

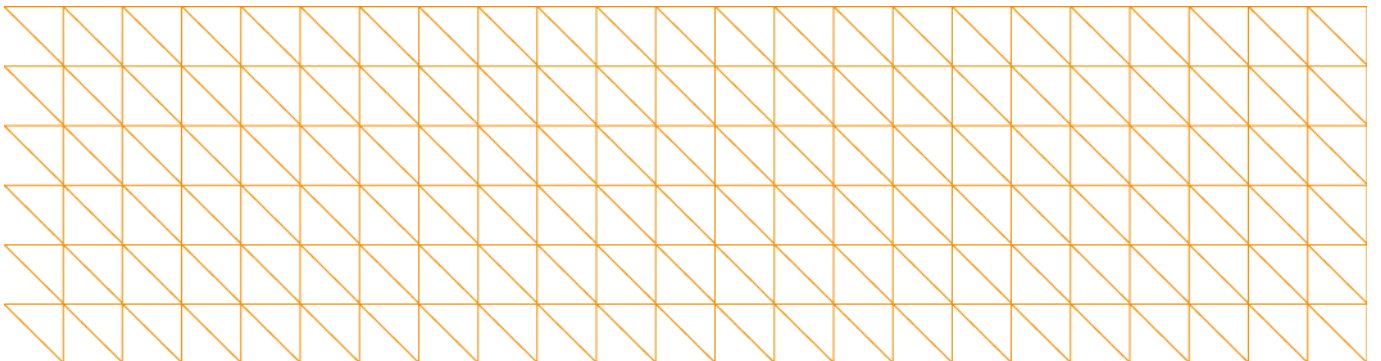


Ministry of
JUSTICE

Transforming the Services of the Office of the Public Guardian

Response to Consultation CP(R)23/2012

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Ministry of
JUSTICE

Transforming the Services of the Office of the Public Guardian

Response to consultation carried out by the Ministry of Justice

This information is also available on the Ministry of Justice website:
www.justice.gov.uk

About this consultation

To: This consultation was aimed at the public, the legal profession, the judiciary, the advice sector and all with an interest in this area in England and Wales.

Duration: From 27 July 2012 to 19 October 2012

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Transforming the Services of the Office of the Public Guardian
- Summary of responses

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Introduction

This document is the post-consultation report for the consultation paper '*Transforming the Services of the Office of the Public Guardian*'.

It covers:

- the background to the consultation paper;
- a summary of the responses to the consultation paper;
- a detailed response to the specific questions raised; and
- the next steps following this consultation.

Further copies of this response and the consultation paper can be obtained by contacting **Kathy Malvo** at the address below:

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This report is also available on the Ministry's website: www.justice.gov.uk.

Alternative format versions of this publication can be requested from:

- email: <mailto:OPGCONSULTATION@justice.gsi.gov.uk>
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Executive Summary

The Office of the Public Guardian (OPG) is currently undertaking a programme of reform that is designed to meet two key challenges. Firstly, to reform its systems and processes in order to deal effectively and consistently with the ever increasing demand to register Lasting Powers of Attorney – a trend that is set to continue with the country's ageing demographic. Secondly, to transform the way its services are delivered to the public in order to reduce bureaucracy, making its services to customers simpler, more efficient and more accessible. This will be achieved by making the majority of its services accessible online.

The consultation paper '*Transforming the Services of the Office of the Public Guardian*' was published on 27 July 2012 and ended on 19 October 2012. It invited comments on a range of issues related to the OPG aspiration to deliver its services digitally by default. Many of these proposals could be achieved through amendments to secondary legislation. We also sought initial views in a few areas about possible changes to primary legislation in the future. Other proposals could be achieved with minimal legislative change, although they would require changes to the OPG's current IT infrastructure and associated business processes.

We would like to thank all those who took the time to respond to the consultation. We received well over a hundred responses, providing very useful feedback on the whole range of issues on which we consulted. Many of the proposals received a broadly positive response. Suggestions were also made as to how those proposals could be improved or amended.

1) *Changes by April 2013*

We intend to implement those proposals that commanded broad support, and which can be implemented within the current legislative framework, as soon as possible.

By April 2013, therefore, we will:

- introduce an online tool for making a Lasting Power of Attorney (LPA) to make the process simpler, clearer and faster and reduce errors in the LPAs that reach the OPG requiring correction;
- reduce the statutory waiting period for registering an LPA from six to four weeks in order to make the process quicker, whilst still retaining adequate safeguards; and
- amend the regulations to allow deputies to change bond provider without the need to apply to the Court of Protection, with the original bond being automatically discharged after two years.

2) Changes by April 2014

We recognise that some changes either require further development or are dependent on the OPG replacement IT system being in place.

By April 2014, therefore, we will:

- develop simpler versions of the current Health and Welfare and Property and Affairs forms that align with the new digital LPA process. We will test these more widely with users and stakeholders as they are being developed;
- amend the current LPA 002 'application to register' form, and consider whether it can be merged with the LPA forms themselves, to remove duplicate information and reduce the amount of form-filling that is required;
- introduce the ability to search OPG registers online as part of the programme of work to replace the OPG's current IT systems;
- complete the fundamental review of the current approach to the way the Public Guardian exercises his statutory supervisory function and have implemented the results of that review wherever possible;
- implement an online payment facility for the payment of both LPA and deputyship fees; and
- introduce digital channels to support deputies in fulfilling their duties under the MCA 2005, which will also be in line with the outcomes of the fundamental review of supervision.

In a number of areas respondents felt it was difficult to give a full response without seeing more detail of what was proposed, or how the proposals might be implemented in practice. This was particularly true of our proposals to redesign the existing Lasting Powers of Attorney forms and any moves to create a 'hybrid form' (i.e. a unified Health and Welfare and Property and Affairs LPA). We intend to do further thinking, based on the responses to this consultation, and work up proposals in these areas in more detail. We will then seek further input from interested parties before taking forward any changes.

3) Areas requiring further development

Some proposals would require primary legislation in order to be implemented. In the main, these also received broad support and we will seek to take those measures forward as and when the legislative timetable allows. We will consult on these specific proposals in more detail at a later date where necessary.

There were some areas where respondents were unsure whether what was proposed would be workable in practice, or where additional evidence to understand the issue might be useful. We will consider what further evidence

might be necessary in order to understand the impact of these proposals, before bringing forward any amended options.

We will, therefore:

- consider in more detail the role of the certificate provider, the benefits provided by the certification process and the difficulties sometimes faced trying to identify suitable people to fulfil this role before bringing forward any further proposals in this area;
- consider in more detail the role of named persons and the value they add to the process of making and registering an LPA. We do not intend to make any changes to the maximum number of named persons at this time;
- consider whether the current process of notification operates effectively and whether there may be scope for further work in this area; and
- consider revising the notification process so that the OPG notifies named people, rather than the person making the application to register the LPA.

Background

The Mental Capacity Act (MCA 2005) came fully into force on 1 October 2007 and marked an important step in reforming the law relating to decision-making for people who may lack capacity. For the first time, it enshrined in legislation certain key principles: that a person must be assumed to have mental capacity unless it is established that he or she lacks capacity to make the decision(s) in question; that any act done in relation to, or decision made on behalf of the person, is to be made in his or her best interests; and that, before the act is done or the decision is made, consideration must be given to doing/making it in a way that is less restrictive of the person's rights and freedoms. Importantly, the MCA 2005 defines decision-making capacity as the capacity to make a particular decision at the time it needs to be made. No longer does the law define people as 'capable' and 'incapable'. Instead, there is recognition that many people, who may lack the capacity to make some decisions, could well be able to make many other decisions for themselves. Where a decision does need to be taken on a person's behalf, the law is clear that the decision must be in their best interests and be as least restrictive of their rights and freedom as possible.

As well as empowering and protecting people who may lack capacity, the MCA 2005 provides a number of options for those people who wish to plan ahead for the future. Most importantly, it enables individuals to make a Lasting Power of Attorney (LPA) to give someone the authority to make decisions relating to either their property and affairs, or their personal welfare, were they to lack capacity to make those decisions in the future.

The MCA 2005 created the Public Guardian, supported by the Office of the Public Guardian (OPG), which is an executive agency of the Ministry of Justice. Its purpose is: the registration of LPAs (and older Enduring Powers of Attorney); the supervision of deputies appointed by the Court of Protection; the maintenance of the registers of attorneys and deputies; and the investigation of any concerns raised about the conduct of either an attorney or deputy.

In October 2008, as part of the review of the implementation of the MCA, the OPG published the consultation paper '*Reviewing the MCA: forms supervision and fees*', which addressed the redesign of the LPA forms. In December 2009, the consultation paper '*Amendments to secondary legislation*' was published, which led to the updating of forms and guidance in an effort to improve the services offered by the OPG.

The development of online services, as outlined in the consultation paper '*Transforming the Services of the Office of the Public Guardian*', is intended to ensure that the OPG continues to meet the needs of its customers through the development of digital tools to make the process of making an LPA simpler and quicker, as well as to support deputies in fulfilling their duties and responsibilities.

Summary of responses

1. A total of 125 responses to the consultation paper were received from a range of MoJ and OPG stakeholders, professional bodies, interested parties and members of the public. The majority of responses came from legal professionals or organisations representing them.
2. Respondent types can be broken down as follows:
 - 70 were from the legal profession (of which 49 were solicitors);
 - 5 were from local authorities;
 - 2 were from National Health Service providers;
 - 9 were from third sector organisations;
 - 21 were from other groups/organisations;
 - 5 were from court appointed deputies; and
 - 13 were from members of the public.
3. Responses were analysed to find out if respondents were in favour of a specific proposal, where this was the question asked. Where we were seeking further opinion or information, responses were analysed on the frequency of the opinion or the information received across all responses. Where respondents gave additional responses or comments, this has been reflected in this document by either including an extract of these comments or by summarising them.
4. We have also attempted to reflect the opinions of a range of respondents. The summaries for each question reflect, in particular, the responses that were not in agreement with the proposals. This is because we think it is important to highlight areas of disagreement, as well as areas where there is consensus. The content of the responses received are described in more depth in the detailed analysis of each question.
5. This response is divided into two sections. Section 1 deals with changes to Lasting Powers of Attorney. Section 2 covers changes to the supervision of deputies, as well as a range of other issues.
6. A list of respondents is at **Annex A**.

Section 1 – Lasting Powers of Attorney

As outlined in the consultation paper, the OPG's systems and processes have struggled to cope with the high levels of demand for its services since its launch in October 2007. This has been most apparent in the numbers of applications to register Lasting Powers of Attorney (LPA) and the older Enduring Powers of Attorney (EPA). However, volumes in all work across the business have continued to rise, including the OPG's work supervising deputies appointed by the Court of Protection and in its safeguarding function. The main barriers to changing the underlying business processes to deal better with the rising volumes, and make improvements to the customer experience, has been the unreliability and inflexibility of the existing IT systems, which need to be replaced.

To meet these challenges, the OPG has commenced a major change programme as part of the Ministry of Justice's wider 'Transforming Justice' agenda. A key element of this will be the development of a new, more robust and flexible IT solution that will enable the agency consistently to meet demands for its services, whilst also radically improving the quality of those services. In the process of developing the new IT solution, the OPG is also seeking to deliver online services across all areas of its business in order to maximise the benefits to customers of a simpler, clearer, faster service. A paper based process will, however, continue to be retained for those customers who need them. Furthermore, the OPG is looking to develop a range of ways to assist those who find it more difficult to use online services so that as many people as possible can access the benefits that the shift to a digital model can bring.

The first section of this document covers the responses given on proposed changes to the LPA process. We intend to implement those changes that received broad support, and can be made in advance of the implementation of the new OPG IT system, in April 2013. Other changes may be made by April 2014, once the enabling IT systems are able to support them, while other changes require further work to refine the original proposals. Where necessary, we will consult on the detail of these future changes.

Summary: Revision of LPA forms

As part of the digitisation of its services, the OPG is developing an online tool that will assist individuals in completing the LPA form, using prompt messages to ensure that all sections are completed fully and accurately. It is hoped that this will eradicate errors in completion, which in turn will result in the OPG having to return forms less often. Feedback from the development of the digital LPA tool is also being used to inform the development of a shorter and simpler revised paper form.

Revision of the current forms for making an LPA needs to be seen within the context of the development of the online process. The OPG and the Government Digital Service (GDS) are currently piloting the online tool for creating an LPA

with a limited group of users in a live environment. This allows us to test the online process and obtain valuable feedback. Coupled with the responses to this consultation, this work will inform our further thinking on the content and format of the LPA forms with the aim of reducing length and duplication, as well as making the forms simpler and easier to complete and with fewer errors.

Overall, the responses to the changes in the LPA forms and the possible introduction of a 'hybrid' form (covering both property and affairs and health and welfare) were broadly positive. Many respondents wanted to see a prototype of the proposed 'hybrid' form in order to give a more informed response. We agree that this is the most appropriate way forward.

We intend to develop a draft 'hybrid' form, taking on board all the detailed and technical comments made during the consultation. We are also mindful that many responses were concerned that a 'hybrid' form would not become the 'default' option. We will, therefore, consult on a potential 'hybrid' form alongside any revisions to the existing forms in more detail in 2013.

Responses to specific questions

1. Are there any reasons why a 'hybrid LPA form', covering both property and affairs and health and welfare, should not be introduced?

The majority of respondents replied to this question. Many had no objection to the introduction of a 'hybrid' LPA form which covered both property and affairs and health and welfare, as they felt that the donor usually wanted the same people appointed for both areas and the introduction of a 'hybrid' form would reduce repetition:

"A good idea in principle"

'A draft should be prepared and trialled by both individuals, as well as key stakeholders.'

'There should be clear instructions so that people know what they are opting for'.

Some respondents opposed the idea of a 'hybrid' form, as they believe it would confuse users, may not be the true choice of the donor and could lead to potential mistakes. Concerns were also raised that a 'hybrid' form would result in greater risks for vulnerable people, as those seeking to take advantage would see the opportunity of the 'hybrid' form as a bonus in terms of controlling a vulnerable person. Taking on board the difficulties already encountered with financial institutions with the current forms, it was felt that a 'hybrid' form would cause even greater confusion. Respondents also felt that there was no reason why a financial institution should be privy to any medical decisions made by the donor and vice versa.

"It is not appropriate for financial institutions to see medical decisions made by the donor and vice versa".

"The two types of LPA come into operation in different ways, that for the H&W is laid down in MCA 2005 but that for PFA is open to variation, it is difficult to see how this could be incorporated into the design of a hybrid".

2. If a hybrid form is introduced should the current two separate forms be retained alongside it?

Most respondents replied to this question. Around half were in favour of retaining the two current forms even if a 'hybrid' form was introduced. Reasons for the retention of the two forms included:

"To retain confidentiality between the distinct powers being granted".

"In the event that the donor appoints different attorneys for each power".

In contrast, the other half of respondents were against retaining two separate forms, as they felt this would create confusion if the 'hybrid' form was introduced. Comments included:

"It will encourage further fraud".

"Too confusing".

"Should be retained for two years in case complications arose from the introduction of the hybrid".

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

All respondents replied to this question. A quarter of respondents were in favour of a short version of a 'hybrid' form, whilst others were in favour of the form being split into two. There was a general consensus that the current versions of the forms are onerous to complete and that a shorter version would be easier for the majority of people to complete and much more user-friendly:

"There was a shorter version of the Enduring Power of Attorney".

"A short version and a long version may be confusing".

Many respondents objected to both options, on the basis that they needed to see a prototype of the form before they could usefully comment:

"The option of splitting the hybrid form into two sections appears very confusing".

"If the form is split or shortened, the short form should make clear what the user is missing out".

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

The majority of respondents answered this question, with many stating their concerns about the level of duplication. Over half of the respondents were in favour of amending the information on the current forms, including:

“The attorney’s date of birth should be in part C”.

“The need for consistency in how the names of attorneys are set out on the forms”.

Summary: Language

Recent user testing of the online process has revealed that customers continue to have issues with the language in the current forms - in particular, around what is meant by the precise legal wording in relation to appointing attorneys ‘jointly’ or ‘jointly and severally’. In many instances when the option to appoint an attorney to act ‘jointly’ for some decisions and ‘jointly and severally’ for others is chosen, the resulting LPA often requires correction before it can be registered by the OPG or may not be able to be registered at all. We proposed removing the choice to appoint attorneys to act ‘jointly’ and ‘jointly and severally’.

The majority of respondents told us they would prefer to retain the terms ‘jointly and ‘jointly and severally’, so that donors continue to have a choice. Therefore, we do not intend to change the wording ‘jointly’ and ‘jointly and severally’, but we will seek to enhance the LPA guidance to increase understanding and clarify what can and cannot be done.

Response to specific questions

5. Should donors continue to be able to appoint attorneys to act ‘jointly’ for some decisions and ‘jointly and severally’ for others?

The vast majority of respondents answered this question. Generally, most felt it was important that the donor should have a choice about how their attorneys should act so that major decisions, such as the sale of a house, could be made jointly. Respondents also suggested that the guidance should be expanded in order to clarify the meaning of the terminology for customers.

A small minority were in favour of this option being removed on the basis that it caused confusion and, if not used correctly, would lead to the LPA being invalid.

“Jointly runs risk of document becoming invalid on death or incapacity of one attorney”.

“Donors don’t understand what it means”.

6. Do you agree that the wording ‘jointly’ and ‘jointly and severally’ although legally precise, is confusing? What alternative wording would you suggest?

Most respondents acknowledged that the legal wording can be confusing. However, it was felt that this could be overcome with clear guidance explaining what can and cannot be done. Of particular note was the fact that some respondents were anxious that the OPG should not revert back to the wording used in earlier versions of the LPA forms, as this had created greater confusion. Comments included:

“It’s not confusing if adequately explained”.

“Past attempts to use plain English versions failed dismally”.

As a result, we will not change the wording ‘jointly’ and ‘jointly and severally’ but will revisit the existing guidance to ensure that effect of using the wording ‘jointly’ or ‘jointly and severally’ is clearly explained.

Summary: Certificate Providers

The role of certificate provider is an important safeguard. The certificate provider is an independent person who is able to confirm that the person making the LPA understands its significance. They must have known the individual for at least two years or have the relevant professional skills to confirm that the person making the LPA understands its significance. They also need to certify that no undue pressure or fraud was involved in the making of the LPA application.

We are aware of the difficulties that donors might experience in needing to find a second certificate provider where they have not specified any named persons to be notified of their intention to register an LPA. We therefore considered whether the requirement for an additional certificate provider remained necessary or should be removed. With the provision of online services in mind, we also sought views on how the role of the certificate provider would operate in a digital context.

We have carefully considered the responses provided. Many respondents consider a second certificate provider remains an important additional safeguard, although they also flagged up the difficulties that donors face in practice in identifying a second certificate provider. We will, therefore, retain the requirement for a second certificate provider, although we intend to consider further how much additional protection they provide in practice and the difficulties donors experience in identifying them.

In addition, we do not intend to specify that the certificate provider must be a professional. Whilst we acknowledge the benefits that their involvement can bring, we continue to advocate that individuals should be able to complete the LPA forms and application process without having to seek assistance from a professional.

We also intend to undertake further work to explore how the certificate provider role might continue to provide the appropriate safeguards in a digital context.

Response to specific questions

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

Most respondents replied to this question. Of those, around half felt that the requirement should not be removed, as this is regarded as a necessary and important safeguard to protect the donor. Comments included:

“The protection is appropriate”.

“If you remove the second certificate provider, it means that it is easier to get a power signed and therefore easy to abuse”.

A minority felt that the additional certificate provider should be removed. Comments included:

“If the first certificate provider is undertaking their role properly, in particular ensuring that the donor has capacity... then the second certificate provider’s role is superfluous”.

“The requirement for an additional certificate provider should be removed. It is comparatively rare”.

Other comments suggested that if the certificate provider were a professional person i.e. a solicitor or the donor’s GP, this would alleviate the need to have two certificate providers.

As outlined above, we are aware that this is an area of significant concern. Consequently, as a second certificate provider remains an important safeguard to ensure that the donor understands the significance of the LPA and is not under any undue pressure or that any fraud is involved in the making of the LPA application, we consider that this requirement should remain.

We do not, however, agree that the certificate provider must be a professional. Whilst we acknowledge the benefits that their involvement can bring, all individuals should be able to complete the LPA forms and application process without having to seek assistance from a professional. Constraining the role of certificate provider to only those who are professionals would force individuals to use their services and, most likely, to incur a cost.

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?

Two thirds of respondents replied to this question. Of those, nearly half felt that the role of the certificate provider was effective and operating as the Mental Capacity Act had intended it to, while an equal number thought that the role was not working well, with the potential for fraud being cited as the main issue. Comments included

"I think it is working well and as the MCA intended. It makes people stop and think which needs to be done when making an LPA".

"It provides valuable contemporaneous evidence of the donor's state of mind at the time of the making of the LPA"

A range of comments were made about how well the role of the certificate provider was operating, with some respondents feeling that the role was difficult for lay persons to undertake as they did not understand it fully and would be leaving themselves open to criticism if the LPA was challenged. Others felt that lay certificate providers do carry out this role effectively. Some respondents also commented that the role should be combined with that of the witness to the donor's signature, thereby providing a more up-to-date assessment of the donor's capacity at the time the LPA is executed.

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?

Many respondents replied that the role of the certificate provider is no less important in a digital context than it is in a paper based one. It was queried how this role would work in a digital context:

"It will be imperative to identify the donor and ensure that their wishes are being accorded with".

"We are concerned that it will make it more difficult to ensure that the donor is fully involved in the process".

"The same protection that it adds is needed in a non digital form".

We agree that the role of the certificate provider remains an important safeguard and we intend to undertake further work to explore how this role might continue to provide the appropriate safeguards in a digital context. Any changes to the requirements for a certificate provider will be for the future and would require primary legislation.

Summary: Registration

An LPA is not created until it has been registered with the Public Guardian. The LPA form and the application to register, known as the LPA002, are currently two separate documents. We are aware that information is duplicated when completing both forms, adding to an already lengthy process. We proposed that the OPG could provide the facility where applicants could use the online process to submit their application to register, providing further minimal details and confirming with a tick box that they wish to register the LPA. Applicants would still be required to send the hard copy LPA, with signatures, to the OPG.

We have considered the responses received and, on balance, agree that we should amalgamate the forms although, for the present time, the LPA002 'application to register' will remain separate from the LPA form. As further work is taken forward to identify how the LPA forms themselves might be simplified and shortened, alongside considering what a 'hybrid' form might look like, we will also consider developing a shortened LPA002 form and testing whether it could be combined with the LPA instrument itself.

Response to specific questions

10. Can you see any reasons why the LPA form and the application to register (the LPA002) should not be amalgamated?

Nearly all respondents replied to this question. The vast majority agreed that the two forms should be amalgamated to avoid duplication. Comments included:

"Providing it is made clear that the donor doesn't have to apply immediately".

"If, and only if, the actual processes themselves were amalgamated".

A minority of respondents were not in favour of the forms being amalgamated, as they felt *"it will create additional pages that are not required"* or it *"would create further confusion for banks and building societies"*. Other respondents highlighted that amalgamating the two forms may have *'an adverse effect on those donors who do not intend to register their LPA straight away and may wish to defer this until the onset of incapacity.'*

We agree in principle that the application to register (LPA002) should be amalgamated with the LPA form. However, for the present time the LPA002 will remain separate, as any changes are dependent on the OPG IT replacement system being in place.

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

Around two thirds of respondents agreed in principle that the applicant should be able to indicate, via a tick box, that they were applying for registration. Comments included:

“I think this would be beneficial but to must work it must be straightforward and properly secure”.

“Provision needs to be made within the tick box registration system for the applicant to signify that they have read and understood the meaning of registration and its consequences”.

A small number of respondents did not agree with this proposal. They felt that *‘the introduction of a tick box could create problems’* or that *“the donor should sign to indicate that they wish to register”.*

As this facility is unlikely to be available until the OPG’s IT system is updated, we will introduce regulations to support this proposal in the future. We will advise stakeholders, through OPG stakeholder groups and information online, once we have finalised a deadline for this change.

Summary: Named persons

The person making the LPA can name up to five people whom they wish to be notified that the LPA is about to be registered. These are known as named persons. Once notified of the impending LPA registration, the named persons can object to the appointment of the attorney if they feel that the individual who has made the LPA lacked the capacity to do so, or that the LPA was made under duress, or that the attorney may not act in the best interests of the individual.

We sought to understand in more detail the protection that named persons provide to the LPA process and whether we should reduce the maximum number of named persons allowed. In addition, we sought views on a revision of the notification process at some point in the future, either by removing it in its entirety, or limiting the persons notified to just the attorney and the donor. We also queried whether the OPG should assume responsibility for notifying all parties of the application to register the LPA. This would be irrespective of whether the application had been made digitally or on paper.

We have decided not to change the current number of named persons at the present time. However, we intend to undertake further work on issues around the notification process, including assessing the additional amount of operational work that sending out notifications may involve for the OPG. Any future changes are likely to require primary legislation.

Response to specific questions

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 majority of respondents replied to this question. Around a third of respondents felt that the number should be reduced, but were divided on the question of what the maximum number of named persons should be, with no clear consensus reached. A similar number of respondents agreed that it should not be reduced and that the option of five people should remain:

“Should be optional as named persons do not add any value to the process”.

“There’s more to notifying person than just their ability to object. It can allow you to ensure that those who feel should be aware are made aware”.

“The donor should have as much choice as possible”.

As there was no clear view from respondents about whether they were in favour of reducing the number of named persons or not, we have decided not to change the current number of named persons at the present time. We will, however, undertake further work into the role of named persons and this may form part of a future consultation.

13. What other changes to the notification process should we consider?

All respondents replied to this question. Many agreed that the notification process should remain as it is, whilst others made some suggestions for improvements:

“Get rid of the process entirely”.

“Notifiable person to acknowledge receipt of notification”.

“It would be safer if the notice was served by the OPG”.

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

The majority of respondents answered this question. Around two thirds agreed that the OPG should send notifications of the application to register to the named persons, with a small minority stating that they did not favour the OPG taking on this role:

“A good way to prevent fraud, a good audit trail”.

“Might induce panic in people who do not know what to do with it”.

“I see no reason to put the burden on the OPG”.

We have considered the comments made by respondents in relation to the removal of the notification process and the possibility of the OPG taking on the notification responsibility. We agree that this proposal is a sensible way forward. However, concerns were also expressed about the OPG's ability to send out notifications in a timely manner, as well as the impact that this additional role may have on registration times. As any changes will require primary legislation, we therefore intend to undertake further work on the issues around the notification process, including assessing the additional workload that sending out notifications may involve for the OPG, whilst ensuring that the registration process is not affected.

Summary: Confirmation of Registration

Currently, once the LPA has been registered, the OPG returns the whole document to either the donor or the attorney. This is because the LPA is a deed and it must be returned to whoever made the application. We sought views on whether the OPG should retain the original LPA and only issue a short 'Certificate of Registration' (in either a digital or paper form) in the future, instead of returning the whole LPA as it does at present. The Certificate would only contain basic information concerning the donor and the attorney, as well as the details of any powers granted.

Many respondents agreed that a 'Certificate of Registration' should be issued by the OPG, although concerns were expressed around security if the OPG retained the original LPA. We intend to undertake further technical work around the issuing of a certificate of registration, although this is likely to be dependent on making changes to primary legislation in the future.

Response to specific questions

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?

All respondents replied to this question. The majority agreed that it would be a good idea for the OPG to retain the original LPA and issue a 'Certificate of Registration'. However, whilst supportive of the idea of a certificate, a few respondents had practical concerns which need to be explored further, such as:

"Some organisations may want to see the original".

"An additional document will cause added confusion for banks".

"Where would the OPG store the original documents?"

"Would the original LPA be available for inspection?"

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

Again, all respondents replied to this question. Some felt it would be "*cheaper to certify*" and "*easier and safer in day-to-day use*". However, some respondents voiced concerns, including:

"The certificate would not contain the degree of information that many third parties require".

"Would not have donor's signature and banks would refuse to accept it".

"Foreign banks are unlikely to accept it".

As concerns were expressed around security if the OPG retained the original LPA, we intend to undertake further technical work on the issuing of a 'Certificate of Registration' and what the practical implications might be so that we can reassure customers and stakeholders about data security.

Summary: Statutory Waiting Times

The Mental Capacity Act (MCA) 2005 provides that there should be a 'prescribed period' – commonly known as the statutory waiting period - before the Public Guardian registers an LPA. This allows named persons to lodge any objections that they may have to the appointment of the attorney. Currently, the Lasting Power of Attorney and Public Guardian Regulations 2007 stipulate that the prescribed period for LPAs is six weeks.

We sought views on reducing the prescribed period to five weeks, bringing it in line with the current prescribed waiting period for EPAs, as well as whether there was merit in reducing the statutory waiting period for both LPAs and EPAs further in the future. In addition, as we recognised that the prescribed period can cause difficulties in times of emergency, we wished to explore more widely what value the statutory waiting period offers and whether it might operate differently.

Overall, many respondents were in favour of reducing the prescribed statutory waiting period. Given this widespread support, we will reduce this period to four weeks for LPAs, although we will retain the current prescribed period of five weeks for EPAs (which is set out in primary legislation). This will mean that there will continue to be a variation in waiting periods for EPAs and LPAs – albeit with LPAs now having a shorter waiting period than EPAs. However, we do not see that this will cause any difficulty in practice, as the waiting time for EPAs begins once the attorney has sent out the notices to the relevant parties, whereas the waiting time for LPAs begins once the OPG has received the application and notified the other parties who did not make the application. In practice, therefore, we believe that there will be little difference in the time available to make an objection.

We will, therefore, amend the regulations to reduce the waiting period for LPAs to four weeks and we intend to introduce this in April 2013. These regulations will be subject to the negative resolution procedure.

Response to specific questions

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 majority of respondents answered this question, with most being in favour of reducing the statutory waiting period to five weeks, thereby bringing it into line with the Enduring Power of Attorney (EPA) prescribed waiting period. A very small minority were not in favour of this change, stating “*reduce, but only in emergencies*”.

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

Similarly, most respondents answered this question. Around half were in favour of reducing the waiting period further or removing it entirely, as they felt it would lead to quicker registration and allow the attorney to act more quickly. However, there was no clear consensus about what the new waiting period should be and, where they did comment, the suggested time periods ranged from one week to four weeks. Comments included:

“Waiting period should be abolished altogether. It causes untold distress and heartache to families at times of critical need”.

A minority were not in favour of further reduction. Fraud was cited as the main reason for this, as it was argued that ‘rushing’ the period for objections could mean that vulnerable people are exploited and others would be unable to raise concerns. It was also suggested that the waiting period should run from the date of notification and not when the paperwork is processed by the Office of the Public Guardian.

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

Again, most respondents replied to this question. The vast majority were in favour of waiving the waiting period in certain emergency situations, providing the named persons had no objections. Some said it would be “*good to have an emergency protocol*”, whilst some suggested that it “*could be waived when a medical certificate is obtained confirming the situation such as life expectancy, imminent surgery etc*”.

A small minority were not in favour of this proposal because they felt that it would be difficult to define what an ‘emergency situation’ was and the fact that an application for a single order could be made to the Court of Protection if required. Comments included:

“Section 5 of the MCA should result in the same (or similar) outcome, in appropriate situations”.

“Unless there is evidence that disadvantage has often been caused, which could be avoided by this process, then adding an additional variation and complication seems undesirable”.

The majority of respondents were in favour of the suggestion of waiving the waiting period in cases of emergency. However, there was no clear consensus about the circumstances which might require a waiving of the waiting period. As a result, we intend to investigate further the options available as to how emergency cases might be dealt with. Any major changes will require primary legislation and will, therefore, be the subject of future consultation.

Section 2 - Supervision and other Issues

This section sets out the responses to the proposed changes to supervision, security bonds, fees and access to the Registers.

Summary: Supervision

As part of its programme to transform the way in which it delivers its services, the OPG is conducting a fundamental review of the way the Public Guardian fulfils his statutory duty to supervise deputies appointed by the Court of Protection. More details about any proposals which may require changes to legislation will be consulted on during 2013.

Transforming the services of the OPG will require the review and redesign of processes and systems throughout the whole agency to ensure that the benefits of adopting a 'digital by default' approach to service delivery are accrued across all areas of its business. This includes the ways that deputies interact with the OPG, the support that they receive and the ways in which they are supervised. Initially, the OPG hopes to develop a facility to enable deputies to manage their deputyship 'account' online and to be able to amend/update their records in this way route. At the end of the year, a deputy will then be able to submit their annual report to the OPG online via a secure network.

Overall, respondents were in favour of the measure proposed for supervision. The facility for deputies to submit their reports and manage their accounts online throughout the year will be available once the necessary systems are in place. This will be subject to further work to ensure that there are sufficient safeguards available to ensure the protection of data. Other digital tools are also likely to be developed to support the outcomes of the fundamental review of supervision.

Response to specific questions

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?

Most respondents agreed with the proposal because it would allow deputies to keep records as they go, rather than having to gather information together at the end of the year. Comments included:

"A reasonable idea provided IT is up to it".

"Anything that makes deputies more accountable and is easier to check on a regular basis is good".

No detailed comments were provided by respondents not in favour of this proposal.

Summary: Change of security bond provider

Currently, if a deputy wishes to change insurer this must be approved by the OPG. In such circumstances, the previous bond will remain in place unless an application is made to the Court of Protection to have it discharged. The decision as to whether to discharge the bond in any given case will be a judicial one.

The OPG is aware that more insurers are entering the market to provide security bonds, and that deputies are investigating the schemes being offered in order to get the best value for the person lacking capacity. This may lead to deputies wanting to change bond providers, potentially on more than one occasion, over the life of their deputyship. The risk therefore, is that changing bond providers may result in two premiums being payable for a period of time unless an application for discharge is made. We therefore sought views on how the process could be simplified.

Most respondents were in favour of our proposal to change the regulations to provide for the automatic discharge of a bond within two years of the commencement date of the bond with the new provider. This would be in line with the current provisions for a bond to be automatically discharged two years after the death of the person lacking capacity (although the period is seven years where the person is still alive). In addition, the two year period would provide a greater opportunity to identify any issues or irregularities that may have occurred.

Therefore, we intend to amend the regulations to allow deputies to change bond provider without the need to apply to the Court of Protection, with the original bond being automatically discharged after two years. It is our intention to introduce this in April 2013. These regulations are subject to the negative resolution procedure.

Response to specific questions

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?

We received responses from the vast majority of respondents to this question. Around half agreed with the proposal, while a small minority were not in favour or made no specific comment:

“This may lead to a situation where no bond is in force”.

“Why not just eliminate bonds where the deputy can offer adequate security?”

“Is convenience overriding protection?”

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

Similarly, most respondents answered this question. Around half agreed that two years would be sufficient, whilst a few respondents suggested that the time period should be between one and three years and others made no comment.

Summary: Fees

New, improved IT systems will enable the OPG to provide online payment facilities for EPA/LPA registration and supervision fees, receipt of which would be processed on the same day.

With the provision of digital services, the recovery of costs via online fees charged to customers could result in a more flexible model to reflect the variances in the processing costs. This variance would allow the possibility of offering differential fees to reflect the difference in processing costs at the OPG between paper based and online applications.

We have considered the comments made by respondents and intend to undertake further work around fees, including investigation of the options for variable fees and the development of the online payment facility. We will consider what changes may be appropriate and will consult where necessary.

Response to specific questions

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

The majority of respondents replied to this question and agreed that they would support the provision of this facility. Some respondents provided additional comments, such as:

“This should be for lay individuals, provided that a cheque procedure is still available for solicitors as otherwise they have to charge clients if they have to pay on their behalf by BACS”.

“Need to remember that, not everyone has a debit or credit card”.

“Not every applicant has online access - particularly the elderly or unsighted”.

“I think it might be an idea to have an account facility for solicitors (perhaps similar to the Land Registry) whereby the key number could be inputted and the fees debited about the firm account in each matter”.

Overall, respondents were in favour of the development of an online payment facility but were anxious that other methods such as the ability to pay by cheque or through direct debit should remain.

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

Many respondents agreed that they would support the provision of this facility, although some respondents voicing concerns around the OPG's obligations in relation to the Equalities Act and the provision of services:

"It would be unfair to customers especially the elderly who cannot go online".

"Both channels of application should be treated equally and not appear to give preference to one client group over another".

Summary: Access to the Registers

Subject to data protection requirements, the shift to a digital approach opens up the possibility of a range of options relating to third parties accessing the registers for LPA/EPAs and Court of Protection deputies. We sought views on how this might be achieved.

Specifically, we suggested that basic 'tier one' searches, which provide minimal information to anyone requesting a search, could be made available online with live access to registers over the internet protected by any necessary security/registration requirements. 'Tier two' searches, which are more detailed and are subject to assessment by the OPG, could be submitted electronically and a response issued by email once staff had the opportunity to assess the request. It was also suggested that certain groups, such as healthcare staff, would be allowed direct access to the registers via a secure log in.

Overall, respondents were generally in favour of our proposal to open up access to the registers, subject to adequate security and data protection being available. Furthermore, the ability to check the registers directly may assist financial institutions in confirming that an LPA or deputy order presented to them is valid.

As providing online access to the registers requires the OPG's replacement IT system to be in place to support this change, we will take this proposal forward once this has been delivered. When the new IT systems are fully in place, we will seek to amend the regulations to allow 'tier one' searches of the register. We will inform stakeholders when this change is imminent through use of the OPG stakeholder groups and the Ministry of Justice website.

Response to specific questions

25. Would you agree with making 'tier one' searches of the registers available online?

Almost all respondents replied to this question. The majority of them agreed that they would support the provision of this facility.

“Should be extended to ALL tiers of LPAs in the interests of openness and transparency. It might just also deal with the reluctance of some banks to acknowledge the validity of such orders”.

“Would speed up the decision making process in safeguarding”.

A small minority of respondents said that they would not support this. Comments included:

“Wary of data protection as I can foresee banks etc accessing this information and then somehow using it for marketing or it being used in some kind of scam”.

“Attorney and donor have absolutely no control over who accesses their data”.

Summary: Assisted Digital

The Government Digital Strategy¹ and the MoJ Digital Strategy² make a clear commitment to ensure that no-one gets left behind when we start delivering our services digitally. We recognise that not everyone who uses our services will be capable of accessing them digitally by themselves and we are committed to making sure our digital services are accessible to all.

We are aware that the introduction and increased use of online services may mean some groups will need additional support to benefit from the digital transformation: for example, those who do not have access to the internet, those who are more elderly or vulnerable, or those with limited digital media capability. Research undertaken by the Government Digital Service indicates that 18% of adults have rarely or have never been online.

Once the online LPA is launched in April 2013, paper forms will still remain available for those who are unable to use the digital form but we will explore ways of removing whatever barriers exist in order to allow as many people as possible to access the benefits that the digital tool offers.

In addition, the Government’s ‘digital by default’ agenda aims to reduce the number of non-digital channels and consider ways to enable as many people as possible to access the digital process as the default method. Assisted digital in this context is about the provision of support to enable everyone to fill out the form digitally.

In order to future-proof our service delivery, the OPG will need to proactively develop high quality, consistent assisted digital support for those customers who need it. The focus will be on working with a wider range of external partners to provide these services.

¹ publications.cabinetoffice.gov.uk/digital/strategy/

² Due to be published in December 2012

As an example, those who cannot access the internet directly could:

- be assisted in accessing a digital service via a trusted or accredited intermediary – such as a family member, or other public or private sector organisations; or
- access the digital service through another ‘way in’, for instance, through smaller, focused call centre provision where an intermediary completes the online form over the phone.

The OPG is already exploring ways in which possible partners might provide support, and is part of the GDS ‘Assisted Digital’ stakeholder group developing ideas for future service provision in consultation with key stakeholders. This includes work with those who already offer support to people making Lasting Powers of Attorney and other public and private sector providers across the advocacy, advice and legal sectors.

Discussions have also begun on developing a collaborative procurement framework for assisted digital provision across government and we are engaged in this conversation.

In the future, partners could be accredited to provide a consistent and secure service that meets a Government standard for assisted digital.

Response to specific questions

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

Many respondents voiced concerns around guaranteeing the current LPA safeguards in a digital process. This included concerns that it would “*have the potential for fraud*” and a need to “*ensure that the assisted alternative is simple*”.

We are currently running a pilot for online applications, which involves a small group of partners from the not-for-profit and legal sectors. This online service populates the existing LPA forms and retains all the current safeguards, as set out in the Mental Capacity Act 2005 and related regulations. It involves no change to the numbers of certificate providers or notified parties.

The pilot is enabling the OPG to test the online service with real LPAs from real applicants and is providing valuable feedback ahead of the planned release to the general public in April 2013, including scrutiny of the safeguarding measures.

The Government approach to Assisted Digital also includes work on accreditation and standards to ensure a consistent service that meets customers’ needs. The OPG will align with this approach.

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

The majority of respondents to this question were not aware of any further information that would assist the development of digital channels.

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?

Again, the majority of respondents answered this question. A minority of respondents said there would be some equality issues, mainly associated with issues around the age of the customers using this service. Otherwise, most respondents had no concerns or made no comment.

We are grateful for the views and comments received on potential equalities impacts in the provision of digital channels. We intend to use this information further as we develop our thoughts on the future development of services.

Conclusion and next steps

1. We are grateful for all of the comments and views received. They will help us ensure that the OPG's transformation programme and adoption of digital services will fully meet the needs of all of its customers. We have analysed each response and the results have guided our next steps.
2. In April 2013, the OPG will launch the new digital tool which will make it easier for customers to complete the current LPA forms online. This will help to eradicate many of the errors that currently occur during the completion of the LPA form and will reduce inefficiencies in the current processes. We will also reduce the current statutory waiting period from six to four weeks in order to make the process quicker for customers, whilst still retaining adequate safeguards.
3. The Ministry of Justice has identified the OPG transformation programme as an 'exemplar' for digital transformation of services. The OPG's online services are being developed to meet customer needs, in line with the new Government digital service standard, as well as ensuring assisted digital support is in place for those who cannot access digital services independently.
4. Throughout 2013 we will take further steps to revise the LPA forms and guidance, including shortening the LPA002 'application to register', and consider in more detail how a 'hybrid' LPA might look and operate. We will consult about these changes as appropriate.
5. As part of its continuing programme to transform the way in which it delivers its services, the OPG has also commenced a fundamental review of the way that the Public Guardian exercises his statutory duty to supervise deputies appointed by the Court of Protection. If required, we will consult on any proposals during 2013.
6. The suggestions and feedback we have received in relation to the questions regarding certificate providers, named persons and the statutory waiting period will be used to inform the ongoing work that is being undertaken as part of the transformation of OPG services. Some of these changes, if they were to be adopted may require primary legislation. We will consult further on these areas as necessary.

Glossary

Applicants	The persons applying to register the Lasting Power of Attorney (LPA)
Attorney	Someone appointed under either a Lasting Power of Attorney (LPA) or an Enduring Power of Attorney (EPA), who has the legal right to make decisions within the scope of their authority on behalf of the person who made the Power of Attorney.
Assisted Digital	The methods by which individuals who cannot access the internet directly are assisted in accessing a digital service via a trusted and supported intermediary
Certificate Provider	An independent person who is able to confirm that the person making the LPA understands its significance
Court of Protection	The specialist Court for all issues relating to people who lack capacity to make specific decisions.
Deputy	Someone appointed by the Court of Protection with ongoing legal authority to make decisions on behalf of a person who lacks capacity to make particular decisions
Digital By Default	The delivery of Government services online or by other digital means
Donor	The person making the Lasting Power of Attorney (LPA)
Enduring Power of Attorney (EPA)	A Power of Attorney created under the Enduring Powers of Attorney Act 1985 appointing an attorney to deal with the property and affairs of the person who made the Enduring Power of Attorney
Jointly	Attorneys must always make all decisions together. If one of the attorneys does not agree with something, that decision cannot be made.
Jointly and severally	Attorneys can act together or independently for all decisions.
Lasting Power of Attorney (LPA)	A Power of Attorney created under the Mental Capacity Act 2005 appointing an attorney (or attorneys) to make decisions about the donor's personal welfare (including healthcare) and/or deal with the donor's property and affairs.
Mental Capacity Act 2005 (MCA)	The Mental Capacity Act (2005) protects people who may not be able to make some decisions for themselves
Named persons	The persons specified in the LPA, who should be notified that the LPA is about to be registered
Security bond	The financial security set by the Court of Protection. The bond is provided by an insurer and provides protection for the person lacking capacity from any financial loss that may occur due to the deputy's handling of their finances

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If you have any comments about the way this consultation was conducted you should contact Sheila Morson on 020 3334 4498, or email her at: sheila.morson@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Ministry of Justice
Consultation Co-ordinator
Better Regulation Unit
Analytical Services
7th Floor, 7:02
102 Petty France
London SW1H 9AJ**

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees ‘buy-in’ to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Annex A – List of respondents

Fiona Heald
David O'Shea
Robert John Evans
David Kitcat
Alex Elphinston
Angela Smith
Jon Leigh
Malcolm Williamson
Nicola Hibbert
David Smith
Michael Daley
Peter Anderson
Charles Neal
Robert Craig
Sarah Steel
Ruth Edwards
Katherine Ann Jordan
Lee Hibell
Jeremy Whigham
Sally Salmon
Tina Fatcher-Smith
Cathryn Meredith
Amanda Firth
Linda Keegan
Hugh Davidson
Jonathan King
Emma Woollard
Carolyn Parham
Philip Palmer
Ron Day
Nigel Bradley
Sheila Campbell
Liz Pearce
Martin Watson
Heather Dixon
Mrs Christine Hockett
Mark Coulthwaite
R Rodgers
David Screen
Glynis Harrison
Roger Goss
Monty Knight-Olds
Jennifer Margrave
Rachel Gaffney
Clive Lissaman
Kathryn Sykes

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Jan Woolley
Mark Daniel
Jill Hill
Neal Hattersley
Lindsay Duckworth
Sarah Zokay-West
Louise Bate
Henry Grant Shaw
Lesley Winfield
Jonathan S. Simons
Catherine Whilby
Karen Palfrey
Andrew Alonzi
Stephen Pett
Ken Hawkins
Rod Fisher
Martin Leonard
Elaine Brown
Jacqueline Stringer
Andrew Pearce
Jesamine Ong
Elaine Theaker
Katherine Melkerts
Ashley Easterbrook
Rebecca Head
Graham Fuller
Jane Hunter
Annabelle Vaughan
Ian Macara
Jill Martin
Sheila Williams
Peter Harrison
Catherine Quekett
Michael Hill
Simon Cramp
Damian Lines
John Thurston
District Judge Lush
Mark Gifford-Gifford
ACTAPS (H Frydenson)
Caroline Bielanska
The Society of Trust and Estate Practitioners (STEP)
Alzheimers Society
Institute of Professional Willwriters
Mary Elizabeth Read
A F Brown
Epoq Legal Ltd
IRIS Laserform
New Quadrant Partner LLP
Liverpool Law Society

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Royal College of Psychiatrists
British Bankers Association (BBA)
Allied Services Trust
Andy Oakes
Society of Will Writers (Richard Wood)
HM Land Registry
Birmingham Law Society
Staffordshire & Stoke on Trent Adult Safeguarding Partnership
Chris Munday on behalf of Withers' Elder Law Team
David Beeson
Lynne Coombes
Peter Larkham
Duncan Boulton
Claire Davis
Denise Crossen
Legal unit of MIND
Age UK
Law Society England & Wales
ICAEW – The Institute of Chartered Accountants
Martin Leonard

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