



Ministry of Justice

Consultation:

Modernising Lasting Powers of Attorney

A Response by
CILEX (The Chartered Institute of Legal Executives)

[October 2021]

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1. Introduction

- 1.1. CILEX (The Chartered Institute of Legal Executives) is one of the three main professional bodies covering the legal profession in England and Wales. The 20,000-strong membership is made up of CILEX Lawyers, paralegals and other legal professionals. Our members are judges, advocates, partners in law firms and specialist lawyers working across every aspect of the law.
- 1.2. This response includes contributions from CILEX members working in the private client sector sourced through its Private Client Specialist Reference Group to better understand their experiences of the Lasting Power of Attorney process and the services of the Office of Public Guardian (OPG). These are expanded in more detail below.
- 1.3. CILEX welcomes initiatives for the appropriate deployment of technology to improve services for consumers and make more efficient and effective the delivery of those services by lawyers subject to the deployment being clear to all who interact with it, proportionate to the improvements it delivers and sensitive to enabling all to benefit from it including the digitally excluded and the vulnerable.
- 1.4. For many citizens, the government's proposals have the added benefit of potentially remedying a long-standing, anachronistic, legislative anomaly to unlock these benefits: currently, CILEX lawyers are permitted to execute an original Lasting Power of Attorney (LPA) but disallowed from certifying their own signature. The government's proposal to introduce Advanced or Qualified Electronic Signatures (AeS/QeS) could at a stroke neutralise this problem as the donor's signature permanently attaches to the electronic deed as the original, removing the need to certify paper-based copies. With the extension of this solution to enduring powers of attorney and general powers of attorney this innovation would resolve a long-standing problem for all able to access digital platforms
- 1.5. The proposal as currently laid out however, will not remedy problems in accessing copies of LPAs/EPAs and general powers of attorney for those without access to digital platforms or unable to access them through disability, infirmity, skills or confidence. This will mean that the government should also include in its final proposals a commitment to amend the Powers of Attorney Act 1971 to enable CILEX Lawyers to certify copies of the original documentation when this is required
- 1.6. We regret government's explicit reference for addressing 'solicitor' access and ask that the continued use of one specific title that fails to include 20,000 qualified legal professionals, 75% of whom are women and 17% of whom come from minority ethnic backgrounds and the vast majority of whom have qualified through a work-based route rather than via a law degree is halted. In this particular issue and in general, there are many lawyers who can provide regulated legal services to consumers, and we believe it better for the government to recognise this in all their communications.

2. A Need for Modernisation

- 2.1. CILEX welcomes the government's attempts for pushing technological boundaries in the interests of improving efficiency of service from the Office of the Public Guardian (OPG). A recent survey into the experiences of CILEX private client practitioners highlighted

issues with the OPG over the COVID-19 period. Qualitative data analysis of member comments further illustrated that the persistence of these problems was notable even pre-pandemic, pointing to a clear need for processes to be modernised and reviewed at this time.

- 2.2. With over three quarters of respondents indicating that OPG services were inconsistent and took excessive amounts of time there was an obvious and negative impact on consumers in general (74% of survey responses), their families (63%) and on the effective operation of their firms (54%).
 - 2.2.1. Delays to LPA registrations saw additional 'stress' and 'worry' frequently cited as the most common impact facing clients and their families, whilst a significant proportion of respondents noted practical challenges where clients had passed away whilst waiting for the registration to be completed, calling into question the efficacy of LPA applications in existing processes.
 - 2.2.2. The net result has seen a reduced quality of service for the consumer, particularly where clients' circumstances change while waiting for registration, rendering the initial advice given by their legal representative no longer fitting. This is witnessed alongside negative impacts on client care and an overall reduction in client trust for LPA processes and outcomes.
- 2.3. As digital solutions are increasingly invested in and developed by the market, CILEX welcomes the potential of technology to address these concerns; particularly as a post-pandemic landscape is expected to see shifts in consumer expectations, new business models for legal service providers and a generally more receptive and expectant approach to technologically enhanced and enabled goods and services.

3. Taking a Measured Approach

- 3.1. In exploring modernisation efforts however, there is an intrinsic need to remain sensitive to the vulnerabilities of an older client demographic in the private client sector. Member feedback highlighted a hesitancy towards further integration of technology within LPA processes where the ability to safeguard against abuse, fraud and undue influence is hindered as a result.
- 3.2. An underlying observation, key to the success of any modernisation attempts, were the perceived low levels of digital competence amongst consumers in the private client sector; a concern which could leave clients exposed to greater risk – for example, relying on family members to help make an LPA application notwithstanding potential conflicts of interest. Although by no means an unsurmountable challenge, these reservations point to the measured approach that government will need to take to the integration of new technology within LPAs, in securing confidence amongst practitioners and consumers as to their use and application.
- 3.3. Certainly, notwithstanding the above concerns, private client practitioners have informed CILEX separately of the full or substantial integration of technology into their everyday processes for delivering legal services (including the adoption of anti-money

laundering software, ID checking software, case management software and remote video and audio software). With majority of practitioners having found these to be particularly helpful, the inference points not to an outright objection against tech-based solutions in modernising legal practice, but the need for greater communication and clarity around the Ministry of Justice (MoJ) proposals, the supporting technologies underlying them and how these solutions would work in practice.

- 3.4. CILEX therefore calls upon government to a). work more closely with the profession in raising awareness of new technologies, b). to collaborate closely with tech providers in understanding risk assessments and the limitations of any new solutions, and c). to pilot proposals within client transactions so that they can be safely developed for wider adoption in practice.
 - 3.4.1. The MoJ may wish to be mindful of existing projects already underway. For example, CILEX is aware of legaltech solutions such as QeS (as explored in the body of this consultation) being tried and tested in other areas of legal service provision such as land registration. Shared learning across various projects and government bodies would be very beneficial to facilitating a measured approach whilst expediting the emergence of these solutions and building trust and confidence in their output.¹
 - 3.4.2. Indeed, suggestions for modernisation (including the electronic execution of deeds) spans back as far as 2018, with the Law Commission's own recommendations suggesting a need and impetus to reimagine these processes so that they remain fit for the modern day.² Doing so in a way that critically assesses the application of new technologies in meeting the needs and requirements of traditional legal services, shall require more than simply translating existing paper-based systems into a digital domain.

4. Modernisation as 'Transformation'

- 4.1. CILEX strongly advocates for modernisation efforts to look to the *transformative* potential of digital systems and solutions, interrogating and recalibrating LPAs as necessary so that they may improve outcomes for the consumer beyond the generic benefits of automation (cost savings and time reduction).
- 4.2. This includes addressing existing anomalies and inefficiencies created by the current paper-based LPA model. For example, entrenched for over 50 years in the Powers of Attorney Act 1971 is the process of certifying copies of enduring powers of attorney, lasting powers of attorney, and general powers of attorney. These processes have been limited to a solicitor, notary public or stockbroker to approve, excluding an entire cadre of qualified and competent legal professionals, in CILEX lawyers, from delivering these services. The restriction has frequently been acknowledged as an anomaly in process as it allows a CILEX lawyer to facilitate in the creation of an LPA, but then renders them unable to certify as genuine, a copy of the very same (contrary to their authorisation as

¹ See: <https://hmlandregistry.blog.gov.uk/2020/07/09/electronic-signatures-in-conveyancing/>

Note the use of blogs to raise awareness amongst practitioners and consumers of the use and application of QES signatures, including benefits such as greater security in comparison to the standard wet-ink or electronic signature. These have been helpful in paving the way for implementation.

² See here: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/09/Electronic-Execution-Report.pdf>

Commissioners for Oaths). Anomalies such as these act as prime candidates for modernisation.³

4.2.1. In fact, research conducted just before the COVID-19 pandemic, highlighted that the anomaly created grievances in practice on average of 10 times a month (per practitioner) with three quarters of respondents stating a negative or very negative impact to the timeliness of service for the consumer, and 58% pointing to a subsequent increase in costs faced by the consumer. These impacts will no doubt have intensified over the pandemic, as more and more vulnerable persons sought to put their affairs in order; increasing the demand for lawyers able to deliver this work notwithstanding the adverse effects of COVID on lawyer supply.

4.2.2. Processes such as these must not be overlooked within the consultation's remit, particularly given the reliance on physical copies in practice; without which LPAs would confer limited utility to donees acting on behalf of donors with relevant third parties.

4.2.3. CILEX hopes to see these anomalies addressed as part of the MoJ's modernisation workstream, calling for immediate reform in the interim, as technological solutions and a measured approach to their integration takes time to embed.

4.3. Similarly, considerations for an urgent application process should not be so easily dismissed. 79% of CILEX private client practitioners voiced support for these more transformative solutions, noting their relevance in instances where a). a client's health has deteriorated rapidly, or they are given a terminal diagnosis, and b). there is a more urgent need to secure funds to pay for an individual's care where they had not previously established such measures.⁴ Once again, in looking beyond existing systems and processes, the MoJ would do well to consider the wider potential of technology in reimagining LPAs so that they better deliver value, assurance and security to the consumer.

4.4. **Conclusion**

CILEX welcomes the proposals to modernise Lasting Powers of Attorney through the judicious use of technology. In particular, we wholeheartedly support and recommend that government adopts and implements at the earliest opportunity the use of AeS/QeS for LPAs, paving the way for their application to enduring and general powers of attorney in turn. This will have the added value of remedying a legislative anomaly widely acknowledged as anachronistic and illogical; and have the added benefit of empowering circa 3,000 additional lawyers to deliver these much-needed services.

³ The urgent need for reform of this provision has already been witnessed by public organisations, as seen in the midst of COVID-19 with the temporary lifting of these restrictions by HM Land Registry with respect to land rights and ownership, see here: <https://www.gov.uk/government/publications/coronavirus-covid-19-useful-information-for-conveyancers-pg80/practice-guide-80-coronavirus-covid-19-useful-information-for-conveyancers#powers-of-attorney-certified-by-legal-executives>

⁴ That said, CILEX does note that the benefits of modernisation would help tackle the time delays currently faced within LPA registration (standing at around 20 weeks) and could therefore provide a solution in and of itself, in these more urgent scenarios.

For further details

Should you
require any
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