



Bar Council response to the Ministry of Justice consultation paper on Modernising Lasting Powers of Attorney

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper on Modernising Lasting Powers of Attorney.¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Proposal 1: Role of Witness

Question 1

What are your views on the proposals outlined? Please give your reasons for your

¹ Available here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003938/mlpa-consultation-document.pdf

responses. Approach 1a. Remove witnessing; Approach 1b. Remote witnessing; Approach 1c. Replace witnessing with a similar function.

4. Approach 1a would have a negative effect, because an LPA is a very important document, which can have potentially a very significant ambit. Witnessing reinforces the importance, and brings it home. It also serves to identify the donor, since the witness is likely to be able to give identification evidence after the event. It corresponds to the formality required for deeds, and wills.

5. Approach 1b would have a mostly positive effect. This appears to be a potentially useful option. Until more is known of the success of remote witnessing of Wills, it is probably too early to give a considered view, but worth trying as one option which may help in unusual circumstances, and may indeed catch on.

6. Approach 1c would have a mostly negative effect. We regard this as an overcomplicated approach, which would be likely to be difficult for the vast majority of individuals making an LPA. Simplicity and ease is the key, provided an appropriate level of security can be ensured. We recognise that the LPA in its current form can itself be complex to complete. But that is a failing in the LPA's design, which is extremely poor. We do not regard approach 1c as reducing the complication, just changing one complication for another. Until it can be demonstrated that a simple and robust option exists, witnessing should be retained.

Proposal 2: Role of application

Question 2

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

7. Yes, because the client doesn't want to pay the fee yet and the LPA is created merely as a precaution. The client does not want to acknowledge that its need is in any way imminent, so prefers it to be kept back. That is not through a misunderstanding of the law, but through an understandable human instinct.

Question 3

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

8. This would have a negative effect, because it might make clients less likely to create the LPA. We do not see this as an important change to confront. Either people do not delay (see the figures of less than 5% of registered LPAs being more than 200 days old at registration) or they do for reasons which appeal to them - and would lessen the chance of them making LPAs if they could not delay. Nor does the requirement to register necessarily reduce the number of LPAs rejected. It may make it more likely that they can be corrected (if registration is left too late), but that could also be achieved by simplification of the application process & form.

Proposal 3: OPG remit

Question 4

Which actors do you think should have their identity checked? Please give reasons for your answer

9. We are not convinced that any case has been made out for identity checking. There is certainly no fact-based case set out in the consultative document. Any solicitor will check the identity of the donor. Any donor making an LPA without a solicitor arguably does not need an identity check (other than the signature). The risk of fraud (not subject to any analysis in the consultation) is most likely coercion or encouragement short of coercion. Forgery of LPAs is not a risk which seems to be widespread. The Attorney will need to prove identity on use of the LPA. The certificate provider identifies themselves in the certificate itself. Adding a requirement for a passport photo does not assist in understanding whether the provider is genuine/capable.

Question 5

What are your views on the proposals outlined? Please give your reasons for your responses. Approach 3a. Conditional checks; Approach 3b. Discretionary checks.

10. Approach 3a would have a negative effect. We regard this as unnecessarily prescriptive.

11. Approach 3b would have a negative effect. We do not regard this system as workable in practice. The whole thrust of the consultation is to reduce the burden on the OPG. We do not see how this is remotely consistent with that thrust.

Proposal 4: How to object

Question 6

What are your views on the proposals outlined? Please give your reasons for your responses. Approach 4a. OPG receives all objections; Approach 4b. OPG receives only factual objections.

12. Approach 4a would have a positive effect. We regard this as a simpler and more user-friendly method of dealing with objections (provided the objector has the safeguard of a right to object to the Court of Protection if not satisfied with the OPG's handling of the objection).

13. Approach 4b would have a mostly negative effect. We do not think it helpful to make a distinction between factual and "prescribed". They are both factual.

Question 7

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

14. Yes, there must be cases where the OPG will recognise that the COP is a more appropriate forum for resolution of some uncertainty.

Proposal 5: When to object

Question 8

Which aspects of the proposals for when to object do you prefer? Please give reasons for your answers. Approach 5a. Object during creation; Approach 5b. Reduce statutory waiting period; Approach 5c. Remove statutory waiting period.

15. We consider that approach 5a will make processes quicker, give more certainty, objections will be found and resolved earlier, concerns will be easier to raise, and it prevents registration of invalid LPAs. We regard the ability to object during creation as extremely helpful. It should not however bar objections after registration, and we agree that that is not sensible.

16. We have no comment on approach 5b.

17. We consider that approach 5c will make the process quicker, make the process simpler, that more evidence of abuse may be available, and that there is absolutely no

need for a statutory waiting period, since it takes weeks to register an LPA and objection can occur within that period. Any period is arbitrary, and likely to give rise to injustice.

Proposal 6: 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.

18. Yes, the donor may need an LPA registered within two weeks. Registration is frequently triggered by some specific upcoming, or already ongoing event. A two-week turnaround would be of huge practical advantage in such an instance. Nor is it entirely easy to see why registration should take an awful lot longer than that, but if it routinely does, then a higher fee for a two-week turn-around might be appropriate.

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.

19. We have no comment on this.

Proposal 7: 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.

20. Barristers do not tend to do this work directly (though are involved in advising). It is very difficult, however, to see how being required to use a service can assist a solicitor in providing best service to the client. The solicitor will already have made an educated choice whether he/she can provide a better service using an online tool or paper. This should be left to the market. We very much agree with the

Government's preference for 7a, for the convincing reasons given. We do not support 7b or 7c.

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.

21. We have no comment on this.

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.

22. We have no comment on this.

Question 14

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

23. What is needed is a simple and robust system for the creation and registration of LPAs. The current form/system could be improved with new design and simplification. The so-called modernisation appears to us essentially an attempt to save costs for the OPG. We are a little surprised that this is considered necessary, when the OPG has been able to reduce the application fee so substantially. The OPG's costs are therefore clearly covered. The new fee level must be encouraging LPA applications, and is very fair. A paper-based system is needed for the general public, particularly the people who might be in need of an LPA. There seems to be no clear advantage to the clients in requiring solicitors to convert to on-line applications, where they have not yet done so, and no financial need for the OPG, whose costs are covered. The Bar Council supports the Government's preferred approach 7a. We regard it as, with respect, very sensible and potentially extremely advantageous.

Bar Council²

² Prepared by the Law Reform Committee

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