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Ministry of Justice
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Sent by email only to mlpaconsultation@justice.gov.uk

13 October 2021

Dear Sir/Madam,

Re: Modernising Lasting Powers of Attorney

The Legal Services Consumer Panel (Panel) welcomes the opportunity to respond to the Ministry of Justice's consultation on Modernising Lasting Powers of Attorney (LPA). We understand that this is a consultation focused on where changes to primary legislation are required to implement digital services at the Office of the Public Guardian (OPG) and further consultations may be forthcoming. The Panel has endeavoured to answer your consultation questions where appropriate and also provide comments on areas that may be ancillary to these questions but may have bearing on how these broader operational changes are put into practice in a way that will best serve the public.

The Panel is pleased to note that the Ministry of Justice is responding to user feedback that the current LPA process is cumbersome and overly paper based and we see the advantages of trying to implement a digital process alongside one that is still accessible to those who are digitally excluded by choice or otherwise. According to our most recent 2021 Tracker Survey of legal services consumers,¹ the use of online legal services has more than doubled from 21% in 2012 to 44% in 2021 and 54% of consumers used online legal services during the pandemic. Nevertheless, when introducing technologically based solutions, it is imperative to remember that people still need to be supported with assistance as required. Though many more people have had to use additional technology over the pandemic period, the public has a wide range of digital abilities and those who need assistance or clarification of the process need an accessible avenue to obtain this help.

For a process that is usually only entered into once in a lifetime (or a few times if changes are made) and for which OPG evidence shows only 3% of people fully understand, user centred service must be a priority. Such an approach must include a toll-free phone line that is staffed appropriately alongside any digital service. Government departments embracing digital services are unlikely to succeed if there is nowhere to seek help. This is important during the initial transition period, but because the majority of lay applicants are not repeat users of the service it will remain a necessity to provide an easily accessible route to seek help for new users. It is encouraging to see that the OPG is trying multiple ways to decrease the numbers of LPA that are rejected, but this is only one facet of serving

¹ LSCP, Tracker Survey, July 2021.

the end user and each reform must be primarily viewed from the user's perspective when designing systems.

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

The Panel feels mostly positive about the proposal to remove the witnessing requirement from the LPA process as it appears it was requiring many LPA to be redone which would mean the public was incurring additional costs to use this service. In addition, witnessing only tries to ensure (and often ineffectively from the evidence) that a person signed a document without any verification of the person or the document and therefore does not add any specific safeguards for the consumer.

The Panel agrees it would also be difficult to incorporate witnessing with electronic signatures which may not be able to be witnessed for security reasons. The ID checking and consent checking requirements (performed by the certificate provider), however, must be strengthened and carefully implemented to provide maximum protection. We would also like to see safeguards put in place to ensure that the public view LPA as the legally binding documents that they are. As your evidence shows, people and legal professionals recognise that the requirement to witness documents does reinforce the fact that an LPA is a legal document with serious consequences. Alternate methods of reinforcing this fact should be explored including digitally signing an attestation that the signator understands how an LPA can be used and when it becomes effective. Tickboxes are overused in online commerce and the OPG should attempt to achieve the same recognition that a person is entering into a legal contract that witnessing has ordinarily provided.

Remote witnessing (approach 1b)

• Positive • Mostly positive • Neutral • Mostly negative • **Negative** • Don't know

The Panel feels negative about the proposal to introduce remote witnessing because it does not make the witnessing process any easier and may even be more confusing for many people who do not regularly use videoconferencing tools. In addition, the limited safeguard that witnessing a document provides is only further reduced by requesting someone to observe a person online where their view and understanding of what is happening are greatly reduced. Moreover, the fact remains from the evidence collected that many people do not understand the legal reason for witnessing and these issues would not be solved or even addressed by introducing remote witnessing.

Replace witnessing with a similar function (approach 1c)

• Positive • Mostly positive • **Neutral** • Mostly negative • Negative • Don't know

The Panel feels neutral about the proposal to replace the requirement for witnessing documents with a similar function because it would like to ensure that appropriate safeguards are put in place that will adequately replace the witnessing requirement with additional checks against the possibility of fraud or coercion. Any new system should also enhance the role of the certificate provider which could also provide a secondary ID check and a full consent check. Further investigation of approaches to identify checks and witnessing in other sectors might yield some pragmatic and proven tools or methods to consider.

Most importantly, the Panel would like to stress that any verification process must properly consider consumers who need help and an effective way of delivering this support. The

Panel is aware that vulnerable consumers often have a lot of difficulties uploading identification documents for verification on other digitised platforms and the result is a delay in the process with negative consequences. A variety of options for support such as in person, over the phone or via a video call may help to ensure all those who need assistance can be effectively helped.

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

The Panel does not have evidence to present on this topic but would encourage the OPG to conduct additional research. When there is a significant gap between when a LPA (or EPA) is signed and when it is received by the OPG, an enquiry should be made as to why there was a delay in registering the document. A survey of certificate providers, third sector organisations and other legal services providers may also provide additional information on this point.

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

- Positive
- Negative
- **Don't know**

Given the lack of current evidence collected around why people may choose to delay registration of their LPA, it is hard to determine what the impact of removing the ability to delay registration would be. The Panel is encouraged by the fact that the OPG intends to work towards making a LPA amendable in the future, however, this will not help those who would want to delay the registration of their LPA before this goal is achieved.

The Panel is concerned, especially given the evidence showing that a large proportion of people (and even some solicitors) do not completely understand the process of establishing a valid LPA currently, that requiring a payment prior to registration may cause many to believe that a LPA is registered even when it is not. This risk is amplified by the fact that the process will be entirely digital and a LPA may not be registered merely because the system does not require it at that moment. For this reason, the Panel does not view proposal 2b as desirable.

The evidence shows that some people continue to execute LPA and not register them and they may want to retain this ability, but the Panel is concerned about vulnerable members of society who do take steps towards putting a LPA in place. Given the current rate of errors that are discovered upon trying to register a LPA, it appears prudent to try to protect the public from the risk of having an error that prevents registration be discovered when the

donor may no longer have capacity to correct it. Whether this result is due to bad legal advice, misconceptions about how LPA work or any other reason, this situation must be minimised because obtaining an order from the Court of Protection is far more onerous on members of the public and government resources alike.

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)**

The Panel would like to see all parties have their identity checked to discourage fraud but agrees that there should be a wide array of options for being able to prove identity. It is important that a robust privacy policy is implemented and communicated to all parties as part of this process.

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

The Panel feels mostly negative about this proposal because it seems too rigid especially as it will be implemented digitally for the most part. Even minor problems with documents or other methods of identification could prevent a person from registering a LPA.

Discretionary checks (approach 3b)

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

The Panel feels mostly positive about this proposal. Discretionary checks are vital to ensuring such a system does not unfairly discriminate against anyone who wants to be a party to a LPA. It is also worth noting that beyond identity, additional evidence based checks should be explored to discourage exploitative use of LPA or fraud generally.

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)

The Panel believes that in order for users to be served, there needs to be a balance of a speedy process and safeguards against donors, especially vulnerable parties, being taken advantage of. As discussed below, an urgent process for those who need a quick turnaround time may be appropriate and therefore complete removal of a statutory waiting period should not be justified on the basis that it allows for this immediate registration. Nevertheless, once a donor has decided to create a LPA and settled all of its details, it should be carried out as soon as possible, especially to ensure that it is in place prior to when it may be needed.

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)

While the Panel does not have direct evidence about the impacts of the benefits of reducing the time to register a LPA to two weeks or having an urgent service available, it does want to stress the need to serve the public adequately. The Panel agrees with the OPG's assessment that there is likely a much greater need for offering LPA on an urgent basis than the amount that currently request it given that many who would want an urgent service may resort to different means. It is important to offer an urgent service for those who require it (such as those who want to put one in place prior to a high risk operation). While the OPG believes that "providing an optimal service for all donors is preferable to providing a quicker service only for those that need it", the Panel does not see the choice as this stark.

Nevertheless, where a fee is charged for a faster outcome in some government services, this may privilege people who can afford to pay at the expense of others because they are fast-tracked and skip the queue. The Panel agrees with the OPG's assessment that evidence of urgent need should be required as a safeguard for urgent applications. While some may find it difficult to provide evidence, many others may be able to provide it readily. As OPG's evidence shows, only 25% of LPA are put in place well in advance of them being required, therefore the vast majority of the public may well require a LPA on an urgent basis and they should be offered this service.

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)

While the Panel does not have direct evidence on the impact of requiring solicitors to use a government digital service for creating and submitting LPA, it does know that significant modernisation and technological upskilling has occurred in the legal market. In addition, firms focused on serving individual clients as opposed to corporate clients are less likely to develop law technology due to a lack of resources² but may be amenable to using technology that was made available and that corresponds with their systems.

The Panel is also aware that legal service providers are not limited to solicitors, legal firms and the third sector. Other organisations and professionals may also be providing services related to LPA. Our recent 2021 Tracker Survey of legal services consumers showed that those consumers that used legal services to obtain a power of attorney (specific types were not specified) in the last two years used a large variety of legal services providers in this same time period. These power of attorney consumers may also have used legal services for other reasons as well, most prevalent among these are probate (25%), will writing (12%), conveyancing (10%), accident and injury (10%) and advice or appeals about benefits or tax credits (10%). The greatest proportions of legal services consumers who used legal services to obtain a power of attorney in the last two years used a notary (33%), accountant/ financial adviser (32%), patent attorney (32%), barristers (25%), trademark attorney (24%) and solicitors (22%). Citizens Advice, council advice services, internet based companies and bank/ building societies all came in at 18% each while national/local charities, insurance companies, law cost draftsmen, trade unions/professional bodies and licensed conveyors were also mentioned. Note that in answering this question, respondents could choose all categories that applied.

Any services that are made available to solicitors should also be made available to other legal services providers so that the benefits can be more widespread. Therefore, it would be a good idea to adopt an approach that is flexible enough to work with these different groups but also provides a useful tool that will most likely provide better outcomes for legal services consumers in the long run. When developing this tool, it is also important to consider the effect of unbundling legal services where consumers may perform some of the work when using a legal services provider to lessen the cost. Our 2021 Tracker Survey shows that 16% of consumers used an unbundled legal service in the prior two years and having two separate systems may make providing an unbundled service for creating and registering a LPA harder than one system that could be accessed by all. The Panel is aware that many consumers require help with LPA and how to register them and the current system does slow things down, particularly where there are errors found that require re-submission.

² Sako, M. & Parnham, R. (2021) Technology and Innovation in Legal Services: Final Report for the Solicitors Regulation Authority. University of Oxford.

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.

Digitising the LPA process must come with public education about the importance of creating LPA. It appears from the OPG evidence that creating LPA could be a growth area in the legal market. Our 2021 Tracker Survey results align with this data because while only 12% of consumers who used legal services in the last two years obtained a power of attorney in 2012, 22% of these consumers obtained a power of attorney in 2021. This fact should be shared with stakeholder legal service providers who may choose to alter their business models to adapt to the changing environment such as has occurred in other areas of the legal sector when digital platforms have been introduced such as the Civil Liability Act and Whiplash reforms.

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

Alongside any additional tools that are being made for legal service providers, the main tool that is available to the public should offer the same guidance and ease of use (such as populating certain fields throughout the document as necessary). In addition, any new digital tools that are designed must allow for parties to a LPA to easily print a copy for their records should they choose to keep a paper copy.

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?

The Panel agrees that the protected characteristics that are set out in the consultation and appended Equalities document may be impacted by the OPG's proposed reforms. While we do not have any evidence relating to the equalities impacts that may result from your proposals, we thought you may find some of our Tracker Survey data relevant.

Although social economic standing is not a protected characteristic, it is interesting to note data on this point from our 2021 Tracker Survey of legal services consumers. Our data shows that 22% of the people who used legal services (from a solicitor or other legal professional) in the last two years (including 1 year of the pandemic), procured a power of attorney (specific types were not specified). For those with a ABC1 socioeconomic background, this was 23% and for those from a C2DE background, it was 19%.

This 22% of legal services consumers who used legal services in the last two years also varied by gender, being 23% among men and 21% among women. Again, these figures varied across various ethnic backgrounds, showing that 24% of those who obtained a power of attorney were from a white British background compared to 15% for those from a minority ethnic background. Our data does breakdown individual ethnicities further as follows: mixed ethnicity (12%), Indian (15%), Pakistani (21%), Chinese (11%), Black African (18%), Black Caribbean (18%) and Asian (net) (16%). With regards to age, for the 18 to 24,

25 to 34 and 35 to 44 age brackets, this percentage was only 10% and for those aged 45 to 54, it was 17% and for those 55 and over, it was 30%.

The Panel looks forward to your response to this consultation. Should you have any questions pertaining to this response, please do not hesitate to contact Heidi Evelyn, Consumer Panel Associate at Heidi.Evelyn@legalservicesconsumerpanel.org.uk.

Yours sincerely,

A handwritten signature in black ink that reads "S Chambers". The signature is written in a cursive, flowing style.

Sarah Chambers
Chair
Legal Services Consumer Panel