

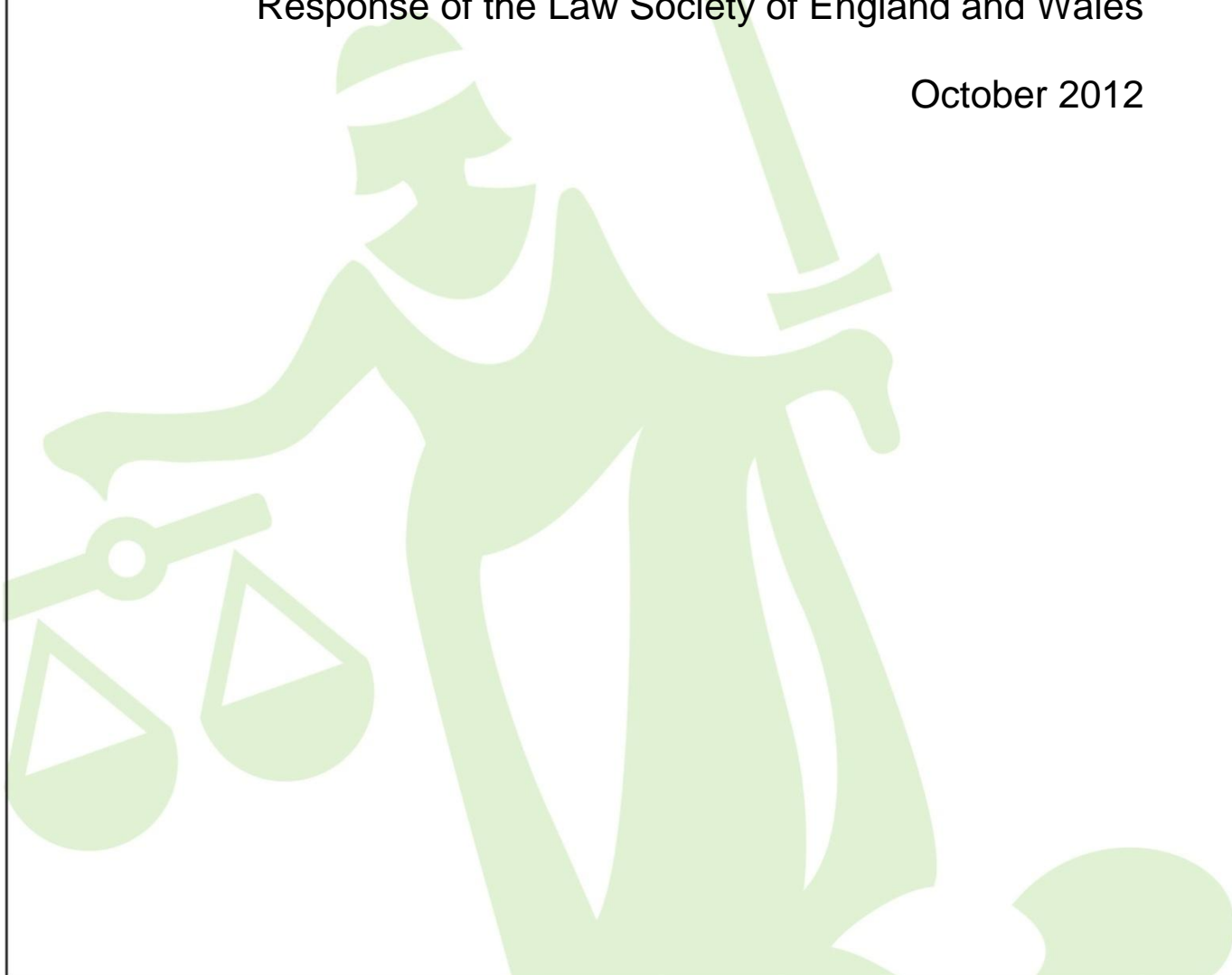


The Law Society

Ministry of Justice consultation Transforming the Services of the Office of the Public Guardian

Response of the Law Society of England and Wales

October 2012



THE LAW SOCIETY'S RESPONSE

Introduction

The Law Society is the representative body for over 145,000 solicitors in England and Wales. It presents the policy of its council made on behalf of the solicitors' profession as a whole, and lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.

We welcome the opportunity to respond to the Ministry of Justice's consultation on transforming the services of the Office of the Public Guardian.

In preparing this response, we have sought the views of the Law Society's Wills and Equity Committee and Mental Health and Disability Committee.

The Society believes that any new Lasting Powers of Attorney (LPA) form developed by Office of the Public Guardian (OPG) should be simple and straightforward. The LPA form is designed to be completed by members of the public and if the current form is made more complicated or becomes confusing, this will increase the chances of individuals filling out the form incorrectly and having to spend time and money putting it right.

The Society has not had the benefit of seeing any draft forms before completing this response. It would be helpful to see such relevant prototypes so that we could get a better idea of how the proposed forms would look and work in practice. We also believe that any new forms need to be tested on a range of typical likely users to ensure that they are understandable and clear.

As a general point, we would like to highlight that in some cases solicitors have been experiencing difficulties with foreign jurisdictions recognising the current LPA form. The option of owning property abroad and/or retiring abroad is now available to a greater number of England and Wales residents. One of the key concerns with the current LPA form is that it does not specify what the applicable law is, which can cause significant problems (problems which will not come directly to the attention of the OPG as they do not relate to use of the forms in this country). We believe that there is considerable benefit in amending the forms to include a space for nominating the applicable law.

Further, another way of assisting the current cross-border problems would be for the Government to consider ratifying the Hague Convention XXXV on the International Protection of Adults ("the Convention") in respect of England and Wales. A key component of the Convention is to provide for reciprocal recognition between Contracting States of measures (such as LPAs) intended to assist in the management of affairs of those who are affected by a lack of mental capacity.

Section 1 – Lasting Powers of Attorney

Question 1: Are there any reasons why a ‘hybrid LPA form’, covering both property and affairs and health and welfare should not be introduced?

The Society understands the rationale behind the concept of a 'hybrid LPA form'. As stated in the consultation, evidence suggests that individuals who have made both types of LPAs tend to appoint the same person to act as attorney in the majority of applications, and where this is the case, completing two separate forms leads to a great deal of repetition. A 'hybrid LPA form' could reduce this repetition.

However, the Society is concerned that a 'hybrid LPA form' could confuse users and lead to mistakes by having all of the information on one form. It may be difficult to clearly explain how to fill out a 'hybrid LPA form'. Also, confusion may arise as to when an attorney has the power to make certain decisions, this is particularly important if the property and financial affairs LPA is being used when the donor has mental capacity. Any 'hybrid' form would need to be designed so that it is understood by users and be accompanied by clear, straightforward guidance on how to complete it.

We are also concerned that the ‘hybrid’ form may lead to personal and confidential information being provided to people and organisations where it was not intended for them to be privy to this information. In particular, health and welfare LPAs may contain very personal instructions and it is likely that the donor would not want this information to be shared with, for example their bank.

If a ‘hybrid LPA form’ is to be introduced we feel that a draft should be prepared and trialled by both individuals as well as key stakeholders such as solicitors. It is important to ensure that any new form achieves its aim and does not lead to unnecessary confusion or problems which invalidate the LPA.

Question 2: If a ‘hybrid LPA form’ is introduced, should the current two separate forms be retained alongside it?

The Society thinks that if a 'hybrid LPA form' is introduced, the current two separate forms should be retained alongside it. In this scenario, where a donor wishes to appoint the same person for each power, a hybrid LPA form could be completed. If the donor wishes to appoint different attorneys for each power, the current two separate forms would be completed. The hybrid LPA form would therefore be a third form that is completed only if the donor wishes to appoint the same attorney for each power.

We would like to highlight that it is difficult to answer this question definitively without seeing a prototype of the new form. However, the Society cannot see how the system would work if the current two separate forms were completely replaced by a 'hybrid LPA form'. We feel it would be very confusing if individuals were required to complete a separate hybrid form for each attorney. There could be cases where, for example the name of an attorney is placed on the wrong ‘hybrid form’ and the attorney ends up appointed under a health and welfare LPA as opposed to property and financial affairs LPA. We are also concerned about personal and confidential information being accidentally shared with people or organisations where it was not intended for them to be privy to this information.

Question 3: Should a short version of the ‘hybrid LPA form’ be introduced? Or, alternatively, should the ‘hybrid LPA form’ be split into two sections?

The Society can see the advantages of having a shorter 'hybrid LPA form' for individuals whose needs are relatively simple. We believe that a short version of the 'hybrid LPA

form' is a good idea in principle. However, there are a number of difficulties that must be overcome.

We feel difficulties will arise with the introduction of a short form as it is likely only a viable option if the two current separate forms are removed. If the two separate forms are retained, this would mean that individuals would be faced with a choice between using the existing two separate forms, the 'hybrid LPA form' or a short version of the 'hybrid LPA form'. This could cause confusion and may lead to individuals completing a form that is not suitable for their needs and circumstances. However, as stated in our response to question 2 we believe there are significant benefits in retaining the two separate forms.

Further, the design of the short form will be key as it will need to capture vital pieces of information. It must also be made clear that a longer version of the form with more options is available for individuals with complex requirements. A short version of the form should highlight very clearly what is not included in that form.

As with question 1, if a short form is to be introduced we feel that a draft should be prepared and trialled by both individuals as well as key stakeholders, such as solicitors, before it is formally introduced.

Question 4: Is there anything else that could be removed from, or amended in, the current LPA forms?

The Society believes that it is unnecessary and can be unhelpful to include the "Guidance section" (Part A, question 6) in the current LPA form. Removing this section would avoid possible confusion with the guidance and notes that appear on the form about how and whether to fill in this section.

Placing the Guidance in, say a letter of wishes known to the attorneys and any others the donor wanted to know about it, would make it easier for these to be updated or changed without having to create and register a whole new LPA, and it will also reduce the risk of the LPA form being rejected where what is considered to amount to a restriction is placed in the Guidance section. It should also lessen the likelihood of third parties (banks or nursing homes for example) being reluctant to deal with the attorney from an excess of caution about whether his or her powers are restricted by the Guidance, or that to act contrary to it (even though for good reason) may lead to trouble with say the family, trouble in which the third party would rather not be embroiled.

We recognise that any amendment to the LPA form will require time, in the meantime we believe the OPG could consider implementing some kind of warning in the pop up boxes (this relates to the proposed online form) or any new guidance notes released stating that Guidance put in the LPA itself, rather than in a separate letter, is public and cannot be removed from the form if the donor changes his or her mind. We note that the donor can still write a subsequent letter saying they have changed their mind in relation to the Guidance in the LPA form, but this will not remove the text from the actual form which will have a higher, more public profile.

We believe there would be benefit in introducing a 'powers conferred' section in the LPA form. A power commonly needed is a discretionary investment management power as, without this, an attorney will find it very difficult in practice to invest more than modest amounts of the donor's assets. We have been informed that currently some members are having to put this power in the restriction section for want of a better place. Obviously it would be important for users to be made aware that they cannot simply confer whatever powers they wish, for example an extended gifting power is not possible.

Question 5: Should donors continue to be able to appoint attorneys to act 'jointly' for some decisions or 'jointly and severally' for others?

Although the Society thinks that the ability for donors to be able to appoint attorneys to act 'jointly' for some decisions and 'jointly and severally' for others can be problematic, we believe that donors should continue to be able to do so. The availability of this option may be important in some situations; for example, where business assets are involved, however we are aware that experience shows that it is often used unwisely in practice.

Any change to remove the choice to appoint attorneys 'jointly' for some decisions and 'jointly and severally' for others would require an amendment to the Mental Capacity Act 2005, section 10 (4), which makes it clear that a donor can appoint attorneys in this way.

However, we think that the current form and guidance positively encourages individuals to choose 'jointly and severally', when in reality, this option is only appropriate in certain circumstances.

The Society therefore thinks that donors should continue to be able to appoint attorneys to act 'jointly' for some decisions and 'jointly and severally' for others, but that the positive encouragement to do so should be removed from the current form and guidance. Instead, the form should explain that this option may not be appropriate in every individual's circumstances.

Question 6: Do you agree that the wording 'jointly' or 'jointly and severally', although legally precise, is confusing? What alternative wording would you suggest?

The Society appreciates that the terms 'jointly' or 'jointly and severally' may be confusing to some individuals. However, any alternative wording risks being too imprecise. A previous form of the LPA form used the terms 'together' and 'independently', which also caused confusion. We therefore think that the wording of 'jointly' or 'jointly and severally' should be retained, as they have a precise legal meaning which can be ascertained, and explained (as in the current Guidance). The OPG may wish to review the current Guidance relating to these terms to assess whether it can be expanded to provide greater clarity for unrepresented donors.

Question 7: Should the requirement for an additional certificate provider, in circumstances where the donor has not specified any named persons, be removed?

The Society thinks that this requirement should be retained. Where clients do not include named persons, we believe that the requirement for an additional certificate provider (who should be notified by the OPG when the LPA is registered – please see our response to question 14) can on occasion provide an important additional safeguard against fraud.

Question 8: How well do you think that the role of the certificate provider is operating and is it in the way that the MCA legislation intended?

The Society believes that the role of certificate provider can act as an important safeguard in some cases, however we recognise that this role may not in practice be operating as intended.

We think that the difficulties in obtaining professional certificates are underestimated. It is our understanding that in some circumstances it may be particularly difficult to obtain certificates from general practitioners, some of whom refuse to issue such certificates at all. The potential burdens placed on a certificate provider, for example having to attend a court hearing to swear on something which occurred 10 years ago, could cause some

non-professional and professional individuals to refuse to be a certificate provider. The difficulty and expense in this process can cause significant problems for some donors.

We believe this is a significant issue which needs to be addressed and suggest that the OPG consider liaising with relevant stakeholders in an attempt to identify the exact reasons for the difficulties in obtaining professional certificates, for example insurance concerns, with the aim of developing an industry-wide approach to this issue. If the Government's intention is to encourage more people to plan ahead in case of future incapacity by making an LPA then it needs to assist in breaking down the barriers which prevent the proper use (by this we mean using a suitable certificate provider instead of finding someone who may not necessarily meet the set requirements) of this important safeguard.

We also recognise the shortcomings of having a non-professional certify whether the donor has capacity, which is no easy task. Even where a legal professional acting as a certificate provider is concerned about the donor's capacity a medical opinion is usually sought.

However, in the absence of any alternative we believe it is important to have some sort of safeguard in place to consider capacity, fraud and undue influence issues which may be prevalent when the donor signs the LPA.

We believe it would be helpful if the OPG could make it clearer what is meant by 'professional' and provide a list of who they deem to be an acceptable professional certificate provider.

Question 9: What value do you think the role of the certificate provider might add to the process for making an LPA within a digital context?

The Society thinks that there must be face-to-face contact between the certificate provider and the donor and wet signatures for the role of certificate provider to have any value in a digital context. We cannot see how a certificate provider could establish that the donor understands the LPA, the authority they are giving their attorneys and verify that the donor is not being pressured into making the LPA without face-to-face contact.

Question 10: Can you see any reasons why the LPA form and the application to register (the LPA 002) should not be amalgamated?

The Society can see no reason why the LPA form and the application to register (the LPA 002) should not be amalgamated, provided there is still scope to register the LPA at a later date after the LPA form has been completed, for those donors who wish to do so.

We would also be interested to learn more about how the OPG sees this amalgamation taking place.

Question 11: In principle, do you agree with the proposal that applicants should be able to indicate, via a tick box, that they are applying for registration?

The Society agrees with this proposal in principle, provided there is still scope to register later for those donors who wish to do so and that individuals are made aware of this option.

Question 12: Do you think the maximum number of named persons should be reduced from five? If you do, what do you think the maximum number should be?

The Society believes that there is no need to specify a maximum number of named persons; individuals should be able to notify as many people as they wish. We note that the consultation paper says that in the majority of LPA applications made, only one or two

named persons are given. The form currently reflects this by having space for two named persons and an option to have more named persons notified if the donor so requires through the use of continuation sheets. We believe this is the right approach to ensure that the LPA form is kept to a reasonable size but without placing restrictions on the donor.

Question 13: What other changes to the notification process could we consider?

We believe, as outlined in our answer to question 18, that the waiting period before an LPA is registered should be waived where all named persons inform the OPG that they have no intention of objecting to the registration of the LPA.

Question 14: If the facility to notify named persons is retained, do you agree the OPG should send notifications of the application to register to the named persons, rather than the onus being on the donor/ attorney?

The Society thinks that the OPG should be responsible for notifying the donor, the attorney and all named persons when an application to register an LPA is made. This would give all parties concerned 'official' notification of the application, it would also guarantee that all named persons are contacted and the OPG will have notice if the notification is returned because one of the parties has moved home, died or is otherwise uncontactable.

Question 15: What are your views on the proposal that the OPG should retain the original LPA and issue a 'Certificate of Registration' instead? Do you have any concerns about the OPG retaining the original LPA?

The Society believes that there is some value in issuing a 'Certificate of Registration' instead of the LPA form. It will, however, be vital that the certificate captures key information from the LPA form, including any restrictions. We would be very interested to learn more about what information the intended certificate would have on it. If such a certificate is to be introduced we believe the draft certificate should be discussed with stakeholders before being launched.

Consideration will need to be given as to how the original LPA will be stored and for how long. Will the donor be able to obtain copies of the certificate from the OPG? Solicitors are currently able to certify copies of an LPA, but this will not be possible without seeing the original LPA.

We would, however, say that we believe more consideration needs to be given to using an LPA in an international context. The implications of using a 'Certificate of Registration' outside of England and Wales need to be taken into account. We are aware that there are some issues with the current LPA being used abroad as foreign notaries often find it difficult to understand, especially without the applicable law being specified. The form therefore needs to be made clearer for use in foreign jurisdictions. The OPG may wish to interact with the Foreign and Commonwealth Office on this issue.

Question 16: Do you envisage any particular advantages or disadvantages of adopting a model where the donor's authority is proved by a Certificate of Registration without the LPA attached?

The Society believes that any change to the procedure where a 'Certificate of Registration' is issued in place of the whole LPA form would require an education exercise to be undertaken to ensure that those effected, such as banks and building societies, are aware of such a change.

We are also concerned to ensure that the proposed certificate captures all the required information.

Question 17: Should the prescribed LPA waiting period be reduced from six to five weeks, bringing it in line with the EPA prescribed waiting period?

The Society agrees that the prescribed LPA waiting period should be reduced to five weeks in line with the period for EPAs.

Question 18: Do you feel the waiting period could be reduced further or perhaps removed entirely?

The Society believes that the waiting period should be removed entirely where all named persons inform the OPG that they have no intention to object to the registration of the LPA. In these cases we do not see any benefit in waiting until the end of the 6 week period before registering the LPA.

Question 19: Should the waiting period be waived in certain emergency situations, providing the named persons have no objections?

As stated in question 18, we believe that the waiting period should be waived in all situations, including emergency situations, where the named persons have informed the OPG that they do not have any intention to object to the registration of the LPA.

Section 2 – Supervision and other issues

Question 20: What are your views on the proposal that deputies should be able to submit their reports and manage their accounts online throughout the year?

The Society thinks that the proposal that deputies should be able to submit their reports and manage their accounts online throughout the year is a sensible one and could be helpful to deputies. However, we think that there should still be an option to complete paper-based reports and accounts as some individuals may find it difficult to use online systems or may not have access to them.

Question 21: In order to allow deputies to change bond provider without the need to apply to the Court of Protection, should the Regulations be amended to allow the original bond to be automatically discharged after a certain time period?

The Society agrees that deputies should be able to change bond provider without applying to the Court of Protection. However, there must be safeguards in place, for example there should be a list of bond providers who have been approved by the Court of Protection or have some other form of recognised accreditation. There also needs to be verification before the automatic discharge that the bond with the new provider has been in place for the required period of time.

Question 22: If you agree, do you think two years is an adequate time period?

The Society agrees that two years is an adequate time period.

Question 23: Would you support the development of a facility to pay both LPA and supervision fees online?

The Society would support the development of a facility to pay both LPA and supervision fees online. An online system for LPA and supervision fees could be convenient and quicker for users. However, we also believe that other options for payment, such as paying by cheque, should also remain available.

Question 24: Would you support the charging of variable fees to customers depending on the channel used?

The Society does not support the charging of variable fees to customers depending on the channel used. We think this would be unfair to elderly clients and others who may not feel comfortable using online systems, and unfair to customers who may have limited online access due to their geographic location or financial circumstances.

Question 25: Would you agree with making ‘tier one’ searches of the registers available online?

The Society agrees that 'tier one' searches of the registers should be made available online.

Question 26: How do you think we can get the balance right between providing ‘digital by default’ (online) services and providing an ‘assisted digital’ alternative?

We recognise the principles behind ‘assisted digital’, but we are unclear as to how this would work in practice. We accept that many donors are already helped by family and friends, however we feel it is a big step to extend this to voluntary/ NGO sectors who may have no experience in this area. We believe there is a difference between an individual choosing to seek the assistance of family and friends who they know and trust as opposed to being positively directed by the government to seek assistance from an organisation. These groups will need to be trained to ensure they understand the LPA form and process, considerations around advice need to be taken into account and there will also need to be some kind of vetting to ensure that unscrupulous individuals are not able to use this as an opportunity to commit fraud.

Question 27: Are you aware of any equalities data that would help inform the development of the new digital channels?

The Society is not aware of any equalities data that would help to inform the development of the new digital channels.

Question 28: Do the proposals outlined in this consultation raise any potential equality impacts which are not covered by the attached equalities impact assessment initial screening?

The Society has not identified at this time any potential equality impacts which are not covered by the equality impact assessment initial screening.