



## **Powers of Attorney Bill**

### **HL Bill 121 of 2022–23**

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On 16 June 2023, the second reading of the [Powers of Attorney Bill](#) is scheduled to take place in the House of Lords.

A [lasting power of attorney \(LPA\)](#) is a legal document which allows a person to grant decision-making powers to another individual in circumstances where they lose mental capacity to make decisions for themselves.

Since 2021, the Ministry of Justice and the Office of the Public Guardian (OPG) have been working together to modernise the LPA system. The government contends that the existing paper-based system for making and registering LPAs has caused several problems, including complexity for users and inefficiencies for the OPG, which administers the system. In July 2021, the Ministry of Justice launched a consultation where it sought views on modernisation proposals. It published its official response to the consultation in May 2022 which provided an overview of how the government planned to amend the LPA process. This included introducing primary legislation which the government said it would bring forward when parliamentary time allowed.

The Powers of Attorney Bill is a private member's bill first introduced in the House of Commons on 15 June 2022 by Stephen Metcalfe (Conservative MP for South Basildon and East Thurrock). Viscount Stansgate (Labour) is the bill's sponsor in the House of Lords. The bill has government support as it would give effect to some of the measures the government said it wanted to take forward in the consultation. The bill would make various changes to the existing process for making and registering LPAs.

For example, it would:

- allow regulations to set out identity verification requirements for registering an LPA
- provide for new forms of evidence of the LPA to be created and accepted
- allow an electronic form of an LPA as registered to be accepted as evidence of the LPA
- permit chartered legal executives to certify copies of an LPA

The government has said the bill would make it easier for people to create an LPA and would give them increased protection from abuse.

The bill received cross-party support during its passage through the House of Commons, including from the Labour frontbench. It passed its House of Commons stages without amendment.

The Ministry of Justice has supplied [explanatory notes as prepared for the Commons stages](#), a [delegated powers memorandum](#) and an [impact assessment](#) for the bill. At the time of writing, explanatory notes for the Lords stages had not been published.

## **I. Background to the bill**

### **I.1 Lasting powers of attorney**

An LPA is a legal document that allows a person (the ‘donor’) to choose one or more people (referred to as ‘attorneys’) to make decisions on their behalf.<sup>1</sup> The purpose of an LPA is to provide support and protection to the donor in the event that they lose mental capacity and are no longer able to make their own decisions in the future.

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<sup>1</sup> Office of the Public Guardian, [‘A guide to making your lasting power of attorney’](#), accessed 21 April 2023.

There are two types of LPA that a donor can apply for:

- **Health and welfare LPA.** This allows an attorney to make decisions about the donor's daily routine, for example medical care, life-sustaining treatment and moving into a care home. Once registered, this type of LPA would only come into effect once the donor has lost mental capacity as defined by an assessment under the Mental Capacity Act 2005.
- **Property and finance LPA.** This allows an attorney to make decisions about the donor's money and property, including managing the donor's bank accounts, paying bills, collecting pensions and selling the donor's property. This type of LPA can come into effect as soon as it is registered, with the donor's permission.

Donors can choose to apply for one or both types of LPA.

LPAs were introduced by the Mental Capacity Act 2005 (MCA). The MCA also created the OPG, which is an executive agency of the Ministry of Justice responsible for registering LPAs.

## 1.2 Process for creating an LPA

A donor can make an LPA application either in hard copy or via the OPG's online tool.<sup>2</sup> However, the entire process cannot be completed online. The current system requires LPAs to be a paper document with handwritten signatures or marks that have been witnessed.

As part of the application process, the donor has the choice to select up to five 'people to notify'. These named persons would be informed when the LPA application is made to the OPG for registration. Named persons are usually family members or close friends but cannot be attorneys or

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<sup>2</sup> Office of the Public Guardian, '[A guide to making your lasting power of attorney](#)', accessed 21 April 2023.

replacement attorneys. Selecting people to notify is optional.

If a donor has chosen people to notify, the person applying to register the LPA (the ‘applicant’) must inform them about the application using a specific form. This form sets out the grounds for objection that named persons can raise about an LPA’s registration. Under the current system, the applicant can be either the donor or their attorneys.

Once the application form has been completed and signed, and the people to notify form submitted (if applicable), the applicant is required to post the LPA application to the OPG for registration. There is also an application fee for registering an LPA.

Before an LPA is registered, the OPG will ensure it is legally correct and contains no errors. The OPG will also give named persons the opportunity to submit their objections to the LPA.

An LPA is only considered to have been legally created under the MCA when it has been registered by the OPG. Until that point, the donor is classed as having completed an ‘instrument intended to create an LPA’.

Once an LPA has been registered by the OPG, it is considered a deed. Attorneys must act in the donor’s best interests and follow any instructions and preferences set out in the LPA.

### **1.3 Problems with the existing LPA process**

In the explanatory notes to the bill, the Ministry of Justice contends that the current system for making and registering LPAs faces several challenges.<sup>3</sup> These include:

- existing LPA protections losing their effectiveness as technology

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<sup>3</sup> [Explanatory notes](#), p 2.

- improves and societal attitudes change
- all LPAs currently being made on paper, which users find “cumbersome, bureaucratic and complex”
  - OPG inefficiencies when handling large amounts of paper and an ever-increasing demand for staff, equipment and storage<sup>4</sup>

To resolve these issues, the Ministry of Justice and the OPG have been working together to modernise the LPA system. The three key aims of the joint project were set out in a consultation launched in July 2021:

- to increase safeguards, especially for the donor
- to improve the process for making and registering an LPA for donors, attorneys and third parties
- to achieve sustainability for the OPG whilst keeping LPAs as affordable as possible for everyone in society<sup>5</sup>

The consultation sought views on various modernisation proposals and closed in October 2021. The government published its response to the consultation on 19 May 2022, setting out proposals the government said it would take forward to modernise the system.<sup>6</sup>

The bill would give effect to some of the measures the government said it would take forward.

## 2. Key provisions in the bill

The bill contains three clauses and one schedule.

**Clause 1** would introduce the schedule to the bill. This would amend the

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<sup>4</sup> [Explanatory notes](#), p 2.

<sup>5</sup> Ministry of Justice, '[Modernising lasting powers of attorney \[consultation\]](#)', July 2021, CP 495, p 6.

<sup>6</sup> Ministry of Justice, '[Modernising lasting powers of attorney: Government response](#)', May 2022, CP 677.

process in the MCA for making and registering LPAs.

**The schedule** is split into two parts. Part I would set out amendments made to the MCA in relation to the registration of LPAs:

- **Paragraphs 2 and 3** would amend the MCA so that only a donor could be the applicant who applies to register an LPA, removing the ability of attorneys to do so. It would also remove the application fee requirement. Additionally, it would allow applications for registration to be accompanied by an LPA instrument that had not been completed (fully executed). The OPG would be required to take steps to ensure that any incomplete applications for registration were completed.
- **Paragraph 4** would remove the requirement for the applicant to give notice to named persons that an LPA had been sent for registration. Instead, the OPG would be responsible for giving this notice.
- Currently, the MCA gives the [Court of Protection](#) the power to dispense with the requirement to notify named persons in circumstances which the court deemed would not be useful. **Paragraph 5** of the schedule would remove this power because the bill, if enacted, would make the OPG responsible for giving this notice. The bill would allow the OPG to dispense with the notification requirement if the donor requested it. In such cases, the OPG would need to be satisfied there were special circumstances to justify doing so.
- **Paragraph 6** would introduce identification verification requirements when applying to register an LPA. It would allow regulations to set out how the OPG would verify a person's ID. Such regulations could apply to anyone either named in the LPA or taking part in the process of applying to register an LPA. This would include the donor, certificate provider, attorneys and replacement attorneys. If the ID requirements were not met, the OPG would not be permitted to register the LPA. In these circumstances, the Court of Protection would decide if the LPA met the criteria for registration, and if so, direct the OPG to register it.

- An attorney or named person can object to the registration of an LPA on “factual” or “prescribed” grounds.<sup>7</sup> Examples of factual grounds include where the donor or attorney has died or where an attorney does not have the mental capacity to be an attorney. Examples of prescribed grounds include where the donor was pressured into making an LPA or did not have mental capacity to do so. The MCA requires objections on prescribed grounds to be made to the OPG and the Court of Protection. **Paragraph 7** of the schedule would amend the MCA so that objections on prescribed grounds would only be made to the OPG. Paragraph 7 would also allow third parties (people other than the donor, an attorney or a named person) to make objections to the OPG about an application to register an LPA.
- **Paragraph 8** would amend the MCA in relation to documents that could be used as evidence of an LPA registration. It would clarify that an “office copy” of a registered LPA would continue to have effect for any LPAs registered before the bill’s commencement. Under the MCA, an office copy is provided by the OPG and considered admissible in legal proceedings as evidence of the LPA. It would also allow electronic forms of LPA registration to be used as evidence of its content and fact of an LPA registration. Regulations could also be introduced to set out which OPG documents would be deemed acceptable as evidence of an electronic LPA registration. The explanatory notes state that this would ensure that if donors, attorneys or third parties found themselves unable to access the electronic record a paper alternative as prescribed in regulations could be used as evidence of the LPA instead.
- **Paragraphs 9 to 12** would set out minor and consequential amendments to the MCA.

**Clause 2** would add “chartered legal executives” to the list of those who can certify copies of powers of attorney. This would be a person authorised by the [Chartered Institute of Legal Executives](#) to practise as a chartered

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<sup>7</sup> HM Government, ‘[Object to the registration of a power of attorney: Lasting power of attorney](#)’, accessed 12 June 2023.

legal executive. The clause would make these changes by amending section 3 of the Powers of Attorney Act 1971.

**Clause 3** would set the bill's territorial extent and application. Most provisions in the bill would apply to England and Wales only, except for certain measures as defined in subsection 2 of the clause, which would also apply to Scotland and Northern Ireland. Clause 1 and the schedule would come into force on a day specified by the Lord Chancellor in regulations. Clause 2 would come into force two months from the day the bill was passed. Clause 3 would come into force on the day the bill was passed.

### **3. House of Commons stages**

Stephen Metcalfe first introduced the bill in the House of Commons on 15 June 2022. The bill received its second reading on 9 December 2022 and a money resolution was approved on 27 February 2023. It was then considered in public bill committee for one day on 1 March 2023. Following this, the bill was reported without amendment and had its third reading on 17 March 2023. The bill received widespread support from both the government and MPs from various parties during its passage through the House of Commons.

#### **3.1 Second reading**

Opening the debate at second reading of the bill, Stephen Metcalfe said the bill would facilitate a flexible system that would allow individuals to use a method for making and registering LPAs that best suited their needs.<sup>8</sup> Mr Metcalfe also said the bill would reform the process to make it “safer, easier and more sustainable” for the public and the OPG.<sup>9</sup>

Speaking on behalf of the Labour Party, Shadow Minister for Justice Alex Cunningham said Labour supported the bill's aims and welcomed the

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<sup>8</sup> [HC Hansard, 9 December 2022, col 685.](#)

<sup>9</sup> [HC Hansard, 9 December 2022, col 682.](#)



modernisation of the process for making and registering LPAs.<sup>10</sup> On behalf of the government, Parliamentary Under Secretary of State for Justice Mike Freer also said he looked forward to supporting the bill's journey through Parliament and hoped it would make its way onto the statute book.<sup>11</sup> The minister said:

I reiterate how vital the improvements in the bill are to support individuals to make a lasting power of attorney and to certify copies of such important documents. The efficiency savings will ensure that donors and attorneys have a better system, with the savings made reinvested to increasingly improve the service, so it is an all-round benefit.

### **3.2 Money resolution**

The House of Commons approved a money resolution on 27 February 2023.<sup>12</sup> The UK Parliament guidance on money resolutions states that where a new bill proposes spending public money on something that has not previously been authorised by legislation, a money resolution must be agreed. A money resolution is required for this bill because clause 1 and the schedule (which would enable a digital channel to be introduced for making and registering LPAs) would include changes to the procedure.<sup>13</sup> The explanatory notes stated that financial implications of the bill would mostly be funded by the OPG's fee income. However, the government said a small amount of funding—£3mn over the course of the current spending review—would come from public revenue.

### **3.3 Remaining stages**

The bill received similar cross-party support during its consideration in public bill committee.

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<sup>10</sup> [HC Hansard, 9 December 2022, cols 687–8.](#)

<sup>11</sup> [HC Hansard, 9 December 2022, cols 690–2.](#)

<sup>12</sup> [HC Hansard, 27 February 2023, col 569.](#)

<sup>13</sup> [Explanatory notes](#), pp 11–12.

Some MPs asked questions on the accessibility of a modernised LPA system. For example, several MPs sought reassurance that a paper-based system would be maintained alongside a new digital channel. The bill's sponsor and the government minister both confirmed that individuals would be able to choose to use either a new digital or paper-based channel in the future, whichever suited an individual's needs.<sup>14</sup>

On the bill's territorial application, the explanatory notes said the provisions would only make consequential changes to Scottish and Northern Irish law.<sup>15</sup> During public bill committee and third reading, Patrick Grady (SNP MP for Glasgow North) said the Scottish Parliament had chosen to lodge a legislative consent memorandum for the bill because it felt certain aspects were within the legislative competence of the Scottish Parliament.<sup>16</sup> The legislative memorandum said the Scottish Parliament supported the bill because it "aligned with the Scottish government's emphasis on increasing accessibility to obtaining a power of attorney".<sup>17</sup>

The bill completed its consideration in committee without amendment. It did not have a report stage and similarly passed third reading without amendment or division.

#### **4. Reaction to the bill**

Reaction to the bill from the charity and legal sectors has been positive overall. For example, the charity Age UK said it "broadly welcomed" the measures in the bill and the government's wider modernisation policy.<sup>18</sup> In particular, the charity said it was pleased that the government had committed to retaining a paper channel alongside a digital system for making and registering LPAs. However, the charity said it would have liked the bill

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<sup>14</sup> [HC Hansard, 1 March 2023, cols 1 and 8.](#)

<sup>15</sup> [Explanatory notes](#), p 14.

<sup>16</sup> [HC Hansard, 17 March 2023, cols 1123–4.](#)

<sup>17</sup> Scottish Parliament, '[Legislative consent memorandum: Powers of Attorney Bill](#)', 16 March 2023, p 3.

<sup>18</sup> Age UK, '[Parliamentary briefing: Powers of Attorney Bill](#)', accessed 2 June 2023.

to have inserted an express requirement in the MCA to retain a paper-based channel.

On provisions in the bill to introduce ID requirements to protect the LPA process from abuse and fraud, Age UK also suggested that a reasonable safeguard would be for attorneys to be required to prove their identity as part of the LPA application process.

The bill has also attracted commentary from the legal sector. The Law Society said it supported the bill's aim to modernise the LPA system but had been "disappointed" that the bill did not require LPA certification to expressly include consideration of the donor's capacity.<sup>19</sup> A society spokesperson said including a donor's capacity "would establish that a person making an LPA has the capacity to do so and is a crucial safeguard that is needed to protect the most vulnerable".

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<sup>19</sup> Monidipa Fouzder, '[Ministry of Justice backs lasting power of attorney bill](#)', Law Society Gazette, 13 December 2022.

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