

POWERS OF ATTORNEY BILL
DELEGATED POWERS MEMORANDUM

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Ministry of Justice with the agreement of Viscount Stansgate Metcalfe, the Peer in charge of the Bill in the Lords, to assist with its scrutiny of the Powers of Attorney Bill (“the Bill”). The Bill passed its third reading in the House of Commons on the 17 March and is due for introduction to the House of Lords on the 27 March. It is unamended from its introduction to the Commons on 15 June 2022.
2. This memorandum identifies the provisions in the Bill that confer powers to make delegated legislation. It explains why the powers have been taken and explains the nature of, and the reason for the procedure selected.

Purpose and effect of the Bill

3. The Bill will enable modernisation of the process for making and registering a lasting power of attorney (“LPA”) made under the Mental Capacity Act 2005 (“MCA”). It will also correct the current inconsistency in the regulatory framework by amending the Powers of Attorney Act 1971 to enable Chartered Legal Executives to certify copies of powers of attorney.
4. The Bill facilitates such modernisation of the Mental Capacity Act 2005 (“the MCA”) with the aim of increasing safeguards for the donor of an LPA, improving the process of making and registering an LPA, and to increase the sustainability of the Office of the Public Guardian (“OPG”).
5. The Bill amends provisions of the MCA, mainly those in Schedule 1, which contain requirements for the making and registration of LPAs. Amendments to this Schedule will enable the introduction of a digital channel for making and registering an LPA, and make changes to the procedure for making and registering LPAs in order to achieve the aims stated; increasing safeguards, streamlining the process and achieving sustainability of the OPG.

6. Schedule 1 of the MCA currently contains several delegated powers to be exercised by the Lord Chancellor, including powers to prescribe requirements regarding:
 - a. how the LPA is executed;
 - b. the form of applications made to register or notices which must be given by the Public Guardian;
 - c. certain content of an LPA as to its purpose and effect;
 - d. the time period in which a person must raise an objection to the registration of an LPA or make an application to court;
 - e. additional grounds on which an objection can be made;
7. Under paragraph 11 of Schedule 1 to the MCA, the Public Guardian must not register any LPA which has not been made in accordance with the Schedule, which means compliance with both the requirements contained in Schedule 1 and those prescribed by regulations under the existing delegated powers in the Schedule.
8. Under section 65(2) of the MCA, powers in Schedule 1 are given to the Lord Chancellor to make regulations by Statutory Instrument subject to the negative procedure. The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (the "2007 Regulations") were made pursuant to the delegated powers in Schedule 1 to the MCA. Accordingly, the 2007 Regulations contain additional detailed provision as to the requirements for making and registering an LPA, as described.
9. The Bill amends Schedule 1 to the MCA in order to change various aspects of the process for making and registering an LPA. It is intended that the MCA will continue to have the same framework as the current Schedule 1 in this regard; with key requirements for making and registering an LPA provided in the Schedule, and additional detail of procedure or form to be set out in regulations.

Delegated Powers

10. The Bill contains the following delegated powers to be exercised by the Lord Chancellor:
 - a) A power to commence the provisions of the Bill;
 - b) A power to prescribe additional elements regarding the execution of instruments intended to create an LPA;
 - c) A power to make regulation regarding the procedure by which those named in an instrument intended to create an LPA are required to establish or verify their identity to the Public Guardian as part of the process for making an LPA;

- d) A power to prescribe the method(s) by which the Public Guardian will be first notified of a donor's intention to make an application to register an LPA;
- e) A power to prescribe grounds of objection to the registration of an LPA which can be raised by third party objectors; and
- f) A power to prescribe a method [for the Public Guardian] to provide a form of document which will be in any part of the United Kingdom evidence of the content of an instrument and that it has been registered as an LPA.

11. The Bill also contains a provision which substitutes reference to an existing delegated power. Whilst we do not consider this to be new a power, it is also explained below.

a) Clause 3: Commencement and Transitional

- *Power conferred on: Lord Chancellor*
- *Power exercisable by: Regulations made by statutory instrument*
- *Parliamentary procedure: None*

12. Clause 3(5) contains a power for the Lord Chancellor to bring provisions of the Bill into force by commencement regulations.

13. Clause (3)(6)(a) provides that the Lord Chancellor may make transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill. Clause 3(6)(b) allows for different provision to be made for commencement for different purposes.

14. Leaving provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance and put the necessary systems and procedures in place, as the case may be.

15. As is usual with commencement powers, regulations made under clause 3(5) and (6) are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

b) Paragraph 3 of the Schedule to the Bill, inserting new paragraph 4A in Schedule 1 to the MCA: Ensuring an instrument complies with execution requirements

- *Power conferred on: Lord Chancellor*
- *Power exercisable by: Regulations made by statutory instrument*
- *Parliamentary procedure: Negative*

Context and Purpose:

16. Paragraph 3 of the Schedule to the Bill inserts a new paragraph 4A to Schedule 1 to the MCA. This introduces an additional provision relating to applications to register an LPA. At present, paragraph 1(1)(c) to Schedule 1 MCA provides a delegated power for the Lord Chancellor to make regulations setting out requirements for the execution of LPAs. These requirements are currently contained in the 2007 Regulations, setting out the order in which the LPA is to be executed by each party.
17. This Bill will enable a new procedural framework for making an LPA which will involve the application to register the LPA being provided to the Public Guardian at the stage where only the donor has executed the instrument. The Public Guardian will then have a role in coordinating the signatures of the other parties to the instrument until it is compliant with all execution requirements.
18. New paragraph 4A therefore contains a provision related to the execution requirements of an LPA. It provides that where an instrument is sent to the Public Guardian with an application to register which has not fulfilled the requirements prescribed under paragraph 1(1)(c), then the Public Guardian must take such steps as are prescribed. This will allow the regulations which currently set out the detail as to how LPAs must be executed, to also include detail as to what steps the Public Guardian will take in facilitating this procedure.

Justification for taking the power:

19. Procedural details regarding how the Public Guardian will co-ordinate the execution of an LPA, where this has been signed by the donor, but not the certificate provider or the attorney (or attorneys) will be linked to the format in which the documents will be provided by the donor, both in a digital channel and with a paper form, while allowing those parties to use the route, digital or paper, they can most easily access.
20. This detail, as a digital process, an updated paper process or a fluid process that involves both, will intrinsically contain administrative and technical detail which it would not be appropriate or proportionate to set out in primary legislation. As a practical matter,

detail as to the digital process and elements in particular, will only fully be finalised when the digital service has been built, tested and is ready to be used.

21. Procedural details may also change in certain respects over time due to technological advances or in order to maintain best practice. This may necessitate legislative changes that can be made more promptly and flexibly managed by regulations.
22. Finally, this power is linked to an existing delegated power to prescribe execution requirements of an LPA under paragraph 1(1)(c) of Schedule 1 to the MCA. It maintains the coherence of the MCA to keep further procedural details regarding execution of LPAs to be prescribed in regulations so they will appear together in the same set of regulations.

Justification for the procedure:

23. Regulations made under Schedule 1 to the MCA are currently subject to the negative procedure. The Department considers that maintaining this procedure provides appropriate parliamentary scrutiny.

c) Paragraph 4 of the Schedule to the Bill, inserting new paragraph 10A in Schedule 1 to the MCA: Identification Requirements

- *Power conferred on: Lord Chancellor*
- *Power exercisable by: Regulations made by statutory instrument*
- *Parliamentary procedure: Negative*

Context and Purpose:

24. This provision makes identification verification a requirement in relation to an application to register an LPA. The delegated power allows the Lord Chancellor in regulations to set out how the Public Guardian will check a person's identification. Such regulations will provide detail on who needs to verify their identity, what documents will be accepted and the process for how they will be checked. Regulations could apply to any person named in the LPA or taking part in the process of applying to register the LPA, which includes the donor, certificate provider, attorneys and replacement attorneys.

Justification for taking the power:

25. Procedural details regarding how identification can be verified by the Public Guardian will contain administrative and technical detail which it would not be appropriate or proportionate to set out in primary legislation. Regulations will set out which forms of

identification document will be acceptable and will specify how such documents or information may be provided to the Public Guardian, via a digital process or through an alternative in person or on paper route. These methods will fully be finalised at a later date.

26. Standards for identification verification, including the documents which may be used, or the methods by which they may be provided, are an area of rapidly developing national and international policy. This is largely driven by technological advances on two linked fronts; improvements to systems which verify identity, and the discovery of new security concerns which need addressing. This will necessitate legislative changes that can be made more promptly and flexibly managed by regulations.

Justification for the procedure:

27. Regulations made under Schedule 1 to the MCA are currently subject to the negative procedure. The Department considers that maintaining this procedure provides appropriate parliamentary scrutiny.

d) Paragraph 7(2) of the Schedule to the Bill, inserting new paragraph 13A(1)(c) in Schedule 1 to the MCA: Objections to registration, prescribed manner by which Public Guardian will be first notified of donor's intention to create an LPA

- *Power conferred on: Lord Chancellor*
- *Power exercisable by: Regulations made by statutory instrument*
- *Parliamentary procedure: Negative*

Context and Purpose:

28. Paragraph 7(2) of the Schedule to the Bill which inserts new paragraph 13A to Schedule 1 to the MCA, requires the Public Guardian to take action on objections to registration received from third parties. This means people or organisations not named in the LPA may raise concerns about the registration of an LPA with the Public Guardian which is a significant widening of provision about objecting to the registration of an LPA. It will increase the safeguards for donors, by allowing those not directly connected to the making of an LPA, but who may have relevant contact with the donor, to raise concerns. Third party objections will be dealt with in the same way by the Public Guardian as those made by donors, attorneys or named persons so long as they are received in accordance with the three conditions set out in new paragraph 13A(1).

29. Conditions have been included in order to time limit the obligation on the Public Guardian to act on such objections. Third parties will not know when an LPA is being made or when an application to register an LPA has been submitted, and therefore are unable to ensure that an objection is made at the relevant time within that process. Therefore, the conditions aim to give third parties some leeway as to timing. However, it is also important that there be a time limit associated with when the Public Guardian is expected to act, so as to avoid an open ended obligation to act on an objection or to store an objection where no LPA is ever made or registered. The three conditions aim to achieve the best balance between these different considerations.
30. The first two conditions are that (1) the Public Guardian must have received an application to register an LPA, and (2) the third party must have raised an objection with the Public Guardian. The delegated power arises in relation to the third condition, which is that the Public Guardian must be aware of the donor's intention to create an LPA, and this allows the objections which need to be actioned to be limited to situations where it is likely an application to register is going to be made.
31. The Lord Chancellor may prescribe the events that amount to the Public Guardian first having notice of the donor's intention to apply to register an LPA. These events will be linked to the steps taken to first engage with the digital process, and with administrative changes to be introduced relating to paper forms for making an LPA. Each will identify the process or procedural step taken by the donor or on their behalf which will amount to notification to the Public Guardian.
32. The effect of this provision is that where third parties make an objection to the Public Guardian after the point the Public Guardian is aware that the donor intends to create an LPA, such objections can be stored by the Public Guardian, to be considered if and when the other two conditions are also met. If an objection is made at a time when the Public Guardian is not aware that there is an intention to make an LPA, the Public Guardian does not need to consider the objection or to store it.

Justification for taking the power:

33. The mechanism for notifying the Public Guardian of an intention to make an LPA will be linked to a specific procedural step. In the digital process for example, this is likely to be the point at which an account is registered with the Public Guardian's service, where a donor or a person acting on their behalf has provided certain information and details which would allow them to start to make the LPA in that format. In the paper-based

system (as amended in light of changes made in the Bill), a form for making an LPA will be linked to a named individual upon a specific request to the Public Guardian.

34. The exact mechanism will consist of administrative and technical detail which it would not be appropriate or proportionate to set out in primary legislation. As a practical matter, detail as to how the mechanism will work within the digital process will only fully be finalised when the digital service has been built, tested and is ready to be used.
35. Like other aspects of the digital process, this mechanism may also need to change over time due to technological advances or in order to maintain best practice. This may necessitate legislative changes that can be made more promptly and flexibly managed by regulations.

Justification for the procedure:

36. Regulations made under Schedule 1 to the MCA are currently subject to the negative procedure. The Department considers that maintaining this procedure provides appropriate parliamentary scrutiny.

e) Paragraph 7(2) of the Schedule to the Bill, inserting new paragraph 13A(2)(b) in Schedule 1 to the MCA: Objections by third parties; reference to prescribed grounds of objection

- *Power conferred on: Lord Chancellor*
- *Power exercisable by: Regulations made by statutory instrument*
- *Parliamentary procedure: Negative*

37. As explained above, paragraph 7(2) of the Schedule to the Bill introduces new paragraph 13A in Schedule 1 to the MCA which allows third parties not named in the LPA to make an objection to the registration of an LPA to the Public Guardian. It also makes provision as to *how* the Public Guardian will treat those objections.
38. New sub paragraphs 13A(2)-(4) of Schedule 1 to the MCA follow the wording of amended paragraph 13, and provide that the Public Guardian will treat objections from third parties in the same way as it treats objections from the attorney or named persons. Specifically, that the Public Guardian will apply the same test as to whether to register the LPA or refuse to register, in light of the objection.

39. Under current paragraph 13 of Schedule 1 to the MCA, objection may be made on factual grounds or “prescribed grounds”. This is an existing delegated power for the Lord Chancellor to set out in regulations the basis for objections to registration. The prescribed grounds are currently contained in regulation 15 of the 2007 Regulations. These are well established and include:
- a. the donor lacked capacity to make the LPA;
 - b. that undue pressure was applied to the donor to make the LPA.
40. New paragraph 13A(2)(b) of Schedule 1 to the MCA refers to “prescribed grounds” in relation to objections from third parties. Accordingly, both paragraphs 13 and 13A of Schedule 1 to the MCA will refer to prescribed grounds. It is intended that this will ensure that third parties may raise the *same* grounds of objection as those which are already prescribed for the attorney or named person. However, it is acknowledged this is technically a new power sitting within a new provision.

Justification for taking the power:

41. This power is linked to an existing delegated power to prescribe grounds of objection to the registration of an LPA under paragraph 13(3) of Schedule 1 to the MCA. It maintains the coherence of the MCA to keep these matters together in the same set of regulations.

Justification for the procedure:

42. Regulations made under Schedule 1 to the MCA are currently subject to the negative procedure. The Department considers that maintaining this procedure provides appropriate parliamentary scrutiny.

f) Paragraph 8(b) of the Schedule to the Bill, inserting new paragraph 16(1A)(b) in Schedule 1 to the MCA: Evidence of Registration

- *Power conferred on: Lord Chancellor*
- *Power exercisable by: Regulations made by statutory instrument*
- *Parliamentary procedure: Negative*

Context and Purpose:

43. Paragraph 8(b) of the Schedule to the Bill inserts a new paragraph 16(1A) to Schedule 1 to the MCA. New paragraph 16(1A)(a) provides that an LPA registered in electronic form will be evidence of the content of that LPA and the fact of its registration. This will enable a system whereby the registered LPA will be accessed by all parties as an electronic document through systems provided by the Public Guardian. New paragraph

16(1A)(b), is a linked provision, which provides a power for the Lord Chancellor to set out in regulations the form of any other document, provided by the Public Guardian, which will be acceptable as proof of the content and fact of registration of an LPA. This ensures that if donors, attorneys or third parties find themselves unable to access the electronic LPA as registered, a paper alternative (as prescribed) can be used.

Justification for taking the power:

44. At present LPAs are made on paper and sent to the Public Guardian for registration. After registration (evidenced by stamping the original), the LPA is returned to the applicant. Under the new system, the LPA as registered will be in electronic form and held by the Public Guardian. Attorneys will access the registered LPA and allow third parties access, through electronic means. In order to allow for people who do not want or cannot use a digital service, there will remain the possibility of having a paper document as evidence of the registered LPA.
45. The exact mechanism by which the Public Guardian can provide documentary evidence of the content of the registered LPA will consist of administrative and technical detail which it would not be appropriate or proportionate to set out in primary legislation. As a practical matter, detail as to how the mechanism will work within the future digital process for registering LPAs as electronic documents, will only fully be finalised when the digital service has been built, tested and is ready to be used.
46. Like other aspects of the digital process, this mechanism may also need to change over time due to technological advances or in order to maintain best practice. This may necessitate legislative changes that can be made more promptly and flexibly managed by regulations.

Justification for the procedure:

47. Regulations made under Schedule 1 to the MCA are currently subject to the negative procedure. The Department considers that maintaining this procedure provides appropriate parliamentary scrutiny.

Additional Delegated Power referred to in the Bill

Paragraph 7(1)(a) of the Schedule to the Bill, amending paragraph 13(3)(b) of Schedule 1 to the MCA: Objections to Registration, substitution of provision currently containing a delegated power

- *Power conferred on: Lord Chancellor*
- *Power exercisable by: Regulations made by statutory instrument*
- *Parliamentary procedure: Negative*

48. Existing paragraph 13 of Schedule 1 to the MCA allows that an attorney or a named person may, within a “prescribed” period of time from the date they are notified of the application to register the LPA, make an objection on factual or “prescribed” grounds. This paragraph contains a delegated power for the Lord Chancellor to set out the basis for objections to registration and the time period in which to do so. The prescribed grounds are currently contained in regulation 15 of the 2007 Regulations, and include:
- a. the donor lacked capacity to make the LPA;
 - b. that undue pressure applied to the donor to make the LPA.

The prescribed period is set out in regulations 14(2) and 15(2) of the 2007 Regulations and is 3 weeks.

49. Current paragraph 13(3)(b) of Schedule 1 to the MCA provides that where the objection is on prescribed grounds it must be made by application to the Court of Protection. Paragraph 7(1)(a) of the Schedule to the Bill amends paragraph 13(3)(b) of Schedule 1 of the MCA, so that an objection on prescribed grounds is made instead to the Public Guardian. The amendment is by way of substitution of that sub-paragraph (3)(b). It retains references to “prescribed period” and “prescribed grounds” which are in the current paragraph 13(3)(b). The amendment does not create a new delegated power, but simply retains references to existing delegated powers.
50. The power as it currently exists allows the grounds for objection and the period for making an objection to be amended and accordingly the substitution of the power is therefore drawn to the Committee’s attention.

Ministry of Justice

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