

Lasting Powers of Attorney – forms and guidance Consultation Paper April 2006

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

Dr Bucks and Dr Jones represent HEAL UoS (the Health Ethics and Law network, University of Southampton). This response is the product of discussion by members of HEAL UoS. This is an interdisciplinary group of academics and clinicians who are associated with the University of Southampton. It is **not** a formal response from the University as an institution but reflects the views of members of the network. On a number of points the range of views is recorded rather than a single conclusion on the consultation questions. As one might expect, not every individual is of the same view.

Responses to the questionnaire

Two prescribed forms

Q.1 Is creating two separate forms, one for personal welfare and one for property and affairs, the most appropriate way forward?

The creation of two separate forms appears to be the most appropriate way forward because, although it involves duplication in terms of form filling, it does protect privacy of one's decision making in two very different spheres. A combined form does not seem like a suitable option as it is likely to cause confusion regarding which sections need to be filled in and under what circumstances. Simplicity is always helpful.

However, if there are going to be two forms, then the prescribed information (guidance notes) needs to be a great deal more explicit. It is not until the bottom of the first page (e.g. p. 17 and 48) that it becomes clear that there are two forms; the second being for personal welfare (and vice versa).

We would suggest that at the top of the notes page (i.e. p. 17 & 48), before the heading "Part One – Property and Affairs" or "Part Three – personal welfare", there should be some wording along the following lines:

"There are two types of Lasting Power of Attorney (LPA): an LPA that allows someone to choose or make decisions about your property and affairs, and an LPA that allows someone to determine

decisions about your personal welfare. If you wish to appoint an attorney to handle both your property/affairs and your welfare, you will need to complete two forms (Form 1, and Form 2)".

The prescribed information

Q.2 For each form (including the prescribed information), have we got the balance right between essential information and length?

Despite the fact that donors are supposed to read the guidance (Part 2 for the property and affairs LPA and Part 4 for personal welfare), many will rely on the information in the prescribed information section; particularly if this information is attached to the LPA forms. Since the guidance is likely to be in a separate document they may never see it. Therefore, it is vital that sufficient information is provided at the outset in the prescribed information section. The difficulty here, which we fully acknowledge, is judging the balance between detail and length. That is, a lengthy exposition of the minutiae of the legal implications is likely to put people off reading the entire document. However, the counter claim is that in its current format the prescribed information may be insufficiently detailed to ensure (as far as possible) that potential donors are fully informed when completing the relevant form(s).

Property and affairs form

For example, on the property and affairs form, few readers are likely to know what is a *trust corporation* as mentioned in the prescribed information on page 18. Additionally, the definition in the Guidance glossary (page 27) is not helpful since it does not set out what makes a *trust corporation* suitable to be appointed.

With regard to Sections 6 & 7 of this form, there may be insufficient space to complete all restrictions/conditions or guidance the donor wishes to make to the attorney(s). (See further below).

Personal welfare form

There is insufficient detail here with regard to the scope of the personal welfare authority. Far more detail could be provided on the prescribed information as to how widely or narrowly this will be defined, and the extent to which the donor can make particular stipulations as to their future area/city of residence, and cultural or religious factors to be taken into account. This is only addressed in the guidance on pages 62-64 which is problematic if donors do not read the documentation (as highlighted under Q1 above). Therefore, greater information regarding the scope of personal welfare, including the definition of life-sustaining treatment and the distinction between advance directives and the powers provided under a LPA to the attorney/donee (addressed on p. 63), should be provided under the prescribed information. We also believe that the potential for donors to provide attorneys/donees with the power to give/refuse consent to life-sustaining treatment should be highlighted more clearly (in bold capitalised print perhaps?) in the prescribed information.

With regard to Sections 7 & 8 of this form, there may be insufficient space to complete all restrictions/conditions or guidance the donor wishes to make to the attorney(s). If this form is completed on-line this may be fine if the boxes can accommodate the data inputted by the donor or their representative. However, for a hand-completed form this is likely to provide insufficient space, and no mention is made of the possibility or appropriateness of attaching further pages of instructions. We doubt that many people would be able adequately to state their needs in the space provided.

Comments relevant to both forms

Essential information regarding the importance of registering the LPA and the process of so doing is not sufficiently clearly set out in the prescribed information documents.

It is unclear that the LPA may be cancelled either because the donor decides to do so, or because the attorney dies, lacks capacity or divorces the donor etc. Given the significance of the document, the section on 'Choosing your attorney' could be more helpful in suggesting why a replacement attorney is a good idea.

Therefore, in its current format, it is our view that the correct balance has not been struck for each form.

N.B. we are unsure where we should address the following issue, but we are concerned that only one person is required to witness the donor's signature on the LPA form. While there is a proviso for two certificate providers to be supplied where there is no-one to be informed of the registration of the LPA forms, we regard this as insufficient as the witness and the certificate provider undertake different roles in relation to the donor and the LPA. Wills require two witnesses to the testator's signature, and as the LPA forms make clear that the donor is signing a legal 'deed', we would recommend that two witnesses should be required for the donor's signature to guard against fraud and/or undue pressure. This is particularly salient as the 'interview' to be undertaken by the certificate provider may prove to be an inadequate check in this respect, especially if they are unable to speak to the donor in private (i.e. without the attorney(s) being present).

Q.3 For each form (including the prescribed information) have we got the right balance between making the language understandable and conveying the complexity of the issues?

The language of both forms is understandable. However, the language of the prescribed information is problematic and at times confusing:

The Act refers to donor and donee; the LPA forms and prescribed information to attorney (attorneys). This change in terminology is potentially confusing. It would be helpful if the prescribed information made clear the relationship between donee or donees and attorney or attorneys.

Comments on both forms

The prescribed information refers on Page 17, paragraph 1 (ditto p. 48 for personal welfare) to **an** attorney, suggesting that a donor can appoint only **one** attorney. However, at the bottom of the same page, the information implies that multiple attorneys can be appointed. This is confusing.

At the top of Page 18 (ditto p. 49 for personal welfare), it states that the donor should read the guidance before completing the form. On first reading it seems as if the guidance is contained on the paragraphs that follow on pages 18 to 20, or pages 48-51 (i.e. the prescribed information). The reader needs directing more clearly to the extensive guidance which is in Part 2 (and Part 4 respectively).

Given that writing guidance and forms for completion by individuals who are likely to be either frail, disabled or elderly is difficult, we recommend trialling the documentation and forms with a user group. This group might include individuals from the above groups plus someone with expertise in cognitive psychology.

The draft guidance

Q.4 Does the draft guidance contain sufficient information to allow people to complete the forms?

We have identified some gaps (see response to Q2 above on trust corporations, and on the scope etc of personal welfare). Greater information could be given about life-sustaining treatment on page 63, and the distinction between advance directives and LPA powers could be outlined more clearly. For example, potential donors might wish to make provision not to be resuscitated in particular circumstances. While the guidance on page 63 skirts around this issue, it need to be put across in a more user friendly, accessible manner so that donors can understand precisely what they are able to provide for under the personal welfare LPA. Further examples of how religious or cultural wishes might impact on the personal welfare LPA could be provided.

Although this does not relate to the completion of the forms *per se*, on the issue of costs (e.g. p 29), referring donors to a web site is problematic if, for whatever reason, they are unable to use the Internet. The costs involved in making LPAs should be transparent and be made available by other means (e.g. documentation from the Office of the Public Guardian together with the forms), and possibly at alternative locations.

Q.5 Is the language in the guidance understandable in light of the technical and complex issues being dealt with?

The language in the guidance is mostly acceptable except for the inconsistencies identified above (see response to Q3).

P 31 should read 'Whom should I choose?' not 'Who...'.

Q. 6 Is there any information missing that a donor (the person making the LPA), an attorney or a certificate provider would need to be aware of?

We have identified the following issues:

Page 30/60. It might helpful if it were made clear the cost and time implications of going to the Court of Protection in the absence of an LPA being in place. That is, there are potential benefits to the donor of the LPA scheme both in financial terms (depending on the registration fee and costs of professional attorneys), and also with regard to the speed of decision-making, but these are not highlighted in the guidance. This information could be relevant to potential donors who are uncertain as to whether or not to proceed with the LPA forms.

Page 31/61. *Joint attorneys*. It is not clear whether the LPA becomes invalid on the death or incapacity of one of the joint attorneys where a replacement attorney has been identified. This issue requires clarification. Also, is it only possible to provide for four original attorneys? If so, why? If not, the forms must be amended accordingly as this is currently unclear.

This information is relevant to potential donors who may be unclear as to how many attorneys they can appoint, and whether the LPA may be rendered void through no fault of their own.

Page 32/62. *Replacement attorney*. This guidance suggests only one replacement attorney is possible. Is this the case? If so, why are further replacements not provided for? This is particularly significant given the point re invalidation above. If further replacements are possible then the LPA forms will need to be amended accordingly.

Page 33/60. When does the LPA become effective?

This section is not clear. The importance of registration **cannot be overemphasised**. This is particularly significant as incorrect completion of an LPA, which is not discovered until later registration, would undermine the wishes of the donor.

The Certificate to confirm understanding of the LPA

Q.7 Is there an appropriate balance between the level of detail in the certificate and its manageability?

The form appears appropriate.

However, we are concerned that, where there is only one certificate provider, then s/he should not be related to the attorney. Otherwise, there may be questions of duress. For example, if an older donor appoints their daughter as LPA and the daughter's husband acts as a signatory.

Q.8 Is two years an appropriate length of time for the certificate provider to have known the person making the LPA?

Page 36/65 reads 'must be someone that you have known for at least two years **or** a person from the following list' (original emphasis).

Should this read '**and**' a person from the list of suitable certificate providers? If not, this guidance undermines the requirement for the certificate provider to have known the donor for two or more years. Albeit we can envisage circumstances in which an isolated older person is not able to identify someone who has known them for two years, the question remains whether it is the purported respectability of the certificate provider that is at issue (evidenced by the list of eligible providers) or the length of time they have known the donor?

However, the issue we find **most troubling** is whether the certificate provider is determining whether the individual has capacity? Do all of the proposed certificate providers have the competence to do this? The form suggests they are to measure whether someone is acting of their own free will. However, in the guidance on page 36, for example, it suggests that the certificate provider is to 'certify that you understand what an LPA is and what it is for and that you understand the authority you will be giving to your chosen attorney(s)'. The latter suggests that they are certifying that the individual has capacity to make the LPA, which is problematic if the identifiable class of certificate providers do not (with respect) have the requisite competence to assess accurately. **This matter clearly requires clarification, as a matter of urgency.**

Q.9 Is the list of people who can provide a certificate appropriate?

The list appears appropriate subject to our concerns as expressed in the responses to Questions 7 (relationship to attorney) & 8 (purpose of the certificate). Clearly, if the role of the certificate provider is to assess capacity to make the LPA then the list requires modification.

Q.10 Are there any other people or types of professions that should be included?

None that we can think of as the categories of medical health care professional and professionally qualified person are fairly widely defined.

Q.11 Is the list of people who cannot provide the certificate appropriate? Is not, who else should be put on or taken off the list?

This seems appropriate, subject to the concerns expressed in the responses to Questions 7 & 8.

Registration

Q.12 Does the form and guidance stress sufficiently the necessity of an LPA being registered before it can be used.

No. See also response to Question 2 above.

Q.13 Is the form clear enough in showing both the donor and the potential recipients that the LPA cannot be used without the OPG seal?

No. We would also raise the possibility of fraud with regard to the OPG seal. What provisions would there be in place to avoid/prevent this?

Notifying other people that the form is to be registered

Q.14 Is five an appropriate number of named persons to be notified?

Five is fine. But, is it possible to make replacements? E.g. on death or incapacity?

Objections to registration

Q.15 Is five weeks an appropriate period within which objections should be lodged?

We wondered whether the five-week period worked in relation to EPAs and whether there was any research into this matter. We felt that eight weeks could be more appropriate, as it may prove time consuming to find people some time after the LPA was made (moving house etc), and to allow for people being on holidays (particularly at certain times of the year).

Q.16 Are the proposed grounds for objection appropriate or are there other, different grounds that should be prescribed?

The issue this question raised for us was who is to assess capacity in these scenarios? Is the person objecting qualified to do this, and if so, on what basis?

Use of the Register

Q.17 Are there other details that should be maintained on the register?

Our main concerns were whether all the proposed information would be available to those searching the register on-line/postal access? Does this raise issues of data protection? We are particularly concerned on the final issue of consent/refusal to life sustaining treatment; of what interest is it to a third party who is not the subject of the LPA as a donor or attorney?