Solicitor Survey. Unpublished.

164. Information from third parties such as these is valuable to OPG and clarifying the process for third parties to raise objections when they have a legitimate concern would likely assist in the prevention of fraud and abuse. In 2019/2020, out of 3093 investigations (including post-registration concerns), 227 were conducted following objections raised by third parties. Most of these related to a concern that the donor lacked the mental capacity to make the LPA. More than 50% (115) of these objections were referred to the Court of Protection. We are also aware that of those 227 objections, 48 were received from Local Authorities.
165. As stated, Local Authorities have a statutory safeguarding duty and this means it is important that OPG has clarity on the powers it has to investigate and act on concerns coming from them and other third party organisations with similar responsibilities. Although small in number, the information provided by these objectors is important to protecting the interests of some of the most vulnerable donors and therefore, information from third parties such as these is valuable to OPG.
166. There is evidence that some objectors may be confused about where to direct their concerns in the first instance. Despite the fact that there is guidance on GOV.UK that prescribed objections should go to the Court of Protection, the Court 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. <sup>18</sup> Adding to this confusion, 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. Clarifying the process for all parties to raise objections when they have a legitimate concern would likely assist in the prevention of fraud and abuse.
167. In the new service, we wish to 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.

#### **Approach 4a – OPG receives all objections**

168. All objections, of all kinds from all parties, would be sent to OPG. 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.
169. 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

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<sup>18</sup> We have been unable to obtain data from the Court of Protection for 2019/20.

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.

170. This approach assumes that OPG should have the power to review and investigate all objections when they are first raised, even those that are currently directed straight to the Court of Protection. OPG will need to be able to manage a greater number of objections, as those currently directed to the Court will come direct to OPG, and be able to direct them accordingly. Any information gathered would need to be easily shared between OPG and Court of Protection. There is a risk that even with this streamlined approach, some people with legitimate concerns will still be unaware of how to raise an objection or that an LPA is being made.

*In practice, this approach might work as follows:*

171. A person learns that a donor has been coerced into making an LPA and they are signposted to GOV.UK to raise an objection. The website prompts them to enter basic information about the donor and themselves and assists them with selecting from a list of reason for objecting. It requires them to submit a statement about the reasons for their objection along with any evidence they have. The objection is received by OPG and triaged to be taken forward to investigation based on grounds of undue pressure. The registration of the LPA is suspended and OPG begins an investigation to gather further evidence. Once the investigation is complete, if it appears to the Public Guardian that the grounds for the objection are justified, OPG will refuse to register the LPA. It may well be that OPG would then make an application to the Court to make a determination in such a case, but in any event, any party dissatisfied with the outcome could apply to the Court.

#### **Approach 4b – OPG receives only factual objections**

172. 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.
173. This approach assumes that we can improve the guidance and signposting to remove the existing confusion and ensure people object to the correct place. There is a risk of delays to objections being dealt with as a result of them initially being misdirected. There is also a risk that this could leave attorneys without the power to act on behalf of their donors if this causes significant delays in registration and they lose capacity in the meantime.

*In practice this approach might work as follows:*

174. A person learns that a donor has been coerced into making an LPA and they are signposted to GOV.UK to raise an objection. The website prompts them to enter basic information about the donor and themselves and assists them with selecting from a list of objections. Because their concern is about coercion, the site directs them to the appropriate application form for the Court of Protection to make an objection on the ground of undue pressure. The website automatically sends a notification to OPG that an objection is being raised at the Court and OPG suspends the registration. During its consideration of the objection, the Court directs OPG to carry out an investigation into the allegation. Once OPG completes this it reports back to the Court and the Court determines that the LPA was not legally valid and should not be registered.
175. **Based on the current evidence available, the Government's preferred approach is 4a.** Our research demonstrates that people want a simpler and better signposted route to raise objections. We also know that a wider group of people have objections to raise with OPG than the MCA currently includes. Changing the legislation to allow objections from anyone, either prescribed or factual, to be directed to OPG would achieve a simplified process. We are concerned that approach 4b would not make the objection process simpler for those with a concern. OPG already receives more prescribed objections than the Court of Protection and in most cases would be directed to investigate a prescribed objection for the Court. This approach allows the investigation to begin earlier and avoid delay. In addition, OPG needs to be aware of prescribed objections to ensure that it does not register an LPA that is currently before the Court of Protection for determination. By directing concerns to OPG in the first instance, it will be aware of any further Court action.

## Questions

6. What are your views on the proposals outlined? Please give your reasons for your responses:

### **OPG receives all objections (approach 4a)**

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

**OPG receives only factual objections (approach 4b)**

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

7. Should the OPG be referring cases directly to the Court of Protection? Please give reasons for your answer.

- Yes
- No
- Don't know

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

176. Under this proposal, we are considering 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, we want to look at the length of the current statutory waiting period, and where it sits in the LPA creation and registration process.

### **The current process**

177. The process for raising objections is detailed in Schedule 1 of the Mental Capacity Act 2005 and the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007. For a concern about the creation of the LPA to be investigated by OPG before it is registered, an objection must be raised during the 4-week statutory waiting period which forms part of the registration process. This waiting period applies to all LPA, even if all parties agree to the LPA and there are no people to notify. The 4-week period includes time to allow for posting, both for parties to receive notification and to respond to OPG. The statutory waiting period is intended to provide a safeguard for the donor as objections can be raised and investigated prior to the LPA being usable, meaning registration can be stopped to prevent use where there is a valid concern.

### **Evidence**

178. Our user research and stakeholder engagement have indicated that users perceive the waiting period as a processing time delay rather than an intended safeguard, adding to what they already consider a lengthy process. There is general stakeholder agreement that reducing the length of the entire registration process would be beneficial to all parties involved, and many people would welcome a contraction to one or two weeks of the waiting period itself.

179. Some stakeholders have expressed concerns over the value of objections during registration, stating that abuse only becomes obvious when the LPA is used, and we should consider how this is better identified and flagged to OPG so that swift investigations can be conducted and LPAs suspended where abuse is found. Their view is that focusing on improving the post-registration process would be more beneficial than bolstering pre-registration objections.

180. A small minority of stakeholders have voiced reservations towards the idea of a shorter objection period. They believe that 4 weeks allows greater decision time for donors, or for people making the, often difficult, decision to raise an objection and gather the evidence in order to do so. This concern mainly comes from charities involved in supporting donors through the LPA creation process.

181. User research has shown that people asked to be Certificate Providers do not have an easy channel to raise concerns, either at a later point in the application or even if they feel after talking to the donor that they cannot act as their Certificate Provider at all. This is despite the fact that they have a key role to play in determining that the donor understand the meaning of the LPA and that no fraud or undue pressure has been applied in the creation of the LPA.
182. There is some evidence that donors themselves may wish to retain a period after the LPA has been submitted for registration where they can withdraw their LPA, should their circumstances, or the decisions they have made, change since the LPA was created. Internal OPG data shows that around 3,300 LPAs were withdrawn from registration by donors in 2019/20. This is around 0.36% of the LPAs received in 2019/20. Whilst a small figure, this demonstrates that there is a need for a period where donors can easily withdraw their LPA after it has been sent to OPG. A 'cooling-off' period for donors may be more suited to the needs of individuals, and the ability to easily halt or cancel an LPA for a short period after its registration may be a balance between improving the speed of application and maintaining safeguards.
183. We want to understand the value that 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, there are three ways we could make changes.

#### **Approach 5a – Objection during creation**

184. Objections could be raised from the point the donor starts creating their LPA until it is sent for registration. This 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.
185. Front-loading objections in this manner means a legitimate LPA could be available for use more quickly by reducing the amount of time for registration processes to be carried out. Although the average time taken to create an LPA is 6 months (this includes time to think about appointments and powers, drafting and signing the document), some are created in shorter time frames and this option would not



significantly reduce the time for those LPAs. This option could also provide a route for certificate providers to provide timely feedback where they have concerns.

186. For this approach to be worthwhile, a new, simpler and more streamlined process would need to be created to make interested parties aware that an LPA has been started and support them in raising legitimate concerns. Objections received would need to be stored by OPG for an agreed period of time and be matched and reviewed when it received the LPA for registration.
187. With this approach, we assume that OPG has permission to access an LPA before it is completed, to contact the parties necessary to start an investigation, and that it is appropriate for it to have the powers to do so. It is possible that OPG would not have enough information while an LPA is being created by the donor and before execution, to robustly investigate. The LPA information may be changed repeatedly before the document is finalised and the donor has made their decisions. There is also the risk that the OPG could be overburdened with illegitimate or frivolous objections, due to limited knowledge of the LPA or unconfirmed information within the LPA prior to registration. This could place undue burden on OPG's resources. In addition, potential objectors may be unaware of the LPA and OPG's role, so may not raise legitimate concerns even when they can.

*In practice, this approach might work as follows:*

188. A family member who is a notified party is worried that someone is being forced into making an LPA, and that they may lack mental capacity to make the decisions necessary. They use guidance from GOV.UK to find a signposted channel and raise a concern with OPG. OPG have not received an application but can see someone has provided some identity credentials matching the named individuals, and is in the process of filling out an LPA. OPG append the objection to their records, and it will be flagged and appended to the case as and when an LPA is received and can then be acted on immediately.

#### **Approach 5b – Reduce the statutory waiting period**

189. The existing process could be retained but reduced in length. There would still be a statutory waiting period after the LPA has been submitted for registration and objections that may be investigated by OPG can be raised during this time, potentially halting the registration, or stopping it from occurring. This will provide a safeguard for donors and prevent registration of LPAs that have not been created in line with legislation. Objections in this instance will be made once the full content of the LPA is known and submitted, reducing the chance of misguided or uninformed objections and reducing the potential burden upon OPG's resources.
190. This approach assumes that there is value to having a particular period in the registration process during which time interested parties can object to the LPA being

registered. Also, those unaware of the LPA being made will need to be made aware of it prior to its formal registration in order to raise an objection in good time. A reduction in the waiting time might disadvantage those who object through paper channels, due to additional postage and receipt times, and we cannot assume that even if a donor chooses to apply for an LPA via an online service, that someone objecting to it would also be able to use online channels. There is also a risk that the donor may be left unprotected and vulnerable due to urgent decisions or actions being delayed as a result of the statutory waiting period preventing quicker registration.

*In practice, this approach might work as follows:*

191. A 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**

192. The statutory waiting period could be removed should other new safeguards and checks in the process 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.

193. This approach assumes there is no value to having a particular period in the application process during which time interested parties can object to the LPA being registered. A new, simpler and more streamlined process would need to be created to make interested parties aware that an LPA has been registered and support them in raising legitimate concerns. Any objections would need to be matched to an LPA after it has been registered.

194. Without a statutory waiting period, an LPA can be registered and used almost immediately. For those where there is no risk of abuse or fraud, and where the power allows it, this enables immediate use of the LPA, and for urgent decisions to be made. However, in other cases, it would provide greater opportunity for fraudulent activity or abuse to take place because the LPA is usable immediately with limited ability to prevent its registration. Additionally, as there is no point in the process where a third party has full sight of the complete contents of the LPA before it's registered, by the time a third party has sight of this information and can determine if they need to the object, it is too late to prevent registration. This could reduce OPG's ability to prevent abuse.

*In practice, this approach might work as follows:*

195. There is no specific objection process. Instead, all concerns reported either before or after an LPA's registration are considered and acted upon in the same way by OPG. Checks on the LPA are conducted during its creation and the moment an application and payment is submitted, the LPA is added to the register and is able to be used, subject to conditions within the LPA. More complex LPAs such as those containing preferences or instructions, or those where a concern has been raised may still be subject to additional processing time. After registration, there would be a two week 'cooling-off' period where the donor may easily suspend or withdrawn their LPA or where the legislation may limit its use on specific factual grounds if a concern is received.
196. **Based on the current evidence available, the Government's preferred approach is a combination of the above approaches.** We believe that all three have benefits that can be combined; allowing people to send objections to the OPG from the point a person starts their LPA until the end of the 'cooling off' period after it is submitted for registration, but reduced from the current four week period. Our research and engagement so far demonstrate that people see value in the ability for individuals outside the process of creating the LPA to raise concerns about it. Given those creating an LPA have limited interaction with OPG, it is important that third parties, especially those with statutory safeguarding roles, continue to have the ability to raise concerns before an LPA is registered. We would therefore not want to completely remove this from the process. However, shortening the period for objection after registration, while extending it in parallel with creation opens up new opportunities for these groups to lodge an objection at the earliest possible point and still have it fully considered.

## Questions

8. Which aspects of the proposals for when to object do you prefer? Please give reasons for your answers.

### **Object during creation (approach 5a)**

- Quicker process
- More certainty
- Objections found and resolved earlier
- Concerns easier to raise
- Prevents registration of invalid LPAs
- Don't know
- Other (please specify)

**Reduce statutory waiting period (approach 5b)**

- Quicker process
- Keeps some waiting period as a safeguard
- Longer to decide whether to make an objection.
- Prevents registration of invalid LPAs
- Don't know
- Other (please specify)

**Remove statutory waiting period (approach 5c)**

- Quicker process
- Simpler process
- Immediate registration is possible
- More evidence of abuse may be available
- Don't know
- Other (please specify)

## Proposal 6: Speed of service

197. Through proposals 1–5, we have considered changes that could significantly reduce the amount of time it takes to create and register an LPA for all people who wish to make one. This aligns with our aim to create a smoother service for all users by making the process more straight forward. In this section, we consider:

- whether there is a group of people for whom an even quicker service would be necessary to meet an urgent need for an LPA,
- how to balance this against the safeguards needed and
- ease of access for those same users

### The current process

198. In the current system, registering an LPA takes time. OPG’s target for registration of LPAs is 40 working days from receipt of the completed application. Once OPG has received an LPA it takes an average of four weeks to perform all operational functions. It is during this time that OPG conducts manual checks to confirm that the LPA can be registered, as explained in proposal 3. Once confirmed, notices are sent to the donor and attorneys and the four-week statutory waiting period starts, to allow objections to the registration to be made to OPG as covered at proposals 4 and 5.

199. OPG currently offers a single service to all donors and does not prioritise its processing of LPAs based upon the donor’s circumstances or severity of need. The waiting period applies even when an LPA is needed urgently, for instance, when the donor could lose mental capacity before the LPA is returned. So even where administration process can be sped up, the LPA still has to wait for those four weeks before it can be registered. During this waiting period, attorneys are unable to begin acting on behalf of the donor, even if the donor loses capacity.

200. This means that when an LPA is created when a donor is close to losing capacity and attorneys need to take quick action to ensure a donor’s needs are met, they can be restricted by how long the registration process takes. This could have a significant impact on the donor if the decisions that need to be made relate to paying for or providing urgent care, such as selling the family home to afford care home provision.

201. To understand how much this is a concern, and to what extent this need exists, we need to understand how many people leave it to the last, or almost the last, moment to create and register their LPAs and for what reasons.

## Evidence

202. Our user research has shown that people put off making an LPA because they don't understand what it is or how it could protect them.<sup>19</sup> This aligns with research that shows there is a general lack of awareness that LPAs can be set up and registered in advance of need.<sup>20</sup> Only 24% of people register an LPA far enough in advance that it could be described as 'planning ahead'.<sup>21</sup> The implication is that often the trigger to making an LPA is a sudden change in circumstance, such as a medical diagnosis, which could create an urgent need.
203. Solicitors state that up to 25% of their clients are creating an LPA due to an immediate requirement,<sup>22</sup> whilst OPG estimates that it receives 5 to 10 calls per day requesting the registration of an LPA be expedited due to an urgent need.
204. In line with these findings, an OPG customer satisfaction survey in January 2020, found that 'quicker registration' was generally the most prominent theme, requested by 11% of respondents (this compares to the second most requested feature "practical approaches to error correction" at 5.1%).<sup>23</sup> However, the number of respondents specifically requesting quicker registration or a fast track service due to an urgent application was quite small (0.4% and 0% respectively).<sup>24</sup>
205. Our engagement with solicitors demonstrates that this is a complex issue, with many of the solicitors that we have spoken to supporting a reduction in the overall time it takes to process an LPA, including the potential removal of the statutory waiting period.<sup>25</sup> However, there is concern amongst some solicitors that this would reduce safeguards, with those who would like to keep the statutory waiting period noting that there is value in the ability for people to object.
206. Our conclusion at this point is that the need for a quicker LPA service is potentially larger than the group specifically requesting this service, possibly around 25% of donors. This is based on the disparity between the number of donors leaving making an LPA to the last minute and the number requesting an urgent service. We therefore have to consider whether this need can be met through increasing the speed of

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<sup>19</sup> Ministry of Justice Digital & Technology (2020) Modernising Lasting Power of Attorney Interviews with Charities and Solicitors. Unpublished.

<sup>20</sup> Financial Conduct Authority (2017) Coping Mechanisms – third party access. Available at: <https://www.fca.org.uk/publication/research/coping-mechanisms-third-party-access.pdf>

<sup>21</sup> OPG (2019) Post Registration (Attorney) Research. Unpublished.

<sup>22</sup> Ministry of Justice Digital & Technology (2020) Modernising Lasting Power of Attorney Solicitor Survey. Unpublished.

<sup>23</sup> OPG (2020) Customer Satisfaction Surveys: Power of Attorney. Unpublished.

<sup>24</sup> OPG (2020) Customer Satisfaction Surveys: Power of Attorney. Unpublished.

<sup>25</sup> Ministry of Justice Digital & Technology (2020) Modernising Lasting Power of Attorney Interviews with Solicitors. Unpublished.

service for everyone through the proposals outlined elsewhere, or whether a dedicated urgent service is necessary.

### **Approach 6 – Dedicated urgent service**

207. Through a combination of the preferred approaches already outlined, we believe it may be possible to reduce the registration time for an LPA down to two weeks for most LPAs, while increasing safeguards and continuing to allow for objections to be made. This would be a significant reduction in the time to register for all LPAs against OPG's current targets and statutory requirements.
208. To provide an urgent LPA service that was quicker than this timeframe, deliberate delays in the registration process would need to be removed or reduced beyond the proposals already outlined. This could include the complete removal of the statutory waiting period (or cooling off period) for urgent LPAs. It would also require prioritisation for those cases where checks cannot be automated, and manual checks are required instead (such as for instructions and preferences). This would allow faster registration of the LPA compared to the standard service, allowing the donor's nominated attorneys to make the urgent decisions needed to support, care for and protect the donor.
209. To ensure appropriate prioritisation of donors' needs and to prevent unnecessary use, access to the service would have to be restricted to those who could demonstrate that there was an urgent need. This would likely require the provision of medical evidence of an urgent need, information on the nature of the urgent decision that was needed and why this was in the donor's best interests.
210. Most importantly, evidence would also be necessary as an additional safeguard against abuse. If the objection period were removed, third parties would have a reduced window during creation within which to object to the LPA and raise concerns with OPG before the LPA could be used. We are also acutely aware that any move to speed up the LPA registration process, whether for all or for some, could increase opportunities for fraudsters unless appropriate protections are maintained or added. Proof of need would be vital to ensuring that fast tracked LPAs were legitimate requests and not being made with malicious intent.
211. However, all of these provisions could make the process more complex, requiring OPG to exercise more discretion and manually interrogate detailed evidence. The more complex the urgent system is the more difficult it becomes for OPG to run but more importantly for the public to use. There are a number of risks in play:
- i. Eligibility thresholds and evidence requirements could make it more difficult for individuals to understand if they are eligible.
  - ii. The time to obtain the evidence could delay creation to the point where the donor has already lost capacity and can no longer make the LPA.

- iii. The cost of obtaining evidence could be prohibitive for some given that capacity assessments by medical professionals are often charged for.
- iv. The costs for OPG of processing this information could mean fees increase for all donors, as we would not want to penalise vulnerable donors who needed the service.
- v. High uptake and no ability to automate the review of evidence could result in longer registration times than the standard service

212. If these risks materialise, they would prevent an urgent service being achievable.

213. **Based on the current evidence available, the Government's preferred approach is not to proceed with an urgent service.** As we have already outlined, 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 evidence available indicates that the need for a quicker registration service, while a minority at around 25%, is not insignificant and there are likely more people that require a quicker registration process than is currently provided. Focusing resources on an urgent service could mean that the standard service remains slower than the optimum level OPG could offer. From this perspective, we believe that providing an optimal service for all donors is preferable to providing a quicker service only for those that need it.

214. Additionally, to provide a quicker service than the standard, would likely require the complete removal of the objection period, which with the changes we propose to who can object, would otherwise continue to function as safeguard. This would require the introduction of new safeguards and evidence provision for the urgent service to prevent it being used to abuse people. There is a significant risk that either those safeguards would be so burdensome that people who need the urgent service can't access it, or so complex for OPG to operate that the process takes even longer and costs more than the standard service and loses its value.

215. We also note that in cases of extreme urgency, it may already be the case that the donor lacks the capacity to execute an LPA. In these circumstances, there is already an alternative to ensure these people have people able to make decision on their behalf via an application to the court of protection to appoint a deputy. The court also has the ability to deal with expedited applications in extremely urgent cases.

216. In conclusion, we don't believe it is possible to offer an urgent service with the necessary safeguards to protect donors. For this reason, we believe the best way to proceed is to provide an optimal speed of service to all donors.



## Questions

9. If we are able to reduce the time to register an LPA to two weeks for most donors (without objections), would an urgent service provide additional benefit for you or the people you support? Please give reasons for your answer.
- Yes, I need an LPA registered within two weeks
  - No, there is no benefit over a two-week service for everyone
  - Don't know
10. If you are a professional who would be asked to provide evidence of eligibility for an urgent service, what would the impact of this be for you? Please provide evidence, including on the impacts in time (days/hours) or in monetary terms where relevant.
- No impact
  - Increase in resources (estimate: \_\_\_\_\_)
  - Increase in costs (estimate: \_\_\_\_\_)
  - Length of time to provide evidence of eligibility (estimate: \_\_\_\_\_)
  - Don't know
  - Other (please specify)

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

217. Under this proposal we consider 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, we need to ensure that solicitors 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), reduced need for error correction and reduced OPG processing time.
  - 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
218. These are symbiotic aims; solicitors want to use the most efficient services, so their clients are not penalised, while the OPG needs solicitors to use this channel to achieve sustainability, a key aim of modernising LPAs.
219. This is not about making the use of a solicitor mandatory for creating an LPA or about how to provide people with access to solicitors' services. The Ministry of Justice and OPG believe that LPAs should be attainable, accessible and affordable for all and access to a solicitor should not be a requirement or a barrier for this

### **The current process**

220. Under the MCA, there is no special provision for solicitors or requirements on them to do anything different to other people who send in LPAs. LPAs received from legal firms are treated in the same way as those from members of the public. In both cases, LPAs are sent to OPG via post. Solicitors' case management systems are not integrated with OPG's systems and there is no separate system of electronic submission. While there is a tool on GOV.UK to aid in the creation of an LPA, it is not currently a requirement for any person to use this to create one and it cannot be used to submit an LPA directly to OPG for registration.
221. As we have set out, OPG is currently bound to a paper system by the legislative framework it operates under. This has implications for OPG's resources and costs for processing, checking and storing the hundreds of thousands of LPAs received each year. It also has a significant environmental impact due to the amount of paper and printing required to create, complete and submit each LPA for registration. Ensuring a high level of uptake for a new system will be vital to ensuring that OPG achieves its aim of sustainability and can focus its resources into the services that add most value for users, such as investigations.

## Evidence

222. According to internal OPG data, only 28.4% of LPAs were created using the existing digital tool in 2019/20. While a proportion of these will have been made by solicitors, in our recent survey, 67% of solicitors told us that they complete LPA paperwork for their clients using their firm's document management system, which is a single system used to provide various services.<sup>26</sup> The scale of solicitor involvement in LPAs means increasing solicitors' use of any new digital channel will be important for OPG to achieve financial sustainability and enable resource reprioritisation. We therefore need to understand the reasons they are less likely to use the existing tool.
223. The reasons they gave for preferring these document management systems include ease of drafting, amending and saving the draft document, built in guidance, customised form fields, ease of administration and auto-population of repetitive information from within their document management systems. As these systems provide extra value for solicitors but do not interact with the current digital tool, we believe this is the main reason for low uptake of the digital tool by solicitors.
224. We recognise that the current digital channel for LPAs is limited in its ability to meet the needs of most solicitors' firms. The main function that we can add that would provide additional value for solicitors, beyond the features they already have in their document management systems, is the ability to submit LPAs digitally, directly to OPG. We are seeking to introduce digital submission as part of the LPA service, but it requires consideration of wider issues and changes to legislation, as covered in proposals 1–5. This provides us with the opportunity to look at how we can better integrate the tools that solicitors already use to create LPAs, with seamless digital submission to OPG for registration once those LPAs have been executed by the parties.
225. This would have a number of benefits for solicitors as it would provide them with access to many of the other elements of the service we have already outlined, such as the ability to automatically check information provided in the LPA for accuracy (while error rates on LPAs from solicitors are low at 6%, there is scope to reduce this further). It would also reduce their reliance on postal services and the time and cost of sending on vast amounts of paper, costs which are passed onto their clients and so increase the cost of an LPA for members of the public.
226. As previously stated, we estimate that the equivalent of around 38m sheets of A4 paper a year are used to send LPAs to the OPG and in the process of OPG registering those LPAs, while postage costs for OPG were around £3.7M in 2019/20. Given that solicitors may be involved in as many as 55% of LPAs, the ability to

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<sup>26</sup> Ministry of Justice Digital & Technology (2020) Modernising Lasting Power of Attorney Solicitor Survey. Unpublished.

integrate digital submission into solicitors' existing systems would have a large impact on reducing the amount of paper that the OPG needs to process and the cost of sending out notices, registered LPAs and other letters. The reduction in error rates that could be achieved through an integrated system would further decrease costs.

227. Reducing the need for general administrative work on LPAs would allow OPG to ensure its resources are best allocated to the services it provides that add the most value for users. This could include increasing its investigation resources to better address concerns about abuse, fraud and coercion, in line with our proposals to widen the group of people able to make objections to an LPA's registration.
228. Our ongoing engagement with solicitors has demonstrated that, even while they are concerned about the ability for digital channels to provide appropriate safeguards for the public, they are keen to have access to them for both creating and registering LPAs. This will allow them to provide a more valuable service to their clients. We are confident that we can work with the legal sector and legal stationers to provide the access to a digital channel that they would like. However, we also need to consider the importance of aiding OPG in achieving sustainability and therefore to consider alternative routes to ensuring that solicitors will submit LPAs via digital means in the future.
229. There are three different approaches we could take to work towards achieving sustainability for OPG while ensuring solicitors have access to the most efficient service.

#### **Approach 7a – Integration only**

230. 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 approach could ensure solicitors are able to provide added value for their clients while supporting OPG's sustainability.
231. Our intention would be to create a GOV.UK service which most solicitors access via a 'solicitor portal' provided by their legal stationer's software. An API, software that allows two applications or systems to 'talk' to each other, would connect the GOV.UK service to the 'solicitor portal.' OPG would work with legal stationers on the API to allow the two systems to connect. This would essentially mean that all those solicitors who currently use paper forms through legal stationers would instead be directly linked to our GOV.UK service. The system would appear seamless to them, with access to the benefits of the new service, potentially including automated checks, instant submission to the OPG, automatic updates when changes are made and the ability to track the status of multiple LPAs at once.

232. We would also intend to build a service that means those solicitors who already use the existing digital tool would migrate directly to the new service on GOV.UK without the need to purchase additional document management systems. Finally, those for whom digital simply isn't an option, for instance due to lack of reliable broadband in some parts of the country, would still be able to use alternative channels to register LPAs.
233. To ensure this integration meets the needs of solicitors, we will need to develop key features within our system to align with those they already have available. For example, adding batch management capabilities to the existing online tool was well received by solicitors and the third sector alike. For this approach to be successful, we need to be able to accurately determine the needs of solicitors, meet those needs through a digital channel, and integrate our service with existing systems to provide a seamless journey. Our engagement so far has been positive in this regard and we hope to continue working with the legal sector and stationers to develop a system that will work for them.
234. However, there is a significant risk that by prioritising the needs of solicitors, the digital channel may not meet the needs of other third parties, such as charities, who provide valuable LPA services and they may find it more difficult to provide these services. We would need to make sure that we were giving equal weight to other third-party support providers, so they also had appropriate access to the new service.

*In practice, this approach might work as follows:*

235. The new digital channel supports solicitors to serve their clients with greater speed and effectiveness over paper alternatives. The OPG releases 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.
236. 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**

237. If we were not able to work with solicitors to create a fully integrated system, or integration on its own was not enough to ensure solicitors made use of the digital channel available, 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.
238. This would allow solicitors to retain some control over how they best serve their clients but would impose certain restrictions. It could also put additional burdens on them or provide a slower process for their clients if it does not have access to upfront checks. For instance, as outlined at proposal 3, we are seeking to introduce ID checks to protect the parties, particularly the donor. If not fully integrated with the OPG system, we would likely have to require solicitors to check ID themselves and provide a statement to that effect to OPG, similar to the system the Land Registry currently runs with conveyancers. This would likely mean that solicitors would have to take on level of liability in relation to the verification of that information so that OPG could be confident in the identity of those making the LPA.
239. Additionally, we are aware that some solicitors may still operate in areas of the country without reliable broadband and case management systems, or those with a lack of digital capability. A legislative requirement would have to make allowances for solicitors that did not have a route of access to a digital system.

*In practice, this approach might work as follows:*

240. We would change legislation to require that final documents provided by solicitors are digitally submitted in the required format and not posted. In this instance a simplified API for submission for registration would be provided. Solicitors would be required to perform ID checks on donors and attorneys. As part of the digital submission to OPG, they would vouch for the ID of the parties. The requirement for solicitors to perform an identity check, and certify the accuracy of information submitted digitally, ensures that those who use the services of a solicitor receive an equal service provision to those going directly via GOV.UK.

### **Approach 7c – Mandate solicitors to use the whole service**

241. Solicitors would be required to use the all 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.

242. The legislation would be amended to provide that from a certain date, after the implementation of a modernised service, solicitors would only be able to submit LPAs to the OPG for registration via the digital channel and that the OPG's system must be used to create all LPAs. The time between implementation and introduction of the mandated system would ensure that solicitors were able to make the changes to their processes and systems necessary to transition to the new system. It would also allow time to fully develop and test the service to ensure it aligned with solicitors' needs before it became compulsory. This would also help create consistency in the safeguards provided to users through a modernised LPA channel by ensuring that no matter who was involved in the creation of the LPA, all checks, particularly any new ID verification, are handled through the same OPG system.
243. This approach assumes that solicitors will not already wish to use the new digital channels, and that the service will not negatively impact upon the other services that solicitors provide. Like approach 2b, it could be perceived to restrict the service that solicitors can offer and create issues where there is limited broadband or digital capability. In addition, the service created may not completely suit the needs of solicitors, but they would be required to use it nonetheless. This could result in fewer solicitors offering LPA services and consequently make it more difficult for the public to find legal assistance.
- In practice, this approach might work as follows:*
244. Solicitors who wish to support a donor to register an LPA must do so through a dedicated service hosted on GOV.UK. All tasks required to complete an LPA, from identifying the actors involved to execution of the deed, would all be captured and checked digitally for speed and accuracy of registration.
245. **Based on the current evidence available, the Government's preferred approach is 7a.** In order to achieve the level of take up necessary to successfully achieve the aims of modernisation, we would currently seek to work with the legal sector to create a system that meets both the public's needs and their needs, and which would be seamlessly available through their current legal stationers. We would also work to provide direct access for those smaller solicitors' firms, charities and other organisations that support the creation of LPAs.
246. However, if the evidence demonstrated that this option on its own would not provide the necessary take up of service, we would need to consider taking forward options 7b or 7c.

## Questions

11. If you were required to use a GOV.UK service to create and register your clients' LPAs, what would the impact be on the service you are able to offer your clients? Please provide evidence, including on the impacts in time (days/hours) or in monetary terms where relevant.
- Easier to use government service than current process
  - Cheaper to use government service than current process
  - Concern about government service meeting solicitors'/donors' needs
  - Speeds up process
  - Slows down process
  - Time delays getting used to government service (estimate: \_\_\_\_\_)
  - Fewer errors
  - Less paper used
  - Less reliance on postal services
  - Don't know
  - Other impacts (please specify)



## Additional questions

247. These seven themes cover the areas of change that will require amendments to primary legislation to facilitate a modernised service. They will allow for a digital channel for creating and registering an LPA while improving safeguards and access, and helping OPG to become sustainable.
248. At the same time, we have noted throughout that there will always be people who cannot make use of digital channels, or choose not to. Some will have support from friends, family, professionals or other organisations and will use digital channels anyway. But we are aware that we will also have to provide analogue channels of access, including paper, so that people are not negatively impacted by these changes.
249. We recognise that the consultation does not cover every possible change that could be made either to digital or paper channels. Some changes will not require changes to primary legislation, for instance, updates to guidance on picking attorneys or the duties of attorneys, new channels to raise objections directly with the OPG. Some are out of scope, such as amendable LPAs. They are therefore not covered in this document. We will continue to engage with stakeholders and members of the public on changes and other issues that do not require primary legislation as development of a modernised service continues.

### 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?

## Equalities

250. The Equalities Statement accompanying this consultation document considers the impacts of proposals alongside the need to:
- a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
  - b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and,
  - c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
251. Under the Equality Act, the protected characteristics are race, sex, age, disability, sexual orientation, religion or belief, pregnancy and maternity, gender reassignment, marriage/civil partnership.
252. We are seeking to gather further evidence on the impacts of our proposals on those with protected characteristics through the consultation. Therefore, we would ask all respondents to consider and provide evidence, where it is available, on the following questions:

### Questions

15. Have we correctly identified the protected characteristics that could be impacted by the proposed reforms set out in this consultation paper? Please give reasons for your answer
16. What do you consider to be the equalities impacts of the proposed options for reform on individuals with a protected characteristic?

# Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

## Role of witness

**Question 1:** What are your views on the proposals outlined? Please give your reasons for your responses.

Remove witnessing (approach 1a)

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

Remote witnessing (approach 1b)

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

Replace witnessing with a similar function (approach 1c)

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

## Role of application

**Question 2:** Would you, or the people you support, choose to delay the registration of an LPA? Please give the reasons for your answers.

No

- Do not see a benefit to delaying registration.

- Was advised not to delay registration.
- Need an LPA as soon as possible due to a medical diagnosis
- Need an LPA as soon as possible due to a financial decision that needed to be made
- Other reason (please specify)

Yes

- Don't want to pay the fee yet
- Can't pay the fee immediately
- Don't want to transfer power of attorney immediately
- May want to change my LPA
- Created an LPA after a medical diagnosis and I'm waiting until nearer the time
- Other reason (please specify)
- Don't know

**Question 3:** What impact would removing the ability to delay registration have? Please give reasons for your answer.

- Positive
- Negative
- Don't know

## OPG remit

**Question 4:** Which actors do you think should have their identity checked? Please give reasons for your answers.

- Donor
- Attorney
- Certificate Provider
- Don't know
- Other (please specify)

**Question 5:** What are your views on the proposals outlined? Please give your reasons for your responses.

Conditional checks (approach 3a)

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

Discretionary checks (approach 3b)

- Positive

- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

## How to object

**Question 6:** What are your views on the proposals outlined? Please give your reasons for your responses.

OPG receives all objections (approach 4a)

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

OPG receives only factual objections (approach 4b)

- Positive
- Mostly positive
- Neutral
- Mostly negative
- Negative
- Don't know

**Question 7:** Should the OPG be referring cases directly to the Court of Protection? Please give reasons for your answer.

- Yes
- No
- Don't know

## When to object

**Question 8:** Which aspects of the proposals for when to object do you prefer? Please give reasons for your answers.

Object during creation (approach 5a)

- Quicker process
- More certainty
- Objections found and resolved earlier

- Concerns easier to raise
- Prevents registration of invalid LPAs
- Don't know
- Other (please specify)

Reduce statutory waiting period (approach 5b)

- Quicker process
- Keeps some waiting period as a safeguard
- Longer to decide whether to make an objection.
- Prevents registration of invalid LPAs
- Don't know
- Other (please specify)

Remove statutory waiting period (approach 5c)

- Quicker process
- Simpler process
- Immediate registration is possible
- More evidence of abuse may be available
- Don't know
- Other (please specify)

## Speed of service

**Question 9:** If we are able to reduce the time to register an LPA to two weeks for most donors (without objections), would an urgent service provide additional benefit for you or the people you support? Please give reasons for your answer.

- Yes, I need an LPA registered within two weeks
- No, there is no benefit over a two-week service for everyone
- Don't know

**Question 10:** If you are a professional who would be asked to provide evidence of eligibility for an urgent service, what would the impact of this be for you? Please provide evidence, including on the impacts in time (days/hours) or in monetary terms where relevant.

- No impact
- Increase in resources (estimate: \_\_\_\_\_)
- Increase in costs (estimate: \_\_\_\_\_)
- Length of time to provide evidence of eligibility (estimate: \_\_\_\_\_)
- Don't know
- Other (please specify)

## Solicitor access to the service

**Question 11:** If you were required to use a GOV.UK service to create and register your clients' LPAs, what would the impact be on the service you are able to offer your clients? Please provide evidence, including on the impacts in time (days/hours) or in monetary terms where relevant.

- Easier to use government service than current process
- Cheaper to use government service than current process
- Concern about government service meeting solicitors'/donors' needs
- Speeds up process
- Slows down process
- Time delays getting used to government service (estimate: \_\_\_\_\_)
- Fewer errors
- Less paper used
- Less reliance on postal services
- Don't know
- Other impacts (please specify)

## Additional questions

**Question 12:** Are there any other costs (in hours/days or in monetary terms) that you could see changes to LPAs causing yourself or other people involved? Please provide evidence for your answer.

**Question 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.

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

## Equalities questions

**Question 15:** Have we correctly identified the protected characteristics that could be impacted by the proposed reforms set out in this consultation paper? Please give reasons for your answer.

**Question 16:** What do you consider to be the equalities impacts of the proposed options for reform on individuals with a protected characteristic?

**Thank you for participating in this consultation exercise.**

# About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## Contact details/How to respond

Please send your response by 13 October 2021 to:

### **Vulnerability Policy Unit**

Family and Criminal Justice Policy Directorate

Ministry of Justice

Post point 7.25

7th Floor

102 Petty France

London SW1H 9AJ

**Email:** [mlpaconsultation@justice.gov.uk](mailto:mlpaconsultation@justice.gov.uk)

## Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

## Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

Alternative format versions of this publication can be requested from [mlpaconsultation@justice.gov.uk](mailto:mlpaconsultation@justice.gov.uk)

## Publication of response

A paper summarising the responses to this consultation will be published in January 2022. The response paper will be available on-line at <https://consult.justice.gov.uk/>.

## Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

## Confidentiality

By responding to this consultation, you acknowledge that your response, along with your name/corporate identity will be made public when the Department publishes a response to the consultation in accordance with the access to information regimes (these are primarily the Freedom of information Act 2000(FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

Government considers it important in the interests of transparency that the public can see who has responded to Government consultations and what their views are. Further, the Department may choose not to remove your name/details from your response at a later date, for example, if you change your mind or seek to be 'forgotten' under data protection legislation, if Department considers that it remains in the public interest for those details to be publicly available. If you do not wish your name/corporate identity to be made public in this way then you are advised to provide a response in an anonymous fashion (for example 'local business owner', 'member of public'). Alternatively, you may choose not to respond.

For more information see the Ministry of Justice [Personal Information Charter](#).

# Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691383/Consultation\\_Principles\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf)

# Annex A: Equalities Statement

## Introduction

1. LPAs were first introduced to retain freedom of access for all who wanted one while increasing protection against abuse compared to the old system of enduring powers of attorney. Our aim with modernising the LPA is to create an LPA service for the digital world which retains the balance of access to an LPA while providing increased protection for individuals against fraudulent or abusive use of the system. This means it is vital to consider the equalities impacts of the changes we are seeking to make to ensure that a modernised service is easily accessible.

## Policy proposals summary

2. There are seven areas of the LPA creation and registration process that we are considering changing as part of modernising the LPA. Each of these areas could be changed in various ways to achieve the aims set out of creating a smoother user experience, increasing safeguards and achieving financial stability for OPG.
  - **Proposal 1: Role of witness:** Consider the value of the witness, and how to retain this value in a modernised service.
    - **Approach 1a – Remove witnessing:** Remove the witnessing requirement for the signing of an LPA by the donor or attorney.
    - **Approach 1b – Remote witnessing:** Use technology to witness the donor and attorneys signing the LPA without being physically present.
    - **Approach 1c – Replace witnessing with a similar function:** Replace the witness with objective evidence that the donor signed the LPA.
  - **Proposal 2: Role of application:** Understand how to sequence the execution and registration of an LPA whilst reducing the chance of an LPA being rejected.
    - **Proposal 2a – Execution starts registration:** require that an LPA is sent for registration as soon as it has been executed.
    - **Proposal 2b – Execution allows delayed registration:** Permit delayed registration with OPG after an LPA has been executed.
  - **Proposal 3: OPG remit:** Consider OPG's powers to checks LPAs, including ID verification, and the actions it can take to halt or delay registration.
    - **Proposal 3a – Conditional registration:** Permit the OPG to delay registration of an LPA until certain prescribed checks are met and to reject LPAs that cannot meet the requirements.

- **Proposal 3b – Discretionary registration:** An LPA would only be registered if it reached a confidence threshold about the level of risk associated with it. OPG would have discretion as to the evidence it accepted to understand the risk.
- **Proposal 4: How to object:** We are examining how to clarify and streamline the different processes for objecting to the registration of an LPA.
  - **Proposal 4a – OPG receives all objections:** Allow anyone to raise an objection. All objections would be sent to OPG to review and investigate.
  - **Proposal 4b – OPG receives only factual objections:** Anyone could raise an objection which would need to be referred directly to the OPG or the Court of Protection, depending upon the nature of the objection.
- **Proposal 5: When to object:** Consider when objections to the registration can be made.
  - **Approach 5a – Objection during creation:** Allow objections from the point an LPA is started until it is sent for registration.
  - **Approach 5b – Reduce the statutory waiting period:** Reduce the time period for objections to be received after an LPA is sent for registration.
  - **Approach 5c – Remove the statutory waiting period:** Remove the objection period but provide a mechanism for the donor to withdraw their LPA.
- **Proposal 6: Speed of service:** We are contemplating whether there is a need to provide an urgent service for donors who may be close to losing capacity.
  - **Approach 6 – Urgent LPA service:** Provide an urgent registration service to those with an urgent need to create and register an LPA.
- **Proposal 7: Solicitor access to the LPA service:** We are reviewing how to support solicitors to use a new modernised service.
  - **Approach 7a – Integration only:** Solicitors would access the new service via a system integrated with their existing document management systems.
  - **Approach 7b – Mandate solicitors to use part of the service:** Solicitors would be required to use the digital channel for certain aspects of registration.
  - **Approach 7c – Mandate solicitors to use the whole service:** Solicitors would be required to use the digital channel for all LPAs after a certain date.

## Public sector equality duty aims

3. The following equalities statement relates to the proposals for modernising LPAs outlined above and should be read in conjunction with the relevant Impact Assessment.

4. Section 149 of the Equality Act 2010 places a duty on Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:
  - Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
  - Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
  - Foster good relations between different groups (those who share a relevant protected characteristic and those who do not)
  
5. In line with our responsibilities under the Equality Act we have paid early consideration to the nine protected characteristics:
  - race
  - sex
  - age
  - disability
  - sexual orientation
  - religion or belief
  - pregnancy and maternity
  - gender reassignment
  - marriage/civil partnership
  
6. Under our statutory obligations, the impact of the final proposals on the nine protected characteristics will be considered where data is available. In the consultation, we ask the following questions on equalities matters:
  - What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.
  - Do you agree that we have correctly identified the range of impacts under each of the proposed reforms set out in this consultation paper? Please give reasons.

We encourage respondents to the consultation to highlight any equality issues and point to any further available data and evidence. The equalities evidence gathered through this consultation will then be taken into account when we update our equality considerations.

## **Evidence and analysis**

7. The team working on modernising LPAs is a cross-functional team working across policy, service design and front-line operations. This gives us access to a wide range of sources of information, data and research, some of which are not always available in policy development such as user research and digital sociology specialisms. This complements the existing approaches already used in policy development including ongoing engagement with key stakeholder and representation groups.

8. Throughout the development of proposals on modernising lasting powers of attorney, and across our different research disciplines, we have attempted to consider the compounding impacts of both digital service provision and ID verification requirements when making an LPA. We are aware that by making changes related to each of these areas there is a risk that we may compound some of the impacts that different groups may experience.

### **Limits of the evidence base**

9. The application process for lasting powers of attorney collects only very limited information on the demographic characteristics of donors and their attorneys. Information is currently limited to:
  - The age of the donor and their attorneys, based on their dates of birth
  - The sex of the donor and their attorneys. This is, however, based on their given titles – for example, Mrs or Mr, but is ambiguous in some cases – for example, Doctor or Reverend. The number of instances where titles are ambiguous or missing is relatively small (typically 3–4%) and most likely to be randomly distributed across sex so unlikely to impact on estimates of LPA take-up across these characteristics.
10. Information is not currently collected on:
  - race / ethnicity
  - disability
  - sexual orientation
  - religion / belief
  - pregnancy / maternity
  - gender reassignment
  - marriage / civil partnership
11. Additionally, the nature of the COVID-19 Pandemic and social distancing requirements over the last 12 months has meant we have had to make significant changes to the way in which we develop policy to ensure that we can still engage safely with the public and frontline services. Throughout this consultation document we have referred to research carried out by the digital user research team and our ongoing stakeholder engagement. This has largely been carried out using remote technology, including online surveys, video conferencing and online collaboration tools, such as Miro, to allow workshops, research and engagement to continue while ensuring everyone remains safe.
12. While we have attempted to reach out to those individuals and groups who can provide specific evidence on how to ensure a modernised LPA will work for those who are digitally excluded or digitally unengaged, we are also aware that our need to make use of digital tools to do this may have built a specific bias into our current evidence base. Therefore, we are especially interested in evidence related to those

who may need analogue services such as in person document checking, whether this is because they do not have access to digital channels or choose not to use them.

13. Similarly, our limited ability to reach the wider public under COVID-19 means that our research has largely been with people who either already have, or are already familiar with LPAs. This has limited our ability to understand the needs of groups who may need an LPA in the future but are not currently engaged in the process e.g. people in younger age groups or those from ethnic minorities.
14. Due to these limitations, we are unable to say with certainty at this stage what the impacts of the proposals on those with protected characteristics are likely to be. This is one of the reasons that we have moved forward with consultation early in our development process so that we can gather as much evidence on these issues as possible, as we move towards developing a solution.
15. Although we lack the evidence to specify the impacts themselves, we do have evidence that leads us to believe that we will need to give special consideration to the needs of some people with certain protected characteristics to ensure a future service is accessible to all. These are:
  - Age:** OPG caseload data for 2019/20 shows that the average age for LPA donors is approximately 74.5 years old with the majority of donors aged over 65.
  - Sex:** OPG data for 2018 and 2019 estimates that approximately 58% of LPA donors are women.
  - Race:** Internal OPG data analysis indicates that those from ethnic minority backgrounds are less likely to make and register lasting powers of attorney than those from white backgrounds.
  - Disability:** While the OPG does not collect data on disability and so we do not know the number of donors or attorneys with this characteristic, the LPA is one of the tools available to those who have, or may develop a disability, to both protect and facilitate their rights and freedoms. Additionally, the MOJ and OPG have a duty to consider and make reasonable adjustments within the services they provide. For these reasons, this must also be an area of consideration.
16. In developing a modernised LPA, it will be important to consider the particular impacts on individuals with these characteristics to ensure that changes do not hinder or block their access to an LPA in the future. This is either because they form a significant part of the group of people who already make LPAs, or conversely, are significantly underrepresented and are a focus of Government awareness campaigns to encourage use of the LPA. This all aligns with the government's stated policy intention that LPAs should be attainable, accessible and affordable for all.



## Questions

17. We are seeking to gather further evidence on these issues through the consultation and therefore would ask all respondents to consider and provide evidence, where it is available, on the following questions:

**Question 15:** Have we correctly identified the protected characteristics that could be impacted by the proposed reforms set out in this consultation paper? Please give reasons for your answer.

**Question 16:** What do you consider to be the equalities impacts of the proposed options for reform on individuals with a protected characteristic?

## Annex B: Glossary of Terms

Here are some terms you'll see when reading the consultation.

### **Applicant**

The applicant is the person who applies to register the LPA – that can be the donor or one or more of the attorneys.

See also: 'Registration'

### **Attorneys**

Attorneys are the trusted people the donor chooses to help them make decisions. Attorneys do not need to be lawyers. Many people choose their wife, husband, civil partner, partner, children, close friends or relatives.

### **Certificate provider**

The certificate provider is an impartial person who confirms that the donor understands the LPA and is not being pressured or coerced into making it. An LPA must have a certificate provider.

### **Deed**

An LPA is a deed, which is a type of legal document. For a deed to be valid, it must be executed. This means it must be:

- signed
- witnessed
- attested
- delivered

See also: 'Lasting power of attorney' and 'Witnessing'.

### **Donor**

The donor is the person making the LPA and choosing their attorneys. Only the donor can make decisions about their LPA. A donor must be at least 18 years old and have mental capacity when they make their LPA.

See also: 'Attorneys'.

### **Executed**

See 'Deed'

## **Imperfect**

An LPA is imperfect if it has errors that can be corrected without making and executing a new LPA.

OPG writes to the person who made the LPA, and asks them to make corrections. Once these are made, the LPA can be registered by OPG.

See also: 'Invalid'.

## **Instructions**

The donor can make instructions in their LPA. These tell the attorneys things that they must and must not do when making decisions and acting for the donor. See also: 'Preferences'.

## **Invalid**

An LPA is invalid if it has errors that cannot be corrected without making and executing a new LPA.

An invalid LPA cannot be registered by the OPG. The donor will need to make and execute a new LPA, then pay another application fee.

See also: 'Deed' and 'Imperfect'.

## **Lasting power of attorney (LPA)**

An LPA is a legal document. It lets the donor choose trusted people who'll be able to help them make decisions, if the donor ever wants or needs them to. There are 2 types of LPA:

- health and welfare
- property and financial affairs

An LPA must be registered by the Office of the Public Guardian (OPG) before it can be used.

## **Mental capacity**

Mental capacity is the ability to make a specific decision at a specific time.

- This includes the ability to make a decision that affects daily life – such as when to get up, what to wear or whether to go to the doctor when feeling ill – as well as more serious or significant decisions.
- It also refers to a person's ability to make a decision that may have legal consequences – for them or others. Examples include agreeing to have medical treatment, buying goods or making a will.

Under the mental capacity act, a person lacks mental capacity if:

1. they are unable to make a specific decision even with relevant support;
2. there is an impairment or disturbance in the functioning of their mind or brain; and
3. the person's inability to make the decision is because of the impairment or disturbance.

Sometimes people have the capacity to make some kinds of decisions but don't have the capacity to make others.

Similarly, some people may have the capacity to make a particular decision at one time, but not at other times.

### **Objection**

A donor, attorney or person to notify can object to an LPA being registered. There are set reasons why they can object.

- Prescribed objections: the LPA was never legally executed in the first place, for example, because the donor did not have capacity to create it or undue pressure was applied to them.
- Factual objections: while the LPA was legally executed, it has ceased to confer power, for example due to the death of the donor or bankruptcy of an attorney.

Objections can only be made during the statutory waiting period.

See also: 'Statutory waiting period'

### **Office of the Public Guardian (OPG)**

OPG is the agency in England and Wales that registers LPAs and investigates where an attorney may have misused an LPA. See also: 'Registration'.

### **People to notify**

People to notify are individuals the donor chooses, who must be told about the application to register the LPA.

### **Preferences**

The donor can make preferences in their LPA. Preferences are things the donor would like their attorneys to think about when making decisions on their behalf. Attorneys should take the preferences into account but do not have to follow them.

See also: 'Instructions'.

### **Registration**

An LPA must be checked and registered by OPG before it can be used.

### **Statutory waiting period**

This is a 4 week period, set out in legislation, that's part of the registration process. Any objections to the LPA's registration can only be made during this period.

See also: 'Objections'

## **Witness**

Witnesses are people who watch the donor and attorneys sign the LPA. They also attest the LPA by signing to say they've witnessed the signatures.

See also: 'Deed' and 'Executed'

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