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# **Modernising Lasting Powers of Attorney**

## **Consultation Response from the Court of Protection Bar Association**

13 OCTOBER 2021

**ISSUED BY**  
COURT OF PROTECTION BAR ASSOCIATION

**CONTACT**

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## About us

1. The Court of Protection Bar Association (the “CPBA”) is a professional association for barristers who specialise in cases in the Court of Protection. Membership of the CPBA is open to any member of the Bar of England and Wales interested in Court of Protection law. The CPBA currently comprises over 300 members of all levels of seniority from pupil barristers to Queen’s Counsel. Its members’ practices cover the whole range of Court of Protection work including property and affairs, personal welfare and serious medical treatment cases.
2. This response has been compiled in response to the Government’s consultation paper “*Modernising Lasting Powers of Attorney (July 2021)*” by a working group made up of members of the CPBA (the “Working Group”)<sup>1</sup>. The response is a collaborative effort and should not be taken to represent the views of any particular member of the Working Group.

## Our response

3. This response takes each of the seven proposals advanced in the consultation paper and provides the view of the Working Group on each proposal. Where relevant, this response highlights further matters which the Government may wish to consider and/or address when making any change(s) to the Mental Capacity Act 2005 (the “MCA 2005”) and/or the wider legislative framework for Lasting Powers of Attorney (“LPAs”).
4. As requested in the consultation paper, this response also identifies groups (including but not limited to those with protected characteristics under the Equality Act 2010) who might be impacted by the Government’s proposals and whose needs and concerns may need to be addressed as the consultation process continues.

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<sup>1</sup> The Working Group consisted of David Rees QC (Chair of the CPBA), Victoria Butler-Cole QC (Vice-Chair of the CPBA); Richard Dew, Georgia Bedworth, Alexander Drapkin, Arianna Kelly, Katharine Elliot, Louisa Brown and Rachael Gourley.



## **Proposal 1: Role of Witnesses**

Proposal 1 considers the role and value of witnessing on LPAs and how to keep that value. The Government's preferred option is to replace witnessing with new safeguards that perform the same function.

### **Options:**

- 1a: Remove the witnessing requirement for the signing of an LPA by the donor or attorney.
- 1b: A person uses technology to witness the donor or attorneys signing the LPA but is not physically present.
- 1c: Replace the witness with objective evidence that the donor signed the LPA, through the use of digital signatures.

### **Response of CPBA**

5. As set out in the consultation paper, an LPA, as a type of power of attorney, must be made by deed (Powers of Attorney Act 1971 section 1(1)). This means the donor's signature must be witnessed. The witness must sign the document and provide their full name and address in accordance with requirements under the Law of Property (Miscellaneous Provisions) Act 1989 (the "1989 Act") and The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (the "2007 Regulations"). The 2007 Regulations also provide for the witnessing of the attorney's signature.
6. If an LPA is not witnessed, it will not meet the aforesaid requirements and will not constitute a deed. If the Government wish to remove the requirement for LPAs to be witnessed, which would be the case if approach 1a was adopted, an amendment to the MCA 2005 will be required in order to allow LPAs to have the status of a power of attorney made pursuant to section 1 of the Powers of Attorney Act 1971 notwithstanding that they would no longer be executed as a deed.

7. The CPBA agrees with the Government's assessment that the current witness requirement provides a limited safeguard to donors as currently the witness only has to verify that a person has signed the document; they do not need to know the donor or carry out any checks. Further, Working Group members have rarely encountered instances of LPA witnesses being asked to provide evidence as to the execution of an LPA in disputes about validity which come before the Court of Protection. In cases where lack of capacity and/or undue influence are alleged, any external evidence adduced (outside any family members or friends of the donor involved in the process) is usually given by the Certificate Provider.
8. The consultation paper research shows that often people conflate the roles of Certificate Provider and witness. The CPBA proposes that rather than removing the requirement for a witness altogether, the LPA form is amended so that the Certificate Provider must act as the witness to the donor's signature. This change would have the benefit of improving safeguarding protections whilst ensuring the LPA remains a deed. The safeguarding improvement would result from the Certificate Provider being required to make a contemporaneous assessment of the donor's understanding<sup>2</sup> and the absence of fraud/undue pressure at the time of the donor signing the LPA, which is currently not required.<sup>3</sup> This change would also align with what CPBA members understand is already recommended as best practice by solicitors.
9. However, the CPBA does suggest that the 2007 Regulations might be amended to remove the requirement for the signature of the donee(s) to be witnessed.<sup>4</sup> Under section 1 of the Powers of Attorney Act 1971 only the donor of the power needs to

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<sup>2</sup> The CPBA notes that the consultation paper at 79 states that "We found many people incorrectly believe the certificate provider is responsible for checking the donor has mental capacity (which under the [MCA 2005] should be assumed, unless there is evidence to the contrary)". This is incorrect. A Certificate Provider must certify that in their opinion at the time the LPA is executed the donor understands (and thereby has the capacity to understand) the purpose of the instrument and the scope of the authority given under it (Sch 1, para 2(1)(e), MCA 2005). This assessment of capacity should of course be undertaken with due regard to the presumption of capacity (s.1(2) MCA 2005).

<sup>3</sup> The 2007 Regulations only require that the certificate is completed as soon as reasonably practicable after the donor has signed the LPA (reg. 9(4)).

<sup>4</sup> Reg. 9(6)(b) 2007 Regulations

execute the instrument as a deed (and thus have their signature witnessed). While we consider that the donee(s) should continue to be required to sign the LPA (their signature constitutes confirmation to the OPG of their willingness to act as attorney and an acknowledgment that they have read the section of the form concerning their legal responsibilities and are aware of their obligations under the MCA 2005), we think that the LPA process would be less cumbersome and less subject to error if a witness was not required for this step. Unlike in the case of the donor's signature, the CPBA does not consider that the current witness requirement for a donee's signature affords any and/or any significant safeguard.

10. In relation to approach 1b, the CPBA is not in favour of the introduction of a digital channel to allow someone to remotely witness an LPA being signed or executed. The CPBA considers this would introduce unnecessary complexities for donors and have a detrimental impact on the ability of individuals to make LPAs, particularly those with visual or hearing disabilities, the elderly and those who are unwilling and/or unable to access the requisite technology. During the COVID-19 pandemic, it has been the experience of the Working Group (including when participating in remote hearings) that many members of the public do not have access to private computers or phones with camera functionality or have difficulties using such technology.
11. Members of CPBA consider that the Government should adopt a cautious approach in proposing remote witnessing in this context. LPAs are extremely powerful instruments which transfer potentially life-changing powers from the donor to the donee(s). For this reason, the CPBA does not consider that they should be in the vanguard of digital change. It is better that digital execution of important documents is tested elsewhere first and for a meaningful period of time. The CPBA is particularly mindful that even electronic conveyancing has not yet come into force. It seems likely that the introduction of remote witnessing would give rise to errors in the witnessing process and could be fertile ground for challenges to the validity of LPAs. This may have resource implications for the OPG and could impose additional costs upon donors who are required to rectify these errors.

12. The CPBA notes that any amendments to the witnessing requirement would have to take into consideration the need for reasonable adjustments for those unable to sign a document for themselves.
13. If approach 1b is chosen, the CPBA considers that it will be essential to retain the option of in person witnessing for donors who may struggle to use the technology required (including those groups identified at paragraph 10 above). This is another area where progress should be informed by developments in other areas of the law.
14. The CPBA is also not supportive of approach 1c for the following reasons:
  - a. It would introduce a system that was far more technical and reliant on computer literacy, which would disadvantage those unable and/or unwilling to use and/or access the requisite technology, in particular those groups identified at paragraph 10 above.
  - b. It would raise the same legal difficulties as approach 1a, in that any LPA signed in this way would not constitute a deed as the law currently stands.
  - c. It would significantly decrease the existing safeguards and open new avenues for potential abuse as it would allow anyone with access to and/or control of the donor's digital/online identity (for example, an unscrupulous carer) to sign the LPA on their behalf. As the Working Group understands it, there would be no way for the OPG or indeed the Court of Protection to distinguish between an Advanced or Qualified Electronic Signature (AeS/QEs) imposed by a third-party without the donor's knowledge or one which the donor has been coerced or tricked into making and the donor's genuine signature.
15. Again, the CPBA considers that the AeS/QeS approach to the signing of legal documents should be trialled elsewhere for a meaningful period of time before it is implemented in an environment where many users are likely to be vulnerable. It would also be important for in-person witnessing to be retained as an option for those unwilling and/or unable to use and/or access the requisite technology as in the case of approach 1b.

16. The CPBA's overall view is that the Government should require the Certificate Provider to act as a witness for the donor's signature at the time that they execute the LPA and remove the need for the signature(s) of the donee(s) to be witnessed. This would:
  - a. Streamline the process for the creation of the LPA by removing the need for additional individuals to be involved in witnessing signatures;
  - b. Ensure that the assessment of the donor by the Certificate Provider was contemporaneous with the execution of the LPA by the donor; and,
  - c. Avoid the need for primary legislation and ensure that an LPA operated as a power of attorney within the meaning of the Powers of Attorney Act 1971.
17. If the Government decides to remove the witness requirement for the donor's signature then it will be necessary to ensure that (i) appropriate amendments are made to the MCA 2005 to enable LPAs to constitute a deed and (ii) the option of a physical witness requirement is maintained.

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

Proposal 2 considers what purpose an application serves within the process of creating and registering an LPA and who can apply to register one. The Government proposal also considers how to reduce the chance of an LPA being rejected. The Government's preferred approach is that an LPA is sent for registration as soon as it has been executed.

### **Options:**

2a: Require that an LPA is sent for registration as soon as it has been executed.

2b: Permit delayed registration with the Office of the Public Guardian (the "OPG") after an LPA has been executed.

### **Response of CPBA**

18. The CPBA notes that this section of the consultation paper refers throughout to the use of a digital tool for the submission of completed LPAs to the OPG. As stated above, the CPBA does not support legislative or other changes which would make digital submission of LPAs mandatory as opposed to optional, because of the negative impact this would have on the ability of certain vulnerable groups to access LPAs (see paragraph 10 above). The CPBA therefore does not support approach 2b and its views as to the imposition of a timeframe for the registration process under approach 2a set out below proceed on the assumption that the application process would retain the option of hard copy LPA submission to the OPG.
19. The CPBA considers that there would be a number of benefits to introducing a requirement for an LPA to be sent to the OPG for registration within a relatively short time frame, such as:
  - a. Preventing donors '*sitting on*' or holding back executed LPAs for many years, unbeknownst to friends and family. The donor may then lose capacity and require the involvement of the Court of Protection to make decisions on their

behalf which their intended donee(s) could have made had the LPA been registered;

- b. Preventing distress to the donor's family or friends who know the donor wished decisions to be made on their behalf by their chosen donee(s), as opposed to by the Court of Protection or a court appointed deputy. This is particularly relevant in the case of Health and Welfare LPAs, as the Court of Protection will only make deputyship orders in that sphere in exceptional circumstances;
  - c. Identifying and resolving objections to the registration of the LPA either from the Public Guardian or third parties at an earlier stage.<sup>5</sup> This would mean that more contemporaneous evidence (for example, as to the donor's capacity or the circumstances in which the LPA was executed) is likely to be available to the parties to an objection and to the Court of Protection, potentially reducing disputes or allowing for them to be dealt with more promptly. This is particularly relevant in relation to capacity issues given retrospective assessments are generally less reliable and accorded less weight by the Court of Protection; and
  - d. Increasing the likelihood that a donor would retain the capacity to deal with any objections themselves (including the capacity to litigate any Court of Protection proceedings) and the capacity to execute a new LPA if the existing document is judged to be irretrievably defective. This would decrease the need for the Court of Protection to appoint deputies in the case of property and financial affairs LPAs where an LPA is found to be defective, but the donor has lost the capacity to make a new one. For the reasons given at paragraph 19.b above, this would also give a donor the opportunity to secure a Health and Welfare decision-maker of their choice.
20. The CPBA also recognised that there would be some disadvantages to a requirement for immediate registration, such as:

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<sup>5</sup> Sch 1, paras 11-13 MCA 2005

- a. Removing the option for people to consider whether or not they want to wait before registering the LPA, including because their circumstances may change and/or they do not want members of their family or friends to become aware of the contents of the LPA (for example, if one child of the donor has been named as attorney but not the other(s)); and
  - b. Increasing the immediate financial cost to the donor. The CPBA recognises that it is possible for a donor to apply to pay a discounted fee based on their financial circumstances but considers nonetheless that the requirement to pay the application fee in a very short period of time may act as a barrier to some vulnerable groups wishing to access LPAs.
  - c. The option to delay registration can provide a '*cooling off*' period and give the donor time to reflect upon whether the making of the LPA or the choice of attorney reflects their true wishes.
21. Overall, the CPBA considers that there are significant benefits, including in terms of safeguarding the donor, to imposing a time limit for registration to be applied for to the OPG for the reasons given above. The CPBA suggest that a 12-month period for registration would allow these benefits to be achieved while still giving donors a '*cooling off*' period to consider whether they want to proceed with the LPA process, and time to save up money to pay the applicable fee.
22. The CPBA considers that it is important to note that a property and financial affairs LPA will take effect immediately upon registration (regardless of whether the donor has capacity) unless the donor has expressly said that it should not do so<sup>6</sup>. This is in contrast to health and welfare LPAs, which only take effect when the individual lacks capacity to take the specific decision in question. As things stand, the OPG has no way of knowing when the donee(s) begin to act on their powers under an LPA. The CPBA considers that a further safeguarding measure could be put in place by introducing an obligation on attorneys to notify the OPG when they first begin to act under either category of LPA.

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<sup>6</sup> By ticking the relevant box in Section 5 of the LP1F form.



## Proposal 3: OPG remit

Proposal 3 considers ways to widen the remit of the OPG in order that it can carry out identity checks, stop or delay registration outside of the Court of Protection if concerns are identified. The Government's preferred option is 3a, conditional registration.

### Options:

3a: Permit the OPG to delay registration of an LPA until certain prescribed checks are met and to reject LPAs that cannot meet the requirements.

3b: 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

### Response of CPBA

23. The CPBA's overall view is that the OPG should not be given a broader discretion to halt or delay registration without recourse to the Court of Protection. Where the OPG has concerns, such as those relating to fraud, abuse or undue pressure, those concerns should be raised by the OPG with the Court of Protection.
24. The CPBA considers that the Government should adopt a cautious approach in introducing identity checks and verification requirements. The collective experience of members of CPBA is that issues as to the execution of an LPA (as opposed to its use by attorneys thereafter) which are of relevance from a safeguarding perspective are most likely to arise as a result of concerns about a donor's capacity and/or undue influence not identity fraud. The CPBA notes that the consultation paper includes no statistical or other evidence as to the prevalence of identity fraud in the LPA arena.
25. Notwithstanding the above, the CPBA recognises that it would be desirable for a donor's identity to be checked given the significant legal power(s) conferred by LPAs. However, any mechanism for checking a donor's identity should account for the fact that donors may not have a passport, driving licence or current form of identification. The CPBA is particularly concerned that any identity verification process should not

impact on potential donors (or indeed other participants in the LPA process) from vulnerable groups, such as the elderly or those from ethnic minority backgrounds (including those who may have been born abroad and may not have access to birth certificates *et cetera*). Attention should be paid to current developments in relation to identity verification requirements in other areas of law (for example, voter identification requirements).

26. The CPBA considers that it may be less important to impose identity and verification checks on proposed attorneys at the registration stage, given that their powers cannot be easily exercised without showing proof of identification at the time e.g. when at a bank. In the CPBA's experience, it is not possible to exercise significant powers under a property and financial affairs LPA without proving your identity as attorney. However, the CPBA does consider that the OPG should carry out checks to ensure that the attorneys meet statutory criteria for appointment (e.g. that they are not an undischarged bankrupt or have not been barred from regulated activity under the Safeguarding Vulnerable Groups Act 2006).
27. Additionally, routinely checking the identity of Certificate Providers is not considered to provide a significant safeguard to donors. What is of central importance is that Certificate Providers are suitably qualified whether by acquaintance or training to verify and confirm that the donor understands the purpose of the LPA and that no fraud or undue pressure is being used to induce the donor to create it. The CPBA considers that randomised checks of the identity and qualifications of people who have acted as Certificate Providers may provide a more useful safeguard in protecting donors in this regard.
28. In relation to the role of the Certificate Provider, we consider that it would be also useful to include within the LPA form a specific box in which the Certificate Provider expressly confirms that they have read the terms of the LPA to the donor together with the prescribed information about the instrument's effect and that in their opinion the donor understands the nature of the instrument<sup>7</sup>. By requiring only a signature from the Certificate Provider, the current LPA forms do not highlight the central importance of this part of the Certificate Provider's role. Further, the CPBA

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<sup>7</sup> Such boxes were present in earlier versions of the prescribed LPA forms.

considers that it would be useful for the form to also include a box whereby Certificate Providers record what factors they have considered in their conclusion that the donor understands the form and that fraud / undue pressure is not present (perhaps by reference to the MCA 2005 Code of Practice).

29. The CPBA has serious concerns in relation to widening the OPG's remit to assess the suitability of potential attorneys on the basis of a criminal conviction. It would give the OPG a very wide discretion to potentially override a donor's wishes and feelings in selecting their attorney. It raises difficult questions, for example: *How would the OPG view a prior conviction for shoplifting or minor criminal damage conviction? Would such convictions preclude someone from being nominated as an attorney?*
30. The CPBA considers that if donors have capacity, then they should be free to select the attorney of their choice, so long as they are aware the attorney's prior convictions. A key principle underpinning the MCA 2005 is that people are able to make decisions that may be seen as 'unwise' by some. It should be remembered that the old test of the 'unsuitability' of the attorney for the revocation of an EPA was jettisoned in the Mental Capacity Act 2005. The CPBA would not be in favour of any new proposals that would impose a wide discretionary power on the OPG and could limit legitimate choices of donors. The CPBA would also not be in favour of any threshold or list of convictions that would provisionally preclude an individual being an attorney. In cases where the OPG has concerns in relation to the attorney's suitability and prior convictions, the OPG should refer the case to the Court of Protection for determination.
31. The CPBA considers that the Government may wish to contemplate requiring attorneys to complete a form, similar to the current COP4 for putative deputies, in which declarations are made in relation to bankruptcy and their criminal record that is filed alongside the LPA documentation. This would ensure that the donor and the Certificate Provider would have access to all relevant information about the suitability of the attorney.
32. The CPBA is not in favour of either option 3a or option 3b as members do not think that it would be appropriate for the OPG to have a broader remit to simply decline

to register an LPA on the basis of the suitability of an attorney. The CPBA considers that any concerns in relation to the suitability of an attorney are matters that should be considered by the Court of Protection, rather than determined internally by the OPG. If measures are introduced which will involve the OPG in consideration of the suitability of an attorney, then the final decision to refuse registration of an LPA on this basis should be taken by the Court of Protection (with the OPG being under an obligation to refer any case where it considers that registration should not occur to the Court for determination).

33. The CPBA's overall view is that the Government should be extremely cautious in implementing the imposition of identity checks and verification measures. There is a risk that doing so could impose a significant resource burden on the OPG with little corresponding benefit for donors. It might in fact erect a further barrier to underrepresented groups wishing to access LPAs. Any mechanism for implementing checks of donors should be flexible to allow for the fact that many donors are not IT literate. The CPBA does not consider that automatic identity checks and verification are necessary for proposed attorneys or Certificate Providers.
34. The CPBA does not consider that additional identity checks and verification will provide significant improvements to safeguarding. The collective experience of members of the CPBA is that issues concerning the donor's capacity are much more prevalent than identity fraud. The CPBA therefore suggests the Government considers further proposals to strengthening or scrutinising the role of Certificate Providers by (i) OPG carrying out randomised checks on the qualifications of Certificate Providers and (ii) requiring Certificate Providers to record in a box what factors they have taken into account before confirming that they have read the terms of the LPA and prescribed information about the instrument's effect to the donor and that the donor understands the terms/information.

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

Proposal 4 considers how to clarify and streamline the current processes for objecting to the registration of an LPA. The Government's preferred option is 4a, allowing all objections to be sent to the OPG.

### **Options:**

4a: Allow anyone to raise an objection. All objections would be sent to OPG to review and investigate.

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.

### **Response of CPBA**

35. The CPBA agrees with the Government that there would be benefits to having a simplified system whereby people can raise objections in one place, rather than the current two-track system whereby the OPG and the Court of Protection both receive concerns. However, the CPBA considers that it is important that the Court of Protection remains the ultimate arbiter for determining objections.
36. As the OPG has the ability to delay registering a power where an objection has been received, there must be a clear mechanism by which parties will be able to challenge that decision and bring matters to the Court of Protection. The CPBA considers that it will always be necessary for either the parties dissatisfied with the OPG's decision or the OPG itself to have the option of taking matters to court as a safeguard and for contested decisions. The CPBA is therefore in favour of retaining the current system of allowing the OPG to decline to register the LPA and referring disputes to the Court of Protection for determination.
37. However, the CPBA recognises that there are limitations in the current process and therefore recommends the following reforms:

- a. The distinctions between objections made by donors, attorneys and named persons<sup>8</sup> should be removed and a single process for objection be adopted. The CPBA is not in favour of retaining these distinctions and considers that it is important to allow a wider group of people (providing that they have a "sufficient interest") to raise concerns. This would include, in addition to relatives and friends of the donor, those with statutory or other duties to the donor (for example, Local Authorities and care providers) and those who may have been involved in the LPA process but are not named in the final document (for example, someone approached to act as Certificate Provider who declined because they considered there to be issues about the donor's capacity and/or the use of undue pressure). The requirement for a person raising to have a concern to have a "sufficient interest" is intended to avoid wholly vexatious objections.
  - b. If there are factual objections under section 13(3) and section 13(6)(a)-(d) MCA 2005, these should be directed straight to the OPG in the first instance. The OPG can then conduct their own investigation, decline to register the LPA if the objection is substantiated and refer the matter to the Court of Protection.
  - c. There should also be a mechanism for objections on other grounds (such as those set out at sections 22(3) MCA 2005) with the Public Guardian prior to the registration of the LPA. The OPG should have power to investigate these objections and if it is satisfied that there are sufficient grounds for concern it should have an obligation to refer the matter to the Court for consideration.
  - d. Any objection that is raised post-registration should be made to the Court of Protection.
38. The CPBA considers that the Court of Protection must be able to make the final decision(s) where there are factual disputes.

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<sup>8</sup> The experience of CPBA members is that since the removal of the requirement for two Certificate Providers in cases where there are no named persons in an LPA, fewer donors choose to notify anyone of the creation of the power.

39. The CPBA considers that it is important to ensure there is a careful interface between the OPG and the Court of Protection, and that a mechanism for the referral of disputes to the court is in place. It is recognised that consideration would need to be given as to how such proceedings should be constituted and who should be joined as parties. This may require amendments to the Court of Protection Rules 2017.
40. The CPBA would welcome clear guidance from the OPG to ensure all individuals who are affected by an LPAs and who wish to raise concerns understand the process by which they can do so.



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

Proposal 5 considers 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. The proposal specifically looks at the length of the current statutory waiting period, and where it sits in the LPA creation and registration process. The Government's preferred approach is a combination of all three options.

### **Options:**

5a: Allow objections from the point the donor starts creating their LPA until it is sent for registration.

5b: Reduce the current statutory waiting period for objections to be received by OPG.

5c: Remove the statutory waiting period but provide a mechanism for the donor to withdraw their LPA

### **Response of CPBA**

41. In line with Proposal 4, the CPBA considers that there needs to be a streamlined and coherent process for people to make objections to LPAs that clearly explains where and when objections should be made. The CPBA's view is that individuals should be able to raise concerns about a prospective LPA with the OPG at any time and be able to raise a formal objection with the OPG at any time from when the donor starts creating their LPA until it is registered.
42. The CPBA notes that this section of the consultation paper refers to the use of a digital tool for the drafting and execution of LPAs. As stated above, the CPBA does not support legislative or other changes which would make digital drafting and execution of LPAs mandatory as opposed to optional, because of the negative impact this would have on the ability of certain vulnerable groups to access LPAs (see paragraph 10 above).

## Raising Concerns Prior to the Registration Process

43. The CPBA considers that there is a need to strengthen current mechanisms to allow earlier safeguarding concerns to be raised. The CPBA proposes that a ‘caution’ mechanism is introduced in order that concerned individuals could provisionally register a concern about a prospective donor or attorney with the OPG. This would allow the OPG to be put ‘on notice’ in relation to safeguarding concerns of a potential LPA in respect of which no application has yet been received by the OPG.
44. The CPBA considers that anyone with a “*sufficient interest*” should be able to lodge a concern with the OPG as a caution, even if no application for registration of an LPA has yet been made.
45. When an individual raises such a concern with the OPG, they should state whether or not they wish to be notified as to the steps taken by OPG following an application for registration of the LPA in question. Just as the OPG will consider whether the individual has sufficient interest to register the caution, they should consider whether the individual has sufficient interest to be notified of the OPG’s response to an application for registration. Once an application for registration of an LPA relating to that donor has been received, the OPG should consider the matters raised and if it considers that the issues raised are sufficiently serious it should refer the question of the registration of the LPA to the Court of Protection.

## Certificate Providers

46. The Proposal highlights the concern that Certificate Providers do not have an easy channel to raise concerns despite their key role in ensuring the donor understands the meaning of the LPA and that no fraud or undue pressure has been applied. The CPBA considers that it would be helpful for Certificate Providers to be given further guidance in relation to mental capacity, in order that they can swiftly raise concerns with the OPG.
47. The CPBA would also be in favour of encouraging a person who has been asked to act as a Certificate Provider to contact the OPG if they are concerned that a donor

lacks capacity and is being pressured into executing an LPA and / or have refused to act as a certificate provider or sign a Part B Certificate. The CPBA consider that this would be an important safeguard in ensuring that red flags are raised if a Certificate Provider suspects that undue pressure is being exerted on a vulnerable donor. This could be part of the '*caution*' mechanism proposed above.

48. The CPBA considers that the pre-registration objection process is still a relevant and necessary safeguard for the donor. The CPBA is therefore not in favour of reducing or removing the statutory waiting period. It is vitally important that third parties, especially those with safeguarding roles, have adequate time in which to raise concerns before an LPA is registered. The CPBA considers that there is clear merit in allowing individuals outside of the LPA process raise safeguarding concerns, provided that they have a sufficient interest in securing the donor's best interests.
49. Additionally, the CPBA recognises the importance of donors themselves having the opportunity to withdraw or reconsider their LPA after it has been submitted for registration.
50. The only exception to the waiting period that the CPBA would propose is that there should be a power enabling the Court of Protection to direct that it should be dispensed with. Members have experience of the need for LPAs to be made urgently, often as a consequence of litigation in the Court of Protection, and it would be sensible if the court could facilitate the almost immediate registration of an LPA.
51. In summary, the CPBA is therefore in favour of allowing concerns to be raised at any stage, including pre-registration and that the ability to lodge concerns should not be limited to donors, attorneys and named parties. The CPBA is in favour of (i) introducing a '*caution*' mechanism by which early safeguarding concerns can be raised and (ii) encouraging Certificate Providers to directly raise concerns around capacity and undue pressure with the OPG. The CPBA is also in favour of dispensing with the waiting period for registration but only in specific cases where a direction of the Court of Protection to that effect is obtained.

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

Proposal 6 considers whether there is a need for an urgent service. The Government's preferred approach is not to proceed with an urgent service.

### **Options:**

6: Dedicated urgent service

### **Response of CPBA**

52. The CPBA agrees with the Government's preferred approach that there should not be a dedicated urgent service. Rather, the CPBA is in favour of a streamlined and quicker process for registration for all applications. The CPBA considers that the imposition of a specific urgent track would risk:
  - a. Making the administrative process more complex by virtue of the two-track system;
  - b. Introducing a further burden on the OPG in deciding how each application should be managed and prioritised, with the need for an appeal mechanism to be incorporated in the event an applicant disagreed with the OPG's categorisation of their application (i.e. as non-urgent); and,
  - c. As a result, detrimentally affecting the processing time for standard track applications. There is also the potential that applicants might abuse the specific urgent track.
53. Under the existing legislative framework, in cases where a donor has lost capacity to make a specific decision before an LPA can be registered, an application can be made to the Court of Protection for an urgent deputyship or specific order dealing with that decision.

54. As described above, the CPBA considers that there would be merit in the Government considering introducing a new statutory power that would allow the Court of Protection to direct the OPG to register an LPA prior to the expiry of the statutory waiting period in cases of extreme urgency, potentially on an interim basis while the normal registration process continues to its conclusion.<sup>9</sup> This could be particularly beneficial in the case of Health and Welfare LPAs where the Court of Protection will not readily grant a deputyship order that would confer equal authority on the prospective donee as the donor had intended they should have under the LPA.

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<sup>9</sup> The Court of Protection already has the power to order otherwise defective LPAs to be registered if it is satisfied that the donor intended the document to create an LPA (Sch 1, para 3, MCA 2005).



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

Proposal 7 considers how to support solicitors to use a new modernised service through the use of integrated digital systems and legislative requirements. The Government's preferred approach is 7a.

### **Options:**

7a: Ensure solicitors can access a digital service via integration with existing document.

7b: Require solicitors to use the new service for certain aspects of the registration process.

7c: Require solicitors to use the whole digital channel for all LPA registrations after a certain date.

### **Response of the CPBA**

55. As the majority of CPBA members are self-employed barristers, the Working Group is not in a position to comment as to the impact of the Government's proposals on solicitors' client services. We therefore do not seek to answer Question 11.
56. However, the CPBA agrees as a matter of principle with the Government's belief that LPAs should be attainable, accessible and affordable to all without requiring the costly input of a solicitor. The CPBA would therefore be reluctant to see legislative changes introduced that might give members of the public the impression that they need to instruct a solicitor in order to execute and register an LPA.
57. There is a significant risk that introducing a function that would allow solicitors to submit LPAs directly to the OPG via a dedicated online platform might create the impression that donors with solicitors are advantaged in some way over those who do not. The CPBA considers that, if digital submission is adopted, there should be one coherent, clear system for all LPAs to be sent to the OPG whether made by with or without the assistance of a solicitor. The potential adverse impact on third party

support providers, such as charities, of any of the Government's proposals identified in the consultation paper is also a concern.

58. Further, as the Government has made clear in the consultation document that OPG resources are limited, it is the CPBA's view that considerable time and money should not be spent on creating a new digital system for solicitors as private entities to create and register LPAs.
59. The CPBA is therefore not in favour of the Government's preferred approach (7a). For the reasons identified in the consultation paper, the CPBA does not consider that pursuing either option 7b or 7c would further the aim of promoting the use of LPAs by members of the public. Further, we note that the suggested requirement for solicitors to carry out identity checks when assisting with an LPA (see paragraph 238) would again create an unhelpful distinction between those LPAs prepared with the input of a solicitor and those which are not. It is unclear how that disparity would be addressed within any revised legislative framework.
60. If the principal aim of this proposal is to reduce reliance on the postal service and the amount of paperwork handled and stored by the OPG, the CPBA would respectfully suggest that a more cost-effective option would be to amend the relevant regulations<sup>10</sup> to allow submission of a freestanding digital version of any LPA sought to be registered (e.g. a scanned PDF version of the completed document) directly to the OPG by email or via upload to a digital platform, a tool which would be open to both solicitors and (with the exception of those unable to access and/or use digital technology) to non-solicitors. This would be an optional route for submission alongside the existing paper route, which should be retained to avoid disadvantaging those who do not wish to and/or cannot access and/or use digital technology.
61. The CPBA notes that the registration fee payment process, including applications for payment of a reduced registration fee, could also be dealt with via an online platform to reduce the administrative burden in terms of time and costs for the OPG in processing applications.

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<sup>10</sup> Regulation 11, Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.



## Consultation process and impact assessment

62. Whilst the CPBA is in favour of introducing a new streamlined process for registering, executing and raising concerns in relation to LPAs, the CPBA considers that the consultation process must be informed by the views of people most likely to be affected by the proposals, including those with impairments which would significantly impact on their ability to and/or prevent them from using the technology intended to underly some of the Government's proposed approaches (for example, impaired sight and/or hearing and/or significant physical disabilities), those with (other) characteristics protected under the Equality Act 2010 (particularly, age and ethnicity) and those living in digital poverty.
63. Digital poverty should be considered both independently and as a factor that intersects with protected characteristics. Consideration should also be given to the fact that individuals may only be able to access computers in public spaces (for example, in libraries) and/or machines which do not have camera functionality.
64. Members of the CPBA are concerned that the Equality Statement at Annex A does not adequately address the impact on these and other groups likely to be impacted by the proposed reforms.
65. The CPBA would welcome further clarification from the Government as to (i) what steps have been taken to facilitate engagement in the consultation process by relevant groups and (ii) likely impact of the proposals on those groups identified in paragraph 62.
66. As the CPBA does not collect data in relation to the experiences of these groups, the CPBA also invites the Government to (continue to) engage with charities and other third parties working with individuals with visual, hearing, and mental impairments, as well as those living in digital poverty, to include their perspective on modernising LPAs and to ensure that individuals most likely to be affected by the proposed changes have a fair opportunity to respond.